CLASS ACTION LITIGATION

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I. INTRODUCTION

During the *Survey* period,[1] Michigan courts addressed a wide range of disputes involving class action claims. These disputes included constitutional claims brought under the Due Process Clause of the Michigan Constitution[2] as well as claims brought under the Headlee Amendment.[3] Michigan courts also addressed a number of class action cases involving non-constitutional claims, including unjust enrichment claims,[4] collective bargaining disputes brought against state and local governments,[5] and a suit brought under the Social Security Number Privacy Act.[6] This *Survey* demonstrates that class actions remain important tools for plaintiffs bringing suits where individual actions would

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1. The *Survey* period extended from June 1, 2019, to May 31, 2020.
2. *See infra* Part II.A.
3. *See infra* Part II.B.
4. *See infra* Part III.A.
5. *See infra* Part III.B.
6. *See infra* Part III.C.

be inefficient and impractical. Additionally, because federal case law concerning class certification is particularly persuasive to Michigan courts, this *Survey* provides a review of relevant decisions concerning class certification from the United States Circuit Court of Appeals for the Sixth Circuit, which includes the State of Michigan.[7]

II. CONSTITUTIONAL CLASS ACTION CLAIMS

A. Due Process Claims

In *Bauserman v. Unemployment Insurance Agency*, a group of former unemployment compensation benefits recipients brought a putative class action against the Unemployment Insurance Agency (Agency) alleging a deprivation of their due process rights pursuant to Const. 1963, art. 1, § 17.[8] Mr. Bauserman brought the class action lawsuit after he and his former employer received a questionnaire from the Agency concerning possible unreported earnings that Mr. Bauserman received while collecting unemployment compensation. Both Mr. Bauserman and his former employer stated Mr. Bauserman had not worked for the employer during the time in question.[9] Despite these responses, Mr. Bauserman received notices of redetermination, stating that he had intentionally misled the Agency and "had received unemployment compensation for which he was ineligible."[10] These notices of redetermination were followed by subsequent notices from the Agency stating his tax refunds could be seized if he failed to repay money owed to the Agency.[11] Mr. Bauserman responded to the Agency in an attempt to cure the issues, explaining that while he had received a single payment during the relevant time, it was for work performed in the previous year and that he was not employed during the time at issue.[12] Despite Mr. Bauserman's efforts, the Agency intercepted his state and federal income tax refunds.[13]

Following the Agency's interception, the plaintiffs brought the putative class action lawsuit alleging that "Michigan's unemployment fraud detection, collection, and seizure practices fail to comply with minimum due process requirements."[14] Soon after, the Agency issued

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7. *See infra* Part IV.B.

8. Bauserman v. Unemployment Ins. Agency, 330 Mich. App. 545, 549, 950 N.W.2d 446, 450 (2019).

9. *Id*. at 550, 950 N.W.2d at 450.

10. *Id*.

11. *Id.* at 551, 950 N.W.2d at 451.

12. *Id*.

13. *Id*.

14. *Id*.

additional notices of redetermination, nullifying its previous findings and returning all monies seized from the plaintiffs. The Michigan Court of Appeals found the plaintiffs had failed to provide timely notice of their due process claims to the defendant in compliance with section 600.6431(3) of the Michigan Compiled Laws.[15] However, on appeal, the Michigan Supreme Court ruled in favor of the named plaintiffs on that issue and returned the case to the Michigan Court of Appeals with the directive that the court "consider the Agency's argument that it is entitled to summary disposition on the ground that [the] plaintiffs failed to raise cognizable constitutional tort claims."[16]

In Michigan, "a claim for damages resulting from an alleged violation of the state constitution will be recognized when 'an official policy or custom caused a person to be deprived of [state] constitutional rights.'"[17] To implement this rule, Michigan courts apply a multifactor balancing test that Justice Boyle set out in his concurring opinion in *Smith v. Department of Public Health*.[18] Justice Boyle's balancing test requires the consideration of:

> (1) the existence and clarity of the constitutional violation itself, (2) the degree of specificity of the constitutional protection, (3) support for the propriety of a judicially inferred damage remedy in any "text, history, and previous interpretations of the specific provision," (4) "the availability of another remedy," and (5) "various other factors" militating for or against a judicially inferred damage remedy.[19]

Before conducting this analysis, the Michigan Court of Appeals rejected the Agency's contention that the Agency was not acting pursuant to a state policy or custom that mandated the alleged unlawful actions.[20] The court stated that the Agency's alleged use of "an automated decision-making system" that disqualifies persons from receiving unemployment benefits, accuses them of fraud, imposes unlawful penalties and interest, and

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15. *Id*. at 549, 950 N.W.2d at 450.

16. Bauserman v. Unemployment Ins. Agency, 503 Mich. 169, 190, 193 n.20, 931 N.W.2d 539, 553 n.20 (2019).

17. *Bauserman*, 330 Mich. App. at 561, 950 N.W.2d at 457 (quoting Carlton v. Dep't of Corrs., 215 Mich. App. 490, 505, 546 N.W.2d 671, 678 (1996)).

18. 428 Mich. 540, 637–52, 410 N.W.2d 749, 792–99 (1987) (Boyle, J., concurring in part and dissenting in part).

19. *Bauserman*, 330 Mich. App. at 562, 950 N.W.2d at 457 (quoting Mays v. Governor, 323 Mich. App. 1, 65–66, 916 N.W.2d 227, 264–65 (2018), *aff'd*, 506 Mich. 157, 954 N.W.2d 139 (2020)).

20. *Id*. at 566–67, 950 N.W.2d at 459–60 (citing Johnson v. VanderKooi, 502 Mich. 751, 762, 918 N.W.2d 785, 791–92 (2018)).

intercepts the financial resources of the plaintiffs constitutes an "established practice of state governmental officials such that it amounts to a custom supported by the force of law."[21]

The court then addressed whether it should infer a damages remedy from article 1, section 17 of the Michigan Constitution[22] by applying the multifactor balancing test from *Smith*. With regard to the first factor, that is, "the existence and clarity of the constitutional violation itself," the court found the plaintiffs' allegation that "the Agency violated Const. 1963, art. 1, § 17 in seizing their property without providing them with adequate notice and an opportunity to be heard" clearly fell within article 1, section 17 and, therefore, weighed in favor of inferring a remedy for monetary damages.[23] The court likewise found the second and third factors favored inferring a remedy for monetary damages, stating that "the Due Process Clause secures an absolute right to an opportunity for a meaningful hearing and an opportunity to be heard before individuals are deprived of their property" and "the plain language of Const. 1963, art. 1, § 17 does not leave the implementation of a private cause of action to the Legislature."[24] Reviewing the fourth factor regarding the availability of alternative remedies, the court rejected the Agency's claim that the Michigan Employment Security Act provides an adequate remedy for plaintiffs for due process violations and, thus, found the fourth factor also favored the plaintiffs' claim for monetary damages.[25] Finally, the court found that "the absolutely 'egregious nature[]' . . . of the Agency's alleged actions in this case may have led to the undermining of the due process rights of thousands of innocent citizens across this state at a particularly vulnerable time in their lives" and that such allegations, if shown, warrant monetary damages.[26] Accordingly, the Michigan Court of Appeals found the plaintiffs alleged a cognizable constitutional tort claim, allowing the putative class action to continue.[27] As of the date of this *Survey*, the court of claims has not yet ruled on the plaintiffs' pending motion for class certification.[28] The Agency filed an application for leave to appeal the

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21. *Id*.

22. MICH. CONST. of 1963, art. 1, § 17 provides, in pertinent part: "No person shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*." (emphasis added).

23. *Bauserman*, 330 Mich. App. at 568, 950 N.W.2d at 460 (citing *Mays*, 323 Mich. App. at 65–66, 916 N.W.2d at 264–65).

24. *Id*. at 569, 950 N.W.2d at 461 (internal citation and quotations omitted).

25. *Id*. at 572, 950 N.W.2d at 462.

26. *Id*. at 575, 950 N.W.2d at 464 (quoting *Mays*, 323 Mich. App. at 72, 916 N.W.2d at 268).

27. *Id*. at 576, 950 N.W.2d at 465.

28. *Id.* at 575, 950 N.W.2d at 464.

Michigan Court of Appeals' decision to the Michigan Supreme Court.[29] In a November 25, 2020 order, the Michigan Supreme Court scheduled oral argument on the Agency's application for leave to appeal and requested supplemental briefing "addressing whether the [plaintiffs] have alleged cognizable constitutional tort claims allowing them to recover a judicially inferred damages remedy."[30] As of the date of this *Survey*, the Michigan Supreme Court has not yet held oral argument, and the application for leave to appeal remains pending.

In *Jackson v. Southfield Neighborhood Revitalization Initiative*, the Michigan Court of Appeals reviewed another case concerning a putative class action brought over alleged due process violations.[31] The named plaintiffs were real property owners in Southfield, Michigan, who had judgments of foreclosure entered against their respective properties.[32] When the plaintiffs discovered that they no longer had title to their properties, they brought the putative class action alleging violations of their procedural and substantive due process rights.[33] The court found the defendants had fully complied with the notice requirements under the General Property Tax Act and, thus, did not deprive the plaintiffs of their right to procedural due process.[34] With regard to the substantive due process claim, the court stated that "it is necessarily true that, where a party's argument relies on the absence of appropriate notice and an opportunity to be heard, it is actually a claim of the denial of procedural due process." Thus, in attempting "to reiterate their procedural due process arguments as substantive due process arguments," the court rejected the substantive due process claim and affirmed the lower court's summary disposition of the plaintiffs' claims in favor of the defendant.[35] The Court of Appeals did not address any class certification issues.

B. Claims Under the Headlee Amendment

The Michigan Court of Appeals addressed a number of class action suits brought under the Headlee Amendment during the *Survey* period. Under the Headlee Amendment, "a local governmental unit is 'prohibited from levying any tax not authorized by law or charter . . . or from

29. Bauserman v. Unemployment Ins. Agency, 950 N.W.2d 737, 738 (Mich. 2020).
30. *Id.*
31. Jackson v. Southfield Neighborhood Revitalization Initiative, No. 344058, 2019 WL 6977831, at *1 (Mich. Ct. App. Dec. 19, 2019), *vacated*, 953 N.W.2d 402 (Mich. 2021).
32. *Id.*
33. *Id*. at *3.
34. *Id*. at *5.
35. *Id*. at *8.

increasing the rate of an existing tax above that rate authorized by law or charter' when the amendment was ratified."[36] The exception to this prohibition arises "when a majority of voters have approved the levying of a new tax or increasing the rate of an existing one."[37] Michigan courts have construed the Headlee Amendment as an "effort to link funding, taxes, and control."[38] While "the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not."[39] Thus, much litigation centers around whether a particular charge is a new tax or a user fee. When determining whether a charge is a tax or a user fee, Michigan courts apply the multifactor test set out by the Michigan Supreme Court in *Bolt v. City of Lansing*.[40]

In *Shaw v. City of Dearborn*, a putative class of Dearborn, Michigan residents alleged the city violated the Headlee Amendment when the city modernized its sewer system.[41] The modernization effort came in 2004 when Dearborn voters approved a property tax millage of $314.12 million to comply with federal regulations concerning combined-sewage-overflow events.[42] The voter-approved tax authorized Dearborn to incur debt, and the funds obtained from the tax were earmarked to service the debt.[43] According to the plaintiff representing the putative class of Dearborn residents, this modernization effort violated the Headlee Amendment in two ways. First, the plaintiff alleged the city's water and sewer rates contained unauthorized hidden charges that paid for capital

36. Shaw v. City of Dearborn, 329 Mich. App. 640, 650, 944 N.W.2d 153, 162 (2019) (quoting MICH. CONST. of 1963, art. 9, § 31).

37. *Id*.

38. Macomb Cty. Taxpayers Ass'n v. L'Anse Creuse Pub. Sch., 455 Mich. 1, 7, 564 N.W.2d 457, 460 (1997) (quoting Durant v. State Bd. of Educ., 424 Mich. 364, 383, 381 N.W.2d 662, 669 (1985)).

39. *Shaw*, 329 Mich. App. at 653, 944 N.W.2d at 163 (citing Jackson Cty. v. City of Jackson, 302 Mich. App. 90, 98–99, 836 N.W.2d 903, 908–09 (2013)).

40. 459 Mich. 152, 158, 587 N.W.2d 264, 268 (1998). As stated by the court in *Shaw*:

> Under *Bolt*, courts apply three key criteria when distinguishing between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose"; (2) "user fees must be proportionate to the necessary costs of the service"; and (3) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service. These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee."

Shaw, 329 Mich. App. at 653, 944 N.W.2d at 163 (internal citations omitted).

41. *Id.* at 643, 944 N.W.2d at 158.

42. *Id*. at 644, 944 N.W.2d at 158–59.

43. *Id*. at 644–45, 944 N.W.2d at 159.

infrastructure costs.[44] Second, the plaintiff argued the water and sewer rates unlawfully maintained caissons, which store combined sewage.[45]

With regard to the first theory relating to alleged capital infrastructure costs, the court found that, after ample discovery, the plaintiff had failed to present any evidence that the city had made unlawful charges relating to capital infrastructure costs.[46] Instead, the court found the record indicated the city made lawful charges relating to "ancillary water and sewer work that was performed at the same time as the sewer-separation work."[47]

The court of appeals also affirmed the trial court's dismissal based on the second theory. First, the plaintiff claimed that because not all sewer ratepayers benefit from the caissons, the costs related to them violated the Headlee Amendment.[48] The court rejected this argument as untenable since, under the theory, "a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system."[49] Instead, the court applied a common-sense approach to the use of public funds to maintain public utility systems:

> When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve a regulatory purpose of providing water to all of the city's residents.[50]

Finally, the court analyzed the *Bolt* factors to verify its finding that no Headlee violation had occurred.[51]

Concerning the first *Bolt* factor, the court found it "beyond dispute" that a regulatory purpose was present, as the water and sewer rates provided water and sewer service to the city's residents.[52] Addressing the second *Bolt* factor, the court found that users paid proportionate shares of

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44. *Id*. at 648, 944 N.W.2d at 160.
45. *Id*.
46. *Id*. at 657, 944 N.W.2d at 165.
47. *Id*.
48. *Id*. at 664, 944 N.W.2d at 168.
49. *Id*. at 664, 944 N.W.2d at 168–69.
50. *Id*. at 665, 944 N.W.2d at 169.
51. *Id.* at 666–69, 944 N.W.2d at 169–71.
52. *Id*. at 666, 944 N.W.2d at 169.

the relevant expenses since metered water usage dictated the water and sewer rates.[53] Finally, the court found the third *Bolt* factor also favored the conclusion that the city imposed a user fee, rather than a tax, since the charges at issue were voluntary in that each individual decided how much water to use.[54] Thus, in applying the *Bolt* factors, the court confirmed the city's water and sewer rates were permissible charges and not illicit taxes in violation of the Headlee Amendment.[55] The court of appeals did not address any class certification issues.

In *Gottesman v. City of Harper Woods*, a class of Harper Woods, Michigan residents brought similar claims under the Headlee Amendment but were more successful than the plaintiffs in Dearborn.[56] The dispute centered around a Storm Water Charge, which Harper Woods had assessed after the Michigan Department of Environmental Quality (MDEQ) ordered improvements to the Milk River System to comply with state and federal regulations.[57] Like the municipality in *Shaw*, Harper Woods argued the charge was a user fee and not an impermissible tax.[58] Applying the first *Bolt* factor, the court found the Storm Water Charge possessed characteristics of both a user fee and a tax.[59] Harper Woods instituted the charge in order to comply with federal and state regulations, indicating a regulatory component.[60] However, since the city had previously "levied ad valorem property taxes to pay for storm water costs," the current application of the charge "may have the effect of increasing revenues by omitting the storm water costs from the expenses covered by [the] defendant's general fund" and, thus, may have had a revenue-generating purpose.[61]

The second and third factors, however, were more conclusive. With regard to the second *Bolt* factor, since the charge did not "consider the individual characteristics of the property, such as pollutants, the type or extent of improvements thereon, or how said improvements affect the amount of runoff flowing from the property," taxpayers did not pay

53. *Id*. at 666–67, 944 N.W.2d at 170.

54. *Id*. at 669, 944 N.W.2d at 171.

55. *Id*. The court also rejected the plaintiff's unjust enrichment claim since the court's analysis determined the charges were proper and reasonable. *Id*. at 669–70, 944 N.W.2d at 171.

56. Gottesman v. City of Harper Woods, No. 344568, 2019 WL 6519142, at *1 (Mich. Ct. App. Dec. 3, 2019).

57. *Id*.

58. *Id*. at *3.

59. *Id.* at *5.

60. *Id*. (citing Binns v. City of Detroit, Nos. 337609, 339176, 2018 WL 6363126, at *1 (Mich. Ct. App. Nov. 6, 2018), *vacated*, 951 N.W.2d 327 (Mich. 2020)).

61. *Id*.

proportionate shares of the charge.[62] Finally, in addressing the third *Bolt* factor, the court noted that the city had conceded the charge was not voluntary.[63] Thus, considering the *Bolt* factors in their entirety, the court concluded the charge was an impermissible tax in violation of the Headlee Amendment and not a user fee.[64]

In finding the charge violated the Headlee Amendment, the court of appeals ruled that the class could maintain its unjust enrichment claim against the city.[65] As demonstrated in *Shaw*, the unjust enrichment claim essentially depended on a successful Headlee Amendment claim; the court of appeals found the Headlee Amendment claim was not an adequate substitute for the unjust enrichment claim.[66] While the statute of limitations for the Headlee Amendment claim was one year, the unjust enrichment claim carried a six-year limitations period.[67] Thus, while the class could recover just a single year's charge under the Headlee Amendment, it could recover for six years' worth of charges under the unjust enrichment claim.[68] The trial court certified the class, but the court of appeals did not address any class certification issues on appeal.[69]

Harper Woods filed an application for leave to appeal to the Michigan Supreme Court, which was held in abeyance pending a decision in *Detroit Alliance Against Rain Tax (DAART) v. City of Detroit*.[70] In *DAART*, the Michigan Supreme Court vacated a Michigan Court of Appeals decision that found no Headlee Amendment violation related to certain drainage charges.[71]

III. NON-CONSTITUTIONAL CLASS ACTION CLAIMS

A. Unjust Enrichment Claims

In addition to the class action cases centering around constitutional claims, the *Survey* period saw the Michigan Court of Appeals address a number of unjust enrichment claims brought in class action suits against

62. *Id*. at *6.
63. *Id*.
64. *Id*. The court also rejected the city's arguments that, despite constituting a tax, the charge was permissible; the court found that neither the Drain Code nor the city's charter authorized the tax. *Id.* at *6–8.
65. *Id.* at *9.
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id.* at *2.
70. 951 N.W.2d 354 (Mich. 2020), *amended on reconsideration in part*, 953 N.W.2d 724 (Mich. 2021).
71. *Id.*

Michigan municipalities. As a preliminary matter, the Michigan Supreme Court recently ruled on the issue of whether the Governmental Tort Liability Act (GTLA)[72] precluded unjust enrichment claims against governmental agencies.[73] Though the matter in *Wright v. Genesee County Board of Commissioners* was not brought on a class basis, because the Michigan Supreme Court's ruling played an impactful role on class action unjust enrichment claims included in this *Survey*, it bears review here. In *Wright*, the plaintiff Jeffrey Wright participated in an employee health insurance plan, which Genesee County administered.[74] An audit revealed that the county's collective insurance premiums erroneously exceeded proper charges.[75] The overcharged amount was refunded to the county and deposited into its general fund.[76] The plaintiff, claiming the inflated premium costs were allocated to the policy holders, brought an unjust enrichment claim for his proportionate share of the refund.[77] In response, the county argued the GTLA barred the claim.

In reviewing the contours of the GTLA, the Michigan Supreme Court in *Wright* stated that the act "provides governmental agencies and their employees with immunity from tort liability when engaged in the exercise of governmental functions."[78] As a general matter, the court noted that "at least two categories of claims are not barred by the GTLA: those seeking compensatory damages for breach of contract and claims seeking a remedy other than compensatory damages."[79] As for unjust enrichment, the Michigan Supreme Court stated it "is a cause of action to correct a defendant's unjust retention of a benefit owed to another . . . [that] is grounded in the idea that a party 'shall not be allowed to profit or enrich himself inequitably at another's expense.'"[80] Thus, in correcting the inequitable retention of a benefit, the remedy for an unjust enrichment claim is not compensatory damages but restitution.[81] Applying these principles, the Michigan Supreme Court found that a claim for unjust enrichment imposes no tort liability, and therefore, the GTLA did not bar the claim.[82]

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72. MICH. COMP. LAWS §§ 691.1401–691.1419 (2012).
73. Wright v. Genesee Cty. Bd. of Comm'rs, 504 Mich. 410, 934 N.W.2d 805 (2019).
74. *Id*. at 414, 934 N.W.2d at 807–08.
75. *Id*. at 415, 934 N.W.2d at 808.
76. *Id*.
77. *Id*.
78. *Id*. at 417, 934 N.W.2d at 809 (citing Ray v. Swager, 501 Mich. 52, 61, 903 N.W.2d 366, 369–70 (2017)).
79. *Id*.
80. *Id*. at 417–18, 934 N.W.2d at 809 (citing McCreary v. Shields, 333 Mich. 290, 294, 52 N.W.2d 853, 855–56 (1952)).
81. *Id*. at 418, 934 N.W.2d at 810.
82. *Id*. at 422, 934 N.W.2d at 811.

Moving to the unjust enrichment claims brought on a class basis or a putative class basis, in *Kincaid v. City of Flint*, a class of Flint residents sued after the city raised water and sewage rates in 2011.[83] While the rate increase was intended to address budgetary shortfalls related to such services, the plaintiffs alleged the city's actions violated local ordinances and, thus, constituted a breach of contract or, in the alternative, unjust enrichment.[84]

The court of appeals rejected the breach of contract claim, noting that "[i]n order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract."[85] In the instant case, the ordinances allegedly violated markedly failed to show such an intention.[86]

Moving to the unjust enrichment claim, the court stated that "[i]n order to sustain the claim of unjust enrichment, [the] plaintiff must establish (1) the receipt of a benefit by [the] defendant from [the] plaintiff, and (2) an inequity resulting to [the] plaintiff because of the retention of the benefit by [the] defendant."[87] The plaintiffs pled two claims for unjust enrichment. First, the plaintiffs claimed the water and sewer rate increase failed to comply with the applicable ordinances, resulting in an unlawful exaction.[88] Second, the plaintiffs claimed the defendants charged an illegal water readiness to serve fee.[89]

As for the first unjust enrichment claim, while the breach of contract claim failed because the statute did not provide such a cause of action, the court found the equitable right to recover illegally obtained money was not statutorily dependent.[90] Moreover, in a previous proceeding, the court of appeals determined the rate increase did, in fact, violate the relevant ordinances.[91] Accordingly, the Michigan Court of Appeals found the first

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83. Kincaid v. City of Flint, No. 337972, 2020 WL 1896712, at *1 (Mich. Ct. App. Apr. 16, 2020), *leave to appeal denied*, 951 N.W.2d 894 (Mich. 2020).

84. *Id*. at *2.

85. *Id*. at *5 (quoting Studier v. Mich. Pub. Sch. Emp'r Retirement Bd., 472 Mich. 642, 662, 698 N.W.2d 350, 362 (2005)).

86. *Id*.

87. *Id*. (quoting Belle Isle Grill Corp. v. City of Detroit, 256 Mich. App. 463, 478, 666 N.W.2d 271, 280 (2003)).

88. *Id*. at *6.

89. *Id*. at *7.

90. *Id*. (quoting Pingree v. Mut. Gas Co., 107 Mich. 156, 157, 65 N.W. 6, 6–7 (1895)). Moreover, the court found the equitable claim was not barred by the Governmental Tort Liability Act, MICH. COMP. LAWS §§ 691.1401–691.1419 (2012). *Id*. (citing Wright v. Genesee Cty. Bd. of Comm'rs, 504 Mich. 410, 934 N.W.2d 805 (2019)).

91. *Id*. at *6 (citing Kincaid v. City of Flint (*Kincaid II*), 311 Mich. App. 76, 84, 874 N.W.2d 193, 199 (2015)).

unjust enrichment claim survived the motion for summary disposition.[92] Unlike the first unjust enrichment claim, the court found the plaintiffs failed to plead an inequity resulting from the water readiness to serve fee and rejected the second unjust enrichment claim.[93] The court found it determinative that the plaintiffs received the water for which they paid.[94] Thus, in failing to allege an inequity, the second unjust enrichment claim was rejected.[95]

In *Collins v. City of Flint*, another class of Flint residents brought suit against the city in the wake of the Flint Water Crisis.[96] Unlike parallel litigation following the Flint Water Crisis, *Collins* centered around an unjust enrichment claim, the gravamen of which was rather simple: "the plaintiffs paid good money for bad water."[97] The court provided a straightforward analysis of the claim. In alleging that the City of Flint not only provided contaminated water but also required the plaintiffs to *pay* for the contaminated water, the plaintiffs stated a valid unjust enrichment claim upon which relief may be granted.[98] Thus, the court reversed the trial court's granting of the defendant's Michigan Court Rule (MCR) 2.116(C)(8) motion and remanded for the case to proceed through discovery.[99] As of the date of this *Survey*, the trial court has not yet ruled on the plaintiffs' motion for class certification.

The Michigan Court of Appeals conducted a similar analysis in *Logan v. Charter Township of West Bloomfield*, where a putative class of West Bloomfield, Michigan residents brought, inter alia, an unjust enrichment claim against the township.[100] The dispute arose when West Bloomfield's building division levied fees, which the putative plaintiff class claimed were excessive and generated a profit used to fund unrelated activities.[101] The Michigan Court of Appeals, on remand from the Michigan Supreme Court, followed the Michigan Supreme Court's opinion in *Wright v. Genesee County Board of Commissioners* and found that the putative plaintiff class in the instant case sought the return of monies paid to the defendant, which the defendant should not have charged in the first

92. *Id*.
93. *Id*. at *7.
94. *Id*.
95. *Id*. at *8.
96. Collins v. City of Flint, No. 345203, 2019 WL 3986245, at *1 (Mich. Ct. App. Aug. 22, 2019), *leave to appeal denied*, 505 Mich. 1133, 944 N.W.2d 691 (2020).
97. *Id*.
98. *Id*. at *4.
99. *Id*. at *5.
100. Logan v. Charter Twp. of W. Bloomfield, No. 333452, 2020 WL 814408, at *1 (Mich. Ct. App. Feb. 18, 2020).
101. *Id*.

instance. Therefore, the funds were unjustly held by [the] defendant.[102] Thus, as in *Collins*, the court found the plaintiff class had stated a valid unjust enrichment claim upon which relief may be granted, allowing the case to move forward with discovery.[103] Based on a review of the trial court docket as of the writing of this *Survey*, it does not appear that the court has certified the putative class.

B. Collective Bargaining Disputes with State and Local Governments

The *Survey* period also saw two cases in which classes of public-sector retirees brought suits against state and local governments after they made adjustments to the retirees' retirement packages.[104] In *Allen Park Retirees Ass'n v. City of Allen Park*, a collective bargaining agreement (CBA) between the city and former police officers promised healthcare benefits for the retirees.[105] The CBA stated the city "reserves the right to change any and/or all insurance company(ies) and/or plan(s), providing the replacement program is equal to or better than the program available from the present company, subject to the mutual agreement of the City and the Union."[106] However, when Joyce Parker became the Emergency Manager for the city in 2013, she notified the retirees that she would propose changes to the CBA in an effort to address financial hardship facing the city.[107] After the changes were made, the plaintiff brought a class action against the city, the State of Michigan, the Department of Treasury, and Parker, in her capacity as Emergency Manager, in Ingham County Circuit Court.[108] However, the claims against the State and the Department of Treasury were transferred to the court of claims, while the claims against the city and Parker were transferred to the Wayne County Circuit Court.[109] The Wayne County Circuit Court proceedings were subsequently stayed pending resolution of the court of claims action.[110]

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102. *Id*. at *4 (citing Wright v. Genesee Cty. Bd. of Comm'rs, 504 Mich. 410, 934 N.W.2d 805 (2019)).

103. *Id*.

104. *See* Allen Park Retirees Ass'n v. City of Allen Park, 329 Mich. App. 430, 942 N.W.2d 618 (2019), *leave to appeal denied*, 505 Mich. 1039, 941 N.W.2d 620 (2020); *see also* City of Wayne Retirees Ass'n v. City of Wayne, Nos. 343522, 343916, 2019 WL 5199361, at *1 (Mich. Ct. App. Oct. 15, 2019), *leave to appeal denied*, 506 Mich. 904, 947 N.W.2d 824 (2020).

105. *Allen Park Retirees Ass'n*, 329 Mich. App. at 433, 942 N.W.2d at 620–21.

106. *Id*., 942 N.W.2d at 621.

107. *Id*. at 434, 942 N.W.2d at 621.

108. *Id*. at 435, 942 N.W.2d at 622.

109. *Id*. at 435–36 , 942 N.W.2d at 622.

110. *Id*. at 436, 942 N.W.2d at 622.

With regard to the claims against the State and the Department of Treasury, the court of claims found that the plaintiffs failed to allege a requisite change in the actual coverage of the health insurance policies, finding only an imposition of deductibles and copays.[111] Following the court of claims' dismissal of the claims against the State-defendants, the plaintiffs in the Wayne County Circuit Court action moved to amend their complaint.[112] The Wayne County Circuit Court denied the request to amend and dismissed the case on a motion for summary disposition, concluding that the claims against Parker were moot and the doctrines of collateral estoppel and res judicata barred the remaining claims against the city.[113]

On appeal, the Michigan Court of Appeals first turned to the issue of mootness. As to the claims against Parker, the court noted that since Parker was no longer the Emergency Manager of Allen Park, there was no possible relief the court could provide in ruling against her.[114] Thus, the claims against Parker were moot.[115] However, the court found that "what is not moot is [the] plaintiffs' claims that the city improperly modified the benefits and that [the] plaintiffs should have been allowed to amend their complaint to reflect these claims."[116] But to complicate matters, the Michigan Supreme Court had recently reversed the case on which the plaintiffs had relied for this issue.[117] Thus, the court decided to remand the case to the trial court with instruction to "reconsider [the] plaintiffs' motion to amend their complaint or, alternatively, consider a motion to file a new amended complaint if [the] plaintiffs deem it appropriate."[118]

The court then turned to the issue of whether the doctrines of collateral estoppel and res judicata precluded the remaining claims against the city. The court found that neither of the doctrines required dismissal of the remaining claims—and for the same reason.[119] The court found that the

111. *Id*. The court of claims also rejected a number of constitutional claims not at issue in the present appeal. *Id*. at 437, 942 N.W.2d at 622 (rejecting claims brought under the Contracts Clause of the Michigan Constitution and under constitutional due-process protections).

112. *Id*. at 438, 942 N.W.2d at 623.

113. *Id*. at 441, 942 N.W.2d at 624–25.

114. *Id*. at 442, 942 N.W.2d at 625.

115. *Id*.

116. *Id*. at 443, 942 N.W.2d at 625.

117. *Id*. The plaintiffs had relied on the recently reversed *Kendzierski v. Macomb County*, 319 Mich. App. 278, 280, 901 N.W.2d 111, 113 (2017), *rev'd*, 503 Mich. 296, 931 N.W.2d 604 (2019).

118. *Allen Park Retirees Ass'n*, 329 Mich. App. at 443, 942 N.W.2d at 625–26.

119. *Id*. at 446, 942 N.W.2d at 627.

relevant claims were not properly addressed or decided in the court of claims proceedings and, thus, could continue.[120]

In *City of Wayne Retirees Ass'n v. City of Wayne*, another group of retirees, this time from Wayne, Michigan, sued the city after it changed the retirees' healthcare coverage benefits.[121] The relevant CBAs stated that the terms of the healthcare benefits would continue "[f]or the life of this agreement."[122] Separately, the CBAs made general references to '"the duration of this agreement,' which expressly limited all provisions of the CBAs to the effective term of each CBA."[123] According to the plaintiffs, the dissimilar phrasing created patent and latent ambiguities as to whether the healthcare benefits would extend beyond the life of any given CBA.[124] Moreover, the plaintiffs argued that their CBAs provided a vested right to receive lifetime healthcare benefits.[125]

The Michigan Court of Appeals, however, rejected any finding of ambiguity. Instead, the court found "[t]he plain meaning of those phrases indicates that they were used interchangeably and that no distinction was intended to establish vesting of retiree healthcare benefits[;] . . . they were simply different ways of saying the same thing."[126] In rejecting the claims of ambiguity, the court ruled that the "plaintiffs have not offered evidence to show that the phrases 'lifetime of the agreement' and 'duration of the agreement' are subject to an interpretation that would extend retiree healthcare benefits awarded under the CBAs to retirees for their lifetimes, beyond the lifetime or duration of the applicable CBAs."[127] Thus, the plaintiffs' claims were dismissed.[128]

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120. *Id*.

121. City of Wayne Retirees Ass'n v. City of Wayne, Nos. 343522, 343916, 2019 WL 5199361, at *1 (Mich. Ct. App. Oct. 15, 2019), *leave to appeal denied*, 506 Mich. 904, 947 N.W.2d 824 (2020).

122. *Id*.

123. *Id*.

124. *Id*.

125. *Id*.

126. *Id*. at *7.

127. *Id*. at *9. The court also rejected the plaintiffs' claim that the past practices doctrine was applicable, finding the plaintiffs failed to make the necessary showing that "a past practice was so widely acknowledged and mutually accepted by the parties that there was a meeting of the minds with respect to an agreement to modify the CBAs to extend healthcare benefits to retirees for their lifetimes, beyond the life or duration of the applicable CBA." *Id*. at *11.

128. *Id*.

C. Social Security Number Privacy Act Claims

The final Michigan state court appellate decision during the *Survey* period involving a class action suit was brought under the Social Security Number Privacy Act (SSNPA).[129] The SSNPA, in pertinent part, states that "a person shall not intentionally . . . publicly display all or more than [four] sequential digits of the social security number" of a person.[130] The plaintiffs claimed they discovered the first five digits of their Social Security numbers listed on Thomson Reuters' "public records portal," which was allegedly available to other subscribers of Thomson Reuters' services.[131] In an effort to comply with the procedural requirements of the SSNPA, the plaintiffs provided Thomson Reuters with a written demand letter calling for the removal of their information and payment of $5,000.[132] The $5,000 demand for payment was not an assessment of actual damages by the plaintiffs but rather the amount the plaintiffs believed they were entitled to in the form of statutory damages pursuant to the SSNPA.[133] The plaintiffs argued that the SSNPA allows claimants to elect recovery of statutory damages rather than plead actual damages.[134]

The court, however, disagreed. Instead, the court found the pleading requirements under the SSNPA rather straight forward. The SSNPA provides that:

> An individual may bring a civil action against a person who violates [the SSNPA] and may recover actual damages. If the person knowingly violates [the SSNPA], an individual may recover actual damages or $1,000.00, whichever is greater. If the person knowingly violates [the SSNPA], an individual may also recover reasonable attorney fees.[135]

The court found that the option to claim the $1,000 in statutory damages only comes into play *after* actual damages have been pled and proven and that "[a]bsent pleading actual damages, a plaintiff fails to plead a cause of action for a violation of MCL 445.83."[136] In the instant case, the

129. Nyman v. Thomson Reuters Holdings, Inc., 329 Mich. App. 539, 541, 942 N.W.2d 696, 700 (2019), *leave to appeal denied*, 505 Mich. 1069, 943 N.W.2d 94 (2020).
130. MICH. COMP. LAWS § 445.83(1)(a) (2005).
131. *Nyman*, 329 Mich. App. at 541, 942 N.W.2d at 700.
132. *Id*. at 541–42, 942 N.W.2d at 700.
133. *Id*.
134. *Id*. at 545, 942 N.W.2d at 702.
135. MICH. COMP. LAWS § 445.86(2) (2005).
136. *See Nyman*, 329 Mich. App. at 547, 942 N.W.2d at 702.

"plaintiffs' demand letter said nothing about actual damages," and, thus, the plaintiffs failed to state a claim under the SSNPA.[137]

IV. GUIDANCE ON CLASS CERTIFICATION FROM FEDERAL COURTS

The preceding *Survey* of decisions involving class action suits provides insight into the types of claims often brought on a class basis in Michigan courts. The *Survey* demonstrates that class actions remain a tool for plaintiffs bringing suits against governmental entities[138] as well as other suits where individual actions would be inefficient and impractical.[139] Absent, however, is a review of the key procedural step of class certification, in which the court certifies that "a member of a class may maintain a suit as a representative of all members of the class."[140] Despite the importance of class certification, there is scant case law from Michigan courts on the issue, and there were no opinions on the issue during the *Survey* period.[141] Due to this scarcity of precedent as well as the intimate similarities between the Michigan Court Rules and the Federal Rules of Civil Procedure concerning class certification,[142] the Michigan Supreme Court has stated that "it is appropriate to consider federal cases" when determining whether a court should certify a class.[143] Thus, federal case law is quite persuasive in the class certification setting in Michigan state courts, creating an impetus for Michigan class action practitioners to remain up to date on federal class certification case law.[144] Accordingly,

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137. *Id*. at 549, 942 N.W.2d at 703.

138. *See* Kincaid v. City of Flint, No. 337972, 2020 WL 1896712, at *1 (Mich. Ct. App. Apr. 16, 2020), *leave to appeal denied*, 951 N.W.2d 894 (Mich. 2020); Logan v. Charter Twp. of W. Bloomfield, No. 333452, 2020 WL 814408, at *1 (Mich. Ct. App. Feb. 18, 2020); Jackson v. Southfield Neighborhood Revitalization Initiative, No. 344058, 2019 WL 6977831, at *1 (Mich. Ct. App. Dec. 19, 2019), *vacated*, 953 N.W.2d 402 (Mich. 2021); Gottesman v. City of Harper Woods, No. 344568, 2019 WL 6519142, at *1 (Mich. Ct. App. Dec. 3, 2019); City of Wayne Retirees Ass'n v. City of Wayne, Nos. 343522, 343916, 2019 WL 5199361, at *1 (Mich. Ct. App. Oct. 15, 2019), *leave to appeal denied*, 506 Mich. 904, 947 N.W.2d 824 (2020); Collins v. City of Flint, No. 345203, 2019 WL 3986245, at *1 (Mich. Ct. App. Aug. 22, 2019), *leave to appeal denied*, 505 Mich. 1133, 944 N.W.2d 691 (2020); *see also* Bauserman v. Unemployment Ins. Agency, 330 Mich. App. 545, 549, 950 N.W.2d 446, 450 (2019); Allen Park Retirees Ass'n v. City of Allen Park, 329 Mich. App. 430, 942 N.W.2d 618 (2019), *leave to appeal denied*, 505 Mich. 1039, 941 N.W.2d 620 (2020).

139. *Nyman*, 329 Mich. App. at 541, 942 N.W.2d at 700.

140. Zine v. Chrysler Corp., 236 Mich. App. 261, 286, 600 N.W.2d 384, 399 (1999).

141. *Id*. at 288 n.12, 600 N.W.2d at 400 n.12.

142. *Compare* MICH. CT. R. 3.501(A)(1) *with* FED. R. CIV. P. 23.

143. *Zine*, 236 Mich. App. at 288 n.12, 600 N.W.2d at 400 n.12.

144. There are, however, some differences between the two class certification regimes, of which practitioners must also be aware. *See* Robert M. Jackson et. al., *Staying Classy in*

this *Survey* will review relevant decisions from the United States Circuit Court of Appeals for the Sixth Circuit, which includes the State of Michigan.

A. Class Certification Under the Michigan and Federal Rules

As stated above, the Michigan rules concerning class certification closely track the corresponding federal rules. Under MCR 3.501(A)(1):

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.[145]

In comparison, Federal Rule of Civil Procedure 23 states that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;

State and Federal Court: Understanding the Small but Significant Differences Between Michigan and Federal Class Action Rules, MICH. B.J., 20, 20 (2016).

145. MICH. CT. R. 3.501(A)(1).

> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.[146]

Moreover, if the putative class is primarily seeking money damages, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members."[147]

B. Sixth Circuit Class Certification Decisions

In *Zehentbauer Family Land, LP v. Chesapeake Exploration, L.L.C.*, a group of lessors brought suit against their respective lessee, an oil and gas exploration and production company.[148] Between 2010 and 2012, the plaintiffs and the defendants committed to hundreds of oil and gas lease agreements, which promised royalty payments to the plaintiffs "based on the gross proceeds received by the defendants from the sale of each well's oil and gas production."[149] Some of the oil and gas extracted from the relevant properties was then sold to companies affiliated with the defendants, known as midstream companies.[150] To ensure the affiliated companies did not receive a preference in pricing for the oil and gas, the defendants used the "netback method."[151] The netback method tallies "the weighted average of prices at which the midstream affiliates sell the oil and gas at various downstream locations and adjusts for the midstream company's costs of compression, dehydration, treating, gathering, processing, fractionation, and transportation to move the raw oil and gas from the wellhead to downstream resale locations."[152] According to the plaintiffs, the defendants' sales to its midstream affiliates resulted in an underpayment of royalties for two reasons. First, the plaintiffs alleged the defendants sold the extracted oil and gas at below-market prices; second,

146. FED. R. CIV. P. 23(a).
147. FED. R. CIV. P. 23(b)(3).
148. Zehentbauer Family Land, LP v. Chesapeake Expl., L.L.C., 935 F.3d 496, 499 (6th Cir. 2019).
149. *Id*.
150. *Id*.
151. *Id*.
152. *Id*. at 501.

the defendants improperly deducted post-production costs from the royalty payment, which the defendants should have absorbed instead.[153]

On the issue of class certification, the defendants argued that the plaintiffs failed to show predominance. Before addressing the issue directly, the court noted that "[i]t may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[154] This probing was necessary because "the 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"[155] The court agreed with the defendants that the plaintiffs' first theory of relief failed to provide the requisite predominance.[156] The plaintiffs' claim that common issues predominated with respect to the allegation that oil and gas was sold at below-market prices failed because such a showing would require a highly individualized analysis for each class member.[157] The court would need to determine "the quality of the oil and gas sold at each well, the quantity of the oil and gas so sold, and the proximity of the well to processing facilities and downstream markets."[158]

With respect to the second theory of liability, the court sided with the plaintiffs on the issue of predominance.[159] The second theory centered around whether the lease agreements deployed the "at-the-well rule" or the "marketable-product rule" with regard to allocating post-production costs.[160] The at-the-well rule allows the lessee to allocate post-production costs to the lessor "in determining the value of the lessor's royalty."[161] In contrast, the marketable-product rule dictates that "the lessee [is] alone responsible for costs incurred up to the place of sale of minerals produced by the lessee or to the point at which a 'marketable product' has been obtained by the lessee."[162] While some states uniformly operate under one rule or the other, Ohio—the source of governing law in the present case—allowed the parties to elect which rule to use.[163] Although there was no dispute that the defendants actually used the at-the-well rule and allocated

153. *Id*. at 499.
154. *Id*. at 503 (quoting Comcast Corp. v. Behrend, 569 U.S. 27, 34, (2013)).
155. *Id*. at 504 (quoting *Comcast*, 569 U.S. at 34).
156. *Id*. at 506.
157. *Id*.
158. *Id*. at 505.
159. *Id*. at 506.
160. *Id*.
161. *Id*. at 504 (quoting Peter A. Lusenhop & John K. Keller, *Deduction of Post-Production Costs—An Analysis of Royalty Calculation Issues Across the Appalachian Basin*, 36 ENERGY & MIN. L. INST. 837, 840–41 (2015)).
162. *Id*. (quoting 3 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW § 645 (2018)).
163. *Id*. at 504–05.

post-production costs, the parties, predictably, disagreed over which rule the contract required.[164] Thus, a single determination would resolve the issue of liability for every class member's claim: whether the standard lease agreements required the marketable product rule.[165] For this reason, the court found that common issues predominated for the second theory for relief.[166]

Finally, the court declined to address the defendants' argument that the deducting of post-production costs was consistent with the leases. The court stated that while it would probe into the merits at the certification stage when conducting its analysis, it would do so only to the extent the certification analysis demanded.[167] Having completed its analysis on the certification issue, the court left issues concerning the merits for future proceedings and remanded the case to the district court.[168]

Like many of the Michigan class action cases included in this *Survey*, *Mays v. LaRose* concerned a class action suit brought against a state actor.[169] In *Mays*, a number of Ohio voters sued the State alleging equal protection violations after they were arrested and detained shortly before the 2018 election, which resulted in their inability to vote.[170] Under Ohio law, any registered voter may vote by absentee ballot as long as the voter made an absentee ballot request by noon three days before the election.[171] The only exception to this deadline is for unexpectedly hospitalized electors, who have until 3:00 p.m. on election day to request an absentee ballot.[172] The plaintiffs claimed the Equal Protection Clause prohibited the "State's disparate treatment of hospital-confined and jail-confined electors"[173] and sought to certify a class representing "any person police arrest[ed] between close of business on Friday and the close of the polls on Election Day."[174]

As to class certification, the court found the prospective class was overly broad and, thus, failed the commonality and typicality requirements.[175] As a result, the court reversed the trial court's order

164. *Id*. at 506.
165. *Id*.
166. *Id*.
167. *Id*. at 508 (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013)).
168. *Id*. at 510.
169. Mays v. LaRose, 951 F.3d 775, 780 (6th Cir. 2020).
170. *Id*.
171. *Id*.
172. *Id*. at 780–81.
173. *Id*. at 780.
174. *Id*. at 793.
175. *Id*.

certifying the class.[176] This was because "class members arrested before Saturday's noon cutoff for requesting an absentee ballot ha[d] substantially different claims than class members arrested after the deadline."[177] To demonstrate this point, the court considered the circumstances of the two named plaintiffs representing the single class. The first named plaintiff was arrested on the Saturday evening prior to Election Day and, therefore, would have qualified for a late absentee ballot request had he instead been unexpectedly hospitalized.[178] The court found these facts gave rise to "at least a plausible [e]qual [p]rotection claim."[179] The other named plaintiff, however, was arrested on Friday evening—that is, more than three days prior to the election—and, therefore, would not have qualified for a late absentee ballot request had he instead been unexpectedly hospitalized.[180] With no evidence of disparate treatment presented, this plaintiff's equal protection claim was significantly weaker.[181] Thus, the court found the class was overly broad by including individuals with substantively different claims, resulting in a failure to show the commonality and typicality requirements.[182]

The final case reviewed in this *Survey* again concerned a class action brought against a governmental unit. In *Doe v. City of Memphis*, three women alleged sex discrimination in violation of the Equal Protection Clause by claiming the city "failed to submit for testing the sexual assault kits (SAKs) prepared after their sexual assaults."[183] The plaintiffs alleged the defendant possessed over 15,000 prepared but unreported SAKs.[184]

While some discovery was conducted with regard to this claim, the defendant brought a motion to strike class allegations, which the district court granted.[185] The district court reasoned that the commonality requirement was unmet due to the "discretion individual investigators have in deciding whether to submit a SAK for testing."[186] The district court found that under the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, this discretion defeated a showing of commonality since the Court

176. *Id*.
177. *Id*.
178. *Id*. at 794.
179. *Id*.
180. *Id.*
181. *Id*.
182. *Id*.
183. Doe v. City of Memphis, 928 F.3d 481, 485 (6th Cir. 2019).
184. *Id*.
185. *Id*. at 486.
186. *Id*. at 497.

required a "common mode of exercising discretion that pervades the entire company."[187]

The Sixth Circuit, however, reversed the district court's finding that additional discovery could not "allow plaintiffs to identify and certify a class."[188] The court found the district court's reliance on *Dukes* to be misplaced since there it was the plaintiff that moved for class certification after an opportunity for meaningful discovery.[189] In the present case, the *defendant* moved to strike class allegations before the plaintiffs had an opportunity for meaningful discovery.[190] Thus, the district court was premature in finding the plaintiffs could not meet the commonality requirement.[191] Accordingly, the Sixth Circuit reversed the district court's decision to strike the plaintiffs' class allegations and remanded the case.[192]

V. CONCLUSION

This *Survey* has reviewed cases that demonstrate the potential power and utility of class action proceedings. This procedural device will continue as an important tool for litigants in Michigan courts as they seek to efficiently adjudicate their claims. Michigan litigants will continue to look to the livelier federal docket for guidance on the issue of class certification as Michigan courts continue to develop their own jurisprudence on this pivotal issue. That said, certifying a class in any litigation, particularly in federal court, may become more and more difficult in the years to come as the federal appellate courts, including the Supreme Court of the United States, now have many more conservative jurists, many of whom tend to be more skeptical of class actions generally.

187. *Id*. (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 356 (2011)).
188. *Id*. at 496.
189. *Id*. at 497.
190. *Id*.
191. *Id*.
192. *Id*. at 497–98.