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Litigating Class Actions Between Class Certification and Trial

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Going the Distance: Litigating Class Actions Between Class Certification and Trial

Fred B. Burnside — Davis Wright Tremaine LLP, Seattle WA

August 11, 2009

I. INTRODUCTION AND OVERVIEW

While many materials exist addressing class-certification motion practice and how to try class actions, scant commentary exists concerning what occurs (when settlement doesn't) between class certification and trial. Oftentimes, counsel put all their eggs in the class-certification basket, giving little thought to post-class-certification strategy. But cases don't always settle simply because the court has certified a class, meaning counsel must consider post-certification litigation concepts, whether involving procedure (i.e., undoing the court's class-certification order) or substance (i.e., completing discovery, moving for or opposing summary judgment, and preparing for trial). Without appreciating the full array of class-action litigation issues, counsel can't properly represent their clients, even *before* class certification occurs.

II. DRAFTING THE CLASS CERTIFICATION ORDER — FINDINGS OF FACT AND CONCLUSIONS OF LAW

Often times courts will grant or deny the class certification motion (or the motion to strike class allegations) at oral argument — assuming you get oral argument. It is difficult at that moment to swallow your pride and begin to advocate again (rather than run from the room cursing), but you must do so immediately, and without apology. Consider the Court's oral ruling as an opening offer, and plan in advance for ways to narrow or better shape the class definition, subclasses, or limit the claims actually certified. Often times you will have given much more thought to the nuances and scope of the class than has the Court or plaintiffs' counsel, and a Court may be willing to certify, but may have unarticulated reservations about the scope of the class that can shape then and there. It is best to use short, affirmative statements: E.g., "So you're certifying X claim, as to X people, but you're not certifying Y claims, as to Y people, right?" Also, if you've made evidentiary objections in the briefing, get rulings on those objections and motions ***now,*** as it will be too late to do so later, and you'll want those rulings for any appeal.

Because a narrowed class is not typically briefed — most defense counsel go for all or nothing — you may suggest that the Court hold off on entering an Order until it can review proposed findings and conclusions from ***both*** parties. Although the defendant has, at this point, lost, this is a valuable opportunity to limit the scope of the class or to better position the defendant for appeal. Indeed, cases show that well-crafted findings and conclusions are essential for meaningful appellate review. *See Hartman v. Duffey*, 19 F.3d 1459, 1474 (D.C. Cir. 1994) ("the paucity of the record on the question of appropriate class certification effectively precludes us from performing our reviewing task"); *Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994) (reversing as abuse of discretion district court refusal to excuse belated opt-out in part because district court failed to identify bases for its ruling). A party's proposed findings and conclusions, if adopted, are entitled to the same deference that a judge's independent order. *See Anderson v. Bessemer City N.C.*, 470 U.S. 564, 572 (1985) ("even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous"); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999) ("even a verbatim adoption of proposed findings of fact does not change the standard of review").

Once proposed findings and conclusions are submitted, it is entirely appropriate for a defendant to: (a) submit objections to plaintiffs' proposed findings and conclusions of law; and (b) submit alternate proposed findings and conclusions that posture the case in a better light for the defendant. In my experience, plaintiffs' counsel tend to overreach (e.g., findings never made, arguments never raised, etc.) when courts ask for these, and defense counsel need to be vigilant in addressing that overreaching. In submitting objections to proposed findings and conclusions, your credibility is essential — do not overreach, and cut issues you lost on. That said, if plaintiffs changed their class definition or theory of liability in their reply brief — which happens not infrequently — it is (in my opinion) acceptable to point out that fact, explain what your response would have been, and craft a proposed finding or conclusion that reflects a more favorable approach for the defense. This is akin to a motion for reconsideration, but should be limited to new areas/arguments raised on reply, such that the court is not "reconsidering" anything. I have seen courts reverse certification orders through this process.

III. RECONSIDERATION AND REVIEW

A. Motion for Reconsideration

Motions for reconsideration are disfavored, and to be candid, are rarely granted. That said, in the realm of class certification, plaintiffs' theories of liability, class definition, and evidence sometimes change dramatically in the reply brief, with no opportunity for the defendant to respond. Sometimes too, the Court may pick up on a small point in the briefing that the parties did not focus on, and to which additional briefing and analysis may be useful. Or the Court may not have ruled on an evidentiary issue or collateral motion that affects the certification decision. Regardless, with due caution to the fact that you will be appearing before the same judge in this case (and likely many others), you may want to consider moving for reconsideration — if for no other reason than to better position the issues and facts for appeal. There is authority for the proposition that the standard for a reconsideration motion is more lenient in the class context, as a result of the significant stakes involved in that decision, which is "often the most significant decision rendered in these class-action proceedings." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). This is because in the class action context "the usual reluctance to entertain motions for reconsideration simply does not apply." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 651-52 (C.D. Cal. 2000). An order certifying a class is inherently tentative; the Court is charged with the responsibility to revisit certification as the case develops. *Id.* at 652. In fact, some suggest that parties should present certification concerns as soon as possible to avoid expending time and resources if a case should not proceed on a class basis. *Westways v. World Travel, Inc. v. AMR Corp.*, 265 Fed. Appx. 472, 476 (9th Cir. 2008) (Berzon, J., dissenting in part).

B. Petition for Appellate Review

Federal Rule of Civil Procedure 23(f) permits a party on the losing end of a class certification motion (or decertification motion) to file a discretionary appeal, so long as the petition is filed within 10 court days from the date the class certification order is entered on the Court's docket. *See* Fed. R. Civ. Proc. 23(f).[1] If a motion for reconsideration is filed within 10

[1] Another avenue of appellate review is a writ of mandamus. Although an appeal under Rule 23(f) is a more likely avenue for review, nothing prevents a defendant from also seeking a writ of mandamus. Before Rule 23(f) was

days of the class certification order, the 10 day period under Rule 23(f) begins to run from the date the reconsideration motion is denied. *See, e.g., Shin v. Cobb County Bd. Of Educ.*, 248 F.3d 1061, 1064-65 (11th Cir. 2001).

The Circuit Courts of Appeal enjoy "unfettered discretion" in deciding whether to allow an appeal from a class certification order. *See* Adv. Comm. Notes to 1998 Amend., Fed. R. Civ. P. 23(f). In exercising its discretion, the Courts considers whether

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Chamberlan, 402 F.3d at 955. These disjunctive factors "are merely guidelines, not a rigid test." *Id.* at 960. This standard is not easily met, so one must consider whether a Rule 23(f) appeal is worthwhile — especially considering the short time frame to prepare the petition (a cautious defense lawyer may draft one before obtaining a ruling, but there is a significant cost factor to that approach).

A detailed analysis of the factors affecting whether the grant a Rue 23(f) petition are beyond the scope of this presentation, but counsel should be aware that neither filing the petition nor its grant stay the litigation in the trial court, so a defendant must also move to stay proceedings during the pendency of the motion or appeal.[2] The decision to grant a stay pending appeal is based on factors similar to the standard for obtaining preliminary injunctions, such that the Court considers (1) whether there is a substantial likelihood that the movant will succeed on the merits of the claims/appeal; (2) whether the movant will suffer irreparable injury if an injunction/stay does not issue; (3) whether others will suffer harm if an injunction/stay is granted; and (4) whether the public interest will be furthered by an injunction/stay. *In re Lorazepam & Clorazepate Antitrust Litig*., 208 F.R.D. 1, 4 (D.D.C. 2002).

IV. DISCOVERY CONSIDERATIONS

A. Create a Formal Discovery Plan

A good practice to limit discovery skirmishes after class certification and in preparation is to schedule a call with the judge or magistrate to create a discovery plan, so as to isolate the issues relevant to trying the class action, the timing of that discovery, and a process at the outset that protects both parties' interests. This is not appropriate in all cases, but if past experience

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created in 1998, a number of appellate courts granted mandamus writs to reverse significant class certification orders. *See, e.g., Jackson v. Motel 6 Multipurpose*, 130 F.3d 999 (11th Cir. 1997) (mandamus directing decertification of race discrimination cases); *In re Am. Med. Sys.*, 75 F.3d 1069, 1089–90 (6th Cir. 1996) (mandamus directing decertification of personal injury class action); *In re Rhone-Poulenc Rorer Inc*., 51 F.3d 1293, 1297–99 (7th Cir. 1995) (mandamus directing certification of mass tort class action).

[2] For a thorough analysis of the standard applied by each circuit, I recommend: 2 McLaughlin on Class Actions §§ 7.7-7.14 (5th ed. 2009).

that discovery may be contentious, getting assistance early on can save everyone time and can avoid needless expense to both sides. Once certified, the case is in many ways akin to a new action. As a result, I believe the Manual for Complex Litigation's analysis as to a Rule 26 discovery-plan is equally applicable post-certification as it is pre-certification:

> A discovery plan should facilitate the orderly and cost-effective acquisition of relevant information and materials and the prompt resolution of discovery disputes. The plan should reflect the circumstances of the litigation, and its development and implementation must be a collaborative effort with counsel. The judge should ask the lawyers initially to propose a plan, but should not accept joint recommendations uncritically. Limits may be necessary even regarding discovery on which counsel agree. The judge's role is to oversee the plan and provide guidance and control. In performing that role, even with limited familiarity with the case, the judge must retain responsibility for control of discovery. The judge should not hesitate to ask why particular discovery is needed and whether information can be obtained more efficiently and economically by other means. Regular contact with counsel through periodic conferences will enable the judge to monitor the progress of the plan, ensure that it is operating fairly and effectively, and adjust it as needed.

Manual for Complex Litigation § 11.42 (4th ed. 2004).

Further, in setting parameters early on — particularly those tied to the theories plaintiffs proffered as a basis for class certification — a defendant can head-off fishing expeditions into irrelevant areas or totally new theories that were no certified.

B. Bifurcated Discovery: Shifting From Class Certification to Merits Discovery

Defendants often seek to bifurcate discovery, limiting pre-certification discovery to those issues bearing on class certification or on the factual bases of the named plaintiffs (bearing on typicality and adequacy). Indeed, the Manual for Complex Litigation supports this approach:

> Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations. Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed. … ***In cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden.***

MANUAL FOR COMPLEX LITIGATION (FOURTH) ("MCL") § 21.14 at 256 (emphasis added). Similarly, the Advisory Comments to Rule 23 state that it is appropriate to allow "controlled" discovery before class certification, "limited to those aspects [of the merits of the case] relevant

to making the certification determination …." Fed. R. Civ. P. 23, Advisory Comments to 2003 amendments.[3]

If a court has ordered (or the parties agreed to) bifurcated discovery, then the shift to merits discovery will likely create substantial additional expense for the defendant, as plaintiffs are now arguably entitled to significantly more evidence. But bear in mind that once certified, the claims of the putative class must be proved through representative testimony of the named plaintiffs, and to the extent that discovery seeks information not reasonably calculated to lead to the discovery of admissible evidence, then a defendant should object and explain this point well. A defendant must always be leery of attempts to cobble together through discovery a fictional combination plaintiff, and reiterate that the class claims are only as good as the class representatives' testimony. *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc*., 155 F.3d 331, 345 (4th Cir. 1998) (reversing certification after trial in which defendant "was often forced to defend against a fictional composite [plaintiff] without the benefit of deposing or cross-examining the disparate individuals behind the composite creation").

1. Discovery to Narrow Plaintiffs' Claims

This period of merits discovery presents significant opportunities for defendant, too. As an initial matter, defendants are well advised to serve an interrogatory asking plaintiffs to set forth their trial plan. (Motions to compel trial plans are discussed below).[4] Likewise, where a defendant has reason to believe that the named plaintiff cannot prove essential elements of her claim, a series of Requests for Admission can be an effective weapon, as if they are denied (or not answered fully), and the defendant prevails at trial or on summary judgment as to those issues, the defendant is entitled the attorneys' fees incurred in proving those facts. *See* Fed. R. Civ. Proc. 37(c); *see also Chem. Eng'g Corp. v. Essef Indus., Inc.*, 795 F.2d 1565, 1575 (Fed. Cir.1986) (affirming district court's award of fees after the matters were proven true on a motion

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[3] This makes some sense, of course, as until certified, this case is an individual action entitled to only individual discovery. *See Morlan v. Universal Guaranty Life Ins. Co.*, 298 F.3d 609, 616 (7th Cir. 2002) (Posner, J.) ("until certification there is no class action but merely the prospect of one; the only action is the suit by the named plaintiffs"). A plaintiff cannot simply "file a complaint, claiming to represent a class whose preliminary scope is defined by him, and by that act alone obtain a court order which . . . requires discovery concerning members of that class." *Shushan v. Univ. of Colorado at Boulder*, 132 F.R.D. 263, 268 (D. Colo. 1990). As the Fifth Circuit has observed, allowing broad merits discovery before certification would "impose[] on defendants one of the major burdens of defending [an] omnibus class action prior to any determination that the action [is] maintainable as such." *Stewart v. Winter*, 669 F.2d 328, 332 (5th Cir. 1982).

[4] One leading treatise suggests the following interrogatory:

> Set forth your trial plan for this case including, but not limited to your trial plan for the following issues: (a) Identification of those issues that will be resolved as common issues for all putative class members and how these issues will be resolved; (b) Identification of those issues that will be resolved on an individual basis for all putative class members (including, but not limited to, causation, injury, reliance, affirmative defenses and damages) and how these issues will be resolved; (c) Process for resolving Class Representative Claims including any limitations on the claims that Class Representatives can litigate; (d) Process for resolving Absent Class Member Claims including any limitations on the claims that Absent Class Members can litigate; and (e) Identification of the process that plaintiffs propose be used for the calculation and distribution of any damages that may be awarded in this case to putative class members.

See 1 McLaughlin on Class Actions § 3.7 (5th ed. 2009).

for summary judgment). "The rule mandates an award of expenses unless an exception applies." *Marchand v. Mercy Med. Ctr*., 22 F.3d 933, 936 (9th Cir.1994). Because of the exceptions to that rule — addressing objectionable, irrelevant, or reasonably disputed issues, *see* Fed. R. Civ. P. 37(c)(2)(A)-(D) — it is best to keep these requests narrowly tailored to facts or documents whose accuracy cannot be disputed. It is important to remember that requests for admission are not a trap for the unwary, but a means to eliminate issues for trial or motion practice. The "true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail." *Marchand*, 22 F.3d at 937 (internal quotations and citation omitted); *Wash. State Dep't of Transp. v. Wash. Natural Gas Co., Pacificorp*, 59 F.3d 793, 805-806 (9th Cir.1995). If a defendant receives request for admission responses it believes are unfounded, a good practice is to send a follow-up letter identifying those areas and explaining that the defendant will seek its reasonable attorneys' fees if forced to prove those facts either on summary judgment or at trial.

2. Defending Against Rule 30(b)(6) Deposition Abuse

One aspect of class certification discovery that appears to have escalated over the past several years is the increasing use of repeated Rule 30(b)(6) depositions to bolster the plaintiffs' case, often with dozens of topic areas listed in each successive notice — likely to avoid the 10-deposition limitation contained in Federal Rule 30(a)(2)A)(i). Preparing witnesses for these depositions is time consuming and expensive, but it is an obligation mandated by the civil rules. That said, Rule 30(b)(6) depositions are no different than any other type of deposition, and once a defendant has provided witnesses to answer the topics listed on a Rule 30(b)(6) deposition notice, that defendant is ***not*** required to submit for a second Rule 30(b)(6) deposition absent leave of court.[5] Of course, if the defendant was successful in bifurcating discovery between class and merits issues, plaintiffs are likely entitled to take new depositions on the merits (including Rule 30(b)(6) depositions) without leave of court. But if, as is happening more often, plaintiffs seek to avoid the limit on the total number of depositions through multiple Rule 30(b)(6) depositions, a defendant should object and force the plaintiff to seek leave of court.

3. Expert Discovery: From Theory to Practice

Another seismic shift in post-certification discovery is that expert testimony shifts from the theoretical bases to the actual evidence necessary to prove class claims. Although there is currently a split among the circuits as to what the admissibility standards for expert witness

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[5] *See* 7 Moore's Fed. Prac., Civ. § 30.05[1][c] (2008) ("The rule requiring leave of court to take a second deposition applies to an entity that is deposed pursuant to Rule 30(b)(6)"; "Even though a party may be deposing a different corporate representative, it is still seeking a ''second'' deposition of the entity. Of course, the party may be found to be entitled to the "second" deposition if it overcomes the Rule 26(b)(2)(C)(i) hurdle that the discovery sought not be unreasonably cumulative or duplicative, or that it is not available from some other source. Nevertheless, ***leave of court is required*** to make this showing.") (emphasis added); *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.* 244 F3d 189, 192 (1st Cir. 2001) ("Because this second Rule 30(b)(6) subpoena was issued to GEAE without leave of the court, it was invalid"); *Zamora v. D'Arrigio Bros. Co. of Cal.*, 2006 WL 3227870, *1-*2 (N.D. Cal. Nov. 7, 2006) *Tingley Sys., Inc. v. Healthlink, Inc*., 2007 WL 1365341(M.D. Fla. May 9, 2007); *In re Sulfuric Acid Antitrust Litig*., 2005 WL 1994105, at *2 (N.D. Ill. 2005); *Innomed Labs, LLC v. Alza Corp*., 211 F.R.D. 237, 240 (S.D.N.Y.2002); *Sunny Aisel Shopping Ctr. Inc. v. Xtra Super Food Centers, Inc.*, 2002 WL 32349792, *1 (D.V.I. July 24, 2002); *Arnold v. Miller*, 2008 WL 3992684, *2 (S.D. Ill. 2008); *Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings LLC*, 2008 WL 3895474 (D. Kan. Aug. 21, 2008).

testimony must be at the class certification stage, there is no dispute that, at trial, an expert witness's testimony must be admissible. Plaintiffs are more frequently attempting to use experts at the certification stage as a means by which to prove causation or damages on a class-wide basis. Because the trial court will not typically resolve the merits of the dispute at the certification phase, defendants are often somewhat limited in their attack on the viability of expert testimony to prove causation or liability on a class-wide basis. But once a class is certified, it is essential that the defendant develop evidence by which to prove that the plaintiffs' expert cannot deliver at trial on the promises made at certification. This is precisely what happened this year in the *Kelley v. Microsoft Corp.* case, where plaintiffs' expert suggested he could prove a price-inflation theory on a class-wide basis to show that consumers purchasing Windows-Vista capable computers were necessarily injured, regardless their expectations or understanding of the product at the time of purchase. *Kelley v. Microsoft Corp.*, 2009 WL 413509, *1-*2 (W.D. Wash. 2009). The Court initially certified a class based on plaintiffs' proffer that they could develop expert testimony allowing proof of price inflation on a class-wide basis, but when further discovery showed this theory to be meritless, the Court decertified the class. *Id.* at *5-*6.

The net effect of post-certification discovery may be, then, a cautionary tale: do not promise at certification more than your expert can deliver in post-certification discovery, because the result will be lost time and money for all sides.

V. POST-CERTIFICATION MOTIONS

A. Motions for Partial or Total Summary Judgment

Once adequate merits discovery is complete, consider with benefits of seeking summary judgment on some or all of plaintiffs' claims. Particularly those claims that provide a right for treble damages and attorneys' fees (like most state consumer protection statutes). In many consumer fraud class actions the theory is that the plaintiff was deceived by the defendant's advertisement. If discovery shows that the named plaintiff: (a) never saw the advertisement; (b) would have purchased the product even had she known of the advertisement; or (c) that she knew of the allegedly deceptive act or practice from prior experience, there is a strong argument that the plaintiff cannot establish causation (a requirement under most state consumer protection statutes), and summary judgment should be granted. By eliminating some claims or theories of liability through summary judgment (or partial summary judgment) motions, a defendant is in a much better position to evaluate the value of various settlement proposals before trial.

Beware, however, that in most instances, a defendant is well advised to wait until ***after*** class notice is complete, because a pre-notice Order granting summary judgment will act as res judicata for the named plaintiff only. *Schwarzchild v. Tse*, 69 F.3d 293, 296 (9th Cir. 1995) (holding that defendant not entitled to notice after obtaining summary judgment). (Of course, if there is a dispute over the appropriate scope of class notice, or if notice in itself may be ruinous to the defendant, waiting to seek summary judgment may not be an option.) This approach is consistent with the general rule that a plaintiff may not seek summary judgment before class certification has been determined, since any other rule would permit putative class members to see if they won or lost before deciding whether to join the action or opt out. In fact, the notice provisions under Rule 23(c)(2) exist for the purpose of preventing "one-way intervention."

American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974) (1966 amendments to Rule 23 responded to criticism that "it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one"); Advisory Committee Notes, 1966 Amendments to Rule 23 ("Under proposed subdivision 23(c)(3), one-way intervention is excluded.").[6]

B. Motion to Compel a Trial Plan

Although there is no trial-plan requirement in Rule 23, the advisory committee notes to the 2003 amendments emphasize that "[a] critical need is to determine how the case will be tried," and observe further that an "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 to class-wide proof.***" Fed. R. Civ. P. 23(b)(3) advisory committee's notes (2003) (emphasis added). Plaintiffs typically urge the Court to avoid any merits determinations at the class certification phase, and the overwhelming majority of cases — let alone class actions — never see trial. This means that most trial court judges have never seen a class action trial, or had presented to them a plan by which the class claims are proven through representative testimony. Creating a class action trial plan is difficult because it is an attempt to reconcile the tension between the fact that class litigation is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979), and the law that procedural rules "shall not abridge, enlarge or modify any substantive right," such as the obligation of claimants to present individual proof of the elements of their claims. 28 U.S.C.§ 2072(b). *See*, *e.g.*, *Broussard*, 155 F.3d at 345 (reversing certification after trial in which defendant "was often forced to defend against a fictional composite [plaintiff] without the benefit of deposing or cross-examining the disparate individuals behind the composite creation").[7] Forcing plaintiffs to present a trial plan can underscore defects in the class certification decision (without expressly attacking the

[6] The rule against one way intervention is a significant protection for defendants — Judge Easterbrook famously referred to the alternative as allowing a defendant to be "pecked to death by ducks." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 372 (7th Cir. 1987) (Easterbrook, J.). But some courts have held that a defendant may waive that protection by seeking pre-certification summary judgment, and allowed a plaintiff to cross move for summary judgment and ***then*** seek class certification. *See Postow v. OBA Federal Savings & Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980) (district court did not abuse its discretion in sending notice to class members after granting plaintiffs' motion for summary judgment where defendant constructively waived protections of Rule 23(c), and post-judgment class notice did not inform potential class members as to the existence of any judgment in their favor)*; Ahne v. Allis-Chalmers Corp*., 102 F.R.D. 147 (E.D. Wis. 1984) (district court decided to resolve parties' motions for summary judgment prior to consideration of class certification issue where defendants offered to waive protections of Rule 23(c)); *Gurule v. Wilson*, 635 F.2d 782, 790 (10th Cir. 1980), *overruling on other grounds recognized by, E.E.O.C. v. Gaddis*, 733 F.2d 1373, 39 Fed. R. Serv. 2d 277 (10th Cir. 1984) *and overruling on other grounds recognized by, World of Sleep, Inc. v. La-Z-Boy Chair Co*., 756 F.2d 1467, 17 Fed. R. Evid. Serv. 852, 1 Fed. R. Serv. 3d 629 (10th Cir. 1985) (district court has power to certify plaintiff class action under Rule 23(b)(2) in prisoners' rights class action, following earlier favorable ruling on plaintiffs' summary judgment motion). *But see Kerkhof v. MCI WorldCom, Inc*., 282 F.3d 44, 55 (1st Cir. 2002) (affirming district court's refusal to consider motion for class certification after judgment in plaintiff's favor); *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1317 (7th Cir. 1991) (holding that it would have been error to certify a class after relief had already been granted to plaintiffs); *Int'l Union UAW v. Donovan*, 746 F.2d 839, 841-42 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 274 (1986) (holding that post-judgment certification is impermissible); *Watson v. Secretary of Health, Educ. & Welfare*, 562 F.2d 386, 390 (6th Cir. 1977) (reversing class certification after judgment for plaintiffs).

[7] *See also* Manual for Complex Litigation § 22.318 (4th ed. 2004) ("courts have rejected class certification after the trial plans exposed an inability to try proof of causation or other elements of liability on a class-wide basis").

decision itself. Thus, by demanding (and then attacking) the trial plan, the ultimate efficacy of certification is reevaluated.

Some defendants demand a trial plan as part of the class certification process, and some courts agree that a trial plan is necessary.[8] But it usually makes more sense to wait until closer to trial (when discovery has closed) to move to compel a trial plan — particularly in the Ninth Circuit, where a pre-certification trial plan requirement has been squarely rejected. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 n. 4 (9th Cir.2005) (per curium) (declining "Ford's suggestion that the district court's failure to adopt a trial plan or to articulate how the class action would be tried was an abuse of discretion ... [since] [n]othing in the Advisory Committee Notes suggests grafting a requirement for a trial plan onto the rule."); *Olson v. Tesoro Refining & Marketing Co.*, 2007 WL 2703053, *7 (W.D. Wash. Sep. 12, 2007) ("[T]he Court rejects defendant's contention here that a trial plan is required for class certification").

C. Motion for Decertification

Some cases get better with time, and some do not. As facts develop, the case evolves, and the relevant evidence for trial becomes clear, it is often appropriate to seek decertification of the class. Federal Rule 23 "provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1176 (9th Cir. 2007) (citing *Armstrong v. Davis*, 275 F.3d 849, 872 n. 28 (9th Cir.2001)). *See also Kelley v. Microsoft Corp.*, 2009 WL 413509, *2 (W.D. Wash. 2009) ("A court's power to revisit certification is 'a vital ingredient in the flexibility of courts to realize the full potential benefits from the judicious use of the class action device.'") (citation omitted).

If subsequent events "disprove[] Plaintiffs' contentions that common issues predominate, the district court can at that stage modify or decertify the class." *Id.*; *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation."). *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003); *see also In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 155-57 (S.D. N.Y. 2008) (decertifying nationwide settlement class after determining that individual issues predominate). Indeed, the Court has a continuing obligation to ensure that class certification is appropriate at all phases of the litigation, and a number of Circuits have held that a District Court ***must*** supervise a class to ensure that its continued maintenance satisfies the standards set forth in Rule 23. *See, e.g., Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir.1999) ("courts are 'required to reassess their class rulings as the case develops'"); *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir.1983) ("The district judge must

[8] *E.g., 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."); *see also In 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.").

define, redefine, subclass and decertify as appropriate in response to the progression of the case from assertion to facts.").[9]

The Ninth Circuit, for example, recognizes that at ***all stages*** of a class action proceeding, certification decisions require courts to engage in "rigorous analysis" to determine if the prerequisites for class treatment are satisfied. *See Valentino v. Carter-Wallace, Inc*., 97 F3d 1227, 1233 (9th Cir 1996) (internal citation and quotation omitted). This mean that "a district court's order respecting class status is not final or irrevocable, but rather, it is inherently tentative." *Officers For Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 633 (9th Cir.1982). Indeed, there is some reason to believe that as the case progresses towards trial, plaintiffs' burden as to class status becomes greater. This makes sense for the same reason that plaintiffs' burden gets greater between a motion to dismiss and at summary judgment. As the case nears trial, the evidence necessary to prove the claims through representative testimony comes into focus. In reviewing a decertification motion, "the standard of review is the same as a motion for class certification: whether [Plaintiff's evidence shows that] the Rule 23 requirements are met." *Marlo v. UPS, Inc.*, 2008 U.S. Dist. LEXIS 48841, *4 (C.D. Cal. May 19, 2008) (citing *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000)); *Legge v. Nextel Comm'ns, Inc.,* 2004 WL 5235587, * 7 (C.D. Cal. June 25, 2004). But where "concern" over the existing record "has ripened into doubt regarding the continuing efficacy of a class action," decertification is appropriate. *Id.* at *7, *33 (decertifying, and holding that at a later stage of the litigation the Court "will sometimes need to reevaluate the certification decision"). Indeed, the advisory committee notes to Rule 23 recognize that "[d]ecertification may be warranted after ***further proceedings***." Fed. R. Civ. P. 23(c)(1)(C) Advisory Committee Note (2003) (emphasis added); *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983) ("Under Rule 23 … [t]he district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts").

Some factors that in particular may warrant bringing a decertification motion include a change in jurists, an amended complaint, or more significantly, an inability to provide appropriate notice.

1. A New Judge May Be Less Willing to Try a Class as Certified.

A new judge will often revisit the class determination for the obvious reason that the judge actually presiding at trial must be confident that the class claims are manageable and can, in fact, be proved through representative testimony. *E.g., Zenith Labs. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (affirming decertification after change in jurists); *In re Scientific Control Group Sec. Litig.*, 71 F.R.D. 491, 503 n.12 (S.D.N.Y. 1976) (despite prior judge's rulings, new judge "would be empowered to make an order determining that further class proceedings would be improper"); *Price v. City of Seattle*, 2006 WL 2691402, *1 n.2, *6-*8 (W.D. Wash. Sep. 19, 2006) (granting in part motion to decertify claims certified by prior judge).

[9] *See also* 1 MCLAUGHLIN ON CLASS ACTIONS § 3:6 (3d ed. 2006) ("Accordingly, even if a class is certified, Rule 23(c)(1) obligates courts to reassess their class rulings as the case develops.") (internal quotation and footnote omitted)); 7A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1785.4 (2008) (a court's initial decision that a class is maintainable "is not irreversible and may be altered or amended at a later date, "[a]s recognized in numerous judicial opinions").

2. Amendment of the Complaint Invites a Decertification Motion

Similarly, amendment of the Complaint may warrant a decertification motion. Sometimes plaintiffs will seek to certify a relatively narrow (and safe) claim, then after certification rely on the liberal amendment rules to boot-strap additional (and more difficult) claims on behalf of the class. Such tactics should be addressed quickly with a motion to decertify the class:

> When a plaintiff chooses to amend its class action complaint, such amendment destroys the vitality of a prior adjudication of a class which was based on a different lawsuit, since to permit a prior determination under Fed. R. Civ. P. 23 to act as an umbrella under which new causes of action or additional theories of relief can gather by means of the application of Fed. R. Civ. P. 15 on amended pleadings would sabotage the function of a Fed. R. Civ. P. 23 determination. Thus, when presented with an amended complaint, a judge has a right to review the prior determination as to a class, and the reassignment of the cause to a new judge for administrative convenience does not insulate the prior determination from the review that Fed. R. Civ. P. 23 requires.

6A Fed. Proc., L. Ed. § 12:295 (2008) (citations omitted). Thus, where plaintiffs seek to amend their complaint, that amendment acts as an invitation to revisit the class decision.

3. Inability to Provide Appropriate Class Notice Warrants Decertification

If discovery demonstrates that notice to class members is difficult, or even impossible, that fact may well warrant decertification because class members will have no chance to opt out. *See, e.g., Valentino v. Carter-Wallace, Inc*., 97 F.3d 1227, 1234 (9th Cir. 1996) (decertifying (b)(3) certification of product liability action against manufacturer of epilepsy drug, in part because "many potential members of the classes cannot yet know if they are part of the class. We therefore have serious due process concerns about whether adequate notice under Rule 23(c)(2) can be given to all class members to enable them to make an intelligent choice as to whether to opt out."); *O'Connor v. Boeing North Am*., Inc., 180 F.R.D. 359, 384 n.33 (C.D. Cal. 1997) ("[T]he Court is reluctant to certify the class under Rule 23(b)(3) because it has serious due process concerns about whether adequate notice can be given to class members no longer living or working in the Contamination Area to enable them to make an intelligent choice as to whether to opt out.").

Indeed, the lead class action opinion from the Supreme Court warns that any problems with effective notice "render[] highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997). Seemingly concrete class definitions may nonetheless define uncertifiable classes because class members "may not even know of their [claim], or realize the extent of the harm they may incur." *Id*. Even where notice is actually received, that notice may still, in some instances be inadequate because "those without current [injuries] may not have the information or foresight needed to decide, intelligently" whether to opt out of the class. *Id.* In cases where the class is defined to include those who may not know if

their injury (if any), there is substantial doubt "whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id*.

Further, where notice necessarily is overbroad, that notice is inadequate and inappropriate. Courts routinely reject requests to send individual notice to groups that encompass non-class members because it causes confusion, frivolous claims, and unnecessary expense. In *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987), for example, the district court ordered mail notice to 92,275 veterans listed in the Agent Orange Registry and 11,256 people who filed or intervened in Agent Orange lawsuits. *Id.* at 167-68. On appeal, plaintiffs argued that the notice was insufficient because it should have gone to all 2.4 million Vietnam veterans. *Id*. at 169. The Second Circuit disagreed: such notice would "have been considerably overbroad" because many Vietnam veterans were not exposed to Agent Orange. *Id.*[10]

Because the class device irrevocably determines the claims of those who many not know or understand the nature of their claims, decertification may well be appropriate where appropriate class notice has not been provided (or is not possible). *See, e.g.*, *Sheinberg v. Sorenson*, 2007 WL 496872, *2-*4 (D. N.J. 2007) (decertifying class, holding that class counsel was inadequate based on failure to provide class notice).

VI. PREPARING FOR TRIAL

A. Motions in Limine

As a class action heads toward trial, the standard pre-trial motions practice ensues, including motions in limine. If previous class certification (or decertification) arguments have not been successful to date, consider effective use of motions in limine.

To be relevant, evidence must meet two conditions. First, the evidence must be probative of the proposition it is offered to prove. Second, the proposition to be proved must be of consequence to the determination of the action. Fed. R. Evid. 401; *United States v. Dean*, 980 F.2d 1286, 1288 (9th Cir. 1992) (quoting *United States v. Click*, 807 F.2d 847, 850 (9th Cir. 1985)). Thus, courts find that evidence is relevant only if it bears on the issues involved in the elements of the particular claim. *See Dean*, 980 F.2d at 1288. Irrelevant evidence is inadmissible under Fed. R. Evid. 402. *Click*, 807 F.2d at 850. To succeed on most consumer protection type claims, for example, plaintiffs must prove (among other things) that a defendant engaged in unfair or deceptive conduct and that its alleged conduct caused their claimed injuries. *See, e.g.*, *Indoor Billboard/Washington, Inc. v. Integra Telecom, Inc.*, 170 P.3d 10 (Wash. 2007). Thus, for example, in a false-advertising claim if the plaintiff does not recall seeing or relying on

[10] *See also In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1099 (5th Cir. 1977) (proposal to send overbroad notice as effective as "mailing notice to every person listed in any California metropolitan telephone book"); *DeHoyos v. Allstate Corp.*. 240 F.R.D. 269, 296 (W.D. Tex. 2007) (rejecting notice to all policyholders because "Allstate has millions of policyholders, the majority of whom are not class members"); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 546 (N.D. Ga. 1992) (refusing notice to overbroad group because, *inter alia*, it "would most likely confuse the recipients and encourage claims by non-class members"); *Skelton v. General Motors Corp.*, 1987 WL 6281, at *3 n.3 (N.D. Ill. Feb. 5, 1987) (rejecting overinclusive list because it "could mislead many thousands of ineligible consumers into thinking they qualify to recover in this action" and would "generate considerable confusion and additional expense in administering the settlement.")

the allegedly false advertising, consider whether to move to exclude any testimony from the named plaintiff under Fed. R. Evid. 401, 402, and 403, since the plaintiff's testimony will have no bearing on whether the allegedly deceptive advertisement caused her harm. With no named plaintiff able to testify, the plaintiffs' case is effectively gutted.

B. Motion to Bifurcate the Trial

Judges are notoriously protective of their juries and sensitive to the time commitments long and complex trials create. One means by which to limit the length of a potential trial that a jury must sit through is to request bifurcation such that any equitable defenses are tried first to the Court, so that if the defendant wins, the remaining claims or issues are either narrower, or in some cases, eliminated.

In some state courts — in particular California — it is sometimes possible (even preferable) to try all equitable claims and defenses to the Court, potentially eliminating any legal claims in the process. *See Hoopes v. Dolan*, 168 Cal. App. 4th 146, 163 (2008) ("it is generally considered 'better procedure to rule upon the [equitable defenses] before submitting the matter for jury determination.'"); *Am. Motorists Ins. Co. v. Superior Court*, 68 Cal. App. 4th 864, 871-72 (1999) ("Where (as here) there are equitable and legal remedies sought in the same action, the parties are entitled to have a jury determine the legal issues *unless* the trial court's initial determination of the equitable issues is also dispositive of the legal issues") (emphasis in original) (citations omitted).

For example, in many consumer class actions, a defense under the equitable voluntary payment doctrine arises — i.e., that a plaintiff who voluntarily pays a fee or charge cannot then request that charge or fee be returned. Class members who repeatedly incurred and voluntarily paid charges have implicitly consented to the fees through their conduct, and therefore lack standing to challenge them. *See Lopez v. Wash. Mut. Bank, FA*, 302 F.3d 900, 904 (9th Cir. 2002) (finding that because plaintiffs remained free to close or modify their accounts, deposits made to cure a challenged overdraft charge were "voluntary payment [s]"). If that equitable defense acts as a bar to all of the plaintiffs' claims, then a trial on that defense alone may terminate the litigation without need to empanel a jury. (Indeed, some courts will refuse to certify a class at all where this defense is present. *Endres v. Wells Fargo Bank*, 2008 WL 344204, *11-*12 (N.D. Cal. 2008) (refusing to certify UCL class action alleging undisclosed overdraft fee because voluntary payment defense would require individual analysis for each class member)). Regardless the outcome of the equitable claim, a defendant will have a much better understanding of its potential liability after this phase of the trial is complete, such that seeking to try the equitable claims and defenses first may be worthwhile.

Note, however, that this approach is more difficult in federal court, where trial of equitable claims or defense first is permissible only if the equitable and legal claims do ***not*** share common issues. *See, e.g., Granite State Ins. Co. v. Smart Modular Tech. Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996). This is because the Supreme Court has held that where there are issues common to both the equitable and legal claims, "the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962). Nonetheless, where evidence necessary to prove the equitable defense is distinct from the evidence necessary to prove the legal claims, preliminary trial of the equitable defense is permissible and may eliminate or further narrow the remaining claims. *See*

Granite State, 76 F.3d at 1027-28 (affirming trial of equitable estoppel claims before legal breach of contract and negligence claims, and holding that contract claim was barred by successful equitable estoppel defense); *Danjaq LLC v. v. Sony Corp.*, 263 F.3d 942, 961-63 (9th Cir. 2001) (trying equitable laches defense first, which barred subsequent claims).

C. Jury Instructions

Before heading to trial, it is essential that you have in mind what you'll ask the jury to decide, and how. Proposing jury instructions before trial begins may well be the last (and best) chance you have to show why trial of a class action is unmanageable, or, for plaintiffs, to set up a comprehensible verdict form. This is particularly true if multiple states' laws are at issue. Outside the settlement-class context — where manageability concerns do not exist— courts overwhelmingly reject certification when multiple states' laws apply, because such a class is fundamentally unmanageable. *See Felts v. Genworth Life Ins. Corp.*, 250 F.R.D. 512, 522 (W.D. Wash. 2008); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 698-99 (Tex.2002) (citing more than 65 cases); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189-90 (9th Cir. 2001).

Indeed, no federal court has ***ever*** tried an action that required the application of the law of all the states. *See Chin v. Chrysler Corp.*, 182 F.R.D. 448, 461 (D.N.J. 1998); *see also* S. Rep. 109-14, at 64, Class Action Fairness Act of 2005 ("The bottom line is that over the past ten years, the federal court system has not produced a final decision — not even one — applying the law of a single state to all claims in a nationwide or multi-state class action."). And with good reason: it would be impossible for any Court to instruct a jury under 50 states' laws. As one district court said in refusing to certify a nationwide class in a mass tort action, "the verdict form necessary to submit the case to the jury would read more like a bar exam," and the "jury would have to be instructed to consider various burdens of proof, and in some cases, contradictory standards of conduct." *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 632 (D. Kan. 1996).[11]

Counsel must be vigilant in objecting to jury instructions that seek to diminish evidentiary burdens, both for purposes of trial and appeal. *See Action House v. Koolik*, 54 F.3d 1009, 1013 (2d Cir. 1995) (striking down jury instruction as "not consistent with New York law, which requires a finding of actual damages before punitive damages may be awarded"). A court may not condense the subtle variances of each state's law into "a kind of Esperanto instruction." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

VII. CONCLUSION

The purpose of this presentation is to emphasize that understanding how to litigate a class action after certification is essential to effective representation, and to provide guidance as to post-certification strategies. Post-certification can be lengthy, expensive, and risky.

[11] *See also In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 350 (D.N.J. 1997) (refusing to certify nationwide class it would require "hundreds of interrogatories and a verdict form as large as an almanac"); *In re Stucco Litig.*, 175 F.R.D. 210, 216 (E.D. N.C. 1997) ("Any instructions attempting to account for [state law] variations would surely baffle a jury."); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 424 (E.D. La. 1997) ("[C]omposite instructions accounting for all of these [state law] differences would hazard a chaos that seems counterintuitive to the spirit of Rule 23."); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir.1996) ("the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action.").

Nonetheless, class certification should not be dogmatically viewed as the end of the battle, and instead should be viewed as but one step in the litigation, with many additional opportunities to reclaim the field, even if it is an incremental and lengthy battle.

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Litigating Class Actions Between Class Certification and Trial

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Drafting the class-certification order

- **Considering the merits**
  - *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3rd Cir. 2008)
  - *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007)
  - *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006)
  - *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001)

Drafting the class-certification order

Findings of fact and conclusions of law
(*Hydrogen Peroxide*, 552 F.3d at 307):

- **Plaintiffs' goals**
  - Remain faithful to class definition and/or court's request for proposed findings and conclusions
  - Offer choices to court (if expressed in class brief) to provide alternative to possible denial of one large class
  - Avoid seeking overambitious class, remaining mindful of court's manageability concerns
  - Avoid appealable language

Drafting the class-certification order

- **Defendants' Goals:**
  - Narrow or shape class definition and scope
  - Determine subclasses
  - Limit claims certified
  - Clarify which claims apply to which plaintiffs
  - Obtain rulings on evidentiary objections
  - Preserve issues for appeal
  - Objections to plaintiffs' proposed findings/conclusions-address overreaching by plaintiffs
  - Propose alternative findings/conclusions to best position case for going forward
  - Properly craft to achieve reconsideration -- limit to new areas/arguments raised on reply

Reconsideration and review

- **Motions for reconsideration**
  - Disfavored by courts and rarely granted
  - In absence of surreply, provides defendants opportunity to address issues raised in plaintiffs' reply brief
    - (i.e., new liability theories, amended class definitions, evidentiary and collateral issues)
  - Plaintiffs therefore should not get overly creative in their reply brief
  - Standard:
    - Some courts have indicated standard may be relaxed due to high stakes of class litigation;
    - Others will not consider undoing what they just did
  - Defendants can use reconsideration motions to help position issues for appeal

Reconsideration and review

- **Rule 23(f) motions for appellate review**

"Unfettered discretion" of appellate court

- Court considers:
  - whether certification order creates death-knell situation that is independent of the underlying claims' merits;
  - whether certification order presents unsettled and fundamental issue of law relating to class actions -- important both to the specific litigation and in general -- that is likely to evade end-of-the-case review; or
  - whether district court's class certification decision is manifestly erroneous.
- Writ of mandamus – bold move; extraordinary circumstances

Reconsideration and review

- **Plaintiffs' considerations regarding staying discovery**
  - Agreeing to defendants' stay request saves plaintiffs' counsel from spending time and money where appellate court might reverse certification
  - But pushing discovery may pressure defendants to settle pre-appellate ruling or immediately after affirmance
  - Also, state-court reverse auctions can present problem for plaintiffs
- **Defense considerations regarding staying discovery**
  - Likelihood that defendants will succeed on appeal
  - Whether defendants will suffer irreparable injury if injunction/stay does not issue
  - Whether others will suffer harm if injunction/stay is granted
  - Whether injunction/stay will further public interest

Discovery considerations

- **Create discovery plan**
  - Isolate issues
  - Focus on relevancy to issues outlined in certification order
  - Set process
  - Set schedule
- **Use of targeted, written discovery**
  - Interrogatories
  - Document requests
  - Requests for admission
- **Depositions**
  - Plaintiffs' use of Rule 30(b)(6) depositions
  - Key liability witnesses
  - Class representatives (again?)

Discovery considerations

- **Bifurcation**

Even viable after *Hydrogen Peroxide* and *IPO*?

- If viable, defendants would have sought it pre-class certification; but is doing so a wise strategy?
- What cost factors affect defendants' decision to request bifurcated discovery?

Discovery considerations

- **Experts**
  - Expert testimony required at class certification?
    - Split among circuits regarding standards
    - But increasingly used to demonstrate classwide causation/damages at class certification
  - Using same expert at trial
    - Can expert deliver at trial on promises made at certification as testimony concerns liability?
    - Both sides "junk-science" considerations – did court require experts to meet *Daubert* or *Frye* standards at class certification; or is this now a trial issue?

Post-certification motions: Summary Judgment

- **Timing Considerations**
  - Rule against one-way intervention
    - Trial court must decide class-action issues before addressing merits of case
    - Due-process principles - to ensure affected parties are bound before ruling on merits
    - Rule protects defendants from "being pecked to death by ducks." *Premier Elec. Constr. v. National Elec. Contractors Ass'n., Inc.,* 814 F.2d 358 (7th Cir. 1987) (Easterbrook, J.)
    - Putative class members should not benefit from favorable merits decision without subjecting themselves to binding effect of unfavorable one
    - Rule also protects absent class members who have not had opportunity to opt out from being bound by unfavorable merits determinations
  - Res judicata considerations

Post-certification motions: Motion to compel plaintiff's trial plan

- **Defendant's goals**
  - Eliminate claims/theories of liability
  - Drive settlement value down
  - Identify or create sub-classes
  - Likelihood of total victory
- **Plaintiffs' perspective**
  - Smart plaintiffs' counsel includes trial plan in class-certification motion
  - No need to make defendants compel that which plaintiffs should have crafted before filing complaint

Post-certification motions: Motion to decertify the class

- **Some courts reluctant to certify too many sub-classes**
- **Eventual individualized questions of fact could result in decertification**
  - *Clark v. Pfizer*, No. 1819, 2009 WL 356382 (Pa. Com. Pl. Feb. 9, 2009)
    - Class lacked "competent, common proof of causation"
    - Individualized causation questions predominated, "making class resolution impracticable and nearly impossible."
  - *Kelley v. Microsoft Corp.*, No. C07-475, 2009 WL 413509 (W.D. Wash. Feb. 18, 2009).
    - Expert unable to demonstrate proof of price inflation on class-wide basis as represented at certification stage; although, more rigorous class-certification analysis avoids this issue

Post-certification motions: Motion to decertify the class

- **Simple, common-sense, well-chosen arguments**
- **Do not limit to terminology of Rule 23**
  - How will claims be tried?
    - Individualized inquiries vs. common evidence
  - What facts must court hear to decide merits?
    - Do the key facts vary from member to member?
    - Carefully examine class definition
  - Is action based on state law?
    - *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985)
      - State must have "significant contact or significant aggregation of contacts" to class claims
      - Fairness dictated by expectation of parties
    - Varying laws, different standards of proof, different elements of claim, different statutes of limitations

Preparing for trial

- **Motions in limine**
  - Last chance to avoid questionable expert opinions
  - Do not differ from individual litigation
- **Motion to bifurcate trial**
  - Seventh Amendment concerns
- **Jury instructions**
  - If multiple state-law classes, must have instructions relating to each class

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Litigating Class Actions Between Class Certification and Trial

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