What Is Superiority?
The Role of Completed, Pending, and Anticipated Government Activity in Certifying a Class Action

Steven Malech and Seth Huttner

Consumer protection and antitrust attorneys seeking to prevent class certifications have three powerful, but underused, defenses upon which they can rely: a completed, a pending, or an anticipated government investigation or lawsuit (collectively, government action). In certain circumstances, these potential defenses could result in denial of a class certification motion, as a court may find that due to the government action, a class action lawsuit is *not* "superior to other available methods for fairly and efficiently adjudicating the controversy."[1] While this argument has been periodically addressed in courts across the country over the last four decades, given the current prevalence of private class action lawsuits "following" investigations by federal, state, and local enforcement agencies, surprisingly few cases directly address this issue, let alone offer any substantive analysis.

Some courts and commentators have noted the importance of completed, pending or potential government action to the determination of whether to certify a class. For example, one court has explained that a trial judge cannot simply "ignore the existence of an Attorney General investigation into [defendant's conduct]."[2] And, a former Deputy Director of the Bureau of Competition at the Federal Trade Commission has made a "modest proposal" that "courts considering the certification of a class under Federal Rules of Civil Procedure Rule 23, or its state law equivalents . . . analyze carefully the full implications of a pending or completed government enforcement action."[3]

In addition, as set forth more fully below, the current trend for trial courts to "assess the relevant evidence" at the class certification stage,[4] also suggests that litigants should be prepared to more frequently raise or otherwise address the interplay between government actions and class certification in antitrust and consumer protection cases.[5] At the very least, defense counsel may benefit from arguing that trial courts should be very careful about certifying a class seeking pri-

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***Steven Malech** is Counsel in the New York, NY office of Wiggin and Dana LLP and a member of the firm's Antitrust and Consumer Protection Practice Group. **Seth L. Huttner** is an Associate in the Hartford, CT office of Wiggin and Dana LLP and is also a member of the firm's Antitrust and Consumer Protection Practice Group.*
The views expressed are solely those of the authors and do not represent the views of Wiggin and Dana LLP or any of its clients.

[1] FED. R. CIV. P. 23(b)(3). *See also*, *e.g.*, TEX. R. CIV. P. 42(b)(4) (2009); MAINE R. CIV. P. 23(b)(3) (2009).

[2] Levine v. 9 Net Ave., Inc., No. A-1107-0071, 2001 WL 34013297 (N.J. Super. A.D. June 7, 2001) (affirming the trial court's denial of class certification based, in part, on the pending Attorney General's investigation).

[3] D. Bruce Hoffman, *To Certify or Not: A Modest Proposal for Evaluating the "Superiority" of a Class Action in the Presence of Government Enforcement*, 18 GEO. J. LEGAL ETHICS 1383 (2005).

[4] *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 42 (2d Cir. 2006). This case was decided after Bruce Hoffman's article, *supra* note 3, but merely serves, in our opinion, to buttress his "modest proposal."

[5] *See* Mooney v. Allianz Life Ins. Co. of North Am., 244 F.R.D. 531, 538 n.3 (D. Minn. 2007) (noting that while the court's class certification decision was pending, "the Minnesota Attorney General initiated litigation against [the defendant] on behalf of senior citizens of Minnesota. *Minn. v. Allianz Life Ins. Co. of N. Am.*, Civ. No. 07-581 (Minn. Dist. Ct.). Neither Plaintiffs nor [defendant] has addressed whether that litigation affects the superiority analysis"). This may have been a missed opportunity for defense counsel.

marily money damages where a state Attorney General (or other state or federal agency) has already settled claims with the same defendant(s) arising from the same course of conduct.[6] After all, a court could justify its refusal to certify a class under such circumstances to prevent "double dipping" by plaintiffs and prevent the unnecessary expenditure of resources by the executive and judicial branches of government.

In this article we identify and explain the patchwork of cases in which courts have, to some degree, addressed this issue. More specifically, we focus on three categories: (1) where the government action has been completed and the consumer harm remedied; (2) where the government action (whether it be an investigation or lawsuit) is pending; and (3) where the government action is anticipated or merely possible (which is predictably the weakest argument against certification, although a potentially useful factor that a court might consider).

[T]rial courts should be very careful about certifying a class seeking primarily money damages where a state Attorney General (or other state or federal agency) has already settled claims with the same defendant(s) arising from the same course of conduct.

Courts' "Rigorous Analysis" of Certification Decisions

The plaintiff bears the burden of convincing a court to certify a class.[7] In federal cases governed by Rule 23 of the Federal Rules of Civil Procedure, a plaintiff's initial hurdle is Rule 23(a)'s four prerequisites: numerosity, commonality, typicality, and adequacy.[8] If the plaintiff satisfies these prerequisites, a class then may only be certified if it meets one of the three additional standards set forth in Rule 23(b). The most commonly raised standard is found in is Rule 23 (b)(3), which requires the court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that any class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[9]

In *General Telephone Company of the Southwest v. Falcon*,[10] the Supreme Court held that a class may only be certified "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[11] Courts have offered differing interpretations of the contours of this "rigorous analysis" test since that 1982 ruling, but recent decisions have clarified the scope of inquiry to be used by the trial courts in deciding whether to certify a class. For example, the Court of Appeals for the Second Circuit recently explained in *In re IPO* that "[a] district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit."[12]

In re IPO and its progeny focused on the district court's obligation to resolve pertinent merits and expert issues at the class certification stage. But, the unmistakably broader point is that a district court must consider "all . . . relevant evidence" before certifying a class. The presence of a completed, pending, or anticipated government action constitutes part of this "relevant evidence."

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6 *See, e.g.*, Kamm v. Cal. City Dev. Co., 509 F.2d 205 (9th Cir. 1975).

7 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 315–16 (3d Cir. 2008).

8 The full version of Rule 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members 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." FED. R. CIV. P. 23(a).

9 FED. R. CIV. P. 23(b)(3).

10 Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982).

11 *Id.* at 161.

12 *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d at 42. *See also In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d at 315–16.

Accordingly, courts may find it necessary to consider the presence or possibility of a government action when ruling on a motion for class certification.[13]

The Leading Case: *Kamm v. California City Development Company*

The Ninth Circuit's 1975 decision in *Kamm v. California City Development Company*,[14] provides the most detailed analysis of when a government action should preclude class certification. In *Kamm*, a group of investors alleged that land promoters failed to disclose the nature of the property and the inherent risks associated with certain real estate investments. After the lawsuit was filed, but before the district court's class certification ruling, the California Attorney General and Real Estate Commissioner reached a settlement agreement with many of the defendants.[15] The settlement agreement "provided for offers of restitution of principal payments to certain purchasers[]," permanently enjoined defendants from making further misrepresentations, and required defendants to use their "best efforts" to settle future disputes.[16] Based on the relief already provided, the district court found that a class action was not the superior method of adjudicating these claims.

The Ninth Circuit affirmed, explaining that, in no particular order of importance, "[s]uperiority must be looked at from the point of view of (1) the judicial system, (2) the potential class members, (3) the present plaintiff, (4) the attorneys for the litigants, (5) the public at large and (6) the defendant."[17] Some of the factors that led the court to affirm denial of class certification included recognition that:

- a class action would require "a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level[;]"
- the state action provided restitution, an agreement to settle future disputes, and a permanent injunction;
- no investor was barred from initiating his/her own suit; and
- defending a class action would be costly to defendants and duplicate the hours spent working to achieve the result with the state.[18]

As dicussed more fully in the next section, other courts have similarly concluded that the class action mechanism is not the best means of adjudicating the controversy where a state or federal agency had already entered the proverbial fray.[19]

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[13] *See, e.g.*, Levine., 2001 WL 34013297 at *3 (noting that the trial judge had an "obligation not to ignore the existence of an Attorney General investigation into [defendant's conduct] when he learned that such an investigation was being conducted").

[14] Kamm v. Cal. City Dev. Co., 509 F.2d at 205.

[15] *See id.* at 207–08. On March 8, 1973, the California Attorney General and Real Estate Commissioner filed their complaint. On that same day, the parties filed a stipulated judgment enclosing the settlement agreement.

[16] *Id.* at 208.

[17] *Id.* at 212 (quoting Katz v. Carte Blanche Corp., 496 F.2d 747, 760 (3d Cir. 1974)).

[18] *Id.* The other factors that supported the trial court's decision were that (1) the class action would involve 59,000 buyers in separate transactions over fourteen years, with some of the buyers desiring to retain their land; (2) the state court retained continuing jurisdiction, and (3) the individual named plaintiffs' suit can still proceed. *Id.*

[19] A settlement reached after litigation brought by the executive branch is not the only form of settlement that could counsel against certification. In *Millett v. Atlantic Richfield Co.*, No. Cv-98-555, 2000 WL 359979 (Me. Super. Ct. Mar. 2, 2000), the Maine Legislature created a Ground Water Oil Cleanup Fund to provide money for persons whose property was damaged by an oil spill. The court refused to certify a class of plaintiffs allegedly affected by the spill. While there were other reasons why the court declined to certify the class (primarily the plaintiff's inability to meet the predominance requirement), it also found that the Legislature's Fund, even though it placed limitations on a claimant's right to recover, "lend[ed] support to this court's conclusion that a class action is not the superior method of resolving this controversy." *Id.* at *18.

Completed Government Action as a Bar to Class Certification

Relying on *Kamm*, the court in *Caro v. Proctor & Gamble Co.*,[20] a consumer protection case, similarly denied class certification, in part, because of a completed government action.[21] In *Caro*, a putative class of consumers alleged that Proctor & Gamble falsely labeled its orange juice. The court denied certification, in part, because P&G had already disgorged funds and spent more than $450,000 "complying with consent decrees and settlement agreements with various governmental agencies including the California Attorney General and District Attorneys in Santa Cruz and Alameda Counties."[22] The *Caro* court further found that the class action would "effectively duplicat[e] work which has been or could be done by the state [and the FDA],"[23] and that the superficial differences between the allegations in the complaint and those involved in the government action failed to make the class action superior because the same or similar conduct was alleged in both.[24]

A court . . . may be advised to carefully consider whether the class allegations are actually the same as those brought in the government action . . .

This final point is particularly important. Plaintiffs' counsel often assert different legal theories to avoid the "duplication defense," notwithstanding that the same operative facts provide the basis for both the private and public actions. Thus, as in *Caro*, a court evaluating whether to certify a class under these circumstances may be advised to carefully consider whether the class allegations are actually the same as those brought in the government action—particularly given *In re IPO's* and *In re Hydrogen Peroxide*'s emphasis on conducting a "rigorous analysis" at the class certification stage.

In *Brown v. Blue Cross & Blue Shield of Michigan*,[25] the defendant's settlement with the Michigan Attorney General formed the primary basis for the court's denial of class certification. The Michigan Attorney General and Insurance Commissioner investigated the defendant for allegedly misrepresenting the amounts the company's subscribers had to co-pay for hospital stays. The government agencies and the company reached a settlement agreement pursuant to which Blue Cross agreed to refund all overpayments (amounting to approximately $24.4 million) for those subscribers who signed and returned a claim form, contingent on the denial of class certification in the private suit.[26]

Based on the settlement, the court declined to certify a class because "the interests of the class would be adequately served by the agreement between defendant and the State of Michigan ren-

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[20] Caro v. Procter & Gamble Co., 18 Cal. App. 4th 644 (1993).

[21] The *Caro* court, however, also found other deficiencies with the class action claims. *See Caro*, 18 Cal. App. 4th at 662–69 (holding that plaintiff's claims were atypical of the proposed class and that individual issues predominated). The same is true in the dairy price-fixing case of *Lohse v. Dairy Commissioner of State of Nevada*, No. R-75-194BRT, 1977 WL 1523 (D. Nev. Dec. 21, 1977), where the court denied class certification because, *inter alia*, plaintiffs' claims would require individualized issues, chief among them that each plaintiff would have to show that he purchased the dairy product in question. At the end of the decision, although denial of certification was a foregone conclusion, the court noted that "[w]hile the exact records are not before this court, reference is made in the files to action which has been taken by the Attorney General of Nevada against most of these same defendants with respect to their misconduct in granting and accepting rebates in the state regulated milk industry. Settlements have been reached. This kind of state action is much preferred to a punitive treble damage antitrust private civil remedy the proceeds from which will only slightly benefit any individual plaintiff." *Id.* at *7.

[22] *Caro*, 18 Cal. App.4th at 660.

[23] *Id.* at 661.

[24] *See id.* ("[T]he fact [that plaintiff's] lawsuit may assert different theories than those involved in the other federal and state proceedings does not preclude consideration of those other proceedings in determining whether to certify the class action here, since such actions involve the same or similar misconduct by defendants.").

[25] Brown v. Blue Cross & Blue Shield of Mich., 167 F.R.D. 40 (E.D. Mich. 1996).

[26] *Id.* at 42 & n.2.

dering a class action unnecessary."[27] In fact, the court explained that consumers would be *better served* by the state's settlement than a class action, because the plaintiffs would not have to pay attorneys' fees.[28] Moreover, the court further explained that, although

> the State agreement may not be perfect or may not be how plaintiffs' counsel would have advocated a settlement in the present case[,] . . . based on the uncertainty of litigation . . . and the complete repayment of subscribers' claims, the Court does not believe that a class action is necessary in light of the State agreement.[29]

In *Thornton v. State Farm Mutual Auto Insurance Company*,[30] the court relied primarily on the defendant's settlement with multiple states attorneys general in denying class certification. In that case, State Farm had entered into an Assurance of Voluntary Compliance (AVC) regarding its failure to obtain branded or salvaged titles for certain vehicles. Pursuant to the AVC, State Farm agreed to pay consumers 20–50 percent of the Blue Book value of their salvaged vehicles (totaling approximately $40 million).[31] The *Thornton* court, echoing the *Brown* court's statements about the purity of the states' motivations versus the motivations of private class action plaintiffs' attorneys, concluded that the attorneys general's actions are "presumably taken with the best interests of state residents in mind."[32] In denying class certification, the court held:

> [I]f courts consistently allow parallel or subsequent class actions in spite of state action, the state's ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it.[33]

Class Certification Despite a Completed Government Action

Other courts, however, have certified class actions following a completed government action. In *County of Stanislaus v. Pacific Gas & Electric Company*,[34] for example, the court certified a class of natural gas users who alleged that the defendants violated the antitrust laws to artificially increase the price of natural gas. Defendants argued that the California Public Utilities Commission (CPUC) had "adjudicated the same issues raised by plaintiffs, and ha[d] ordered a $100 million 'refund' to class members," but the court held that the class action was nevertheless the superior method to adjudicate the claims.[35]

Although this case arose within the Ninth Circuit, the district court did not address *Kamm*. Instead, citing a treatise which stated that courts should look at the "type of remedy that could be awarded by the agency and the general attitude of the agency toward the issues and problems

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[27] *Id.* at 44. *Brown* explicitly stated that it was not addressing whether the prerequisites of Rule 23 had been satisfied. *Id.* The court may have denied certification generally based on its discretion to do so, but it did cite to *Kamm*—which was based on the superiority requirement in Rule 23(b)(3)—as supporting its decision. *Brown*, 167 F.R.D. at 44, 46.

[28] *Id.* at 45.

[29] *Id.* at 47.

[30] Thornton v. State Farm Mut. Auto Ins. Co., No. 06-CV-0018, 2006 WL 3359482 (N.D. Ohio Nov. 17, 2006).

[31] *Id.* at *1.

[32] *Id.* at *3.

[33] *Id.*

[34] County of Stanislaus v. Pac. Gas & Elec. Co., No. CV-F-93-5866-OWW, 1994 WL 706711 (E.D. Cal. Aug. 25, 1994).

[35] *Id.* at *5.

raised by the claimants,"[36] the court held that the CPUC action was not superior because the CPUC "has only a limited ability to issue injunctive relief—a remedy sought by plaintiffs—and no direct jurisdiction over [one of the defendants]."[37]

Similarly, the trial court in *Gouldd v. Lowrance*,[38] a Ponzi scheme case, also certified a class after a completed government action. On appeal, the defendants relied on *Kamm* to argue, among other things, that a class action was not the superior means of adjudication because they had previously settled investigations by various states' attorneys general. The court rejected this contention because the settlement agreements did not "provide any relief to any class members on the matters of which [the class members] complain."[39]

Gouldd and *County of Stanislaus* rejected the argument that a completed government action precluded finding the class action superior because the governmental settlements, according to the courts, did not provide a sufficient remedy to the consumers in the putative class.[40] Two leading treatises also suggest that the state's remedy may be the dispositive factor,[41] but it is not clear from *Kamm* and other cases that the remedy should, by itself, determine whether a class should be certified notwithstanding a completed government action.

Indeed, in *Kamm*, the Ninth Circuit focused on seven factors in evaluating whether the trial court properly concluded that a class action was not superior—and only one of those factors involved the available remedy.[42] Similarly, courts following *Kamm*, such as *Brown* and *Caro*, have highlighted the need for courts to consider how plaintiffs' attorneys' fees affect injured consumers' ultimate recovery[43] and the waste of resources for duplicated work.[44] Both *Gouldd* and *County of Stanislaus* abandoned *Kamm*'s multi-faceted approach and did not consider other collateral affects of proceeding as a class action.

In summary, each of the aforementioned courts considered the existence of a completed government investigation in making a class certification decision. An open question remains, however, as to whether the remedy provided by the government action should be the only relevant inquiry,

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[36] *Id.* at *5 (quoting 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 1779 at 560–61).

[37] *Id.* at *6.

[38] Gouldd v. Lowrance, No. 08-97-0401-CV, 1998 WL 526489 at *7 (Tex. Ct. App. Aug. 24, 1998), *reh'g denied*, Sept. 25, 1998).

[39] *Id.* at *7.

[40] Another case in which a trial court certified a class notwithstanding a prior government action was *Andrews v. Trans Union Corp.*, 917 So.2d 463 (La. Ct. App. 2005). In *Andrews*, the FTC issued an order precluding Trans Union from using consumer information for the purpose of target marketing because the agency asserted that the practice violated the Fair Credit Reporting Act (FCRA). After the FTC issued its order, the plaintiff filed a putative class action under state law. The court rejected defendant's argument that this prior FTC action precluded a finding of superiority. In doing so, the *Andrews* Court relied on two cases—*Swecker v. Trans Union Corp.*, 31 F. Supp. 2d 536 (E.D. Va. 1998) and *Watkins v. Trans Union, LLC*, 118 F. Supp. 2d 1217 (N.D. Ala. 2000)—that primarily addressed the issue of whether the FCRA preempted state law defamation claims. As such, it is not clear to what extent, if any, *Andrews* will provide persuasive authority on the issue of whether a class action provides the superior method of adjudicating claims subject to a completed government action.

[41] *See* 7AA WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1779, at 173 (3d ed. 2005) ("[W]hether an administrative adjudication would provide a more advantageous procedure than a class action may depend on the type of remedy that could be awarded by the agency and the general attitude of the agency toward the issues and problems raised by the claimants."); 2 CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS § 4:27, at 255 (4th ed. 2002) ("Although a court, in assessing the superiority requirement, may consider whether administrative proceedings which embraced the issue before the court can adequately resolve the controversy, whether the administrative adjudication is preferable over a class action may depend on the remedy available to the agency.").

[42] *Kamm*, 509 F.2d at 212.

[43] *See Brown*, 167 F.R.D. at 45.

[44] *See Caro*, 18 Cal. App. 4th at 661.

or whether courts should consider all of the *Kamm* factors. It is likely, however, that courts will not have an opportunity to evaluate the existence of a completed government action in the context of class certification proceedings unless the issue is raised by one or more of the parties.

Pending Government Action

In some cases, defense attorneys have raised the existence of a pending, but not completed, government action as a basis for denying class certification. In response, some courts have held that, depending on the circumstances, a pending government action can either defeat superiority or, at a minimum, factor into the court's denial of certification where the government, as opposed to a private party, had the authority and intent to bring about an appropriate remedy.[45]

[C]ourts will not have an opportunity to evaluate the existence of a completed government action in the context of class certification proceedings unless the issue is raised by one or more of the parties.

The first case to consider this issue appears to be *Wechsler v. Southeastern Properties*,[46] in which the plaintiff alleged that the defendants made false representations in connection with a public offering of securities. The defendants informed the court that there was a pending proceeding brought by the New York Attorney General, and, in response, the court stayed the proceedings "until it could be determined whether the Attorney General's New York Supreme Court action would be adequate to protect the interests of the plaintiff."[47] Almost one-and-a-half years later, the court dismissed the class action because the Attorney General obtained sufficient relief.[48] Although the case lacks any detailed analysis of how the settlement precluded a superiority finding, the government action appears to have been the dispositive factor in the court's denial of class certification.

In *Commonwealth of Pennsylvania v. Budget Fuel Company*,[49] a private class action complaint was filed the same day as a Pennsylvania Attorney General *parens patriae* complaint, both alleging that the defendants engaged in a price-fixing conspiracy in the home heating oil industry. Rather than holding the private suit in abeyance as in *Wechsler*, the court immediately struck the class allegations. The court held that the "*parens patriae* action is superior to a class action as a means for adjudication of collective claims," as evidenced by "the lack of any provision or requirement for court approval or certification of a *parens patriae* action."[50] Arguably, the *Budget Fuel* rationale should also apply to Attorney General consumer protection investigations based on Little FTC Acts.

While *Wechsler* and *Budget Fuel* denied certification based exclusively on pending government actions, other cases find such parallel proceeding relevant, but not dispositive, to the class certification inquiry. For example, in *Levine v. 9 Net Avenue, Inc.*,[51] the plaintiff brought a putative class action against multiple defendants for allegedly sending unsolicited faxes. The trial court denied class certification based, in part, on the New Jersey Attorney General's investigation into the same conduct. The appellate court, affirming, explained that it was "neither error nor a mis-

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[45] *See* Cartwright v. Viking Indus., Inc., No. 07-CV-02159 FCD EFB, 2009 WL 2982887, at *14 (E.D. Cal. Sept. 14, 2009) (refusing to follow *Kamm* because the parallel action (1) did not provide any relief for consumers, and (2) was brought by a private citizen, not by a state agency).

[46] Wechsler v. Southeastern Props., Inc., 63 F.R.D. 13 (S.D.N.Y. 1974), *aff'd*, 506 F.2d 631 (2d Cir. 1974).

[47] *Id.* at 16.

[48] *Id.* at 16–17.

[49] Commonwealth of Pa. v. Budget Fuel Co., 122 F.R.D. 184 (E.D. Pa. 1988).

[50] *Id.* at 185.

[51] *Levine*, 2001 WL 34013297.

taken exercise of discretion to weigh the existence of such an ongoing investigation, *together with all other relevant factors*, as part of the court's [class action] determination. . . ."[52]

In response to concerns raised by the Attorney General in an amicus brief, the appellate court explained that it was "not endors[ing] the proposition that an Attorney General investigation, or the mere statutory authorization for such alternative relief, should automatically preclude private consumer actions. However, the [instant class] action, like any other class certification proceeding, had to be considered in light of its own unique foundational circumstances."[53] Unfortunately, the court's analysis ended there, and did not offer any explanation as to when class certification should not be denied because of an Attorney General's investigation into the same alleged conduct as that raised in the proposed class action.

Similarly, in *Ostrof v. State Farm Mutual Automobile Insurance Company*,[54] the court held that an investigation by the Maryland Insurance Commissioner concerning the use of computer programs in reviewing medical claims was one factor militating toward denying certification of a class of insureds claiming, among other things, that using those programs was a deceptive and unfair business practice. After first concluding that the plaintiffs' claims could not satisfy either commonality or predominance,[55] the court also found that the plaintiffs could not satisfy the superiority requirement because the Maryland Insurance Administration, which had been investigating State Farm's and others' use of these programs for two years, had (1) expertise in this area, and (2) the power to impose a remedy.[56]

In another case in which an ongoing government investigation precluded class certification, the plaintiffs brought a putative class action based on defendant's allegedly defective anti-lock braking system.[57] The court denied plaintiffs' motion for class certification based primarily on predominance,[58] but also held that the plaintiffs' class claims failed to meet the superiority requirement because "the administrative remedy provided by [the National Highway Transportation Safety Administration], including recall of vehicles for inspection and/or repair, is more appropriate than civil litigation seeking equitable relief and money damages in a federal court."[59]

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[52] *Id.* at *3.

[53] *Id.* The court in *Budget Fuel* also made an attempt to avoid drawing a bright line rule that Attorney General actions preclude a superiority finding. *See Budget Fuel*, 122 F.R.D. at 186 ("By striking [plaintiff's] class action allegations, the court is not stating that *parens patriae* actions were intended to supplant the private class action in antitrust damage cases. All the court is stating is that in the situation where a state attorney general and a private class representative seek to represent the same class members, the *parens patriae* action is superior to that of a private class action"). The *Budget Fuel* court, however, did not offer any analysis as to when an Attorney General proceeding and class action may proceed side-by-side.

[54] 200 F.R.D. 521 (D. Md. 2001).

[55] *Id.* at 528–31.

[56] *See id.* at 532 ("Not only does the MIA have the authority to order individualized remedies if the circumstances warrant; it has apparently indicated that it will exercise that authority. But if that is so, it is clear that adding a class action overlay in federal court makes little sense").

[57] Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998).

[58] *See id.* at 454.

[59] *Id.* at 464. It is not clear to what extent that court's decision to deny class certification rested upon the "mere possibility" that the NHTSA could take action to remedy the underlying conduct or, alternatively, relied upon the fact that the NHTSA had already initiated an investigation that, in turn, resulted in a voluntary recall overseen by the agency.

In reaching this conclusion, the trial court declared that it was not bound by the Third Circuit's dictum, which was subsequently criticized,[60] that Rule 23 was not "intended to weigh the superiority of a class action against possible administrative relief."[61]

The Possibility of Government Action

The most undeveloped category (and also the most aggressive from a defense counsel position) is the proposition that an anticipated or possible government action precludes a finding that a class action is the superior method of adjudicating a controversy.

The most undeveloped category (and also the most aggressive from a defense counsel position) is the proposition that an anticipated or possible government action precludes a finding that a class action is the superior method of adjudicating a controversy. While no case has yet held that an anticipated or potential suit should be a dispositive factor in precluding certification, a number of courts have considered the government's ability to enter the fray as one of the factors influencing the overall class certification decision.

A good example is *Pettrey v. Enterprise Title Agency*,[62] where the plaintiffs brought a putative class action based on the defendants' alleged practice of referring purchasers to certain real estate settlement service providers in return for fees in violation of the Real Estate Settlement Procedures Act (RESPA). The *Pettrey* court held that class certification was not appropriate based on a lack of commonality,[63] typicality,[64] adequacy,[65] and predominance.[66] And, although it is likely that the class would not have been certified even without the additional superiority analysis, the court did hold that a class action was not superior because: (1) the statute provided for recovery of costs and attorney's fees so potential plaintiffs had an incentive to bring individual actions, and (2) "HUD, the Attorney General of any state, or the insurance commissioner of any state may bring an action to enjoin violations of this section of [RESPA]."[67]

The possibility of an attorney general investigation as a factor in the court's certification analysis was likewise mentioned in *McNair v. Synapse Group, Inc.*[68] The *McNair* plaintiffs sought to certify a putative class of consumers who were allegedly duped by defendant's automated magazine renewal practices. The court's certification decision was based on a host of factors, especially whether individualized issues—i.e., what option each plaintiff chose in response to the automated system—predominated.[69] The *McNair* court also rejected the plaintiffs' argument that without the class device the defendant's practices would never be challenged, by explaining that the state

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[60] *See* WRIGHT, MILLER & KANE, *supra* note 41, at 173–74.

[61] Amalgamated Workers Union of V.I. v. Hess Oil V.I. Corp., 478 F.2d 540, 543 (3d Cir. 1973). For discussion of *Amalgamated Workers* decision in *Chin*, see 182 F.R.D. at 464–65.

[62] Pettrey v. Enterprise Title Agency, Inc., 241 F.R.D. 268 (N.D. Ohio 2006).

[63] *Id.* at 280.

[64] *Id.* at 281.

[65] *Id.*

[66] *Id.* at 283–84.

[67] *Id.* at 284 (internal quotation marks omitted). *See also* Gardner v. First Am. Title Ins. Co., No. 00-2176 (RHK/AJB), 2003 WL 221844, at *8 (D. Minn. Jan. 27, 2003) (denying class certification in another RESPA case based primarily on predominance, but also noting that the plaintiffs could not meet the superiority requirement because (1) RESPA allows for the recovery of attorneys fees and costs, suggesting that individual cases are likely to be brought; (2) Congress gave the U.S. Department of Housing and Urban Development (HUD) "global oversight" over enforcement; and (3) HUD had, in fact, already investigated defendants and concluded that "corrective action was unnecessary"). Because *Gardner* referenced an earlier HUD investigation that resulted in no finding of wrongdoing *and* HUD's continuing "global oversight," it is most appropriately classified as a hybrid case, involving both completed and anticipated government action.

[68] McNair v. Synapse Group, Inc., No. Civ.A 06-5072 JLL, 2009 WL 1873582 (D.N.J. June 29, 2009).

[69] *Id.* at *11–*14.

could bring an action on behalf of individual subscribers and noting that "the attorney generals for numerous states have challenged policies similar to those at issue here with [defendant's] parent [corporation]."[70]

In combination, these cases provide a framework for a potentially powerful argument that the possibility of a government action providing restitution for state consumers is one factor that the court should consider in assessing the propriety of certifying a class. In particular, where the predominance inquiry is a close call and the class certification decision therefore is focused on superiority, this argument may be the dispositive factor considered by the court. It appears, however, that such an argument faces an uphill battle if the potential government action could not provide the same remedy that a private action affords.

[T]he potential for government action is likely to be a factor in a court's decision only where (1) the state or federal agency has either (a) specific expertise in that area or (b) general expertise but has looked into this issue before, and (2) the government entity involved has the authority to bring about significant relief.

For example, in another vehicular-defect case, *Hiller v. DaimlerChrysler Corporation*,[71] the court noted that it was "questionable whether the NHTSA can provide the precise relief sought by the plaintiff in this case."[72] Therefore, the court held that an anticipated NHTSA proceeding would not be superior to a class action.[73] Similarly, in *McLaughlin v. Liberty Mutual Insurance Co.*,[74] the court certified a class of Liberty Mutual employees seeking overtime pay notwithstanding the defendant's argument that the plaintiff could "request the attorney general to bring a claim on their behalf."[75] The *McLaughlin* court refused to deny certification simply "because plaintiffs *could* petition the Attorney General to bring suit on behalf of all auto damage appraisers in the Commonwealth, but where the Attorney General has not *actually* brought suit."[76] The court explained that "no reason exists for [the court] to presume that the Attorney General would take on the plaintiffs' case, nor does any basis exist for [the court] to know that the Attorney General's suit would bring adequate relief to the class."[77] Thus, without knowing whether the Attorney General would bring suit, the court decided it could not evaluate the remedy.

McLaughlin is probably the most helpful of the "anticipatory" cases for defense counsel because it frames the issues on which future courts are likely to focus. More specifically, the potential for government action is likely to be a factor in a court's decision only where (1) the state or federal agency has either (a) specific expertise in that area or (b) general expertise but has looked into this issue before, and (2) the government entity involved has the authority to bring about significant relief.

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[70] *Id.* at *14. *See also* Freeman Indus. LLC v. Eastman Chem. Co., No. E2003-00527-COA-R9Cv, 2004 WL 1102435, at *8–*9 (Tenn. App. Ct. May 18, 2004), r*ev'd in part on other grounds by* 172 S.W.3d 512 (Tenn. 2005) (affirming the trial court's denial of certification based, in part, on the trial court's finding that a class action was not superior because "the individual state's Attorney Generals are the proper people to represent the people in their individual states[;] . . . [a]lthough most of this litigation by the respective Attorneys General has not been filed, it appears they would").

[71] Hiller v. DaimlerChrysler Corp., No. 02-681, 2007 WL 3260199 (Mass. Super. Ct. Sept. 25, 2007).

[72] *Id.* at *5.

[73] The court ultimately denied certification, but apparently did so because individualized issues predominated, and not on the grounds that plaintiffs failed to satisfy the superiority requirement. *Id.* at *5.

[74] McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 304 (D. Mass. 2004).

[75] *Id.* at 312.

[76] *Id.*

[77] *Id.*

Conclusion

Recent class action cases have emphasized that trial judges are expected to "assess all of the relevant evidence" to determine whether plaintiffs have satisfied all Rule 23 requirements.[78] One effective argument for avoiding class certification could be whether a government action has already, is currently, or could potentially address the same issues raised in the class action complaint. To date, federal and state courts have not clearly delineated either (1) the parties' obligations to identify the existence of a government action, or (2) the standards under which a court will determine that a government action, rather than a class action, provides a superior method for adjudicating or remedying the underlying conduct.

While the answers to these questions are not at all clear, the governing rules and legal precedent appear to require practitioners to identify the pertinent facts about a completed, pending or potential government investigation and for trial courts to analyze that information in making class certification determinations. If practitioners and courts abide by these obligations, it will only be a matter of time until a more in-depth body of case law provides the requisite guidance for all involved. ●

[78] *In re* Initial Public Offerings Securities Litig., 471 F.3d at 42.