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COMMENTARY

Is it a class action? Prove it!

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For decades, class-action plaintiffs have pushed the notion that once the court certifies a case for class-action treatment, they are home free. To them, Rule 23 of the Federal Rules of Civil Procedure is merely a front-end procedural mechanism — a necessary step to achieving their end game of what Judge Henry Friendly coined the "blackmail settlement" of a class action.[1]

Class-action plaintiffs take the view that once a class is certified, the only question remaining is "how much will the defendant pay to settle?" As Judge Richard Posner recognized, a class action enables plaintiffs with weak claims to blackmail defendants into the Hobson's choice of either settling or rolling the dice in a jury trial and risking financial ruin.[2]

Given this dynamic, it is no wonder the plaintiffs' bar (and some courts) have become accustomed to thinking about Rule 23 as a mere procedural hurdle, easily jumped and left behind early in a case. As Judge Posner and Judge Friendly predicted, most companies settle once a class is certified, and very few class actions ever make it to trial.

There is a paucity of decisions directly articulating the class plaintiffs' trial burden, and the plaintiffs' bar points to this lack of authority as support for their claim that once Rule 23 is satisfied, the class issue drops from the case. But, a closer look at class-action jurisprudence reveals that prevailing in a class action requires more than simply meeting the threshold requirements of Rule 23. Rule 23 certification was never intended to be the end of the analysis or the definitive word on the class plaintiffs' burden of proof. Instead, the ultimate burden of proving a class action must be carried on the merits at trial.

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EARLY HISTORY OF RULE 23

In 1934, Congress enacted the Rules Enabling Act, which authorizes the U.S. Supreme Court to promulgate uniform rules governing practice and procedure in the federal courts.[3] In doing so, Congress was clear that those rules were not to "abridge, enlarge, or modify any substantive right."[4] In 1966, Rule 23 was amended into the form we recognize today.

As discussed below, much like the summary judgment procedure in Rule 56, Rule 23 essentially serves a "gatekeeper" function — to ensure that only those cases that potentially can be proven at trial make it that far. Just as a plaintiff whose claim survives the summary judgment stage still must make his or her case at trial, as must a class of plaintiffs who convince a court to allow them to pursue their claims together at trial.

The Supreme Court has long recognized that class actions are an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[5] This means that a class action must "leave[] the parties' legal rights and duties intact and the rules of decision unchanged."[6]

In other words, the Rules Enabling Act means that Rule 23 treatment is not permissible if it would require eliminating a claim element that would have to be proved in a non-class case.[7] This is why it has long been the rule that a plaintiff in a class action must prove the same elements of the claim as he or she would if the lawsuit had proceeded individually.

Nothing about Rule 23 was designed to lessen this burden of proof simply because class plaintiffs bring their claims together in one lawsuit, rather than individually. Just like any other form of "joint" action, each plaintiff still must prove that the defendant is liable to him or her on the merits at trial.

THE SUPREME COURT'S RECENT DECISIONS

Somewhere along the way, these strong underpinnings of Rule 23 have been forgotten (or ignored). Class-action filings have proliferated over the past few decades, and certification of class actions seemed

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to become routine in many courts. Often, classes were being certified without any showing that the case could be tried to a jury on a class-wide basis. In fact, some plaintiffs have denied that they had any such burden at trial.

In 2010, however, in *Wal-Mart Stores v. Dukes*, the Supreme Court breathed new life into Rule 23's stringent requirements.[8] In Dukes the Supreme Court emphasized that a class action cannot be used to short-circuit the defendant's entitlement to a determination of its rights and duties vis-à-vis each class member, and that the plaintiffs must prove they can satisfy each element of Rule 23 before a class should be certified.

For this reason, the *Dukes* decision has been hailed as a watershed decision meant to rein in the misuses of the class-action device at the class-certification stage.

Espenscheid v. DirectSat USA LLC sounded a similar theme when the court decertified a class action because the plaintiffs' trial plan was incapable of proving liability on a class-wide basis at trial. The court noted that there may be no way to bring a class action in certain situations in which class members are "each harmed to a different extent (and many [are] not harmed at all)."[11]

The 8th Circuit also recently reversed certification of a Rule 23 class because "trial would require considering varied circumstances" to decide whether plaintiffs proved their claims on a class-wide basis.[12]

These decisions and others like them reiterate that Rule 23 is not a mere procedural formality. It is a substantive element that class plaintiffs must be able to satisfy at trial to win.

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But, the decision goes much deeper than addressing just the certification issue. In *Dukes*, the court also foreshadowed its view that class plaintiffs must not only prove their class theory at the certification stage, but also must prove the merits of their claims at trial for each member of the class. The court specifically noted in a footnote — as if the proposition were obvious — that class members "will surely have to prove [class-wide liability] at trial in order to make out their case on the merits."[9]

Two years after its decision in *Dukes*, the Supreme Court reiterated its message about the class-action plaintiffs' burden of proof at trial, this time in a less subtle way. In *Comcast Corp. v. Behrend,* the Supreme Court reversed certification of a class action because the plaintiffs had not demonstrated that they would be able to carry their burden of proving class-wide damages at trial.[10]

Since then, the lower courts have begun to hold class counsel's feet to the fire when they seek to take the claims of class plaintiffs to trial. While not relying on *Dukes,* Judge Posner's decision for the 7th Circuit in

DEFENDING AGAINST CLASS-ACTION TRIALS

As discussed at the beginning of this article, defendants who find themselves on the doorstep of a class-action trial often believe their only option is to capitulate to the plaintiffs' "blackmail settlement" because of the perceived risk of the trial outcome. That is a decision that each defendant must make on his or her own. However, with the help of experienced class-action trial counsel, defendants can position themselves for positive outcomes in class-action cases that are headed toward trial.

In a class-action trial, it is critical to hold the plaintiffs to their class-wide burden of proof. By the time the case gets to trial, the bravado of the plaintiffs' counsel about being able to prove claims on a class-wide basis will no longer be enough. At this point, a defendant may want to ask the court to require plaintiffs' counsel to present a plan for how the case can be presented and managed on a class-wide basis at trial. Often, class counsel has assumed all along that the case will settle before trial, and it quickly becomes evident that there is no plan at all for how the case will be proved at trial.

Defendants also must ensure that they ask for a jury instruction requiring the plaintiffs to prove their claims on a class-wide basis. Courts have recognized that proving a case on a class-wide basis means that plaintiffs must prove liability for each member of the class.[13] This burden cannot be assumed through a damages model of an expert witness or through the use of averages.[14] Nor can this burden be carried simply by proving the claims of the named plaintiff or plaintiffs.

To prevail at trial, class plaintiffs must demonstrate liability for each member of the class with the use of common evidence. It is important that the jury instructions properly reflect this standard regarding the plaintiffs' burden of proof. The downfall of the plaintiffs' case at trial may turn on the jury's finding that plaintiffs simply failed to prove the claims of every member of the class.

Holding the plaintiffs to their burden on class-wide proofs can also set the case up for a decertification motion by the defendant. It may be advantageous to allow the plaintiffs to present their "class" proofs in their case-in-chief at trial, after which the defendant can make a motion to decertify at the Rule 50(a) stage. By waiting until the plaintiffs have rested, the defendant will have avoided educating the plaintiffs on its class arguments, and by that time the record will reveal whether the plaintiffs have been able to carry through on their burden of class-wide proofs. Having given the plaintiffs every opportunity to make good on their "threat," the court may finally realize that the case was never suitable for class-wide resolution.

If the court denies the defendant's Rule 50(a) motion, there will be an additional opportunity in the defendant's case-in-chief to present further proof that the claims are incapable of class-wide treatment. In fact, some of the best evidence to undermine class-wide resolution of the plaintiffs' claims can come from the defendant's own witnesses, and it is important to be mindful of this in developing the defendant's trial strategy. The defendant can then attack the plaintiffs' class-wide proofs in closing arguments and on a Rule 50(b) motion, if needed.

CONCLUSION

For decades, the plaintiffs' bar has acted as if Rule 23 were a mere procedural rule. But the Supreme Court has signaled in recent years that the rule has "teeth" and that its requirements are not merely procedural but extend all the way through trial.

Defense counsel will serve their clients well if they continue to remind the courts that "class action" is not just a title slapped onto the caption of a case. If the plaintiffs believe they have a class claim, they must prove it.

NOTES

[1] Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973).

[2] *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1304 (7th Cir. 1995).

[3] 28 U.S.C. § 2072.

[4] *Id.*

[5] *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979).

[6] *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,* 559 U.S. 393 (2010) (plurality opinion).

[7] *See Cimino v. Raymark Indus. Inc.,* 151 F.3d 297, 312 (5th Cir. 1998) (citing the Rules Enabling Act and holding, "Just as the meaning of liability does not vary because a trial is bifurcated, the requisite proof also in no way hinges upon whether or not the action is brought on behalf of a class under Rule 23.... Consequently, this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs"); *see also Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2561 (2011) (disapproving of the "novel project" of proving liability and damages through sampling because "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" and "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims") (internal citations omitted).

[8] *Dukes,* 131 S. Ct. at 2561.

[9] *Id.* at 2552 n.6.

[10] *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013).

[11] *Espenscheid v. DirectSat USA LLC,* 705 F.3d 770, 776 (7th Cir. 2013).

[12] *Luiken et al. v. Domino's Pizza LLC,* 705 F.3d 370, 372 (8th Cir. 2013).

[13] *See, e.g., Powers v. Ohio,* 499 U.S. 400, 410 (1991) ("a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties"); *Blades v. Monsanto Co.,* 400 F.3d 562, 571-72 (8th Cir. 2005) (in a class action, the plaintiff must be able to prove injury to each class member with proof common to the class); *Babineau v. Fed. Express Corp.,* 576 F.3d 1183, 1186, 1193 (11th Cir. 2009) (class treatment for wage claims for pre- and post-shift and meal activities, and *quantum meruit* is inappropriate because "proving the existence of a general policy may not be sufficient to establish that a defendant is liable to individual class members"); *Cimino,* 151 F.3d at 312 ("this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs").

[14] *See, e.g., Dukes,* 131 S. Ct. at 2561 (rejecting use of an average derived from sampled members of a class to arrive at the entire class recovery, because it would deprive the employer of individualized proceedings); *Espenscheid*, 705 F.3d at 774 (to award damages based on an average would "confer a windfall" on some class members, while undercompensating others); *Blades,* 400 F.3d at 574-75 (holding that a court cannot assume the same economic harm to all class members, even with the use of an expert's model).