Introduction

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Why a book on class action strategy? Like any area of the law, there is a need for practical answers to a myriad of “how to” issues and this book certainly covers those. But, class actions present a unique problem for lawyers. These complex and high-risk cases turn many, if not most, of a lawyer’s normal instincts on their head. In a class action, advocates on both sides are forced to play a kind of three-dimensional chess. They must repeatedly rethink strategies as the case evolves, monitor or disrupt parallel litigation in other courts, and even, at times, join hands with their opponents. In what other kind of case would a defense lawyer call it a victory if she loses the claims pled by the individual plaintiff so long as she defeats class certification? Other than in a class action, when would a plaintiff’s lawyer intentionally simplify his case and drop some lucrative damage claims?

Lawyers who have not been down this path before risk missing key strategic decisions because they have not thought their arguments all the way through to the end of the case. For a novice, the difficulty of understanding these complex decisions is exacerbated by the long duration of a typical class action. An associate may spend several years working on just one phase of a class action (e.g., class certification and an interlocutory appeal of that order) without the ability to connect that
work with the decisions at the outset of the case or the intricate compromises made in the settlement of the dispute. The full arc of the case, as well as the detours along the path, are both essential to understanding class action strategy.

Further, a class action practitioner must always consider the reaction of the lawyer on the other side of the “v” or risk missing critical strategy calls. Indeed, a class action is never actually bilateral because the court and potentially dissatisfied class members can each in their own way profoundly influence the outcome of the litigation. All of this complexity is amplified by the fact that the class certification decision (the decision that truly drives the value of the case) is a discretionary decision for the trial judge and thus often impossible to predict with any certainty for clients.

For those and many other reasons, most chapters in this book are co-authored by a team composed of both a plaintiff and defense lawyer. Where appropriate, we have allocated entire chapters to the unique concerns of one side or the other. We provide here a brief roadmap.

Chapter 2 focuses on what plaintiff counsel needs to do to prepare for filing a class action. How does one choose the right plaintiffs—a critical decision? Are they adequate? What claims do they personally have? What law will govern their claims? In what venue can they bring their claims? Will they tell a compelling story to the press? To the court? To a mediator? To the defendant? Are their claims typical? Did they have individualized contacts with the defendant? Are they serial plaintiffs? Will they agree to take a “pickoff” settlement offer? Will they be willing to persevere over years of long and contentious litigation? Do they fully understand their responsibilities as class representatives?

What is the ideal number of plaintiffs? Can too many class representatives hurt the case or invite dissension? Is one plaintiff just too risky if the fate of the entire case turns on his or her answers in deposition? Should counsel sign up other plaintiffs in case the named plaintiff is found inadequate? Perhaps plaintiff counsel should have a mass sign-up for everyone who might be a plaintiff so that counsel can negotiate from strength if the class certification motion is denied.

Those named plaintiff questions cannot be considered in a vacuum, though, because they interconnect with a series of other decisions. Where should class counsel bring the case? What is the most favorable forum for the claims and do the prospective named plaintiffs have venue there? What happens if the case is transferred to a distant forum as part of a multi-district litigation (MDL) proceeding?
Class counsel must also determine how to define the class. How broadly should they define the class? In contrast to normal cases, the wrongdoing must be carefully and precisely defined—especially in the class definition. Class counsel must determine what is certifiable—what can they prove with common evidence? What claims should be included? What is a fail-safe class definition and how can it be avoided? Must the class members be identifiable at the time of certification (depending upon the legal standard in the relevant circuit)? What time period should be covered (for instance, statute of limitation issues can sometimes be used as an argument to defeat predominance)?

In Chapter 3, we explore the defendant’s forum choices and again the correct strategy decision will be a multi-layered analysis, leading at times to a counterintuitive result. Moreover, the defendant often has very little time to react to the forum choice, even though it is perhaps the most important question in the case. Should the defendant opt to remove the case from state to federal court? Is it better to have a federal judge who has time to fully review the briefs and arguments and will likely apply a more rigorous evidentiary standard to expert testimony? But, will removing the case cause other plaintiff’s counsel to notice the litigation and more sophisticated counsel to become involved? Will removing the case make settlement more difficult and affect the structure of the settlement as well as its costs? How will standing issues play out in each forum? Is the potential of a motion to transfer the case to an MDL after removal good news or bad? Perhaps the state court offers better class certification law, broader discovery, or an easier appeal mechanism than federal court.

That’s not all. Practitioners must consider if there is a forum selection clause in the mix. Also, is a venue motion likely to deliver the defendant to safer waters? What are the advantages or disadvantages of various alternative venues?

And, of course, can the defendant compel private arbitration, particularly where the proceeding will be taken outside of public view? Is the inevitable fight over arbitration worth the money and time? What about the dangers of arbitrators applying equity and splitting the baby rather than sticking to legal doctrine? Is it worth the risk of giving up a full appeal from a final decision? If the case is truly dangerous and will involve hundreds or thousands of individual cases and damaging public relations, should the defendant take the opportunity to settle and resolve a problem with a global class action settlement rather than risking piecemeal arbitration?
Chapter 4 addresses the defendant’s options in responding to the complaint. What are the steps for a full and complete early case assessment? Are there ways to resolve the individual complaint, either before filing or after? Could early concessions or a voluntary change to a challenged practice lead to an argument by plaintiff’s counsel that they are entitled to catalyst attorneys’ fees? Maybe the case is significant enough (or so insignificant) that an early class settlement is the best move for the client?

Is it worth it to file a motion to dismiss? What are the best arguments for dismissal? Perhaps the goal of educating the court is worth filing an early motion. Perhaps it will cause plaintiff’s counsel to file a narrowed complaint. On the other hand, filing a motion to dismiss may merely educate the plaintiff’s lawyers about the problems with their complaint and their class representatives, allowing them to solve the problems early. Should the defendant take the offense and file a motion to strike the class allegations? If no motion is filed, what are the affirmative defenses or counterclaims to include in an answer and/or cross-complaint?

In Chapter 5, our authors tackle class action discovery from both sides’ perspective. Should the court grant a stay of discovery while considering a motion to dismiss? Should the defendant agree to broader discovery in the hope of demonstrating the presence of individualized issues? How broadly should discovery be drafted? What type of agreement on Electronically Stored Information (ESI) is appropriate? Can the defendant make predominance arguments regarding varying facts without allowing broad discovery on those facts? Is bifurcation of discovery between merits and class issues still a viable option after the Supreme Court has made clear that merits issues can overlap with the elements of class certification? Are communications allowed with class members before and/or after certification and on what terms? Is the list of class members discoverable? Is discovery allowed from absent class members and, if so, in what forms?

Chapter 6 discusses summary judgment options, a strategy that has evolved over the years. Can and should a defendant move for summary judgment before class certification? Are there advantages even if the motion will not win the case (for instance, narrowing the case, causing the plaintiff to respond in an individualized way). Should the plaintiff agree that the court should hear the defendant’s summary judgment motion before class certification? What standard should the court apply?
Chapter 7 is a rich resource on the class certification arguments for both sides, covering each of the elements of the Federal Rule 23 and the typical arguments for and against class certification. The lesson of Chapter 7 is that class certification is discretionary and difficult to predict. As a result, both sides need to focus on providing the court with a complete evidentiary record—not merely hypothetical or boilerplate legal arguments.

Among the many issues covered: What are the main issues that courts focus on during class certification? How does counsel establish (or challenge) each element of Rule 23? Are courts more skeptical of certifying classes when the merits appear weak? Why is it important to rely upon the defendant’s documents, policies, and Rule 30(b)(6) depositions during the class certification motion? What is ascertainability and why is this such a controversial topic? What are the differences among (b)(1), (b)(2), and (b)(3) classes and how to determine which fits and does not fit your case?

Chapter 8 takes on how to manage multiple class actions (and government enforcement actions, especially criminal actions). For instance, when and why should counsel file for MDL consolidation? What does the MDL Panel find most important in deciding whether to consolidate and where? How many cases must exist before consolidation? Can consolidation backfire on defendants? To what districts or judges are cases most likely to be transferred? Are there trends in consolidation decisions? Once consolidated, how do plaintiff lawyers organize their steering committees? How do counsel on both sides try to coordinate MDL proceedings?

What are the risks to both sides from consolidation? What law applies if the actions are consolidated? Are there any rights of review for consolidation decisions?

If no MDL is created, how can both sides consolidate multiple actions, especially if parallel cases are pending in state and federal courts? What about managing competing civil and criminal cases?

Class actions, like other civil cases, ordinarily settle, but the process is vastly more complicated, requires court approval, and offers a bevy of traps for the unwary. Settlement and all that it entails is covered in Chapter 9. Practitioners must consider settlement from the very beginning of the case and the desire for a final global resolution can drive decisions that would otherwise seem upside down. Defendants may decide not to remove or compel arbitration; plaintiffs may avoid
issuing press releases to avoid copycat cases. Settlement creates some of
the most interesting strategic issues. When the defense has decided to
settle, they will normally want the most expansive class definition and
the broadest release, even though they have vociferously opposed any
certification earlier in the case. Plaintiffs in turn will find themselves
downplaying the value of a claim that they once touted as a blockbuster.
When the terms of a settlement are finally hammered out, plaintiff and
defense counsel share a common goal of obtaining approval and will
then join forces to this end and against any objectors who oppose the
accord.

The value of this chapter to practitioners cannot be overstated. Settle-
ment is driving proposed changes to Rule 23 and new case law. It is
clearly the hottest topic in class actions—notice, settlement approval
factors, emphasis on the preliminary approval stage, distribution meth-
ods, claims processing, unclaimed proceeds and cy pres, coupon settle-
ments, class representative payments, objector payments, conflicts of
interest, among many other topics. What should be part of a term sheet
as opposed to part of a side agreement? How will attorney fees be cal-
culated? When should they be negotiated?

Occasionally class actions go to trial and, even when they do not,
courts often demand trial plans at the class certification stage. Chapter
10 explains trial plans. In the past, the question of actually conducting
a class action trial was often not actively considered (and even more
rarely conducted). While trial plans were rare 20 years ago, many fed-
eral courts treat them as essential today. Defendants frequently argue
that a class trial will devolve into endless individual-by-individual tes-
timony. Plaintiffs must be prepared to respond by explaining how they
propose to try the case with a focus on methods of macro-proof, such
as statistics or admissions. This chapter both discusses the elements of
a good trial plan and provides examples of trial plans. There is simply
no other similar resource available and this chapter is reason enough to
buy this book.

Finally, we cover expert witnesses in class actions. Today, it is rare
that a motion to certify a class is filed without an accompanying expert
witness report. Likewise, virtually every opposition brief uses an
expert. The competing expert testimony typically centers on whether
the claims can be proven with common evidence although they can be
used for many other purposes (e.g., numerosity, feasibility of notice,
merits issues). Daubert motions, which test the admissibility of expert
testimony, are an essential part of almost every class certification fight today, and the Supreme Court has focused on expert testimony in several of its recent class certification decisions. Does the court apply the same Daubert standard at class certification as it does before trial? Does the expert rely upon admissible evidence? Does the testimony “fit” the legal theory and claims? Would the testimony be admissible in an ordinary single plaintiff case? Should the plaintiff or defendant hire a consulting expert to assist in litigating the case? How can an expert use sampling to support claims of class-wide liability or impact?

All of this is to say that class actions involve decisions on strategy at every turn. The positions of the parties are constantly changing, and counsel must always be looking ahead and, at the same time, carefully watching their flank. We hope this book helps all practitioners identify and answer those key strategy questions and also recognize the choices that their opponent is similarly struggling to make.