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An attorney with Loeb & Loeb LLP sets forth three requirements federal courts should institute to curb misuse of Rule 23, noting all should occur within the time frame of the first case management hearing.

INSIGHT: Streamlining Class Actions—Active Case Management, Trial Plans, and Test Cases

By Jason Stiehl

Over the past 50 years since the institution of the modern version of Federal Rule of Civil Procedure 23, an entire market has been created for ''class-action'' lawyers, resulting in a handful of lawyers ultimately shepherding millions of claims through the Rule 23 grinder. Both the Rules Advisory Committee and Congress have struggled to rewrite Rule 23 or pass laws to curb the abuses of the class action vehicle. Simpler paths exist, however, for the courts to increase their role as a gatekeeper and return Rule 23 to its original procedural box.

This article proposes three tools federal courts could utilize immediately, within the confines of the current federal rules, to corral class action litigation, all of which could and should occur within the time frame of the first case management hearing. The **first** would be that each side submit a brief position statement on the merits of their case, citing applicable case law, in line with the spirit of Rule 26(f). The **second** would be to require plaintiffs to submit a trial plan, detailing the evidence they anticipate acquiring and how a trial adjudicating the rights of all class members would be conducted, and offering the option of the ''test case'' approach to the defendant as the ''superior'' method. **Third**, the court should conduct an in-chambers conference to provide guidance, and preliminary rulings, as appropriate.

The History of Rule 23 and Where it Gang Aft Agley

Under English law, the concept of ''representative'' litigation arose when a certain event violated local town or parish law, thereby affecting citizens in the same manner. The remedy, typically, was akin to the type of injunctive relief found under the modern Federal Rule of Civil Procedure 23(b)(2). As feudal structures broke, group litigation in England waned and, eventually, died, only having recently been reborn in the past decade. As such litigation faded across the ocean, it gained new life in the United States. In 1842, the U.S. Supreme Court promulgated Equity Rule 48 which acknowledged the concept of representative lawsuits, but did not go as far as to bind absent parties. In 1912, the rule was rewritten as Rule 38 and began allowing, under certain circumstances (such as a common fund), for judgments to bind absent class members.

This concept was further codified in the rewriting of Rule 38 into Rule 23, but it was not until the 1966 revisions to Rule 23 that the modern concept of class actions was borne, moving from what was termed a ''spurious'' lawsuit requiring class members to ''opt-in'' to the ''most adventuresome'' innovation, Rule 23(b)(3), now binding class members unless they affirmatively ''opt out''. *See* Kaplan, *A prefatory Note*, 10 B.C. Ind. & Com. L. rev. 497, 497 (1969); *see also In re Joint Eastern & Southern Dist. Asbestos Litigation*, 129 B.R. 710, 803 (E.D.N.Y. 1991), *judgment vacated*, 982 F.2d 721 (2d Cir. 1992). The revisions was done under the naïve

belief that the outcome would produce, perhaps, ''an average of some ten class actions a year in federal court. . .'', *see* letter from Charles Alan Wright, professor of law, Univ. of Texas, to Benjamin Kaplan, reporter to the Advisory Committee on Civil Rules and professor of law, Harvard Law Sch., 5 (Feb. 6, 1963), and that the largest class would be about 100 people injured by an airplane crash of fire. *See* statement of John P. Frank to Courts Subcommittee on Senate S.B. 353, May 4, 1999, p. 52.

Instead, over the past 50 years, this ''most adventuresome'' provision has created a cottage-industry, allowing plaintiff's counsel to leverage the threat of certification, while returning, arguably, little benefit for their clients. In 2013, the Institute for Legal Reform commissioned an empirical study by Mayer Brown to evaluate a random sample of 149 class action cases filed in 2009. Of those, while 86 percent had reached a final resolution, **none** of them resulted in a judgment on the merits, and not a single one had gone to trial. Of the six cases where information was publicly available as to the benefit derived by the class, the percentages were as follows: .000006 percent, .33 percent, 1.5 percent, 9.66 percent and 12 percent. Conversely, the study found that in insurance class actions, attorneys' fees amounted to an average of 47 percent of the total class-action payouts. *See* ''Do Class Actions Benefit Class Members?'' An Empirical Analysis of Class Actions, Mayer Brown LLP (2013). In another recent study of every reported ''no injury'' class action settlement between 2005-2015 (2158 cases), the report revealed that of the approximately $4 billion made in available funds, 38 percent (or $1.52 billion) went to the lawyers, whereas, at most, $360 million made it into the pockets of the class members. *See* ''An Empirical Survey of No-Injury Class Actions,'' Shepherd, Joanna (2016). Moreover, unlike the ''10 cases a year prediction'', a recent study found that companies spent $2.17 billion on class actions in 2016, accounting for 11.2 percent of all litigation spending in the United States. *See* Class Action Survey 2017, Carlton Fields LLP, https://classactionsurvey.com/pdf/2017-class-action-survey.pdf.

Giving Class Actions a 'Closer Look' as Originally Contemplated

While recent efforts have been made to further amend Rule 23, or to pass legislation, the most effective constraint on class action litigation run amok would be for judges to utilize the tools of the federal rules to strengthen their gatekeeper role. Utilizing Rule 26 would allow courts to operate under the current constructs of Rule 23 that a class be certified at ''an early practicable time'', while also adhering to the original Reporter of Rule 23's guidance that courts must take ''a close look at the case before it is accepted as a class action. . . .'' *See Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997). Recent jurisprudence instructs as much.

Step One: Requiring More from Litigants in their 26(f) Planning Conference

Many judges in the Northern District of Illinois have utilized Rule 26(f) to require litigants to flesh out the legal and factual bases for their claims and defenses. ***See, e.g.***, Initial Status Report Template for Manish S. Shah, http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/shah/Initial%20Status%20Report%20Template.pdf. Unfortunately, all too often parties are allowed to put forth minimal effort, utilizing boilerplate case law references or shorthanded notes in defense. For example, in a Telephone Consumer Protection Act (TCPA) action, plaintiffs may cite one case defining liability under the TCPA, and a defendant will respond with one case setting forth the defense of consent, without either having conducted any factual investigation of the applicability of the law to their own clients.

Under this article's proposal, each party would be required to identify the application of its own actual, or expected, facts, based upon a reasonable investigation of its client's position. The documents should be contemporaneously submitted, with the clear understanding that the positions taken were preliminary and would not be binding or limiting on the parties in any manner.

Step Two: Submission of a Trial Plan and the Option of a ''Test Case''

While the reality is that almost no class action lawsuit, especially in the consumer context, goes to trial, a plaintiff should be required to explain to the court how it would propose trying its claims if a class were to be certified. This limited burden provides two benefits.

First, it requires a plaintiff to evaluate the governing law and jury instructions for its case, and set forth how it would proceed in satisfying its obligations under governing practice and law.

Second, it would quickly identify any potential issues related to proving a particular element of a cause of action—e.g., damages—on a class-wide basis, and how the plaintiff would propose handling that issue.

In addition, it would allow a defendant a platform to consider whether allowing for a ''test case'' procedure would be superior to proceeding as a class action. In *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (*en banc*), *cert. denied*, 419 U.S. 885 (1974), the lower court offered the option of allowing the case to proceed individually, and then allowing for one-way intervention if a party wanted to opt-in (or out) of the subsequent decision. As one district court pointed out, when utilizing a ''test case'':

> the postponement of class action determination does not prejudice potential class members. If the named Plaintiff loses on liability, potential plaintiffs will not be bound but are discouraged from wasting time and effort pursuing claims against Fifth Third because of *stare decisis*. If liability is established, then a class member's decision to opt-in will be a more informed one.

Corum v. Fifth Third Bank of Ky, Inc., No. 99-cv-268, 2004 U.S. Dist. LEXIS 4651, *11-12 (W.D. KY March 3, 2004). Moreover, the recent decisions in *Wal-Mart Stores v. Dukes* and *Comcast Corp. v. Behrend* almost demand such an early consideration, both looking forward to the likelihood (and, in the case of *Comcast*, inability) for the plaintiff to meet its burden of proof at trial. 564 U.S. 338 (2011) (noting plaintiff will ''surely have to prove [class-wide liability] at trial in order to make out their case on the merits''); 569 U.S. 27 (2013) (reversing certification where plaintiffs had not demonstrated they could carry their burden of proving class-wide damages at trial).

Step Three: Active Case Management

In recent years, courts have been encouraged to take a more active role in case management, and the recent Mandatory Initial Discovery Pilot Program in the Northern District of Illinois is illustrative. Indeed, the Manual for Complex Litigation (Manual) encourages courts to use ''. . . the numerous grants of authority that supplement the court's inherent power to manage litigation.'' Manual for Complex Litigation, Fourth § 10.1 The Manual continues, suggesting active management to allow identifying crucial issues before they arise, rather than ''await passively for counsel to present them.'' *Id.*

If courts were to require in-chambers presentations on the above-two steps (summary position statement and trial plan), it would present an opportunity for the court to discover and identify the strengths and weaknesses of the claims, and mandate a particular course of action suitable for the case *sub judice*. For example, if a defendant in a TCPA claim were affirmatively raising the defense of either consent or lack of an ATDS (Automated Telephone Dialing System), then it might behoove both parties to dedicate time early in the proceeding to confirm or reject those defenses, or identify that such defenses could not be determined on a classwide basis.

Conclusion

Rule 23(b)(3) class actions present unique challenges and require unique solutions. Even a cursory review of the history and underlying purpose of Rule 23 makes clear how far adrift modern practice has come from the intentions of the drafters. While rule changes and legislative drafting have attempted to curb the misuse of the rule, active case management by judges will have a more immediate and positive effect on reviving the original intent of Rule 23.

Author Information

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