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HOW TO DEFEAT CLASS CERTIFICATION

REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
JUL-SEP 2019 ISSUE

www.corporatedisputesmagazine.com

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KIRKLAND & ELLIS LLP

Published by Financier Worldwide Ltd
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ONE-ON-ONE INTERVIEW

HOW TO DEFEAT CLASS CERTIFICATION

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Dan Laytin is a litigation partner in Kirkland's Chicago office. His practice is principally concentrated in the areas of antitrust and other complex litigation. Mr Laytin has been recognised as a leading antitrust practitioner by Chambers every year from 2006 to 2019; by The Legal 500 U.S. for antitrust in 2007, 2010, 2012–2014, 2016–2018, and for appellate: supreme court in 2017; and by The Best Lawyers in America, U.S. News and World Report, Best Lawyers from 2013 to 2019. In 2018, Mr Laytin was named one of The National Law Journal's "Mergers & Acquisitions and Antitrust Trailblazers".

CD: Could you provide an overview of emerging trends and developments concerning class certification? How have these impacted the litigation space?

Laytin: We have seen courts get more and more sophisticated when it comes to managing the class certification process. It is no longer seen as a procedural motion that can be resolved without a factual and expert record. While that results in a longer time period until class is resolved, and a bigger volume of filings for the court to wade through, it makes sense given the gravity of the motion. In addition, more and more class certification hearings are testimonial in nature, which allows the court to make critical credibility determinations and also results in more user-friendly, less technical, expert and legal presentations.

CD: How do courts generally determine which claims can be certified as a class action?

Laytin: In federal courts, the governing rule sets some objective criteria, for example regarding the number of class members, but then also has criteria that are often subject of significant litigation, such as whether a trial prosecuted by a single class member would be similar or dissimilar to a trial prosecuted by all class members. That question of 'predominance' is where a lot of the action is in class action litigation. The subject matter of the underlying case affects the predominance inquiry significantly. For example, in antitrust cases, the critical question is often whether plaintiffs have come forward with class-wide proof that the challenged agreement or conduct impacted all or nearly all class members. If it does not, then courts typically conclude that common questions do not predominate and no class can be certified.

> **"We have seen courts get more and more sophisticated when it comes to managing the class certification process."**
>
> *Daniel E. Laytin, Kirkland & Ellis LLP*

CD: To what extent do witness statements and sworn declarations influence class certification determination?

Laytin: Especially given the trend to testimonial hearings and robust factual records, class certification motions are more typically decided after the close of fact discovery. So we usually have deposition transcripts of the key witnesses – fact and expert. Our practice is to use the depositions of our witnesses as an opportunity to build a record of affirmative testimony that we can use at the class certification phase and beyond. That allows us to use a video transcript of our key witnesses at class hearings, rather than show the court a witness statement or declaration that probably has less persuasive effect. There can be circumstances where it still makes sense to obtain a witness declaration – typically where we have been working with a third-party witness to obtain valuable testimony. Even there, the other side typically is going to want to depose the witness.

CD: With claims potentially reaching massive proportions once given class status, what steps can companies take to defeat certification at an early stage to negate a mass tort scenario?

Laytin: This is a great question because class certification often is not the first issue that the company is thinking about when the litigation is filed – the merits of the underlying claim typically is. But it is critically important to have class certification firmly in mind from the beginning because there are critical first steps. Getting an expert who knows the class certification space involved immediately is incredibly helpful. A key first step is understanding from that expert's perspective what data the company has that will likely prove to be useful in the class certification phase; unless you do that, you are likely to produce the minimum amount of data you can, but then be faced with a difficult decision whether to supplement that production later. Another is to identify third parties who may have helpful information for the class process quickly, as they usually need to be subpoenaed, and obtaining their key documents or testimony is often a lengthy process that has to be undertaken right away to be effective and useful.

CD: Could you outline any specific cases which demonstrate defeat of class certification? What made them successful?

Laytin: A case that I always go to back to is *In re Canadian Export Litigation*, which was litigated in federal court in Maine and then by the First Circuit Court of Appeals. There are a couple of reasons for that. One is that the arguments made at class certification were dynamic – that is, they reflected the changing circumstances in reality, and focused on how those changing circumstances affected the class certification questions. Another is that the class certification questions focused on the important

question whether plaintiffs had to show that all – or just most – class members were injured by the alleged conduct. Thinking creatively and developing key economic and factual evidence to establish that not all class members could have suffered injury was incredibly important in establishing the impropriety of class certification there.

CD: What advice would you offer on analysing case evidence and building an argument to demonstrate that class certification does not satisfy strict legal requirements?

Laytin: One thing we always emphasise in thinking about class certification is that while it is a procedural question, and somewhat removed from the merits inquiry, it is incredibly important to tell the client's merits story at the class certification phase. One reason for that is the significant overlap between merits questions and class questions, and that courts are increasingly willing – and often have to – delve into merits questions at the class phase. But another is that we are all human, and understanding the reasons why plaintiffs' claims make no sense – or, from plaintiffs' perspective, why they are compelling – is important atmospherics for the class certification litigation.

CD: What are your expectations for class certification in the years ahead? Do you expect more class-related disputes to be challenged in the early stages?

Laytin: We are keeping our eye on courts' increased use of different procedural vehicles – like issue certification, mini trials of streamlined actions, and so on – to either substitute for or supplement early class certification motions. In large multidistrict litigation (MDL) or mass action cases, courts are empowered to think and act creatively about designing processes to lead to an efficient resolution of the entire case. Class certification has always been one of those tools, and it remains an important one. But these other vehicles are increasingly used to meet the same end. It becomes very important to be involved with the court early to help design those vehicles, rather than for them to arise from the court's frustration with the process to date. CD