TAKING A CLASS ACTION TO TRIAL

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I. Introduction

Class actions rarely go to trial. Most cases are "won" or "lost" at the class certification stage. If a class is not certified, the case ends or finds its way to the court of appeals. If a class is certified, typically a settlement will then be reached. Once a class is certified, the defendant finds itself in an untenable situation. The defendant faces a scenario in which a jury could hold it liable for millions or even billions of dollars. The defendant is now in a "bet-the-company" case. The prospect of a loss more often than not forces the defendant to the bargaining table.

But not always. Some observers have found that defendants have become more willing to try a class action. Settlement talks can break down if the plaintiffs' settlement demands could cripple a business. The prospect of a large damage award following a verdict can cause some plaintiffs to demand sums in settlement that are tantamount to a loss for the defendant at trial. The author found himself in just such a situation, trying a case for a company that faced the prospect of imminent bankruptcy if a jury found against it. Plaintiffs' demands to settle the case really were not much better than losing at trial, so the company opted to defend itself in court. A trial ensued and the company, in the end, had to pay nothing. It won and was vindicated.

So what lessons can be learned in taking a class action to trial? The first one is easy: it's before trial. You want to win at class certification. Defeating the class certification motion is still the best way to defeat a class action. But if you lose class certification and are stuck having to take the case to trial, there are several best practices (at least in the author's view) that you should keep in mind. While hardly comprehensive, this paper discusses some of the big-picture lessons that may help shape your preparation for a class action trial.

II. The Class Action Trial

A. How Often Do Class Actions Try?

Before addressing the specific "lessons learned" in trying a class action, you may be asking how often class actions are actually tried. As noted, not often. But surprisingly, the data suggest that they go to trial at about the same rate as a typical civil case, which is also not very often. For instance, a study conducted by the Federal Judicial Center in the mid-1990s of four U.S. district courts (the Eastern District of Pennsylvania, the Southern District of Florida, the Northern District of Illinois, and the Northern District of California) found that class actions went to trial about as often as nonprisoner, nonclass civil actions – at a rate from 3% to 6%. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, Fed. Jud. Center, at 68 (1996). And except for one default judgment that led to a class settlement, no trial resulted in a final judgment for the plaintiff class. *Id.*

Defense counsel may want to temper their enthusiasm for going to trial, however. More recent experience has trended more pro-plaintiff. A review of class actions tried in both state and federal courts from 2016 to 2018 – a total of seven cases – shows that the plaintiff class won in six of those cases. Elizabeth Cabraser & Fabrice N. Vincent, *Roundup of Recent Class Action Trials, 2016-2018*, American Bar Ass'n Section of Litig., Class Actions & Derivative Suits

Committee (Feb. 28, 2018), https://www.americanbar.org/groups/litigation/committees/class-actions/articles/2018/winter2018-roundup-recent-class-actions-trials-2016-2018/. The damages awarded ranged from $780,000 to $454 million. *Id.*

While the discussion in this paper centers on class actions in the United States, it is worth mentioning what the experience of Canada has been in this area. In Canada, Quebec has authorized class proceedings since 1978. Common law provinces, starting with Ontario in 1992, enacted legislation adopting class actions. All provinces in Canada permit class actions either by legislation or local rules. A study in 2014 found that, as of 2011, a total of 94 class actions have gone to trial in Canada since class actions have been available. *See* Jon Foreman & Genevieve Meisenheimer, *The Evolution of the Cass Action Trial in Ontario,* 4:2 online W.J. Legal. Stud., https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5589/4674. The largest number of trials were held in Quebec (63), followed by Ontario (18), and then British Columbia (8). *Id.* Of the 94, the authors of the study were able to determine that in 57 the plaintiffs prevailed, while in 33 the defendants. *Id.* As for the remaining four, three were settled after trial began, and one was ongoing at the time of the study. *Id.*

B. The Trial Plan

In many respects, a class action trial is not altogether different than a typical civil trial. As Judge Posner commented:

> Class actions are rarely tried, but when they are the trial proceeds the same way it does in an ordinary case—there are no special *trial* procedures for class actions as such[.]

Amati v. City of Woodstock, 176 F.3d 952, 957 (7th Cir. 1999) (emphasis in original). While Judge Posner's observation is true in many respects, plaintiffs have taken that view and used it as their mantra in many class pretrial proceedings. For the plaintiffs' bar, the case is simple and straightforward. Despite plaintiffs' insistence otherwise, however, class actions are different.

Foremost, they are complex. That is something that even Judge Posner pointed out. Although class actions do not have any "special *trial* procedures," many if not most class actions can be very complicated. According to Judge Posner, "if the suit is particularly complex, as some nonclass actions are and some class actions ... are not, the ordinary trial procedures may have to be modified." *Armati*, 176 F.3d at 957. In this regard, the trial judge has "a great deal of control over the conduct of a class action trial." *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 792 n.2 (10th Cir. 1970).

One means for addressing a class action trial's complexity is insisting that the plaintiffs submit a trial plan to the court in connection with their class certification motion. Although Rule 23 does not require submission of one, "[a]n increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." Fed. R. Civ. P. 23, advisory committee's note to 2003 amendment. Some courts, however, only require a plan after certification. *See In re Conagra Foods, Inc.*, 302 F.R.D. 537, 580 (C.D. Cal. 2014) ("Thus, if at some point [the

court] determines that some or all of plaintiffs' class can be certified, it will direct plaintiffs to submit a trial plan for its consideration.")

A trial plan will address how the proposed class intends to present the claims, and any individualized issues that would be raised by the defense. Often, certification will turn on whether the proposed trial plan "achieves the efficiencies offered by class treatment while preserving a defendant's rights to present a meaningful defense." Michael K. Grimaldi, *Trying Class Actions: The Complex Task of Managing and Resolving Individual Issues in Class Trials*, 36 Rev. of Litig. 90, 92-93 (2017). Among other things, the trial plan should address the presentation of common proof for each of the causes of action asserted, which laws apply, and how damages are proposed to be determined. For those courts requiring a trial plan, failure to submit one demonstrating that a trial would be practical can result in denial of a certification motion.[1] A plan contemplating a "shapeless, freewheeling trial" without careful attention to how liability and damages would be determined will defeat class certification. *See Epenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 773 (7th Cir. 2013) (decertification warranted when plaintiffs' trial plan failed to offer a manageable way to calculate damages, instead determining damages would have required "2341 separate evidentiary hearings").

C. Jury Selection

Jury selection in a class action trial is similar to picking a jury in any civil case, but with one exception: Some members of the venire may have strong views on class actions. You need to identify those potential jurors during *voir dire*. Depending on how much leeway the trial judge will give you during jury selection, consider using a questionnaire that asks potential jurors whether they have ever been a member of a class or even a plaintiff in a civil suit. Some potential jurors do not like plaintiff's lawyers and view class actions as simply a means for those lawyers to make lots of money. But others believe class actions are necessary as a check on the so-called "evils of corporate America." Insofar as you can, it is critical that you weed out those persons and make sure they do not sit on your jury.

D. Revisiting Class Certification

As discussed above, class action plaintiffs typically view a class action trial as just like any other civil trial. For the class and its counsel, certification has already been determined and need not

[1] *See Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir. 2003) ("Certification of a class under Rule 23(b)(3) requires that the district court consider how the plaintiffs' claims would be tried."); I*n re MTB Prods. Liab. Litig.*, 209 F.R.D. 323, 351-53 (S.D.N.Y. 2002) (refusing to certify class based on unmanageable trial plan); *In re Ford Motor Co. Vehicle Paint Litig*., 182 F.R.D. 214, 219-22 (E.D. La. 1998) (refusing to certify a class based on inability of plaintiffs to present manageable trial plan where each plaintiff's notice of alleged flaw was central issue); *Insolia v. Philip Morris Inc.*, 186 F.R.D. 535, 546-47 (W.D. Wis. 1998) (denying certification because trial plan was "sheer fantasy"); *In re Prempro*, 230 F.R.D. 555, 568 (E.D. Ark. 2005) ("The absence of an adequate trial plan and proper jury instructions supports what Defendants have said all along -- there is no way that the claims of these multi-state plaintiffs can be adequately addressed in a single class action trial.").

be looked at again. The one thing that plaintiffs will strenuously avoid is retrying the elements of class certification.

By contrast, for the defense, class certification, or more precisely decertification, is always in play. Rule 23(C)(1)(c) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(C)(1)(c). That means the previous order certifying the class may be revisited at trial.

Consequently, defense counsel must be ever mindful of the class certification issues and be prepared to insist on compliance with Rule 23 during every step of the trial. One of the lessons from the Supreme Court's decisions in *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), and *Comcast Corporation v. Behrend*, 569 U.S. 27 (2013), is that Rule 23's requirements are not procedural formalities but rather are substantive elements of plaintiffs' claims that must be satisfied at trial. As Justice Thomas warned:

> District courts must ensure continued compliance with Rule 23 throughout the case. When a district court erroneously certifies a class, then holds a trial, reversal is required when the record shows that improper certification prejudiced the defendant. And an incorrect class certification decision almost inevitably prejudices the defendant. When a district court allows class plaintiffs to prove an individualized issue with classwide evidence, the court relieves them of their burden to prove each element of their claim for each class member and impedes the defendant's efforts to mount an effective defense.

Tyson Foods, Inc. v. Bouaphakeo, 135 S.Ct. 1036, 1053 (2016) (Thomas, J., dissenting).

Counsel must hold plaintiffs to their burden to prove their case with common evidence. Evidence adduced at trial may establish that individual issues really do predominate, or that absent class members are not being adequately represented, thus undermining the decision to certify. As an example, during a class action trial, one or more of the class representatives likely will testify at trial. It is essential that plaintiffs demonstrate that the representatives' claims are representative of the class as a whole. Deviations from the claims of absent class members may call for more individualized proof. The defense team may be able to establish that individual evidence is necessary, which in turn would make the case unmanageable. Decertification would then be warranted.

E. Liability

Determining liability during a class action trial often centers on evidence from the defendant, from the class representatives, and from plaintiffs' experts. While other third-party witnesses may also be called (for instance, in an antitrust conspiracy case, cooperating witnesses – usually former defendants that settled – will be called), defense counsel can be certain that, at a minimum, witnesses from the defendant, the class, and one or more experts will testify in plaintiffs' case.

From the defendants, what the defendant did or did not do – for example, whether it was aware that its product was hazardous and could cause injuries in a product liability class action; whether it fixed prices with competitors in an antitrust class action; or whether it made material misstatements causing changes in its stock price in a securities fraud class action – will be the centerpiece of plaintiffs' trial presentation. Counsel for the defendant must prepare its witnesses to be cross examined during plaintiffs' case in chief. Depending on the scope of plaintiffs' cross, a full-blown direct examination of the defendant's witnesses may have to wait until the defense case.

The questioning of the class representatives will focus largely on how they were injured – they bought and were harmed by the product, they are customers of the defendant and paid too much, or are shareholders who saw the value of their stock fall. Their evidence on these issues will be relatively straightforward, although putting a representative on the stand carries risk for the plaintiffs. In many instances, the defense will find opportunities to undermine the credibility of the class representatives on cross. Among other things, defense counsel should consider asking how the representative became involved in the lawsuit, what specifically the representative knows about the allegations, or how exactly the representative was injured. It is surprising how often the answers to these questions will be "through plaintiffs' counsel," "nothing," and "not really sure." A successful cross examination of the representative can be devastating to the plaintiffs' case.

It is with the experts, however, where plaintiffs often become overly aggressive. Plaintiffs commonly use the experts to essentially be the mouthpiece for their slanted story. Under the guise of an "objective," third-party neutral, plaintiffs may try to have the expert explain what occurred and why the defendant should be held liable. To that extent, defense counsel must be vigilant in ensuring that the expert is not portraying herself as a fact witness. She is not. She may discuss what she considered and relied upon in forming her opinions, but she should not become a vehicle for discussing, let alone introducing, hearsay, including hearsay from absent class members or absent witnesses.

F. Injury and Damages

In many class action trials, the case is won or lost on injury and damages. Were the plaintiffs harmed and by how much? Those questions are typically addressed by experts. And those questions often are the most complex, as compared to the issues surrounding liability.

During the pretrial phase, you should give serious consideration to bifurcating liability from damages. This may prolong the case if the jury finds against the defendant on liability, but there are advantages to bifurcation: namely, if the damages plaintiffs are seeking are high, you may not want the jury to hear what the number is for fear that they will conclude that something bad must have happened. Bifurcating will preclude the jury from hearing the damages number, yet defense counsel will still be able to try the issue of injury. Conversely, if the damages number is through the roof, maybe bifurcation is not in the defendant's best interest. An exceedingly high number may undermine the credibility of the plaintiffs' case by making them (and their lawyers) look greedy. Also, bifurcation may not be all that practical or efficient. If most of the evidence underlying the expert's damages analysis will be heard during the liability phase, leaving simply

the arithmetic of calculating the damages number, you may want to simply proceed with a single, undivided trial.

Regardless of whether you bifurcate or not, attacking the questions of injury and damages can lead to victory. First, on liability, you should explore thoroughly whether the plaintiffs really suffered an injury. Is the injury something that is borne out by the actual facts in the real world? Or does the injury require a complex formula or regression analysis to explain? The same is true for damages. Did the expert have to spend hundreds of hours in order to show the amount of damages that plaintiffs are claiming? If so, then defense counsel can attempt to show that the harm and resulting monetary loss are not as transparent as plaintiffs would have the jury believe.

Be sure you have an equally capable expert to counter plaintiffs' claims on injury and damages. Depending on the facts of your case, you will need to consider whether you have your expert prepare his own damages calculation or focus instead on attacking the plaintiffs' expert's methods and calculations, or both.

III. Conclusion

Trying a class action can be a high-stakes gamble. The downside of an adverse verdict may be catastrophic to your client. Although in most cases a settlement is almost certain after a class is certified, at times, the defendant may decide the rewards of going to trial are worth the risk. Indeed, if the settlement demand is one the defendant cannot afford, the defendant may decide it has no choice but to try the case. For defense counsel, trying a class action can present the ultimate professional challenge. Though it is not for the faint of heart, the rewards to counsel of trying a class action can be equally great.

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