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BLOG

Class Actions 101: Defeating Motions for Class Certification in Rule 23(b) Cases

FEBRUARY 8, 2024

Class certification is the most important moment of any putative class action. Before class certification, the defendant's exposure beyond the individual claim is still theoretical rather than concrete. But certification of a class allows a single plaintiff (or a small group of plaintiffs) to formally pursue the claims of numerous absent individuals, which raises the stakes for defendants from claims with nuisance value to potentially crushing class-wide liability. Thus, when a plaintiff files a motion for class certification, the defendant must have a winning response.

On one hand, plaintiffs must win the motion for their case to continue with any force, as a win exposes a defendant to liability to thousands or millions of people. The threat of such massive liability makes a plaintiff's claims economically viable. Without the value added from the absent class members' claims, the cost to continue litigation would far exceed the potential recovery. Losing the motion almost certainly brings a putative class action to its end.

On the other hand, for defendants, defeating certification amounts to de facto victory. Without certification, the case as a whole loses substantial economic value and results in relatively small individual settlements. Once a class is certified, however, a defendant often must choose between a voluntary class-wide settlement payout versus the expense and unpredictability of a jury trial. Either way, a certified class becomes very expensive for defendants.

This article will explain basic strategies defendants should consider in class certification briefing. Although this article paints with broad strokes, a defendant should never accept a one-size-fits-all approach to class certification, nor should a defendant underestimate plaintiffs' counsel. Plaintiff-side class action attorneys constantly adapt their strategies to changes in the case law and to defense lawyers' strategies. Thus, we recommend seeking the guidance of experienced class action litigators who can devise nuanced, tailored arguments that overcome the plaintiff bar's increasingly creative bids for class certification.

RULE 23: PLAINTIFF'S DEMANDING BURDEN

Rule 23 provides the requirement for class certification. Because litigation of non-litigants' claims through court-appointed representatives is meant to be the exception, not the rule,[1] plaintiffs bear the burden of proving that the proposed class meets *all* of Rule 23's requirements.[2] Thus, a plaintiff seeking to maintain a class action "must affirmatively demonstrate his [or her] compliance" with Rule 23.[3] Under Rule 23(a), a class representative must prove (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.[4] And if seeking money damages, the

class representative must also show predominance and superiority under Rule 23(b)(3).[5] Because plaintiffs' motions frequently gloss over the Rule's requirements, defendants must use their briefing to remind courts of Rule 23's evidentiary demands and highlight plaintiffs' failures to meet those demands. Defendants must make clear that a plaintiff's failure to meet its burden as to even one of these components should preclude class certification.

Rule 23 also imposes a responsibility on trial courts. Courts must conduct a "rigorous analysis" of the claims, defenses, issues, *and evidence* to determine whether the proof relevant to each element of a plaintiff's claims—and any affirmative defenses—is individualized or common.[6] Courts must also resolve factual disputes pertaining to Rule 23's requirements—even if those disputes overlap with the merits of plaintiffs' claims.[7] Plaintiffs' burden at the class certification stage demands evidence—reliance on the pleadings and speculation alone is insufficient.[8] Defendants must therefore scrutinize the merits of a plaintiff's case to identify weaknesses in the plaintiff's class certification arguments.

ADDRESSING RULE 23(A) REQUIREMENTS

Rule 23(a) has four requirements. First, plaintiffs must prove numerosity by showing that the putative class is large enough to warrant a class action. Bare assertions of numerosity without any factual support are insufficient.[9] If a defendant contests numerosity, plaintiffs must respond with evidence. Second, plaintiffs must show that class members' claims turn on common issues of law or fact. General allegations or pleadings, for example, that all class members purchased the same product or transacted with the same business are not enough. Defendants should therefore analyze whether common questions exist that have common answers for all class members and whether these common questions pertain to the elements of the underlying claim.[10] Defendants must go beyond the pleadings to analyze the facts of the case to identify weaknesses in a plaintiff's commonality argument. Third, typicality requires plaintiffs to prove that "the claims or defenses of the representative parties are typical of the claims and defenses of the class."[11] Typicality only requires that "the claims of the class representative and class members are based on the same legal or remedial theory," so differing fact situations are not necessarily detrimental to the plaintiff's typicality argument.[12] Defendants must analyze plaintiffs' theories and injuries, defenses to plaintiffs' arguments, and the potential proof of each claim element or defense to determine whether plaintiffs' claims are typical of those of the class.[13] And fourth, adequacy requires the interests of class representatives to be aligned with the interests of absent class members. Again, defendants must consider how the putative class claims will play out at trial and be prepared to argue that a class representative will need to prove his or her claims in a way that will be prejudicial to the interests of absent class members' claims.

Although the rubber usually meets the road at the more demanding predominance requirement, defendants should not neglect Rule 23(a)'s requirements. Indeed, plaintiffs' counsel occasionally make mistakes that prevent them from complying with Rule 23(a). Defense counsel must watch for such mistakes and exploit them when they occur. For example, in *Bodner v. Oreck Direct LLC*, a named plaintiff purported to represent a class of more than 77,000 Californians who had purchased a certain brand of air purifier, which the named plaintiff claimed did not lessen his allergies during allergy season.[14] The court denied the plaintiff's motion for class certification because the named plaintiff's claims were atypical of those of the class and because the named plaintiff was an inadequate class representative.[15] Even though the theory of injury was that the air purifier was not cleaning the air as advertised, the plaintiff did not know what he was allergic to and frequently kept his window open during allergy season.[16] The named plaintiff's deposition testimony prevented the plaintiff from meeting the typicality requirement because the plaintiff could not show that other class members were similarly situated to him in terms of their allergies and window-related habits.[17] And as to adequacy, defense counsel elicited deposition testimony that the named plaintiff did not meet his attorney until the day before his deposition and had never read the complaint.[18] The court therefore concluded that the named plaintiff was an inadequate class representative and chided the plaintiff's attorneys for pursuing a class actions without a seriously engaged client.[19] In other cases handled by Winston attorneys that never reached certification briefing, deposition testimony elicited disqualifying facts, such as that the named plaintiff purchased the items at issue for re-sale, that the named plaintiff was related to attorneys employed by the firm seeking to be appointed class counsel, and that the proposed class representative had an entirely different theory of liability than what the pleadings alleged. Thus, counsel must thoroughly explore the "how, when, and why" of a

named plaintiff's journey from consumer to proposed class representative and his or her thought process on selecting counsel.

ADDRESSING RULE 23(B) REQUIREMENTS

Rule 23(b) provides the most important limitations in many class actions. Plaintiffs must prove at least one of the Rule 23(b) factors applies. Specifically, plaintiffs must show that (1) prosecuting separate actions would result in inconsistent rulings or "substantially impair or impede" the ability for other members of the class to protect their rights; (2) the party opposing class certification has acted or refused to act in a manner that justifies final injunctive or declaratory relief; or (3) the common questions of law or fact predominate over any individualized inquiry and a class action is a superior means of fairly and efficiently addressing the issues before the court.[20]

Usually, plaintiffs seek to certify a class under Rule 23(b)(3)—which requires plaintiffs to prove predominance and superiority—because most claims for class-wide damages fall under Rule 23(b)(3). Although similar to Rule 23(a)'s commonality requirement, the much stricter predominance requirement requires not only common questions of law or fact but also that the plaintiff prove that such questions predominate over individualized issues.[21] Defendants should respond to plaintiffs' predominance arguments by highlighting any individualized inquiries the core issues of the case will require.

For example, briefing in a recent automobile products-liability putative class action shows that the timing of putative class members' claims can weigh against certification *even if* the legal nature of the claims is uniform across the class. In *Squires v. Toyota*, the plaintiffs sought to certify a class that would have argued that the manufacturer failed to disclose allegedly material facts (about an alleged defect) resulting in putative class members paying more for their cars than they would have had the manufacturer disclosed the facts.[22] The plaintiff attempted to meet the predominance requirement by arguing that the inquiry for each class member was the same: were the allegedly withheld facts objectively material?[23] Like many class action plaintiffs, the *Squires* plaintiffs oversimplified the inquiry. The plaintiffs glossed over the fact that the information that the manufacturer could have disclosed (and its knowledge about any alleged defect) varied throughout the proposed class period.[24] In addition to arguing that no defect existed and that no material information was withheld, defense counsel responded on behalf of the manufacturer that this was not a case in which the manufacturer had information about a potential defect that it could have disclosed at the time it started selling the product. Instead, the plaintiffs claimed that the knowledge of the allegedly withheld information arose over time, while the putative class members were purchasing their vehicles.[25] In response, the defendant argued that resolving a given class member's claim would first require determining what information had arisen, such that the manufacturer could have disclosed said information, at the time of the specific class member's purchase.[26] The information the manufacturer had and could have disclosed at the time of early purchases was different from the information the manufacturer had and could have disclosed at the time of later purchases.[27] The *Squires* case settled after the parties fully briefed and orally argued the motion for class certification but before the court ruled on the motion.[28] In short, undercutting the predominance argument will require defendants to evaluate how core questions will be answered for each class member and emphasizing any individualized inquiry that would be required.

ATTACKING THE PLAINTIFF'S DAMAGES MODEL

Under the predominance requirement, defendants must also highlight the burden plaintiffs bear regarding damages. Although Rule 23 does not require plaintiffs to show that every putative class member's damages will be the same, the Supreme Court of the United States has stated that a plaintiff must establish a class-wide damages model under which the damages of each class member can be calculated in a uniform way.[29] Plaintiffs attempt to establish such models in various ways. For example, a plaintiff could try to rely on a legal theory under which each class member's damages are (arguably) easily determined, such as a breach-of-warranty theory in a products-liability class action. Under such a theory, a plaintiff could argue that each class member bought an item that was worth nothing, rather than what the class members paid for their items, such that each class member would be entitled to a refund of what they paid for their item. Alternatively, if such a legal theory were not available, a plaintiff could retain an economist as an expert witness to derive a formula for calculating each class member's damages.

Typically, these types of arguments are vulnerable to criticism because the plaintiffs' proposed models are not reliable. Take the simple-legal-theory example. The defendant should respond by attacking the premise that every class member lost the same amount of value because of an alleged breach of warranty. And to respond to damages models created by retained experts, defendants should retain their own experts. Keep in mind that a defendant's goal in retaining an expert should be at least two-fold: The defense expert should both opine that the plaintiff's proposed damages model is impossible to achieve on a class-wide basis, and that, even if a model were possible, the plaintiff's proposed model is unreliable.

The order denying class certification in *Passman v. Peloton* shows how defendants can defeat certification on damages grounds.[30] *Passman* was a misrepresentation case.[31] In *Passman*, the plaintiffs attempted to establish a class-wide damages model by hiring a survey expert and an economist to devise a survey that, according the plaintiffs, would capture the price premium purchasers paid for the Peloton product because of an allegedly misleading statement Peloton made.[32] The court rejected the plaintiffs' proposed damages model because the model inadequately isolated the price premium resulting from the alleged misstatement.[33] Because the plaintiffs' model included damages other than those attributable to the alleged misstatement and failed to consider supply-side factors (i.e., factors related to a seller's willingness to sell as opposed to factors related to a buyer's willingness to buy), the court ruled that the plaintiffs failed to propose a model that could reliably measure class-wide damages.[34] For this and other reasons, the court denied plaintiffs' motion for class certification.[35] Ultimately, defendants should try to convince courts that, even if a plaintiff establishes liability on a class-wide basis, another trial for each class member would have to occur to establish each such class member's damages, because the plaintiffs cannot establish a workable damages model that would reliably apply across the class.

RELYING ON EXPERT WITNESSES

Plaintiffs may rely on expert witnesses to support class certification briefing. In many circuits, trial courts must evaluate the admissibility of proffered expert testimony the same as if the expert were going to testify at trial, which means expert testimony proffered with class certification briefing must comply with Federal Rule of Evidence 702 and the *Daubert* standard.[36] And unlike at the summary-judgment stage, a battle of the experts does not mean the plaintiff gets to take the claims to trial. If the plaintiff and defendant submit conflicting expert testimony with their class certification briefing, as the parties did in *Passman v. Peloton*,[37] the court must weigh the expert testimony along with the other evidence the parties submit to determine whether the plaintiff has met his or her evidentiary burden.[38] Moreover, when a motion for class certification depends on expert opinions that do not comply with *Daubert*, the court must deny the motion.[39] In *Kondash v. Kia*, for example, the plaintiff alleged that certain vehicle sunroofs were defectively designed, and claimed that the question of whether the design defect existed was a common question justifying a class action.[40] The plaintiff's motion for class certification depended on an expert opinion that the alleged design defect existed.[41] However, the court found that the expert's opinion failed to comply with Rule 702 and therefore declined to consider it.[42] Because the plaintiff had no evidence of a design defect without the expert's opinion, the court found that the premise driving plaintiff's motion was untrue and denied class certification.[43] Thus, defendants must use their briefing to expose expert opinions that do not comply with Rule 702 and *Daubert* and persuade courts not to consider such opinions—without which plaintiffs' motions often cannot survive.

THE SUPERIORITY REQUIREMENT

Plaintiffs must show that a class action is superior to other ways of resolving the claims at issue. Rule 23(b)(3) provides a non-exhaustive list of factors courts consider in this analysis.[44] Generally speaking, "a class action is superior when it allows for the vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[45] Plaintiffs may argue that different barriers, such as language or financial concerns, would make individual litigation impracticable for class members.[46] To counter such arguments, defendants should argue that class members can assert their claims individually through other means, such as through traditional lawsuits. Defendants can establish the viability of non-class proceedings by showing that individual claims are valuable enough to warrant individual litigation.[47] Contractual provisions subjecting some class

members' claims to arbitration (and determining such provisions apply must be accomplished on an individualized basis) can also affect this analysis if timely raised.[48]

POKING HOLES IN THE PLAINTIFFS' TRIAL PLAN

In some jurisdictions, plaintiffs also bear the burden of establishing that trying a case as a class action will be manageable.[49] This provides another opportunity for attack because a plaintiff must present to the court a plan for trying its case as a class action, and the plan must consider any individualized factual or legal issues that will need to be resolved along with the common questions that justify the class action. And if a plaintiff asks a trial court to resolve class-wide claims arising under the laws of multiple states, the plaintiff's trial plan must explain how to instruct the jury on the applicable states' laws and what questions the court should include on the jury verdict forms. Defendants should criticize plaintiffs whose proposed jury instructions and verdict forms attempt to provide instructions and questions intended to resolve claims under multiple states' laws all at once rather than separate instructions and questions for each state at issue.[50]

CONCLUSION

Class certification briefing is some of the most complex briefing that can arise in litigation. Persuading a court to deny class certification—and effectively derail a proposed class action before trial—requires careful presentation and a complete understanding of the facts of the case, the law governing the substantive claims at issue, and the law governing class certification. This article presents a high-level guide to defeating class certification arguments, but as practitioners in this field know, navigating the nuances of Rule 23's standards and effectively arguing them depends on the legal theories alleged, the facts regarding the factors discussed above, and defenses not addressed here. Consulting experienced class action counsel is essential if your company or client receives a putative class action complaint.

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[1] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51; *Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016).

[2] *Ibe*, 836 F.3d at 528.

[3] *Dukes*, 564 U.S. 338, 350 (2011).

[4] Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.").

[5] Fed. R. Civ. P. 23(b)(3) (". . . [t]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."); *see also Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 593 (1997).

[6] *Dukes*, 564 U.S. at 350–51; *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013).

[7] *Dukes*, 564 U.S. at 351–52; *Comcast Corp*, 569 U.S. at 33–34.

[8] *Dukes*, 564 U.S. at 350–51 ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."); *Prantil v. Arkema Inc.*, 986 F.3d 570, 574 (5th Cir. 2021).

[9] *Ibe*, 836 F.3d at 528 ("A plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members.") (citation omitted); *Spread Enter., Inc. v. First Data Merchant Serv. Corp.*, 298 F.R.D. 54, 67 (E.D.N.Y. 2014) ("[A] plaintiff cannot rely on pure speculation or bare allegations in order to demonstrate numerosity.") (internal quotations and citation omitted).

[10] *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 914, 916 (10th Cir. 2018).

[11] Fed. R. Civ. P. 23(a)(3).

[12] *Menocal*, 882 F.3d at 914, 917 (citing *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014); *see also Spread Enter., Inc.*, 298 F.R.D. at 68.

[13] *Beck v. Maximus, Inc.*, 457 F.3d 291, 300–01 (3rd Cir. 2006).

[14] *Bodner v. Oreck Direct, Ltd. Liab. Co.*, No. C 06-4756 MHP, 2007 U.S. Dist. LEXIS 30408, at *1–3 (N.D. Cal. 2007).

[15] *Id.* at *5–7.

[16] *Id.* at *2–3, *7.

[17] *Id.* at *5.

[18] *Id.* at *5–6.

[19] *Id.* at *6–7.

[20] Fed. R. Civ. P. 23(b).

[21] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997).

[22] *See generally* Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 151 (E.D. Tex. Oct. 4, 2022).

[23] *Id.* at 2–4.

[24] Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 161 at 23–27 (E.D. Tex. Nov. 18, 2022); Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 168 at 13–15 (E.D. Tex. Dec. 28, 2022).

[25] Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 46 at ¶¶ 119–25 (E.D. Tex. Oct. 4, 2022).

[26] Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 161 at 23–27 (E.D. Tex. Nov. 18, 2022); Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 168 at 13–15 (E.D. Tex. Dec. 28, 2022).

[27] Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 161 at 23–27 (E.D. Tex. Nov. 18, 2022); Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 168 at 13–15 (E.D. Tex. Dec. 28, 2022); *see also, e.g.*, *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 216 (E.D. La. 1998) (denying class action after finding Ford's knowledge of the alleged defect was not uniform over the class period and across members); *Sanneman v. Chrysler*, 191 F.R.D. 441, 443 (E.D. Pa. 2000) (same).

[28] Case No. 4:18-cv-00138-ALM, *Squires v. Toyota Motor Corp.*, Dkt. No. 254 (E.D. Tex. Nov. 18, 2022).

[29] *See, e.g.*, *Comcast*, 569 U.S. at 34

[30] *Passman v. Peloton Interactive, Inc.*, No. 19-cv-11711 (LJL), 2023 U.S. Dist. LEXIS 76417 (S.D.N.Y. May 2, 2023).

[31] *Id.* at *2–4.

[32] *Id.* at *95.

[33] *Id.* at *94–103.

[34] *Id.* at *103.

[35] *Id.*

[36] *Prantil v. Arkema Inc.*, 986 F.3d 570, 575–76 (5th Cir. 2021); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187–88 (3rd Cir. 2015) (citing several circuit cases supporting this proposition).

[37] *Passman v. Peloton Interactive, Inc.*, No. 19-cv-11711 (LJL), 2023 U.S. Dist. LEXIS 76417, at *95–103 (S.D.N.Y. May 2, 2023).

[38] *In re Blood Reagents Antitrust Litig.*, 783 F.3d at 187 (noting that Supreme Court precedent requires that the class certification analysis be "rigorous" and that this rigorousness applies to expert testimony relied upon in the analysis).

[39] *Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 987 (9th Cir. 2020); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 819 (7th Cir. 2010).

[40] *Kondash v. Kia Motors Am., Inc.*, No. 1:15-cv-506, 2020 WL 5816228, at *1 (S.D. Ohio Sept. 30, 2020).

[41] *Id.* at *2–3.

[42] *Id.* at *6–11.

[43] *Id.* at *11–12.

[44] Fed. R. Civ. P. 23(b)(3).

[45] *Menocal*, 882 F.3d at 915 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)).

[46] *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017) (finding that the value of individual damages was too small to make individual litigation cost effective); *Menocal*, 882 F.3d at 917 (finding superiority when the class members "reside[d] in countries around the world, lack[ed] English proficiency, and [had] little knowledge of the legal system in the United States").

[47] *Cole v. Gene by Gene, Ltd.*, 322 F.R.D. 500, 508 (D. Ala. 2017) (finding an individual claim for $100,000 "weigh[ed] strongly against class certification"); *Stoudt v. E.F. Hutton & Co.*, 121 F.R.D. 36, 38 (S.D.N.Y. 1988) (finding superiority was defeated where the plaintiff "possesse[d] sufficient wealth to benefit from a tax shelter and [sought] recovery in the amount of 'at least' $60,000").

[48] *See* Gayle Jenkins, DaWanna L. McCray-Allen, & Hugh B. Dunkley, *Should the Ninth Circuit's Waiver Test Be More Closely Scrutinized*, Winston & Strawn LLP (Jan. 29, 2024, 10:29 AM), https://www.winston.com/en/blogs-and-podcasts/class-action-insider/should-the-ninth-circuits-waiver-test-be-more-closely-scrutinized (highlighting the necessity of raising contractual arbitration provisions, even if only applicable to absent putative class members, early in litigation).

[49] *Woodard v. Andrus*, 272 F.R.D. 185, 196 (W.D. La. 2010) (quoting *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999)).

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[50] *Castano v. Am. Tobacco Case*, 84 F.3d 734, 750 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

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