Principles of litigating consumer class actions

While class actions are complex, the cases most suited to class treatment are statutory driven cases with a simple damages analysis

By Abbas Kazerounian

Class actions are extremely complex in nature and generally have far more considerations and variables than individually litigated cases. However, the cases that are most suited to class treatment tend to be statutory driven cases with a simple damages analysis. Though statutory cases are often complex (e.g., statutory interpretations, regulatory considerations, lack of stare decisis and legislative intent to mention a few), the damages offered by statutes are often appealing for class treatment. If a statute offers common damages for certain wrongful conduct, plaintiff attorneys know that they have a class of people that have common and similar damages.

Taking the Telephone Consumer Protection Act ("TCPA") as an example, it is clear and unambiguous that negligent violations trigger a $500 penalty per call and willful violations bring about $1500 in damages. There are no variables or alternatives to the damages brought about by the TCPA. Therefore, all the trier of fact has to establish is whether the alleged violation is negligent or willful in nature.

Taking a cellular-telephone marketing TCPA case as a model, a plaintiff attorney has to see if he/she can create common questions of fact and law for a set of people that are similarly situated. "All" that the plaintiff has to do is establish that the call/s made to his/her cellular telephone was with the use of an automated telephone dialing system ("ATDS") and/or a pre-recorded voice in the last four years (see 47 U.S.C. § 227 (b) *et seq.*). With few caveats and/or exceptions, there are only two affirmative defenses to this statute: prior express consent OR whether the call was made for an emergency purpose. Therefore, as a starting premise, the plaintiff has common questions of fact and law:

Were the calls made to a cellular telephone?

Were the calls made with an ATDS and/or prerecorded voice?

Were the calls made with prior express consent?

Were the calls made for purposes of an emergency?

If the calls are violations, were they negligent or willful?

Interestingly, only questions 1, 2 and 5 are plaintiff's burden. Questions 3 and 4 are affirmative defenses and the defendant's burden (see *Grant v. Capital Mgmt. Servs., L.P.* (9th Cir. 2011) 449 Fed. Appx. 598, fn. 1). At this juncture, at least on the surface, there is potential for a class

action with the common questions and uniformity of potentially eviscerating damages.

Is it that simple?

Obviously certifying a case is not that simple. Though at first there seems to be a set of common questions, a smart defense attorney can still create issues and barriers to a potential class action. Since the landmark case of *Wal-Mart Stores, Inc. v. Dukes* (U.S. 2011) 131 S.Ct. 2541, attorneys have successfully defended class actions by creating an individualized inquiry. Taking the hypothetical of a TCPA case, if the defense can create an individualized question on one or more of the merits issues (as how they will apply to absent class members), they will defeat certification under the analysis of the Supreme Court in *Dukes*. As an example – whether or not the mechanism that made the calls to the putative class is an ATDS is dispositive but it will not necessarily create an individualized issue (because the same mechanism that made all the calls is or is not an ATDS and common to all absent class members). The most successful defenses in the TCPA realm have been individualized issues surrounding ascertainability. Though in the 9th Circuit the burden of providing prior express consent is massive (on the defense), that also creates an opportunity in defending the case.

Where the battle is won and lost

In the 9th Circuit, the defense has a large burden in showing *all* prior express consent documents at the time of TCPA discovery (see *Stemple v. QC Holdings, Inc*., 2013 U.S. Dist. LEXIS 99582). However, if the defense can demonstrate that even though some class members may have been called without consent, it would be impossible to certify this case without manually going through every "account" (to see if in fact consent was given or not), the class action would be destroyed. If the defendant is a large national bank, that could be millions of accounts. What that amounts to (at least in the 9th Circuit) is that the most important battle in (most) class-action litigation is the discovery battle.

If the court decides that the plaintiff should be entitled to all documents, software and data, that usually amounts to bad news for the defense. In TCPA litigation, if the Court orders all prior express documents to be produced pre certification, that usually spells trouble for the defense. The same is true for the outbound dial list (which is the list of numbers called from the "alleged" ATDS mechanism to all cellular numbers). In conjunction with a site inspection and the right experts, this gives every opportunity to the plaintiff to create a certifiable class. Why? With the data and technology being available, the plaintiff has an opportunity to try and demonstrate to the court that he/she can ascertain the "class" through the technology available to him/her and without manually going through every account. Should the discovery be denied by the court, the defense will have the upper hand because without the data, it will be hard to know what class of people may be segregated via an efficient and systematic avenue (rather than an individualized manner).

In the TCPA context, even if the data is made available to the plaintiff by the court, and the defendant actually provides it, that data could be and usually is extremely voluminous. In a case against a national bank, the data could consist of billions of telephone numbers and millions of prior express consent documents. Even with the aid of electronic discovery rules, the institutionalized defendant has the upper hand in the depth of its pocket. Even with the data, the plaintiff still has to have the resources to be able to mine, scrub, de-duplicate and extrapolate. Only with the best experts and technology may a plaintiff have the potential to demonstrate that he/she can ascertain a class. This is, of course, incredibly expensive and creates a much larger risk to the plaintiff than to the defendant. The risk to the defendant is that once the discovery order goes against it, a capable plaintiff is permitted to go on a fishing expedition within the parameters of the discovery order – not something that any astute institutionalized defendant would want. That is why a large portion of defendants choose to go to mediation at this juncture of litigation.

The big mistake

Once the discovery battle is over, the largest mistake that a plaintiff can make is to bite off more than they can chew. If the potential class presented to the plaintiff is enormous, it can be a mistake to try to certify the "whole enchilada." Taking the TCPA example, the damages are catastrophic. Should the discovery be available (and it has been established via experts that smaller subclasses can be ascertained), it is always better to carve out a smaller manageable sub-class to certify rather than the millions that may be available as the *potential* universe.

In *Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 579 (S.D. Cal. Oct. 29, 2013), the plaintiff attempted to certify the whole potential class valued at over $2 billion. The defendant showed numerous ways that it had obtained consent. Though it is easy to Monday morning quarterback, and easy to comment without the discovery being made available to the commentator, the chances of ascertaining and managing a smaller subset of similarly situated people were exponentially higher in *Connelly* than the route that the plaintiff took [*Author's note*: It should be noted that *Connelly* is on appeal, but if I were to predict an outcome it would be that the 9th Circuit will affirm the lower court's decision.].

The smarter play would have been to concentrate on a subset of similarly situated people because it is more manageable. Furthermore, it is of note that with only 10,000 people in a certified class, if plaintiff wins on merits, the defendant is facing liability of at least $5 million.

In the case of *Connelly*, a small subclass of people could have been 100,000 people or more. If plaintiff had managed to certify that smaller subclass, what would that have done? The liability would have been potentially $50 million. The most likely scenario is that the defense would have wanted to mediate this case before merits were decided with a dispositive motion. But the interesting point here is that it is unlikely that the defense would have gone to the mediation table trying to mediate only the class of 100,000. They would have most likely gone to the mediation table attempting to mediate the entire potential universe.

Why would the defense leave millions out there for another plaintiff to pick off (at least another subclass)? Most likely, the defense would not want to do that. Therefore, it is arguable that to try and certify the largest class available is not always the smartest litigation strategy. Plaintiff has to be sure of his class, especially if eviscerating damages are a possibility. It is always going to be making a judge's job easier if it is deemed that the plaintiff is overreaching (with catastrophic economic consequences).

Mediation

Should the parties decide to mediate a class action, and should the parties even come to a meeting of the minds, class counsel will still have a lot of work ahead of them. Unlike a personal injury case, where a case is usually paid within 30 days of an executed settlement agreement, in the context of a class action, every aspect of the agreement has to be put before a court and scrutinized. That includes but is not limited to the structure of the settlement, the terms of the release (specifically the scope of the release), the notice given to class members, the attorneys' fees being requested and the relief negotiated on behalf of the class. Therefore, the parties may believe that they have a good deal, but until the court approves that agreement, the settlement agreement is almost meaningless.

This is where the sophistication of the mediator is imperative. Long gone are the days of reversionary settlements in the 9th Circuit. If you have a certificate/voucher settlement, there are issues that have to be considered:

- Are the certificates transferable?
- Will they go out of date?
- Will the class be given cash in conjunction with the tokens/vouchers?
- Do class members have to spend money in order to use your certificates?

If the plaintiff decides to accept vouchers, will that pass muster before the court? The plaintiff has to show why he/she is accepting such a settlement. Some voucher/token settlements can be justified – perhaps the defendant is struggling financially, or the risks of litigation are great. The issue is that it has to be justified and explained with in-depth knowledge of the prevailing law in the particular circuit.

Sometimes, in certain consumer cases, the best method of notice is merely national publication and not direct mail notice. This is another issue that has to be justified to the court. Did the plaintiff try hard enough to ascertain addresses for the class members? In a potential misrepresentation case against a food manufacturer (for products sold in almost any supermarket) direct mail notice may be impossible and the best method of notice would be publication. The issue here is that for purposes of preliminary approval, a judge still has to go through an FRCP 23 analysis. The problem for the judge would be whether this class is even ascertainable for settlement purposes. At this juncture there is a balancing act between showing the court the best notice practicable and at the same time showing that the class is ascertainable. The plaintiff faces risk in availing this settlement notice plan to a court because there is a chance that the court could respond to it negatively (as it pertains to ascertainability).

When mediating a class case, it is therefore not just a matter of agreeing to a number. Class counsel has to consider the structure of the settlement (is it reversionary, is it a common fund, is it a claims made or an opt-out only settlement?), the compensation, the scope of the release, the notice, attorneys' fees and so much more. The case law is continually changing and class counsel and mediators have to be very cognizant of what will and will not pass muster before the courts. To demonstrate the contrast, when mediating a personal injury matter, the case law is almost never a factor as the stare decisis has changed very little on common law negligence in the last 50 years. There are exponentially more moving parts and issues with class mediations than individualized cases. As a result, a far more sophisticated mediator would be needed for a class case.

In the world of TCPA, class cases are sometimes settled for pennies on the dollar. But does that make the settlements bad? Not necessarily – because what the lay person or even the judge may not know are the risks involved, the financial viability of the defendant, commensurate results, etc. Class counsel has the task of educating the presiding judge as to why the settlement at bar is fair, reasonable and adequate. Class counsel has to be persuasive and make sure that the judge understands the nuances of the settlement and its reasonableness because the judge is the person that ultimately decides upon the fairness of the settlement.

Conclusion

There is no simple roadmap to litigating a class case; different attorneys have demonstrated through different techniques and strategies that they can prevail. However, there are takeaways that should perhaps be rules of general applicability (and always with exceptions) when entering into unchartered territories, e.g., when trying to litigate a type of case that has not been litigated before, it is advisable not to overreach. Be sure that a class can be ascertained and is manageable; be sure of the case law before

agreeing to a settlement that is unconventional – it must still pass muster before the court. Being creative is a huge part of being a good class action attorney but the license to be creative is more elastic and forgiving when one has mastered their craft and their specific practice area.


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