

Blog Entry: Third Circuit Establishes Test For Numerosity Under Rule 23(a)(1)

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While Fed. R. Civ. P. 23(a)(1), the “numerosity” requirement, is not a frequently challenged issue in many class actions, its importance cannot be ignored. Rule 23(a)(1) mandates that in order to certify a class action, the plaintiff must prove that the “class is so numerous that joinder of all members is impracticable.” While cases involving more than 40 potential class members are typically considered to satisfy this requirement, case law provides little guidance for determining whether joinder is “impracticable” in smaller potential classes.

In *In Re Modafinil Litig.*, No. 15-3475 (3d Cir. Sept. 13, 2016), the Third Circuit established a non-exhaustive list of factors for district courts to consider in determining whether joinder is “impracticable” in potentially smaller classes. Specifically, courts should consider: judicial economy, the claimants’ ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages. While noting that these factors are similar to Rule 23(b)(3)’s superiority requirement, the Third Circuit emphasized that the numerosity requirement is focused specifically on the potential for joinder of absent class members in the lawsuit, whereas the superiority requirement allows courts to “consider[] alternatives to class actions other than joinder.”

In Re Modafinil involved a putative class of up to 22 class members. The district court held that numerosity was satisfied and certified the class. While the Third Circuit did not hold that class certification was improper per se, it vacated the class certification order and remanded the case to the district court for reconsideration in light of the Third Circuit’s list of factors to consider.

A full copy of the decision is available [here](#).