

Federal Rule of Civil Procedure 23 and Insurance Industry Class Actions

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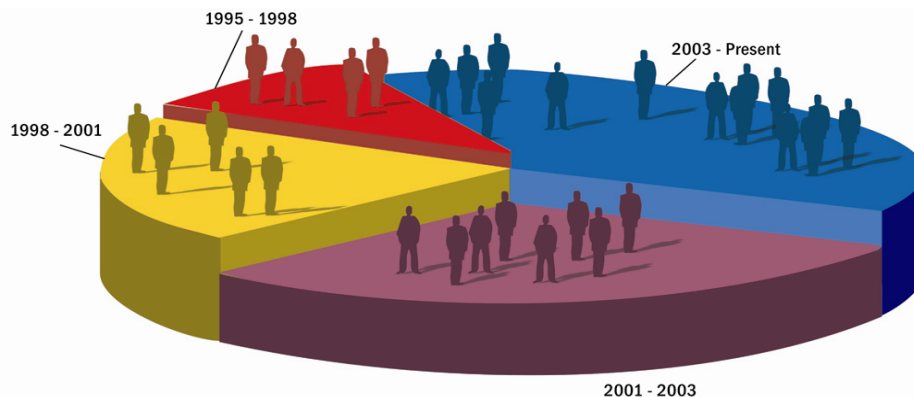
Introduction

Throughout the past 10 years, there has been a significant increase in the number of class actions filed against insurance companies. The vast majority of these cases fall into one of four categories. First, many deal with the so-called “market conduct” of the insurance companies. “Market conduct” involves the interaction between the sales agent and the potential client at the point of sale. The interaction depends on a number of different variables such as the complexity of the product, the sophistication of the potential client, and what illustrations and other sales materials are available during the sales presentation. In these situations, plaintiffs have claimed that the sales agents have uniformly misrepresented or omitted material information. Examples of market conduct class actions include cases involving vanishing premiums, churning, modal premiums and life insurance policies posed as retirement plans. The second category of insurance industry class actions are those involving the use of non-original equipment manufacturer (non-OEM) parts to repair damaged automobiles. The plaintiffs in these cases allege breach of contract claiming that the use of non-OEM parts are inherently inferior to OEM parts and thus do not restore the automobile to pre-loss condition as mandated by the insurance policy. The third category of class actions involve the alleged failure of an insurance company to adequately process or pay insureds’ claims under their policies. The final general category of insurance industry class actions are entitled “managed care” cases. The plaintiffs in these types of cases challenge the cost-containment practices of the insurance companies in the administration of their managed-care programs.

To fully understand insurance industry class actions, a general understanding of class actions is helpful. The class action is a procedural device designed to provide an efficient and fair process for deciding liability to a group of people who have been uniformly wronged by a defendant. Additionally, individuals do not use the class action device when seeking large monetary damages. On the contrary, class actions provide an avenue for individuals to prosecute their rights when seeking relatively small monetary damages because without proceeding as a class action, these individuals would have no economic incentive to bring the lawsuit. Thus, the typical class action is brought by individuals seeking relatively small individual damages and who have been uniformly wronged by a defendant.

On the Rise

Number of class actions filed against insurance companies in the last 10 years



4 Categories of Class Action Cases Filed Against Insurance Companies

- 1) **“Market conduct” case**
The sales agent is accused of uniformly misrepresenting or omitting material information
- 2) **Non-original equipment manufacturing parts to repair damaged automobiles case**
A breach of contract is alleged claiming that non-OEM parts are inferior to OEM parts
- 3) **Alleged failure of an insurance company to adequately process or pay insureds’ claims under their policies**
- 4) **“Managed care” case**
The cost-containment practices of the insurance companies in the administration of their managed-care programs is challenged

Keeping this background in mind, let’s now turn to the insurance industry. In general, to completely defeat an insurance industry class action, the insurance company must successfully challenge class certification. As mentioned above, plaintiffs have brought class actions under numerous different theories and plaintiffs attorneys will continue to create new ones in the future. However, no matter what theory is alleged, a court will address the issue of class certification under a fixed standard. In federal court that fixed standard is **Federal Rule of Civil Procedure 23** (see below for a copy of **Rule 23**). Additionally, most states have adopted some variant of **Rule 23** to govern class actions and many states treat federal opinions as persuasive authority. Satisfying **Rule 23** requires two steps. First, the plaintiff must satisfy the requirements of sub-part (a). These requirements include: numerosity, commonality, typicality and adequacy of representation. As a practical matter, plaintiffs in insurance industry class actions generally do not have a problem satisfying these requirements.

In addition to satisfying the requirements of **23(a)**, plaintiffs must also satisfy one of the subparts of **23(b)**. Plaintiffs may seek certification under either **23(b)(2)**, which requires that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or... declaratory relief...” or **23(b)(3)**, which requires that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members...” Given the injunctive or declaratory relief required by **23(b)(2)**, most plaintiffs in insurance industry class actions move to certify under **23(b)(3)**. In a vast majority of insurance industry class actions, class certification comes down to a battle over **Rule 23(b)(3)**. The outcome of this battle has generally favored the insurance company, and thus the insurance company would be wise to make itself stand at this stage.

As the language states, questions of “law or fact” must predominate. Thus, insurance companies typically challenge **23(b)(3)** by claiming that factual or legal variance precludes certification. Factual variance refers to the need for individualized proof of key elements of a class member’s claim. The most frequent elements challenged are reliance and causation. For example, in a class action claiming “market conduct” misrepresentation, the insur-

ance company may argue that factual variance precludes class certification because the court would have to address each individuals interaction with the sales agent and each individuals reliance on any misrepresentations. Thus, individualized factual inquiry precludes common questions of fact from predominating. A similar argument is made in class actions involving the use of non-OEM parts. The insurance company may argue that the preloss condition of each individual plaintiff's automobile must be examined before a court may determine whether non-OEM parts restored the vehicle to preloss condition. Thus, again, individualized factual inquiry precludes certification.

Legal variance refers to the requirement that the separate laws of the states in which the class members reside must be applied to their respective claims, and the fact that these laws may vary with respect to the legal theories at issue. States laws may differ in a variety of ways relevant to a class action lawsuit. For example, states may have differing elements of a cause of action, standards of proof, statutes of limitations or policies regarding extrinsic evidence. The court would not only have to apply the correct state law but would also have to instruct the jury as to which states' laws apply to which class members. Jury confusion would necessarily follow. Just as an individualized factual inquiry would impede the overall class action purpose of efficiency, so would applying the differing laws of several states. However, a minority of courts have allowed class action plaintiffs to side-step the factual and legal variation hurdle by presuming reliance and causation, finding a common scheme of behavior, or applying the law of only one state to the claims of all members.

This paper addresses the requirements of class certification in the order of the language of **Rule 23**, with a specific focus on the cases involving the predominance requirement of **23(b)(3)**. Additionally, it briefly discusses the differing requirements of class certification with respect to a settlement class. Finally, it closes with a brief analysis of the few published insurance industry class action cases that have reached the merits of the case.

For reference, **Federal Rule of Civil Procedure 23** states in relevant part as follows on page 4.

What is a insurance industry class action?

- ☑ It's a procedural device designed to provide an efficient and fair process for deciding liability to a group of people who have been uniformly wronged by a defendant
- ☑ Individuals do not use the class action device when seeking large monetary damages
- ☑ Class actions provide an avenue for individuals to prosecute their rights when seeking relatively small monetary damages because without proceeding as a class action, these individuals would have no economic incentive to bring the lawsuit
- ☑ The typical class action is brought by individuals seeking relatively small individual damages and who have been uniformly wronged by a defendant

Federal Rule of Civil Procedure 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of sub-part (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Requirements of Rule 23(a)



Numerosity

This requirement states that the class must be “so numerous that joinder of all members is impracticable.” **Fed.R.Civ.P 23(a)**. Numerosity reflects the obvious principle that a class action is inappropriate unless it seeks to resolve the similar claims of numerous people. Courts have not established a strict or bright-line standard as to the minimum number of people required to satisfy numerosity. In determining whether the numerosity requirement is met, the court may consider “the size of the class, nature of the action, size of the individual claims, inconvenience of trying individual suits, and any other facts relevant to the practicality of joining all the putative class members.” *Parkhill v. Minnesota Mut. Life Ins. Co.*, 188 F.R.D. 332, 337 (D. Minn. 1999).



Commonality

This requirement states that there must be “questions of law or fact common to the class.” **Fed.R.Civ.P. 23(a)**. Commonality reflects the principle that the essence of a class action is to decide common issues. It is less stringent than the requirement under **23(b)(3)** that common issues must predominate. *Parkhill*, 188 F.R.D. at 338. The requirement is met “when the legal questions linking the class members are substantially related to the resolution of the litigation.” *Id.* Thus, a single question may be sufficient. *Dunnigan v. Metropolitan Life Ins. Co.*, 214 F.R.D. 125, 136 (S.D.N.Y. 2003). “The critical inquiry is whether the common questions are at the ‘core’ of the cause of action alleged.” *Id.* For the most part, the commonality requirement is easily met in insurance industry class actions, however, there are a few exceptions. See *Ostrof v. State Farm Mutual Automobile Ins. Co.*, 200 F.R.D. 521 (D. Md. 2001); *In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001); *Kent v. SunAmerica Life Insurance Co.*, 190 F.R.D. 271 (D. Mass. 2000).



Typicality

While commonality refers to the characteristics of the group, typicality refers to the individual characteristics of the class representative in relation to the class. The requirement states that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” **Fed.R.Civ.P 23(a)**. A named plaintiff’s claims are typical “where each class member’s claims arise from the same course of events and each class member makes similar

legal arguments to prove the defendant's liability." *Dunnigan*, 214 F.R.D. at 137. The class representative's claims "must be based on treatment 'not special or unique to [themselves].'" *Parkhill*, 188 F.R.D. at 339. Thus, the purpose of the typicality requirement is to ensure that the factual circumstances of the representatives are sufficiently aligned with those of the class as a whole. Like the other **Rule 23(a)** requirements, typicality is normally met in insurance industry class actions, but again, there are exceptions. See *Dunnigan v. Metropolitan Life Ins. Co.*, 214 F.R.D. 125 (S.D.N.Y. 2003); *Franze v. Equitable Assurance*, 296 F.3d 1250 (11th Cir. 2002); *Ostrof v. State Farm Mutual Automobile Ins. Co.*, 200 F.R.D. 521 (D. Md. 2001); *Markarian v. Connecticut Mutual Life Insurance Company*, 202 F.R.D. 60 (D. Mass. 2001); *Kent v. SunAmerica Life Insurance Co.*, 190 F.R.D. 271 (D. Mass. 2000); *Solomon v. Massachusetts Mutual Life Ins. Co.*, 2000 WL 33116006 (Pa. Com. Pl. 2000).



Adequacy

Like typicality, the adequacy requirement focuses on the class representative. The requirement states that "the representative parties will fairly and adequately protect the interest of the class." **Fed.R.Civ.P. 23(a)**. To satisfy this requirement, the class representative and their attorneys "must be able and willing to prosecute the case competently and vigorously," and "each representative's interest must be sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *Parkhill*, 188 F.R.D. at 339. In other words, there cannot be a conflict of interests with the members of the class and the class representative. The purpose of the requirement is to protect the legal rights of absent class members. *Leszczynski v. Allianz Insurance*, 176 F.R.D. 659, 673 (S.D. Fla 1997). Normally, this requirement is not challenged and thus satisfied, however, there are again exceptions. See *Jim Moore Ins. Agency, Inc. v. State Farm Mut. Automobile Ins. Co.*, 2003 WL 21146714 (S.D. Fla.); *Ostrof v. State Farm Mutual Automobile Ins. Co.*, 200 F.R.D. 521 (D. Md. 2001); *Markarian v. Connecticut Mutual Life Insurance Company*, 202 F.R.D. 60 (D. Mass. 2001).

Requirements of Rule 23(b)(2) – Equitable or Declaratory Relief

Class certification under this rule is appropriate if “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Thus, there are two requirements: (1) grounds generally applicable to the class and (2) injunctive or declaratory relief must predominate over monetary relief.

Certification Denied Under Rule 23(b)(2) (Federal Cases)

***Brooks v. Educators Mut. Life Ins. Co.*, 206 F.R.D. 96 (E.D. Penn. 2002)**

Plaintiff/Insureds sought class certification alleging that defendant/group health insurer’s failure to pay the “reasonable and customary charge” for anesthesia services in accordance with its medical insurance contracts violated ERISA.

Regarding certification under **Rule 23(b)(2)**, the Plaintiffs assert certification is appropriate because they seek, in addition to monetary damages, a declaratory judgment and a permanent injunction requiring defendant to pay for all future anesthesia services based on the reasonable and customary charge as defined in its policies. However, the court stated that “the face of plaintiffs’ Amended Complaint strongly indicates that this action is first and foremost an action for money damages.” Thus, the court denied certification under **Rule 23(b)(2)**.

***Hammett v. American Bankers Ins. Co. of Fla.*, 203 F.R.D. 690 (S.D. Fla. 2001)**

Regarding **Rule 23(b)(2)** certification, the court stated that “Plaintiff and the putative class are neither bound together by a legal relationship or a significant common trail and thus lack the class cohesiveness that distinguishes (b)(2) from (b)(3) actions. Without this unity, there is more likely a need for an interest in individual representation and less likelihood that [one plaintiff] can adequately represent the interests of absent members.” Additionally, the court stated that “while Plaintiff has an interest in obtaining a declaratory judgment that the Defendants have breached the LUI policies and associated injunctive relief, the predominant nature of the relief she seeks is for money damages.” Accordingly, class certification under **Rule 23(b)(2)** was inappropriate. (See *infra* Part IV(I)(1) for a summary of the facts).

***Velasquez v. Crown Life Ins. Co.*, 1999 WL 33305652 (S.D. Tex.)**

Plaintiffs seek to certify a class action against their life insurance company with regard to the sale of a “vanishing premium” policy. In general, plaintiffs alleged that defendants knew that their dividend projections were wrong and could not be realized but failed to disclose this information to their customers. Regarding the **23(b)2** requirement, the court stated that certification was inappropriate because “it is clear from the complaint,... that the primary relief plaintiff seeks is actual and punitive damages.” The court continued, “[s]ince plaintiff’s predominant claims are for monetary damages, plaintiff’s incidental request for declaratory relief does not make this case appropriate for certification under **Rule 23(b)2**.”

***Rothwell v. Chubb Life Ins. Co. of America*, 191 F.R.D. 25 (D. New Hampshire 1998)**

Regarding **Rule 23(b)(2)**, the Court stated that this rule "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." The Court found that any injunctive relief sought by the Plaintiffs, under both the vanishing premium and churning claims, was secondary to their claims for money damages, thus the court denied certification under **Rule 23(b)(2)**. (See *infra* Part IV(A)(1) for summary of facts). See also, *McDonald v. The Prudential Ins. Co. of Am.*, 1999 WL 102796 (N.D. Ill.) (stating that "Plaintiffs are primarily seeking monetary damages....")

Certification Denied Under Rule 23(b)(2) (State Cases)

***Freedom Life Ins. Co. of America v. Wallant*, 2004 WL 2996898 (Fla. App. 4th Dist.)**

Plaintiffs sought class certification alleging that defendant "improperly denies and delays claims in contravention of Florida law and the terms of the policies." The court denied certification for injunctive relief. The court noted that "although the claims raised by [Plaintiffs] request declaratory relief as an end in itself to a degree, the claims also request monetary damages." The court concluded that "although declaratory relief is at issue, monetary recovery is the predominant issue..."

***Gilman v. John Hancock Variable Life Ins. Co.*, 2003 WL 23191098 (Fl. Cir. Ct.)**

Plaintiff brought a class action suit against life insurer alleging that insurer misrepresented that insured would receive a full year of coverage in return for her first premium payment, when in fact, insured received less than a full year. The court found certification for injunctive relief was inappropriate because "individual injuries that lack cohesiveness — not group injury — is the gravamen of plaintiff's claims, and the interests of the class members are not significantly common or homogeneous..." Additionally, the court stated that "plaintiff seeks substantial monetary damages that are not merely incidental to the claim for injunctive relief." Accordingly, class certification was inappropriate.

Certification Granted Under Rule 23(b)(2)

***DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474 (Sup. Ct. Rhode Island 2004)**

Plaintiffs/Annuitants sought class certification against defendant/insurer claiming breach of contract and breach of duty of good faith and fair dealing. Plaintiffs alleged that they received policy statements with inconsistent annual rates and caps. Plaintiffs sought certification under both **Rule 23(b)(2)** and **Rule 23(b)(3)**.

Regarding **Rule 23(b)(2)**, the court found in favor of the plaintiffs. The court noted that "declaratory relief is essential because plaintiffs and defendant are engaged in a long term contractual relationship, and clarification of the rights accruing under the [agreement] is critical." The court further stated that "there is no evidence that plaintiffs' request for injunctive relief is a procedural sham designed to win class certification. To the contrary, we are satisfied that equitable relief is the only way to restore fully plaintiffs to the position they bargained for under the [agreement]." After finding that class certification was appropriate under **Rule 23(b)(2)**, the Court did not proceed to analyze whether

certification would have been appropriate under **Rule 23(b)(3)**.

In the Matter of: Monumental Life Ins. Co., 365 F.3d 408 (5th Cir. 2004)

Plaintiffs, black policyholders, brought suits challenging defendant, life insurers', alleged practice of paying lower benefits and charging higher premiums to blacks in the sale of low-value life insurance. Plaintiffs specifically "accuse defendants of placing blacks in industrial policies offering the same benefits as do policies sold to whites, but at a higher premium." Additionally, the plaintiffs accused defendants of placing "blacks in specially-designed substandard industrial policies providing fewer or lower benefits than do comparable plans sold to whites." Plaintiffs sought class certification under Rule 23(b)(2).

The district court denied certification "finding that plaintiffs' claims for monetary relief predominate over their claims for injunctive relief, making... certification inappropriate." In reversing, the appellate court first stated that "certification does not hinge on the subjective intentions of the class representatives and their counsel in bringing suit." Additionally, the court noted that monetary relief in this case was merely incidental and "capable of computation by means of objective standards and not dependant in any significant way on the intangible, subjective differences of each class member's circumstances." Thus, certification under Rule 23(b)(2) was appropriate. See also, *Brown v. American Capital In. Co.*, 2004 WL 2375796 (E.D.La.) (involving a race-based insurance industry class action).

Fabricant v. Sears Roebuck, 202 F.R.D. 310 (S.D. Fla. 2001)

Plaintiffs/Credit card holders sought class certification alleging that the "Defendants marketed and sold insurance to thousands of consumers, using standard, uniform applications that failed to make sufficient disclosures and to obtain appropriate consent" in violation of the Truth in Lending Act (TILA) and Florida law. Regarding certification under **Rule 23(b)(2)**, the court acknowledged that plaintiffs sought injunctive relief "to require Defendants to change their marketing practices." The court stated that "requesting a declaration that Defendants presently are violating the law and an injunction forcing defendants to comply with the law is precisely the type of class appropriate for class certification under **Rule 23(b)(2)**." Thus, class certification under **Rule 23(b)(2)** was granted. See also *Powers v. Government Employees Ins. Co.*, 192 F.R.D. 313 (S.D. Fla. 1998) (certifying a Florida resident class seeking to recover the full deductible paid on a collision claim from the amount the insurer recovered on a subrogation claim).

Leszczynski v. Allianz Insurance, 176 F.R.D. 659 (S.D. Fla 1997)

Regarding certification under **Rule 23(b)(2)**, the Court stated that the plaintiffs met the first requirement of "general applicable" because defendant's policies clearly cover the alleged claims and therefore the wrongful refusal to pay these claims is a "policy or practice that affects all or nearly all of the members of plaintiffs' proposed class." The court then found that the plaintiffs met the second requirement of seeking injunctive relief rather than monetary relief and stated that "it is settled law that an action may be maintained under [**Rule 23(b)(2)**] even though the plaintiffs are seeking monetary damages so long as the primary relief sought is declaratory or injunctive." The court found that plaintiffs were "primarily seeking a declaration of their rights to coverage under the [Defendant's] policies." Thus, class certification under **Rule 23(b)(2)** was appropriate. (See *infra* Part IV(F)(3) for summary of facts)

Requirements of Rule 23(b)(3) – Predominance

To satisfy this requirement, the court must find that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members...” **Fed.R.Civ.P 23(b)(3)**. This inquiry “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). It is a much more demanding criterion than the commonality inquiry under **Rule 23(a)**. *Id.* at 623-24. “Although there is no bright-line boundary for determining whether common issues of fact or law predominate, ‘predominance will be found where generalized evidence may prove or disprove elements of a claim, since such proof obviates the need to examine the elements individually.’” *In re Hartford Sales Practices Litigation*, 192 F.R.D. 592, 604 (D. Minn. 1999). As the language of the rule states, “questions of law or fact” must predominate. Consequently, the two main ways predominance is defeated is through factual or legal variance. Factual variance refers to the need for individualized proof of key elements of a class member’s claim including, for example, reliance and causation. Legal variance refers to the requirement that the separate laws of the states in which the putative class members reside must be applied to their respective claims, and the fact that these laws vary with respect to the legal theories at issue.

Vanishing Premium Cases

The majority of class actions involving insurance industry market conduct were focused on the marketing and sale of so-called “vanishing premium” policies. These cases allege that policyholders were given hypothetical rates of return that showed cash values increasing rapidly enough to be able to satisfy premium payments and thus they were led to believe their policy would be fully paid up or that their premium payments would “vanish” after a certain amount of time or number of payments. When interest rates dropped, policyholders alleged that the failure of the policies to perform in accord with the hypothetical illustrations constituted a breach of contract and fraud.

Predominance Not Satisfied – Factual Variance (Federal Cases)

***In re Jackson National Life Insurance Company Premium Litigation*, 209 F.R.D. 134 (W.D. Mich. 2002)**

Plaintiffs sought to certify two classes – one alleging that the defendant illegally sold policies to Mexican residents, and the other alleging deceptive conduct regarding vanishing premium policies. In regards to the vanishing premium class, the court found that the “Plaintiffs have made no showing, nor even argued, that there are extraordinary circumstances warranting reconsideration of the Court’s prior rulings on vanishing premium classes.” The court reiterated that the plaintiffs had failed to show that common questions of law and fact predominate over individual ones, thus, certification was inappropriate.

***Van West v. Midland National Life Ins. Co.*, 199 F.R.D. 448 (D. Rhode Island 2001)**

Plaintiffs sought class certification against insurer alleging that the insurer, through its network of agents and brokers, deceptively sold vanishing premium policies. Plaintiffs further alleged that the misrepresentations were part of “an overarching scheme” by the defendant and was implemented by the “dissemination of written materials and oral sales presentations made by agents and brokers... based upon information and training provided by [insurer].”

Regarding the predominance requirement, the court stated, "To the extent that the alleged misrepresentations are contained in literature disseminated by [insurer] to prospective buyers, a common issue is presented because class-wide determinations could be made as to what representations were made and whether those representations were false." However, the court further held that, "to the extent that the alleged misrepresentations include different statements made... by a variety of agents or brokers, it would require proof of what each class member was told and the nature of the relationship between [insurer] and the particular agent or broker making the statements." Thus, the Court concluded that "determining whether [insurer] falsely represented that premiums would vanish becomes a matter of individualized proof rather than a common question." Plaintiff's motion for class certification was denied.

***Markarian v. Connecticut Mutual Life Insurance Company*, 202 F.R.D. 60 (D. Mass. 2001)**

Plaintiffs sought class certification alleging that insurer intentionally engaged in deceptive sales practices concerning vanishing premium policies. The court found that the plaintiffs' allegations failed to meet the predominance requirements of **Rule 23**, and thus class certification was inappropriate. The court stated that the evidence demonstrated "that [sales] agents did not receive common training or use a common sales script, which supports the conclusion that each agent presented different information to each policyholder." See also, *Kent v. SunAmerica Life Insurance Co.*, 190 F.R.D. 271 (D. Mass. 2000) (finding that vanishing premium proposed class did not satisfy predominance requirement). But see, *In re New England Mutual Life Insurance Company Sales Practices Litigation*, 183 F.R.D. 33 (D. Mass. 1998) (certifying a vanishing premium class defined by the court).

***Keyes v. The Guardian Life Ins. Co.*, 194 F.R.D. (S.D. Miss. 2000)**

Insureds sued insurer alleging fraud in the sale of "vanishing premium" life insurance policies. Plaintiffs alleged "that Guardian provided its agents with illustrations generated by Guardian, and/or more significantly, with computer software which allowed the agents to print their own illustration, in order to demonstrate how and when a customer's premiums would 'vanish.'" The plaintiffs further alleged that "all class members were victims of standardized misrepresentations and omissions when Guardian used its software to create the uniform illustrations. All class members suffered from Guardian's uniform deception caused by policy illustrations generated by the same computer software, with the same actuarial assumptions." The court rejected Plaintiffs' arguments and stated, "Guardian did not employ a 'sales force' or any salespeople, but rather sold its products through independent general agents throughout the country; and did not train these agents, [nor did they] require them to provide a scripted, or standardized sales pitch." The Court continued that "agents were free to provide their clients with whatever explanation or elaboration about the product and/or illustration which they may have deemed appropriate or relevant to their clients." Thus, the court held that individual issues relating to non-standardized sales presentations to individual insureds and their reliance thereon substantially predominated over common issues, rendering class certification inappropriate.

***Adams v. Kansas City Life Ins. Co.*, 192 F.R.D. 274 (W.D. Mo. 2000)**

Insureds sought class certification in regards to the sale and marketing of certain "vanishing premium" life insurance policies. Plaintiffs claimed that defendant "devised a

fraudulent, sophisticated sales scheme to induce prospective policyholders to purchase vanishing premium plans that [defendant] knew would not perform as represented due to [defendant's] use of 'teaser rates' and manipulation of the actuarial assumptions on which the policy's performance depended." The court concluded that "this case should not proceed as a class action because plaintiff has not demonstrated that common questions of law or fact predominate over issues affecting only individual policyholders."

The court found that "contrary to plaintiff's allegations, the facts presented in this case show that [defendant's] agents did not receive uniform training, did not utilize a uniform sales script during their presentations, did not use uniform policy illustrations, and did not distribute uniform marketing materials." Thus, the court concluded that the plaintiff's assertion that reliance can be inferred on a class-wide basis "defies logic" in light of variations in the written and oral communications between agents and customers. Accordingly, class certification was inappropriate.

Cohn v. Massachusetts Mut. Life Ins. Co., 189 F.R.D. 209 (D. Conn. 1999)

Plaintiffs brought a class action against Mass. Mutual alleging deceptive sales practices in the marketing of vanishing premium life insurance policies. Plaintiffs alleged that the insurer designed and implemented a centralized training program and used uniformly misleading sales presentations. Mass. Mutual claimed that the sales illustrations varied in many significant respects, and that the tens of thousands of agents and brokers who sold the policies were not subject to a uniform training program. The court held that individual issues, including reliance, predominated over common ones and reliance could not be presumed.

The court stated that any "common questions are overshadowed by individualized issues such as the nature of the oral representations or disclosures made by the agent or broker at the point of sale, the nature of any questions asked by the consumer, the content of any written illustrations or disclosures given to the consumer, the degree of care exercised by the consumer in reviewing any written illustrations and the policy instrument, the portions of the offer that were attractive to the consumer, the degree of the consumer's financial sophistication and his or her understanding of the product." On the reliance issue, the court stated that where "the content of the illustrations varied, and the information contained in the illustrations was shared with consumers, if at all, in the context of varying oral presentations, presumption of reliance is inappropriate."

Parkhill v. Minnesota Mut. Life Ins. Co., 188 F.R.D. 332 (D. Minn. 1999)

Insured brought purported class action against life insurer to recover for alleged misrepresentations involving the sale of "vanishing premium" life insurance policies. Plaintiffs essentially alleged that class members were "fraudulently induced and deceived into purchasing Policies from Minnesota Mutual based upon uniformly false and misleading Policy illustrations, sales presentations, marketing material and other information approved, prepared and disseminated by Minnesota Mutual through its nationwide sales force of agents."

The court denied certification, stating that "defendant's policies were sold in hundreds of thousands of individual meetings between independent agents and prospective clients. Because defendant did not require a uniform sales presentation, the information disclosed by agents to potential policyholders would depend on the client's needs and circumstances." The Court continued by stating, "if certification were granted the court would have to conduct thousands of individual inquiries into the content of each sales presentation, the expectations and questions asked by each policyholder, and the reliance placed by the policyholder on the representations made by defendant's agent." In the end, the court stated that individual questions of the purchasers' reliance upon alleged misrepresentations predominated.

***Velasquez v. Crown Life Ins. Co.*, 1999 WL 33305652 (S.D. Tex.)**

Plaintiffs sought class certification against their life insurance company with regard to the sale of a "vanishing premium" policy. In general, plaintiffs alleged that defendants knew that their dividend projections were wrong and could not be realized, but failed to disclose this information to their customers. Plaintiffs sought certification under either **23(b)2** or **23(b)3**.

Regarding certification under **Rule 23(b)(3)**, the court found that "plaintiff failed to show that common issues of law or fact predominate over the individualized issues that would necessarily have to be resolved in assessing the claims of each individual class member." The court concluded that the plaintiffs' causes of actions "has within it individualized questions of misrepresentation, scienter, reliance, and causation that predominate over common questions related to the allegedly false assumptions that underlie defendants' illustrations."

***In re Hartford Sales Practices Litigation*, 192 F.R.D. 592 (D. Minn. 1999)**

Plaintiffs sought class certification for alleged misrepresentations concerning vanishing premiums, churning and use of policies for retirement or investment. Specifically, the plaintiffs have alleged that the defendants "have orchestrated a nationwide deceptive marketing campaign, and generated documents for distribution to its agents." The court rejected plaintiff's argument and found that the predominance requirement was not satisfied.

The court stated that "it would be virtually impossible, and certainly impracticable, to resolve on a class-wide basis questions of individual reliance on the part of class members." The court continued; "although the Plaintiffs generally claim that [Defendant], rather than the individual sales agents, was responsible for the deceptive and fraudulent information conveyed to them, it is clear that the manner in which this information was conveyed to them was through the individual sales agents. The oral representations of each individual sales agent, as well as each Plaintiff's reliance thereon, will necessarily vary from Plaintiff to Plaintiff, from sales agent to sales agent, and from incident to incident. Because of the need to show reliance on an individualized basis, class-wide adjudication... would be at best unwieldy, and potentially impossible." Accordingly, class certification was inappropriate.

***Rothwell v. Chubb Life Ins. Co. of America*, 191 F.R.D. 25 (D. New Hampshire 1998)**

Plaintiffs sought class certification for the deceptive sales of certain vanishing premium and replacement policies without regard to purchasers' interests (churning). Defendant

sold its vanishing premium policies, through their sales agents, by using computer-generated illustrations, which were tailored to the individual financial situations of each prospective policyholder. Plaintiffs sought class certification under both **Rule 23(b)(2)** and **Rule 23(b)(3)**.

Regarding **Rule 23(b)(3)** certification for the vanishing premium subclass, the court pointed out that plaintiffs did not base their claim of a common deceptive scheme on any standard form policy language, standardized sales scripts, or any other deceptive advertising that was aimed at a mass market. Instead, the court noted that "each agent made individualized oral representations to the policyholder based on illustrations, other written material, and the potential policyholder's financial situations and goals." The court stated that the "resolution of these claims requires proof... that the individual class members reasonably relied on [the] misrepresentations in purchasing their insurance policies." Accordingly, the court declined to certify the vanishing premium subclass under **Rule 23(b)(3)**.

Predominance Not Satisfied – Factual Variance (State Cases)

***Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36 (Iowa 2003)**

Plaintiffs brought this class action against their life insurer to recover for breach of contract, negligent misrepresentation, fraud, fraudulent inducement, and breach of fiduciary duty in sale of vanishing premium life insurance policies. Plaintiffs alleged insurers "uniformly and deceptively failed to inform existing policyholders and new customers of the substantial risks that the only way in which premiums would vanish was if interest rates and dividend scales remained relatively constant which was not likely." Plaintiffs submitted evidence that the defendant provided its independent agents with software to create illustrations during sales presentations to clients.

In affirming the trial court's denial of certification the court stated, "even assuming the nondisclosures as the plaintiffs allege, there is simply no evidence that the agents made uniform presentations, used scripts provided by Farm Bureau, and used the illustrations in all cases. Presumption of reliance would be inappropriate here because common facts, if any, do not predominate over individual facts that must be developed to determine the reliance issue."

***Russo v. Massachusetts Mut. Life Ins. Co.*, 192 Misc.2d 349, 746 N.Y.S.2d 380 (N.Y. S.Ct., Tompkins County 2002)**

Plaintiff sought certification of a class action against the insurer for fraudulently representing that the premiums for whole life insurance policies would vanish. The court denied certification finding that it could not be shown that all proposed members of the class relied upon the same allegedly false representations concerning premiums and dividends, and no issue common to the class predominated. The court concluded that "absent an individual inquiry into each oral presentation, a jury could not know whether the description of the risks... were misrepresented by an agent..."

***Solomon v. Massachusetts Mutual Life Ins. Co.*, 2000 WL 33116006 (Pa. Com. Pl. 2000)**
Plaintiff sought certification of a class action against the insurer relating to the insurer's sale of vanishing premium whole life insurance policies. The class action alleged breach of contract and fraud. Even after recognizing that "decisions in favor of maintaining a class actions should be liberally made," the court denied certification because individual issues predominated over common issues.

The court stated that, "resolving plaintiff's contract claim class-wide would require individual inquiries into (1) the variety of oral and written representation MassMutual made about the N-Pay policy; (2) which illustration MassMutual showed the prospective class member; and (3) other extra-contractual discussions between the policyholder and MassMutual." Thus, individual issues predominated over common issues.

With regard to plaintiff's fraud-based claims, the court stated, "fraud-based claims are unsuitable for class-wide resolution because resolving those claims typically requires proof of reliance and materiality." In distinguishing this case from one that reliance was found, the court stated, "here, defendants communicated with plaintiffs by oral sales presentations and written marketing material, all utilizing a variety of brochures, documents, charts, and illustrations." Accordingly, class certification was inappropriate.

***Mentis v. Delaware American Life Ins. Co.*, 2000 WL 973299 (Del. Super. 2000)**
Plaintiffs' sought class certification alleging that defendant deceptively marketed vanishing premium policies. The court noted that defendant had no common scheme or training. The court then stated that a "determination of whether and which illustrations were given to class members, and... the nature of oral presentations made to them at the point of sale, [are] elements of obvious and undeniable importance to the plaintiff's claims, [and] are matters requiring individualized fact development." Thus, individualized questions predominated, making certification inappropriate.

Predominance Not Satisfied – Legal Variance (Federal Case)

***Adams v. Kansas City Life Ins. Co.*, 192 F.R.D. 274 (W.D. Mo. 2000)**
Insureds sought class certification in regards to the sale and marketing of certain "vanishing premium" life insurance policies. The court concluded that "this case should not proceed as a class action because plaintiff has not demonstrated that common questions of law or fact predominate over issues affecting only individual policyholders." The court stated that the "necessity of applying the substantive law of multiple jurisdictions [rendered] class certification counterproductive, because variations in state law [swamped] any common issues and [defeated] predominance." This was so because plaintiff failed to address "numerous potentially divergent state law issues" and assurance that "they can be easily handled by grouping those variations" does not sufficiently demonstrate manageability so as to render claims susceptible to class treatment.

Predominance Satisfied (Federal Cases)

***In re Lutheran Brotherhood Variable Ins. Products Co. Sales Practices Litigation*, 2004 WL 909741 (D. Minn.)**

This is a multidistrict lawsuit challenging the sale of vanishing premium insurance policies alleging violation of a state consumer protection law. Defendants sought a motion to decertify a class claiming that plaintiffs cannot prove common misrepresentation, common damages, common causation or reliance, and that there is no common questions of law.

On the issue of common questions of fact, the court stated that the underlying misrepresentation that the obligation to pay premiums would vanish at some point in the future is common to all plaintiffs. Conceding that the sales agents' presentations to each plaintiff may have been slightly different, the court none the less found that "these differences do not change the uniform nature of the basic misrepresentation..." The court further stated that "in a case involving life insurance contracts, each misrepresentation would by definition be different because the information given would depend on the potential purchaser's age, health and the amount of coverage he or she elected." Additionally, the court stated that the "presence of individual damages will not, by itself, decertify a class," because "it is permissible for plaintiffs to prove damages by an expert witness's testimony regarding aggregation of damages, or by testimony regarding an appropriate formula to use to calculate individual damages."

Regarding reliance, the court stated that "evidence of what the defendant knew or thought about the effect its sales practices on consumers were having is evidence that the consumers relied on the sales practices." Additionally, the court stated that the defendant "cannot formulate illustrations seeking to convince customers to buy products, observe that those illustrations are indeed convincing customers to buy, and then argue that the record contains no evidence of reliance."

On the issue of common questions of law, the court found that "even assuming that the Court should do a choice-of-law analysis for each class member's claim, Minnesota has the most significant interest in the claims at issue here, requiring the Court to apply Minnesota law to those claims." However, the court noted that the choice-of-law analysis is unnecessary because the Minnesota consumer protection law at issue was intended to apply both to the conduct of out-of-state corporations that injure Minnesota residents and to the conduct of Minnesota companies that injures non-residents. Since the court found that common questions of law and fact predominated, the Defendant's motion to decertify the class was denied.

***In re Great Southern Life Ins. Co. Sales Practices Litigation*, 192 F.R.D. 212 (N.D. Texas 2000)**

Plaintiffs moved to certify a "vanishing premium" class of approximately 280,000 policyholders who purchased policies in 46 states and Washington, D.C.. Plaintiffs alleged that "defendants failed to inform policy owners of the pricing assumptions on which their products were based and the manner in which these assumptions were then manipulated by defendants." Plaintiffs further alleged that the insurance agents with Great Southern were

not informed as to the true actuarial tables, rates of return and other formulas used to determine policy values, and therefore could not properly advise potential purchasers. The Court held that the breach of contract and fraud actions were governed by Texas law and met the predominance requirement, and plaintiffs were entitled to a presumption of reliance on the fraud count.

On the reliance issue, the court stated, "the Supreme Court held that positive proof of reliance is unnecessary in cases involving primarily a failure to disclose." Continuing, the court stated, "it seems to this Court that where a party had no opportunity to learn the truth, a presumption of reliance is warranted to a greater degree than where there is a misrepresentation... [P]laintiffs' allegations pertain to Great Southern's alleged omission of material actuarial, interest, and mortality expectations from the materials it provided its agents, not, as Defendant urges, misrepresentations at the point of sale."

Additionally, with regard to plaintiffs' contract claims, the court held that it could apply the law of Texas, defendant's home state, noting that "contrary to Defendant's suggestions... the contracts at issue were entered into in Texas, not the homes of its consumers." The basis for the court's finding was that "an insurance policy does not issue until it is received in the home office and the underwriting department approves it." With regard to plaintiffs' fraud claim, the court held that the alleged torts also occurred in Texas, noting that "the harm is caused to those accounts by Great Southern's corporate decision not to disclose the methods by which returns are calculated for those accounts."

Predominance Satisfied (State Cases)

***Massachusetts Mut. Life Ins. Co. v. Superior Court*, 119 Cal.Rptr.2d 190 (Cal. App. 4 Dist. 2002)**

Defendant appealed the trial court's certification of a vanishing premium class action. Plaintiffs alleged that "at the time they purchased policies Mass Mutual was paying a discretionary dividend rate which Mass Mutual had no intention of maintaining," and that defendant's "failure to disclose to purchasers its own conclusions about its high discretionary dividend rate and its plans to lower the rate" violates California's Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA). Addressing the issue of reliance, the court stated that relief under the UCL is available "without individualized proof of deception, reliance and injury." With regard to the CLRA, the court found that where material misrepresentations are made to a class member whose actions thereafter are consistent with reliance upon that representation, an inference of reliance arises. Thus, under both the UCL and CLRA, the court found that common questions of law and fact predominated.

***Varacallo v. Massachusetts Mut. Life Ins. Co.*, 332 N.J.Super. 31, 752 A.2d 807 (2000)**

Insured brought a class action against insurer alleging common law fraud and violation of the Consumer Fraud Act for the deceptive marketing of a "vanishing premium" life insurance policy. Plaintiffs alleged that Mass Mutual withheld material information from its printed literature during the relevant period, which if disclosed, would have conveyed the notion that there was a substantial probability that the rates illustrated would not last. Importantly, the plaintiffs alleged that the deceptive information was not revealed to its

agents, and thus do not claim that the agents knowingly withheld the material facts. The court noted that the plaintiffs' two causes of actions differed in that "common law fraud requires proof of reliance while consumer fraud requires only proof of a causal nexus between the concealment of the material fact and the loss." The court continued that "[i]rrespective of whether the trial court may be required to deal with individual claims of reliance, causation, and/or damages, the predominance factor has been met and class actions have been approved in this State where the court has found a common core of operative facts and the plaintiffs are seeking to redress a common legal grievance." The court concluded that "if the plaintiffs in this case establish the core issue of liability, they will be entitled to a presumption of reliance and/or causation." Accordingly, class certification was appropriate.

Security of Denver Ins. Co. v. Ferguson, 1999 WL 339017 (Tex.App.-Dallas)

Defendant appealed the trial court's certification of a vanishing premium class action lawsuit, claiming that "individual issues involving specific point of sale representations of the independent agents, as well as questions of reliance, damages, and applicability of the statute of limitations and other possible defenses to each policyholder's claims, will inevitably predominate..." over common questions of law and fact. Defendant further claimed that "this class action will collapse into a litany of mini-trials in which a single jury would have to apply the law of 39 states to each of the six causes of action asserted [by the class members]... who purchased from hundreds of independent agents."

The court rejected the defendant's arguments. It stated that the knowledge and conduct of the defendant in designing and marketing the vanishing premium policy, as opposed to the conduct of any individual agent will be the focus of trial court. "Individual questions involving reliance, statute of limitations, damages and the specific policy provisions referenced by [defendant] are not likely to overshadow these pivotal issues." On the issue of choice-of-law, the court stated that since no choice of law has been determined, "the most efficient approach for the trial court is to certify the class, and if necessary after the case is developed, to dissolve the class or certify subclasses."

Churning Cases

The plaintiffs in a "churning" case allege that they were improperly induced to replace an existing insurance product with new policies without being advised of the many disadvantages associated with the switch. Among the disadvantages: policyholders must rebuild cash value as well as incur surrender costs.

Predominance Not Satisfied

Banks v. New York Life Insurance Co., 737 So.2d 1275 (La. 1999)

Plaintiffs alleged that New York Life "used unfair and deceptive practices to mislead class members about: (1) the benefits of their 'premium offset proposal', (2) the fact that their life insurance policies were not savings or retirement plans, and (3) the amount of dividends each class member would realize by replacing their old policies with new policies." New York Life trained its agents at its home office, where it also produced and sent out its

marketing materials.. During the class period, illustrations such as charts and explanatory brochures were available to assist agents in the sales presentations, but each sales presentation was individualized. In reversing the trial courts certification of the class the court stated, "a reliance of each aggrieved person as to each credit purchase must be shown. A fraud class action cannot be certified when individualized reliance will be an issue." The court continued; "[w]e find that the trial court would be required to scrutinize each plaintiff's case individually to determine whether the oral representations were at odds with the written disclosures and analyze whether plaintiffs relied upon oral statements, written materials, or both."

***Rothwell v. Chubb Life Ins. Co. of America*, 191 F.R.D. 25 (D. New Hampshire 1998)**

Plaintiffs sought class certification for the deceptive sales of certain vanishing premium and replacement policies without regard to purchasers' interests (churning). Defendant sold its vanishing premium policies through their sales agents by using computer-generated illustrations, which were tailored to the individual financial situations of each prospective policyholder. Plaintiffs sought class certification under both **Rule 23(b)(2)** and **Rule 23(b)(3)**.

Regarding certification of the churning claim under **Rule 23(b)(3)**, the court stated that to prove this claim, the plaintiffs would have to prove that a fiduciary relationship existed, and the policy replacement was not beneficial to his or her interests. The court found that both showings necessitate individualized inquires, thus certification was inappropriate. See also, *In re Hartford Sales Practices Litigation*, 192 F.R.D. 592 (D. Minn. 1999) (Infra Part IV(A)(1)); *State Metropolitan Life Ins. Co. v. Starcher*, 474 S.E.2d 186 (Sup Ct. App. W.V. 1996).

Predominance Satisfied

***Wilner v. Sunset Life Insurance Co.*, 78 Cal.App.4th 952 (Cal. Ct. App. 2d Dist. 2000)**

The trial court sustained without leave to amend defendant's demurrer related to plaintiff's class action allegation of improper replacement of her universal life policies. Plaintiff appealed. Plaintiff alleged that through its agents, Sunset, "engaged in a common course of conduct designed to induce thousands of its existing and prospective policyholders to purchase 'replacement' or 'financed' life insurance policies by using the cash value of... an existing policy, by surrendering, borrowing or stripping such cash or cumulative value from the purchase of new policies [Sunset] issued," and failed to disclose that the replacement policy was not in the best interest of the policyholder.

In reversing the trial court's decision, the court stated that "there does not appear to be [any] singular difficulty in proving what common representations Sunset and its agents made to universal life insurance policy purchasers, the materiality of these representations and whether they were false." On the reliance issue, the court stated that "[t]he fact of reliance upon alleged false representations may be inferred from circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect... where representations have been made in

regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed, that the representations were relied on." The court concluded that "should the trial court find upon an evidentiary hearing that Sunset made material misrepresentations to the class members, at least an inferred of reliance would arise as to the entire class."

***Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d, 696 N.E.2d 1001 (Ohio 1998)**

Plaintiffs brought a class action alleging that Metlife, through its agents, developed and implemented a widespread scheme to obtain higher commissions and extra charges by selling existing policyholders policies that were advertised as new when, in fact, they were replacement policies. In certifying the class the court stated that "it is now well established that a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." The court noted that plaintiffs' allegations were based on written disclosure forms and not oral misrepresentations or omissions. On reliance, the court stated, "[i]t is not necessary to establish inducement and reliance upon material omission by direct evidence. When there is nondisclosure of a material fact, courts permit inferences or presumptions of inducement and reliance." The court concluded that "if appellants can establish by common proof and/or form documents that Metlife, through its agents, was required and failed to give the mandated disclosure warnings, then at least an inference of inducement and reliance would arise as to the entire class, thereby obviating the necessity for individual proof on these issues."

Life Insurance Policies Posed as Retirement Plan Cases

The theory involved in these cases involve plaintiffs' allegations that they were misled about the true nature of the products they purchased. Plaintiffs claim that they thought they had purchased a traditional savings or retirement plan policy when, in fact, they had purchased nothing more than a regular life insurance policy.

Predominance Not Satisfied

***Moore v. Paine Webber, Inc.*, 306 F.2d 1247, 2002 WL 31261938 (2d Cir. 2002)**

Plaintiffs brought a class action against PaineWebber for its allegedly deceptive techniques in its marketing of a universal life insurance policy as a type of IRA. Plaintiffs alleged violations of RICO and common-law fraud, claiming that PaineWebber advertised the universal life insurance policy as a retirement savings plan through a centralized marketing scheme. Plaintiffs claimed that in the marketing of the universal life insurance policy, PaineWebber deliberately avoided insurance-associated terms like "premium" and instead used misleading words such as "contribution" or "deposit," and that the life insurance coverage was simply an added benefit to the retirement product. Plaintiffs presented evidence of a training seminar during which brokers were instructed to market the insurance as an IRA alternative. Additionally, plaintiffs presented marketing scripts, some of which advertised the insurance as a "retirement product" and "systematic savings program." Plaintiffs claimed that if they had known the true nature of the policy, they would

not have purchased it, but instead would have invested their money in actual IRAs. In opposition, PaineWebber submitted affidavits from brokers indicating they did not attend the training seminar and did not employ a standardized sales presentation. PaineWebber argued that individual questions of law and fact predominated over common issues.

The court found in favor of PaineWebber stating: "Contrary to Plaintiffs' argument, liability for fraudulent misrepresentations cannot be established simply by proof of a central, coordinated scheme. Rather, to recover..., even if the fraud is the result of a common course of conduct, each plaintiff must prove that he or she personally received a material misrepresentation, and that his or her reliance on this misrepresentation was the proximate cause of his or her loss." The court continued by separating fraud actions into two categories: "fraud claims based on uniform misrepresentations made to all members of the class and fraud claims based on individualized misrepresentations. The former are appropriate subjects for class certification because the standardized misrepresentations may be established by generalized proof. Where there are material variations in the nature of the misrepresentations made to each member..., class certification is improper..." The court concluded that "class certification of fraud claims based on oral misrepresentations is appropriate only where the misrepresentations relied upon were materially uniform, allowing such misrepresentations to be demonstrated using generalized rather than individual proof." Finding no such uniformity, the court held that class certification was inappropriate.

Cunningham v. PFL Life Ins. Co., 1999 WL 33656879 (N.D. Iowa)

Plaintiffs sought class certification alleging that defendant "fraudulently marketed and sold the life insurance policies by misrepresenting the policies as 'retirement plans,' 'savings plans,' or other 'investment' vehicles." The plaintiffs argued that the defendant "disseminated uniform sales materials to their sales agents nationwide, and deployed the agents to sell the policies via misrepresentation and outright deceit." However, the court found that there was no written prospectus and that the agents were not required to follow a uniform sales script. Additionally, the court stated that "materiality and reliance are integral elements" of the plaintiffs' claims. "The materiality of the misrepresentations that each agent made to each putative plaintiff is a fact issue that warrants individualized treatment. Similarly, each putative plaintiffs' reliance on the alleged misrepresentations raises important individualized questions." Finally, the court further rejected plaintiffs' contention that Iowa law should be applied to all plaintiffs, stating "the Court finds that the state law variations present in this litigation compound the disparate factual and legal questions." Accordingly, the court found that common questions of law and fact did not predominate, and therefore class certification was inappropriate.

Kirkham v. American Liberty Life Ins. Co., 717 So.2d 1226 (La.App. 2d Cir. 1998)

Insureds sought class certification alleging fraud in the selling of whole life insurance policies as savings or retirement plans. The insureds claimed that they thought they had purchased a traditional savings or retirement investment because the label on the policy was Insured Savings Plan, when instead they had merely purchased a life insurance policy. The court noted that whether such label on the policy combined with the alleged misrepresentations of the policies could fraudulently mislead each plaintiff is an individual issue of fact. "It therefore becomes an individual issue of fact whether each member of the pro-

posed class ignored the written provisions of the contract because of false or misleading statements by the various salesmen. Such a highly individualized inquiry defeats a class action in this case."

Peoples v. American Fidelity Life Ins. Co., 176 F.R.D. 637 (N.D. Fl. 1998)

Plaintiffs sought class certification alleging that they thought they had purchased a traditional savings or retirement investment product when, in truth, defendant was selling nothing more than life insurance. Plaintiffs alleged that defendant trained its agents to present a uniform sales pitch, which contained fraudulent misrepresentations that the product was a retirement plan. Plaintiffs further alleged that the sales presentations were scripted, and therefore the policies were sold to thousands of innocent people in exactly the same fraudulent manner. The court denied class certification based on the legal and factual variance, which precluded common questions of fact and law to predominate.

Regarding legal variance, the court stated that "the necessity of applying the substantive law of multiple jurisdictions would render class certification counterproductive." On the factual variance issue, the court then rejected plaintiffs' argument that this case should be treated like a securities fraud case. The court noted that "in securities class action litigation it is generally accepted that there is great class-wide commonality in the content of the sales presentation because the written prospectus is essentially the presentation... Here, however, there is no prospectus, and whether there is certainly a canned training presentation, there is no proof that the canned presentation was used consistently nationwide, much less as between these plaintiffs."

The court concluded that "if each purchase of a policy has to be examined as to the content of the presentation, the questions asked by the purchaser, the parts of the offer which were attractive to the purchaser, and the reliance by the purchaser on both the oral and written presentations, there will have to be a mini-trial involving each of those issues for each of the thousands of purchasers plaintiffs purport to represent." Accordingly, class certification was denied. See also, *Banks v. New York Life Insurance Co., 737 So.2d 1275 (La. 1999) (Infra Part IV(B)(1))*; *In re Hartford Sales Practices Litigation, 192 F.R.D. 592 (D. Minn. 1999) (Infra Part IV(A)(1))*.

Predominance Satisfied (No Cases)

2 Main Ways Predominance is Defeated in a Claim

Factual variance - Refers to the need for individualized proof of key elements of a class member's claim including, for example, reliance and causation.

Legal variance - Refers to the requirement that the separate laws of the states in which the putative class members reside must be applied to their respective claims, and the fact that these laws vary with respect to the legal theories at issue.

Managed Care Cases

The plaintiffs in these types of cases challenged the cost-containment practices of insurance companies in the administration of their managed-care programs.

Predominance Not Satisfied In Part/Satisfied In Part

In re Managed Care Litigation, 209 F.R.D. 678 (S.D. Fla. 2002)

Plaintiffs brought a series of lawsuits around the country that challenged the cost-containment practices of major insurance companies involved in administering managed-care programs for ERISA plans. "The crux of plaintiffs' allegations is that each Defendant made material misrepresentations to the entire class that were uniform in all respects and that Defendants have engaged in a common scheme of misrepresenting to the subscribers the amount of coverage they receive." Additionally, plaintiffs claimed that "Defendants have engaged in a conspiracy and have also aided and abetted each other in implementing and continuing a common fraudulent scheme designed to systematically obstruct, reduce, delay and deny payments and reimbursements to health care providers." The litigation was split into two "tracks," a provider track (those brought by physicians with business relationships with the defendants) and a subscriber track (those brought by participants in plans, which the defendants provide services).

Regarding the subscriber track, the plaintiffs sought class certification under both **Rule 23(b)(2)** and **23(b)(3)**. Under **Rule 23(b)(3)**, the court found that "because... there is no proof of a common scheme and the disclosures the putative class members have received regarding their medical benefits are not uniform, and indeed materially vary from year to year and plan to plan, class treatment of Plaintiffs' claims predicated on fraud is inappropriate. Where there are variances in the alleged representations supporting claims based on fraud, courts routinely refuse to certify class actions because of the individualized proof involved in order to sustain the claims." The court also rejected plaintiffs' argument that reliance can be presumed. Accordingly, subscriber track class certification was denied.

Regarding certification of the provider track, the Plaintiffs again sought class certification under both **Rule 23(b)(2)** and **23(b)(3)**. The court granted class certification under **23(b)(3)**, and thus did not address **23(b)(2)**. The court stated that "numerous issues are common to all claims and, in fact, predominate... including Defendants' medical necessity requirements, Defendants' use of actuarial guidelines, Defendants' use of automated claims system and comparable software capable of adjusting CPT codes and reimbursement rates and automatically delaying and denying claims as well as other uniform activities designed to deny, delay or decrease reimbursement or payments to physicians." Therefore, "because a common scheme is alleged and demonstrated by the evidence here, there are no individual issues of reliance. Thus, the common issues and common scheme predominate." Accordingly, the court granted class certification to the provider track.

Predominance Not Satisfied

Eisen v. Independent Blue Cross, 839 A.2d 369 (Penn. 2004)

Plaintiffs/chiropractors sought class certification for breach of contract alleging improper policies and practices by Defendant/health insurers regarding prior authorization of payment for insurance subscribers using these in-network chiropractors. Plaintiffs' claim rested on the assertion that defendants "have fabricated eight 'schemes' designed to deny them reimbursement under the contract; three of these... involved 'bundling' and 'downcoding' claims; one asserts denial of coverage by unqualified personnel; and four posed application of certain standards and algorithms 'which operate as absolute denial mechanisms or irrebutable presumptions foreclosing meaningful opportunity for individualized analysis of claims.'"

Regarding the predominance issue, the plaintiffs argued that their claims all arise from interpretation of a form contract. The contract "stipulates that coverage be provided to subscribers and/or compensation/reimbursement to providers for the delivery of medically necessary care." The court stated that "a determination of medical necessity must precede authorization of or payment for services, and is, perforce, based on individual rather than common factors. Although [Plaintiffs] ostensibly challenge the process by which such decisions are made, precertification must be granted or denied on individual, not common, facts." The court further stated that plaintiffs "also fail to calculate the denial of precertification or reimbursement dependant on the breadth of the coverage carried by each individual patient, a variable which, perhaps even more than the determination of medical necessity, affects [Defendants'] response to benefit claims." Accordingly, the court denied class certification.

A strong dissenting opinion was filed, which argued that "the overarching question in this case is whether there was a pattern of denials, not medical necessity." The dissent cited the federal case of *In re Managed Care Litigation*, and noted that that case reached the direct opposite conclusion based on the same facts. The dissent stated that the central issue in both this case and in *In re Managed Care Litigation* is that "the insurers have used a systematic scheme to deny claims improperly." The dissent noted that, as in *In re Managed Care Litigation* "do not seek to prove that the treatments were medically necessary. Rather, they are claiming that the insurance companies breached their duty of good faith and fair dealing by denying claims with a set of standards designed to eliminate the more expensive treatment." Accordingly, the dissent would have granted class certification.

Premium Gap Cases

These types of cases involve claims made by insured who allege they were wrongfully charged a full premium for the first policy year in exchange for less than a full year's worth of coverage.

Predominance Not Satisfied

***Gilman v. John Hancock Variable Life Ins. Co.*, 2003 WL 23191098 (Fl. Cir. Ct.)**

Plaintiff brought a class action suit against life insurer alleging that insurer misrepresented that insured would receive a full year of coverage in return for her first premium payment, when in fact, insured received less than a full year. Plaintiffs sought class certification under either Fla.R.Civ.P. 1.220(b)(3) (predominance) or Fla.R.Civ.P. 1.220(b)(2) (injunctive relief).

Regarding the predominance issue, the court found that individual issues of law and fact would predominate. The individual issues of fact included: "material variations between dozens of different policy forms approved for use during the class period...; potential variations as to whether policyholders read and understood their contracts...; variations between written and oral communications with policyholders regarding the inception of their insurance coverage and their obligation to pay premiums during the first policy year...; what the parties agree are variations between the timing of putative class members' first premium payments...; what the parties agree are variations between policyholders' delivery dates...; [and] variations between putative class members' exercise of special dating options...." Additionally, the court also concluded that "Variations between the 50 states' laws governing the admission of extrinsic evidence to resolve putative class members' breach of contract claims also preclude a finding of predominance, particularly given plaintiffs' assertion that [defendant's] contracts are ambiguous." Accordingly, the court denied certification.

***Burstein v. First Penn-Pacific Life Ins. Co.*, 209 F.R.D. 674 (S.D. Fl. 2002)**

Insured brought a class action suit against life insurer alleging violation of RICO claiming that insurer misrepresented that insured would receive a full year of coverage in return for her first premium payment, when in fact, insured received less than a full year. The court found that the "reliance and causation elements of Plaintiffs' RICO claim necessarily entail individual inquiries of virtually each and every class member. Reliance will depend on the state of mind of the class member and simply cannot be resolved on a class-wide basis." Accordingly, the court denied class certification. See also, *Bogard v. Inter-State Assurance Co.*, 589 S.E.2d 317 (Ga. App. 2003)(holding that the language of the contract was unambiguous, thus no cause of action can lie for deceptive practices); *Franco v. Guardian Life Ins. Co. of Am.*, 2003 WL 230700 (N.Y. Sup. Ct.) (same).

Predominance Satisfied (No Cases)

Failure to Adequately Compensate or Pay Insureds' Claim Cases

All these cases involve some sort of claim involving the procedure an insurance company uses to process or pay insureds' claims.

Predominance Not Satisfied – Factual Variance

***Dunnigan v. Metropolitan Life Ins. Co.*, 214 F.R.D. 125 (S.D.N.Y. 2003)**

Beneficiaries of a long-term disability plan sought class certification alleging violations of ERISA. Plaintiffs claim that defendant unreasonably delayed in payment of disability benefits and thus deprived the recipients of the time value of their money. The court found that "claims for interest for retroactive benefits... [is an] equitable remedy that requires an individualized assessment of each class member's claim." Accordingly, whether the delay was unreasonable must be determined on an individualized basis. The court denied class certification.

***Basurco v. 21st Century Ins. Co.*, 108 Cal.App.4th 110 (2d Dist. 2003)**

Plaintiffs sought to certify a class consisting of homeowners who were allegedly denied insurance benefits by defendant in the aftermath of an earthquake. The court found that individual questions of law and fact predominated. The court noted that "the existence of damage, the cause of damage, and the extent of damage would have to be determined on a case-by-case basis." Accordingly, the Court denied class certification. See also, *Newell v. State Farm General Ins. Co.*, 118 Cal.App.4th 1094 (2d Dist. 2004).

***Pollet v. Travelers Prop. Cas. Ins. Co.*, 2001 WL 1471724 (E.D.La)**

Plaintiffs sought class certification alleging that the defendant "intentionally or negligently failed to adequately compensate [class members] for legitimate hail damage claims." Regarding certification under *Rule 23(b)(3)*, the court found that "the need for individualized proof on thousands of separate claims strongly counsels against maintaining a class action." The court noted that each claimant had a different roof with different hail damage in different locations. Additionally, because plaintiffs claimed defendant acted in bad faith, an individual inquiry into damages, the type of insurance policy, and the defendants' actions would be required. Accordingly, the court denied class certification.

***Ostrof v. State Farm Mutual Automobile Ins. Co.*, 200 F.R.D. 521 (D. Md. 2001)**

Plaintiffs sought class certification alleging that defendant/automobile insurer wrongfully denied reimbursement for medical bills and lost income under the personal injury protection (PIP) provision of their policies. Plaintiffs contended that defendant engaged in a course of deceptive conduct by urging them "to accept PIP coverage, suggesting it would evaluate PIP claims fairly, objectively, thoroughly, promptly, and in accordance with Maryland law, but at the same time concealed from them the existence of a 'common and fraudulent plan, scheme, or practice' that made each of those representations false." On the issue of predominance, the defendant argued that each claimant's situation is unique and "would require individualized proof of an erroneous coverage determination as well as proof of actual injury resulting from that determination." The court agreed with defendant and stated that "fundamental questions necessarily apply to each and every claimant. Was there in fact an accident? Was the claimant injured? Was the event adequately documented? Was review of the claim based on computer review alone? Utilization review alone? Medical review alone? On come combination of these? Did the claimant have a pre-existing medical condition? Was the treatment prescribed for claimant necessary? Was it excessive? Were the health care provider's bills reasonable? Was there duplication in billing? Was fraud involved? Did the individual claimant actually have to pay the

amount [Defendant] denied? Has the claimant been sued for the fee?" Accordingly, the court denied class certification.

McDonald v. The Prudential Ins. Co. of Am., 1999 WL 102796 (N.D. Ill.)

Plaintiffs brought a class action against defendant alleging ERISA violations. Specifically, "Plaintiffs allege that [Defendant] had a policy of denying claims for ultrasound guidance procedures when used in connection with [injection compression sclerotherapy], finding such treatment not medically necessary. Plaintiffs additionally alleged that [Defendant] reduced the payment made on claims they submitted, asserting that the charges made by the physicians exceeded what [Defendant] determined was the usual and prevailing charge in the community for similar services and procedures." Plaintiffs sought class certification under either **Rule 23(b)(2)** or **23(b)(3)**.

Regarding certification under **Rule 23(b)(3)**, the plaintiffs argued that a "medical necessity determination would not need to be undertaken on a case-by-case basis because [Defendant] uses the same medical necessity standard from policy to policy, and therefore, the issue is whether [Defendant's] uniform standard is proper or improper." The court rejected this argument finding that it would have to assess each individual's medical condition and determine whether the sclerotherapy for that person was medically necessary, thus precluding predominance. Additionally, the court noted that "an individual assessment on a claim by claim basis regarding whether the usual and prevailing rate was proper with respect to each particular procedure in reference to the appropriate geographical area" would have to be made, again, precluding predominance. Accordingly, the court denied class certification. See also, *Hylaszek v. Aetna Life Ins. Co., 1998 WL 381064 (N.D. Ill.)*; *Fietsam v. Conn. Gen. Life Ins. Co., 1994 WL 323313 (N.D. Ill.)*.

Predominance Not Satisfied – Legal Variance

Bowers v. Jefferson Pilot Financial Ins. Co., 219 F.R.D. 578 (E.D. Mich. 2004)

Plaintiff sought class certification based on allegations that defendant miscalculated the equity value under the terms of their policies. Plaintiffs argued that "this case is ideal for class certification because it is based on a breach of a standardized form policy..., [thus] the contract is to be interpreted uniformly." Defendant on the other hand argued that "variations in state law with respect to extrinsic evidence will make this class action unmanageable." The defendant "acknowledged that the question of whether a contract is ambiguous is a question of law, but argued that there are some states that permit the introduction of extrinsic evidence to show the parties' intent, even if the contract language is unambiguous." The court stated that "to establish that certification is appropriate, Plaintiff must 'credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insurmountable obstacles.'" The court held that the plaintiff failed to do so. Additionally, the court rejected the plaintiff's argument that Michigan law may be applied to the claims of all class members. Therefore, the Court denied plaintiffs motion for class certification. See also *Hobson v. Lincoln Ins. Co., 2001 WL 648958 (N.D. Ill.)* (holding that "the fact that plaintiffs are required to prove intent in connection with [the claim of violation of the Illinois Consumer Fraud Act] raises a significant possibility that some inquiry regarding what was said to each individual insured/debtor will be necessary..." thus predominance was not met).

Predominance Satisfied

***Freedom Life Ins. Co. of America v. Wallant*, 2004 WL 2996898 (Fla. App. 4th Dist.)**

Plaintiffs sought class certification alleging that defendant "improperly denies and delays claims in contravention of Florida law and the terms of the policies." Plaintiffs sought certification under both **Fla.Civ.Proc.Rule 1.220(b)(2)** (injunctive relief) and **Rule 1.22(b)(3)** (predominance).

Regarding certification under **Rule 1.220(b)(3)**, the court granted certification. The court stated that "the common issues that predominate in the case at bar are the enforceability of the dispute resolution provision which is common to all class members' policies and the question of whether statutory violations have occurred that should result in monetary recovery for denied and delayed claims."

***Wachtel v. Guardian Life Ins. Co.*, 223 F.R.D. 196 (D. N.J. 2004)**

Plaintiffs were beneficiaries of two employee benefit health plans offered by a group health insurer, the defendant. Plaintiffs sought class certification alleging defendants engaged in "a systematic course of conduct in interpreting contracts of insurance in an improper, undisclosed, and self-serving way in contravention of the plans and of [Defendant's] fiduciary duty to beneficiaries who chose to use out-of-network providers." On the issue of predominance, defendant argued that individual issues regarding damage calculations and reliance predominated. The court rejected both arguments. Regarding damage calculations, the court stated that "If [Defendant] is found liable, [Defendant] could be required to use its computerized system to reprocess those claims..." found to be improper. The court noted that defendant "has already demonstrated its ability to use its computer system to determine beneficiaries affected by particular claims practices." Regarding reliance, the court stated that individual issues of reliance do not predominate because plaintiffs alleged a "common scheme of misconduct that applies to all class members." Accordingly, the court granted class certification.

***Brooks v. Educators Mut. Life Ins. Co.*, 206 F.R.D. 96 (E.D. Penn. 2002)**

Plaintiff/Insureds sought class certification alleging that defendant/group health insurer's failure to pay the "reasonable and customary charge" for anesthesia services in accordance with its medical insurance contracts violated ERISA. Plaintiffs sought class certification under either **Rule 23(b)(2)** or **23(b)(3)**. Regarding certification under **Rule 23(b)(3)**, the court found in favor of plaintiffs. The court stated that "liability is predicated upon what plaintiffs allege was a common improper method of calculating the reasonable and customary charge." Accordingly, common questions predominated and the court granted class certification.

***Unum Life Ins. Co. of America v. Crutchfield*, 568 S.E.2d 767 (Ga. App. 2002)**

Plaintiffs sought class certification claiming that defendant life insurer failed to pay statutory post-mortem interest on the death benefit of a life insurance policy. Plaintiffs further alleged that defendant had a pattern and practice of underpaying post-mortem interest nationwide. The court affirmed the trial court's grant of class certification but with some reservation. Defendant admitted that "its computers are programmed to pay the post-mortem interest that corresponds with the state which is considered to be the 'situs' of

the policy." Therefore, the operation of the computer program was a common fact applicable to the entire class. However, the court was cognizant of the fact that there were significant individual issues of law, given that potential plaintiffs live in many different states. In the end, the court stated that it was not an abuse of discretion to find that common questions of law and fact predominated.

***Selby v. Principal Mut. Life Ins. Co.*, 197 F.R.D. 48 (S.D. N.Y. 2000)**

Plaintiffs/insureds sought class certification alleging that the defendant's claims agents, who conduct an initial on-line review, "disregard the diagnoses listed in an insured's claim for benefits when the insured's doctor lists several diagnoses as a basis for a treatment, and instead only consider the first listed diagnosis, and this policy creates an unreasonable barrier to the insured's ability to access his health benefits." Plaintiffs claimed that this policy violated the ERISA provision which "prohibits an insurer from administering its claims review process in a manner that inhibits or hampers the processing of claims." In a brief decision on the issue of predominance, the court stated that the "shared legal question... whether [Defendant's] practice... violates ERISA..." predominates over the particular issues associated with each plaintiff's claim. Accordingly, the court granted class certification.

***Leszczynski v. Allianz Insurance*, 176 F.R.D. 659 (S.D. Fla 1997)**

Plaintiffs filed a class action against defendant/automobile insurer asserting that their automobile insurance policies provided for medical payments, personal injury protection and uninsured/underinsured motorist coverage for injuries suffered in automobile accidents. Plaintiffs contended that defendant adopted a standardized business practice under which it refused to acknowledge responsibility to make payments under certain provisions of the policy. Plaintiffs sought classification of one nationwide class and two Florida classes under both **Rule 23(b)(2)** and **Rule 23(b)(3)**.

Regarding certification under **Rule 23(b)(3)**, the defendants "argue that there are unique factual circumstances surrounding each individual plaintiff's accident, status, individual insurance coverage, settlements, and medical outcomes that predominates, if not outright control, the outcome of plaintiffs' claims." The court rejected this argument and stated that "a legal determination as to whether the policy in question covers claimants... is the predominant question of interest among the class members." Accordingly, the court granted class certification.

Modal Premium Cases

The plaintiffs in modal premium class actions challenge the insurance companies' general practice of adjusting policy premiums depending on the frequency of the premium payments. The plaintiffs alleged that the insurers failed to properly disclose what differing payment options would cost when paid more than once a year. The plaintiffs further contend that the insurers have a duty to disclose in the actual policy: 1) the calculation of the dollar difference between the annual payment and the total of the modal payments; and 2) the so-called "effective annual percentage rate of interest" ("APR") which the plaintiffs mistakenly claim is charged to all consumers who choose to pay premiums more often than once a year.

Predominance Not Satisfied In Part/Satisfied In Part

***Berry v. Federal Kemper Life Assurance Co.*, 2004 WL 2348510 (Ct. App. N.M.)**

Insureds sought class certification of a modal premium class action, claiming that insurer failed to disclose the different rates insurer charged when insured paid premiums more than once a year. The trial court granted class certification with respect to insureds' breach of contract and breach of duty of good faith and fair dealing cause of actions. Insurer appealed.

Regarding insureds' breach of contract claim, the appellate court held that the trial court did not abuse its discretion in finding that common questions of fact and law predominated. On the issue of factual variance, the insureds argued, and the court agreed, that insureds could prove their case without individualized evidence because "all of the documentary evidence is essentially identical for the entire class: that is, the policy language, ... the application forms, the agent training, and sales materials are all the same and do not require individual explanation." The appellate court noted that even though the insurer had the right to try and prove affirmative defenses relating to specific class members, this right, in and of itself, does not make the insureds case "an inherently individual matter." On the issue of legal variance, the appellate court stated that "we simply see no significant variation in the cases from the standard approach to interpretation of insurance contracts: starting with plain language and progressing through rules of grammar, consideration of context and extrinsic evidence and ending, if necessary, with construction favoring the insured, if other approaches fail." Accordingly, the Appellate Court affirmed the class certification of the breach of contract claim.

Insureds' claim of breach of duty of good faith and fair dealing did not fair as well. Regarding factual variance, the appellate court cited, with approval, the vanishing premium cases that had previously been certified "where the plaintiffs did not rely on oral misrepresentations as the factual basis of their claim," and stated that the case at bar was closely related to those cases. Additionally, the appellate court noted that the "materiality" of the undisclosed differences in rates for the modal premiums should be presumed because "it would be an unrealistic burden on a plaintiff to prove how he would have acted if the omitted material information had been disclosed." Accordingly, the appellate court held that the trial court did not abuse its discretion in finding that common questions of fact predominated. However, the appellate court held that legal variance precluded a finding of overall predominance of fact and law. The appellate court stated that "there do seem to be variations in the way a few states define and apply their version of the duty of good faith, which precludes application New Mexico law across the board...." Thus, the appellate court reversed class certification of the insureds' breach of duty of good faith and fair dealing claim. See also, *Enfield v. Old Line Life Ins. Co. of America*, 98 P.3d 1048 (Ct. App. N.M. 2004) (affirming class certification of breach of contract claim, and reversing class certification of breach of duty of good faith and fair dealing in a modal premium case); *Alfa Life Ins. Corp. v. Johnson*, 822 So.2d 400 (Ala. 2001) (vacating a modal premium class certification on the grounds that before certifying the class, the trial court should have decided whether the policy was ambiguous and what effect any ambiguity would have on predominance).

Predominance Satisfied (No Cases)

Use of Non-Original Equipment Manufacturer Parts Cases

Plaintiff/Insureds in these cases challenged the insurers' policy of using nonoriginal equipment manufacturer (OEM) parts for car repairs. Specifically, the plaintiffs claimed that the insurers breached its contract because the use of non-OEM parts failed to restore plaintiffs' vehicle to preloss condition.

Predominance Not Satisfied – Factual Variance

***Augustus v. The Progressive Corporation*, 2003 WL 155267 (Ohio App. 8 Dist.)**

Insureds sought class certification alleging that insurer “utilized a company-wide policy that required the use of cheap, poor quality ‘imitation parts’ in repairing and/or replacing damaged insured automobiles under the comprehensive or collision coverage.” Insureds further alleged that this use of substandard parts “understates the amount necessary to repair the damaged automobile to its pre-loss condition,...” thus resulting in a breach of contract.

The court noted that “under the terms of the policy, the [insurer] uniformly provide that they will pay ‘the amount necessary to repair the damaged property to its pre-loss condition.’ In utilizing nonoriginal equipment to restore an automobile to its ‘pre-loss condition,’ the policies in question required the parts to be of ‘like kind and quality’ to those replaced parts.” The Court stated that “it would only reason that the determination of ‘pre-loss condition’ could only be made by individually examining each and every putative class member’s vehicle.” The court further stated that “it would be inconceivable to reason that an automobile is not returned to its ‘pre-loss condition’ because a non-OEM part is utilized in making a repair.” Accordingly, the court denied class certification.

***Schwendeman v. USAA Casualty Ins. Co.*, 65 P.3d 1 (Wash. App. 2003)**

Insureds appealed the trial court’s denial of class certification in its suit against insurer regarding car repair practices. Specifically, insureds claimed that “the use of non-OEM parts violates the terms of [insurer’s] insurance policy and the Consumer Protection Act and that non-OEM parts are inferior in appearance, performance, and safety to OEM parts.” Insureds argued that the common issue to all class members was whether, “by using non-OEM parts, [insurer] breached its obligation to replace damaged parts with parts of ‘like kind and quality.’” Insureds further argued that the “resolution of this issue will involve nothing more than a comparison of a non-OEM part with its OEM counterpart and will not require an examination of each insured’s vehicle because, according to [insureds’] experts, regardless of what part is compared, the non-OEM part will always be inferior in terms of durability, performance, and safety.”

The appellate court rejected insureds’ argument and affirmed the denial of class certification. It stated that “whether [insurer] has met the contractual obligation to repair an insured’s vehicle with a part of like kind and quality will depend on the condition of each insured’s vehicle, particularly the kind and quality of the part being replaced and the re-

placement part.” The appellate court further stated that “given the need to examine the condition of the vehicles and the difference in vehicle makes and models and the fact that there are several manufacturers of non-OEM crash parts, the determination of whether a particular non-OEM crash part is inferior to its OEM counterpart would require testing thousands of crash parts.” Thus, individualized questions of fact predominated making class certification inappropriate.

***Snell v. The Geico Corp.*, 2001 WL 1085237 (Md.Cir.Ct)**

Insureds sought class certification alleging that insurer “had a systematic and uniform policy of providing estimates based upon the use of... non-OEM parts,” and thus “breached their promise to provide replacement parts of like kind and quality...” Insureds additionally alleged that the non-OEM are “necessarily and uniformly inferior to their OEM counterparts.” The court held that predominance was not satisfied for numerous reasons. First, the court stated that “in order to determine if there was a breach, and if so, the measure of damages, the [insureds] must establish in each instances the pre-loss condition.” Secondly, “individual inquiry would be required concerning whether or not the body shops installed OEM parts, even though non-OEM parts were specified in the estimate.” Finally, given that insureds’ claim “is based in part on allegations that [insurer] uniformly omits certain necessary repairs from its estimates...,” the question of whether the omitted repair was necessary can only be determined by individual inquiries.

Predominance Not Satisfied – Legal Variance

***Snell v. The Geico Corp.*, 2001 WL 1085237 (Md.Cir.Ct.)**

After holding that factual variance precluded predominance from being satisfied (Infra Part IV(H)(1)), the court further held that legal variance was also a problem. The court noted that there are differing state laws when it comes to the application of the collateral source rule to contract damages. Additionally, the court stated that “all states are not in accord on whether a trial court can read an express limitation of liability out of the contract.” The court further stated that “the meaning of the phrase ‘like kind and quality’ involves at some level issues of public policy,... [and] different states have taken different positions on this question specifically as it relates to non-OEM parts.” Finally, the court stated that “the rules of construction for interpreting insurance contracts differ among the states.” Accordingly, class certification was inappropriate.

Predominance Not Satisfied In Part/Satisfied In Part

***American Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483 (Mo. 2003)**

Insureds sought class certification of both a nationwide class and a Missouri class. The trial court certified both classes and the insurer appealed. Insureds alleged that insurer “breached its contracts... to restore [insureds’] vehicles to pre-loss condition by devising and implementing a practice that results in payment of claims based on (1) the systematic specification of ‘inferior’ non-OEM crash parts for repairs, and (2) the systematic omission of specific ‘necessary’ repairs from estimates.” Regarding the nationwide class, the court initially noted that “the laws of the several states range from allowing the use of non-OEM parts in a vehicle if the owner is given notice, to forbidding the use of non-OEM parts as a condition to payment of a claim.” Given this legal variance, the court held that

common questions of law did not predominate, and thus reversed class certification relating to the nationwide class. The Missouri class fared much better. The court held that the common issue that predominated was whether insurer “breached its contracts with each prospective class member when it made payment on [insureds’] claims based upon estimates either specifying the use of non-OEM crash parts or omitting particular repairs.” Accordingly, the court affirmed certification of the Missouri class.

Predominance Satisfied

Lebrilla v. Farmers Group, Inc., 16 Cal.Rptr.3d 25 (4th Dist. 2004)

Insured sought class certification alleging that insurer had a “company wide policy to use parts not manufactured by the OEM, but knock-offs or imitations of the OEM parts made by manufactures who do not have the material or dimensional and manufacturing specifications of the OEM.” The insureds further alleged that the non-OEM parts are “inferior to OEM parts in terms of structural integrity, corrosion resistance, finish and appearance, fit, material composition, durability, and dent resistance; and therefore are not of like kind and quality of OEM parts as required by [insurer’s] insurance policy.”

The court initially acknowledged that “the question of whether a class can establish imitation crash parts are uniformly not of like kind and quality as OEM parts has been examined by nearly one dozen” other state courts, but is one of first impression for California. The court further stated that “the state courts rejecting class certification uniformly interpret ‘like kind and quality’ as being tied to the pre-loss condition of each vehicle.” The court rejected this argument and stated that “like kind and quality centers on the original parts’ OEM status alone, and an analysis may focus on the quality of OEM parts and the contested crash parts in general.” Thus, if the insured can “substantiate [its] generalizations as to the quality of OEM parts and the contested crash parts, [it] will be able to establish damages and the value of such damages on a class-wide basis.” The Court further noted that “it remains to be seen whether the trier of fact will be persuaded by the [insureds’] common proof and experts’ testimony as to the quality of OEM parts and the imitation crash parts..., [but] it is not our role... to involve ourselves with the merits of the underlying action or which parties’ experts are most qualified.” Accordingly, class certification was appropriate.

Foultz v. Erie Ins. Exchange, 2002 WL 452115 (Pa.Com.Pl.)

Insureds sought class certification claiming that insurer’s use of non-OEM parts “diminishes the value of the vehicle while failing to restore the insured vehicle to its pre-loss condition....” Insurer claimed that predominance was unmet because the contract provision of “like kind and quality includes distinctions based on the age, condition, and use of the part being replaced, [thus] resolving the Class’s claims will require the Court to confront individual questions....” The court rejected this argument and found that “like kind and quality refers only to a part’s material and suitability, not its age or extent of use,” and therefore “the condition of each Class Member’s used OEM part will be irrelevant.” The court held that “contingent on [insureds] ability to substantiate her generalizations as to the quality of OEM parts and Contested Crash Parts, the [insureds] will be able to establish damages and the value of such damages on a class-wide basis.” Accordingly, class certification was appropriate.

***Avery v. State Farm Mutual Automobile Ins. Co.*, 746 N.E.2d 1242 (Ill. App. 5th Dist. 2001)**
Insureds brought a class action against insurer claiming that insurer “had promised to pay for replacement parts of ‘like kind and quality’ that would restore the vehicle to its ‘pre-loss condition’ and that it breached this promise by uniformly specifying inferior non-OEM parts when they were available and cheaper than...” OEM parts. Insurer argued that “in order to determine whether each class member has a right to an award of damages,... there must be evidence concerning each member’s repairs, including identification and evaluation of the damaged part and the specified replacement part, evidence of the vehicle’s pre-loss condition, and affirmative defenses such as waiver or consent, and whether the extent to which each member was damaged by the alleged breach.” Insurer claimed that these showings necessarily required an individualized inquiry. The court rejected this argument stating that “the record demonstrates that [insureds] presented evidence to show that [insurer] made the same promise... to its policyholders throughout the country.” Additionally, the court found that insurer “devised a nationwide policy mandating the use of non-OEM parts in its insureds’ property-damage claims if those parts were cheaper and available.” The court also found that insureds’ claim that non-OEM parts are “categorically inferior” to OEM parts was supported by expert testimony, “from which it could be reasonably inferred, if accepted as true, that the lot of non-OEM parts... was inferior in terms of appearance, fit, quality, function, durability, and performance.”

Insurer also claimed that the trial court would have to consider the consumer-fraud laws of the 48 states, and thus legal variance precludes predominance. The court also rejected this argument for numerous reasons. First, “the question of whether laws of different states apply to specific transactions alleged in a class action does not ordinarily prevent certification of the class.” Next, there were “no true conflicts between the substantive laws of Illinois and those of the other states whose residents were part of the class.” Finally, the court found that Illinois “has significant contacts so that the application of its consumer fraud laws to all class claimants is neither unfair nor a violation of due process.” Accordingly, class certification was appropriate. But see *Herrera v. United Automobile Ins. Co.*, 2002 WL 32072837 (Fla.Cir.Ct.)(distinguishing *Avery*).

Miscellaneous Additional Cases

Predominance Not Satisfied – Factual Variance

***Bradberry v. John Hancock Mut. Life Ins. Co.*, 222 F.R.D. 568 (W.D. Tenn. 2004)**

Plaintiffs brought a class action against defendant long-term care insurer. The district court granted class certification. Defendant appealed claiming that individualized questions of fact predominated. The appellate court first noted that even after a class is certified, a court must “continue to ensure that the requirements of class certification remain satisfied as the case progresses, and the court may alter or amend the certification if the requirements are not longer met.” The court decertified the class because the predominance requirement became unmet given the individual variation in insurer’s agent’s sales presentations. The court noted that there was no evidence of a uniform course of conduct in the sales presentations, and thus an inquiry into what statements were made or not

made to each class member, whether the class member relied on those representations, and whether that reliance was reasonable would have to be made.

***Zarella v. Minnesota Mut. Life Ins. Co.*, 824 A.2d 1249 (Sup. Ct. Rhode Island 2003)**

Insureds sought class certification against insurer seeking to recover difference between expected surrender value and payment actually made for surrender of life insurance policy. The court adopted the trial court's reasoning concluding that individual questions of law and fact predominated. First, "the insurance policies were sold by individual agents who did not follow a canned script, but rather sold the policies in a way that was inherently individualized." Additionally, "questions of individual instances of reliance on the part of different members of the class" precluded predominance. Accordingly, class certification was inappropriate.

***Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Ins. Co.*, 319 F.3d 205 (5th Cir. 2003)**

Defendants appealed certification of a class action for alleged violations of RICO brought by plaintiffs who claimed that defendant charged excessive premiums on retrospectively rated workers' compensation insurance policies. Plaintiffs sought damages caused by allegedly false filings that defendants made with regulators and by inflated invoices sent to policyholders.

The court noted that "proximate cause generally demands that a misrepresentation be relied upon by the plaintiff, individually." The court continued that "when civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation." Thus, "cases that involve individual reliance fail the predominance test."

Defendants contended that "plaintiffs were aware that carriers were charging them more than the filed rates." Thus, "knowledge that invoices charged unlawful rates, but did so according to a prior agreement between the insurer and the policyholder, would eliminate reliance and break the chain of causation." The court concluded that "defendants are entitled to attempt to undercut [proof of detrimental reliance] with evidence that might persuade the trier of fact that policyholders knew the amounts being charged varied from rates filed with regulators and that they had agreed to pay such premiums." Therefore, individual issues predominated and class certification was inappropriate.

***Gyarmathy & Assocs., Inc. v. TIG Ins. Co.*, 2003 WL 21339279 (N.D. Tex.)**

Plaintiffs sought class certification alleging misrepresentations and omissions on the face of a worker's compensation insurance policy sold to them by defendant. Plaintiffs sought certification under **Rule 23(b)(3)**. After finding legal variance precluded class certification, the court further addressed plaintiffs' claims that common issues of fact predominated. Plaintiff argued that "all putative class members were given an essentially identical flat dividend proposal, all of which omitted the same material information." The court stated that "while the text of the flat dividend proposals may have been identical, the record before the court shows that those documents were not delivered to the putative class members in identical contexts." Thus, the court found that individualized questions of fact predominated.

***McAdams v. Mass. Mut. Life Ins. Co.*, 2002 WL 1067449 (D. Mass. 2002)**

Plaintiffs sought class certification alleging breach of fiduciary duty arising from defendant's administration of a deferred compensation plan. Plaintiff's contend that common questions of law and fact predominate because their claims are grounded in a common agreement and defendant's common administration of the same deferred compensation plan. Defendant argued that the claims must be analyzed under the laws of several different states and that each plaintiffs' relative sophistication must be determined.

Regarding the choice-of-law issue, the court agreed with plaintiff that Massachusetts law applies to all counts because of the choice-of-law provision in the underlying agreement. However, the Court found that individual issues predominated because "an individualized determination of the plaintiffs' allegations of a fiduciary duty will be required, rendering the certification of a class inappropriate."

***Begley v. Academy Life Ins. Co.*, 200 F.R.D. 489 (N.D. Ga. 2001)**

Plaintiffs sought class certification contending that defendant trained counselors of non-commissioned United States military officers to exploit the officers' trust and induce them to buy inferior life insurance products. Plaintiffs alleged that the products were "the most expensive, have the highest surrender charges, and have the poorest income performance of any of the listed insurance products." The court found that predominance was unmet and based this decision on two factors. First, "based on... the plaintiffs' review of the applicable laws of the varying jurisdictions and their effect on the individual issues of reliance, damages, and individual representations..." predominance is unmet. Second, "even though the plaintiffs allege a uniform sales policy, [it]... may not have always, or ever, been used by the counselors... Because the common scheme does not appear to have been followed on a consistent basis, individual issues of whether a material fact was misrepresented to a particular class member and whether such class member detrimentally relied thereupon predominates over any common issues." Accordingly, class certification was inappropriate.

***In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001)**

Defendant appealed the district court's order certifying a class of purchasers of a two-tiered deferred annuity contract containing both an annuitization value (the amount paid to the owner if the funds deposited are held under the contract for at least one year and annuitized over at least five years) and a cash value (the amount the contract owner received in the event that he or she elects a full or partial lump sum surrender). Plaintiffs alleged that defendant misrepresented the annuities provisions.

The district court based its decisions primarily on the holding in *In re Prudential Ins. Co. of Am. Sales Practice Litigations*, 148 F.3d 283 (3d Cir. 1998). The appellate court stated "the District Court's principal reliance on [*Prudential*]... was misplaced and unfortunate. In *Prudential*, we affirmed the certification of a settlement class action... However, *Prudential*, unlike this case, involved uniform, scripted, and standardized sales presentations. The district court opinion in *Prudential* found that 'the oral component of the fraudulent sales presentations did not vary appreciably among class members.'" The appellate court found that defendants in this case did not use "captive" agents and did not employ uniform marketing materials. Accordingly, class certification was inappropriate.

***Hammett v. American Bankers Ins. Co. of Fla.*, 203 F.R.D. 690 (S.D. Fla. 2001)**

Insureds sought class certification against credit insurers alleging they violated RICO and breached their involuntary unemployment insurance (IUI) agreement by failing to pay minimum amounts on insureds credit accounts. Specifically, the insureds alleged that "Defendants issued IUI policies to thousands of consumers, using standard, uniform applications in which the Defendants represented that they would make 'the minimum monthly payment on Your account' in the event of 'involuntary loss of employment.'" The insureds claimed that instead of making the payments, the defendants "devised a scheme wherein claims were not processed on a timely basis, Defendants failed to pay amounts equal to the Insureds' finance charges plus the credit insurance premiums it automatically charged to the Insureds' accounts, and thereby created self terminating policies." The insureds sought certification under both **Rule 23(b)(2)** and 23(b)(3).

Regarding certification under **Rule 23(b)(3)** for alleged RICO violations, the court stated that "resolution of each class members' claims will require distinctly case-specific inquiries into the facts surrounding each alleged increase in the Insureds' debt, late fees, over limit fees, and increased interest rates." The court further stated that "whether Defendants delayed or improperly paid each class members' claims cannot be determined by only considering the legality of Defendants' actions. Rather, to determine liability and damages the trier of fact also will have to consider each class members' cardholder agreements and claims history." Additionally, the court stated that "Plaintiffs... must each show that they relied to their detriment on Defendants' misrepresentations. This individualized issue of reliance predominates over common issues, thus defeating Plaintiff's certification under **Rule 23(b)(3)** for her RICO claim." Accordingly, the court denied class certification.

***Young v. Nationwide Life Ins. Co.*, 183 F.R.D. 502 (S.D. Tex. 1998)**

Plaintiffs sought class certification alleging securities fraud and common law claims. "The crux of Plaintiffs' complaint arises from their allegations that the Defendants made material misrepresentations and/or omissions in connection with the marketing and sale of the variable contracts. Specifically, although Plaintiffs acknowledge that they knew they were not investing in publicly traded mutual funds, they claim that the Defendants represented the sub-accounts, or underlying mutual funds, to be 'clones' or replicas of well known, publicly traded mutual funds with the same or similar names."

Although acknowledging "what appears on the undisputed facts to be an extensive and manipulative scheme to defraud investors," the court denied class certification because individual reliance is an essential element of plaintiffs' claims and thus cannot meet the predominance requirement of **Rule 23(b)(3)**. See also, *Jim Moore Ins. Agency, Inc. v. State Farm Mut. Automobile Ins. Co.*, 2003 WL 21146714 (S.D. Fla.).

Predominance Not Satisfied – Legal Variance

***Gyarmathy & Assocs., Inc. v. TIG Ins. Co.*, 2003 WL 21339279 (N.D. Tex.)**

Plaintiffs sought class certification alleging misrepresentations and omissions on the face of a worker's compensation insurance policy sold to them by defendant. Plaintiffs sought certification under Rule 23(b)(3). The court found that legal variance precluded certification. The court stated that "it appears that a Texas court would apply the law of each insurer

eds' states of residence to the claims before the Court. [Plaintiff] has thus failed to show that common issues of law predominate." Accordingly, the Court denied class certification.

***In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001)**

After holding that factual variance precluded predominance (See *infra* Part IV(l)(1)), the appellate court additionally criticized the district court's failure to "consider how individualized choice of law analysis of the forty-eight different jurisdictions would impact on **Rule 23's** predominance requirements... as well as individual determinations of causation, adjudications of contract law, reliance, the fiduciary status of defendant, and [defendant's] defenses of contributory/comparative negligence and limitations."

***Hammett v. American Bankers Ins. Co. of Fla.*, 203 F.R.D. 690 (S.D. Fla. 2001)**

Again, after holding that factual variance precluded certification of plaintiffs' RICO claims (See *infra* Part IV(l)(1)), the court held that legal variance precluded certification of their breach of contract claim. Defendants argued that the breach of contract claim "will require adjudication under the laws of many states and thus defeat the predominance of other common issues." The court agreed. Accordingly, it denied class certification.

***Powers v. Government Employees Ins. Co.*, 192 F.R.D. 313 (S.D. Fla. 1998)**

Plaintiffs/insureds sought class certification against automobile insurer for recovery of the full amount of the deductible insureds paid on their collision claim from the amount, which insurer recovered on their subrogation claim. Insureds sought to certify two classes: a class with individuals from fifteen states, and a class with only Florida residents. Insureds sought certification under either **Rule 23(b)(2)** or **23(b)(3)**.

Regarding the multi-state class under **Rule 23(b)(3)**, the court initially noted that insured "must prove through 'extensive analysis' that there are no material variations among the law of the states for which certification is sought." The court then held that insureds failed to carry this burden because they merely provided a " cursory analysis of the laws of the fifteen states from which the proposed class is comprised." The court further stated that "the differences in state law directly impact and outweigh the central question of whether [insurer] violated the insured-whole rule." Therefore, class certification was inappropriate for the multi-state class. (Note: the court held that class certification was appropriate for the Florida class under **Rule 23(b)(2)**. See also *Monte De Oca v. State Farm Fire & Casualty Co.*, 2004 WL 2955008 (Fla. App. 3d Dist.)(holding that insureds were not entitled, under the theory of the "made-whole" doctrine, to full recovery of their deductible); *Scho nau v. Geico Gen. Ins. Co.*, 2004 WL 2898124 (Fla. App. 4th Dist.) (same).

Predominance Not Satisfied In Part/Satisfied In Part

***Mantz v. St. Paul Fire & Marine Ins. Co.*, 2003 WL 23109763 (W.Va. Cir. Ct.)**

Plaintiffs sought class certification claiming that defendant is liable for "exiting the medical malpractice insurance business without providing [Plaintiffs] with either the paid-for coverage or any refund of their premiums." Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, conversion, negligence or gross negligence, and breach of fiduciary duty.

The court first held that plaintiffs' claims of breach of contract and fiduciary duty must be held in abeyance pending further consideration. It stated that these claims "necessarily involve issues of reliance such that the liability aspect of each such claim would not necessarily be substantially similar." Additionally, the court held in abeyance pending further consideration Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. The court stated that it "remain(s) unconvinced that uniformity exists among all states as to the existence of such an implied covenant."

The court denied certification on plaintiffs' claims of negligence and gross negligence. The court stated that contrary to plaintiffs' assertion defendant had no fiduciary duty in favor of plaintiffs as to its management of its business.

The court granted certification on plaintiffs' claim of conversion. The Court stated that "the facts relevant to each member of the class to recover are identical and, because conversion is founded in common law, the Court is of the opinion that all members of the Class can be adequately protected herein."

The Court additionally granted certification on Plaintiffs' claim of unjust enrichment. The Court stated that "the facts relevant to each member of the class to recover are identical, and because unjust enrichment is predicated in equity, the Court is of the opinion that all members of the Class can be adequately protected herein."

Predominance Satisfied

***Martin v. Grange Mut. Ins. Co.*, 2004 WL 2937308 (Ohio App. 11th Dist.)**

The trial court granted plaintiffs' motion for class certification and defendant appealed. Plaintiffs alleged that defendant continued to collect multiple premiums for uninsured/underinsured coverage without informing policyholders that the Ohio Supreme Court had invalidated those provisions. The court concluded that the common issue across the entire class is whether defendant was obligated to notify the class members of the Ohio Supreme Court decision. The court concluded that the defendant had no legal duty to keep policyholders informed, however, "if an insurance company has taken steps in the past to notify insureds of changes in the law bearing on coverage or some other term of a policy, the company may then be required to instruct policyholders on further reforms." The court further stated that "to establish this obligation, the class will rely upon common proof and form documents which demonstrated [Defendant's] prior conduct. This evidence will undoubtedly form the basis of the claims for the whole class. Thus, a presumption of reliance arises." Accordingly, the court affirmed the trial court's grant of class certification.

***Arkansas Blue Cross and Blue Shield v. Hicks*, 78 S.W.3d 58 (Ark. 2002)**

Medicaid recipients brought a class action against insurer for allegedly selling them an unnecessary Medicare supplement policy. The trial court certified the class and the insurer appealed. The appellate court affirmed stating, "the common issue that predominates any other potential issue is whether [defendant] engaged in a fraudulent scheme to sell insurance policies that they knew, or should have known, were voidable because they provided coverage that was already being provided by Medicaid. If this issue is resolved in

favor of the class, the individual members will have suffered a common injury of having paid insurance premiums on a void policy."

***Nat'l Western Life Ins. Co. v. Rowe*, 86 S.W.3d 285 (Tex. Ct. App. 2002)**

Defendant/Insurer appealed certification of a class of plaintiffs/insureds who paid premiums for child rider coverage after such coverage was terminated (when the child turned 25) and were not refunded those premiums. Plaintiffs alleged that defendant designed the riders to place an affirmative obligation on insured to recognize when the child rider has expired, recognizing that most insureds would likely fail to realize when a rider terminates and continue paying premiums. On appeal, defendant argued that individualized reliance issues precluded predominance. However, the Court determined that some of plaintiffs' claims would not require a showing of reliance. Additionally, "the presumed direction of the trial on these non-contract claims will focus on the uniform conduct of [Defendant], its billing policies, and its failure to refund any premiums paid for terminated riders." The court affirmed class certification but recognized that the reliance issue could prevent some class members from proceeding, stating that "the trial court may decertify or reshape the class to address issues such as reliance."

***Rose v. United Equitable Ins. Co.*, 651 N.W.2d 683 (Sup. Ct. N.D. 2002)**

Insurer appealed certification of an insured class of North Dakota residents who purchased guaranteed renewable nursing home policies from insurer before insurer was bought out by another insurance company. After the buy-out, insurer stopped issuing policies in North Dakota, a process known as "closing the block." The insureds claim the "combination of higher premiums and a shrinking pool or insured to share increased costs of claims resulted in a 'death spiral' or 'selection spiral,' with premiums increasing so dramatically that the remaining policyholders are unable to pay and are forced to relinquish their policies."

The insurer argued on appeal that the trial court erred when it "mechanically" determined that a majority of the thirteen factors stated in the North Dakota class action statute favored class certification by merely tallying up which side had more factors in its favor. The court noted that a trial court "may conclude that common questions predominate even if there are significant individual questions to be resolved." Referencing the highly deferential standard of review an appellate court employs in reviewing class certification, the court found that the trial court did not abuse its discretion in granting certification.

***Fabricant v. Sears Roebuck*, 202 F.R.D. 310 (S.D. Fla. 2001)**

Plaintiffs/credit card holders sought class certification alleging that the "Defendants marketed and sold insurance to thousands of consumers, using standard, uniform applications that failed to make sufficient disclosures and to obtain appropriate consent" in violation of the Truth in Lending Act (TILA) and Florida law. Plaintiffs sought certification under both **Rule 23(b)(2)** and **23(b)(3)**.

Regarding certification under **Rule 23(b)(3)** for alleged violations of TILA, the plaintiffs alleged that "defendant provided the same disclosures to all class members and that those disclosures violated TILA." The defendants only challenge to predominance was

whether a claim for actual damages requires denial of class certification. The court found that it did not, stating "the potential recovery of actual damages by some class members in subsequent proceedings does not defeat predominance." The Florida law claims fared just as well under **Rule 23(b)(3)**. The court stated that "the central legal issue... is based on an allegation that insurance policies were sold in violation of Florida law, are void as a matter of public policy and the class is entitled to a refund of premiums paid... these common issues predominate and are appropriate for certification." In the end, the court exercised its option of "divided certification" by certifying an injunctive class for the portion of the case seeking equitable relief and a damages class for the portion of the case seeking damages.

***Makastchian v. Oxford Health Plans, Inc.*, 704 N.Y.S.2d 44 (1st Dept. 2000)**

Health care insureds brought a class action against insurer. Insureds alleged that the insurers' general practice of terminating insurance policies without providing 30 days prior notice violated the plain terms of the policies. Regarding class certification, the court stated that "this general practice, and the question of whether it violates the insurance policy, affects all policy holders,... and any questions relating to individual reliance, causation and damages are, given the essentially declaratory nature of the relief sought, relatively insignificant, if not entirely irrelevant to the question of class certification." Accordingly, class certification was appropriate.

***Baughman v. State Farm Mut. Automobile Ins. Co.*, 88 727 N.E.2d 1265 (Ohio 2000)**

Insureds appealed the appellate court reversal of the trial courts granting of class certification. Insureds claimed that insurer had obtained uninsured motorist (UM) and underinsured motorist (UIM) coverage premiums without informing the insured that only one vehicle in the household had to have UM and UIM coverage to provide protection to all resident relatives in the household. Defendant argued that individual reliance precludes a finding of predominance. The court rejected this argument and found that if insureds could establish by "common proof and/or form documents" that insurer made misrepresentations or that insurer had a duty to disclose the fact that only one household vehicle needed the UM and UIM coverage, "then at least a presumption of reliance would arise as to the entire class, thereby obviating the necessity for individual proof on this issue." Accordingly, the court found the predominance test met and reversed, thereby certifying the class. See also, *Simmons v. Am. Gen. Life & Accident Ins. Co.*, 748 N.E.2d 122 (Ohio App. 6th Dist. 2000).

***Dornberger v. Metropolitan Life Ins. Co.*, 182 F.R.D. 72 (S.D.N.Y. 1999)**

Plaintiff, citizen of England residing in Switzerland, brought a class action against defendant after purchasing a personal life insurance from defendant's overseas office. Plaintiff claimed that defendant sold these policies as part of a "far-reaching scheme allegedly perpetrated by the defendant to sell insurance without the requisite authorizations and licensing from European regulators." Plaintiff claimed that the scheme was carried out "through a pattern of fraudulent omissions and misrepresentations made by means of telephone marketing, mailing, advertisements and face-to-face solicitations by agents following a set of uniform guidelines for such sales disseminated knowingly by the New York office." Plaintiff sought class certification. Regarding legal variance, the court found that the plaintiffs "have sufficiently alleged a common course of conduct on the part of [defendant] to satisfy the requirements of... predominance even though this case will ne-

cessitate particularized inquiries into different foreign laws." The court also noted that "common questions may predominate where defendants are alleged to have engaged in a common scheme to defraud. The central, common and predominant issue, which is covered by New York law, is that of liability and damages, if any."

Regarding factual variance, the court found that since defendant's conduct was uniform, the "need to prove individual reliance and misrepresentation... does not defeat the Motion to Certify." The court analogized the facts of the case to those of securities fraud cases with approval. The court found that defendant's uniform sale's literature which contained potentially fraudulent misrepresentations met the test of predominance.

***Taylor v. American Bankers Ins. Group*, 267 A.D.2d 178 (N.Y. Sup. Ct. 1st Dept. 1999)**

Plaintiffs sought class certification alleging that defendant engaged in a "general practice of offering, in prominent print, ostensibly easily available credit insurance coverage, while, at the same time, relegating to small, inconspicuous print the precise terms of the coverage being extended, and then, rejecting insurance claims on the ground that the customer had not been paying for the appropriate type of insurance." The trial court certified the class and the defendant appealed.

The appellate court stated that "although defendants contend that they used a variety of forms and promotions, there was ample justification for the motion court's finding that the solicitations in question did not differ materially. Accordingly, given the nature and uniformity of defendants' offers of coverage, any matters relating to individual reliance and causation are relatively insignificant, if not irrelevant, and as such, do not preclude class certification." Additionally, the court stated that "while defendants assert, in a conclusory manner, that the law of all 50 States is relevant to the adjudication of this matter, defendants are all residents of Florida, and there is no apparent conflict between the law of New York and that of Florida insofar as consumer issues are concerned." The court affirmed the grant of class certification. See also, *Pitts v. Am. Sec. Ins. Co.*, 550 S.E.2d 179 (N.C.App. 2001); *Mega Life & Health Ins. Co. v. Jacola*, 954 S.W.2d 898 (Ark. 1997).

Requirements of Rule 23(b)(3) – Superiority

In addition to requiring that common questions of law or fact predominate, the court must also find that a class action is the superior method of adjudicating the claims. The rule lists a non-exhausted list of factors the court should examine in determining superiority. The factors include: "1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; 2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; 3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and 4) the difficulties likely to be encountered in the management of a class action." Fed.R.Civ.P. 23(b)(3).

Although technically separate, the predominance and superiority requirements generally overlap. Once a court determines that common questions predominate, the court will additionally find that a class action is the superior method of proceeding, and vice-versa. For example, if the court finds that individualized questions of causation and reliance predominate, the court will

also find that a class action is not the superior method of addressing plaintiffs' claims. Thus, as a practical matter, the superiority requirement is consumed by the predominance requirement.

Settlement Cases

Class actions involving a proposed settlement agreement are treated differently for class certification purposes. The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), addressed this unique circumstance. As noted above, factual and legal variance normally preclude class certification under Rule 23 (b)(3), because manageability problems preclude predominance because individualized questions of fact, such as reliance and causation, or individualized questions of law, such as applying differing state laws, would make class certification impractical if not impossible. While acknowledging that the requirements of Rule 23 must still be established in settlement class actions, the Supreme Court further stated that when "confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would represent intractable management problems... for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. In other words, the predominance requirement is no longer a significant hurdle for certification of settlement classes.

Following *Amchem's* lead, numerous insurance industry class actions were granted class certification. *Gregg v. Independence Blue Cross*, 2004 WL 869063 (Pa.Com.Pl.); *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55 (S.D.N.Y. 2003); *Grove v. Principal Mutual Life Ins. Co.*, 200 F.R.D. 434 (S.D. Iowa 2001); *Snell v. Allianz Life Ins. Co.*, 2000 WL 1336640 (D.Minn.); *Hanson v. Acceleration Life Ins. Co.*, 2000 WL 33340298 (D.N.D.); *Wilson v. Massachusetts Mut. Life Ins. Co.*, 1999 WL 33291387 (Dist. Ct. N.M.); *Bussie v. Allmerica Fin. Corp.*, 50 F.Supp.2d 59 (D. Mass. 1999); *Manners v. American Gen. Life Ins. Co.*, 1999 WL 33581944 (M.D.Tenn.); *Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741 (M.D.Fla.); *In re The Prudential Insurance Company of America Sales Practices Litigation*, 148 F.3d 283 (3d Cir. 1998); *In re Manufacturers Life Ins. Co. Premium Litigation*, 1998 WL 1993385 (S.D.Cal.); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54 (D.Mass. 1997).

Insurance Industry Class Actions That Have Reached the Merits of the Case

The previous sections of this paper dealt with the class certification stage. The three types of cases mentioned in this section involve insurance industry class actions that have reached the merits of the case.

Modal Premium Cases (See *infra* Part IV(G) for description)

***Azar v. Prudential Ins. Co. of America*, 68 P.3d 909 (Ct. App. N.M. 2003)**

Insureds brought this modal premium class action against life insurer. Insureds' complaint included allegations of breach of the implied covenant of good faith and fair dealing and breach of duty of disclosure under the common law, the Unfair Practices Act (UPA) and the Unfair Insurance Practices Act (UIPA). The trial court granted insureds summary judgement on all claims. Insurer appealed.

First, the appellate court held that as a matter of first impression, insureds' claim of breach of the implied covenant of good faith and fair dealing could not stand. The court stated that "the implied covenant of good faith and fair dealing cannot be used in this case to challenged [insurer's] modal premium charges where the policies expressly authorize such charges." Additionally, the court noted that "because the implied covenant of good faith and fair dealing depends upon the existence of an underlying contractual relationship, [insureds] may not recover under the theory for omissions occurring before the existence of the policy." Therefore, the appellate court reversed the grant of summary judgment in insureds' favor for their breach of the implied covenant of good faith and fair dealing claim.

Insureds' claim of breach of the duty to disclose under common law, the UPA, and the UIPA fared somewhat better. The appellate court held that insurer "may have had a duty to disclose additional information to [insureds] concerning its modal premium practices both before and after the formation of the insurance contracts." However, the appellate court held that "reasonable minds could differ as to the materiality of the alleged undisclosed facts and that additional relevant facts must be developed for the trial court to properly determine whether a duty to disclose arose in this case." Thus, the court reversed the grant of summary judgement in insureds' favor and remanded the case to determine the materiality of the undisclosed information.

***Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545 (Ct. App. N.M. 2003)**

This is another New Mexico modal premium class action case. The insureds brought similar allegations to those in the case of Azar, above. The trial court denied insurer's motion to dismiss all allegations, and the insurer appealed. The appellate court came to similar findings as it did in Azar. The court held that the complaint failed to state a claim for breach of the covenant of good faith and fair dealings for the same reasons stated in Azar. Thus, the court reversed the denial of insurer's motion to dismiss the claim for breach of the covenant of good faith and fair dealing. However, the court held that "the UPA and the UIPA each imposes a duty to disclose material facts reasonably necessary to prevent any statements from being misleading, [and] the existence of a duty is dependant on the materiality of the facts." Additionally, the court recognized that, depending on the materiality of the omitted information, the insurer has "a common law duty to disclose additional information about the modal premium charges." Contrary to Azar, the court stated that insureds adequately pleaded "the materiality of these facts, [thus] materiality is not an issue in this appeal." Accordingly, the court affirmed the denial of the insurer's motion to dismiss claims of breach of the duty to disclose under the common law, the UPA and the UIPA.

**Use of Non-Original Equipment Manufacturer Parts Cases
(See *infra* Part IV(H) for description)**

***Roth v. Amica Mut. Ins. Co.*, 796 N.E.2d 1281 (Sup. Jud. Ct. Mass. 2003)**

Plaintiffs brought a class action against their automobile insurer to recover for its decision not to specify OEM parts to repair a vehicle fender. Plaintiffs claimed that the use of non-OEM parts inherently diminished the value of the vehicle. The trial court granted summary judgment in favor of insurer and denied class certification. The appellate court agreed

stating that insurer's "specification of non-OEM parts to repair a damaged automobile is not an automatic violation of its obligations..." under the insurance policy. The appellate court noted that "in an appropriate case, a plaintiff may successfully claim damages based on an insurer's specification of a substandard non-OEM part, or successfully demonstrate that the insurer's duty... to repair or replace can only be satisfied by the designation of a particular OEM part to repair the specific damage to that automobile — there are certainly some parts of some vehicles where unique dimensions or specifications of the part are such that only a replacement part from the original manufacturer will suffice to restore the vehicle to its proper functioning condition." However, the Appellate Court stated that this is not that type of case. Accordingly, the trial courts summary judgment in favor of insurer and denial of class certification was affirmed.

***Sweeney v. Integon General Ins. Corp.*, 806 So.2d 605 (Fl. Ct. App. 4th Dist. 2002)**

Insureds brought a class action against automobile insurer seeking damages for breach of contract based on insurer's policy of authorizing non-OEM parts for vehicle repairs. Insureds' complaint alleged "that the non-OEM parts are not of 'like kind and quality' and were not only uniformly inferior in quality, but also did not restore the vehicle to its pre-loss condition." The trial court dismissed insureds' complaint for failure to state a cause of action. Insureds appealed. The appellate court reversed stating "whether [insured] is entitled to claim the benefits of the terms of the policy or whether it will be proven that the parts authorized for use are of like kind and quality to [OEM] parts remain to be resolved by summary judgment or trial." See also *State Farm Mut. Automobile Ins. Co.*, 556 S.E.2d 114 (Ga. 2001) (holding that insurer was required to pay for diminution in value).

***Berry v. State Farm Mut. Automobile Ins. Co.*, 9 S.W.3d 884 (Tx. Ct. App. 2000)**

Insureds brought class action against automobile insurer to require payment for OEM parts. The trial court entered summary judgment in favor of insurer on the grounds that insureds failed to plead facts establishing a cause of action. Insureds appealed. Insureds claimed that insurer must "always pay for OEM parts, absent the enactment of administrative rules providing otherwise, and that the 'like kind and quality' provision in the standard Texas automobile insurance policy is now invalid insofar as it would otherwise allow insurers to pay only for the cost of non-OEM parts of like kind and quality." The court acknowledge that "policyholders might be coerced into accepting substandard and possibly dangerous replacement parts in some situations..." but affirmed the summary judgment in insurer's favor stating that "we cannot say as a matter of law that all non-OEM parts are substandard and that insurers must pay for new OEM parts in every claim, regardless of the age or condition of the covered vehicle prior to the accident or the quality of available non-OEM parts." See also *Rodriguez v. Amstar Ins. Co.*, 2004 WL 2955028 (Fla. App. 3d Dist.) (affirming a dismissal of a class action involving use of non-OEM parts). Summary judgment in insurer's favor stating that "we cannot say as a matter of law that all non-OEM parts are substandard and that insurers must pay for new OEM parts in every claim, regardless of the age or condition of the covered vehicle prior to the accident or the quality of available non-OEM parts." See also *Rodriguez v. Amstar Ins. Co.*, 2004 WL 2955028 (Fla. App. 3d Dist.) (affirming a dismissal of a class action involving use of non-OEM parts).