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A class in class actions

DAMAGES AND THEIR ROLE IN CLASS CERTIFICATION, WITH A LOOK AT THE *BATEMAN* RULING ON "DISPROPORTIONATE" DAMAGES

As a class-action attorney, about once a month I receive a text or email from a friend or relative with a screenshot or email notice of a class-action settlement. The most frequently asked questions are: "Is this a scam?" followed by "How much will I get?"

My responses are almost always, "No" and "It depends," respectively.

To delve into the question on the amount of the settlement check (or more recently, electronic transfer), it is helpful to briefly put class actions and class-action settlements into context, including assessing damages in class actions. This article provides a broad overview of class-certification requirements, potential challenges to certification based on damages (including a particularly useful Ninth Circuit opinion), and practical guidance when seeking preliminary and final approval of a class action settlement, whether in state or federal court.

Statutory authority

Class actions are a mechanism for many individuals who were harmed in a similar manner to seek redress. These individuals would likely not pursue an individual case for a variety of reasons. Our state and federal courts recognize the ability of putative class representatives to bring these suits on behalf of a class of similarly situated individuals. "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." (Code Civ. Proc., § 382.)

In federal court, "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." (Fed. R. Civ. P. 23(a).) The court must also determine which prong of Rule 26(b) applies. (See e.g., Fed. R. Civ. P. 23(b)(3) ["questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available

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methods for fairly and efficiently adjudicating the controversy."].)

Aggregating damages, fees, and resources

Class actions are appropriate where many suffer harm. These collective actions seek redress on behalf of a group (or multiple groups, if subclasses are involved) of individuals who generally would not file individual lawsuits. Therefore, it should come as no surprise that class members' individual recoveries may typically not reach the same levels of damages as those in single-plaintiff cases. "The very premise of such suits is that small individual recoveries worthy of neither the plaintiff's nor the court's time can be aggregated to vindicate an important public policy." (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 846.) Of course, what is "worthy" of someone's time is subjective. However, the point is that class actions provide an efficient method of adjudicating the claims of many.

Class actions reduce strain on our court system when the courts and counsel can resourcefully manage these lawsuits. "[T]he class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469 [citing *Eisen v. Carlisle Jacquelin* (2d Cir. 1968) 391 F.2d 555, 560].) The California Supreme Court has noted how "class actions offer consumers a means of recovery for modest individual damages." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 445 [class action involving a surcharge of four cents per gallon on gasoline customers using credit cards].) Class actions are "appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer." (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 68 [quoting *Blue Chip Stamps v. Superior Court*, 18 Cal.3d 381, 385-86; citations omitted].)

Courts recognize the benefits of class actions not only to the judiciary, but to class members themselves, such as reducing costs by spreading them among the class. (See *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 339 n.9 [noting that two named plaintiffs with damages totaling $1,006.00 "would be unlikely to obtain legal redress at an acceptable cost," hence a "central concept of Rule 23" is fee-spreading].) From a societal aspect, deterring defendants' improper behavior that occurs on a widespread basis – but where an individual plaintiff may not find it worthwhile to pursue their own case – is a key benefit of class actions. For example, consumer class actions "often produce 'several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims.'" (*Ibid.*, quoting *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808, superseded by statute as noted in *Flores v. Southcoast Auto. Liquidators, Inc.* (2017) 17 Cal.App.5th 841.)

Class actions as a procedural device

Both the U.S. Supreme Court and California Supreme Court recognize that class actions are a procedural device and "a means to enforce substantive law." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462; see *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 331.) Since the measure of damages for the class will necessarily depend on the causes of action at issue in each case, the salient matters attorneys should review include ensuring that the class can be certified, whether at the class-certification stage or if the parties reach a settlement pre-certification, at preliminary and final approval.

Generally, "if the defendant's liability can be determined by facts common to all members of the class, a class will be certified *even if the members must individually prove their damages*." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 [citing *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266, emphasis added.)

The fact that differences exist in *calculating* damages for class members is not a proper basis for denying class certification. (*Wilens v. TD Waterhouse Group, Inc.*, (2003) 120 Cal.App.4th 746, 754.) But if "the individual issues … go beyond mere calculation; [and] involve each class member's entitlement to damages," the court could deny class certification. (*Ibid.*) For example, if each class member must litigate "substantial and numerous factually unique questions to determine his or her individual right to recover," courts may find that class treatment is inappropriate. (*Id.* at 756.) Accordingly, to the extent a damages model hinges upon differences in the ability of class members to *recover* damages (but not their actual individual damages calculation), this could impede the ability to certify the class.

In challenging class certification, defendants may attempt to claim that there is no superiority, e.g., that under Rule 23(b)(3), the class action is not "superior to other available methods for fairly and efficiently adjudicating the controversy." For example, defendants may argue that there is no proportionality between their liability and the actual harm. (See e.g., *Bateman v. American Multi-Cinema* (9th Cir. 2010) 623 F.3d 708, 713; see also *Kline v. Coldwell, Banker Co.* (9th Cir. 1974) 508 F.2d 226, 234.) However, as the Ninth Circuit has noted, "None of these enumerated factors in Rule 23(b)(3) appear to authorize a court to consider whether certifying a class would result in disproportionate damages." (*Bateman*, 623 F.3d at 713; see *Id.* at 721 [holding that the fact that "class treatment would render the magnitude of the defendant's liability enormous" is not an appropriate reason to deny class certification under Rule 23(b)(3)].) In fact, the opposite could be true – that is, because of widespread harm to many

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based on common conduct, class treatment is particularly appropriate.

Bateman and purportedly "disproportionate" damages

The Ninth Circuit's opinion in *Bateman* provides a robust overview of the role of damages in the context of class certification (in that case, statutory damages), with some particularly insightful commentary on the scope of damages as they pertain to certification. In *Bateman*, the plaintiff appealed the district court's denial of class certification where he sued AMC, the movie-theater operator, for violations of the Fair and Accurate Credit Transactions Act (FACTA). (623 F.3d at 710.) FACTA is a federal law enacted to protect identity theft by, *inter alia*, prohibiting businesses from printing more than five digits of any customer's card number or card-expiration date on receipts. Businesses that violate FACTA face statutory damages ranging from $100 to $1,000 per violation.

The plaintiff in *Bateman* sought to recover those statutory damages of $100 to $1,000 for each willful violation of FACTA. (623 F.3d at 710.) The district court denied class certification under Rule 23(b)(3), finding that a class action was not the superior method of litigating the case because: 1) AMC made a good-faith effort to comply with FACTA after plaintiff filed the lawsuit, 2) the magnitude of AMC's potential liability ($29-$290 million) was enormous, and 3) out of proportion to any harm suffered by the class. (*Ibid.*, *Bateman v. Am. Multi-Cinema, Inc.* (C.D. Cal. 2008) 252 F.R.D. 647, 648, 650-51].) The Ninth Circuit agreed with plaintiff that none of these grounds justified denial of class certification on superiority grounds. (*Id.* at 710-11.)

AMC claimed that the district court properly denied class certification because the damages would have been disproportionate. The Ninth Circuit examined the plain text and legislative history of FACTA in analyzing this argument, ultimately disagreeing with AMC. Indeed, the Ninth Circuit found nothing to suggest that Congress intended to cap "potentially enormous statutory awards or to otherwise limit the ability of individuals to seek compensation." (*Bateman*, 623 F.3d at 722.)

In fact, the panel clearly recognized how statutory damages are necessary to compensate victims, including and especially where actual damages may be difficult to determine. (*Bateman*, 623 F.3d at 718 [noting that the actual harm that a willful violation of FACTA will inflict on a consumer will often be small or difficult to prove].) The Ninth Circuit also noted how both actual and statutory damages provided for under FACTA serve to deter the specific conduct underlying the enactment of FACTA. (*Ibid.*) Thus, recovery of statutory damages is available "even where no actual harm results." (*Ibid.*)

The Ninth Circuit took a commonsense approach to statutory damages, noting that "proportionality does not change as more plaintiffs seek relief; indeed, the size of AMC's potential liability expands at exactly the same rate as the class size." (*Bateman*, 623 F.3d at 719.)

In other words, because the statutory penalties were based upon the number of violations, as the class grew, the penalties grew. At the time of enacting FACTA, Congress was aware of class actions and set no cap on the total amount of damages, no limit on the size of a class, and no limit on the number of individual suits that could be brought against a merchant for violating FACTA. (*Ibid.*) Accordingly, there was no basis for the district court to deny class certification simply because of the high number of violations and potential statutory damages. (*Ibid.*)

In fact, this would have the opposite effect of deterrence. Denying "class certification because of the sheer number of violations and amount of potential statutory damages would allow the largest violators of FACTA to escape the pressure of defending class actions and, in all likelihood, to escape liability for most violations." (*Ibid.*) Denying certification based on the fact that many were harmed and damages would be large would not only undermine the FACTA, but the procedural mechanisms of class actions overall.

While this perspective may seem rational and straightforward, defendants have argued – and courts have considered – that disproportionate damages render a class untenable. Establishing that potential damages are neither disproportionate nor present a superiority problem should negate any challenges to certification.

Approval process

While class-action settlements require court approval that is not typically involved in an individual case, practitioners should not be overwhelmed by the prospect of submitting the required motions for preliminary and final approval. The court's objective is to protect the interests of absent class members to ensure that settlements are fair, reasonable, and adequate. Class counsel's job is to provide the court with all the information required to make that assessment.

California Rule of Court 3.769 governs settlement of class actions, which notes the following requirements:

(a) Court approval after a hearing

(b) Attorney fees: any agreement to pay attorney fees or an application for approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action

(c) Preliminary approval: the settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion

(d) Order certifying provisional settlement class: The court may make an order approving or denying certification of a provisional settlement class after the preliminary hearing

(e) Order for final approval hearing: If the court grants preliminary

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approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing

(f) Notice to class of final approval hearing: If the court has certified the class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement

(g) Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement

(h) Judgment and retention of jurisdiction to enforce: If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment.

It is not uncommon for courts to post checklists and requirements for preliminary and final approval. Make sure to thoroughly review those documents to ensure that the judge, staff attorney, and/or law clerk can effortlessly check off each required element of the preliminary and final approval motions. For preliminary approval hearings in federal court, be aware that judges may require an appraisal of the value of nonmonetary or deferred monetary components of a class action settlement before the fairness hearing, e.g., coupon settlements, which are commonly and increasingly scrutinized and disfavored (as opposed to a monetary fund for the common benefit of the class, known as a common fund). (Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (2005) at 10-11.)

Always run a search for published (or more likely unpublished) opinions authored by the judge to whom you are assigned. In state court, check the judge's tentative rulings to see if there are recent rulings on class certification. Though the requirements and procedures are governed by rules of court or civil procedure, individual courts may have their own specific procedures they use (e.g., preferences as to scheduling the final approval hearing).

Damages in class actions will vary based on the class size, claims at issue, and availability of certain types of damages (e.g., statutory, punitive, etc.). One aspect that does not change, no matter the case, is the need for class counsel to demonstrate to the court that damages are adequate to address all class members' harm and can be modeled in a way that comports with the requirements of certifying a class, whether for settlement or before the case resolves.

To do so, ensure that damages can be calculated on a class-wide basis and that any variances relate to the amount of individual damages, not the method of calculation. Finally, keep in mind that class actions are a procedural device. They are a means to efficiently resolve the claims of many while resourcefully allowing parties and the courts to adjudicate widespread harm and deter pervasive improper behavior.

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