

CLASS ACTION TRIALS COMMONLY DEPRIVE DEFENDANTS OF DUE PROCESS

by

James D. Griffin and Kristopher A. Kuehn

Despite recent well-publicized cases overturning class certification decisions¹, or refusing to certify classes, the reported cases are still skewed in favor of the class action procedure. Because most cases which are certified as class actions settle, most judges do not have to deal with the practical implications of their class certification decisions. Therefore most class certification decisions are made in the abstract or in the context of a settlement class where the court does not have to consider the practicalities of a trial. The best way to understand the danger of class certification is to study the cases that have actually been tried.

Reviewing such class action cases demonstrates in a concrete way that many class actions cannot actually be tried without violating substantive and constitutional rights of defendants to demand actual proof of the claims against them. When plaintiffs (and judges) struggle to force cases into the class action procedure, they take procedural and evidentiary shortcuts to skip over what otherwise would be individual issues. These shortcuts deprive defendants of the right to defend themselves. Defense lawyers, parties, and judges should carefully study these cases, and apply the lessons derived from that study to prevent certification of classes with individual issues.

Each of the cases discussed below was certified as a class action, tried, and then either decertified or remanded with strong language suggesting decertification. A great deal of time and expense could have been saved if the cases had never been certified as class actions to begin with.

¹*Castano v. American Tobacco Co.* 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.* 51 F.3d 1293 (7th Cir. 1995)

Broussard v. Meineke Discount Muffler Shops, Inc.

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) was brought by ten franchisees of Meineke, who, on behalf of all franchisees, alleged breach by Meineke of its franchise agreements, as well as what the court described as a “raft” of tort and unfair trade practice claims. The dispute centered on Meineke’s disbursements from an advertising fund paid for by the franchisees. Over the time period covered by the claims, there were several revisions of the franchise agreement, including a version by which a large percentage of the class released any claims relating to the advertising fund. Despite this obvious schism in the class, and despite the fact that some of the class disagreed with the strategy of the class representatives, the trial court denied Meineke the right to depose absent class members. Eventually the case was tried on almost every theory imaginable. After trebling, the verdict was \$590,000,000 later reduced to a mere \$390,000,000.

While the Fourth Circuit reversed the decision to certify the class for several reasons which should have been apparent to the trial court at the time the class was certified, the court used the unfairness of the trial to illustrate how the class action procedure was misused. The court described the “cornerstone” of plaintiffs’ case as language that appeared in only one-fourth of the contracts. For some tort claims plaintiffs relied on taped excerpts of “review sessions” which were held with each franchisee before the signing of each franchise agreement. However, only one of these taped excerpts involved a class representative present at the trial. The damage calculation of lost profits was an abstract analysis based on averages — the plaintiffs’ expert admitted he never attempted to calculate any individual franchise damages. This generalization of the plaintiffs’ claims made it almost impossible for the defense. As the court put it:

[P]laintiffs enjoyed the practical advantage of being able to litigate not on behalf of themselves but on behalf of a “perfect plaintiff” pieced together for litigation.

. . .

And Meineke was often forced to defend against a fictional composite without the benefit of deposing or cross-examining the individuals behind the composite creation.

Id. at 344 – 345.

This unfairness so infected the trial that the Fourth Circuit reversed even the individual decisions in favor of the named plaintiffs. By grouping dissimilar claims and allowing generalized proof but denying the right of Meineke to depose or cross-examine absent class members, the trial court put Meineke in an impossible position. Meineke was deprived of the right to demand proof of the individual claims and it was forced to fight an abstraction. The trial therefore demonstrated that the class should never have been certified in the first place.

Blyden v. Mancusi

Often plaintiffs seeking class certification argue that any issues that seem individualized can be bifurcated from the allegedly common issues. *Blyden v. Mancusi*, 186 F.3d 252 (2d Cir. 1999) proves that bifurcation of a class action trial will not solve the problem of individualized issues. *Blyden* arose out of the Attica prison riots of 1971. A class was certified on behalf of prisoners who were retaliated

against by guards. Plaintiffs claimed that the defendants failed to supervise the guards to prevent the retaliation. Apparently realizing that each prisoner had individual damage claims, the court attempted to solve this problem by bifurcating liability from damages. It was also apparently clear that plaintiffs could not prove that the defendants' actions could apply to every claim by every guard against every class member. Therefore, the jury instructions required a finding only that cruel and unusual punishment was inflicted upon "plaintiffs or any of them." After a jury verdict against one of the defendants on liability, two individual cases were tried in the damages phase.

There was apparently great confusion at the trial level about what had actually been established at the liability trial. At the damages trials the remaining defendant denied that all the plaintiffs' injuries were due to his lack of supervision. Therefore, the jury in the damages trial was instructed that the defendant might not be liable for every act of reprisal by a guard. In other words, because the first trial had not established that each and every act of retaliation against each and every prisoner was caused by culpable failure of supervision, the second jury had to make that determination on an individual basis. This reexamination was constitutionally defective because the Seventh Amendment does not allow an issue to be tried by different successive juries.

However, on remand the court asked the trial court to re-evaluate whether class certification was appropriate. The trials made it clear that "with the benefit of hindsight" it was hard to see how common issues predominated. If the class remained certified, and the liability portion of the case was retried, the jury would have to make extraordinarily detailed findings about each act of reprisal against each class member and whether each act was attributable to the defendant. Otherwise in the damage trial the second jury would have to examine which actions were in fact reprisals and which reprisals were the responsibility of the supervisor. Therefore bifurcation did not solve the fundamental problem in the case — individual issues predominated over common issues. The first trial was the trial of an abstraction which did not advance the determination of the individual cases.²

Cimino v. Raymark Industries

Cimino v. Raymark Industries, 151 F.3d 297 (5th Cir. 1998) involved an asbestos class action with a three-phase trial plan. Phase one was a complete jury trial of the entire individual cases of ten class representatives as well as a class-wide determination on product defectiveness, warnings and punitive damages. Phase two was to make findings of exposure to particular defendant's products on a craft- and job site-basis by decade. In phase three, 160 "sample" individual cases were to be tried on whether each sample plaintiff had an asbestos-related disease, and if so, damages. The remaining 2,128 cases would be assigned by the court to one of five disease categories and would be awarded damages based on the average of those verdicts in the 160 sample cases involving the same disease category.

Surprisingly, one of the defendants, Pittsburgh Corning, made it through this process. However,

²See *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001), holding that bifurcating a general liability issue from other more individualized issues would be "no more than the trial of an abstraction — for which subclassing and bifurcation is no cure."

even though there were to be three separate trial phases,³ nowhere in the process was there any finding that any of the 160 sample plaintiffs were actually exposed to any particular defendant's products, or that any such exposure caused any disease. The extrapolation phase was purely by the court and no evidence of the actual damages of the remaining 2,128 class members was permitted.

Of course the trial court had to skip over these elements of proof in order to justify certifying the case as a class. The Fifth Circuit held that the phase three trial violated Pittsburgh Corning's Seventh Amendment right to a determination of whether its products actually caused each plaintiff's disease and its right to have a determination of the actual damages suffered by each "extrapolation" plaintiff. A defendant does not lose its Seventh Amendment rights to a jury trial just because a case is filed as a class action.

Other Cases

The Sixth Circuit in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir), *cert denied*, 524 U.S. 923 (1998), on appeal after a lengthy bench trial, decertified a class of 50,000 early retirees of General Motors who claimed that General Motors had breached contracts to maintain health care benefits and was estopped from changing those plans. There were several contract forms, and the statements made by General Motors which supported the plaintiffs' claims of estoppel varied from person to person. The court decertified because of the commonality and typicality requirements of Rule 23(a). The court noted that the fact that more than 300 class members testified in order for the court to obtain a purportedly representative sample of the representations of GM strongly suggested that class-wide relief was improper.

Other courts have decertified class actions after confronting detailed factual disputes at summary judgment, *e.g. O'Connor v. Boeing of North America, Inc.*, 197 F.R.D. 404 (C.D.Cal. 2000), or after confronting practical problems with trial as the trial approaches, *e.g. Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 754 (4th Cir. 1998).

Conclusion

Courts should carefully consider the effect of individual claims and defenses before certification, not after. Perhaps the unhappy experiences of the courts and parties in the cases discussed in this LEGAL BACKGROUNDER can be used to prevent improper class certification in the future.

³A phase two trial was avoided by a lengthy stipulation that, generally, Pittsburgh Corning products were at certain job sites during particular time periods.