Is this a class action?

The basics of deciding whether your case has the makings of a successful class action

By David Pivtorak

I often get calls that start with a question many of us are familiar with: "Hey, is this a case?" The answer to this query is the Platonic ideal of a lawyer response: "Maybe."

When it comes to class actions, the equivocation is especially loaded. This is because class-action plaintiffs must do more than just prove the specific elements of whatever cause of action they are pursuing. The class-action mechanism imposes an additional layer of judicial scrutiny on plaintiffs and their counsel, called "class certification." This means that before even thinking the word 'CACI,' a representative plaintiff must show the judge handling the matter that the case meets specific, legal criteria which would allow it to proceed as a *class* action to the merits stage.

For an attorney well versed in personal-injury litigation, this is most comparable to an MSJ in a case with difficult liability but significant damages. In the personal-injury context, those cases often end up settling after a favorable ruling for plaintiff on the MSJ. Similarly, representative actions frequently resolve after the court issues the order certifying the class and allowing the case to proceed on the merits.

Although class certification is technically merely procedural, most judges are loath to certify a case without some showing that it has merit. And while defendants can – and often *do* – file MSJs post-certification, the motions generally do not have the same significance on the overall posture of the case as the certification motion.

So, what exactly is "class certification" and what extra "elements" must be satisfied before you can legitimately say you're handling a class litigation? These questions will be answered shortly. But before delving into the technical side of representative litigation, it's important to understand the current legal landscape.

Consumer class actions under the modern Supreme Court

Class actions used to be a lot simpler. In the early 2010s, however, the U.S. Supreme Court turned the world of consumer class actions on its head. The change was inspired, in large part, by some of the late Justice Antonin Scalia's greatest hits; specifically, *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740 and *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541.

In *Concepcion*, a 5-4 opinion, the Court held that California state contract law, which deems class action waivers in arbitration agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The decision was a death knell for most consumer and employee class actions against large corporate entities like wireless carriers, financial institutions, and tech companies. For those companies that did not already have arbitration clauses and class action waivers in their consumer and employment contracts, *Concepcion* served as a dinner bell. Now, almost every contract of adhesion consumers enter into – from the "terms of service" on apps and electronics to employer contracts – has a clause mandating individual arbitration as the exclusive dispute resolution mechanism.

A few months after *Concepcion* came the decision in *Dukes* which created a new and significantly more restrictive job for courts deciding whether a case may proceed as a class action. Writing for another 5-4 majority, Justice Scalia concluded that instead of accepting a mere "showing" at the class certification stage that plaintiffs have met all the requirements of a class action, courts must perform a "rigorous analysis" of the evidence and require plaintiffs to offer "significant proof" that they meet class-certification standards. (*Dukes*, 131 S.Ct. at 2551, 2553.)

This new hurdle imposes an obligation on plaintiffs' attorneys to take on significantly more work and provide mountains of evidence before the merits of the case are even considered. Suffice it to say, after these two monumental decisions, there has been a steady decline in the number of consumer class actions filed to redress corporate wrongdoing.

F.R.C.P. Rule 23

If you haven't stopped reading, or quit the law in order to pursue a less stressful occupation (like serving as Michael Avenatti's PR manager, for instance), here's what you need to know about certifying a case for class-action status:

While most class actions are battled out in federal court (I'll explain why shortly), California law has its own rules and procedures for handling these types of cases. Most superior courts have separately dedicated 'complex' departments for this reason. Because California's class-action mechanism largely mirrors (indeed, adopts) the standards established by federal law, I'll begin with the latter.

Under federal law, class actions are governed by the Federal Rules of Civil Procedure, specifically Rule 23. For a class

to be certified, a plaintiff must satisfy each prerequisite of Rule 23(a) and must also establish an appropriate ground for maintaining class actions under Rule 23(b). (See *Stearns v. Ticketmaster Corp.* (9th Cir. 2011) 655 F.3d 103, 1019.) The requirements of Rule 23(a) are: (1) a class so numerous that joinder is impractical (numerosity); (2) common questions of fact or law (commonality); (3) typicality of the representatives (typicality); and (4) that the representatives will adequately protect the class (adequacy). (See *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. at p. 2548.)

A plaintiff must also satisfy one of Rule 23(b)'s provisions, namely: (1) separate adjudications will create a risk of decisions that are inconsistent with or dispositive of other class members' claims, (2) declaratory or injunctive relief is appropriate based on the defendant's acts with respect to the class generally, or (3) common questions predominate and a class action is superior to individual actions. (*Amchem Products, Inc. v. Windsor* (1997) 117 S. Ct. 2231, 2235.)

Rule 23(b)(3) is most commonly seen in consumer class actions and requires that "questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]." (*Id.* at 2541.) "The predominance inquiry … asks whether proposed classes are sufficiently cohesive to warrant adjudication by representation." (*Ticketmaster*, 655 F.3d at 1019.) With respect to superiority, the Ninth Circuit has held that "there is a clear justification for handling the dispute on a representative rather than an individual basis" if "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication..." (*Mazza v. American Honda Motor Co., Inc.* (9th Cir. 2012) 666 F.3d 581, 589.)

Under Rule 23, "common questions can predominate if a 'common nucleus of operative facts and issues' underlies the claims brought by the proposed class." (*Messner v. Northshore University HealthSystem* (7th Cir. 2012) 669 F.3d 802, 815.) The court must analyze the elements of the parties' claims and defenses and the nature of the evidence that will be presented at trial, compare the relative importance of the contested issues in the case, and make "some prediction as to how specific issues will play out." (*Marcus v. BMW of North America, LLC* (3d Cir. 2012) 687 F.3d 583, 600.) "Individual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." (*Messner,* 669 F.3d at 815.) "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." (*Valentino v. Carter-Wallace, Inc.* (9th Cir. 1996) 97 F.3d 1227, 1234.)

Rule 23(b)(2), which deals with injunctive relief, allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." (*Id.* at 2541.) The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." (*Id.* at 2557.)

Code of Civil Procedure section 382

California class-action requirements essentially track the federal law in most respects, but practitioners will tell you that it's a lot easier to get certified in state court, at least in big metro complex departments (bringing a class action in a small California county court is discussed below). California's version of Rule 23 is Code of Civil Procedure section 382. Under this section class actions are statutorily authorized where "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc., § 382.) "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313.)

Federal vs. state court: Do I have a choice?

So now that you know all the elements of certifying a class, you can finally sue that cell phone carrier for its false "best network in the nation" claims on behalf of all the people who signed up only to find out they get zero bars in their apartment, right? Not so fast.

One of the most important choices that a plaintiffs' class-action attorney must make is deciding whether to file in state or federal court – an issue that rarely comes up in routine tort cases. Even then, depending on where your potential class representatives reside – or where your defendant is located – you may have a handful of counties and federal districts to choose from. And unless your choice is between a great jurisdiction and a terrible one, the decision-making process becomes more art than science. In those situations, there are no hard-and-fast rules for picking a venue. Just some general guidelines that, with enough experience and litigation IQ, can make the odds a bit more favorable.

As you probably noticed from the previous section, California law has more relaxed standards for what can be certified as a class action. That is why you can almost guarantee you'll be removed to federal court by a defendant that has a legitimate legal basis for doing so (and the ones that don't will certainly not be dissuaded from trying). As you may recall from your first-year civil-procedure class, the two bases for federal jurisdiction are diversity and federal question. In 2005 Congress added a new arrow to corporate defendants' quivers with the Class Action Fairness Act, or "CAFA," which follows in the rich tradition of Congressional bills whose names, if Geiger counters could measure irony, would produce Chernobyl-level Roentgen readings. (See, e.g. Affordable Care Act, Defense of Marriage Act, PATRIOT Act, etc.)

The path (almost) always leads to federal court

Before CAFA, a defendant could only remove federal-question class actions or those with complete diversity of citizenship and an amount in controversy over $75,000 (without aggregating the plaintiffs' claims. Aggregation was appropriate only where a defendant owed an obligation to the group of plaintiffs as a group and not to the individuals severally.). Post-CAFA, federal courts now exercise jurisdiction "where the aggregate number of members of all proposed plaintiff classes is 100 or more persons" and "if: (1) the aggregate amount in controversy exceeds $5,000,000, and (2) any class member is a citizen of a state different from any defendant." (*Serrano v. 180 Connect, Inc.* (9th Cir. 2007) 478 F.3d 1018, 1020-1021.) There are also both mandatory and discretionary statutory exceptions to CAFA jurisdiction, but that may be the subject of another article. Simply put, in most significant class actions defendants will almost always have a path to federal court, if they so choose.

Another crucial difference between state and federal courts is California's peremptory challenge under Code of Civil Procedure section 170.6, which does not exist at the federal level. So, if you have to file in a federal district where your odds curve towards drawing a judge who has historically expressed hostility to the class-action mechanism, expect a long, bumpy road.

Still determined to file in state court?

If you are determined to file in state court, knowing the above parameters may inform your primary case strategy, i.e., how you draft your complaint, who you name as a defendant, and how you'll define your class. But the state-court scenario, even with a peremptory challenge, also heavily depends on what county or counties you can file in. If the county you choose is one where you haven't litigated a complex matter, the first thing you must do is talk to someone who has and, failing that, do some online research.

Class actions are vastly different, not just procedurally but philosophically, from all other types of litigation. You should make sure when filing in state court that it is in a county with a robust, experienced complex department. In Los Angeles, for example, we are blessed to have a complex department that in many ways rivals the experience and resources of its federal counterparts.

Drawing from a larger complex department will alleviate, but not eliminate, your chances of being in front of a judge whose ideological bent carries an outsized influence on your case. In areas that have one-judge complex departments or no dedicated complex departments, which rarely see class actions, you are more likely to end up with a jurist who may not understand or be hostile to a lawsuit where the damages to each individual are seemingly minimal. That is one situation where it's certainly a good idea to seriously consider the federal court route. There are many more, but the editors of this publication suggested that some room should be left for others who may also like to have their articles published here.

What comes next?

While this article will not teach you everything there is to know about becoming a competent class-action attorney, I hope it at least provides a starting point for anyone interested in what it's all about. That being said, I'll leave the reader with one final thought: Representative litigation in the current legal environment requires more than just knowing the basic concepts. It necessitates a deeper understanding of how the shifting legal terrain affects the class mechanism as a whole.

Tony Soprano, in the opening moments of the eponymous show, utters a statement that drives at the core of the post-Vietnam American zeitgeist. "It's good to be in something from the ground floor. I came too late for that and I know. But lately, I'm getting the feeling that I came in at the end."

As our nation shifts from an industrial superpower to a tech-driven gig-economy, many people have a visceral understanding of what he meant. Plaintiffs' attorneys who represent individuals in consumer class actions also see a painful reality in those words.

But at least when you get that call from a victim of corporate malfeasance asking if they have a legitimate class action, you're now armed with the insight and knowledge to say confidently to that person: "Maybe…tell me more."


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