Chapter 60A

Class Actions

by David G. Leitch, Gary L. Sasso, and D. Matthew Allen[1]

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[1]The authors gratefully acknowledge the participation of the following attorneys in the preparation of this chapter. From Ford: John F. Mellen, Associate General Counsel — Litigation and Regulatory, Donald J. Lough, Assistant General Counsel — Product Litigation, and Michael J. O'Reilly, Counsel — Products Liability. From Carlton Fields: Chris S. Coutroulis, chair of the Business Litigation and Trade Regulation Practice Group, and Wendy Lumish, chair of the Appellate Practice Group.

§ 60A:1 Scope note

In this Chapter, we discuss successful partnering between inside and outside counsel in litigating class actions. A class action is a lawsuit filed by one or more plaintiffs seeking to represent a group or "class" of similarly situated persons.[1] The purpose of a class action is to "enable parties, who have insufficient means to pursue their individual claims, to pool

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[1]*See, e.g.,* Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (C.C.A. 8th Cir. 1948) (describing the class action's equitable origins and its subsequent memorialization under Federal Rule of Civil Procedure 23 as a procedural device that may apply to equitable or legal actions).

their resources and pursue their common complaints."[2] Although corporate clients may on occasion contemplate filing class actions offensively as plaintiffs, more typically, they are involved in class litigation as defendants. Hence, in this Chapter, we focus on defending against class actions.

We begin by discussing key objectives, concerns, and preliminary considerations inside and outside counsel must address in class action litigation. We next describe effective partnering and strategies peculiar to class action defense, focusing on defense against the certification of the litigation as a proper class action.[3] We also review the legal framework governing class action litigation. Finally, we provide checklists for use by inside and outside counsel and forms for addressing procedural necessities in class action litigation.

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[2]In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1545 n.6, 9 Fed. R. Serv. 3d 415 (11th Cir. 1987).

[3]For additional discussion of class actions, *see* John F.X. Peloso, Peter Buscemi, and James D. Pagliaro, Chapter 16 "Class Actions," in Haig, Business and Commercial Litigation in Federal Courts, §§ 16:1 et seq. (2d ed.).

§ 60A:19 Effective partnering

We now turn to discussing specific approaches to effective partnering between inside and outside counsel and strate-

gies they might develop in defending class actions. Given that class action litigation can implicate core aspects of the defendant's product lines or business practices or policies, effective partnering between inside counsel and outside counsel is indispensable to ensure that the conduct of the litigation itself does not impair the ability of the company to continue to do business with as little disruption as possible. Plaintiffs may be claiming millions or billions of dollars in damages, which may approach "bet the company" proportions. Accordingly, the company will have to weigh investing considerable internal and financial resources to defend the litigation, and managers of the affected business units and the defendant's legal department will be highly motivated to ensure that the company's investment is well spent.

§ 60A:20 Effective partnering—Planning is crucial

From inception of the litigation, therefore, it will be crucial for inside and outside counsel to discuss corporate goals and objectives, budget objectives or constraints,[1] staffing, preferred means of reporting and invoicing, roles of inside and outside counsel in preserving and producing information, ongoing case evaluation, preferences of inside counsel in participating in key decisions, conferences, hearings, meetings, and other aspects of the litigation, use and modification of litigation budgets, retention of experts, and strategies for defense of the litigation.[2] In-house litigators at Ford apply a simple test to determine whether their planning discussions with outside counsel are effective: If a monthly bill shows activity that was not discussed in advance, then something went wrong in the planning discussions.

§ 60A:21 Effective partnering—Discussions should be confirmed in writing

Discussions and agreements between inside and outside counsel should be confirmed in writing and modified, as nec-

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[1]*See* Chapter 11 "Budgeting and Controlling Costs" (§§ 11:1 et seq.).

[2]*See generally* Chapter 10 "The Planning Process" (§§ 10:1 et seq.).

essary, as the litigation proceeds. This is not an exercise in creating a paper trail, but an indispensable means to ensure that inside and outside counsel start and remain on the same page as they manage what inevitably will become highly complex litigation. At Ford, a written budget is used to plan near term and long-term defense efforts. The budget is not particularly detailed, but it drives the discipline of detailed planning discussions between inside and outside counsel.

§ 60A:22 Effective partnering—Introductions

As noted above, inside counsel should identify all members of the in-house team who will be active in the litigation in any way. Ideally, outside counsel managing the day-to-day litigation should personally meet these corporate team members and be integrated in the team. Likewise, outside counsel should identify and introduce to in-house counsel all attorneys, paralegals, and staff who will be involved in the litigation and provide contact information that will enable inside counsel to reach any team member day or night. Face-to-face introductions are ideal for this purpose, and video conferences can be a cost-effective substitute for expensive travel.

§ 60A:23 Strategies in class action engagement

Focus on defeating class certification. Although defense of a class action will resemble the defense of any complex business litigation, there are important differences. The plaintiffs' use of the class action procedural device is the "elephant in the room" that will give this particular form of litigation great leverage over a corporate defendant due to the extent of the financial exposure and the threat to the defendant's product line or business model. As a result, the defense should focus intently on defeating class certification.

This goal should inform the company's strategy in determining whether to move to dismiss the complaint. For example, if the named plaintiffs' claims are time-barred, filing a motion to dismiss based on the statute of limitations may well stave off the class action entirely if plaintiffs' counsel is unable to find a suitable substitute class representative. Putting this defense in play also will highlight the predominance of individual issues in the litigation and may help defeat class certification. At other times,

the company may *forego* moving to dismiss certain claims on the merits, such as fraud, because their *inclusion* in the complaint may necessitate the litigation of individual issues that ultimately will assist in defeating class certification.

Do not assume a class will be certified. Too often, corporate defendants simply roll over on class certification, taking too much to heart the characteristically confident assertions in the complaint that the case should be certified as a class action or statements in judicial decisions indicating that class certification may be favored in this area or that. Class certification always will depend upon the rigorous application of numerous legal principles and criteria to often highly variable facts.[1] Class certification is highly complex and eminently contestable in many settings in many different ways. Never assume otherwise without mounting an intensive legal and factual investigation into the matter.

§ 60A:24 Strategies in class action engagement—Elements of claims and defenses; classwide proof

Every defense begins with understanding the elements of all claims and defenses. In class actions, this also includes the plaintiffs' theory for class certification and the legal standards that will govern that theory. In most cases, the plaintiffs will seek class treatment under Rule 23(b)(3) or its state law equivalent (discussed in more detail below). This is the type of class action that best supports a claim for money damages. The company's principal defenses to such a class action may include the following:

- The class definition is insufficient because it does not lend itself to a determination of who is a class member based on readily ascertainable objective factors.

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[1]*See, e.g.,* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 595 n.13, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 68 Fed. R. Serv. 3d 661 (2007) (stating that "Rule 23 requires 'rigorous analysis' to ensure that class certification is appropriate") (*citing* General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740, 34 Fed. R. Serv. 2d 371 (1982) and In re Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006), decision clarified on denial of reh'g, 483 F.3d 70 (2d Cir. 2007)).

- The class representatives (or class counsel) are not adequate representatives.
- Common issues do not predominate; rather, the case will be rife with individual issues and defenses and will not be manageable as a class action.

§ 60A:25 Strategies in class action engagement—Elements of claims and defenses; classwide proof—Understand the nature of the claims

To position the case to take advantage of these defenses, inside and outside counsel must intimately understand how plaintiffs will have to prove their case on the merits and how the company must defend against those claims on the merits. Only with such an assessment can counsel determine whether the claims and defenses can fairly be adjudicated on a common basis with common proof. Even if the company's strategy is to attack class certification before presenting merits defenses to the court (e.g., by moving for summary judgment), counsel nonetheless must understand the merits thoroughly *for purposes of defeating the class claims or opposing class certification.*

This is true because to show that the case should be certified under Rule 23(b)(3) as a "common issues" class action, the named representatives will have to demonstrate that, by proving their own individual cases, they will be able to prove substantially everything that the class needs to show to obtain a recovery for each of the absent class members.[1] On the core issues driving liability, proof as to one should be

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[Section 60A:25]

[1]*See, e.g.,* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234, 35 Fed. R. Serv. 3d 731 (9th Cir. 1996) (reversing certification of class where "there [was] no showing by [p]laintiffs of how the class trial could be conducted"); Goldsby v. Adecco, Inc., 2008 WL 5221088, at *1 (N.D. Cal. 2008), subsequent determination, 2009 WL 262216 (N.D. Cal. 2009) (stating that "[i]n determining whether a plaintiff has made a sufficient showing as to such requirement, a district court considers to what extent, if any, the claims of the putative class are 'subject to common proof' "); Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd., 246 F.R.D. 349, 359 (D.D.C. 2007) (stating that "in general, predominance is met 'when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position.' ") (quoting In re Vitamins Antitrust Litigation, 209 F.R.D. 251, 262 (D.D.C. 2002)).

proof as to all. So the more the company can show that any single plaintiff must prove her own claim by getting into peculiar facts unique to her particular situation, the more problematic it will be for that plaintiff to act as the in-court champion for an untold number of out-of-court class members whom the defendants will have no opportunity to investigate, cross-examine, or otherwise confront individually.

§ 60A:26 Strategies in class action engagement—Elements of claims and defenses; classwide proof—Focus on elements that defeat predominance

The company may have opportunities to show that individual issues predominate even in cases that appear superficially to treat liability as a perfunctory classwide issue. For example, Carlton Fields has opposed class certification in actions where named representatives have asserted that defendants violated plaintiffs' statutory rights protecting the privacy of agency records that class counsel characterized as a matter of strict liability, meaning that the statute imposed a specific statutory penalty *automatically* for each act of noncompliance with the statute. The defendants successfully contended, however, that in order to get a recovery under the statute, plaintiffs had to show that they suffered an actual injury. Actual injury often cannot be proven on a class-wide basis by simply using the evidence that the named representatives will adduce in support of their personal claims. Whether any person suffered an actual injury necessarily involves consideration of facts and circumstances peculiar to that individual, and is not usually susceptible to classwide proof. By the same token, it would deny due process to the company in such a case to deny it the right to have a trial against each class member to explore whether, how, or to what extent he or she ostensibly was injured.

In this connection, the United States Supreme Court has recently made clear that plaintiffs in a securities class action must show they suffered actual economic losses that are actually caused by the defendants' alleged misrepresentations and that this requirement is not satisfied by the presumption of reliance arising where defendants allegedly

commit a fraud against the whole market for the securities.[1] This raises the specter of individual issues in such litigation.

In some cases, not only are the factual issues not susceptible to being shown through proof common to the class, but the substantive legal standards that apply also may be individualized.[2] For example, in a products liability context involving a prescription drug, questions of legal (i.e., "proximate") causation will be highly individualized and turn on medical testimony specific to each particular patient. Class counsel cannot prove legal causation on a common, classwide basis even though common proof may be available to show that the drug is *generally* capable of causing injury (i.e., general causation).[3] Additionally, with regard to nationwide products-liability class actions, if the applicable legal doctrines differ from state to state, then class certification is likely improper because the putative class members are not governed by the same legal standards.[4]

To illustrate further, Ford has defended consumer fraud class actions by contending successfully that plaintiffs must prove actual reliance on the alleged misrepresentation. In one such case, a federal district court refused to certify a class centered on state deceptive-trade-practices legislation because the required proof involved "[i]ndividual issues of

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[1]Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 341–43, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005).

[2]*See, e.g.,* In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015, 52 Fed. R. Serv. 3d 422 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3).").

[3]*See, e.g.,* Miller v. Janssen Pharmaceutica Products, L.P., Prod. Liab. Rep. (CCH) P 17738, 2007 WL 1295824, at *7 (S.D. Ill. 2007) (refusing to certify class where "the Court would have to determine via a mini-trial for each class member the following: whether the patch or patches he or she used actually leaked; whether the leak(s) resulted from defects; whether the symptoms he or she identifies were caused by the leak(s) . . .").

[4]*See generally* In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 52 Fed. R. Serv. 3d 422 (7th Cir. 2002) (decertifying nationwide class, in part, because the relevant states did not share the same products-liability doctrines).

causation, like issues of reliance."[5] In so holding, the court recognized that "[d]enial of class certification is appropriate where individual issues of causation predominate."[6] Again, reliance typically must be proven plaintiff-by-plaintiff and cannot be demonstrated on a class wide basis through common proof. And if the class reaches across many states with differing substantive laws (e.g., regarding reliance or causation), variations in those laws will provide still additional grounds for arguing that individual legal questions predominate over common questions and class treatment is inappropriate.

§ 60A:27 Strategies in class action engagement—Elements of claims and defenses; classwide proof—Complementary roles of inside and outside counsel

Inside counsel and outside counsel should have different but complementary roles in this effort to assess the strengths and weaknesses of claims, defenses, and class certification theories. Outside counsel ordinarily is best suited to research the applicable law and to provide guidance to inside counsel with respect to the types of factual information that will be most important to the case. Inside counsel then will be prepared to guide outside counsel through the company's business records and practices.

For example, in a consumer fraud case, outside counsel should determine what law applies to the plaintiffs' complaint (it might be different from that pleaded in the complaint and different from the law of the jurisdiction where the case was filed) and identify the elements of a consumer fraud claim under that state's laws. If the applicable law requires that the plaintiff be a "consumer" who relied on an alleged misrepresentation and was damaged, then inside counsel can help locate witnesses and documents relevant to those issues. Inside counsel might be able to locate evidence showing that the plaintiff used the product in question for business purposes (and therefore is not a "consumer") and that the defendant provided information or assistance to the

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[5]Williams v. Ford Motor Co., 192 F.R.D. 580, 585 (N.D. Ill. 2000) (addressing complaint based on the Illinois Consumer Fraud Act).

[6]Williams v. Ford Motor Co., 192 F.R.D. 580, 585 (N.D. Ill. 2000).

plaintiff that would have negated any reliance or damage or that might at least render the plaintiff dissimilar from other class members. Outside counsel would then be in the best position to develop this evidence thoroughly and begin the process of presenting a defense.

Ordinary civil litigants prosecuting or defending individual claims may not have the occasion or even the motivation to develop some of these aspects of a case. But the motivation to develop these issues will be present in a class action because of their enormous importance to the resolution of class certification. For example, in a given case the class representatives themselves may be able to allege and prove they individually satisfied the requirements of the cause of action they assert, including reliance. And if the case were brought as an individual action, both sides might agree that reliance must be proven, and they might further agree the case must go to the jury on the reliance issue. In defending against a "common issues" class action, however, the critical question is whether class counsel can prove the claims of *all* class members with the same evidence counsel will use to prove the claims of the class representatives.[1] The stakes of proving every element of every claim and defense thus go up considerably in a class action, and defense counsel has the additional defense that all proof must be applicable to the entire class. Inside counsel can be instrumental in developing facts to show that the plaintiffs' proof is not classwide in character.

An increasing number of courts insist that plaintiffs address this critical question by submitting—at the class certification stage—an exemplar trial plan showing how they anticipate presenting the evidence at trial.[2] Having outside counsel request that the plaintiffs be required to submit a

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[Section 60A:27]

[1]*See, e.g.,* Zeno v. Ford Motor Co., Inc., 238 F.R.D. 173, 190 (W.D. Pa. 2006) ("[I]n general, predominance is met 'when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position.' " (quoting In re Vitamins Antitrust Litigation, 209 F.R.D. 251, 262 (D.D.C. 2002)).

[2]*See, e.g.,* Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of America, 453 F.3d 179, 186 n.7, 65 Fed. R. Serv. 3d 433 (3d Cir. 2006); Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1279 (11th Cir. 2009) (recommending

trial plan can be a very effective tool for the defendant to show that liability and defenses cannot be determined on the basis of class wide proof.[3]

In sum, even if the company cannot defeat the named representatives' individual claims on a motion for summary judgment or at trial, it may nonetheless defeat class certification at the inception of the litigation by focusing on the individual character of the claims or the defenses against such claims.

§ 60A:28 Strategies in class action engagement—Discovery

Some aspects of class action discovery are similar to discovery in other types of litigation.[1] Here, however, we focus on those aspects of discovery that are unique to class actions.

§ 60A:29 Strategies in class action engagement—Discovery—Special requirements

Inside and outside counsel will face special issues in planning and managing discovery in class actions. As a threshold matter, outside counsel should research any particular requirements imposed by the law at issue in the litigation. For example, a securities reform statute provides for a stay of discovery when the defendant files a motion to dismiss a securities class action, but, importantly, the statute also imposes upon the defendant an attendant obligation to preserve discoverable information during the time discovery is stayed—which can be a lengthy period, especially if there

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that "district courts make it a usual practice to direct plaintiffs to present feasible trial plans"); James D. Hinson Elec. Contracting Co., Inc. v. BellSouth Telecommunications, Inc., 642 F. Supp. 2d 1318 (M.D. Fla. 2009) (stating that the "Court would expect plaintiff to submit a trial plan with its motion to certify a class").

[3]Ford Motor Co. Ignition Switch Products Liability Litigation, In re, 174 F.R.D. 332, 350, 39 Fed. R. Serv. 3d 208 (D.N.J. 1997) (plaintiffs "have the burden of designing a workable plan for trial embracing all claims and defenses prior to class certification"); *see also* Chin v. Chrysler Corp., 182 F.R.D. 448, 463, 41 Fed. R. Serv. 3d 1561 (D.N.J. 1998).

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[1]*See generally* Chapter 61 "Discovery and Information Gathering" (§§ 61:1 et seq.).

is an interlocutory appeal.[1] Inside counsel also will want to have discussions with outside counsel about how the company will handle proprietary and confidential information, which may warrant the filing and entry of a stipulated protective order.

§ 60A:30 Strategies in class action engagement—Discovery—Bifurcation

In some jurisdictions, such as Alabama and Florida, the trial court is expected to bifurcate discovery, permitting discovery to go forward on the issue of class certification while staying merits discovery.[1] Even where this is not provided for by statute or case law, it may be in the company's strategic interests to seek such a bifurcation of discovery. Bifurcation may allow the defendant to avoid the cost and disruption of extensive merits discovery and also ensure that the court focuses on the crucial issue of class certification without plunging headlong into other aspects of the case as though class certification were a foregone conclusion. Nonetheless, Ford's general practice is not to seek bifurcation, particularly if doing so might preclude moving for summary judgment on the named plaintiffs' claims early on in the litigation.[2]

§ 60A:31 Strategies in class action engagement—Discovery—Focus on the named plaintiffs

Keep in mind that outside counsel will need to explore in discovery the nature of the *named class representatives'* claims and how class counsel proposes to prove the merits of the class claims in order to test the adequacy of the representatives and to probe plaintiffs' assertion that common issues predominate. Outside counsel also will want to

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[Section 60A:29]

[1]*See* Private Securities Litigation Reform Act ("PSLRA"), codified in relevant part at 15 U.S.C. §§ 77z-1(b)(1) to (3), 78u-4(b)(3).

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[1]*See* Ala. Code 1975 § 6-5-641; Policastro v. Stelk, 780 So. 2d 989 (Fla. Dist. Ct. App. 5th Dist. 2001).

[2]See a discussion of the pros and cons of bifurcating discovery in Federal Judicial Center, Manual for Complex Litigation § 21.14 (4th ed.).

serve interrogatories addressed to class counsel's trial plan for the same reasons.

Properly understood, pressing ahead with discovery on the named plaintiffs' claims is not at all inconsistent with postponing *plaintiffs'* merits discovery into the defendants' business practices until class certification is resolved. In actual practice, the company rarely will get an argument on this issue from class counsel. Class counsel almost always insist they do not need fact discovery to obtain class certification because the court should view the issue as cut and dried based on the allegations of the complaint, the law, and at most a very cursory examination of the facts.

Discovery into the circumstances of the class representatives may be the most important discovery the company will take in the case. As we have discussed,[1] inside and outside counsel should prepare for this by conducting a thorough internal investigation and review of public sources, including the internet, to learn everything possible about the named plaintiffs' dealings with the defendant, participation in other litigation, or other relevant matters. We have located publications written by class representatives that proved useful in the defense of the class action. In one case, the class representative was an economist who published economic analyses undercutting class counsel's theory of damages. In another case, the plaintiff was a stockbroker who published bulletins for his clients inconsistent with the allegations in his later-filed class action.

Ordinarily, outside counsel should serve a document request on plaintiffs and perhaps basic interrogatories asking for information relevant to the litigation. But counsel should take care not to provide a roadmap to class counsel of all the questions that may be asked of the named plaintiffs in deposition.

§ 60A:32 Strategies in class action engagement—Discovery—Deposing the named plaintiff

Outside counsel must plan the depositions of the named class representatives carefully. In some cases, depending on

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[1]*See* § 60A:15.

the results of the preliminary internal investigation, counsel may wish to depose the named plaintiffs quickly, before their attorneys have had a chance to prepare them fully or refine their legal theories. At the depositions, counsel should explore the plaintiffs' backgrounds and experiences to learn about their involvement in other civil or criminal claims or charges and their experiences with products or services like those at issue in the litigation. In defending against a class action challenging the performance of a vehicle, Ford learned, for example, that the named representatives consistently selected other vehicles made by Ford or other manufacturers, with full knowledge and acceptance of the performance traits at issue in the litigation, refuting their claims of ignorance of facts they insisted Ford should have disclosed.

In the deposition, outside counsel will want to focus on facts relevant to the adequacy of the class representatives and their counsel to serve as class fiduciaries and on individual issues important to the proof of all claims and defenses.[1] Adequacy turns most importantly on whether the named plaintiffs and their counsel have any conflicts of interest with absent class members and on whether they are informed and committed to the prosecution of the claims of the class.[2] Both Ford and Carlton Fields have obtained admissions in deposition from class representatives that they seek only to get a recovery for themselves individually, and they have no knowledge about or interest in the claims of other class members; that they had special dealings with the defendant that no other class members had; that they were given inappropriate promises by class counsel about what special remuneration they might receive to serve as class representatives; that they never experienced the kind of transaction at issue in the case; and that their own circumstances were radically different in other important ways from those

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[Section 60A:32]

[1]A list of suggested topics is located in § 82(B).

[2]*See* § 60A:21; Guarantee Ins. Agency Co. v. Mid-Continental Realty Corp., 57 F.R.D. 555, 566–67, 16 Fed. R. Serv. 2d 1148 (N.D. Ill. 1972) (stating that "[a]bsent any conflict between the interests of the representative and other purchasers, and absent any indication that the representative will not aggressively conduct the litigation, fair and adequate protection of the class may be assumed").

pleaded in the complaint on behalf of the class, something which, in and of itself, can make them inadequate representatives.

In the deposition, outside counsel also will want to probe every individual aspect of the named plaintiffs' claims and the defenses in order to create concrete examples of how individual issues predominate over common issues and why the parties simply cannot litigate the claims of absent class members using evidence from the named plaintiffs' case. The goal is to help the court understand that even if the named plaintiffs *can* prove individual elements of their claims, such as injury or causation, they can do so *only* by proof that is highly specific to them.

For example, Carlton Fields has defended antitrust cases in which proof of alleged overcharges could not be shown on a common, class wide basis because the actual prices paid by individual putative class members or the prices that would have been paid by them absent the alleged conspiracy (the so-called "but-for prices") were highly individualized determinations involving many factors peculiar to the specific transactions at issue. Exploring with the class representative the various factors that impact these core issues, and how commerce actually takes place in the market place, can be very helpful in demonstrating that proof for one will not constitute proof for all on the crucial liability question of impact and damages.[3]

§ 60A:33 Strategies in class action engagement—Discovery—Third-party depositions

Occasionally, outside counsel may need to take discovery from third parties—for example, auto mechanics who have serviced plaintiffs' vehicles. But, more often than not, the company can obtain most of what will be needed for certification purposes directly from the plaintiffs themselves or through informal investigation.

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[3]Cf., e.g., In re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F.3d 6, 17–32 (1st Cir. 2008) (remanding for reconsideration of previously granted certification, while highlighting the importance of how the putative class members interacted with, or were affected by, the automotive-export "grey market" between Canada and the United States).

§ 60A:34 Strategies in class action engagement—Experts

Courts are permitting defendants more frequently to offer expert testimony in opposition to class certification. The company may wish to use its own employees who have the necessary expertise, or outside counsel may need to retain an outside expert. Employees may be viewed more favorably than paid experts may, so it is desirable to offer current or former employees as witnesses, even when outside experts are used. Also consider retaining a consulting expert who will not testify but who can guide the defense while not being subject to discovery.[1]

Identifying witnesses is more perilous than some counsel realize. Some jurisdictions require that all potential witnesses be disclosed early in a case and will bar a party from calling any witness not identified. If the defense team is not thinking early and often about trial, it is more likely to omit a needed witness. Conversely, overlisting witnesses can be just as dangerous. Class counsel are likely to depose every witness listed in hopes of finding a weak or unprepared witnesses or creating inconsistencies. Also, opposing class certification usually requires one or more affidavits from company fact witnesses and experts on issues that might seem collateral to the merits. But testimony offered during discovery and motions on class certification will be fair game later on the merits or at trial.[2]

A common mistake is to offer an affidavit from a company employee on one issue only to find out later that the witness has unfavorable opinions on other material issues. The defense team should vet every potential witness or affiant thoroughly on every possible issue before listing them or offering any testimony from them. Inside counsel's prior expe-

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[1]*See generally* Chapter 62 "Expert Witnesses" (§§ 62:1 et seq.).

[2]Cf., e.g., In re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F.3d 6, 17 (1st Cir. 2008) ("[W]eighing whether to certify a plaintiff class may inevitably overlap with some critical assessment regarding the merits of the case. It would be contrary to the rigorous analysis of the prerequisites established by Rule 23 before certifying a class to put blinders on as to an issue simply because it implicates the merits of the case." (internal citations and quotation marks omitted)); Williams v. Ford Motor Co., 192 F.R.D. 580, 584 (N.D. Ill. 2000) (substantially similar).

riences with company witnesses in other cases or in settings other than litigation can be invaluable to this process.

If permitted by local practice, it may be advisable to retain an expert for purposes of opposing class certification who will not testify on the merits if the class action is certified or the plaintiffs proceed to trial on their individual claims. This is because the roles of these experts may differ materially, and also because if the company loses the issue of class certification, it may not wish to proceed to trial with an expert whose testimony has already been rejected or even discredited by the court.

At the class certification stage, the role of the expert will be to refute specific propositions that the plaintiffs need to establish to obtain class certification, including, for example, that injury to class members can be proved with common evidence or that all class members relied on allegedly fraudulent misconduct. In a securities class action, for example, an expert may be able to show that the conditions that permit an assumption of common reliance due to "fraud on the market" simply do not exist in the circumstances of a particular case (e.g., due to an inefficient market for the securities at issue).[3] Likewise, in an antitrust case, an expert may be able to show why actual or "but-for" prices cannot be demonstrated with common proof given market place realities and the way transactions actually occur.

Sometimes experts can be helpful to refute the viability of the plaintiffs' proposed methodology for demonstrating class wide effect.[4] Carlton Fields has found that in environmental contamination cases, for example, expert analysis may help demonstrate the lack of any kind of formulaic or common method for showing impact and damages to property owners across the putative class. Even when the plaintiffs have proffered an expert model in an attempt to show a common proof approach to impact and damages, contrary expert evidence

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[3]*See, e.g.,* Unger v. Amedisys Inc., 401 F.3d 316, 324–25 (5th Cir. 2005) (noting that, at the class certification stage, a decision on whether the market for a particular security was efficient may benefit from or be aided by expert analysis).

[4]*See, e.g.,* In re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F.3d 6, 20–21 (1st Cir. 2008) (auto manufacturers introduced expert testimony from an economist to refute the representative plaintiffs' claims that import restrictions on Canadian vehicles had an appreciable class wide effect on American auto prices).

may be available to demonstrate the "infeasibility" of the plaintiffs' expert's approach, either because it or its application is not recognized and does not comply with *Daubert*; because it cannot be applied in practice to the case at hand given the unavailability of data or other necessary information; or because the methodology ignores certain important facts uncovered in discovery and investigation that cannot be squared or reconciled with its application (e.g., in a medical monitoring case, showing that exposure and degree of ingestion vary widely based on changing plant operations over time and that employee turnover was so high as to make common assumptions infeasible).

If the company plans to retain a defense expert at the class certification stage, we recommend that this task be accomplished early so that the expert can help outside counsel prepare for the depositions of the class representatives. Experts can help outside counsel understand the importance of admissions the company may be able to obtain. It is important, however, to take the depositions of the class representatives before the plaintiffs' expert coaches them on what to say—or not to say—in the course of providing expert disclosures or deposition testimony.

In an effort to certify a class, plaintiffs sometimes retain law professors as experts on a *legal question* such as whether the rule-based class certification requirements have been satisfied or whether variations in the state laws applicable to different class members' claims cause individual questions of law to swamp common questions. Plaintiffs sometimes also retain a legislator as an expert witness to testify that lawmakers did not intend for reliance to be required under a consumer protection statute (because, if it were, it would cause individual issues to predominate). This is a questionable practice, and we do not recommend following suit as a defense strategy unless the court makes clear that it is going to accept such testimony from plaintiffs' expert. The better course is to file a motion to strike the plaintiffs' expert's testimony. Carlton Fields has been successful in striking such testimony, even when it is offered ostensibly to help the court make a determination whether certifying the class would be consistent or inconsistent with the way other courts have handled such issues.

§ 60A:35 Strategies in class action engagement—Case management considerations

It is important to remind the court frequently that the plaintiffs bear the burden of proving that class certification is appropriate, just as the plaintiffs have to prove everything else they allege in their complaint.[1] Typically, plaintiffs will want to file a boilerplate motion for class certification drawn solely from the allegations of the complaint and then save any evidentiary showing they may plan to make as "rebuttal" after the defendant files its opposition to class certification. Outside counsel should oppose this gamesmanship and insist upon a procedure that requires plaintiffs to lay out their entire basis for class certification first. At a minimum, raising this issue with the court may require class counsel to make admissions on the record that they need no discovery to support their affirmative showing for class certification and that they are prepared to do so based on what they knew in filing the complaint. The company certainly will want a case management order that affords the defense adequate time to take discovery after plaintiffs file their motion for class certification and that specifically provides for the identification of experts, disclosures of expert opinions, and depositions of experts before the opposition to class certification must be filed.

§ 60A:36 Strategies in class action engagement—The class certification hearing

The defense team must consider whether the company's interests are better served by seeking an evidentiary hearing on class certification or a legal hearing that will rely on the discovery record and briefing and argument by counsel. A legal hearing may be more appropriate when the company has a very strong discovery record and the issues are fairly clear cut. A full evidentiary hearing, however, may be necessary to demonstrate facts that contradict the plaintiffs' bald

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[Section 60A:35]

[1]*See, e.g.,* Williams v. Ford Motor Co., 192 F.R.D. 580, 583 (N.D. Ill. 2000) ("The burden is on the party seeking class certification to establish each of these elements."); Ortiz v. Ford Motor Co., 909 So. 2d 479, 481 (Fla. Dist. Ct. App. 3d Dist. 2005) (same holding under state-law counterpart of rule 23).

assertion that core issues of liability could be demonstrated with common proof.

In particular, an evidentiary hearing—at which plaintiffs' evidence is subjected to a "rigorous analysis"—can provide an excellent opportunity to educate the court on the complexities of the proof that will be offered on the claims and defenses. It also may expose weaknesses in plaintiffs' experts' opinions. Further, it can demonstrate to the court the gravity of class certification in a way that a legal argument might not, and it can provide the court with assurance that it is giving the parties their day in court on the very consequential issue of class certification before deciding the motion. An evidentiary hearing may have the additional salutary benefit of showing the court quite graphically that the named plaintiffs are mere pawns, not independent representatives of absent class members.

Courts must take the merits into consideration in determining whether the requirements for certifying a class are satisfied.[1] How much of the merits to emphasize will be a strategy decision. In Ford's experience, convincing the trial court to consider the merits at the class certification stage is half the battle. Those courts that think mistakenly that they are not permitted to consider the merits or are not inclined to do so are far more likely to grant a boilerplate class certification motion. In cases where the company's position on the merits is strong, counsel should not hesitate to delve into the merits at the class certification stage.

If the company requests and obtains an evidentiary hearing, inside counsel should insist that outside counsel treat it like a full-blown trial, because that is what it should be and because the appellate court will defer to the trial court's findings of fact on the basis of this hearing. The company may rely in part on written discovery or depositions, but counsel should prepare to present the case against certification with live witnesses, demonstratives, and other exhibits, as in a bench trial on the merits.

[Section 60A:36]

[1]*See, e.g.,* Williams v. Ford Motor Co., 192 F.R.D. 580, 584 (N.D. Ill. 2000) ("Evidence relevant to class certification may be intertwined with the merits, . . . and our resolution of [a certification] motion may involve some consideration of the factual and legal issues underlying [the] claim." (*citing*, e.g.,Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351, 25 Fed. R. Serv. 2d 565 (1978))); *see also* § 60A:18.

Inside counsel should be present at the hearing. The defense team may need to make critical decisions on the fly about which witnesses will testify at the hearing and what they will address. Inside counsel will play a vital role in working with company witnesses or other officers or employees actively supporting the trial effort. It is also an important opportunity for inside counsel to gauge the court's reaction to the case, the company, and outside counsel. Having the right lawyers arguing motions and trying the case is one of inside counsel's most fundamental responsibilities, and the class certification hearing will be one of the best opportunities to evaluate the lineup of lawyers working on the case.

§ 60A:37 Strategies in class action engagement—Response to class certification

An order granting class certification is not the end of the battle regarding class certification. Under federal law, and under the laws or rules of certain states, the company may have the right to seek immediate review by an appellate court of an adverse class certification decision.[1] Counsel will almost always want to invoke that opportunity, if available, unless they believe the company can make a stronger record as the litigation proceeds on issues that caused the trial judge to certify a class. Of course, if an adverse decision is affirmed, the trial court's view will harden, making decertification by the trial court at a later date less likely.

Even though class certification is committed to the discretion of the trial court, the cases are legion in which appellate courts have reversed decisions granting (and sometimes denying) class certification. This is because statutory requirements, court rules, substantive law, and class action case law amply restrain the discretion of trial courts in what they may do in this area and also because appellate courts recognize that class certification can be a game changer in the litigation—or even in the life of a company.

If an interlocutory appeal is unsuccessful (or not pursued), the company will have the opportunity as the litigation pro-

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[Section 60A:37]

[1]*See* Fed. R. Civ. P. 23(f); Hagan v. Rogers, 570 F.3d 146, 157 (3d Cir. 2009)(stating that the "Court has the discretion to exercise jurisdiction over an interlocutory appeal denying class certification").

gresses to move to decertify a previously certified class action based on later developments in the litigation. In one recent Ford case, for example, the Third Circuit remanded a certified class action to the district court for decertification where some class members benefitted from the challenged practice and others suffered a greater or lesser alleged injury.[2] Hence, even if a class is initially certified, it is important to continue to develop defenses against class certification that the trial court may not have appreciated fully at an earlier point in the litigation.

[2]Danvers Motor Co., Inc. v. Ford Motor Co., 543 F.3d 141, 148–9 (3d Cir. 2008). *See also* Clarke ex rel. Pickard v. Ford Motor Co., 228 F.R.D. 631, 636–37 (E.D. Wis. 2005) (decertifying class once the court realized that the language of the representative plaintiff's retirement plan differed materially from that contained within the class members' plans).