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I L L I N O I S B U S I N E S S L A W J O U R N A L

AN "UNMANAGEABLE" TASK: BREACH OF WARRANTY CLAIMS IN MULTI-STATE CLASS ACTION LITIGATION

❖ Article ❖

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I. INTRODUCTION

The crossroads of warranty law and class action litigation pose substantial hurdles for claimants asserting a multi-state class action for breach of express or implied warranty. Not only do they have to satisfy the rigorous Federal Rules of Civil Procedure Rule 23(a)[1] requirements of numerosity, commonality, typicality and adequacy of representation,[2] but also have to fit the cases into one of the three categories outlined in Rule 23(b). Plaintiffs must also deal with widely varying state rules regarding such issues as reliance, pre-suit notice and privity of contract which might destroy the required elements of commonality or typicality.[3] These variables have resulted in several courts deeming multi-state warranty class actions to be "unmanageable," rendering them unsuitable for class-wide resolution.[4]

This paper will examine some of the state-to-state variables that result in many multi-state class actions for breach of warranty being deemed "unmanageable" for the district courts in which such actions are brought. The paper begins with a review of the requirements of Rules 23(a) and (b) for class certification to more fully understand the circumstances under which class action treatment of a controversy have been considered "unmanageable."

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[1] Hereinafter Rule 23.

[2] *See* Fed. R. Civ. P. 23(a) and (b).

[3] *See* Forsher v. J.M. Smucker Co., 612 F. Supp. 3d 714, 727 (N.D. Ohio 2020).

[4] *See, e.g.*, In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002); In re Caterpillar, Inc., 2015 U.S. Dist. LEXIS 98784, 2015 WL 4591236 at *25 (D.N.J. July 29, 2015); Pilgrim v. Universal Health Card, LLC, 2010 U.S. Dist. LEXIS 28298, 2010 WL 1254849 at *4 (N.D. Ohio Mar. 25 2010); *Forsher*, 612 F. Supp. 3d at 726–27.

Following a review of the requirements imposed by Rules 23(a) and (b), this paper will discuss a number of cases that have examined some of the obstacles to class-wide treatment of multi-state breach of warranty claims arising from variances in state law, as well as some of the ways that courts have handled such issues. These include reconfiguring or decertifying proposed classes in order to minimize the difficulties arising from differing state laws on such issues as pre-suit notice under the Uniform Commercial Code,[5] or varying rules relating to reliance or privity of contract between the parties.

II. BACKGROUND

A. Federal Class Action Prerequisites

Addressing class certification standards, the Supreme Court of the United States has said that a district court must undertake a "rigorous analysis" to satisfy itself that the prerequisites of Rule 23 are met.[6] As the Court has enumerated:

- "Because class action litigation remains 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,' the requirements of Rule 23 are heavily scrutinized and strictly enforced."[7]
- "The Court's decision to certify a class action under Fed. R. Civ. P. 'is not free-form, but rather has been carefully scripted by the Federal Rules of Civil Procedure.'"[8]
- "[A]ctual, not presumed, conformance with [Rule 23] remains . . . indispensable."[9]

1. Rule 23(a) Prerequisites

Under Rule 23(a) the following four factors are listed as necessary prerequisites for class action treatment: (1) numerosity;[10] (2) commonality;[11] (3) typicality;[12] and (4)

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[5] *See, e.g.*, Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 541 (6th Cir. 2012).

[6] Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

[7] CGC Holding Company, L.L.C. v. Broad and Cassel, 773 F.3d 1076, 1086 (10th Cir. 2014).

[8] McGlenn v. Driveline Retail Merchandising, Inc., No. 18-CV-2097, 2021 WL 165121 (C.D. Ill. Jan. 19, 2021).

[9] *Id.* at 1086 (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982)).

[10] Numerosity means that "the class is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1).

[11] Commonality means that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2).

[12] Typicality means that "the claims or defenses of representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3).

adequacy of representation.[13] Regarding numerosity, "[t]here is no strict numerical test for determining impracticability of joinder."[14] Rather, the numerosity requirement will be met "so long as general knowledge and common sense indicate that joinder would be impracticable."[15] "Where the number of class members exceeds forty, Rule 23(a)(1) is generally deemed satisfied."[16]

As to commonality, "the claims of the class "must depend on a common contention . . . of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'"[17] "Plaintiff 'must show that there is a common question that will yield a common answer for the class . . . and that the common answer relates to the actual theory of liability in the case.'"[18] Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, "there is a common question."[19]

"Typicality looks to 'whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.'"[20] Thus, "a claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'"[21] The premise of the typicality requirement is simply stated: "as goes the claim of the named plaintiff, so go the claims of the class."[22] The Supreme Court of the United States has recognized that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge"[23] and therefore have common element of proof.

With respect to adequacy of representation, "the named plaintiff must be prepared to 'fairly and adequately protect' the class's interests."[24] This requirement is essential

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[13] Adequacy of representation means that the represented parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4).

[14] In re Amer. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1995).

[15] Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 541 (6th Cir. 2012).

[16] Ham v. Swift Transp. Co., Inc., 275 F.R.D. 475, 483 (W.D. Tenn. 2011); *see also* Daffin v. Ford Motor Co., 458 F.3d 549, 552 (6th Cir. 2006) (noting "substantial numbers usually satisfy the numerosity requirement").

[17] Savidge v. Pharm-Save, Inc., 727 F. Supp. 3d 661, 697 (W.D. Ky. 2024) (quoting *Young*, 693 F.3d at 542).

[18] *Id.* (quoting Rikos v. Procter & Gamble Co., 799 F.3d 497, 505 (6th Cir. 2015)).

[19] Suchanek v. Sturm Foods, Inc., 764 F.3d 750,756 (7th Cir. 2014).

[20] *Id.* at 699 (quoting Sprague v. General Motors Corp., 133 F. 3d 388, 399 (6th Cir. 1998)).

[21] Beattie v. CenturyTel, Inc., 511 F. 3d 554, 561 (6th Cir. 2007) (quoting In re Amer. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir. 1995)). *See also* Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 597 (7th Cir. 1993).

[22] *Beattie*, 511 F. 3d at 561 (quoting Senter v. General Motors Corp., 532 F.2d 511, 525 n.31 (6th Cir. 1976)).

[23] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011).

[24] In re Ford Motor Co., 86 F.4th 723, 727 (6th Cir. 2023) (quoting Fed. R. Civ. P. 23(a)(4)).

to due process "because a final judgment in a class action is binding on all members."[25] The adequacy of representation inquiry "consists of two parts: (1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad of members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel."[26] A class is not fairly and adequately represented if class members "have antagonistic or conflicting claims."[27]

2. Rule 23(b) Prerequisites

In addition to the requirements of Rule 23(a), the proposed class action must fit within one of the three categories of Rule 23(b). "Even where all four requirement of [Rule] 23(a) are met, class certification is not appropriate unless one of the three categories of Rule 23(b) also applies."[28] The first alternative, Rule 23(b)(1)(A)-(B), is intended to avoid inconsistent or varying results from individual adjudications that may create the risk of incompatible standards of conduct for the opposing party, or substantially impair or impede the interests of non-parties. The second alternative, Rule 23(b)(2), is directed to the possibility of injunctive or corresponding declaratory relief in cases in which such a remedy would be appropriate in addressing the grievances of the class in its entirety.

The third alternative, and the one featured most prominently in the cases cited herein, Rule 23(b)(3), imposes the additional requirements for proposed class actions: (1) predominance;[29] and (2) superiority,[30] as determined, in part, by factors listed in Rule 23(b)(3)(A)-(D). One such factor, as discussed in the cases cited herein, is manageability. Rule 23(b)(3) permits class certification only if the questions of law or fact common to the class members "predominate" over questions that are individual to the class. "There is no mathematical or mechanical test for evaluating

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[25] Cmty. Refugee & Immigr. Servs. V. Registrar, Ohio Bureau of Motor Vehicles, 334 F.R.D. 493, 505 (S.D. Ohio 2020). *See also In re Amer. Med. Sys.*, 75 F.3d at 1083.

[26] Gomez v. St. Vincent Health, Inc., 649 F.3d 583, 592 (7th Cir. 2011).

[27] Riffey v. Rauner, 873 F.3d 558, 563–64 (7th Cir. 2017).

[28] Savidge, v. Pharm-Save, Inc., 727 F. Supp. 3d 661, 702 (W.D. Ky. 2024) (citing *Senter*, 532 F.2d at 533); Lyngaas v. Ag, 992 F.3d 412, 428 (6th Cir. 2021).

[29] Predominance means that common questions of law or fact predominate over any questions affecting any individual members of the class "when the substance and quality of evidence necessary to prove the class claims won't vary significantly from one plaintiff to another." Tershakovic v. Ford Motor Co., 79 F.4th 1299, 1306 (11th Cir. 2023). *See also* Brown v. Electrolux Home Prods., 817 F.3d 1225, 1234 (11th Cir. 2006); Cole v. General Motors Corp., 484 F.3d 717, 724 (5th Cir. 2007) (quoting Castano v. American Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) ("In multi-state actions, variations in state law may swamp any common issues and defeat predominance.")).

[30] Superiority means that a class action must be "superior to other available methods for fully and efficiently adjudicating the controversy. Fed R. Civ. P. 23(b)(3). The superiority requirement also includes "the likely difficulty in managing a class action." *See Tershakovic*, 79 F.4th at 1316, in which the defendant objected to class certification because the result would be "unmanageable."

predominance."[31] "Individual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole."[32]

The test for predominance under Rule 23(b)(3), however, has been described as rigorous. While similar to Rule 23(a)'s requirements for typicality and commonality, the Supreme Court has said that "'the predominance criterion is far more demanding.'"[33] Still, Rule 23(b)(3)'s predominance requirement is satisfied when "common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication."[34] "Or to put it another way, common questions can predominate if a 'common nucleus of operative facts and issues' underlies the claims brought by the proposed class."[35]

The second prong of the Rule 23(b)(3) test requires a showing that "a class action is superior to other available methods for the fairly and efficiently adjudicating the controversy."[36] In applying this test, courts have said that "our focus is not on the convenience or burden of a class action *per se,* but on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs."[37]

Comparing two prongs of the Rule 23(b)(3) test, one court has said; "In many respects, the predominance analysis . . . has a tremendous impact on the superiority analysis . . . for the simple reason that the more [that] common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims."[38] Additional rules exist regarding the timing of certification of the class(es),[39] defining the class(es),[40] appointment of class counsel,[41] forms of notice for the various types of classes,[42] and the creation of subclasses where appropriate.[43]

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[31] Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 814 (7th Cir. 2012), (citing 7AA Wright & Miller, *Federal Practice & Procedure*, § 1778 (3d ed. 2011)).

[32] *Id.* at 815.

[33] *Id.* at 814 (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997)).

[34] Wright & Miller, *supra* note 31 § 1778.

[35] *Messner*, 669 F.3d at 815 (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000)).

[36] Fed. R. Civ. P. 23(b)(3).

[37] Klay v. Humana, Inc., 382 F.3d 1241, 1269 (11th Cir. 2004) (citing In re Managed Care Litig., 209 F.R.D. 678, 692 (S.D. Fla. 2002) (noting that the superiority factor "requires the Court to determine whether there is a better method of handling the controversy other than through the class action mechanism")).

[38] *Klay*, 382 F.3d at 1269.

[39] Fed. R. Civ. P. 23(c)(1)(A).

[40] Fed. R. Civ. P. 23(c)(1)(B).

[41] *Id.*

[42] Fed. R. Civ. P. 23(c)(2)(A) and (B).

[43] Fed. R. Civ. P. 23(c)(5).

Within this array of rules, the often-overriding question of "manageability" is frequently discussed in conjunction with commonality (i.e. whether there are questions of law or fact common to the class); or with predominance (i.e. whether such common questions of law or fact predominate individual claims or defenses); or with superiority (i.e. whether class treatment poses advantages over individual claims, litigated separately). This paper suggests that manageability, although referenced last among the Rule 12 factors for determining the appropriateness of a class action, pervades all other factors and should be regarded as a threshold matter when determining the appropriateness of class-wide treatment in multi-state breach of warranty claims. This is especially so when state law variables such as pre-suit notice to the defendant, privity of contract (especially vis a vis consumer plaintiffs and remote manufacturer defendants) and reliance in express warranty claims, dominate any commonality in law or fact that may otherwise exist.

B. Manageability Issues in Multi-State Breach of Warranty Actions

A starting point for a discussion about the unmanageability of multi-state breach of warranty cases may be gleaned from the opinion of the Supreme Court of the United States in *BMW of North America v. Gore*,[44] a case involving a challenge to a punitive damages award in which the Court made it clear that consumer protection laws vary widely from state to state, and that courts must respect those differences rather than apply one state's law to transactions in other states with different rules.[45]

A frequently cited case on the practical aspects of class action warranty litigation is the Seventh Circuit decision in the *Bridgestone/Firestone* case,[46] which vividly illustrates the unmanageable nature of the one-size-fits-all approach to multi-state class actions. *Bridgestone* involved the abnormally high rate of failure of Firestone tires on Ford Explorer SUVs during the late 1990's. Some of the resulting lawsuits sought recovery for physical injuries or deaths from vehicle rollovers related to tire failures, while the bulk of the claimants whose tires had thus far performed properly, sought compensation "for the *risk* of failure [as] reflected in diminished resale value of the vehicles . . . ."[47] The district court, obliging the request of counsel for many of the plaintiffs in a consolidated suit, certified two nationwide classes, the first of which consisted of all persons who owned or leased a Ford Explorer (model years 1991 through 2001) (the "vehicle class"), and the second consisting of owners or lessees of certain tires used on the subject vehicles as well as others (the "tire class"). All in all, "[m]ore than 60 million tires and 3 million vehicles fit these definitions."[48]

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[44] 517 U.S. 559 (1996).

[45] *Id.* at 568–73; *See also* In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002).

[46] In re *Bridgestone/Firestone*, 288 F.3d at 1012.

[47] *Id.*at 1015.

[48] *Id.*

The court examined the "unmanageability" issue in the context of the commonality and superiority requirements of Rule 23.[49] In so doing, the Seventh Circuit described the district court's conclusion that one state's laws should apply to claims by consumers throughout the country and beyond as a "novelty," considering that the principle of *lex loci delecti* was applicable under the appropriate choice of law rules for the venue of the action, and that the economic injuries for which recovery was sought "occurred in all 50 states, the District of Columbia, Puerto Rico and U.S. territories such as Guam."[50] Since the question of recovery for breach of warranty is determined by the law of the state where the consumer is located, and not the location of the corporate headquarters of the sellers of either vehicles or the tires involved, the Seventh Circuit determined that "a single nationwide class [for either the vehicle class or the tire class] is not manageable."[51]

So many variables existed as to the use of the tires and the vehicles involved that "it would not be possible to make a once-and-for-all decision about whether [the products] were defective, even if the law[s] were uniform."[52] The court concluded by saying that "[d]ifferences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court."[53] The district court's order certifying the two nationwide classes was thereby reversed.

A year earlier, the same circuit judge who wrote the decision in the *Bridgestone/Firestone* case authored the opinion in *Szabo v. Bridgeport Machines, Inc.*,[54] a case combining breach of warranty allegations with claims of fraud and negligent misrepresentation involving control units used to direct machine tools in performing complex metal milling tasks. The plaintiffs claimed that all the control units manufactured in the past five years were defective and sought certification of a nationwide class containing hundreds of customers seeking damages of more than $100,000 each. While the warranty claims were governed by the law of the control manufacturer's home state (per contract), the tort claims were not, depending instead on "who made the representations, where, and on whose behalf."[55]

Noting that "the applicable law likely would be supplied by the state in which the statements were made,"[56] the court said that "[d]ifferences of this kind cut strongly against nationwide classes" and that "[t]hese and other potential sources of variation account for the fact that few warranty cases have ever been certified as class actions – let alone as nationwide classes, with the additional choice-of-law problems that

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[49] Fed. R. Civ. P. 23(a),(b)(3).
[50] In re *Bridgestone/Firestone*, 288 F.3d at 1016.
[51] *Id.* at 1018.
[52] *Id.* at 1019.
[53] *Id.* at 1020.
[54] 249 F.3d 672 (7th Cir. 2001).
[55] *Id.* at 673.
[56] *Id.*

complicate such a venture."[57] Holding that factual determinations regarding the alleged misrepresentations were necessary before deciding whether to allow the case to proceed as a class action, and that "[n]agging issues of choice of law, commonality and manageability beset this case,"[58] the Seventh Circuit vacated the class certification granted by the district court and remanded the case for further proceedings consistent with its opinion.[59]

Four years after *Bridgestone/Firestone* a court in the Northern District of Illinois decided the case of *Muehlbauer v. General Motors Corp.*,[60] in which the defendant was accused of having breached the implied warranty of merchantability as well as having been unjustly enriched by the sale of defective braking components in vehicles purchased or leased by the plaintiffs. The defendant moved to strike the class allegations of the plaintiffs' initial complaint on the grounds that the number of states (forty-six) whose laws were implicated made the maintenance of the number of sub-classes proposed by plaintiffs unmanageable. Quoting the *Bridgestone/Firestone* decision extensively, the district court granted the defendant's motion for a determination that the class(es) proposed could not be maintained, but denied the defendant's motion to dismiss the case, choosing instead to allow the plaintiffs to amend their classification of claimants in such a way as to group the plaintiffs in a more narrow number of categories, or sub-classes, having common legal theories and the same elements of proof, thereby avoiding the need for a "product-by-product analysis"[61] that plagued the proposed class in *Bridgestone/Firestone.*

In the case of *In re American Medical Systems, Inc.*,[62] the district court certified a rather ill-defined nationwide class (plaintiffs' estimates were between 15,000 and 120,000 persons)[63] who had used a certain medical device manufactured by the defendant. In reviewing the requirements of Rule 23 relative to the facts of the case, as well as the decision of the district court to certify the proposed nationwide class, the federal appellate court was very critical of the district court for its analysis leading to class certification. In fact, the Sixth Circuit said that "the district judge's disregard of the class action procedures was of such severity and frequency"[64] as to warrant mandamus being issued, directing the district judge to decertify plaintiffs' class.[65] Noting that "a number of other courts have denied class certification in drug or medical product liability actions"[66] for lack of the commonality and superiority requirements, the Sixth Circuit, regarding the manageability aspect , added that "[i]f more than a few of the

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[57] *Szabo*, 249 F.3d at 674.
[58] *Id.* at 677.
[59] *Id.* at 678.
[60] 431 F. Supp. 2d 847 (N.D. Ill. 2006).
[61] *Id.* at 871.
[62] 75 F.3d 1069 (6th Cir. 1995).
[63] *Id.* at 1076.
[64] *Id.* at 1074.
[65] *Id.* at 1090.
[66] In re *American Medical Systems, Inc.*, 75 F.3d at 1085.

laws of the fifty states differ, the district judge would face an impossible task of instructing the jury on the relevant law . . . ."[67]

A manageability challenge to a proposed multi-state class action involving alleged breach of implied warranty was rejected by the district court in *Lessin v. Ford Motor Co.,*[68] which involved claims of latent effects in the suspensions and steering linkage systems in certain models of Ford trucks. In response to plaintiffs' motion seeking class certification of ten sub-classes under the laws of eight states, Ford argued that "due to the material differences in state law . . . and the numerous claims at issue, this case would be unmanageable for class certification."[69] The district court responded to this objection by stating that "the differences in laws can be handled at trial through different jury instructions based on each of the separate subclasses, and multiple courts have certified similar classes."[70] (citing cases that had certified thirty-two, twenty-seven and twenty-four classes, respectively, that found the superiority requirement to be satisfied).

Variations in proximate causation have caused federal reviewing courts to either refuse certification or to vacate certifications granted by district courts. In *Marcus v. BMW of N. Am., LLC*,[71] a case involving alleged defects in run-flat tires with which the subject vehicles were equipped, plaintiffs asserted claims of breach of implied warranty, breach of express warranty and breach of warranty under the Magnuson-Moss Act. In addressing the issue of proximate cause in the context of a multi-state product liability claim, the court cited the fact that "[o]ther federal courts have also recognized that suits alleging defects 'involving motor vehicle often involve complicated issues of individual causation that predominate over common questions regarding the existence of a defect.'"[72]

Some courts have treated breach of express warranty claims differently from those alleging breach of implied warranty due to the need to show reliance in the former type of claims, an element which may require individual, rather than class-wide consideration.[73] In *Hampton v. Gen. Motors*,[74] the element of reliance was discussed in the context of a breach of express warranty claim which the defendant said was incompatible with class-wide treatment due to the different degrees of reliance on the part of individual class members. Defendant argued that "the required element of reliance . . . can only be established through individual proof and therefore defeats predominance."[75] Indeed, the Tenth Circuit has recognized that "reliance is often a

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[67] *Id.*

[68] 19-cv-01082 (S.D. Cal. Nov. 7, 2024).

[69] *Id.* at *83.

[70] *Id.* at *84.

[71] 687 F.3d 583 (3d Cir. 2011).

[72] *Id.* at 604 (quoting Oscar v. BMW of N. Am, LLC, 274 F.R.D. 498, 511 (S.D.N.Y. 2011)); *See also* Chin v. Chrysler Corp., 182 F.R.D. 448, 455 (D.N.J. 1998).

[73] *See* Roberts v. C.R. England, Inc., 318 F.R.D. 457, 513 (D. Utah 2017).

[74] 21-CV-250 (E.D. Okla. May 13, 2024).

[75] *Id.* at *23.

highly idiosyncratic issue that might require unique evidence from individual plaintiffs" and "presents an impediment to the economies of time and scale that encourage class actions as an alternative to traditional litigation."[76] In *Hampton*, however, the district court held that:

> Sometimes issues of reliance can be disposed of on a classwide basis without individualized attention at trial. For example, where circumstantial evidence of reliance can be found through generalized, classwide proof, then common questions will predominate and class treatment is valuable in order to take advantage of the efficiencies essential to class actions.[77]

Pilgrim v. Universal Health Card, LLC,[78] involved a healthcare discount program intended to provide members with access to a network of healthcare providers that had allegedly agreed to lower their prices for members. The problem was that many of the healthcare providers had never heard of the program. Based upon this and other misrepresentations, two "disenchanted consumers" sued in federal court, seeking to represent a nationwide class of all the people who had joined the program. The two defendants moved separately to strike the class allegations and to dismiss the complaint, both of which motions were granted by the district court, which reasoned that under the forum state's choice-of-law rules it would have to analyze each class member's claim under the law of his or her home state. "Such a task," the district court concluded, "would make this case unmanageable as a class action[,]"[79] and the Sixth Circuit agreed, citing *In re Am. Med. Sys., Inc.*,[80] also from the Sixth Circuit, which said that "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task in instructing a jury on the relevant law."[81] The Sixth Circuit also cited *In re Bridgestone/Firestone, Inc.*[82] from the Seventh Circuit, which held that "[b]ecause these [consumer fraud claims involving allegedly defective tires] must be adjudicated under the law of so many jurisdictions, a single nationwide claim is not manageable."[83]

Most recently, a district court in New York discussed the manageability of potentially divergent state laws in the context of a nationwide class action alleging

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[76] Huddleston v. John Christner Trucking, LLC, 2020 WL 489181 at *17 (N.D. Okla. Jan. 30, 2020), *amended on reconsideration in part,* 2020 WL 6375163 (N.D. Okla. Oct. 26, 2020) (quoting CGC Holding Co., LLC v. Broad and Cassel, 773 F.3d 1076, 1089 (10th Cir. 2014)).

[77] 21-CV-250 at *23.

[78] 660 F.3d 943 (6th Cir. 2011).

[79] Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 945 (6th Cir. 2011) (quoting the district court).

[80] 75 F.3d 1069 (6th Cir. 1996).

[81] *Id.* at 1085.

[82] 288 F.3d 1012 (7th Cir. 2002).

[83] *Id.* at 1018.

breach of an express warranty. In *Goetz v. Ainsworth Pet Nutrition, LLC*,[84] plaintiffs complained of defendants' allegedly false claim that their pet food products were "natural," when in fact the U.S.F.D.A. had identified a number of synthetic ingredients in the defendants' products. The defendants moved to strike the plaintiffs' class allegations in advance of any motion on the part of the plaintiffs to certify the class, thereby taking on the higher burden of having to prove "from the face of the complaint that it would be impossible to certify the alleged class regardless of the facts that the plaintiffs may be able to obtain during discovery."[85] "But prior to discovery," the district court said, "'it is impossible for the Court to determine how many states' laws are implicated in this action, how many of those laws vary, and how many variations are material.'"[86]

Even given state law variations on the issues of notice, reliance, and privity (which will be discussed in detail in the section that follows), the court said that it was not clear that "the standards of liability in [the] relevant states are sufficiently different that they would raise insurmountable case management issues,"[87] adding that "courts in this Circuit have cautioned that 'the specter of having to apply different substantive law does not warrant refusing to certify a class on common-law claims.'"[88] "Even where state laws differ," the district court said, "'concerns are lessened where the states' laws do not vary materially.'"[89] The district court thereupon denied the defendants' motion to strike the plaintiffs' class allegations.

Despite this willingness to downplay the impact of variations in state law, there remains throughout the cases' discussions of such factors as statutes of limitations, pre-suit notice of a breach of warranty, privity of contract and reliance (as discussed below) that militate against a nationwide (or multi-state) class actions for breach of warranty claims.

An interesting means of dealing with the above-referenced objections to multi-state class actions for breach of warranty was demonstrated by the district court in the case of *Bietsch v. Sergeant's Pet Care Prods., Inc.*,[90] a multi-state class action involving dog food which was described on the package labelling as "nutritious," but which sickened the named plaintiff's dog and killed others. In a motion to dismiss filed by the defendant, along with a motion to strike the class allegations of plaintiffs' complaint, the defendant raised several of the issues that cause manageability problems in multi-state class action litigation, i.e. failure of the plaintiffs to adequately plead reliance on the express warranty, lack of privity of contract between plaintiffs and defendant, and lack of pre-suit notice as required by the Uniform Commercial Code.

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[84] 24-CV-04799 (S.D.N.Y. Mar. 3, 2025).
[85] *Id.* at *20 (quoting Reynolds v. Lifewatch, Inc., 136 F. Supp. 3d 503, 511 (S.D.N.Y. 2015)).
[86] *Id.* (quoting Greene v. Gerber Products Co., 262 F. Supp. 3d 38, 80 (E.D.N.Y. 2017)).
[87] *Id.* (quoting *Greene*, 262 F. Supp. 3d at 80).
[88] 24-CV-04799 at *21 (quoting *Reynolds*, 136 F. Supp. 3d at 518).
[89] *Id.* (quoting In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 127 (2d Cir. 2013)).
[90] No. 15 C 5432 (N.D. Ill. Mar. 15, 2016).

The named plaintiff in the *Bietsch* case was a citizen of Illinois who purchased the defendant's dog food at a pet store. According to the applicable choice of law rules, the law of the plaintiffs' home state governed the action.[91] Regarding the alleged failure of the plaintiffs to adequately plead reliance on the express warranty set forth on the defendant's packaging, the court said that "[a]lthough some states require a plaintiff to 'show reliance on a statement or representation for it to be considered part of the basis of the bargain[,]'"[92] "in Illinois the seller's representation creates a rebuttable presumption of reliance on the buyer,"[93] thereby excusing the need to plead reliance.

As to the absence of privity between plaintiffs and defendant (because plaintiffs purchased the dog food from intermediate sellers), the court, after stating the general rule that privity is required between the parties in order to maintain claims for breach of express or implied warranties,[94] cited the following exceptions to the privity requirement under the applicable choice of law rules. Regarding the express warranty claim, Illinois law creates an express warranty from representations or promises made directly to the consumer by the remote manufacturer on its product packaging thereby eliminating the need for direct privity. Regarding the implied warranty, another exception to the privity requirement exists under Illinois law for "articles of food sold in sealed containers."[95]

Finally, regarding the absence of pre-suit notice from the buyer to the seller as required by the Uniform Commercial Code,[96] the named plaintiff admitted that the complaint did not contain an allegation of pre-suit notice to the defendant, but argued that there had been a telephone call to the defendant's customer service department regarding the dog's injury prior to suit being filed, and that this was demonstrated in a separate declaration or affidavit provided to the court in response to the defendant's motion to dismiss, which the court accepted as evidencing notice, since its averments were deemed "consistent with those in the complaint."[97]

The defendant's contentions having been addressed by a denial of its motion to dismiss, the court next turned its attention to the defendant's motion to strike the class allegations from the plaintiffs' complaint. The defendant cited the Seventh Circuit's decisions in the *Bridgestone/Firestone*[98] and *Szabo v. Bridgeport Machines*[99] cases, the latter

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[91] In re Rust-Oleum Prod. Liab. Litig., 155 F. Supp. 3d 772,786 (N.D. Ill. 2016).

[92] *Bietsch*, No. 15 C 5432 at *10 (quoting In re *Rust-Oleum*, 155 F. Supp. 3d at 808).

[93] *Id.* (citing Felley v. Singleton, 302 Ill. App. 3d 248, 708 N.E. 2d 930 (2d Dist. 1999)).

[94] *See* Voelker v. Porsche Cars of N. Amer., Inc., 353 F. 3d 516, 525 (7th Cir. 2013); Mednick v. Precor, Inc., No. 14 C 3624, 2014 WL 6474915 at *5 (N.D. Ill. Nov.14, 2014).

[95] *Bietsch*, No. 15 C 5432 at **12–13 (citing Adkins v. Nestle Purina Pet Care Co., 973 F. Supp. 2d 905 (N.D. Ill. 2013).

[96] U.C.C. § 2-607(3)(a) (2002).

[97] *Bietsch*, No. 15 C 5432 at *18 (citing Help at Home, Inc. v. Med. Capital, L.L.C., 260 F. 3d 748, 752–53 (7th Cir. 2001) (holding that plaintiff may add facts "by affidavit or brief in order to defeat a motion to dismiss if the facts are consistent with the allegation of the complaint")).

[98] 288 F. 3d 1012, 1015 (7th Cir. 2002).

[99] 249 F. 3d 673 (7th Cir. 2001).

of which held that nationwide class actions for breach of warranty "pose serious problems about choice of law, the manageability of suit, and the propriety of class certification."[100] The district court responded by saying that it was deferring an inquiry into the impact of state law variations (on such issues as reliance, pre-suit notice and privity of contract), finding such considerations to be "premature" at the motion to dismiss stage, and that a recitation of state law variations under which the plaintiffs sough to proceed was "not sufficient to demonstrate that a multistate class is 'per se unworkable.'"[101]

Although courts may defer the difficult decisions concerning the impact of state law variants at the motion to dismiss stage, it is at the class certification stage (if not earlier) that the problems presented by the need to apply the divergent laws of the various class members' home states must be resolved. Some of those problems are presented in the following section.

C. Certain Aspects of Breach of Warranty Claims That Make Them Particularly "Unmanageable" for Class Action Treatment.

In all class action litigation, plaintiffs' claims must depend upon "a common contention . . . that is capable of class-wide resolution[.]"[102] "What matters most to class certification. . . is not the raising of common 'questions' – even in droves – but rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."[103]

One major source of "dissimilarities within the proposed class" are the variations found in the state laws that govern the claims asserted in class actions, particularly in multi-state class actions alleging breaches of express or implied warranties.[104] In such cases "a district court must consider how variations in state law affect the elements of

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[100] Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 674 (7th Cir. 2001).

[101] *Id.* at 24–25 (citing Rysewyk v. Sears Holding Corp., No. 15 CV 4519, 2015 WL 9259886 at *8 (N.D. Ill. Dec. 18, 2015) (refusing to strike class allegations where defendants did not show "specific Impediments" to a multi-state class, noting that "Plaintiffs might not carry their burdens at class certification, but nothing in the complaint or defendants' explanation of the law persuades me that it is practicable to resolve the certification question at this stage")). *See also* Mednick v. Precore, Inc., No 14 C 3624, 2014 WL 6474915 at **6–7 (N.D. Ill. Nov. 13, 2014) (deferring consideration of impact of state law variants until class certification stage, finding that "the mere possibility that the presence of class members in other states may require the application of different state laws does not satisfy the facially and inherently deficient standard").

[102] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

[103] Nagareda, *Class Certification in the Age of Aggregate Proof,* N.Y.U. L. REV. 97, 131–32 (2009).

[104] "In a multi-state class action, variations in state law may swamp any common issues and defeat predominance." Castano v. American Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) (citing Georgine v. Amchem Prods., 83 F.3d 610, 618 (3d Cir. 1996) (decertifying a class because legal and factual differences in the plaintiffs' claims, "when exponentially magnified by choice of law considerations, eclipse any common issues in this case.")). *See also* In re American Medical Sys., 75 F.3d 1069, 1085 (6th Cir. 1996).

predominance and superiority."[105] A 2020 case from the Northern District of Ohio[106] succinctly illustrates the manageability problems arising from state law variations:

> The elements for breach of express warranty differ from state to state, including whether reliance, pre-suit notice, or privity are required. In Ohio, reliance is not required but pre-suit notice is. In Indiana, neither is required. Texas class members would have to show both. Ten states require both reliance and pre-suit notice, three states require reliance but have not decided on pre-suit notice, seven states require reliance but not pre-suit notice, ten states require pre-suit notice but not reliance, eight states do not require reliance and have not decided on pre-suit notice, and five states do not require either. Furthermore, different class members have different privity requirements. Under Ohio law, for example, privity is not required . . . [b]ut in Illinois, "privity of contract is required to enforce an express warranty where economic loss is alleged[.]"[107]

This section will review a number of such variances in state law that make multi-state class actions for breach of warranty "unmanageable," and particularly unsuited for class-wide resolution.

1. Statutes of Limitations

Under the provisions of the Uniform Commercial Code ("U.C.C."), adopted with minor variants by every state, an action for breach of warranty must be commenced within four years after the cause of action had accrued.[108] The cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.[109] With regard to implied warranties, the breach generally occurs when tender of delivery is made.[110] With regard to express warranties, where the warranty explicitly extends to future performance of the goods, as is often the case, and discovery of the breach must await the time for such performance, the cause of action accrues when the breach is discovered, or should have been discovered, by the buyer.[111]

Section 2-725(4) explicitly states that this section of the U.C.C. "does not alter the law on tolling of the statute of limitations,"[112] which introduces one of the state law variants that implicates individual inquires and therefore can confound the concept of commonality. This concept was the subject of considerable discussion in the case of *Haley v. Kolbe & Kolbe Millwork Co,.*[113] a muti-state class action involving allegedly defective window installations in residential homes. Claims of breach of express and

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[105] Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986), *cert. denied,* 482 U.S. 915 (1987).
[106] Forsher v. J.M. Smucker Co., 612 F. Supp. 3d 714, 727 (N.D. Ohio 2020).
[107] *Id.* at 727.
[108] U.C.C. § 2-725(1) (2002).
[109] U.C.C. § 2-725(2) (2002).
[110] *Id.*
[111] *Id.*
[112] U.C.C. § 2-725(4) (2002).
[113] 2015 WL 9255571 (W.D. Wis. Dec. 18, 2015), *aff'd,* 863 F.3d 600 (7th Cir. 2017).

implied warranty were asserted, and the court, as a threshold matter, elaborated on case management problems caused by a number of issues.

As to the express warranty claims, the court stated that because of the nature of the contracts involved, the express warranty claims accrued when the plaintiffs discovered, or should have discovered, that the windows were defective. Therefore, the timeliness of the express warranty claims "require[d] inquiries into the state of mind and knowledge of individual class members and the specific circumstances surrounding the failure of their windows."[114]

Regarding the implied warranty claims, which accrued on the delivery dates of the windows (as opposed to the date of their installation), the court determined that the plaintiffs' proposed subclass was "not manageable . . . because up to 50 states could govern those claims."[115] Both the express and implied warranty claims, being subject to the state laws of the individual members of the class, were also subject to state law variations with respect to tolling and equitable estoppel, both of which "involve multi-factor tests that require fact-intensive and individual inquiries that will vary from class member to class member."[116]

The district court in *Haley* noted that "courts facing similar individual inquiries regarding accrual, tolling and equitable estoppel have refused to certify a class, at least with respect to the statute of limitations issue."[117] The district court concluded its discussion of the statute of limitations issue by saying that "the large number of individual questions of law and fact necessary to determine the accrual and tolling of the limitations period for each class member precludes certification of any class with respect to those issues."[118]

2. Pre-Suit Notice

Section 2-607(3)(a) of the Uniform Commercial Code requires that once a tender of goods from the seller has been accepted by the buyer, "the buyer must within a reasonable time after he discovers or should have discovered any breach [of any express or implied warranty] notify the seller of the breach or be barred from any remedy."[119] The purposes behind the timely pre-suit notice requirement have been described by the courts as giving the seller a meaningful opportunity to investigate and

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[114] *Id.* at **28–29.

[115] *Id.* at *27.

[116] *Id.* at *29; *See also* Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990) (explaining types of inquiries required under both tolling and equitable estoppel).

[117] 2015 WL 9255571 at *29 (citing Pella Corp. v. Saltzman, 606 F.3d 392, 393 (7th Cir. 2010)); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 342 (4th Cir. 1998) (tolling depended on individualized showings of misrepresentations and obfuscations unique to each class member).

[118] 2015 WL 9255571 at *29.

[119] U.C.C. § 2-607(3)(a) (2002),

resolve the breach,[120] to encourage parties to settle their disputes,[121] and to avoid litigation.[122]

Despite the name of the aforementioned Code, state law interpretations of section 2-607(3)(a) have been anything but "uniform."[123] For instance, in some states the mere filing of a complaint is sufficient to provide notice to the seller, whereas in other states it is not.[124] In most states, timely pre-suit notice to the seller of a breach is an essential element of a buyer's breach of warranty claim,[125] while in other states the notice element is excused entirely.[126] When buyers deal only with a middleman, as opposed to a remote manufacturer, some states say that notice to the immediate seller suffices as pre-suit notice to the manufacturer[127] (note that U.C.C. § 2-607(3)(a) provides that the buyer need only "notify the seller" of the alleged breach), while other states require direct notification to the remote manufacturer in order to sustain a buyer's action for breach of warranty against that party.[128]

This divergence in state law regarding the notice requirement has led a number of courts to deny class certification of breach of warranty claims on the grounds of unmanageability.[129]

3. Privity of Contract

Privity is, basically, one of the central aspects of the commercial relationship between buyer and seller in the marketplace. Simply stated, it is "that connection . . . which exists between two or more contracting parties."[130] "Courts are sharply split regarding whether privity is required in implied and express warranty actions when a buyer seeks only recovery for economic loss. While many jurisdictions retain the privity requirement in an implied warranty action for economic loss, other jurisdictions

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[120] *See, e.g.*, Oettle v. Walmart, Inc., 685 F. Supp. 3d 706 (S.D. Ill. 2023).

[121] *See, e.g.*, Ibarrola v. Kind, LLC*,* 83 F. Supp. 3d 751 (N.D. Ill. 2015).

[122] *See, e.g.*, Reyes v. McDonald's Corp., 06-c-1604,2813, 2006 WL 3253579 at *3 (N.D. Ill. Nov. 8, 2006).

[123] Walsh v. Ford Motor Co., 807 F.2d 1000, 1016–17 (D.C. Cir. 1986), *cert. denied,* 482 U.S. 915 (1987) (holding that: "The Uniform Commercial Code is not uniform").

[124] *See* In re Caterpillar, Inc., 1:14-cv-3722 (D.N.J. July 29, 2015) (comparing cases).

[125] *See, e.g.*, Hedges v. Earth, Inc., 14-c-9858, 2015 WL 1843039 at *1 (N.D. Ill. Apr. 21, 2015) (quoting Whitwell v. Wal-Mart Stores, Inc., 09-513, 2009 WL 4894575 at **4–6 (S.D. Ill. Dec.11, 2009)).

[126] *See* Forsher v. J.M. Smucker Co., 612 F. Supp. 3d 714, 727 (N.D. Ohio 2020). (collecting cases).

[127] *See, e.g.*, Halprin v. Ford Motor Co., 686, 689 (N.C. App. Ct. 1992) (collecting cases holding that notice to the immediate seller is sufficient to allow a warranty case against a remote manufacturer). *See also* Blommer Chocolate Co. v. Bongards Creameries, Inc., 635 F. Supp. 911 (N.D. Ill. 1985); Owens v. Glendale Optical Co., 590 F. Supp. 32 (S.D. Ill. 1984).

[128] *See, e.g.*, Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 672–75 (Tex. 2004) (collecting cases holding that pre-suit notice to a remote manufacturer is necessary).

[129] *See* In re Bridgestone/Firestone, Inc.*,* 288 F.3d 1012, 1018 (7th Cir. 2002); *Forsher*, 612 F. Supp. 3d. at 727; Melnick v. Tamko Bldg. Prods., 19-CV-2630 (D. Kan. July 25, 2024).

[130] *Privity,* BLACK'S LAW DICTIONERY 1079 (5th ed. 1979).

have abandoned the privity requirement and now allow buyers to assert an implied warranty claim for economic loss against remote manufacturers."[131]

Several states that retain the privity requirement in implied warranty cases no longer require it in express warranty claims.[132] For example, under New York law, a plaintiff must allege privity with the defendant in a claim for breach of an implied warranty, although "New York has long since dispensed with the privity requirement for express warranty claims . . ."[133] Similarly, the Ohio courts take the position that privity between the parties is not necessary to impose liability for breach of an *express* warranty.[134] "Thus, a [remote] manufacturer can be held liable by a purchaser for breach of an express warranty even though there is no privity between the two parties."[135]

On the other hand, in order to sustain a contract-based breach of *implied* warranty claim, the parties must be in privity.[136]

Among states there is a sharp split of authority as to whether a purchaser may recover economic loss from a remote manufacturer when there is no privity of contract between the parties.[137] For example, "a significant number of jurisdictions require vertical privity in implied warranty actions for direct economic loss [while] [o]ther jurisdictions, however, have eliminated the privity of contract requirement and allow recovery of economic loss from remote manufacturers."[138]

Noting the "significant variations in state law and the multiple individualized legal and factual questions they present," the Fifth Circuit concluded in *Cole v. General Motors Corp.*[139] "that plaintiffs have failed to carry their burden in establishing predominance and that the district court abused its discretion in certifying the class."[140]

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[131] Simonet v. SmithKline Beecham Corp, 506 F. Supp. 2d 77, 84–85 (D. P.R. 2007) (citing Cole v. Gen. Motors Corp., 484 F.3d 717, 728 (5th Cir. 2007) (discussing state law variations of implied warranty claims for economic loss when no privity exists between the buyer and the manufacturer)).

[132] Such jurisdictions include Arizona, California, Illinois, Indiana, North Carolina and Washington. *See* Collins Co., Ltd. v. Carboline Co., 532 N.E. 2d 834, 838–39 (1988) (holding that the difference between express and implied warranties justify the distinction in privity rules).

[133] *See* Colpitts v. Blue Diamond Growers, 527 F. Supp. 3d 562, 591 (S.D.N.Y. 2021); Weisblum v. Prophase Labs, Inc., 88 F. Supp. 3d 283, 296 (S.D.N.Y. 2015).

[134] Bobb Forest Prods., Inc. v. Morbark Industries, Inc., 151 Ohio App. 3d 63, 783 N.E. 2d 560 (7th Dist. 2002); Chik Promotions, Inc. v. Middletown Sec. Sys., Inc., 688 N.E.2d 278 (12th Dist. 1996).

[135] Caterpillar Fin. Servs. Corp v. Harold Tatman & Son's Enters., Inc., 50 N.E. 2d 955, 961 (2015); Johnson v. Monsanto Co., 2002 Ohio 4316, 2002 WL 2030889 at *14 (2002).

[136] *Caterpillar*, 50 N.E.2d at 961; Curl v. Volkswagen of Am., Inc., 871 N.E. 2d 1141 (2007) (holding that the U.C.C.'s implied warranty of merchantability and implied warranty of fitness are not enforceable against remote manufacturers with whom the consumer is not in privity).

[137] Cole v. Gen. Motors Corp., 484 F.3d 717, 727 (5th Cir. 2007).

[138] *Id.* at 728 (collecting cases).

[139] 484 F.3d 717, 730 (5th Cir. 2007).

[140] *Id.* at 730. The Fifth Circuit also noted that "[o]ther courts have declined class certification, at least in part because of variations in state law regarding privity of contract" *Id.* (citing Chin v. Chrysler Corp, 182 F.R.D. 448, 460 (D.N.J. 1998) (noting that plaintiffs failed to show that state law differences regarding vertical privity did not pose manageability problems);*see also Walsh v. Ford Motor Co., supra* at

4. Reliance

Reliance, a concept usually associated with fraud-based claims, also impacts actions for breach of express warranties. Section 2-313 of the U.C.C. provides that an express warranty is made by the seller in one of three ways: "(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods . . . creates an express warranty that the goods shall conform to the affirmation or promise . . . (2) Any description of the goods . . . creates an express warranty that the goods shall conform to the description , , , [and] (3) any sample or model [of the goods] creates an express warranty that the whole of the goods shall conform to the sample or model."[141] In all three cases the affirmation, description or sample must be part of the "basis if the bargain,"[142] but the U.C.C provides no specific definition of this requirement.

"There is a clear split in authority among the jurisdictions as to whether a buyer must show reliance on a statement or representation for it to be considered part of the 'basis of the bargain.'"[143] For example, "[s]ome jurisdictions require a strict showing of reliance [while] [o]ther jurisdictions have no reliance requirement . . . [a]nd still other jurisdictions have applied a rebuttable presumption of reliance."[144] Such a divergence "greatly impacts the predominance inquiry: 'the economy ordinarily associated with the class action device' is defeated where plaintiffs are required to bring forth individual proof of reliance."[145]

In the *Cole* case, which proposed a class of more than 200,000 members, class certification was deemed unmanageable, as it "would require the court to undertake an inquiry that would turn on facts particular to each of those class members and raised the potential that the trial would break down into multiple individual hearings."[146] In a context other than warranty law, the Tenth Circuit has said that "[s]ince reliance is often a highly idiosyncratic issue that might require unique evidence from individual plaintiffs, it may present an impediment to the economies of time and scale that encourage class actions as an alternative to traditional litigation. In terms of Rule 23 doctrine, individualized issues of reliance often preclude predominance."[147] Thus reliance, like statutes of limitations, pre-suit notice and privity of contract, is another

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272 ("Along the various implied warranty standards and other subsidiary issues . . . the numerous vertical privity rules convince this Court that a predominance of common issues are not present in this case")).

[141] U.C.C. § 2-313(A)(1)–(3) (2002).

[142] Gabriel, *The ABC's of the UCC, Article 2: Sales,* (2d ed. 2013) AMERICAN BAR ASSOCIATION, p.52.

[143] Cole v. Gen. Motors Corp., 484 F.3d 717, 726 (5th Cir. 2007). *See also,* Clark & Smith, *The Law of Product Warranties,* § 4:16 (2d ed. 2002).

[144] *Cole*, 484 F.3d at 726.

[145] *Id.* at 727 (quoting Patterson v. Mobile Oil Co., 241 F.3d 417, 419 (5th Cir. 2001) ("Claims . . . where individual reliance is an element are poor candidates for class treatment, at best")).

[146] *Id.* at 727.

[147] CGC Holding Company, L.L.C. v. Broad and Cassel, 773 F.3d 1076, 1089 (10th Cir. 2014).

state law variable that can render multi-state class actions for breach of warranty unmanageable for the federal trial courts.

III. ATTEMPTS TO AVOID VARYING STATE LAWS REGARDING PRIVITY AND PRE-SUIT NOTICE

Some plaintiffs who have contemplated class action treatment for breach of warranty claims may attempt to circumvent varying state law requirements regarding pre-suit notice and privity, which may hinder or restrict class action certification of state law breach of warranty actions by suing under federal law, i.e. the Magnuson-Moss Warranty Act.[148] In reality, however, it has been held that implied warranty claims brought under the Magnuson-Moss Act are subject to the same state law privity rules as warranty claims brought under state common law.[149] Additionally, the Magnuson-Moss Act imposes its own requirements as to pre-suit notice.[150]

The Act reads as follows: "No action. . . may be brought. . . for failure to comply with any obligation under any written or implied warranty, . . . and a class of consumers may not proceed in a class action. . . unless the [defendant] is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action, . . . such reasonable opportunity will be afforded by the named plaintiffs, and they shall at that time notify the defendant that they are acting on behalf of the class."[151] Therefore, suing under the Magnuson-Moss Act does not circumvent state law rules regarding privity of contract. In addition, as stated above, the Act includes its own provisions concerning notice and the need to provide the seller with an opportunity to cure.[152]

A. Subclasses

One of the other means proposed by plaintiffs to deal with the variations in state laws which often characterize multi-state class action litigation, and hence to make such cases more "manageable," is the creation of subclasses that organize class members by state or by issue, for example those of whom privity is required as opposed to those for whom privity is excused.[153] Regarding the creation of subclasses as a manageability tool, the court in *Hart v. BHH, LLC* [154] said that "[i]n the event that there are material variations in the law of the fifty states, the Court may employ

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[148] 15 U.S.C. § 2301 et seq.

[149] *See, e.g.*, Abraham v. Volkswagen of America, 795 F.2d 238 (2d Cir. 1986) (holding that implied warranty claims brought under the Magnuson-Moss Act are subject to state law privity rules, including those applicable to consumers' breach of warranty actions against remote manufacturers).

[150] *See* Bearden v. Honeywell Int'l Inc., 720 F. Supp. 2d 932 (M.D. Tenn. 2010).

[151] 15 U.S.C. § 2310(e).

[152] *Id.*

[153] *See* Young v. Nationwide Mut. Ins. Co., 693 F.3d 532 (6th Cir. 2012).

[154] 2017 WL 2912519 (S.D.N.Y. July 7, 2017).

subclasses or decertify those state law subclasses whose adjudication becomes unmanageable."[155]

In the case of *In Re Telectronics Pacing Sys., Inc.,*[156] the court commented favorably on the possibility of using subclasses to deal with the variations in state laws. Likewise in the case of *Matrinelli v. Johnson & Johnson*[157] the court allowed the use of subclasses where ten such categories were created as a means of managing the variations in state law. Such means of dealing with state law variations is disfavored by other courts, however, who have said that "subclasses are not [a] substitute for compliance with Rule 23"[158] requirements regarding commonality and typicality, two essential elements for class certification.

A variation of the creation of subclasses to handle the manageability of multi-state class actions involving implied warranty claims is seen in the case of *Stuve v. The Kraft Heinz Co.*[159] in which plaintiffs filed a class action involving claimants from eleven states who alleged that the defendant had falsely labelled its macaroni and cheese product because it failed to disclose that the product contained, or risked containing, a synthetic chemical known as phthalates, which scientific studies had linked to a variety of ailments, including damage to the fetus in pregnancy. At the pleading stage, only economic damages were claimed by the plaintiffs (i.e. it was alleged that they would not have purchased the product had it warned consumers about the potential presence of phthalates).

Among the claims asserted was one for breach of implied warranty. The district court noted that, generally, "[b]reach of implied warranty is a contract claim, one element of which is privity between the parties."[160] The court cited cases from several jurisdictions requiring privity, including Florida, Illinois and New York,[161] in which several of the class members resided, but also noted that one of the plaintiffs in the proposed class lived in Massachusetts, which does not impose the privity requirement.[162] The district court singled out the Massachusetts plaintiff, and permitted her implied warranty claim to continue while dismissing the remainder of the implied warranty claims for lack of privity. Thus, the court demonstrated one way in which the issue of conflicting state laws on the issue of privity may be successfully "managed" i.e. by segregating those plaintiffs for whom the privity requirement is

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[155] *Id.* at *8.

[156] 172 F.R.D. 271,292 (S.D. Ohio 1997).

[157] 2019 WL 1429653 at *10 (E.D. Cal. Mar. 29, 2019).

[158] Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 n.9 (6th Cir. 1998). *See also* Forsher v. J.M. Smucker Co., 612 F. Supp. 3d 714, 728 (N.D. Ohio 2020).

[159] Case 21-CV-1845 (N.D. Ill. Jan. 12, 2023) (Opinion of Judge Pallmeyer).

[160] *Id.* at *23.

[161] Weiss v. Gen. Motors LLC, 418 F. Supp. 3d 1173, 1183 (S.D. Fla. 2019); Manley v. Hain Celestial Grp., Inc., 417 F. Supp. 3d 1114, 1121 (N.D. Ill. 2019); Catalano v. BMW of N. Am., LLC, 167 F. Supp. 3d 540, 556 (S.D.N.Y. 2016).

[162] Jacobs v. Yamaha Motors Corp., U.S.A., 649 N.E. 2d 758, 763 (Mass. 1995); Schneider v. BMW of N. Am. LLC, No. 18-cv-12239, 2019 WL 4771567 at *6 (D. Mass. Sept. 27, 2019).

excused, allowing those claims to proceed while dismissing the claims of those plaintiffs as to whom the privity requirement applies.

IV. CONCLUSION

Although listed last among Rule 23's criteria for class action treatment,[163] manageability is a factor that pervades the other listed prerequisites for a class action. State law variances on such issues as pre-suit notice, privity, reliance and others in multi-state breach of warranty actions erode the concepts of commonality, typicality, predominance and superiority that give class actions their reasons for being, often making the maintenance of such actions "unmanageable" for the federal trial courts, tasked (among other things) with fashioning a workable set of jury instructions for such cases.

While categorization of claims (be it by plaintiff or by jurisdiction), or the creation of subclasses, may pose a partial solution to the manageability of multi-state breach of warranty claims, the specter of an "unmanageable task" will still loom large in multi-state class actions for breach of warranty.

[163] Fed. R. Civ. P. 23(b)(3)(D) ("the likely difficulties in managing a class action").