Using Conflict of Law Analyses to Oppose Certification of Consumer Fraud Class Actions

Defense counsel must be aware of and insist that courts recognize the many differences and divergences of the state statutes

By James A. O'Neal and Brenda R. Erickson

IT WOULD be overly optimistic to think that the federal court system's well-reasoned and conservative approach to class certification in mass tort cases, as exemplified by the U.S. Supreme Court's decision in *Amchem Products Inc. v. Windsor*[1] and the Fifth Circuit's in *Castano v. American Tobacco Co.*,[2] free defense counsel from having to worry about class certification where individual issues seem clearly to predominate. True, federal courts are primarily, although not exclusively, following the example of the Supreme Court and refusing to certify mass tort classes. In the more populist state courts, however, plaintiffs' attorneys still find judges willing to certify amazingly ambitious classes, often where there are emotionally and politically charged allegations of consumer fraud.

One aspect of the certification of consumer fraud classes on which defense counsel should focus is the inappropriateness of certifying a multijurisdictional class in the face of the many conflicts in consumer protection laws among the different states. The stakes are high, given that treble and exemplary damages and attorneys' fees awards are possible under the state statutes. Since *Castano*, a careful and specific demonstration of conflicts of laws should be strong armor against the certification of an inappropriate, unmanageable but highly threatening national class action.

CLAIMS UNDER CONSUMER PROTECTION STATUTES

Plaintiffs who assert state consumer fraud claims on behalf of persons in many jurisdictions usually seek to impose liability based on the consumer protection statutes of the seller's home state. They argue that there is nothing arbitrary or unfair about requiring a seller to conform to the consumer laws of its own jurisdiction and that other states would have no interest in preventing their residents from recovering damages under a foreign state's law. This is a woeful oversimplification of conflict of laws principles, which themselves vary between jurisdictions. Even if the application of a particular state's law is not arbitrary or unfair, courts must still determine whether the choice of only one state's law would create a conflict in the context of a multijurisdictional class action.

In analyzing the choice of law issue, the first consideration is "whether the choice of one state's law over another's creates an actual conflict."[3] If there is a conflict be-

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1. 521 U.S. 591 (1997).
2. 84 F.3d 734 (5th Cir. 1996).
3. Jepson v. Gen. Cas. Co., 513 N.W.2d 467, 469 (Minn. 1994).

tween the law which plaintiffs seek to invoke and other state consumer protection statutes, then the court must apply an individualized choice of law analysis to each purported member's claims.[4] Plaintiffs may not avoid this conflict analysis merely by proposing the law of a single state. Courts have rejected that tactic.

For example, in *In re Ford Motor Co. Ignition Switch Products Liability Litigation*,[5] the U.S. District Court for the District of New Jersey rejected the very argument that the home state of the defendant corporation has the most significant interest in regulating the corporation's conduct, thus justifying the application of that state's law to each class member's claims. In that case, the plaintiffs argued that Michigan law should apply, including Michigan's consumer protection statute, because Ford was headquartered there, the vehicles were manufactured there, the decisions relating to the allegedly defective switches were made there, and the alleged misrepresentations, statements or advertisements regarding the vehicles originated there. While acknowledging that Michigan had an interest in regulating a corporation within its borders, the court nevertheless found that the laws of each putative class member's home state had interests that outweighed those of Michigan:

> Each plaintiff's home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws. These interests arise by virtue of each state being the place in which plaintiffs reside, or the place in which plaintiffs bought their allegedly defective vehicles or the place where plaintiffs' alleged damages occurred.[6]

In so ruling, the court specifically rejected the invitation to simplify its task in order to justify class certification:

> While it might be desirable, for the sake of efficiency, to settle upon one state—like Michigan or New Jersey—and apply its law in lieu of the other 49 jurisdictions, due process requires individual consideration of the choice of law issues raised by each class member's case before certification. Since the laws of each of the 50 states vary on important issues that are relevant to plaintiffs' causes of action and defendants' defenses, the court cannot conclude that there would be no conflict in applying the law of a single jurisdiction, . . . as plaintiffs suggest. Thus, the court will apply the law of each of the states from which plaintiffs hail.[7]

The same conclusion was reached in *Chin v. Chrysler Corp.*,[8] in which another judge in the same district similarly rejected the plaintiffs' attempt to simplify that proposed class action by the application of New Jersey law to all claims.[9]

The same analysis was echoed by Judge Bechtle of the U.S. District Court for the Eastern District of Pennsylvania in *In re Diet Drug Products Liability Litigation*, in which he refused to adopt the plaintiffs'

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4. *See, e.g.*, In re Scimed Sec. Litig., 1993 WL 616692 at *7 (D. Minn.), Fed. Sec. L. Rep. (CCH) ¶ 98,080. See also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985); Georgine v. Amchem Prod., 83 F.3d 610, 627 (3rd Cir. 1996) *aff'd sub nom.* Amchem Prod. Inc. v. Windsor, 521 U.S. 591, 627-29 (1997) (decertifying class because, based on application of individualized choice of law analysis of each plaintiff's claims, legal and factual differences in plaintiffs' claims, coupled with choice of law considerations, outweighed common issues); In re Ford Motor Ignition Switch Prod. Liab. Litig., 174 F.R.D. 332, 348 (D. N.J. 1997) (denying class certification where individualized choice of law analysis determined that consumer protection statutes of all 50 states must be applied because of each state's overwhelming interest in protecting its own citizens.)

5. 174 F.R.D. 332 (D. N.J. 1997).

6. *Id.* at 348.

7. *Id.*

8. 182 F.R.D. 448, 453-56 (D. N.J. 1997)

9. *See also* Carroll v. Cellco Partnership, 713 A.2d 509, 513 (N.J. Super. 1998) (holding that trial judge's analysis of state law issues fell short of Castano standards, as "there is possibility that common issues could be subsumed by substantive conflicts in state laws"); Weikel v. Tower Semiconductor Ltd., 183 F.R.D. 377, 402 (D. N.J. 1998) (failure of lead plaintiffs to provide explanation or analysis of laws of interested forums prevented finding that New Jersey law should be applied).

position that the law of Pennsylvania should be applied to the class as a whole because Pennsylvania has the greatest interest in applying its law:

> The ingestion and prescription of these diet drugs occurred on a nationwide basis. Most of the proposed class members have no ties whatsoever with Pennsylvania. Although AHP's [American Home Products Corp.] subsidiary, Wyeth-Ayerst Laboratories Division, has its principal offices in [Pennsylvania] and many of AHP's activities regarding the drugs at issue occurred in Pennsylvania, AHP conducted its FDA [Food and Drug Administration] contacts and various marketing efforts in other jurisdictions as well. In light of all the circumstances, the court finds that the jurisdictions in which each class member was prescribed and ingested the diet drugs have a strong interest in applying their applicable law to the sale, prescription and ingestion of pharmaceuticals within its borders, which is the conduct which gave rise to the class members' claims.[10]

SIGNIFICANT CONFLICTS

Once a court rejects the simplistic notion that no conflicts analysis is required because the plaintiffs are invoking the law of the seller's home state, the court must go on to a detailed conflicts analysis. The first question is whether conflicts exist. A review of state consumer protection laws demonstrates that significant conflicts exist.

Even a cursory analysis reveals significant variations among the various state consumer fraud statutes.

A. Scienter

There are different levels of scienter required, ranging from willfulness to a complete absence of intent. Oregon requires willful conduct,[11] while Louisiana[12] and Illinois[13] require intent. Idaho,[14] Kansas,[15] Oklahoma[16] and Nevada[17] require knowledge. South Dakota[18] and Utah[19] require intent or knowledge.

B. Reliance

Some statutes require a plaintiff to establish "reliance" on the alleged deception. Others do not. California[20] and North Carolina[21] require reliance. The Michigan act requires that a plaintiff must establish that a reasonable person would have relied on the defendant's representations; individual reliance is not required.[22] In yet another variant, reliance is required in Arizona, but it need not be reasonable.[23]

C. Causation

The requisite proof of "causation" between the allegedly false statement and a plaintiff's claimed damages also varies. While the majority of consumer protection statutes require some form of proximate causation, there are "countless variations on the definition of proximate causation."[24]

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10. In re Diet Drugs Prod. Liab. Litig., 1999 WL 673066, MDL 1203, Memorandum and Pretrial Order No. 865, at 30 (E.D. Pa. 1999). The court ultimately certified a class for purposes of the plaintiffs' medical monitoring claims, finding that a minimal number of subclasses could be created for such claims to reflect the differences in state law.
11. OR. REV. STAT. § 646.638(1).
12. United Group of Nat'l Paper Distribs. v. Vinson, 666 So.2d 1338 (La.App.), *writ denied*, 679 So.2d 1358 (La. 1996).
13. Eshaghi v. Hanley Dawson Cadillac Co., 574 N.E.2d 760 (Ill. 1991).
14. IDAHO CODE § 48-603.
15. KAN. STAT. ANN. § 50-626(b)(1).
16. OKLA. STAT. ANN. tit. 15, §§ 753(5) and (7).
17. NEV. REV. STAT. ANN. § 598.0915 (amended by 1999 Nevada Laws ch. 604 (A.B. 431).
18. S.D. CODE ANN. § 37-24-6. *See* State v. Western Capital Corp., 290 N.W.2d 467, 470 (S.D. 1980).
19. UTAH CODE ANN. § 13-11-4(2).
20. Occidental Land Inc. v. Superior Court (Fahnestock), 556 P.2d 750 (Cal. 1976), *vacating* 125 Cal.Rptr. 101 (Cal.App. 1975).
21. Forbes v. Par Ten Group, Inc., 394 S.E.2d 643 (N.C. Ct. App. 1990).
22. Dix v. Am. Bank Life Assurance Co., 415 N.W.2d 206, 209 (Mich. 1987).
23. Parks v. Macro-Dynamics Inc., 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979).
24. Adas v. Ames Color-File, 407 N.W.2d 640, 642 (Mich Ct. App. 1987).

For example, Delaware recognizes the traditional common law "but for" definition of proximate causation, which is "'that direct cause without which [an] accident would not have occurred'" or on "'which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.'"[25] Other states that have adopted the traditional "but for" approach include Nebraska[26] and North Dakota.[27]

North Carolina employs a completely different proximate cause standard—the "substantial factor" theory. Under that state's consumer protection statute, a "plaintiff must prove that the defendant's conduct was a substantial cause of [the plaintiff's injury] and . . . that [the injury] was a type . . . which defendant's conduct was naturally likely to cause."[28] Vermont has approved this approach.[29] Michigan, on the other hand, has adopted the theory that a defendant is "responsible for injurious consequences of his negligent act" that occur "naturally and directly." Proximate cause "indicates a requirement of unbroken causation between an act and an injury produced by that act," which goes beyond mere "but for" causation, but is not defined specifically as a "substantial factor" standard.[30]

D. Private Cause of Action

Some statutes do not permit, or limit private causes of action. The Iowa act does not allow for a private cause of action,[31] and the Arkansas statute authorizes private causes of action only by elderly or disabled persons.[32]

E. Class Actions

Some statutes permit a private cause of action, but not a class action. A federal court has stated that class certification would be unlikely under the Wisconsin Act.[33] Statutes in Louisiana,[34] Mississippi,[35] Montana,[36] South Carolina,[37] Alabama[38] and Virginia[39] do not permit class certification.

F. Trial by Jury

The consumer protection statutes in Illinois[40] and Massachusetts[41] do not allow a trial by jury. Connecticut does not allow the jury to decide whether a plaintiff is entitled to punitive damages. [42]

G. Damages

The damages that may be awarded under various statutes are not uniform. For example, treble damages, punitive damages, and/or costs and fees can be awarded under some statutes, but not others.

The Tennessee statute allows for the recovery of actual damages or treble damages if the violation is knowing or willful, and for reasonable costs and fees.[43] Although at least half of the states' consumer

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25. Duphily v. Delaware Elec. Coop. Inc., 662 A.2d 821, 828-29 (Del. 1995) (internal citations omitted).
26. Stiver v. Allsup Inc., 587 N.W.2d 77, 82 (Neb. 1998).
27. Rued Ins. Inc. v. Blackburn, Nickels & Smith, Inc., 543 N.W.2d 770, 774 (N.D. 1996).
28. Am. Rockwool Inc. v. Owens-Corning Fiberglass Corp., 640 F.Supp. 1411, 1444 (E.D. N.C. 1986).
29. Rooney v. Medical Ctr. Hosp. of Vermont Inc., 649 A.2d 756, 762 (Vt. 1994).
30. Adas, 407 N.W.2d at 642 (internal quotations and citations omitted).
31. IOWA CODE ANN. § 714.16(7).
32. ARK. STAT. ANN. § 4-88-204.
33. Demitropoulous v. Bank One Milwaukee N.A., 915 F.Supp. 1399, 1416 n.17 (N.D. Ill. 1996).
34. LA. REV. STAT. ANN. § 51:1409(A).
35. MISS. CODE ANN. § 75-24-15(4).
36. MONT. CODE ANN. § 30-14-133.
37. S.C. CODE ANN. § 39-5-140(a).
38. ALA. CODE § 8-19-10(f).
39. VA. CODE ANN. § 8.01-364, Reviser's Note.
40. Richard/Allen/Winter, Ltd. v. Waldorf, 509 N.E.2d 1078 (Ill.App. 1987).
41. Guity v. Commerce Ins. Co., 631 N.E.2d 75 (Mass.App. 1994).
42. CONN GEN. STAT. § 42-110g(g).
43. TENN. CODE ANN. § 47-18-109.

protection statutes do not provide for treble damages, a number do.[44]

There is no uniform standard for awarding punitive damages. The standard of conduct justifying punishment, the burden of proof, procedural trial requirements, and the availability of caps and limits and requirements that some portion of punitive awards be paid to the state—all differ from state to state.[45] And although reasonable costs and fees potentially are recoverable under the Tennessee statutory scheme, certain states, for example, Delaware, do not permit an award of attorneys fees.[46]

REQUIREMENTS OF RULE 23

Rule 23 of the Federal Rules of Civil Procedure, and those state class action rules that follow Rule 23, impose well-known requirements for certification of a class action. Those most commonly at issue in consumer fraud cases are Rule 23(b)(3)'s requirements that common issues predominate over individual issues and that a class action is superior to other available methods of adjudication.

A. Individual Issues

A closer look at a few state consumer fraud statutes illustrates how individual issues of law may dominate the trial of a multijurisdictional class action. Although the Minnesota Supreme Court has not yet ruled on the issue,[47] the Minnesota Court of Appeals and the federal court for the District of Minnesota have held that individual reliance is required in order to recover damages under Minnesota consumer protection statutes.[48] Under the Delaware consumer fraud statute, a plaintiff need not prove reliance, but must establish proximate cause between the alleged fraud and the harm suffered.[49] Under both of these statutes, a class-member-by-class-member analysis is required to determine reliance or proximate cause.

In *Tylka v. Gerber Products Co*, a decision by an Illinois federal court certifying a common law fraud class, the court relied on the proposition that, under the law of Illinois, "individual issues of reliance do not thwart class actions of common law fraud claims."[50] The Illinois Consumer Fraud Act relied on by the plaintiff in *Tylka* has been interpreted by Illinois courts to "employ an objective standard when determining the materiality of an alleged misrepresentation" and not to require proof of actual reliance. However, as the *Tylka* court recognized in granting summary judgment, the Illinois act does re-

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44. See, e.g., ALASKA STAT. § 45.50.531; COLO. REV. STAT. ANN. § 6-1-113; CONN GEN. STAT. § 42-110g; DEL. CODE ANN. tit. 6, § 2524; FLA. STAT. ch. 501.207(3); IOWA CODE ANN. § 714.16(7); KAN. STAT. ANN. § 50-634(b); KY. REV. STAT. ANN. § 367.220(1); ME. REV. STAT. ANN. tit. 5, § 213; NEV. REV. STAT. ANN. § 42.005; OHIO REV. CODE ANN. § 1345.09(B); OKLA. STAT. ANN. tit. 15, § 761.1(B); OR. REV. STAT. § 646.638(1); W. VA. CODE § 46A-6-106(1) and WIS. STAT. 100.18 (11)(b)(2).

45. *See, e.g.*, Poe v. Sears, Roebuck and Co., 1998 WL 113561, at *3 (N.D. Ga.).

46. Stephanson v. Capano Dev. Inc., 462 A.2d 1069 (Del. 1983).

47. The U.S. District Court for the District of Minnesota recently certified to the Minnesota Supreme Court the question of whether a private plaintiff must plead and prove reliance on the defendant's statements or conduct in order to be eligible for damages under the Minnesota Prevention of Consumer Fraud Act. *Group Health Plan Inc. v. Philip Morris Inc.*, Civil File Nos. 98-1036, 99-1739, Certification Order at 2 (D. Minn. Feb. 22, 2000).

48. *In re Prof'l Fin. Management Ltd.* 703 F. Supp. 1388, 1398 (D. Minn. 1989) (individual reliance and injury must be shown under Minnesota Prevention of Consumer Fraud Act); *Wilson v. Polaris Industries, Inc.*, 1998 WL 779033, at *2 (Minn. Ct. App.) (individual plaintiffs must prove actual damages in order to recover under Minnesota Deceptive Trade Practices Act); *Peterson v. Honeywell Inc.*, 1994 WL 34200, at *5 (Minn.App.) (trade and consumer protection statutes do not modify common law requirement of justifiable reliance).

49. Duphily, 662 A.2d at 828-29 (Del. 1995).

50. 178 F.R.D. 493, 499 (N.D. Ill. 1998), quoting Sparano v. Southland Corp., 1996 WL 681273, at *3 (N.D. Ill.), and also citing, among other cases, Cirone-Shadow v. Union Nissan of Waukegan, 955 F.Supp. 938, 944 (N.D. Ill. 1997) (objective standard), and L.R.J. Ryan v. Wersi Electronic GmbH and Co., 59 F.3d 52, 53 (7th Cir. 1995) (reliance not required).

quire proof of materiality, causation and damages in order for a plaintiff to recover.

Other jurisdictions' interpretations conflict with the Illinois rule. In contrast, that given to the Minnesota Deceptive Trade Practices Act by the Minnesota courts is that class certification is not appropriate in fraud cases where individual issues of reliance and causation must be proven for each class member. The federal courts in Minnesota routinely deny certification of fraud claims because the need to prove individual reliance defeats the requirements of predominance and superiority.[51]

The proposition that reliance is inherently individual and makes fraud cases very difficult to certify also is recognized in many other jurisdictions.[52]

As part of the Rule 23.02(c) predominance inquiry, a court must consider the individual legal issues that necessarily arise through the application of the various state laws. In *Castano*, the Fifth Circuit stated: "A requirement that a court know which law will apply before making a predominance determination is especially important when there may be differences in state law."[53] Plaintiffs have the burden of providing an "extensive analysis" of state law variations to assist the court in the choice of law determination.[54]

B. Superiority

Courts have broad discretion in deciding whether a class should be certified, and certification of a class action is not necessarily defeated even if the interests of the class members are not identical on every issue. Under Rule 23(c)(4)(A), partial class actions may be maintained for the determination of particular issues. For example, according to Advisory Committee Supplementary Note to the 1966 amendments, a class may be certified for the determination of liability, but the court may require individual proof with respect to damages. Under Rule 23(c)(4)(B), classes may also be divided into subclasses where appropriate, with each subclass treated according to the provisions of Rule 23. Subclasses are permitted under Rule 23 where they would not create "insurmountable difficulties which would destroy cohesion" in the litigation.[55]

The Advisory Committee notes on Rule 23 provide little insight as to when subdivision of the class would be appropriate, stating only that subdivision may be used where "a class is found to include subclasses divergent in interest."

However, even if damages and reliance can be tried separately under Rule 23, this does not solve, but rather highlights, the

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51. *See, e.g.*, Raymond v. Miller & Schroeder Municipals Inc., 1983 WL 1419, at *4 (D. Minn.), Fed. Sec. L. Rep. (CCH) ¶ 99,714 (issue of reliance in action for common law fraud is necessarily individual question); McMerty v. Burtness, 72 F.R.D. 450, 455 (D. Minn. 1976) (denying class certification of fraud claim where proof of actual individual reliance, which is essential element of action based on affirmative misrepresentations, would present individual questions of fact at trial); Reichert v. Bio-Medicus Inc., 70 F.R.D. 71, 76 (D. Minn. 1974) (denying certification of securities fraud class and quoting with approval 1966 Advisory Committee note on Rule 23 that fraud cases may be unsuited for class action treatment if there are material variations in representations or in kinds or degrees of reliance).

52. *See, e.g.*, Broussard v. Meineke Discount Muffler Shops Inc., 155 F.3d 331, 341 (4th Cir. 1998) (proof of reasonable reliance would depend on fact-intensive inquiry); Andrews v. Am. Tel. & Tel. Co., 95 F. 3d 1014, 1025 (11th Cir. 1996) (plaintiffs must show individually that they relied on misrepresentations); Anderberg v. Masonite Corp., 176 F.R.D. 682, 685 (N.D. Ga. 1997) (fraud action are highly individualistic and often particularly ill-suited to class resolution); Martin v. Dahlberg Inc., 156 F.R.D. 207 (N.D. Cal. 1994) (individual issues of reliance predominated in RICO consumer fraud action); Strain v. Nutri/Systems Inc., 1990 WL 209325 (E.D. Pa.) (no certification of RICO consumer fraud class).

53. 84 F.3d at 741. *Accord* In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300-02 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

54. Ford Ignition Switch, 174 F.R.D. at 349.

55. In re Diet Drugs, 1999 WL 673066 (E.D. Pa.).

manageability problem. Where a national class is involved, even a minor difference in the law on one element of proof or defense can cause significant—if not insurmountable—difficulties. In jury trials, the difficulties are most evident. As explained by the Sixth Circuit in *In re America Medical Systems Inc.*, "[i]f more than a few of the laws of the 50 states differ, the district judge would face an impossible task of instructing a jury on the relevant law."[56]

Rule 23 (b) (3) requires that the class action as a mode of litigation be superior to other available modes. Courts will consider the four Rule 23(b)(3) factors: (1) class members' interests in separate or individual actions; (2) any litigation relating to the same matter that has already begun, (3) the desirability of the particular forum in which plaintiffs seek to certify the class; and (4) any difficulties that are likely to surface if the action is prosecuted as a class action.[57]

Concisely stated, these factors look to the class action's manageability, fairness and efficiency, and to the available alternatives.

Courts repeatedly have held that where countless mini-trials would be necessary to resolve each class member's claim, the class action is not the superior method of adjudication.[58] How is a court to digest, or a jury to apply, the consumer fraud laws of 50 different states in a multijurisdictional class action? They cannot.

CONCLUSION

Defense counsel must not assume that trial judges will follow the prevailing *zeitgeist* and deny the certification of consumer fraud class actions because they involve individual issues. In the case of putative multijurisdictional classes, counsel should dig in and demonstrate to the courts not only the individual fact issues, but also the significant conflicts of consumer fraud statutes, which require conflict of laws analyses.

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56. 75 F.3d 1069, 1085 (6th Cir. 1996). *See also* Zandman v. Joseph, 102 F.R.D. 924, 929 (N.D. Ind. 1984) (common issues would not predominate in that fraud issues would have to be tried in accordance with substantive law of state of each class member).

57. Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 549-51 (D. Minn. 1999). The author's law firm represented some defendants in this case.

58. *See e.g.*, Gross v. Johnson & Johnson—Merck Consumer Pharm. Co., 696 A.2d 793, 800 (N.J.Super. 1997); Simer v. Rios, 661 F.2d 655, 678, (7th Cir. 1981) *cert. denied*, 456 U.S. 917 (1982); Boshes v. Gen. Motors Corp., 59 F.R.D. 589, 602 (N.D. Ill. 1973).