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).