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CLASS ACTIONS 101

--A focus on class action practice.

Course Syllabus

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What is a Class Action?

A lawsuit in which one or more "named" (individual) plaintiffs sue on behalf of a class of "absent" class members.

The *two essential features* of a class action (each with significant implications) are:

- The ***representative nature*** of the action, with certain present individuals representing others who are not present or actively participating in the case; and
- The ***aggregation of claims*** inherent in a class action.

Importantly, if all requirements are followed, a class action will result in ***res judicata*** for all class members, whether relief is awarded or not.

NB:

- The actual plaintiffs are the individuals who are named in the complaint; they seek to represent a class of "absent" class members.
- Between the time the complaint is filed and the time that the court decides to certify a class (if it does so), the class is a "putative" (proposed) class, and its members (defined in the complaint and in the class certification motion) are referred to as "putative" class members.
- In federal court, class procedures are governed by Federal Rule of Civil Procedure 23 (hereinafter, "Rule 23").
- Defendant classes are authorized by Rule 23 but either rare or non-existent in practice.
- There are different ***types*** of class actions authorized by Rule 23 (discussed below), for:
    - Monetary relief
    - Injunctive relief
    - or where there is a ***limited fund*** or a risk that defendant(s) would be subject to "inconsistent" adjudications that would establish "incompatible standards of conduct."

Primary Purposes of Class Actions (Why Do We Have Them?)

- To aggregate claims that would not be economical to litigate individually.

- To achieve judicial economy by allowing numerous actual or potential lawsuits with a common core of facts and claims to be managed in a single proceeding by a single judge.

- There is an *inherent tension* here: to what extent should class actions allow a few lawyers or individual clients to aggregate claim?
    - Plaintiff perspective: every wrong deserves a remedy; defendants should not be able to "hide" behind transaction costs/ignorance blocking class members from bringing individual claims.

- Defense perspective: Who are these lawyers/individual plaintiffs to purport to bring claims that thousands of others have chosen not to bring? Whose interest is really being promoted? Moreover, several prominent appellate decisions have recognized the inherent burden (in terms of risk, costs) on defendants facing a certified class.
- Note that the courts are not passive bystanders, either, but have direct interests of their own. In addition to promoting justice in line with the above concerns:

    - Impulse to avoid "stirring up controversy" (let sleeping dogs lie).
    - Impulse to avoid solicitation of litigation by attorneys.
    - Instead of promoting judicial economy, a liberal class certification regime may threaten to bury overburdened courts in large, complex, slow-moving cases with intense motion practices (Rule 12(b)(6) motion; class cert. motion and hearing; *Daubert* motion; Rule 56 motion; fairness hearings; etc.)--and even more difficult trials.
    - Concern for the due process rights of absent class members.

- NB: Rule 23 only dimly reflects these competing values (e.g., superiority requirement, discussed *infra*). *But these tensions underlie every case*. You need to recognize them and craft your strategy, proofs, and arguments accordingly.

Motivations (What Drives Class Actions?)

Plaintiff perspectives (often $$$$):

- The economics of class actions are the major driver of this form of action. (After all, *plaintiffs* file class actions; defendants don't!) A successful class action can be very remunerative for plaintiff's counsel, through award of a fee typically deducted from a *common fund* (verdict or settlement) created as a result of their effort. Of course, unsuccessful class actions are very expensive for plaintiffs' counsel.

- Civil rights & labor arena: public interest and labor activist can achieve widespread change by concentrating limited resources in a single proceeding.

Defense perspectives (often saving $$$$):

- Defendants are almost always *companies* (deep pockets).

- Defendants almost always *fight class certification*
    - Companies are risk-averse and fear even a remote chance of an enormous verdict or ruinous result;
    - Class actions are especially expensive to *defend*. Virtually all discovery (other than that of experts) is done of the defendants, meaning that they have to (i) find and review the documents, (ii) answer the written interrogatories, and (iii) prepare for and defend the Rule 30(b)(6) and numerous fact depositions. Moreover, in a bet-the-company case defense counsel do not come cheap!

- *If a liability class is certified,* most often, defendants will "change gears" on the question of class certification if a reasonable settlement can be negotiated. At this point, the defendant's motives are:

    - To *mitigate risk* of an adverse verdict or ruling;
    - To avoid expense and distraction of a trial;
    - To achieve *res judicata* through a settlement that binds all or most class members, thereby *avoiding future litigation costs and exposure*.

Types of Cases Frequently Litigated on a Class Basis

Consumer [1]
Antitrust
Securities
Civil Rights
Labor
Products

NB: Judicial decisions in each of these substantive areas of law have "colored" class action practice in each area, even though Rule 23 and most class action principles formally apply in each area. Accordingly, you need to:

1. Thoroughly research class certification decisions in the substantive area at issue; but also
2. Pay attention to major class action decisions in other substantive areas that may influence the resolution of your case.

Example: The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 277 (2011) ("Dukes")* will predictably cause litigants and courts dealing with even non-discrimination cases to focus on the particular elements of the claim at issue, and whether the commonality prerequisite has been met.

Relation to other procedures and practices

Joinder
- Preference for joinder over class certification (*see* Rule 23(a)(1)).

Derivative Actions
- Shareholder represents other shareholders; claim brought to enforce corporation's rights (see Rule 23.1).

Government actions (FTC, DOJ, State AG's)
- Enforcement of the public's interests, may set up a private civil class action.

"Test" cases (e.g., *Grutter v. Bollinger*, 539 U.S. 306)
- A class case is not always necessary to move the law.

Declaratory judgment actions
- These may also be brought on a class basis. Rule 23(b)(2).

Judicial Panel on Multidistrict Litigation

Arbitration agreements

[1] *But see* arbitration agreements, discussed *infra*.

- The Supreme Court recently ruled that arbitrators cannot infer an agreement to arbitrate claims on a class basis where the agreement is silent. *Stolt-Nielsen S.A. v. Animalfeeds Intl. Corp.*, 589 U.S. 662 (2010).
- The Supreme Court recently ruled that state laws that deem consumer contracts "unconscionable" merely because they bar class arbitration are preempted by the Federal Arbitration Act's policy of making private agreements to arbitrate enforceable. *AT&T Mobility LLC v. Conception,* 563 U.S. 321 (2011).
- The net effect of these two decisions has been to severely restrict the availability of customer class actions where a form agreement is involved.

A Word About Ethics & Duties

- "Finding" named plaintiffs is a dance between state ethics restrictions and First Amendment commercial speech protections.
- Class counsel's *clients are the named plaintiffs*—not absent class members. Therefore class counsel need not "clear conflicts" for putative class members.
- However, class counsel has a well-established *fiduciary duty* to absent class members (both putative and actual). Therefore, he/she *must manage the case for the benefit of the class* as a whole and not just the named plaintiff(s).
    - Revised Rule 23(e) provides limited exception, enabling class counsel to settle the class representative's claims without court approval *prior to certification of a class*.
    - NB: Ethical rules forbid an attorney from agreeing to not represent future clients as part of a settlement, so class counsel could not ethically agree not to turn around and file a new class action after settlement of the named representative's claims.
- The court has a fiduciary duty to absent class members in the context of settlement, due to concerns about inherent conflict of interest between class counsel and the class in this context.
- Best practices (and some judicial opinions) dictate that class counsel not negotiate a fee award with defendants before reaching an agreement in principle on the amount and kind of relief to be awarded the class under a proposed settlement.
- In a federal class action, state ethics rules that would otherwise bar class counsel from agreeing to be ultimately responsible for costs incurred (as opposed to merely "advancing" such costs) are trumped by Rule 23. *Rand v Monsanto, 926 F.2d 596* (7th Cir 1991). Class counsel can agree to absorb such costs if the case is unsuccessful.

State vs. Federal Class Actions

- Most states provide for class actions in state courts.
- Many (but not all) states track Rule 23—some with important differences.
- *RESOURCE*: The ABA Litigation Section, Class and Derivative Suits Subcommittee, publishes a compendium of state class action law.
- Since passage of the Class Action Fairness Act of 2005(CAFA), *most* class are removable to federal court, if
    - There are projected to be at least 100 class members;
    - There is at least $5,000,000 in controversy

  - There is *minimal diversity* (i.e., between any *class member* and *any* defendant).
- CAFA does not change removal rules for federal question cases (e.g., federal antitrust).
- CAFA is an *alternate* basis for federal jurisdiction (traditional bases still exist).
- CAFA does not apply to securities or corporate governance cases. (Most securities class actions are filed in federal court based on federal question jurisdiction and subject to the Private Securities Reform Act of 1995 (PSLRA) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA). SLUSA generally preempts state securities fraud lawsuits on behalf of 50 or more people and makes such class actions removable to federal court.
- CAFA does provide plaintiffs a *limited* means of selecting a state form for some class actions, by limiting class members to residents of a given state and suing primarily or exclusively defendants who are resident of the chosen state; and gives judges limited discretion to remand class actions involving predominantly claims and parties specific to a given state.
- RESOURCE: There are many published works on CAFA. A convenient summary by Prof. William B. Rubenstein of UCLA Law is linked to the Wikepedia article on CAFA and available at: http://www.classactionprofessor.com/cafa-analysis.pdf

Prerequisites to Certification--Rule 23(a)

NB: It is *plaintiff's burden* to establish all prerequisites for class certification. According to the Supreme Court's seminal decision in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982), the trial court must undertake a "rigorous analysis" of whether plaintiff has sustained this burden.

Why do these prerequisites exist?

- Due process concerns (so that its "fair" to bind absent class members and defendants).
  - *See, e.g., Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).
- Avoid conflicts of interest among plaintiffs & class members.
- To avoid class actions except where they are necessary.
  - *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 700-701(1979) (class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only").

Rule 23(a)

(1) Numerosity—class must be "so numerous that joinder of all members is impracticable."

- Various cases discuss 20-40 class members as a minimum; CAFA minimum is 100.
- Rarely an issue—but still plaintiff's burden to establish.

(2) Commonality—"there are questions of law or fact common to the class."

- Requires only "a" common question (distinguish from "predominance" element of Rule 23(b)(3)).
- Are all class members alleging the same wrongdoing?
- Focus on the nature of the claim and associated proof requirements. *Dukes.*

(3) Typicality—named plaintiffs' claims must be "typical of the claims" of the class.

- Focus is on comparing the named plaintiff's claims to other putative class members' claims
- Can it fairly be said: "As go the claims of the representative, so go the claims of the class"?
- The key concern is due process: Is it fair to absent class members (and the defendant) to have their claims turn on the facts and theories of the named plaintiff(s)?
- Defendants will focus on "wedge" issues (e.g., unique defenses; standing)
- Overlap with commonality requirement.

(4) Adequacy

- Two components: adequacy of the named plaintiff(s); adequacy of class counsel
- Named plaintiff(s) must be
    - A member of the proposed class
    - Engaged and attentive, at least minimally knowledgeable
    - Not obviously beholden to plaintiff's counsel (e.g., his or her secretary).
- Inadequacy of counsel is most often established where they have not done a minimally proficient job *in the case at hand.*
- An articulable conflict between the named plaintiff and some of the class, or between the duties of class counsel vis-à-vis different segments of the proposed class, will defeat a finding of adequacy.

Rule 23's implicit requirements

- Live controversy/mootness. An action is moot where:
    - the controversy is no longer live
    - the parties lack a personal stake in its outcome
        - NB: capable-of-repetition but avoiding review exception
- Ascertainable/definable class
    - "fail safe" classes are not permitted
    - Membership must be ascertainable based on objective criteria, *not* based on a determination of defendant's liability.

Types of Rule 23 Class Actions

Limited Fund/ Risk of Inconsistent Adjudications: Rule 23(b)(1) (A) & (B)

Key differences:

- No opt outs.
- No notice required.
- No predominance requirement.

NB: Supreme Court has established a high bar for determination whether there is truly a "limited fund." *Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999).

Injunctive or Declaratory Relief: Rule 23(b)(2)

Key differences:

- No opt outs.
- No notice required.
- No predominance requirement.

NB: Still significant open issues (and differences among circuits) as to how much monetary relief can be sought and still qualify for Rule (b)(2) treatment. Since *Dukes* plaintiffs are moving for *both* (b)(2) *and* (b)(3) in employment cases (bifurcated motions).

Damages Class Actions: 23(b)(3)

Accounts for >90% of class actions.

Key differences:

- Class members may opt out.
- Mandatory notice.
  - Absent extraordinary circumstances, to be paid by plaintiffs' (reimbursable if settlement or verdict).
- ***Predominance requirement.***
- Class action must be superior to other forms of resolution. In making this determination, the court is directed to evaluate:

    (A) class members' interests in individually controlling their separate claims
    (B) the extent and nature of any litigation already begun by class members
    (C) the desirability or undesirability of concentrating the litigation in the particular forum
    (D) the likely difficulties in managing a class action.

  - In practice these criteria collapse into the (fraternal) twin determinations of ***superiority*** and ***manageability***. Common illustrations:

    - If each class member's claims are substantial, and there are no obvious roadblocks to individual litigation, then not "superior."

    - If each class member's (or hundreds or thousands of them) would need to individually establish his/her damages at an evidentiary hearing, then the case is not "manageable."

Rule 23(b(3)—The Predominance of Predominance

NB:

- Each case is unique, and turns on its own specific circumstances.
- Factual or Legal issues can present common or individual questions.
- Types of claims frequently found NOT to present a predominance of common issues include
    - Common law and some consumer fraud claims (reliance, misrepresentation made, causation, materiality)
    - Personal-injury claims (causation)
    - Multi-state class actions based on state law
        - But, choice-of-law considerations. *Shutts*.
    - Equitable claims
    - Claims presenting *unique defense*, e.g.,
        - Statute of limitations
        - Waiver
        - Unclean hands

- Types of claim frequently found to present predominantly common issues:
    - Securities fraud (Section 10(b)(5) claims for stocks trading in an efficient market for a discrete time period);
    - Direct-purchaser antitrust claims brought under Section 1 of the Sherman Act (e.g., price-fixing).
    - Single-state consumer fraud statute claims.

- "Mixed Bag"
    - Labor cases
    - Civil rights cases
    - State law indirect-purchaser antitrust claims.

NB: There are lots of exceptions to the general results; remember, *each case turns on its own unique facts and circumstances.*

- ***The degree of creativity and energy brought to bear on developing strategies, evidence, and arguments for and against a finding of predominance for Rule 23(b)(3) classes is perhaps the single most important determinant of a class action practitioner's success.***

Strategic Considerations

- Plaintiff: Paramount goal is to achieve a certified class. A certified class has high value as a lawsuit. Anything else has little or no value (absent reversal on appeal). This means:
  - Surviving a motion to dismiss, and
  - Winning the class certification motion.

- Defendant: might try to "pick off" a named plaintiff by settling with him or her or making a Rule 68 offer of judgment before the class certification motion is filed (allowed by the revised Rule 23(e)).
  - Some jurisdictions allow offer of judgment to "moot" the named plaintiff's claims if made before class cert motion is filed. *See Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) (discussing cases).

- Defendant's "4.5 bites at the apple":
  - Motion to dismiss
  - Motion for class certification (and 23(f) appeal)
  - Motion for summary judgment
  - Trial

- Occasionally, early settlement might be the best course for defendants, in order to:
  - achieve *res judicata* for most/all claims in one proceedings;
  - avoid cost of extensive motion practice/discovery/trial; or
  - settle claims within policy limits.
  - The key is to LEARN your client's priorities and to develop the most cost-effective strategy for achieving them.

- Competing class actions—the fight for "lead counsel"
  - Control over case assignments (and therefore "lodestar")
  - Control over settlement negotiations
  - Control over fee petition

- Consideration of plaintiffs' early settlement *with a co-defendant*, in order to:
  - narrow the "facts" in play at class certification stage, to increase prospects of certification;
  - reduce resources on the defense side (one less party/set of lawyers to fight);
  - potentially "fund," in part, the litigation (or at least establish its viability); or
  - reduce incentives for the settling co-defendant's witnesses to develop harmful evidence or shade the truth.

The Class Certification Motion

When decided?

- "At *an early practicable time* after a person sues . . . ." Rule 23(c)(1)(A). This language was changed from "earliest practicable time" in the prior rule to give the trial court flexibility to delay the certification decision until after adequate discovery, motion practice, and hearing to permit the arguments for and against certification to be more fully developed.

However,

- It is in the interest of all parties to know as soon as "practicable" whether or not the class is certified so that they can allocate their efforts and resources accordingly.

Common Discovery Issues

- How much?
- What kind?
    - Strategies for class discovery—plaintiffs:
        - Damning admissions of liability (e.g., "smoking gun," key deposition admissions) may influence the trial court's certification decision.
        - Liability evidence common to the class – focus on defendant.
        - Evidence of common impact or causation – sometimes need expert opinion to demonstrate that defendant's alleged misconduct affected entire class.
        - Evidence of classwide damages – again, helpful to focus on defendant.

    - Strategies for class discovery—defendants:
        - Often the best facts with which to demonstrate predominance of individual issues lie with third parties.
            - E.g., indirect-purchaser antitrust claim: consider subpoenaing third parties to adduce evidence that manufacturer price increases alleged to have been the result of price fixing were not passed on to indirect purchasers by various wholesalers or retailers at various times to some class members (so no common "impact").
            - Do not become wholly reactive—focusing so many resources responding to plaintiff's discovery that you do not investigate and develop fruitful facts from your own client or co-defendants that may yield strong support for predominance of individual issues.
            - Discovery/depositions of named plaintiffs can yield wonderful gems.

- BOTH sides: The time to develop your strongest arguments for/against class certification is in the discovery phase. If you wait until briefing or the hearing it will likely be too late.
- Will your court hold an evidentiary hearing? If so, "save" demonstratives for the hearing? If not, put them in the brief.
- Do you need experts? Identify the best and prepare them early. This practice can pay big dividends if followed and yield *major* problems if ignored.

- Bifurcated discovery?
  - Advantage to plaintiffs: can conceivably narrow their discovery efforts and costs until they find out whether the court will certify a class; probably yields a quicker class certification decision.
  - Advantage to defendants: reduce overall discovery costs if a class ultimately is not certified. Also brings more "focus" to the certification question. And the prospect of extended future discovery and additional motion practice (e.g., Rule 56) post-certification might possibly indirectly discourage a trial court from certifying.
  - Major disadvantage: fights over whether particular discovery goes to class certification or the merits delays proceeding and waste resources of the parties and the court.

- Discovery of Absent Class Members.
  - Defense counsel communicate informally with absent putative and especially certified class members at their peril (risk of sanctions or judicial backlash). Some communication may be necessitated by ongoing customer relationship. Since the absent class member is not officially a client of class counsel, ethical questions are murky. E.g., can defense counsel advise a client how to respond to customer questions about a pending class action, or class notice? Tread carefully!

- Discovery of Third Parties.
  - As noted, in many instances, defendants in particular (but perhaps plaintiffs as well) need to take discovery of third parties to build a record against or for certification.

Motion & Brief

- Plaintiff's "Catch-22": The broader (and therefore the more potentially profitable) the class, the greater the risk that defendants can successfully argue that individual issues predominate (or that it fails even to satisfy "commonality" prerequisite; e.g., *Dukes*).
- Defendants' "Catch-22": Defendant's arguments in favor of certification of a settlement class that is later rejected by a trial or appellate court might estop defendants from challenging a liability class. *Carnegie v. Household Int'l Inc.*, 376 F.3d 656 (7th Cir. 2004).

- Except for trial manageability concerns, settlement class must satisfy the same "rigorous" application of the Rule 23 requirements as cases certified for trial. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).
- Defense counsel: do yourself, your client, and the Court a favor: ***pick your shots***! Do not spend time on marginal arguments.
- Lots of excellent class certification briefs are filed every week by major plaintiff and defense firms around the country, in all substantive areas.

"Merits"

Despite a plethora of prior case law (and plaintiff's briefs) reciting that trial courts are barred from reaching the merits of a claim at the class certification phase (and therefore must decline to resolve defendant's challenge to some aspect of plaintiff's proof that common issues predominate), it has become increasingly clear that courts may *not* avoid resolving the merits of any issue "central" to class certification. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316-21 (3d Cir. 2008). This resolution is for purposes of class determination only, and is not binding at trial.

Trial Management Plans

Because it is plaintiff's burden to establish all of the Rule 23 criteria, many sophisticated plaintiff's counsel will submit a proposed trial management plan with their class certification brief. These plans can be quite sophisticated, but should focus on demonstrating:

- That the case can reasonably be tried to a jury, and that
- The jury can reasonably be expected to resolve class claims based on common proofs.

Such plans frequently include:

- to the extent possible a description of the classwide proof necessary to prove these claims' elements;
- draft jury instructions to demonstrate the manageability of trying the case on a classwide basis;
- an explanation of the possible need for a special master or claims-administration firm to assist in allocating any lump-sum settlement;
- an explanation that plaintiff will seek to direct any remainder from any lump-sum settlement to a suitable *cy pres* recipient; and
- an explanation that the court will retain jurisdiction over any allocation matters.

The Class Certification Hearing

Class certification hearings have gotten more common and extensive over recent years. Experience suggests that trial courts rarely certify a contested class based solely on the papers.

Evidentiary Hearing

- While cases and the Manual For Complex Litigation (Fourth) states that an evidentiary hearing on class certification "may" be necessary where relevant facts are in dispute, it is

difficult to understand how the trial court can undertake a "rigorous analysis" of a strongly contested certification motion without one.

- An advantage of such a hearing for plaintiff is that since he or she has the burden of proof, an opportunity to marshal and introduce more persuasive proofs should help more than hurt the prospects of certification. Moreover, credibility determinations made at a hearing are subject to a deferential standard of review on any Rule 23(f) review or appeal of a final judgment.

- From a defense perspective, an evidentiary hearing is desirable to truly "focus" the court on the importance of the class certification decision, and encourages a rigorous analysis more likely to demonstrate shortcomings in plaintiff's attempt to meet his or her burden. Additionally, it helps builds an evidentiary record with which to challenge any certification decision on appeal.

- The economics of class action practice probably generally encourage defendants to spend more money earlier to secure better-researched and more fully-supported expert testimony at the certification stage than plaintiffs:
    - Plaintiffs' counsel are more reluctant to expend significant funds on experts before they know whether the judge will certify a class;
    - Defeating class certification in a bet-the-company case is a key imperative for defendants from the outset, and expert fees are paid by the client (not counsel).

Expert Witness Testimony

- Applicability of *Daubert* to class certification experts:
    - Several circuits have held that *Daubert* applies at the class certification phase (e.g., Seventh Circuit);
    - The Supreme Court essentially ducked this issue *Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013);*
    - Better practice is for ***both*** parties to satisfy *Daubert* whether or not it is required, in order to maximize persuasiveness.
- Do not skimp on your class certification expert selection or preparation: this is not just the "battle of the experts": *in large measure, it's the entire war*!

The Class Certification Decision

- Applicable standards
    - "Rigorous analysis" of the class requirements is required. *General Telephone Co. of Southwest v. Flacon, 457 U.S. 147 (1982).*
    - Written order required under Rule 23(c)(1), that:
        - Defines the class
        - Identifies the "claims, issues, and defenses" to be tried.

  - Appoints class counsel
  - Provides for notice to class members

- A certification decision can be changed or amended at any time before final judgment. Rule 23(c)(1)(C).
- A court may certify sub-classes "that are each treated as a class under this rule". Rule 23(c)(5).
- A court may certify particular issues for class treatment. Rule 23(c)(4).

Interlocutory Appeal of Class Determination: Rule 23(f)

- After an initial wave of interlocutory appeals, appellate courts have developed restrictive standards. See, e.g., *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002).
- Short (14-day) appeal period. NB: Each defendant must file its own timely appeal, or will be excluded.
- Discretionary.
- No automatic stay.
- Frame your petition to demonstrate any "plus" factors, e.g.:
  - Focus on the trial court's handling of open or unsettled issues associated with class certification (e.g., whether the trial court applied *Daubert* to challenged class cert. expert; whether trial court refused to reach merits of an issue critical to class certification);
  - call out any governmental agency findings that support private enforcement action (e.g., *Messner v. Northshore University Healthsystem, 669 F.3d 802, 813 (7th Cir. 2012)*); and
  - Demonstratively less-than-"rigorous" examination of the Rule 23 criteria by the trial court, plus massive exposure.
- Grant of a Rule 23(f) petition should trigger (or renew) settlement discussions by *both* sides.
- Appellate review of class certification decisions are ostensibly under an "abuse of discretion" standard.

Class Trials

- Rare, but not unheard of.
  - In an increasingly competitive business and financial environment class trials may mushroom.
- Ferretting out strong biases about class actions in *voire dire* is critical for both sides.
- Plaintiff will try to keep the focus on defendant's conduct, the path to victory.
- Defendant needs to build a record, if possible, demonstrating that it bears no liability to one or more named representatives or absent class members, and that—even if the jury finds liability as to the named representatives this does not establish its liability to substantially all absent class members.

  - Given the infrequency of Rule 23(f) certifications, appeal of a final judgment may be the only opportunity for review of the certification opinion. Trial provides a much bigger stage for making a record that Rule 23 requirements have not been satisfied than a class certification hearing.
- Particular focus on damages
  - For plaintiff, the methodology and evidence must be very sound. The bigger a verdict the greater the scrutiny post-trial and on appeal;
  - For defendant, golden opportunity to establish the unfairness of the class trial (i.e., that named plaintiff's individual claims are not typical of those of class members generally, and that proffered damages evidence sweeps in huge damages calculation never tested at trial by cross examination of those whose "damages" are being litigated).
    - Focus on any individual defenses that might be available vis-à-vis absent class members.
    - Focus on broad assumptions made by plaintiff's expert.
    - Focus on the complicated details of the market/business or practice/course of conduct at issue.

Class Settlement

- The importance of "arms-length" negotiations
- Use of third-party mediators (e.g., Jams-Endispute)
- The dynamic of insurance carriers
- Understanding the financial drivers behind each party

Strategic considerations

- From the class counsel's side,
  - the difficulty of funding all costs
  - difficulty absorbing all (non-compensated) hours in protracted class litigation on a slow docket
  - uncertain outcome
  - prospect of appeal of a favorable verdict (and associated costs and additional work)
  - diminution in coverage limits used to pay defense costs may leave a marginal defendant unable to pay judgment
  - risk of defendant's bankruptcy

- From defendants' side
  - enormous defense costs (paid monthly)
  - adverse publicity associated with ongoing litigation and any adverse rulings (e.g., denial of motion to dismiss; class certification; etc.)
  - distraction of management
  - possible overhang on stock price

- possible interference with bank/bond financing
- risk of catastrophic verdict
- professional reputations of management involved
- diminution in coverage limits used to pay defense costs may leave individual (management) defendants exposed to judgment, particularly in view of possible state law limitations on a corporation's ability to indemnify

Key Concepts

- Need for "confirmatory" discovery.
- Rule 23(e) provisions:
  - settlement must be "fair, reasonable, and adequate";
  - the parties are required to file a statement "identifying any agreement made in connection with" the proposed settlement; Rule 23(e)(3)
  - class members may object to proposed settlement (objection may be withdrawn only with court's approval); Rule 23(e)(5) and
  - the rules authorize a second opt-out opportunity: if trial class was previously certified and the required opt-out period has expired, the court may require that class members be given a second opportunity to opt out so that they can make an informed decision based on the proposed settlement terms. Rule 23(e)(4).
- Preliminary Fairness Hearing
- Class Notice/opportunity to opt out (discussed *infra*)
- Final Fairness Hearing
  - CAFA requires that the final fairness hearing not occur prior to 90 days after notice to appropriate officials. 28 U.S.C.A. § 1715(d).

The Importance of the Claims Administrator

- Working with a competent, neutral, cost-effective claims administrator can be critical.
- Consult the administrator early and often on notice options, costs, etc.
- A sophisticated claims administrator may spot tax issues (labor and even antitrust class actions).
- Both plaintiff and defendant have a stake in the selection of and communication with the claims administrator.

The Importance of Notice

- The requirement is for "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23(c)(2)(B).
  - This mean first class mail if class member's names and addresses are available. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974).
  - Many other forms of notice now used in addition (e.g., email; web site; social media).

- Adequate notice is paramount to both parties, but especially *to defendant:*
  - Implication of inadequate notice is *no res judicata* if the settlement is collaterally attacked. *See State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) (Supreme Court of Vermont refused to give *res judicata* effect to nationwide settlement based on insufficient notice and representation in an Alabama class action).
  - Accordingly, defense counsel should "own" the notice and assure that it meets due process requirements.
  - NB: CAFA "gottcha"—requirement to notify appropriate state and/or federal authorities of prospective settlement prior to final approval or else *no res judicata*. *See* 28 USCA §1715(e).
  - No defense counsel ever wants to try to explain to a client why the judgment or settlement they paid for in a prior class action does not bind plaintiffs in subsequent litigation.

- The rules emphasize plain language: "The notice must clearly and concisely state in plain, easily understood language . . . ." Rule 23(c)(2)(B). *More words are not necessarily better*.
  - Model clear-notice forms can be found at Federal Judicial Center website – www.fjc.gov .

- Rule 23(c)(2)(B) requires that the notice explain:

  (i) the nature of the action;
  (ii) the definition of the class certified;
  (iii) the class claims, issues, or defenses;
  (iv) that a class member may enter an appearance through an attorney if the member so desires;
  (v) that the court will exclude from the class any member who requests exclusion;
  (vi) the time and manner for requesting exclusion; and
  (vii) the binding effect of a class judgment on members.

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Additional Resources

- *Managing Class Action Litigation: A Pocket Guide For Judges*, 3d ed., Barbara J. Rothstein & Thomas E. Willging (Federal Judicial Center, 2010), freely available at: www.fjc.gov/public/pdf.nsf/lookup/classgd3.pdf/$file/classgd3.pdf . A "best practices" guide for federal judges developed in response to

CAFA, and covering such practical issues as selection of class counsel, case management, settlement and attorneys' fees.

- *Principles of the Law of Aggregate Litigation*, Prof. Samuel Issacharoff (ALI, 2010): A scholarly synthesis of class action law from some of the top minds.
- *Class Actions and Other Multi-Party Litigation in a Nutshell*, 4th ed., Prof. Robert Klonoff (Nutshell Series) Paperback – (West Nutshell Series, October 3, 2012). A condensed treatment of class action law and practice by one of the Associate Reporters of the ALI *Principles* and member of Rule 23 Subcommittee of the Advisory Committee on Civil Rules.
- *Newberg on Class Actions*, William Rubenstein, Alba Conte, and Herbert B. Newberg (Lawyers Cooperative Publishing, 2002-2014): A multi-volume loose-leaf treatise now being very ably updated by Professor Rubenstein.
- *Manual for Complex Litigation* (4th ed., Federal Judicial Center, 2004): A slightly dated go-to resource for many federal judges; not expensive.
- *The Class Action Playbook*, Brian Anderson and Andrew Trask (LexisNexis/Matthew Bender, 2013): A helpful and refreshingly condensed overview of class action practice.
- *The Class Action Fairness Act: Law and Strategy*, edited by Gregory C. Cook (ABA 2013): A roadmap to this important federal statute.
- *State Survey of Class Action Law*, 2012–2013 (ABA, 2013): Helpful mostly if you think you can or should file or keep a class action in state court in light of the Class Action Fairness Act (see above).

In addition, we recommend you consult (and join) the ABA Section of Litigation Class Action and Derivative Suits Committee, known as CADS, which has a terrific website full of resources (www.tinyurl.com/o66ebve).

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