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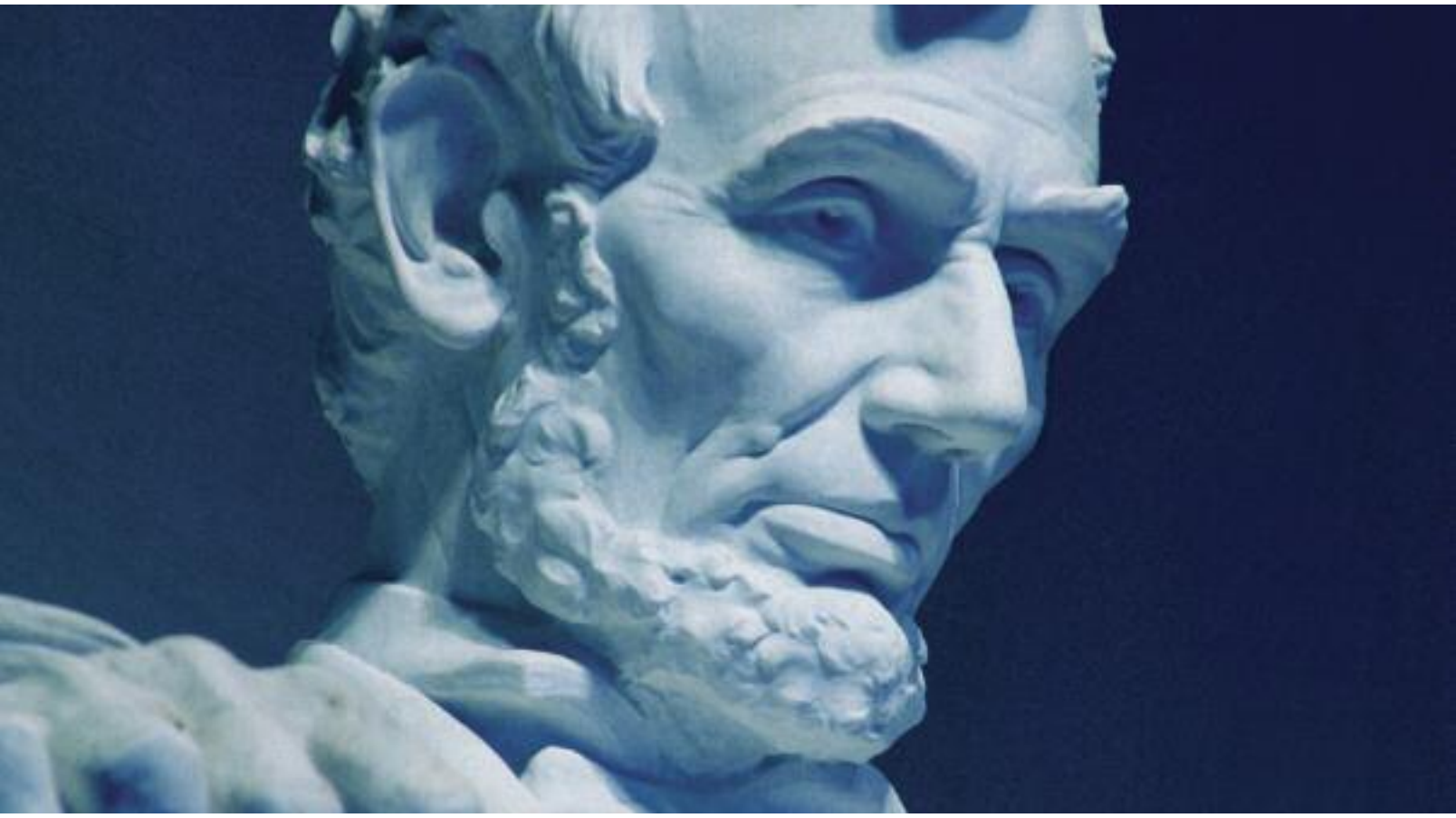

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articles

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Class Action Practice Today

AN OVERVIEW

By William B. Rubenstein

Class action law is in flux, but that's nothing new. For the past 40 years, class action law has been a battle between two competing trends: expansion (in the number and types of cases and in the amount of settlement awards) and contraction (resulting from legislation and court decisions aimed at limiting the class suit's seemingly perpetual growth).

The late 1980s and early 1990s were characterized by the development of the mass tort field, with class sizes and settlement values never seen before. The Supreme Court's decisions in *Amchem*[1] and *Ortiz*[2] reined these in to some extent, while Congress, during the same period, attempted to slow the increase of securities class actions with its enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA). Both sets of developments have had significant effects: Nationwide mass tort cases are far less prevalent than they were a decade ago,[3] and securities class action filings are significantly down, even in an era marked by widespread securities fraud allegations.[4]

At the same time, class action practice appears to be as vigorous as ever. Entrepreneurial plaintiffs' attorneys have turned their attention to different areas—to lucrative consumer cases, for example, and since the Wal-Mart certification, increasingly to the employment field. They have also begun pushing the envelope of internationalizing class action practice. Again, defense attorneys and their corporate allies have fought these developments, with their most recent accomplishment being Congress's enactment of the Class Action Fairness Act of 2005 (CAFA) (see sidebar on page 5); the act aims to curtail easy state court certification and cheap coupon settlements in consumer cases.

The best means for taking a snapshot of the current state of class action practice is to look at the key contraction and expansion areas and the trends they portend for the future of class action practice.

Areas of Contraction

CAFA. The legislative history of CAFA reads like an indictment of class action practice—particularly coupon settlements—implying that CAFA will shut down such practices. But the law turns out to be relatively mild, simply expanding federal subject-matter jurisdiction and sharpening some procedures for settlement oversight, including requiring that public regulatory officials be notified of such settlements and be given an opportunity to speak to their fairness. To date, case law under the act primarily has concerned procedural issues such as its effective date, burdens of proof, and appeal deadlines.[5] That said, it does appear that defense lawyers are taking advantage of its provisions to remove many consumer cases to federal court, and a few judges have begun to remark that the law is intended to ensure tougher oversight of coupon settlements.[6] Also interesting, in a recent nationwide settlement of a class action against Sharper Image concerning marketing of its Ionic Breeze product, 27 state attorneys general filed an objection to the settlement terms, which were subsequently amended by the parties to be more favorable to the class.[7] If these developments continue, CAFA would begin to have a greater impact on curtailing interstate consumer practice generally and coupon settlements in particular.

The IPO Decertification. The Second Circuit Court of Appeals vacated class certification in six cases designed to test the viability of more than 300 class actions alleging that underwriters, issuers, and individual corporate officers conspired to manipulate the initial public offerings market during the dot-com boom of the 1990s.[8] Judge Jon O. Newman's decision for the panel acknowledges that Second Circuit law did not provide clear guidance as to the procedural standards for class certification in the circuit. Reading that earlier case law, the trial court had essentially concluded that the plaintiffs need only make "some showing" that the certification requirements were met and that the court should be wary of looking at the merits too rigorously at the certification stage. In reversing, the Second Circuit held that a district judge may certify a class only after "making determinations that each of the Rule 23 requirements has been met," resolving factual disputes to do so, and undertaking this resolution even of issues that overlap with merits determinations. Applying this standard, the court decertified the class, an outcome that could jeopardize a $1 billion settlement agreement and force thousands of potential class members to pursue claims individually. Beyond the cases in question, the decision is likely to make class certification in the Second Circuit more difficult in future cases and could be persuasive to other circuits reconsidering their own approach.

Pruning the Edges

A series of cases about issues in class actions—though not about class action law itself—will, nonetheless, have significant impacts on class action practice.

Pleading. The Supreme Court threw out two large class action lawsuits this past term on pleading grounds. In *Twombly*,[9] plaintiffs alleged that regional telecommunication companies had conspired not to compete with one another and had engaged in concerted conduct designed to discourage potential entrants. The Second Circuit permitted the class action to proceed. In a 7-2 decision, the High Court reversed, holding that a complaint under the Sherman Act must allege "some factual context suggesting agreement," and finding that the complaint in this case did not sufficiently do so. In *Tellabs*,[10] the Court interpreted a portion of the PSLRA that requires plaintiffs to "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind."[11] In an 8-1 decision, Justice Ruth Bader Ginsburg, writing for the majority, stated that the key aspect of deciding whether an inference of scienter is "strong" is that it must be compared with other inferences that can be drawn from the facts: "A complaint will survive," the Court held, "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any competing inference one could draw from the facts alleged." Applying this standard, the Court upheld the trial court's pleading-based dismissal.

Punitive Damages. The tobacco industry won two key victories in class action cases, convincing the high courts in Florida[12] and Illinois[13] to reverse $145 billion and $10.1 billion judgments, respectively, against cigarette companies. The Florida Supreme Court did uphold the trial court's finding that smoking causes numerous health conditions; however, the Florida Supreme Court overturned the lower court's $145 billion punitive damages award as excessive, awarding only $12.7 million in compensatory damages for two named plaintiffs. The Illinois Supreme Court likewise reversed a $10.1 billion lower-court verdict finding that Phillip Morris fraudulently misstated the amount of tar and nicotine in its light cigarettes. The court did not rule on the size of the damages specifically, but rather held that because the labeling of the cigarettes complied with certain consent orders of the Federal Trade Commission, it fell into exemption provisions in state consumer protection laws and could not be challenged under them.

Preemption. Two recent Supreme Court cases short-circuited class action lawsuits on the grounds that the underlying substantive claims were barred. In *Credit Suisse*,[14] the Court sided with a New York federal trial court, which had dismissed an antitrust class action filed by 60 investors alleging that 10 investment banks acted as underwriters to manipulate the IPO market. The Court, fearing inconsistent results across antitrust courts, said that federal antitrust laws are inapplicable because the Securities and Exchange Commission actively enforces rules and regulations prohibiting market manipulation. In *Dabit*,[15] the Court held that a class of former Merrill Lynch brokers could not maintain a suit based on Oklahoma state law against the company for breaching its fiduciary duty by disseminating misleading research because SLUSA preempts state-law claims. Similarly, the California Supreme Court tossed out a statewide class action challenging tobacco advertising to minors under state law as preempted by federal law.[16]

Arbitration

Class action defendants are increasingly turning to contract principles to foreclose the possibility of aggregate litigation. Arbitrators are then faced with the issue of whether to proceed using the class action form and, if so, how to combine the public notions of class action practice with the private concept of alternative dispute resolution. The most recent development was a non-event: The U.S. Supreme Court denied certiorari in a case in which the New Jersey Supreme Court had held that a provision in a consumer contract prohibiting consumer participation in class-wide arbitration was unenforceable because the provision was unconscionable.[17] Although courts seem concerned about class action waivers, and occasionally even express concern about forced arbitration, the practice is on a rise that seems inexorable. It is likely that during the coming years, class action arbitration will grow as a means of resolving large disputes and its underlying processes will become more clearly defined.

KEY ELEMENTS OF CAFA

The Class Action Fairness Act of 2005 changed class action practice in three principal ways:

- It changed the rules for federal diversity jurisdiction and removal, enabling most large class action cases to be filed in or removed to federal court.
- It transformed the procedures for settling all class actions in federal courts.
- It restricted the practice of coupon settlements and limited the manner in which attorney fees can be provided in coupon cases.

(For more on CAFA, see article by Allan Kanner and M. Ryan Casey on page 12.)

Areas of Expansion

Big Settlements. After reading the contraction news, one might think that class action cases had ground to a halt. But, in fact, settlements for astonishing sums of money continue to dot the landscape. Settlements for billions of dollars are no longer unheard of, and those for hundreds of millions of dollars have become somewhat routine. (See sidebar on page 6.)

Record Certifications. Alongside the critical decertification decisions mentioned above stand two record certifica-

tions. The first is a *tour de force*: Brooklyn federal district court Judge Jack Weinstein's 366-page decision certifying a nationwide class of tens of millions of smokers who allege Racketeer Influenced Corrupt Organization Act claims against tobacco companies for their representations that "light" cigarettes were a healthy alternative to conventional cigarettes.[18] The class certification portion of the decision, comprising more than 30 pages of the Federal Reporter, is a "must read" for any class action attorney.

Within five months of Judge Weinstein's decision, the Ninth Circuit affirmed the nationwide certification of a class of 1.6 million female Wal-Mart employees alleging gender discrimination and seeking more than $10 billion in damages.[19] Plaintiffs' attorneys contend that this is the largest civil rights class action in U.S. history. Class action claims against Wal-Mart appear to be developing as a field of their own,[20] and Judge Weinstein's certification of the tobacco advertising case could open a whole new avenue of smokers' litigation.

Internationalization. Class action practice is expanding outward in three directions. First, cross-border class actions are increasingly pursued in U.S. courts, sweeping in plaintiffs from other countries to actions brought and tried or settled here. Second, class action law is developing in foreign countries, particularly Canada, drawing American litigators, and increasingly American litigants, into actions resolved in foreign jurisdictions. Third, American lawyers are increasingly bringing class actions against foreign defendants in American courts. In short, class action law is undergoing globalization much like the rest of the U.S. economy.

Medical Monitoring. Two state supreme courts came to opposite conclusions regarding recoverability of medical monitoring costs for latent diseases after exposure to toxins. The Missouri Supreme Court held that the costs of medical monitoring are compensable damages, certifying a class of children exposed to lead emissions by a smelter operator.[21] Recovery for medical monitoring, the court ruled, is not predicated on the existence of current physical injury. However, the Mississippi Supreme Court determined that Mississippi law does not recognize a medical monitoring cause of action absent a showing of physical injury, answering a certified question from the Fifth Circuit Court of Appeals that led to the dismissal of a class action brought by workers against a distributor of beryllium products.[22] It is interesting to note that the Missouri Supreme Court allowed its case to proceed in part because there was no state law prohibiting recovery for medical monitoring; Mississippi disallowed recovery for medical monitoring because there was no state law authorizing it.

MEGA-SETTLEMENT ROUNDUP

Recent settlements of more that $100 million demonstrate the stakes involved in large class action cases:

- Tyco: Tyco agreed to pay $2.975 billion—the largest securities fraud settlement in history—to resolve a class action lawsuit by shareholders arising out of ex-CEO Dennis Kozlowski's alleged accounting fraud.
- Microsoft: Microsoft settled a series of statewide class actions alleging antitrust violations, including one in California in which the company agreed to pay up to $1.1 billion (primarily in coupons) to 14 million consumers.
- Freddie Mac: Freddie Mac paid $410 million back to individual investors and pension funds to settle claims arising out of its 2003 accounting errors and subsequent stock collapse.
- Credit Card Currency Conversion Cases: Visa, Mastercard, and Diner's Club agreed to pay $336 million to settle consolidated class actions alleging that the companies and member banks conspired to fix fees charged for currency conversion when cardholders made purchases overseas.
- Hurricane Katrina: Murphy Oil agreed to pay $330 million to a group of Louisiana residents to settle a class action alleging damages caused by leakage from a storage tank during Hurricane Katrina that polluted acres of land.
- Williams Securities Litigation: Williams Companies, Inc., agreed to pay $290 million to its shareholders to settle claims that it misstated earnings and manipulated its accounting statements, one of the largest securities class actions in history.
- Rent-A-Center: The company agreed to pay $109 million to settle a New Jersey class action alleging effective interest rates exceeding those permitted by state law.
- AOL LLC: AOL agreed to pay the California State Teachers' Retirement System $105 million to settle claims that it overstated revenue by recording Internet advertising proceeds incorrectly.
- ERISA Litigation: AOL Time Warner paid $100 million to settle ERISA litigation brought against it by its 401(k) plan participants.

Conclusion

Class action law is, and will likely continue to be, a central, exciting, fascinating, and challenging practice area for many litigators in the United States. Most large law firms now have links on their websites extolling the virtues of their complex litigation practice, while new plaintiffs' firms emerge daily. Class action law itself embodies a remarkable, unique achievement of the American legal

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CLASS ACTION WILDCARD
THE DEMISE OF THE MILBERG WEISS FIRM

The lurking big news in class action law concerns what will happen to the Milberg Weiss firm and its West Coast spin-off, Lerach Coughlin, in light of the U.S. Attorney's prosecution of the firm's practices. Milberg Weiss had long been the largest class action law firm in the United States, indeed one of very few to pursue class action lawsuits in a relatively large firm setting (200 lawyers). With Mel Weiss leading the firm's East Coast practice and Bill Lerach leading its West Coast practice, the firm dominated securities class actions in particular for the past several decades. In May 2006, the U.S. attorney in Los Angeles indicted the firm and two named partners, David Bershad and Steve Schulman, on charges of mail fraud, racketeering, and bribery.

The gist of the suit is that the firm paid named plaintiffs kickbacks to serve in that capacity; it is likely the firm will suffer as much for not disclosing those payments (and hence misrepresenting to courts how plaintiffs were compensated) as for the practice itself. Regardless, the indictment has decimated the firm, with half of its partners leaving and with some courts holding that the firm can no longer serve as a lead counsel in securities class actions.[23] Most recently, even Bill Lerach, who seemed beyond the reach of the case that had targeted the New York partners, also appears to be swept up in the investigation; he has retired from practice. The interesting question for class action law is what will happen in the wake of the Milberg Weiss collapse. Most of the firm's attorneys will escape prosecution and find comfortable homes at other firms. Less clear at this point is the fate of Milberg Weiss itself and the targeted partners; whether any firm will grow up in Milberg Weiss's wake to so dominate class action practice in the future; and what effect, if any, the firm's demise will have on class action practice generally.

system—the capacity to redress aggregate harms that are often too small to be addressed individually, through the use of private, entrepreneurial lawyers. At the same time, class action law can be a site of abuse, and it requires constant monitoring by courts, public officials, and the bar. The law does, and always will, reflect these competing tendencies. Stay tuned.

WILLIAM B. RUBENSTEIN is a professor at Harvard Law School, where he teaches and writes about civil procedure and complex litigation and regularly consults with attorneys on these matters.

ENDNOTES

1. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).
2. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).
3. The era of asbestos, silicone breast implants, and Fen-Phen has given way to an era of Paxil (Blain v. Smithkline Beecham Corp., 240 F.R.D. 179 (E.D. Pa. 2007)) and Vioxx (Merck, fighting each case, has yet to pay out for any; *see* Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Cases*, N.Y. Times, Aug. 21, 2007, at A1).
4. *See* http://securities.stanford.edu/index.html.
5. A full summary of the case law under CAFA can be found at my website, www.classactionprofessor.com.
6. *See, e.g.*, Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 654 (7th Cir. 2006) (noting that although the case was not brought under CAFA, the statute requires heightened judicial scrutiny of coupon-based settlements).
7. *See* Julie Kay, *Sharper Image Claims Reimbursing Customers Will Cause Bankruptcy*, Daily Business Review (Aug. 16, 2007), *available at* http://www.law.com/jsp/article.jsp?id=1187168525423). Disclosure: I serve as an expert consultant to defendant's counsel in this matter.
8. *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24 (2d Cir. 2006).
9. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).
10. Tellabs v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007).
11. 15 U.S.C. § 78u-4(b)(2) (emphasis supplied).
12. Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006).
13. Price v. Phillip Morris, Inc., 848 N.E.2d 1 (Ill. 2005).
14. Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).
15. Merrill Lynch v. Dabit, 547 U.S. 71 (2006).
16. *In re* Tobacco Cases II, 163 P.3d 106 (Cal. 2007).
17. Muhammad v. County Bank of Rehoboth Beach, Del., 912 A.2d 88 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007).
18. Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006).
19. Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007).
20. In Iliadis v. Wal-Mart Stores, Inc., 191 A.2d 710 (N.J. 2007), the New Jersey Supreme Court certified a class of 80,000 current and former Wal-Mart employees suing the company for allegedly forcing plaintiffs to skip breaks and work off the clock. In Pennsylvania, a jury awarded a class of plaintiffs $78 million for similar claims. Braun v. Wal-Mart Stores, Inc. (Pa. C.P. Ct. 2005) (unreported). A Missouri appeals court certified a class to pursue nearly identical claims. Hale v. Wal-Mart Stores, Inc. (Mo. Ct. App. 2007) (unreported). However, the day before the Missouri decision, a state trial court in New York found that a similar group of plaintiffs did not constitute a class because the requirements of predominance, typicality, and adequate representation were not met. Alix v. Wal-Mart Stores, Inc., 838 N.Y.S.2d 885 (Sup. Ct. 2007). In addition, a subsequent Maryland state trial court decision denied certification in an overtime class action for Maryland Wal-Mart employees. Cutler v. Wal-Mart Stores, Inc., No. 1376 (Md. Ct. Spec. App. June 29, 2007) (unpublished).
21. Meyer *ex rel.* Coplin v. Fluor Corp., 220 S.W.3d 712 (Mo. 2007).
22. Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1 (Miss. 2007).
23. *See, e.g.*, *In re* Medtronic, Inc., Implantable Defibrillator Prod. Liab. Litig., 434 F. Supp. 2d 729 (Minn. 2006).

New Pleading Themes under CAFA

By Daniel R. Karon

Since CAFA's enactment, considerable commentary has been published examining changes created by the act and identifying the legal issues they raise. But little, if any, commentary exists describing and examining the new ways in which creative plaintiffs' attorneys have begun pleading their class action lawsuits, previously in state courts, to embrace or avoid CAFA's effects.[1]

With the act's passage, 50-state class action cases alleging a single state law's substantive application largely disappeared. Although plaintiffs sometimes succeeded in certifying and settling these types of cases in state courts before CAFA, plaintiffs' attorneys generally agree that federal courts tend to be less receptive toward 50-state class action lawsuits applying a single state's substantive law, despite U.S. Supreme Court jurisprudence permitting this approach.[2] Because under CAFA plaintiffs can no longer expect courts to certify 50-state or multistate classes, plaintiffs' attorneys have begun devising new ways to achieve a similar end while accepting the environment they and their clients now inhabit.

50-State Class Actions

Suing in 50 states under a single state's substantive law. If plaintiffs' counsel remain so inclined, they can certainly file 50-state class action lawsuits even after CAFA's enactment. Although plaintiffs' lawyers, pre-CAFA, often pursued multistate claims in a single plaintiff's name, this pleading practice posed potential problems of standing, subject-matter jurisdiction, and—if the plaintiff even reached class certification—class membership. Plaintiffs' counsel pleaded (and sometimes still plead) this way because they yearn to capture the broadest class possible while exerting the minimum effort necessary.

But a properly alleged multistate class action lawsuit sometimes requires multiple class representatives—ethically retained and with actual damages. And even though plaintiffs' counsel can always pursue these multiple clients' cases in the federal courts in the clients' home states, counsel may instead want to consider pursuing the clients' claims together in a single federal court under the substantive law of a single state, forum, or otherwise. After all, now being in federal court as opposed to state court, these cases are subject to multidistrict consolidation,[3] meaning that the Judicial Panel on Multidistrict Litigation will likely consolidate and transfer them to a single forum.

So, to avoid multiple filing fees and engaging multiple local counsel—whose roles will largely if not entirely disappear after consolidation and transfer—plaintiffs' counsel may simply decide to file in a single federal court where proper venue exists. In doing so, plaintiffs' counsel should strongly consider the home state of the defendant (or of the main defendant, when multiple defendants exist) because this allows counsel to argue for that state law's substantive, class-wide application under the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*.[4] And if the Judicial Panel on Multidistrict Litigation transfers the consolidated case to a "neutral" forum, plaintiffs may still argue that the law of the defendant's home state (or of the main defendant's home state) applies class-wide under *Shutts*.

Suing in 50 states under 50 states' substantive laws. Pursuing as many as 50 individual class action lawsuits or alleging state law claims on behalf of as many as 50 states' class members in a single class action lawsuit requires considerable work, and plaintiffs' counsel should examine whether it is worthwhile. They should balance the benefit of truly global coverage against the risk of leaving some states unsued. Although pursuing claims for class members in all 50 states (whether in 50 initially separate lawsuits or in one master complaint) deters "uninvited" attorneys from participating in the case, suing in this ambitious manner risks creating manageability problems that the transferee judge may consider insurmountable even pre-class certification. Plaintiffs' counsel must therefore balance the risk of unwanted company against the risk of losing their judge when deciding whether to file multiple cases (or one mega-case asserting claims under multiple states' laws).

Exemplar-State Class Actions

Suing on behalf of class members in a limited number of states—"exemplar states"—is an innovative alternative to filing multiple cases or one mega-case, and it may solve the potential management difficulties associated with ambitious pleading at potentially slight, if any, ultimate cost.[5] Exemplar states are simply four or five states for whose alleged victims plaintiffs' counsel file a consolidated class action complaint through appropriate class representatives.

If plaintiffs' counsel pursue the exemplar route, they must include class representatives from enough states (though there is no clear-cut rule as to how many that is) to litigate their case effectively, focusing on states with strong state law and significant populations. This keeps the case small enough to avoid manageability issues, yet big enough to coax a global settlement if the opportunity arises.

But because other plaintiffs' attorneys can immediately access all federal class action cases through electronic databases like PACER, CourtLink, or CaseStream, filing in only exemplar states leaves plaintiffs' counsel vulnerable to other attorneys filing overlapping class actions. Plaintiffs' counsel who pursue exemplar-state class action cases must therefore engage in politics and consolidate their leadership position early so as to fend off any future leadership attacks. Otherwise, they must prepare to argue and win inevitable lead-counsel motions by demonstrating extensive pre-suit investigation, their class action lawsuit's proprietary nature, and their entitlement to the lead, or at least a colead, counsel position.

Federal Subject-Matter Jurisdiction

Suing in the above-described manner will most likely subject a lawsuit to CAFA's newly created federal subject-matter jurisdiction, which exists so long as plaintiffs' claims exceed $5 million and minimal diversity exists, meaning at least one plaintiff resides in a state different from at least one defendant. But even where minimal diversity exists, state-court jurisdiction may remain if the plaintiff pleads one of CAFA's local-case exceptions or seeks less than $5 million in damages.

CAFA's "home-state" and "local-controversy" exceptions. Under CAFA's home-state exception,[6] if two-thirds or more of the proposed class members and the primary defendants are citizens of the state where plaintiff filed suit, federal subject-matter jurisdiction under CAFA does not exist. And under CAFA's local-controversy exception,[7] if two-thirds of the plaintiffs and at least one defendant against whom significant relief is sought are citizens of the state where the plaintiff filed suit, if the principal injuries occurred in that state, and if no other class actions against any of the defendants on behalf of the same class have been filed in the past three years, federal subject-matter jurisdiction under CAFA does not exist, either.

Seeking less than $5 million in damages. Although the Supreme Court long ago ruled that district courts could not aggregate class members' damages to satisfy jurisdictional minimums,[8] CAFA now requires aggregation to determine whether the plaintiffs' amount in controversy exceeds $5 million. So, if class plaintiffs want to remain in state court, they may want to consider alleging less than $5 million in damages.

Before CAFA, district courts measured the value of injunctive relief by considering whether the relief exceeded the diversity statute's $75,000 threshold. And although relief to individual class members would not typically exceed $75,000, the total cost of injunctive relief to defendants typically did. But CAFA's mandatory aggregation provision now appears to require measuring injunctive and other nonmonetary relief according to the total class-wide benefit sought or the total cost to defendant. Consequently, plaintiffs interested in remaining in state court might want to consider avoiding requests for injunctive relief while pleading damages under $5 million.

Facing or forgetting remand. If fewer than one-third of all class members are citizens of the original forum state, CAFA requires federal subject-matter jurisdiction and remand cannot occur. But district courts have discretion to decline subject-matter jurisdiction if between one-third and two-thirds of the class members and the primary defendants are citizens of the state where the plaintiff filed suit. And when exercising discretion to decline jurisdiction, under CAFA, district courts must consider six more factors.[9] Finally, district courts must remand class actions if they satisfy CAFA's home-state or local-controversy exceptions.

From a plaintiff's perspective, counting class members and identifying their geographical locations can be nearly impossible at the outset of a lawsuit. Defendants—not plaintiffs—are more likely to know class members' identities and addresses. Class members may also have moved or purchased relevant products through third parties such as retailers or distributors. These problems all create the real risk of remand mini-trials concerning class size and geographic location, which will likely include information that defendants will be uncomfortable disclosing. And speaking of uncomfortable, if plaintiffs allege less than $5 million in damages and forgo a request for injunctive relief, defendants must then argue that class members' damages actually exceed $5 million—an unenviable task for any defendant.

Moreover, CAFA refers to "primary" defendants and defendants from whom "significant" relief is sought or who allegedly caused the plaintiff's "principal injuries" but does not define these terms. Yet plaintiffs' counsel can try to influence remand by naming or not naming certain defendants, by describing them as primary or as defendants from whom they seek significant relief, or by describing injuries so as to make these injuries principal.

Given the likelihood of confusion and uncertainty, where minimal diversity exists, trying to massage CAFA's contours into a formula necessitating remand is an all but impossible task, whether concentrating on the amount in controversy, class members' number and/or location, which defendant is primary or significant, or

which defendant allegedly caused the plaintiffs' principal injuries. Given this difficulty, plaintiffs' counsel should not try too hard to retain state subject-matter jurisdiction. A remand-related sideshow may erupt, and plaintiffs may well lose after spending considerable time and money. Rather, and most fundamentally, even against CAFA's backdrop, if plaintiffs' attorneys pursue responsible and worthy cases and believe in these cases with the passion and enthusiasm that the ethical rules suggest, if not require, it should not matter where they try these cases—justice should prevail, whether in state or federal court.

Settling Broadly

At settlement time, drafting a sufficiently broad settlement agreement in a 50-state class action lawsuit (where class representatives from all 50 states exist) is relatively easy because the settlement agreement will necessarily apply to claims in all 50 states. But crafting a satisfactory settlement agreement in an exemplar-state class action lawsuit requires a bit more care.

When litigating, defendants fight for the narrowest possible class, but when settling, they argue for the broadest possible class. Because a typical exemplar-state class action complaint may allege claims only on behalf of people under comparable laws in, say, four or five states, come settlement time the parties must decide how to provide defendants broad relief (without which defendants may not agree to settle) while respecting due process and perhaps comity concerns. After all, if defendants only settle for the exemplar states, this leaves multiple states (perhaps 45 or more) still available for later lawsuits by other attorneys. And with the exemplar-state case possibly (but probably not) tolling these unsued states' statutes of limitations, even if the exemplar-state case lingered for years, exposure to defendants may persist.

To be safe, then, plaintiffs' counsel should consider amending their complaint to allege claims on behalf of class members in all 50 states. If plaintiffs pursued their complaint in the defendant's (or the main defendant's) home state, amending their complaint in this manner does not necessarily invoke the issues of standing, subject-matter jurisdiction, and class membership described earlier because *Shutts* allows the extraterritorial application of the forum state's law so long as doing so does not violate due process, such as when plaintiffs sue in the defendant's home state. Alternatively, if plaintiffs pursued their complaint somewhere else, *Shutts* likewise permits the extraterritorial application of the pleaded states' laws so long as no conflict exists among these laws and the newly added states' substantive laws.[10] Moreover, certain state laws, independent of *Shutts*, permit their extraterritorial application, meaning that a federal court may approve multistate settlements pursuant to these particular substantive laws without even the need to conduct a *Shutts* analysis.[11]

So, even after CAFA, multistate resolutions are possible, if not desirable. If the parties take special care when crafting their multistate class action settlement agreements (mindful of the due process, jurisdictional, and standing concerns that CAFA created), both sides can likely conclude the litigation with the relief and peace of mind that they desire.

CAFA undoubtedly makes pleading, litigating, and resolving multistate class action cases more challenging, but it certainly did not make this process impossible. While sizeable class action cases are in federal court to stay, their new venue need not cause plaintiffs' counsel undue anxiety. If plaintiffs' counsel pursue meaningful and worthwhile multistate class action lawsuits with the foregoing themes in mind, they should be able to prosecute and resolve these claims, not despite CAFA, but because of it.

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ENDNOTES

1. This article examines federal class action lawsuits and will not study ways that plaintiffs' counsel attempt to avoid CAFA's federal jurisdictional requirements, such as pleading multiple city or county classes, each alleging less than $5 million in potential damages.
2. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985) (permitting extraterritorial application of single state's substantive law so long as "the choice of [one state's] laws is not arbitrary or unfair").

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Class Action Practice in the Wake of CAFA

By Allan Kanner and M. Ryan Casey

The Class Action Fairness Act (CAFA) became law on February 18, 2005. The act is widely viewed as a victory for business interests at the expense of class action plaintiffs. Despite the media frenzy around CAFA as a pro-corporate bill, there is very little in the express language that supports this conclusion. Class action litigators must not concede interpretation issues: CAFA's many ambiguous provisions coupled with its language supporting consumer rights give plaintiffs' attorneys reason not to concede. In addition, CAFA actually creates opportunities for plaintiffs with respect to discovery, class certification, forum selection, and settlement.

CAFA's immediate impact is the limited federalization of class actions. Although limited federalization may initially benefit defendants, one of its long-term effects is, arguably, to create pressure on federal courts to certify classes. In short, to expand federal jurisdiction over class actions, Congress had to limit the federal courts' ability to dispose of unwanted litigation. And despite the notion that CAFA federalizes class actions, plaintiffs retain many devices for defeating removal and effectuating a remand.

Furthermore, CAFA is not without positive attributes for plaintiffs. The act curbs abuses resulting in sweetheart settlements, which emboldens plaintiffs to reject settlement offers that fall short of CAFA standards. Accordingly, the true value of settlements, as well as their real cost, should increase.

CAFA is a relatively new tool that most attorneys do not know how to use properly. Nor do most attorneys fully understand its limitations. Both plaintiff and defense attorneys should make CAFA an integral part of their strategic approach to class action lawsuits, especially at the pleading, certification, removal and remand, and settlement phases.

Jurisdiction, Removal, and Remand under CAFA

CAFA expands federal jurisdiction by substituting minimal diversity and aggregate $5 million amount-in-controversy requirements[1] for the complete diversity and the $75,000 amount in controversy required under 28 U.S.C. § 1332(a). Because of the act's new diversity-jurisdiction requirements, it is now easier to remove class actions originally filed in state court to federal court.[2] The act eliminated some of the more stringent removal provisions that previously limited defendants' right to remove class actions under 28 U.S.C. 1441(a), the general removal statute. If the damages alleged exceed the $5 million threshold, one of three things must also occur to trigger CAFA's new federal subject-matter jurisdiction:

- Diversity must exist between any defendant and any class member.
- Any plaintiff and any defendant must be foreign citizens.
- Any defendant must be a foreign citizen (making it harder to plead around).

The act also contains provisions through which the court may remand the case: the home-state exception, the local-controversy exception, and the permissive "interests-of-justice" exception.

Home-State Exception.[3] A federal court must decline jurisdiction if two-

thirds or more of the proposed class and all the defendants are citizens of the state in which the original action was filed.

Local-Controversy Exception.[4] A federal court must decline jurisdiction if two-thirds or more of the proposed class and at least one defendant are citizens of the state in which the original action was filed and all of the following are met:

- The in-state defendant is one from whom significant relief is sought.
- The alleged conduct of the in-state defendant forms a significant basis for the claims asserted in the class action.
- The principal injuries resulting from the in-state defendant's conduct occurred in the state in which the original action was filed.
- Three years prior to the class action's filing, no other class action was filed asserting the same or similar factual allegations against any defendant.

Permissive "Interests-of-Justice" Exception.[5] A federal court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction when between one-third and two-thirds of the class are citizens of the state in which the original action was filed and the "primary" defendants are also citizens of that state. In exercising this discretion, the court considers the following:

- whether claims involve matters of national or interstate interest
- which state's law will govern the claims
- whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction
- whether the forum has a distinct nexus with the class, the harm, or the various defendants
- the state citizenship of the proposed class members

CAFA's Settlement Provisions

In addition to frivolous class actions, CAFA also targets settlements that enrich attorneys while providing almost nothing of value to class members. The outcry over coupon settlements was the moving force behind this legislative goal.

Regarding the requirements for settlements, CAFA made three significant changes.[6] Settlements under the act must be fair, reasonable, and adequate, but it restricts attorney fees, especially fees associated with widely derided coupon settlements. It also contains provisions for disbursing unclaimed coupons to charitable or governmental organizations.

Fears v. Wilhelmina Model Agency, Inc.[7] describes a post-CAFA fee analysis. In *Fears*, plaintiffs' counsel sought a fee award of one-third (a little over $7 million) of the money claimed, plus about $1.5 million in expenses. The amount of money actually redeemed by plaintiffs' coupons exceeded the desired attorney fees, but was less than the plaintiffs' counsel's lodestar calculation. The court found that a fair and appropriate fee award was 40 percent (a little under $4 million) of the money actually redeemed, plus all claimed expenses.

Plead the Merits

Although on its face CAFA is a jurisdictional statute, plaintiffs' lawyers should remember that Congress passed the act to weed out unmeritorious lawsuits, essentially handing the federal judiciary a directive to reject frivolous claims. Pre-CAFA, notice pleading was sometimes sufficient to get a class certified, but bare-bones notice pleading becomes even less tactful under CAFA. When drafting a complaint, it is now more important to frame the merits of a case. Accordingly, complaints must detail the plaintiffs' injuries and allege particular facts regarding the defendants' liability.

Frame the Discovery Debate

CAFA creates opportunities for defense counsel to take early discovery. They can argue that early discovery is needed to determine whether the case meets the act's jurisdictional requirements and to determine whether class treatment is appropriate given the act's implied higher bar.

Basic jurisprudence directs judges to determine their own jurisdiction before turning to discovery or other aspects of litigation. An exception to this rule allows a court to take limited discovery for the purpose of determining its own subject-matter jurisdiction. CAFA's intricate jurisdictional analysis therefore creates tactical opportunities for attorneys to pursue early discovery.

CAFA's implied raised standard for class certification can also be used as a justification to pursue early discovery. Attorneys rarely start with all the facts favoring or opposing class certification. Rather than hiding this from the court, counsel should inform the court of the information needed to develop the full history (or not) of the plaintiffs' injury. Counsel must demonstrate that limited discovery is needed to determine class certification and should direct the judge toward a factual analysis at the class certification hearing.

What Is Your Case Plan?

CAFA has resulted in more class action cases being litigated in federal court, and attorneys should plead their cases with that in mind. Plaintiffs' attorneys seeking to invoke federal jurisdiction in class actions must empathize with the pressures placed on federal judges. Faced with an increasing number of cases without corresponding funding, federal judges must focus more and more on managing their dockets. Class action pleadings should also contain a manageability plan, including tools such as subclassing and issue certification, if necessary, and an exit strategy. Plaintiffs' attorneys should continue to discuss their manageability plan and exit strategy throughout the case.

When dealing with different state laws, a smart plaintiffs' attorney will consider pleading subclasses. In addition to telling the judge your theory on choice-of-law issues, this also emphasizes your commitment to case management.

In addition, seeking issue certification can lower the perceived risk of your case to a judge's overall docket management.

INTERPRETING CAFA

EXPRESS LANGUAGE TRUMPS LEGISLATIVE HISTORY

Because of the powerful business interests that coalesced to encourage CAFA's passage, the act is often viewed as a direct attack on the class action mechanism. The legislative history of the act is not necessarily anti-plaintiff, however. And the act's ambiguity provides courts considerable leeway in interpreting it. Indeed, it is well established that courts should consider a statute's express language over legislative history when interpreting legislation, and CAFA's express language is not nearly as damaging to class actions as some may believe.

Despite legislators' behind-the-scenes motivations, legislative intent must be derived from the contents of the legislative record. The "official" legislative history, whether considered disingenuous or not, reflects the realities of the political process and should be the basis for any legislative analysis of CAFA.

CAFA's legislative history is not hostile to the class action mechanism. Rather, the Senate report explains that the goal of the act is to help plaintiffs rather than provide relief to defendants or address a litigation crisis:

> Class actions were designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries. As such, class actions are a valuable tool in our jurisprudential system. However, they are only beneficial when the class members are kept a priority throughout the process.[12]

President Bush also interpreted CAFA in a pro-plaintiff light. As he noted in his signing statement, "class actions make the legal system more efficient and help guarantee that injured people receive proper compensation. That is an important principle of justice. So the bill I sign today maintains every victim's right to seek justice and ensures that wrongdoers are held to account."[13]

Admittedly, CAFA's legislative history takes a pro-defendant position on certain issues. For example, as the Senate report states, "[i]f a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)."[14]

But much of this discussion about legislative history is moot. When engaging in statutory construction, courts should not resort to legislative history where it conflicts with the express language of the statute. The Eleventh Circuit noted this when it rejected the Senate report's conclusion that CAFA shifts the burden of removal to the party resisting jurisdiction. The Eleventh Circuit held that "'courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point.'"[15]

CAFA's express language is also far from anti-class action. The act praises class actions as "an important and valuable part of the legal system."[16] Its stated purpose is to promote "fair and prompt recoveries for class members with legitimate claims."[17] Plaintiffs seeking to certify a class in federal court can look to the act's language seeking "interstate cases of national importance under diversity jurisdiction"[18] in federal courts for support. The act seeks to "benefit society by encouraging innovation and lowering consumer prices."[19] Its express language empowers plaintiffs by addressing frivolous suits that undermine the class action mechanism.

If there is one issue that is common to the laws of the different states involved, plaintiff's counsel can offer to conduct a trial on that element first. If the plaintiff loses on that issue, the judge can dismiss the case. If the plaintiff wins, it increases pressure on the other party, which may facilitate a settlement.

Does CAFA Help Certify Nationwide Classes?

CAFA, from the defendant's perspective, is a catch-22. By restricting nationwide classes in state courts, the act necessarily restricts a federal judge's ability to "pass the buck" to state judges. Expanding federal courts' subject-matter jurisdiction also decreases the ease with which federal judges can dismiss the actions. CAFA arguably provides a mandate for federal courts to maintain nationwide class actions; however, whether these courts certify nationwide classes is an altogether different, and more complicated, question.

Attorneys should remind federal courts of their CAFA-era responsibility to adjudicate nationwide class actions. Some courts are beginning to take notice, as a Massachusetts district court recently observed:

> Having smelled victory on the choice-of-law issue, defendants expect a knock-dead punch on their argument that the differences among the state consumer laws are so significant that they cause individual issues to predominate. Indeed, in a double-dare at oral argument, they waxed that no court in the nation has successfully certified a nationwide consumer class for litigation (as opposed to settlement) purposes.[8]

The AWP court answered the defendants' challenge with a state-by-state analysis and certified a significant portion of the plaintiff's proposed class.

Before the enactment of CAFA, the party asserting federal jurisdiction had

the burden of proof in demonstrating the presence of the federal jurisdiction. The act does not shift the burden of proof at either the removal or remand phase of jurisdictional wrangling. However, arguments to the contrary continue to arise in litigation, and attorneys should take notice.

Defendants often point to legislative history to argue that CAFA shifts the burden on removal to the party opposing federal jurisdiction. But express language always trumps legislative history (see sidebar on page 14). Courts facing this argument have rejected the Senate report's opinion that CAFA shifts the burden on removal.[9] With respect to remand, the burden is on the party seeking to invoke the home-state and local-controversy exceptions. Once the removing party satisfies its burden of establishing the requisite amount in controversy and minimal diversity, the burden shifts to the other party to prove any exception under CAFA.[10]

CAFA and Settlement Negotiations

Plaintiffs can try to leverage CAFA's limitations on sweetheart deals to coax more meaningful settlements. For example, plaintiffs can reject defendants' low or coupon settlement offers with confidence, noting the act's aversion to such deals. Plaintiffs can also use the act's notice provisions to their advantage. CAFA requires notice in some cases to certain state and federal officials, including the attorney general's office,[11] which may increase the defendants' temptation to resolve claims.

CAFA has changed the landscape of class action practice by expanding federal jurisdiction. This creates new responsibilities for the parties. Federal judges have a greater responsibility when adjudicating claims and considering class certification. Plaintiffs' attorneys also have the new responsibility to draft their pleadings with federal court in mind and to familiarize themselves with arguments concerning the act's construction. Despite being viewed as a benefit solely to defendants, CAFA creates opportunities for plaintiffs at the certification, discovery, and settlement stages of litigation.

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ENDNOTES

1. 28 U.S.C. § 1332(d)(2).
2. *See* 28 U.S.C. § 1453.
3. 28 U.S.C. § 1332(d)(4)(B).
4. 28 U.S.C. § 1332(d)(4)(A).
5. 28 U.S.C. § 1332(d)(3).
6. *See* 28 U.S.C. § 1712.
7. No. 02-4911, 2007 WL 1944343 (S.D.N.Y. July 5, 2007).
8. *In re* Pharm. Indus. Average Wholesale Price (AWP) Litig., 230 F.R.D. 61, 83 (D. Mass. 2005).
9. *See* Abrego v. Dow Chem. Co., 443 F.3d 676, 686 (9th Cir. 2006) (per curiam) ("CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction."); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (holding that CAFA's "naked legislative history" does not alter the well-established rule that a proponent of subject matter jurisdiction bears the burden of persuasion on the amount in controversy").
10. *See* Frazier v. Pioneer Americas LLC, 455 F.3d 542, 545 (5th Cir. 2006) (Party seeking remand has burden of proving home-state and local-controversy exceptions, noting the "longstanding § 1441(a) doctrine placing the burden on plaintiffs to show exceptions to jurisdiction buttresses the clear congressional intent to do the same with CAFA.").
11. 28 U.S.C. § 1715(b).
12. S. Rep. No. 109-14 (2005), as reported in 2005 U.S.C.C.A.N. 3, 2005 WL 627977 (Leg. Hist.).
13. George W. Bush, Remarks on Signing the Class Action Fairness Act of 2005, Feb. 18, 2005.
14. S. Rep. No. 109-14, at 42, as reprinted in 2005 U.S.C.C.A.N. 3, 40.
15. Miedema v. Maytag Corp., 450 F.3d 1322, 1328 (11th Cir. 2006) (quoting Int'l Bhd. of Elec. Workers v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987)).
16. 28 U.S.C. § 1711(a)(1).
17. 28 U.S.C. § 1711(b)(1).
18. Pub. Law. 109-2, § 2, 119 Stat. 4 (2005); *see* 28 U.S.C. § 1711.
19. 28 U.S.C. § 1711(b)(3).

NEW PLEADING THEMES

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3. *See* 28 U.S.C. § 1407(a) (2006) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").
4. *Shutts*, 472 U.S. at 821.
5. *See., e.g.*, *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 235 F.R.D. 127, 148 (D. Maine 2006) (certifying exemplar-state classes of indirect automobile buyers and lessees); D.R. Ward Constr. Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485, 494 (E.D. Pa. 2006) (denying defendants' motion to dismiss plaintiffs' exemplar-state complaint in consumer price-fixing case).
6. 28 U.S.C. § 1332(d)(4)(B).
7. 28 U.S.C. § 1332(d)(4)(A).
8. Zahn v. Int'l Paper Co., 414 U.S. 291 (1973).
9. *See* 28 U.S.C. § 1332(d)(3)(A)–(F).
10. *See Shutts*, 472 U.S. at 816 (A court may apply a single state's substantive law extraterritorially so long as the law sought to be applied "is not in conflict with that of any other jurisdiction connected to the suit.").
11. *See, e.g.*, Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 523 (Tenn. 2005) (Non-Tennessee residents may invoke Tennessee's antitrust statute so long as the defendants' "alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree.").

Seven Steps to a Successful Class Action Settlement

By John B. Isbister, Todd B. Hilsee, and Carla A. Peak

The settlement of a class action is no different from the settlement of any litigation: The parties want peace and predictability within a reasonable period of time, not the burdens and uncertainties of further litigation. However, when settling a class action, the parties must observe certain procedures to bind absent class members. In addition, a class action settlement is far from a private arrangement. The 2003 changes to Federal Rule of Civil Procedure 23 and the Class Action Fairness Act of 2005 (CAFA) make class action settlements very visible and public (see sidebar on page 18, concerning notice to government officials). Because of this transparency and the enormous stakes involved in class litigation, many people may examine the details of a class settlement and have an opportunity to criticize and object. Nonetheless, savvy counsel on both sides of class action litigation can achieve the peace and predictability they desire by following the steps discussed below.[1]

1. Know the rules and the process.

Counsel should expect the court to examine critically any proposed class settlement. District courts have been charged to act as "a fiduciary of the class" when considering a proposed class action settlement and are subject to "the high duty of care that the law requires of fiduciaries."[2] Counsel should begin their consideration of settlement and negotiations with a clear understanding of the process for the approval of a class action set out in Rule 23(e). The rule is intended to protect the interests of absent class members, to ensure that the court is well informed about the class settlement, and to ensure that the court expressly scrutinizes its terms.

2. Negotiate wisely.

Courts closely examine the manner in which a class action has been negotiated to determine whether the deal was the result of an arm's-length process. Counsel should keep detailed notes of all discussions as evidence of the propriety of the settlement negotiations. Plaintiffs' counsel should be especially prepared to explain the steps taken to ensure that the class was fairly represented in negotiations, for example, by being ready to show the named plaintiffs' participation in monitoring negotiations. In some cases, counsel may want to involve a mediator or other neutral to serve as another set of eyes watching over the interests of the absent class members.

Courts particularly look for signs that a class action settlement resulted from a "reverse auction"—a defendant's collusive agreement with the attorney who is willing to accept the lowest class recovery, often in exchange for generous attorney fees. By this tactic, the defendant hopes to preclude all other claims. Courts have had no problem rejecting class settlements that are the product of a reverse auction.[3]

Similarly, the Supreme Court has directed courts to scrutinize closely "settlement only" class actions—classes certified for settlement early in the case.[4] Because there has been no extended discovery and litigation between adversaries, courts will more closely examine the strengths and weaknesses of the case and the terms of the settlement.[5] Counsel who reach a speedy resolution must therefore establish that they had sufficient information to do so.

The settlement negotiations must also involve all the right people. If members of the class have divergent interests and plaintiffs' counsel cannot fairly represent the interests of all class members, then plaintiffs' counsel should identify potential subclasses and appropriate representatives who can be brought into settlement discussions. Similarly, counsel should identify possible objectors and consider involving them in the settlement discussions. In particular, counsel can expect attorneys who represent individual members of the class or counsel who have filed their own related class actions to object to any settlement that will affect their lawsuits. Consumer groups or state agencies with an interest in the litigation should also be consulted.

Finally, Rule 23(e)(2) requires the parties to disclose anything that might be considered a side agreement. Accordingly, the parties should refrain from discussing any settlement term that they do not intend to include in the settlement agreement.

3. Negotiate a fair deal.

To approve a class action settlement, the judge must find the settlement fair, adequate, and reasonable.[6] To decide this, courts apply multifactor tests that vary slightly by circuit. The following are some well-recognized factors:

- the complexity and duration of the litigation

- the reaction of the class to the settlement
- the stage of the proceedings
- the risks of establishing liability
- the risks of establishing damages
- the risks of maintaining a class action through trial
- the ability of the defendants to withstand a greater judgment
- the range of reasonableness of the settlement in light of the best recovery
- the range of reasonableness of the settlement in light of all the attendant risks of litigation[7]

When negotiating a settlement, counsel should consider the evidence that will demonstrate each factor because, without sufficient evidence, the court can refuse to approve the settlement.

CAFA describes certain settlement provisions that counsel should avoid. It expressly restricts "negative value" settlements in which class members incur a loss to compensate class counsel, and it prohibits settlements in which some class members receive more than others "solely" because they live closer to the courthouse.

CAFA also requires courts to scrutinize coupon settlements—when members of the class may receive relatively valueless pieces of paper, while class counsel receives large fee awards. Under CAFA, if a settlement uses coupons, the value of the coupons actually redeemed—not predicted to be redeemed—determines the value of the settlement for the purpose of determining attorney fees.[8] Because the amount of the fee award cannot be determined until the time to redeem the coupons has expired, there will be an inevitable delay in the payment of any fee award. This delay and the uncertainty of how many coupons will be redeemed has made plaintiffs' attorneys reluctant to enter into coupon settlements in federal court. Although this CAFA provision seems geared to discourage coupon settlements, the legislative history explains that coupon settlements may be appropriate in certain circumstances, for example, when they provide real value to class members or when the individual claims at issue are very small.

Cy pres relief is considered when the class is very large, the recovery per class member very small, and the cost of administering the settlement likely to exceed the benefit to individual members of the class. Courts closely scrutinize *cy pres* settlements to ensure that the interests of the plaintiff class are aligned with the interests of the proposed recipient of the relief.

Injunctive relief settlements, particularly when the action originally sought damages, provoke questions about the worth of the injunction and the value of the claims that are being released. Counsel should therefore be prepared to present expert evidence on the value of any injunction.

Courts disfavor "reverter" clauses, which specify that unclaimed funds revert to the defendant. Reverter clauses allow counsel to agree to an inflated settlement amount that serves as the basis for calculating attorney fees, and they provide an incentive to discourage members of the class from making claims.

Finally, be prepared to justify any difference in compensation that will be awarded to different members of the class. The justification should include evidence that the differences are based upon credible legal and economic analysis. If there is no underlying predicate for the differences, the settlement is vulnerable to attack.

4. Plan an effective campaign.

The parties must also satisfy Rule 23's notice requirements. In 2003, Rule 23(c)(2)(B) was amended to require notice in clear, concise, and easily understood language. The Advisory Committee Notes accompanying the rule explain that this change was a "reminder of the need to work unremittingly at the difficult task of communicating with class members." The Supreme Court has similarly set a high standard for notice to satisfy due process. The parties must give notice in a manner reflecting a "desire to actually inform" absent class members.[9] To achieve this, experts opine that notice must get to the class, be noticed, and be read and understood.[10]

More and more courts recognize and rely on "reach" calculations to determine whether notice was adequately disseminated.[11] Reach calculations provide logical and objective answers to the key question: How many class members will be notified as a percentage of the class universe?

The following are common notice dissemination and reach flaws:

- Low reach—The notice plan does not demonstrate and quantify reach to 70–90 percent of the class.
- Not targeted—*The Wall Street Journal*, for example, does not reach the average consumer.
- Geographically insufficient—Advertising in a large metropolitan area may do little to reach class members residing in distant small towns, and readily available statistics proving as much may have been ignored.
- Scattershot placement of notices—Cherry-picking a few newspapers may result in a mere gesture that does not satisfy due process.
- The notice does not account for how class members obtain information—are they frequent radio listeners, magazine readers, or television watchers?

Being noticed is the essential purpose of a class action notice; therefore, a conscious effort must be made to design an effective and "noticeable" notice. It must grab the attention of class members, alert them that they may be affected, and provide them a compelling reason to read on, for example, by highlighting a potential recovery. A simple and prominent headline on the notice—highlighting who should read it and why it is important to them—goes a long way toward ensuring that class members will actually notice a settlement notice.

Once there is a plan to reach the class and the notice has been well designed, Rule 23(c)(2)(B) comes into play. This rule is intended to minimize confusion on the part of class members by requiring that notices not contain complex language or legalistic jargon. Despite this rule's directive and the model notices posted at www.fjc.gov that illustrate appropriate practices, problems relating to the content of notices persist. For example, notices frequently:

- are too lengthy
- omit pertinent information
- don't explain terms for laypeople
- attempt to solicit clients for lawyers
- vilify the defendant
- sell rather than inform about the settlement
- scare people out of participating, objecting, or opting out
- create hurdles for class member to exercise their rights
- create language, cultural, and other barriers
- limit class member response and participation

Successful notice programs, if expertly designed with the foregoing themes in mind, are affordable, noticeable, understandable, and can withstand collateral attack.[12]

5. Use all existing tools to notify.

The environment in which courts must provide class action notice is rapidly changing. Our population is becoming increasingly mobile, and new technologies have spawned a flood of information. A notice will be received by class members who are faced with thousands of other advertisements each day. Nonetheless, expertly designed notice campaigns can overcome these challenges.

Approximately 14 percent of U.S. residents move annually, but only about 40 percent of people who move report a change of address to the U.S. Postal Service. In addition, many people have been displaced either temporarily or permanently due to natural disasters such as hurricanes. To overcome these challenges, most notice experts employ careful mailing and re-mailing protocols, such as address-updating services before mailing and again on mailings returned as undeliverable.

Over 80 percent of U.S. adults now access the Internet, and this number is growing. The great majority of today's class action cases involve a party-neutral website, allowing class members to get information 24/7. Gone are the days when class members were expected to go to the courthouse to review case files. Today, information is available at the click of a mouse.

NOTICE TO STATE AND FEDERAL OFFICIALS

Practical strategies to comply with CAFA's governmental notice requirements, 28 U.S.C. § 1715, include the following:

- As a general rule in large, nationwide or otherwise significant class action settlements, all state attorneys general as well as the U.S. attorney general should be sent notices. It costs very little and eliminates the risk of failing to give official notice in a state in which a class member may reside.
- Defendants who stand to lose the binding effect of a settlement for a failure to comply with CAFA notice requirements should pay close attention to which state regulators should receive notification.
- The required notice documents can all be burned onto CDs for each attorney general and regulator, which keeps production and distribution costs to a minimum and avoids burdening recipients with mountains of paper too vast to review. A concise cover letter accompanying the CDs should describe the notification purpose and contents and everything should be mailed registered mail, return receipt requested.
- While seeking preliminary settlement approval, the parties can ask courts to approve the CAFA notice issuance plan and give the parties additional peace of mind.

Email has become an increasingly popular form of communication, and email notification is often contemplated by counsel. However, notices via email must be carefully designed to overcome spam filters and the recipient's delete button. For example, an email notice should carry an appropriate subject line and return address. Whether email notice satisfies Rule 23's "best practicable" requirement for "individual notice to all members who can be identified through reasonable effort," when a postal address is available, has yet to be established.

Two of the most common forms of advertising are radio and television. Despite common fears of soaring costs for such media, these methods, in appropriate cases, need not break the bank. If properly crafted, radio and television notices can convey important information in 30 seconds. In addition, a broadcast schedule can be developed to target the class to minimize funds spent on ads that class members will never see.

Other ways to achieve efficient notice abound. Courts commonly approve using informational press releases or public service announcements, which can help spread the word through credible news sources and electronic media. Although nothing guarantees that any news stories will result, if they do, class members may obtain additional opportunities to learn about their rights.

6. Watch the attorney fees.

Class actions are often criticized as benefiting the attorneys more than the class. Therefore, questions about the fairness of a class action settlement are often tied closely to concerns about the fees awarded to class counsel. Stated simply, an excessive attorney fee provision is an invitation to challenge a settlement.

Rule 23(h) recognizes that members of the class have an interest in any proposed fee awarded to counsel. The rule requires plaintiffs' counsel to make any request for attorney fees by motion under Rule 54(d)(2). The district court "may" hold a hearing, but it must make findings of fact and conclusions of law. Class members must be given notice of the motion and the right to object. Though not stated in the rule, the notice should include the amount of attorney fees and costs being sought.[13] Significantly, the 2003 revision to Rule 23 did not resolve the question of whether the loadstar or percentage of the fund approach should be used in awarding a fee.

In addition to scrutiny from the class, active judicial involvement in awarding fees occurs even when there are no objections. In particular, "clear sailing provisions"—in which the defendant agrees that it will not contest counsel's fee request—sometimes trouble courts. Accordingly, when requesting fees, counsel should focus on results actually achieved for the class, avoid clear sailing provisions, and be prepared to provide the court with sufficient support for the fee petition.

7. Establish a user-friendly claims process.

The benefits of a settlement should be readily available to as many class members as practicable. Do not make class members jump through hoops to obtain the benefits to which they are entitled. Moreover, convenient response mechanisms are effective and affordable. Allow people to access information and claim forms via the Internet or a toll-free number. Do not require class members to mail their objection or exclusion request to numerous places. When considering settlement administration, demand flawless execution and diligent statistical reporting, such as how many mailings were sent, how many were returned, how many were re-mailed, how many responses were received, and how these mailings were handled. Work with a claims administration vendor with the most up-to-date services, tools, and phone systems, and make sure the administrator is able to print and mail large volumes quickly. And look for a claims administrator that does not promote methods that impair effective notice to class members, such as mailing fine-print notices just to save money.

Every class action is unique, and every class action settlement presents its own challenges. However, following these seven steps should help the parties secure the peace and finality that they seek.

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ENDNOTES

1. Although this article focuses on successful class action settlements in federal court, many of its recommendations will be applicable to class actions in state courts, particularly in those states whose class action rules are modeled after FED. R. CIV. P. 23.
2. Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280 (7th Cir. 2002).
3. *See id.* at 283.
4. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).
5. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612 (2007).
6. FED. R. CIV. P. 23(e)(1)(C).
7. *E.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 117 (2d Cir. 2005).
8. *See* 28 U.S.C. § 1712(a).
9. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).
10. Todd B. Hilsee et al., *Do You Really Want Me to Know My Rights?*, 18 GEO. J. LEGAL ETHICS 1359, 1369 (2005).
11. *See, e.g.*, *In re* Serzone Prods. Liab. Litig., 231 F.R.D. 221, 236 (S.D. W.Va. 2005).
12. *See* Hospitality Mgmt. Assoc., Inc. v. Shell Oil Co., 591 S.E.2d 611, 616–21 (S.C. 2004).
13. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2007).

Expert Witnesses in Class Certification Proceedings

By Charles M. Denton, Josh M. Wallish, and David Gulley

At the class certification stage, many courts allow the use of experts without strictly requiring that the expert testimony be subjected to a *Daubert* analysis. However, the way in which courts deal with expert testimony when considering class certification motions demonstrates that courts often process the testimony using a judicial framework that understandably embraces the basic *Daubert* philosophy of reliability. In fact, some of those courts state that they are using a less stringent version of the *Daubert* analysis.

Admission of Expert Testimony

In *Anderson v. Boeing Co.*,[1] a group of employees sued their employer, alleging gender discrimination, violation of the Labor Management Relations Act, and breach of implied contract. At the class certification hearing, the plaintiffs offered expert testimony by a labor economist who conducted a preliminary statistical investigation of compensation and overtime among males and females employed at the defendant's plants to determine whether there was a disparity and, if so, whether the disparity was visible on a class-wide basis. The defendant moved to exclude the expert testimony.

The court held that, at the class certification stage, the expert's testimony did not have to meet *Daubert*'s rigorous standard. Using a very broad standard but still examining whether the expert's methodology conformed to generally accepted principles of economics, the court ruled that the labor economist's testimony could be used for purposes of deciding the class certification motion because it was not so fatally flawed as to be inadmissible as a matter of law. Therefore, his testimony was allowed to help establish numerosity and commonality among the proposed class.

In *In re Terazosin Hydrochloride Antitrust Litigation*,[2] the plaintiffs, indirect pharmaceutical purchasers, filed suit against a drug company, alleging violation of antitrust laws and unjust enrichment as a result of allegedly delaying generic competition for a drug. As part of the class certification motion, the plaintiffs argued that computation of damages was susceptible to common proof. The plaintiffs' expert economist testified to the impact of the delayed introduction of the generic version of the drug on the market and price of the drug. The defendant argued that the expert's methodologies were too imprecise for class certification. The court allowed the expert's testimony for class certification purposes, noting that his methods were reasonable, were widely accepted, and have been used in numerous other antitrust class action lawsuits. The court held that Rules 23(c)(1) and (d) permit flexibility to deal with the individual damage issues that may develop later in the case and that the plaintiffs did not need to provide a precise damage formula at the point of class certification.

Class Certification Granted

The court in *Behrend v. Comcast Corp.*[3] certified a class of Comcast subscribers in the Philadelphia area in this antitrust suit alleging that the defendant entered into agreements to avoid competition. Both sides submitted expert reports to support their respective class certification positions, and the court referred to the experts' testimony as it decided a number of class certification issues. The defendant's expert opined that there was no typicality among the proposed class because a significant number of subscribers were unaffected, while the plaintiffs' expert testified that all class members were similarly affected by the elimination of competition. Though the court emphasized that it would not hear arguments on the validity of the experts' methodologies, it examined their bases for some degree of reliability. In doing so, the court cited the various sources the experts used in formulating their conclusions to demonstrate the reliability of their research. Recognizing that it is not necessary for the plaintiffs to establish the merits of their case at the class certification stage, the court held that the plaintiffs' expert opinion was sufficient to establish typicality, adequacy of representation, and the predominance of common issues for purposes of class certification.

In *Dukes v. Wal-Mart, Inc.*,[4] the court explicitly referred to a "lower *Daubert*" standard that should be employed at the class certification level. The court ruled that the class of female employees of the defendant had satisfied the commonality requirement for class certification, in part through testimony from an expert sociologist and a statistician that the defendant's company-wide policies and practices caused gender discrimination. The court allowed the experts' testimony and used the testimony in its commonality analysis after noting that it was based on long-accepted methodologies. The court

considered the expert statistician's analysis after noting that it was probative and based on well-established scientific principles.

The court in *In re Hydrogen Peroxide Antitrust Litigation*[5] certified a claim for price fixing against hydrogen peroxide manufacturers and relied heavily upon expert testimony submitted by the plaintiffs. The court stated that plaintiffs' expert provided credence for the plaintiffs' allegations of price fixing by showing that the hydrogen peroxide industry is susceptible to a price-fixing conspiracy of the sort alleged in the case. In particular, the court used the expert testimony to determine that plaintiffs satisfied the predominance requirement. In response to defendants' objections to the methods used by the plaintiffs' expert economist, the court said that class certification was not the time to analyze strictly the correctness or likely success of plaintiffs' proposed analytical model. Nevertheless, the court did find the expert evidence credible in light of the expert's qualifications and its finding that the testimony was both reliable and relevant. In analyzing the expert testimony, the court explicitly recognized a lesser, *Daubert*-like standard, noting that its inquiry was less exacting than it might be for evidence to be presented at trial. It held that to preclude the proffered expert evidence at the class certification stage would require a showing that the opinion was "junk science."

Class Certification Denied

In *Vickers v. General Motors*,[6] the court refused to certify a group of homeowners living in the vicinity of a manufacturing plant alleged to have caused damage to their properties through emissions of sulfuric acid into the air. Among the reasons given by the court for denying certification was that the proposed definition of the class lacked evidentiary support. The plaintiffs had introduced purported expert testimony identifying two potential class boundaries. The court found that the opinions and analysis of plaintiffs' expert did not support a finding that the air emissions from the plant dispersed in equidistant circles that could be used to establish a class boundary. The court's conclusion was based on its determination that a map from the state health department on which the expert relied contained wavy lines (not perfect circles) indicating a dispersion pattern inconsistent with the proposed class boundary; the plaintiffs' expert had no idea what the lines on the map meant; when asked about the scales used for the map, the expert said he thought "the map was a little confusing"; the expert admitted that the only information he took from the map was that the impact of the emissions extended about 500 meters from the plant; the expert's own report did not suggest that emissions from the plant were dispersed in a perfect circle given the impact of wind patterns; and other evidence suggested that any impacts from the plant did not occur at equal distances around the plant. In effect, the expert evidence was not sufficiently credible, relevant, or reliable.

Following a certification hearing that included expert testimony presented by both sides, the court in *Rodriguez-Feliciano v. Puerto Rico Electric Power Authority*[7] refused to certify a class of electric utility ratepayers who alleged that they had been fraudulently billed for improper rate adjustments. The court found that the plaintiffs' expert failed to apply any mathematical, statistical, or economic models or methods and that, on the other hand, the defendant's expert economist provided extensive mathematical and statistical evidence, and used actual billing records and invoices in his calculations. It also noted that plaintiffs' expert had applied legal reasoning, and her credentials did not include prior expert reports in the area of class action lawsuits. The court found that the defendant's expert had demonstrated that there were vast factual differences among the members of the purported class, that the proposed class members were not similarly situated, and that the proposed class contained individuals who would benefit and others who would suffer damage from the revised billing formulas suggested by the plaintiffs.

Even when expert testimony proffered at the certification stage in a class action lawsuit is not formally subjected to a *Daubert* analysis, the court ruling on the certification motion is likely to apply aspects of the *Daubert* analysis to its evaluation of the expert testimony. Thus, testimony that otherwise would not survive a technical *Daubert* challenge is likely to be admitted at the certification stage. However, litigants should avoid offering casual expert testimony at the class certification stage, mindful that courts may carefully consider the fundamental reliability of their expert testimony even at that stage.

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ENDNOTES

1. 222 F.R.D. 521 (N.D. Okla. 2004).
2. 220 F.R.D. 672 (S.D. Fla. 2004).
3. No. 03-6604, 2007 U.S. Dist. LEXIS 32753 (E.D. Pa. May 2, 2007).
4. 474 F.3d 1214 (9th Cir. 2007).
5. 240 F.R.D. 163 (E.D. Pa. 2007).
6. 204 F.R.D. 476 (D. Kan. 2001).
7. No. KDP 2005-1591 (P.R. Super. Ct. June 28, 2007).

Consumer Cases Brought under Rule 23(b)(3)

STRATEGIES FOR DEFEATING CLASS CERTIFICATION

By Thomas A. Dye and Dean A. Morande

A consumer lawsuit founded on even seemingly innocuous individual allegations, once certified as a class action, raises the specter of protracted, bet-the-company litigation. Unless early settlement is deemed to be the wiser course, defense counsel should employ their entire arsenal to derail class certification early on. This article addresses important and sometimes overlooked tools that counsel can use to challenge whether a potential consumer class action truly satisfies the requirements for certification under Federal Rule of Civil Procedure 23.

In 1966, Rule 23 was expanded to allow for recovery of damages in class action cases. Those amendments triggered the filing of a wide range of consumer class actions. The business community, in turn, became increasingly discontented with class actions, which resulted in lobbying efforts to restrict what some considered abuses. Around 1995, tort reform and court interpretations of Rule 23 began whittling away at consumer class actions. For example, in 1995, Congress passed the Private Securities Litigation Reform Act, which restricts the choice of counsel to represent the class to the lead plaintiff—the largest shareholder.

Federal and state procedural class action reform culminated in the passage of the Class Action Fairness Act of 2005. (See Rubenstien article on page 4.)

The determination of whether to certify a class remains within the discretion of the trial court. Nonetheless, that determination must be guided by several principles, in accord with which defendants now have more tools than ever to succeed in defeating class certification of consumer claims.

Setting the Stage under Rule 23

It is the plaintiff's burden to prove all the necessary requirements of Rule 23. The court is charged with the duty of undertaking a "rigorous analysis" to determine whether the plaintiff has satisfied each element of the rule.[1] A failure to establish any one factor is fatal to class certification. It is the defendant's objective in opposing class certification to demonstrate that rigorous analysis will reveal at least one, if not numerous, shortcomings in the plaintiff's motion for certification. In doing so, defense counsel should prepare for the class certification hearing as if it were a trial with evidentiary proof. Defendant's counsel should pursue rigorous and thorough discovery to prepare for the hearing, including investigation into the appropriateness of the class representative and the relationship with the proposed class counsel. Expert witnesses should also be considered, and convincing demonstrative proof should be assembled.

A plaintiff typically cannot simply rely on the allegations of the complaint to satisfy its burden under Rule 23; the court must be satisfied that there is sufficient evidence to support each Rule 23 element. Although the court should not delve into the merits of the lawsuit, it must, if necessary, go beyond the pleadings to make whatever legal and factual determinations are necessary to evaluate whether the Rule 23 requirements are met.[2]

Furthermore, a class must be "adequately defined and clearly ascertainable."[3] A class definition fails if it is overbroad. This is an important element as courts continue to analyze the proposed class definition to be sure a workable class has been circumscribed.

Probing Mere Lip Service to Predominance

For plaintiffs seeking class certification under Rule 23(b)(3), in addition to other factors not discussed here, the rule itself recognizes that certification is permissible only when "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." This predominance inquiry is "far more demanding" than Rule 23(a)'s commonality requirement and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[4]

The predominance requirement must be examined against the backdrop of the elements of plaintiff's claims, any defenses asserted, relevant facts, and the substantive law. As a result, defendants should approach the predominance issue understanding that the issues presented by a potential class cannot predominate in an abstract sense; that is, plaintiffs must be able to demonstrate in a concrete way how common issues will predominate as to each member of the class. This requires that the plaintiffs be able to present evidence to support their allegations to prove a case, not only for the class representative, but for each and every potential class member as against each and every defendant.

Simply listing common issues and suggesting that they "predominate" is

not sufficient. In even the most borderline of cases, any plaintiff's counsel can come up with a laundry list of common questions, such as "Did Defendant X make a false statement in a public disclosure?" or "Did Defendant X know, or should have known, that the statement made was false?" In essence, common questions can be made broader and broader, until the common question might as well be presented as "Is Defendant X liable to the proposed class members for damages?"

Another way of thinking about how the proof must predominate over the class is to recognize that, as a practical matter, the plaintiffs will actually have to prove their allegations at trial.[5] In that sense, defendants should demand that the plaintiffs present a trial plan wherein they demonstrate their allegations on a class-wide basis, using a single set of facts that apply to all plaintiffs vis-à-vis all defendants. If the plaintiffs cannot devise a single (or common) set of facts to prove their claims, the common issues cannot be said to predominate.

For example, in *In re Ford Motor Co. Ignition Switch Products Liability Litigation*,[6] the class claims were essentially founded on allegations that the ignition switches in 23 million vehicles were defective. Plaintiffs brought several causes of action consisting of, among other things, fraudulent concealment and violation of state consumer fraud statutes. Plaintiffs were taken to task for failing to create a trial blueprint demonstrating "how their multiple causes of action could be presented to a jury for resolution in a way that fairly represents the law of the 50 states while not overwhelming jurors with hundreds of interrogatories and a verdict form as large as an almanac."

In situations such as this, plaintiffs might seek to limit their class to the residents of a single state. However, not all individualized inquiries can be defeated by narrowing the class definition. For example, a class definition including only those persons who actually relied on allegedly fraudulent conduct will not cure the reliance problem. The court is still faced with the prospect of conducting a mini-trial for every potential class member just to establish who actually falls into the class. Nor can plaintiffs (or the court) ignore the defenses that will be raised at trial. Each defendant must have the right to present its evidence, and this must be accounted for in determining whether common or individual questions predominate.

Framing Reliance as an Individualized Issue

In the context of consumer fraud claims, for example, a class cannot be certified if the claims are based on oral representations or nonuniform writings that vary from putative class member to putative class member. This result flows from the principle that "a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made."[7]

As for the reliance element itself, although common-law fraud requires proof of reliance, some consumer fraud and deceptive trade practices statutes do not. Yet, even under consumer fraud statutes lacking a "reliance" element, many courts require something like reliance to establish the required causation.[8] In other words, such statutes usually require proof that the plaintiff suffered damages as a result of the fraudulent conduct. Demonstrating that causal link is, for the most part, similar to demonstrating reliance and, most important, requires individualized proof.

Even if the plaintiffs can demonstrate that the defendants made uniform representations to each class

member, each putative class member's reliance or non-reliance on those purported representations is not a common question, but an individualized one. As courts uniformly recognize, "a person who discovers the truth may not claim that a defendant's misrepresentation or omission of information harmed him."[9] Therefore, each plaintiff must prove his or her own reliance. One notable exception is in the context of securities claims, where direct reliance is not required, but reliance on the market reflection of a stock's value may be presumed. In most cases, however, reliance may not be presumed. In fact, as one district court noted, "the vast majority of states have never adopted a rule allowing reliance to be presumed in common law fraud cases, and some states have expressly rejected such a proposition."[10] As a result, each plaintiff must affirmatively demonstrate, as an essential element of the claim, that he or she subjectively relied on the defendant's alleged misrepresentations and otherwise did not "discover the truth."

The plaintiff's affirmative requirement of proof of reliance (or causation) is not the only means to attack predominance. "[L]ike other considerations, affirmative defenses must be factored into the calculus of whether common issues predominate."[11] For example, even if reliance could be presumed on a class-wide basis, defendants must still be permitted to rebut this presumption as to individual plaintiffs. These individual defenses can subsume the common issues, even in the face of a presumption regarding reliance. As a result, the argument can and should be made that a class should not be certified if the defendant's affirmative defenses have merit and, because those affirmative defenses depend on facts peculiar to each plaintiff's case, would require individualized inquiry in at least some cases.

Some courts, of course, might be tempted to bifurcate the issues and certify only the issues involving common questions. Reliance and causation, however, are not generally among the issues that can be carved out of a certified class. Bifurcation itself "is not the usual course that should be followed" and is permissible only if the issues to be tried separately are "distinct and separable."[12] This is because inherent within the Seventh Amendment right to a jury trial is the general right of a litigant to have only one jury pass on a common issue of fact. Thus, a plaintiff's evidence of reliance and a defendant's evidence of non-reliance are issues bearing directly on liability and cannot be separated from the certification analysis.

Although some courts have bifurcated liability and damages, issues subsumed by the liability question cannot be separated from them. Indeed, a number of courts have decertified or refused to certify classes precisely because liability issues could not be bifurcated.[13] For example, in *Castano v. American Tobacco Co.*,[14] the district court had proposed to empanel a class jury to adjudicate common issues, while some number of second juries would determine the individual issues, which ranged from reliance to proximate causation. The Fifth Circuit decertified the class, determining, among other things, that the district court's plan impermissibly required that the second juries reexamine findings of fact made by the first jury. Similarly, in *Engle v. Liggett Group, Inc.*,[15] after 10 years of litigation and bifurcated trials, the Florida Supreme Court finally determined that the case could not proceed as a class action, and the class was decertified.

Beyond the Facial Statements of Rule 23

Beyond the plain language of Rule 23, certain strategies have been used effectively to defeat class certification in the consumer context. For example, a defendant facing a potential class action should consider whether any federal or state administrative agencies have processes in place to address some or all of the issues raised. If appropriate relief through an administrative remedy exists, a compelling argument can be made that employing the burdensome and expensive class action mechanism is not the superior method of adjudicating those issues.[16]

The lack of superiority of a class action over an administrative agency adjudication is particularly acute where substantial public policy issues are infused into the case. In a class action setting, specialized policy issues would be decided by laypersons, rather than agency experts charged with regulating that particular field. The prospect of crucial policy decisions being placed in the hands of a jury—or even the court itself—as opposed to an agency equipped with the expertise to deal with those issues, presents a compelling argument against the superiority of the class action vehicle.

Another issue to consider in the certification analysis is Federal Rule of Civil Procedure 13(a), which requires that defendants assert compulsory counterclaims, even in the context of class actions. Asserting counterclaims may raise additional individualized issues and require separate factual determinations regarding any defenses each plaintiff/counterclaim-defendant might advance.[17]

Although some plaintiffs might argue that asserting compulsory counterclaims is nothing more than a defense tactic to defeat certification, the class device cannot take away a defendant's right to bring its own claims. In *Ex parte Water Works & Sewer Board of City of Birmingham*,[18] the lower court had certified two class actions against a utility company, its directors, and others, alleging the misuse of public funds. In response, the utility company asserted compulsory counterclaims against a large number of the

plaintiff class members based on their delinquency in the payment of their water bills—the same bills that the plaintiffs asserted were too high because of the alleged illegal conduct of the defendants.

In rejecting the plaintiffs' argument that counterclaims are inherently inappropriate for class actions, the court determined that "Rule 23's policy of affording the offensive tactic of bringing large dollar claims" with imposing settlement potential does not "automatically outweigh Rule 13's policy allowing a defendant to use the defensive tactic of bringing counterclaims against plaintiffs."[19] Indeed, "the rules, when applied together, strike a balance between the offensive tactic of the plaintiff class members and the defensive tactic of the defendant."[20]

Another concept to consider is that courts have stated in no uncertain terms that adjudicating a proposed nationwide class action implicating the laws of all 50 states would be "absurd and clumsy."[21] As with many causes of action, the variety of proof required to demonstrate fraud among the 50 states is overwhelming. Variations involving the required degree of culpability, accrual of the cause of action, standard for reliance, definition of materiality, and the necessary type of misrepresentations are but a few issues that militate against a nationwide class where numerous laws would be applied.

If a plaintiff nonetheless brings a nationwide class implicating the laws of the 50 states, defendants should be quick to demand that the plaintiff satisfy its burden of presenting a thorough analysis of each state's laws, culminating in the conclusion that all the laws at issue can be placed into one of a small number of clearly discernable groups.[22] The defendants in such a case will, of course, have to create a competing list, highlighting the differing and incompatible elements of the various causes of action.

Creative attempts to apply the law of one state—be it to a particular cause of action or the entire case—have almost universally been rejected by federal courts. Such an approach would ignore state law choice-of-law principles and almost certainly violate due process.[23] Thus, at the very least, a party defending against a class should be required to defend against each particular claim under a uniform set of laws.

Despite the ebb and flow of the contours of Rule 23, several tried-and-true methods have emerged to test whether a potential class truly meets all the requirements necessary for the crucial step of certification. Successfully defending consumer class litigation requires a firm understanding of Rule 23 and an eye for the big picture of each aspect of the litigation, from the complaint to jury instructions. Putting plaintiffs to their burden of presenting a trial blueprint, along with the other concepts discussed in this article, are effective ways of identifying and exploiting any elements of Rule 23 that might not be properly addressed by the class.

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ENDNOTES

1. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).
2. *Id.* at 160 ("[I]t may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.").
3. DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970).
4. Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 594 (1997).
5. *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 350 (D.N.J. 1997); *see also* Chin v. Chrysler Corp., 182 F.R.D. 448, 463 (D.N.J. 1998) (refusing to certify a class when the plaintiff failed to "design a workable plan for trial embracing all claims and defenses").
6. 174 F.R.D. 332 (D.N.J. 1997).
7. FED. R. CIV. P. 23 advisory committee's note.
8. *See, e.g.*, Small v. Lorillard Tobacco Co., 720 N.E.2d 892, 897 (N.Y. 1999); Davis v. Powertel, Inc., 776 So. 2d 971, 974 (Fla. Dist. Ct. App. 2000).
9. Reynolds v. East Dyer Dev. Co., 882 F.2d 1249 (7th Cir. 1989).
10. *In re* Ford Motor Co. Vehicle Paint Litig., 182 F.R.D. 214, 221–22 (E.D. La. 1998).
11. Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 438 (4th Cir. 2003).
12. Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978).
13. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (decertifying a class of persons with hemophilia who had contracted HIV from blood transfusions because bifurcating liability and causation issues would violate the Seventh Amendment); Rink v. Cheminova, Inc., 203 F.R.D. 648 (M.D. Fla. 2001) (refusing to certify a class of persons exposed to the chemical malathion on these same grounds); *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323 (S.D.N.Y. 2002) (refusing to certify a class of persons claiming exposure to groundwater contamination when the plaintiffs' trial plan proposed bifurcating issues of general liability and specific liability).
14. 84 F.3d 734 (5th Cir. 1996).
15. 945 So. 2d 1246 (Fla. 2006).
16. Pattillo v. Schlesinger, 625 F.2d 262 (9th Cir. 1980).
17. Heaven v. Trust Co. Bank, 118 F.3d 735, 738 (11th Cir. 1997).
18. 738 So. 2d 783, 794 (Ala. 1998).
19. *Id.*
20. *Id.*
21. Vega v. T-Mobile USA, Inc., No. 06-CIV-20554, 2007 WL 1364333 (S.D. Fla. May 8, 2007).
22. *See In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 350 (D.N.J. 1997).
23. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002).

Much Ado about Nothing?

THE QUARREL OVER PREDOMINANCE IN ISSUE CERTIFICATION

By Janet C. Evans and Kari Thoe Crone

A recent decision by the Second Circuit Court of Appeals has reinvigorated debate over issue, or partial, class actions in federal courts. In *In re Nassau County Strip Search Cases*,[1] the Second Circuit held that certification of particular issues under Federal Rule of Civil Procedure 23(c)(4) does not require a preliminary determination that common issues predominate with respect to the action as a whole. This new holding contradicts the Fifth Circuit's holding in *Castano v. American Tobacco Co.*[2] Decided on the heels of the courts' increasing use of issue certification through the 1980s and early 1990s, *Castano* was widely credited with stemming the tide of issue class actions. Although the Ninth Circuit intimated its disagreement with the *Castano* holding,[3] until *Nassau County*, no other federal circuit court of appeals had directly decided the issue.

Commentators have speculated that the Second Circuit's decision in *Nassau County* will prompt a resurgence of issue-based class actions.[4] The suggestion also has been made that the circuit split will lead to forum shopping by plaintiffs hoping to certify issue-based class actions. These questions beg another one: How inconsistent are the holdings in *Castano* and *Nassau County*? Though the decisions are irreconcilable, do they actually dictate different results? Probably not.

Under either standard, the courts should be, as they have been, able to exercise their wide discretion under Rule 23 to certify classes in appropriate cases. Perhaps the best approach would be to consider appropriate those cases in which issue certification advances the fundamental goal of Rule 23 itself; that is, when certification advances a fair and judicially efficient disposition of the entire action, even if it does not completely resolve the action. Thus, even if the predominance analysis is nominally limited to a particular issue, the certification determination must take into account much broader issues. Under this view, whether approached as in *Castano* or as in *Nassau County*, the issue-certification result likely will be the same.

Everything Old Is New Again

Rule 23(c)(4) dates back to the passage in 1966 of Rule 23 in its current form and allows a class action to be maintained with respect to particular issues "when appropriate."[5] After largely overlooking Rule 23(c)(4) through the 15 years following its passage, the courts began to recognize the utility of issue or partial certification in managing large mass tort cases in the 1980s and early 1990s.[6] Most of these courts did not explicitly address the relationship between issue certification and the predominance requirement of Rule 23(b)(3).

This did not mean that issue classes were certified without scrutiny. Instead, the courts addressing issue certification properly considered the manageability of trying such issues and the impact of their resolution of the matter as a whole.[7] In summarizing the developing jurisprudence, one district court concluded that the predominance requirement of Rule 23(b)(3) was lessened in cases proceeding under Rule 23(c)(4).[8] This lessening importance of the predominance requirement, however, was "offset by a corresponding increase in the importance accorded to Rule 23(b)'s requirement of superiority, a requirement that is unaffected by Rule 23(c)(4)(A)."[9] Whatever the analysis, the courts denied issue, or partial, certification when it would not "materially advance a disposition of the litigation as a whole."[10] Courts also denied issue certification when "common issues [were] inextricably entangled with the individual issues."[11]

Then, in 1996, the Fifth Circuit decided *Castano*. There, the district court had certified for the resolution of particular issues, including "core liability," a nationwide class of nicotine-addicted smokers. The Fifth Circuit reversed the certification order, holding that the district court erred in its determination that common issues predominated and in its conclusion that the class action device was the superior method of resolving the claims. Specifically, the Fifth Circuit held that the district court "failed to consider how variations in state law affect predominance and superiority" and that its "predominance inquiry did not include consideration of how a trial on the merits would be conducted." According to the Fifth Circuit, the district court in *Castano* did very little to determine whether or how it could manage the trial of what could have been the "largest class action ever attempted in federal court." Nor did the district court determine whether the certification and trial of particular issues would advance the litigation.[12] The following passage came to be regarded as a death knell for issue-based class actions:

Severing the defendants' conduct under rule 23(c)(4) does not save the class action. A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial. Reading (c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.[13]

The response to *Castano* outside the Fifth Circuit was mixed. A number of courts adopted its holding.[14] At least one court explicitly rejected it.[15] Many other courts simply did not address it at all.[16] Other federal circuits continued to encourage the use of Rule 23(c)(4) in appropriate circumstances.[17] Whether or not they adopted the *Castano* analysis, courts continued to deny issue certification when certification would not promote judicial economies.[18] All that said, for nearly a decade, no federal circuit took on the Fifth Circuit's evaluation of predominance in relation to issue certification.

Then came the Second Circuit's decision in *Nassau County*. In that case, the district court declined to certify on liability issues a class of individuals challenging the county's blanket policy of strip-searching arrestees. The Second Circuit found this reversible error. In so holding, the court rejected the Fifth Circuit's "strict application of Rule 23(c)(3)'s predominance requirement," explaining that such a strict application had the effect of rendering Rule 23(c)(4) "virtually null." Based on the structure of Rule 23 and its advisory notes, the Second Circuit concluded that predominance could be found on particular issues even in the absence of predominance as to the cause of action as a whole.[19]

Applying its holding to the facts of the case, the Second Circuit held that the district court erred in finding that individual issues predominated with respect to liability issues. Having determined that the issues-based class implicated two broad common liability issues—whether the blanket policy existed and whether the defendants were liable for its implementation—the court found issue certification appropriate. The only countervailing issue was whether, with respect to individual class members, there existed particularized suspicion sufficient to justify each strip search, which issue the district court had characterized as de minimis. In these circumstances, the Second Circuit found issue certification under Rule 23(c)(4) appropriate and remanded the case for further consideration of full certification of the claims.

A Distinction Without a Difference?

So, what is the import of the *Castano-Nassau County* split? The cases certainly raise an interesting issue of statutory construction. Proponents of the *Castano* holding emphasize that the language discussing issue certification is housed not within section (b) of the rule (Class Actions Maintainable) but within section (c), which deals generally with procedural aspects of class actions, rather than their permissibility.[20] The *Nassau County* decision and its backers argue that the plain language of the rule anticipates application of the predominance standard after particular issues are isolated. And both sides argue that the other's

interpretation eviscerates portions of Rule 23.[21] At the end of the day, however, this dispute may be no more than academic because neither camp points to egregious results from applying one analysis over the other.

Arguably, in fact, the results in *Castano* and *Nassau County* would have been the same regardless of which analysis was applied. The district court in *Castano* did little to determine how individual issues would be tried and whether it would be worthwhile to do so, as had other courts certifying individual issues. Thus, even absent the Fifth Circuit's landmark holding, the issues identified by the *Castano* court may have been inappropriate for certification under Rule 23(c)(4). And in *Nassau County*, the Second Circuit determined that the common liability issues were "pervasive" and that their resolution would advance the litigation.[22] Especially given the flexibility of the predominance inquiry, a particular issue that "materially advances the disposition of the litigation" may also be predominant under Rule 23(b)(3).[23]

Back to Basics: Fairness and Efficiency

The ultimate answer to the issue-certification quarrel might be found in the rule itself. Though scarcely discussed by the courts, Rule 23(c)(4) limits issue-based class actions to appropriate cases. Both before and after *Castano*, the courts certified issue, or partial, class actions only after concluding that it was both manageable and beneficial to the entire action to do so. The decision in *Nassau County* should not change this result. Rather, the courts should continue to assess critically whether class treatment—of particular issues or entire claims—is appropriate; that is, whether certification advances a fair and judicially efficient disposition of the action as a whole. And the predominance inquiry—whether conducted before or after application of Rule 23(c)(4)—together with the superiority requirement, should assist the courts in distinguishing those claims or issues appropriate for certification from those that are not within the context of the action as a whole.

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ENDNOTES

1. 461 F.3d 219 (2d Cir. 2006).
2. 84 F.3d 734 (5th Cir. 1996).
3. *See* Valentino v. Carter-Wallace, 97 F.3d 1227, 1234 (9th Cir. 1996) (explaining that "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues").
4. *See* Jason R. Bent, *2d Circuit Breaches Barrier to Class Certification; Its Ruling Undermines a 5th Circuit Precedent Covering "Issue Classes,"* NAT'L L.J. (Oct. 30, 2006).
5. FED. R. CIV. P. 23(c)(4)(A).
6. *See, e.g.*, Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 169 (2d Cir. 1987); *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986); *In re* Copley Pharm., 158 F.R.D. 485, 491 (D. Wyo. 1994).
7. *See, e.g.*, *In re Sch. Asbestos Litig.*, 789 F.2d at 1008–9 (reasoning that even if individual damages suits are required, the "result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again").
8. *See In re* Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985).
9. *Id.*; *see also* Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 298 (positing that "superiority analysis becomes central to determining whether a case should be certified as to common issues").
10. *In re* Tetracycline Cases, 107 F.R.D. at 727; *see also* Harding v. Tambrands Inc., 165 F.R.D. 623, 632 (D. Kan. 1996).
11. Emig v. Am. Tobacco Co., 184 F.R.D. 379, 395 (D. Kan. 1998).
12. Castano v. Am. Tobacco Co., 84 F.3d 734, 737, 740, 744–45 (5th Cir. 1996).
13. *Id.* at 745 n.21.
14. *See, e.g.*, Arch v. Am. Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997).
15. *See* Simon v. Philip Morris, Inc., 200 F.R.D. 21 (E.D.N.Y. 2001).
16. *E.g.*, *Emig*, 184 F.R.D. at 395.
17. *See* Chiang v. Veneman, 385 F.3d 256, 267 (3d Cir. 2004) (affirming certification under Rule 23(c)(4) adjudication of first two elements of prima facie case under Equal Credit Opportunity Act, even though remaining elements may require individual adjudication); Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 167 (2d Cir. 2001) ("District courts should take full advantage of [23(c)(4)(A)] to certify separate issues in order to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies.").
18. *See, e.g.*, *In re* Paxil Litig., 218 F.R.D. 242, 250 (C.D. Cal. 2003).
19. *In re* Nassau County Strip Search Cases, 461 F.3d 219, 222, 225–27 (2d Cir. 2006).
20. *See* Joel S. Feldman et al., *Attempting to Manufacture Predominance: Practical and Legal Concerns with Issue Certification under Rule 23(c)(4)*, *in* CLASS ACTION LITIGATION 2007: PROSECUTION & DEFENSE STRATEGIES 55, 64 (PLI Litig. & Admin. Practice Course, Handbook Series No. 11372, 2007).
21. *Compare* Feldman et al., *supra* note 20, at 65, *with Nassau County*, 461 F.3d at 219.
22. *See* Feldman et al., *supra* note 20, at 76 (suggesting that facts in *Nassau County* may have supported finding of predominance for claim as a whole).
23. *See, e.g.*, *In re* Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986) ("There may be cases in which class resolution of one issue or small group of them will so advance the litigation that they may fairly be said to predominate."); *see also* Romberg, *supra* note 9, at 285–89 (characterizing predominance inquiry as "slippery concept").

Balancing Act

WEIGHING MERITS ISSUES AT THE CLASS CERTIFICATION STAGE

By Craig C. Martin

The basic rule on merits issues at class certification seems simple and well settled: When deciding a class certification motion, courts may not "inquire into the merits" of the plaintiff's claims.[1] But like most legal rules, this one has exceptions. Many courts recognize that addressing class certification requires at least some consideration of merits issues. As merits issues arise, attorneys should consider them in the context of the entire case, not just class certification.

How Certification Sets the Tone

Courts typically consider class certification after the pleadings close but before extensive merits discovery commences. Because a court's class certification ruling influences many of the key issues that will arise later, this decision often previews the court's early views of the lawsuit. For example, in deciding the class certification motion, the court may characterize the claims in the case or may express views of the types of factual determinations upon which the case may ultimately turn. So, although the court's decision may only decide class certification, often it will also shape and define the case as it moves forward.

Moreover, where a court grants class certification, the defendant may choose to settle rather than face extensive discovery and trial expenses, as well as the possibility of a significant adverse verdict. Similarly, if the court denies class certification, plaintiffs may seek to drop their case entirely because they cannot cost effectively pursue their claims individually. And some plaintiffs may seek leave to amend their complaint to try again to assert a viable class, with class certification considerations shaping the allegations of the amended complaint. When courts certify a class as to certain issues but not others, plaintiffs frequently abandon the noncertified claims. Thus, a court's class certification ruling not only affects the contours of the case but also influences the results of settlements.

"An Early Practicable Time"

The class certification decision occurs early in the litigation but with sufficient time for the parties to conduct some limited discovery. Although there is no requirement that a court decide class certification by a particular time, Federal Rule of Civil Procedure 23(c)(1)(A) requires the court to determine class certification "at an early practicable time," and by local rule, some federal district courts require plaintiffs to move for class certification within a specific time.

After federal courts expressed a need to allow some class discovery, the phrase "at an early practicable time" replaced the phrase "as soon as practicable," by amendment effective December 1, 2003. This amendment was designed to provide more flexibility for discovery prior to class certification rulings, but in practice, courts have not interpreted it as a drastic departure from the old rule. Courts continue to make class certification decisions in the early stages of the litigation and typically after a limited amount of discovery, thereby allowing attorneys to identify the lawsuit's facts and issues and to choose their legal strategies.

Discovery Prior to Class Certification

The courts generally allow the parties to conduct a limited amount of discovery prior to the class certification decision, such as depositions of the class representatives. Indeed, federal courts generally look beyond the pleadings and at relevant evidence to determine whether plaintiffs have satisfied Rule 23's requirements. These include Rule 23(a)(1)'s requirement that individual treatment of putative class members' claims would be impractical because of the size of the putative class; Rule 23(a)(2)'s requirement that there be sufficient commonality among the claims of individual class members that relief is appropriate as to the class as a whole; Rule 23(a)(4)'s requirement that the proposed class representatives will adequately represent the interests of the class; and Rule 23(b)(3)'s requirement that common questions of law or fact predominate over the claims of the class as a whole.

For example, in addressing the myriad issues necessary to determining whether to certify a class, the courts may consider evidence developed during limited discovery about whether there are questions of law or fact common to the class; where the alleged wrongdoing occurred or where plaintiffs suffered their alleged injuries, when deciding choice of law issues; whether the class representative's injuries are typical of the class's injuries; whether a conflict of interest or defenses unique to the proposed representative would prevent the class representative from adequately

representing the class; and whether the common issues (as shaped by evidence) predominate over the individual issues.

In addressing these issues with some limited discovery, courts are better able to make many of the determinations necessary to the class certification ruling. For example, class action complaints frequently contain allegations that although the number of individual members of a putative class is unknown, they number in the hundreds or thousands. The court can likely consider the actual number of potential claims or class members from a more grounded and realistic viewpoint once the parties have produced limited documents to show, for example, how many of the products at issue in a products liability suit were actually sold. Similarly, to determine whether a proposed class representative will adequately represent the interests of the class as a whole, a deposition of the proposed representative can be extremely useful.

Probing Behind the Pleadings

In *Eisen v. Carlisle & Jacqueline*,[2] the Supreme Court stated that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit" in making its class certification decision. This statement provides the basis for the rule that a court may not inquire into the merits of the plaintiff's claims while deciding on class certification. Eight years later, the Supreme Court again dealt with the issue of inquiring into the merits at the class certification stage in *General Telephone Co. of the Southwest v. Falcon*,[3] but the Court did not address or discuss *Eisen*. Rather, the Court acknowledged that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." According to the Court, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[4] And in *Oppenheimer Fund, Inc. v. Sanders*,[5] the Court has also noted that "discovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation."

Both the Second and Fifth Circuits have further explained how merits issues influence class certification decisions. In *In re Initial Public Offering Securities Litigation*,[6] the Second Circuit recently examined the Supreme Court's pronouncement in *Eisen*, observing that the *Eisen* rule "was made in a case in which the district judge's merits inquiry had nothing to do with determining the requirements for class certification." In addition, the Second Circuit laid out the following five conclusions:

- Before making its class certification decision, the court must determine whether each Rule 23 requirement has been satisfied.
- The determination requires the court "to resolve factual disputes relevant to each Rule 23 requirement."
- An overlap between Rule 23 requirements and merits issues does not preclude the court from making this determination.
- The court may not consider any merits issues that are unrelated to the Rule 23 requirements.
- The court must be given discretion to limit discovery regarding the Rule 23 requirements to ensure that class certification "does not become a pretext for a partial trial of the merits."[7]

The Fifth Circuit, in *Castano v. American Tobacco Co.*,[8] also addressed the scope of the *Eisen* rule, reversing the district court's grant of class certification where the district court had cited *Eisen* for the proposition that it could not inquire into the merits of the plaintiffs' claims.[9] The Fifth Circuit explained that the district court misinterpreted *Eisen*, which does not "suggest that a court is limited to the pleadings when deciding on certification." According to the Fifth Circuit, *Eisen* "stand[s] for the unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision." The Fifth Circuit went on to state that "[a] district court certainly may look past the pleadings to determine whether requirements of Rule 23 have been met" because the district court "must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues."[10]

An example of where certification and merits issues overlap is securities fraud class actions involving fraudulent conduct or misrepresentation. Plaintiffs in these cases often rely on the fraud-on-the-market theory, which the Supreme Court recognized in *Basic, Inc. v. Levinson*.[11] This theory is based on the economic premise that the market price of securities reflects all material information, including public misrepresentations that have wrongfully inflated the price of a given security. Under this presumption, any person who buys or sells securities on the open market is presumed to have relied on the alleged misrepresentation and suffered damages because the price reflected the misrepresentations. This presumption makes it easier for class representatives to show that common issues of fact and law predominate. By way of contrast, in *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*,[12] the Fifth Circuit decertified a class of shareholders and did not allow them to use a presumption of reliance to establish predominance. Without this presumption, the court held, the issue of individuals' reliance predominated the common issues.

Merits Discovery a Ticklish Issue

Oftentimes the parties dispute whether merits discovery should begin, and what constitutes merits discovery, before the court makes its class certification decision. Discovery's usual purpose is to allow each party to learn facts and information to support or defend its case. Class discovery usually involves

little more than the depositions of the class representatives and some limited interrogatories and document requests. However, questions persist as to the exact degree of merits discovery allowed before class certification.

Although Rule 23(c)(1)(A) gives neither party permission to engage in far-reaching discovery into a case's actual merits, the line between "class" and "merits" discovery is often murky. Many courts attempt to preserve this distinction, but in practice, the line between certification and merits discovery is not very clear. It is often difficult to distinguish between class issues, such as class members' names and addresses (which is a quite narrow issue), and that which goes to the actual merits of the case. Anticipating this possibility, the Advisory Committee commented that the courts should not waste valuable time during this early period in the case, separating certification from merits discovery.[13]

Too much focus on merits discovery prior to the class certification decision may lead to unwanted and counterintuitive results. For example, if the depositions of defendants are taken prior to the class certification decision, neither party will have had the benefit of having the court define and shape the issues in the case. As a result, the depositions may result in much wasted time and effort involving issues that the court finds unimportant and may not yield the information that is necessary to the prosecution or defense of the case and that is helpful to the court in deciding the case. Further, as a tactical matter, it simply may be unfair for the parties to depose witnesses before the party has considered its trial position and strategy, or before the party has considered the information known and available in light of the court's views as expressed in a class certification decision. Finally, in-depth merits discovery before the court's certification ruling arguably may become burdensome and expensive for the defendant and premature and unnecessary for the plaintiff.

How Merits Disclosure Can Foreclose Options

When staking out a party's positions on merits issues during class certification, lawyers should make sure that positions taken during class certification do not foreclose positions the party may want to take further down the road. A good example of this is Rule 23(c)(2), which is the codification of the rule against one-way intervention or the premise that putative class members may not sit on the sidelines to benefit from an outcome helpful to them yet avoid being bound to any adverse rulings. Under this subsection, once a class is certified, the putative class members receive notice and are given an opportunity to opt out of the class. The class members then either remain parties to the suit, bound by any judgments, or become nonparties who will neither be bound by any judgments nor take part in any recovery.

Recently, the California Supreme Court addressed similar issues in *Fireside Bank v. Superior Court of Santa Clara County*.[14] The bank filed suit for a deficiency judgment against a car buyer after she defaulted on her loan. The defendant filed a motion for judgment on the pleadings, arguing that the bank had issued improper notices. During discovery, defendant found that the bank had sent identical notices to roughly 3,000 other car buyers, and she sought class certification on her counterclaim. The plaintiff requested that the court decide class certification and provide notice to the class before ruling on the motion for judgment on the pleadings. The trial court granted the motion on the pleadings and granted class certification. On appeal, the state court of appeals affirmed the case.

The California Supreme Court reversed the ruling. Basing its decision on the rule against one-way intervention, the supreme court held that by ruling on the merits prior to class certification over the bank's objection, the trial court gave putative class members an opportunity for one-way intervention. Importantly, the supreme court's ruling did not bar deciding dispositive motions prior to class certification, but it did establish criteria for courts to use when doing so. This opinion demonstrates the need for counsel to be aware of the potential risks and benefits from staking out positions on the merits at class certification before all of the facts of the case are established in discovery.

Plaintiffs' and defense attorneys should be aware of what level of inquiry into the merits specific courts may perform while determining class certification. Although *Eisen*'s rule provides that courts may not "inquire into the merits" of the plaintiff's claim, later decisions have found such inquiry necessary. Counsel should also realize the risks and pitfalls associated with staking out positions during class certification that may limit flexibility in strategy as the case unfolds and as they discover new facts. Although courts may rule on merits-related motions before class certification, the value of any such ruling may change once the court grants or denies class certification. As always, the lesson is that, like any good legal rule, the rule that merits issues should not affect a decision on class certification has plenty of exceptions.

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ENDNOTES

1. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
2. *Id.* at 177.
3. 457 U.S. 147 (1982).
4. *Id.* at 160.
5. 437 U.S. 340, 351 & n.13 (1978).
6. 471 F.3d 24, 33 (2d Cir. 2006).
7. *Id.* at 41.
8. 84 F.3d 734 (5th Cir. 1996).
9. *Id.* at 739.
10. *Id.* at 744.
11. 485 U.S. 224, 247 (1988).
12. 482 F.3d 372 (5th Cir. 2007).
13. FED. R. CIV. P. 23 advisory committee's note.
14. 40 Cal. 4th 1069 (2007).

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