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# Killer Class Actions Your Company Can Win

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*"No area of the law is more challenging than high-stakes, 'bet the company' class action litigation. On one side stands a defendant facing millions, sometimes billions, of dollars in damages if a single case goes badly. On the other stands a sophisticated and well-funded cabal of plaintiffs' lawyers, aided by advanced computer technology, seeking to represent thousands of putative class members. In the middle rests a wild-card jury."*

# Defeating Class Actions by Defeating Class Certification

No area of law is more challenging than high-stakes, "bet the company" class action litigation. On one side stands a defendant facing millions, sometimes billions, of dollars in damages if a single case goes badly. On the other stands a sophisticated and well-funded cabal of plaintiffs' lawyers, aided by advanced computer technology, seeking to represent thousands of putative class members. In the middle rests a wild-card jury. From the defense perspective, the class action dilemma is stark and disquieting: If a class is certified—that is, if the lawsuit is permitted to proceed as a class action—the defendant must either bet the company on a single jury verdict or settle the case. Regardless of the merit of the claims, the pressure to settle is necessarily immense.

The American legal system has wrestled for decades with this conundrum. Class actions challenge courts to reconcile the fundamental tension between traditional notions of individual justice on the one hand, and the goal of litigation efficiency on the other. Faced with these competing considerations, rule-makers were moved to change and invent, to discard the traditional model of individual case-by-case adjudication in favor of aggregated trials. This has resulted in the rise of the class action, a

procedural device first introduced in 1966 with modest aspirations, which today has evolved far beyond the vision that spawned it. High-stakes class action litigation of a kind never contemplated by the drafters of the class action rule is now ubiquitous, particularly in certain "hot-spot" jurisdictions such as Madison County, Ill., where scores of class actions are pending at any given time. Like it or not, the prospect of one-shot, winner-takes-all trials is now a fixture on the American legal and business landscape.

Class certification is the watershed moment in this process. For defendants, certification represents the difference between massive, "bet the company" litigation (or a "shotgun settlement") on the one hand, and manageable individual trials (or no trials at all) on the other. The business consequences are far-reaching: Class certification can undermine share prices and credit ratings, and perhaps even raise the specter of insolvency. Even where certification is reversed on appeal, the interim period can wreak havoc on a company's operations. Quite simply, then, the trial court's class certification decision is critical. The pressing question for companies is how to defeat the initial certification of killer class actions, and thereby defuse the risk of a devastating judgment or an unattractive settlement. The answer is that defendants cannot sit back and hope that plaintiffs fail in meeting the burden of satisfying the requirements for certification. Instead, defendants must act affirmatively to prove that a class trial is inappropriate, unfair, and, as a practical matter, less efficient than a series of individual trials.

The purpose of this article is to discuss some particular trial manageability issues that bear upon class certification and to outline some strategies for convincing courts that a particular class action is unworkable. There are, of course, situations where class certification makes sense for a defendant, particularly where liability is troublesome and a class-wide settlement is attractive and will likely bar most claims. But if that is not the case and the leverage imposed by class certification is the principal issue, a defendant simply must avoid certification at all costs. To repeat, if a class trial is unfair to the parties and unmanageable as a practical matter, the court will not certify it—and if the court doesn't certify, the defendant need not bet the company on a single jury verdict.

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## Overview of the Class Certification Decision

Whether a class action is certified depends on whether the specific case fits within the parameters of the class action rule—Federal Rule of Civil Procedure 23 or its state court counterpart. In general terms, class actions are authorized (1) where issues common to each plaintiff "predominate" over any individual issue; and (2) where class certification is a "superior" means of resolving the pending claims. In practical terms, this means that class actions are certifiable where similar claims can be fairly and efficiently resolved in a single trial based upon the claims of typical and representative plaintiffs—the so-called "class representatives." This sounds straightforward enough, but there's tremendous deviltry in the details. In deciding whether to certify a class, courts must wrestle with difficult and often competing considerations, ranging from the desirability and feasibility of a trial plan to the constitutional rights of the parties.

### The Plaintiffs' Basic Class Certification Strategy

The plaintiffs' basic class certification strategy is to emphasize those elements of the claims that are common to the class while glossing over those that are individually unique. In other words, their approach is to trumpet the efficiencies of certification while understating the complexities. Plaintiffs devote a host of standard arguments to this end, some of which are superficially compelling. Defendants' ultimate goal is to debunk these claims—to prove to the court that a class action is a demonstrably inferior means of resolving the individual cases.

At the heart of class certification are issues of fairness and efficiency. Will certification facilitate the just, speedy, and inexpensive resolution of the claims? Plaintiffs' lawyers argue that it will—that by certifying a class, the court and the parties need only litigate common questions once, rather than endlessly revisiting them in thousands of individual trials. Judicial resources and attorney fees will be saved, and the parties will obtain a fair and speedy global resolution of the claims.

Similarly, plaintiffs argue that where individual claims are too small to be brought economically, defendants would get away with abuses and profit from them absent class certification; basic justice, it is argued, demands that such "negative value suits" be certified for class treatment. Many courts have been convinced by these arguments.

## Defendants' Right to a Fair Trial

But there's another side to the story, one that focuses primarily on fundamental fairness. Defendants, in short, have a constitutional right to a fair trial, which at minimum requires that every plaintiff prove every element of his or her claim as would be required in an individually brought lawsuit. Class actions are inherently problematic in this regard. By allowing certain plaintiffs (typically those with the strongest claims) to stand as a proxy for the remainder, class certification deprives the defendant of its right to confront each plaintiff and to demand individual proof of harm. It is therefore no surprise that class actions are infamous for awarding damages to plaintiffs with substantively weak claims, which, in a vicious cycle, encourages more frivolous class actions. In sum, defendants must be alert to any procedural shortcut suggested by plaintiffs' counsel or adopted by the court that would affect a defendant's fundamental right to defend against individual claims. In those instances, constitutional "due process" becomes central to any class certification defense.

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Other defense arguments against class certification are more concrete and focus on the practical problems associated with trying a class action that is riddled with individual questions. Anytime a proposed class action involves unique individual issues such as questions of injury, causation, comparative fault, damages, affirmative defenses, and choice of law (which state's law applies when class members are from many different states), certification raises substantial trial management difficulties. Plaintiffs downplay these concerns, often by proposing a "bifurcated" trial structure where common issues are tried first on a class-wide basis followed by individual mini-trials. But this practice has little to commend it in terms of fairness and efficiency. For example, if the plaintiffs in a mass personal injury case (a "mass tort") allege negligence on the part of the defendant and the defendant responds that certain plaintiffs were themselves negligent, how can liability be apportioned in a class-wide trial? The answer is that it cannot; individual trials would be necessary on the issue of comparative fault. And if subsequent individual trials

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are required anyway, how does class-wide resolution of common issues foster litigation efficiency? The answer is that it does not; it is more costly and time-consuming to conduct a class trial followed by a series of individual trials than simply to try the individual cases first. One trial is cheaper and faster than two. Moreover, the Seventh Amendment and due process prohibit a second jury (the jury in an individual trial) from revisiting issues decided by a previous jury (the jury in the class trial). So constitutional as well as pragmatic considerations caution against the plaintiffs' favored practice of severing common and individual issues for separate trials.

Owing to such difficulties, numerous appellate courts have expressed skepticism as to whether certification of mass tort class actions is ever advisable. But the same is true of other cases where individual and common issues are necessarily intertwined, including some antitrust, securities fraud, and discrimination actions, and many consumer protection class actions. Individual injury issues may, for instance, predominate in antitrust and discrimination cases, while consumer fraud class actions may involve significant questions as to whether class members even knew about claimed misrepresentations, much less relied on them to their detriment.

The rule of thumb, then, is that defendants have more than a fighting chance to defeat class certification where significant elements of the case are unique to the individual plaintiffs. It is imperative to demonstrate to the court that these individual issues predominate, thus rendering a class-wide trial so unfair and complex as to be unworkable.

The next two sections outline strategies for building a proper certification record, one that demonstrates to the court the ways in which class certification will undermine rather than facilitate litigation fairness and efficiency.

## Class Action Manageability: Is the Trial Plan Workable?

In 2003, the Federal Rules of Civil Procedure were amended to modify the class action rules. One seemingly modest change involved the timing of a trial court's class certification decision. Courts were previously required to rule on class certification "as soon as practicable," but in 2003 this

protocol was modified to allow certification at a later date, namely, "at an early practicable time." This subtle revision is of practical importance. Rather than rushing to rule on motions for class certification, today a federal trial court has the authority to develop a substantial record—or, more likely, to permit the parties to develop such a record—upon which to base its decision.

## Insist on a Trial Plan

A proposed trial plan is central to the certification record. The trial plan is a road map; it illustrates whether class certification simplifies or complicates the litigation. Therefore, the first and crucial step is for defendants to ensure that the court is presented with a comprehensive trial plan prior to certification. Plaintiffs often prefer to elude the complexities of a class-wide trial by submitting their trial plan at a later date. But the commentary to the Federal Rules appears to disapprove this practice, stating that "an increasing number of courts require a party requesting class certification to present a trial plan" in advance. Defendants must insist that plaintiffs submit a detailed trial plan prior to certification, because without it the court cannot verify that a class action is both fair and efficient.

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Once plaintiffs submit a trial plan, the next step is for defendants to painstakingly review its details, highlighting for the court the ways in which it may complicate rather than streamline the case. One prong of the critique should emphasize fairness. For instance, does the trial plan require every plaintiff to do that which he or she would be required to do if the case had been brought individually—that is, to prove every element of his or her claim?

## The Fairness Issue

The fairness argument sometimes touches on the merits of the case. In order to determine whether certification is consistent with the defendant's right to a fair trial, courts "probe behind the pleadings" to examine the underlying substance of the plaintiffs' claims. Where the claims are demonstrably frivolous or where they are individually distinct (thus aggregating weaker claims with stronger ones), class certification is improper. The point here is that defendants should initially survey the substance of the legal claims presented in the trial plan, and where

appropriate, attack the fairness of adjudicating them on a class-wide basis.

## The Efficiency Argument

Beyond fairness, and constitutional arguments, it is essential for the defendant to debunk plaintiffs' efficiency arguments. Plaintiffs' trial plan is intended to show that certification is simpler, faster, and cheaper than a series of individual trials. But close inspection often demolishes these theses. In recent years a number of defendants in high-stakes litigation have successfully focused attention on trial plan deficiencies and defeated class certification by demonstrating that the trial plan was unworkable.

*Castano*, a massive tobacco case, is an important federal decision in this regard. Reasoning that a class action of millions creates "severe manageability problems," the Fifth Circuit Court of Appeals decertified a nationwide class of tobacco plaintiffs. The court found that a nationwide class would be so "overwhelmed" by "procedural problems" that the litigation could in fact "consume more judicial resources than certification will save."

The court concluded that the proposed four-phase trial plan in which common "core liability" issues would be tried first on a class-wide basis with individual damages trials to follow could actually lengthen, not shorten, the time it would take for the plaintiffs to reach final judgment.

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The trial manageability problems in *Castano* stemmed from the numerous individual issues that would require subsequent or overlapping litigation. Since the decision, virtually every other state and federal court to consider certifying tobacco personal injury actions as class actions has declined to do so.

In *Newton v. Merrill Lynch*, a mammoth securities fraud case, the Third Circuit Court of Appeals found it "difficult to imagine how [the] case can be tried"—and thus refused to certify a class of hundreds of thousands of investors. The plaintiffs in *Newton* alleged that NASDAQ broker-dealers systematically overcharged investors for their trades. But because individual injury determinations were required, the court concluded that "adjudicating the claims as a class will not reduce litigation or save scarce judicial resources." One of many lessons from *Newton* is that

class certification is not a foregone conclusion in securities and antitrust cases.

*Bernal* is a leading state court decision on trial plans and class certification. In an opinion by then-Justice (now White House counsel) Alberto R. Gonzales, the Texas Supreme Court held that "it is improper to certify a class without knowing how the claims can and will likely be tried." *Bernal* involved hundreds of personal injury claims arising from a refinery explosion. The claims turned on "thorny causation and damage issues with highly individualistic variables." The plaintiffs' trial plan called for proof of causation and damages on a class-wide basis, with "the help of models, formulas, extrapolation, and damage brochures." The court rejected this idea, holding, first, that defendants have a fundamental right to case-by-case discovery and individual trial of personal injury claims, and, second, that if "individual issues" cannot be resolved "in a manageable, time-efficient, yet fair manner, then certification is not appropriate."

A final case illustrating the significance of trial plans is the recent *Bridgestone/Firestone* litigation. The action involved a nationwide class of approximately 3 million vehicle owners who alleged breach of warranty and consumer fraud claims arising from their purchase of allegedly defective Bridgestone/Firestone tires. The Seventh Circuit Court of Appeals decertified the class on trial manageability grounds.

*...this holding raises serious doubts as to whether a nationwide class is ever certifiable where the claims arise under the law of different states.*

One problem in *Bridgestone/Firestone* was choice of law. The original trial plan for the nationwide class failed to account properly for differences in state law, a problem of constitutional magnitude. The Court of Appeals rejected as unmanageable the proposed remedy of subdividing the national class into state-law subclasses. In the wake of *Castano* and other cases, this holding raises serious doubts as to whether a nationwide class is ever certifiable where the claims arise under the law of different states.

Another important aspect of *Bridgestone/Firestone* was the court's focus on individual issues and their impact on the trial plan. The court found that variability in the tires themselves (the claims involved a number of allegedly defective models), along with variability in the individual claims (some plaintiffs bought new, for example, while others bought used), rendered a class trial impractical.

These and other recent cases teach a number of general lessons. One is that class certification cannot trample the defendant's constitutional rights, including, among others, its due process right to a fair trial and its Seventh Amendment right to confront the plaintiff before a jury. Second, the cases illustrate that when class action trial plans are examined in detail, certification is often more costly and time-consuming than a series of individual trials. Scrutiny of trial plans assist the court in determining that some proposed class actions are neither fair to defendants nor an efficient means of claims resolution.

## Trial Plan Issues of Particular Concern

Trial plans in high-stakes litigation are typically drafted and submitted by sophisticated plaintiffs' lawyers. As discussed above, their general strategy is to sever common issues from individual issues in an effort to convince the court that class certification followed by a multi-phase trial is manageable and constitutionally acceptable. For defendants, the constitutional rebuttal is paramount. The second line of defense is to rebut the claim of efficiency and manageability. The following outline contains some common objections to trial plans that infringe on due process rights and gloss over the need for individual adjudication of essential liability issues. The list is not intended to be all-inclusive, but rather to provide a general overview of the types of individual issues that may render certification inappropriate.

**Due Process** The universe of due process/fair trial arguments is broad, and a complete recitation is beyond the scope of this article. At the very least, the trial plan must require that every class member establish every element of his or her claim; it must provide for constitutionally adequate notice that ensures that all class members will be covered by the judgment if the defendant wins; and it must offer structural protection against intra-class conflicts of interest. These and other due process arguments are central to any class certification defense.

**Seventh Amendment** The trial plan must protect the parties' right to trial by jury, and must not allow a second jury to re-examine previous jury findings. For example, some trial plans propose that a special master, rather than a jury, determine issues such as individual injury and damages. This proposal runs head on into the Seventh Amendment. Similar constitutional problems arise when trial plans propose to sever individual from common issues. Such "bifurcated" trials often require a

second jury to re-examine a prior jury's findings, again in conflict with the Seventh Amendment.

**Choice of Law** Multi-state class actions are notorious for presenting overwhelming choice-of-law difficulties. To wit: How can a nationwide products liability class action reconcile the varying tort doctrines of all 50 states? Any trial plan that fails to account for such choice-of-law issues is fundamentally flawed.

**Individual Affirmative Defenses** Defendants can often assert affirmative defenses applying to some class members but not others. The trial plan must accommodate these individual defenses without rendering the case unmanageable.

**Individual Injury** A class-wide trial makes little sense where the plaintiffs suffer individually distinct injuries. For example, the securities plaintiffs in *Newton* were allegedly injured in myriad unique transactions. The trial plan must require individual proof of injury, again without introducing intractable complexity.

**Individual Causation and/or Reliance** Similar to individual injury, a class action fails to further efficiency where individual issues of reliance and/or causation remain for plaintiff-by-plaintiff resolution. These issues are of particular significance in mass tort and consumer protection cases.

**Comparative Fault** Tort law generally provides defendants with a reduction or elimination of liability in cases where the plaintiff is partially responsible for his or her own damages. This is a necessarily individual inquiry. Therefore, in cases where comparative fault is in play, class certification is almost a non-starter.

**Individual Damages** In certain cases—including "negative value" class actions—the need to calculate individual damages does not defeat class certification. Calculating damages in such cases is often simply a matter of "doing the math." In other cases, however, where the damages theory is complex and intertwined with liability issues, the need to calculate individual damages may require an individual trial. This is especially so where punitive damages are involved. The upshot is that cases requiring individual damage trials are often inappropriate for class certification.

The preceding is an overview of trial manageability concerns. Each case presents its own unique issues, any one of which may influence the class certification calculus. The basic point, however, is that complex class action trials are sometimes more complex, and less efficient, than a series of individual trials. The trial plan is a road map in this regard. Where the proposed plan is incomplete or defective, the efficiency benefits of a class action are probably illusory, rendering certification inappropriate.

Class certification is winnable, but cases do not win themselves. A defendant has to help the court "get it right" by insisting that the plaintiff lay out how each element necessary to establish liability can be satisfied through common proof. In most instances, when put to this test, plaintiffs will fail.

If defendants supplement their constitutional and procedural arguments with a concrete critique of the proposed trial plan, then class certification, and a corresponding "bet the company" dilemma, may be avoided.

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