When the class-action case does not settle

Trying the class action is a new experience, but with a familiar feel – much like a regular trial

By Joshua H. Haffner

There was a time when it was virtually unheard of for a class-action case to go to trial. They were, and to a large degree still are, notorious for settling, either before or after certification, but certainly before a jury or judge makes ultimate findings on the claims and defenses. The reasons for this are manifold. Class actions tend to be big cases with high stakes for both sides.

From the plaintiff's perspective, it is extremely challenging to even get a class certified, and they can be defeated pretrial on the merits at the pleading or summary judgment stage. From the defense perspective, providing class notice alone can be very undesirable, let alone the potential liability that could result if the class claims are ultimately successful. The cases can also be complex and expensive for both sides, and involve many parties, making litigation burdensome.

Conversely, class settlements can be structured in a way that benefit the class members, while also providing defendants with certainty regarding the extent of their liability for particular conduct, while avoiding the risks, uncertainties, and expense of continued litigation. These and other reasons make class cases conducive to settlement, and it is why it is a rare class case that goes to trial. Indeed, as recently as May of this year, the California Supreme Court described a class action that "proceeded through trial" as a "rare beast." (*Duran v. U.S. Bank Nat. Ass'n* (2014) 59 Cal.4th 1, 12.)

While class-action trials remain a "rare beast," there does appear to be anecdotal evidence that they are occurring

with more frequency, and that a trend of more class actions going to trial may be developing. I recently heard a prominent class-action attorney say that she had noticed that trial courts have become more receptive to class-action trials. Her analysis was that both federal and state judges have seen their power curbed in various subtle ways over the past few years and have diminishing opportunities to try large cases. Partly because of this, she thought that trial judges are more open than they used to be (if not enthusiastic) about trying a class action.

I recently come out of a nearly two-month class action against a title company in Los Angeles Superior Court. I would echo the sentiment that trial courts are becoming more receptive to class-action trials. If a trial judge can be convinced a class action is meritorious and manageable, and a reasonable settlement is not attainable, class counsel should not shy away from pushing for and taking the case to trial. The judicial trend seems to favor allowing well-constructed class actions to proceed to trial, and the remedies available are often far better than could be achieved in a settlement. Class practitioners should take this to heart and consider trying more class actions.

Having recently tried a class action, I have concluded that the imagined complications and difficulties of trying a class case are often far less than the reality. Below are some of the insights I picked up on how these cases can be effectively presented should you find yourself in the position of taking a class action to trial.

Class vs. individual action at trial

The first thing that struck me on reflection about trying a class action, and it is something that I only really understood after experiencing it, is that there is really not that big a difference between trying an individual case and a class action. There are no procedures unique to a class-action trial. By the time trial takes place, the class has already been certified, so those issues have been dealt with. The Seventh Circuit recently described how individual and class action trials are similar.

> Class actions are rarely tried, but when they are the trial proceeds the same way it does in an ordinary case – there are no special trial procedures for class actions as such, though if the suit is particularly complex, as some non-class actions are and some class actions, including this one, are not, the ordinary trial procedures may have to be modified.

(*Amati v. City of Woodstock* (7th Cir. 2011) 176 F.3d 952, 957.)

Basically, in a class-action trial, just as in an individual trial, you have to prove the elements of your causes of action. Yes, there are some unique issues that may relate to class status, but there are often unique issues in individual actions as well, requiring flexible management. Courts have made clear that trial courts enjoy broad flexibility and discretion in managing the class action so that they can be effectively tried. "Trial court must be accorded the flexibility 'to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process.'" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.App.4th 429, 440.) Thus, under federal and state rules, "the trial judge maintains a great degree of control over the conduct of a class action trial." (*Gold Strike Stamp Co. v. Christensen* (10th Cir. 1970) 436 F.2d 791, 792, n.2.) The trial court's discretion allows it to fashion a class-action trial in a manner similar to an individual trial, which is likely the judge's natural proclivity anyway.

So in preparing for a class-action trial, think of it as any other trial.

Don't retry class certification

One thing to avoid during a class trial is retrying the elements of class certification, which is something defendants may strenuously attempt. This is because oftentimes in a class action the best defense a defendant has is to certification, not liability. The problem for the defense is that by the time trial comes around, certification has already been decided. Defendants should not be allowed to retry it.

The issue of whether a case will be certified as a class action is decided in connection with a motion for class certification. This is done pre-trial. Indeed, the rules suggest that class certification be decided at "an early practicable time" after initiation of the suit. (*In Re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298.) The class-certification motion is litigated based on evidence, and its conclusions and findings as to whether it is an appropriate class action are binding. Thus, by the time trial starts, the issues regarding class certification have been decided.

Class certification rules do provide, however, that "[a]n order that grants or denies class certification may be altered or amended before final judgment." (Federal Rules of Civil Procedure, rule 23(C)(1)(c).) (In this article we cite both federal and state rules on class actions, which for the purposes of this article are significantly similar. (See *In Re Tobacco II Cases* (2009) 46 Cal.4th 298, 318 ["we look [to federal law] when seeking guidance on issues of class-action procedure"].))

Practically speaking, however, there must be new facts for a court to reconsider an order certifying a class. (Code of Civ. Proc., § 1008.) Without material new facts going to certification issues (i.e., commonality, typicality, numerosity, manageability, etc.), certification cannot be relitigated. Class counsel should be aggressive in making this point. Issues relating to absent class members, defendant's liability to them, their amount of damages, should be sharply curtailed, if allowed at all, because it has already been certified as a class action, and the named representative plaintiff's claims are the only ones to be litigated.

In that regard, it becomes critical to protect your named plaintiff's claims during the trial, as would be the case in any individual trial. The silver bullet for

the class action defendant is to take out the named plaintiff, and thereby defeat the class action. This gives them res judicata as to any such claims by any of the other class members because a judgment in a class action "will be res judicata as to all persons as to whom the common questions of law and fact pertain." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706.)

Therefore, the big goal at trial is to establish your plaintiff's claim, just like a regular trial, except the results affect more people (the absent class members). Thus, during trial, you have to worry less about class-certification issues and far more about winning your named-plaintiff's claims. This focus is just like any other trial.

Thus, as in any trial, your individually named plaintiff must be well-prepared, and you need to be confident in his or her claims. Any major problems with an individual plaintiff's claim should be well analyzed prior to class certification, because once certification occurs, class members are bound by trial results. Picking a plaintiff with the fewest problems at the outset, and then protecting that plaintiff through trial, is critical.

Because the case for all class members rises or falls with the named plaintiff, the stakes are high in a class-action trial when the plaintiff testifies. Any misstep can doom not just his or her individual case, but the whole class action.

The issue of needing the named plaintiff to prevail raises the potential strategic call of having more than one named plaintiff as class representative. Having more than one class representative is a double-edged sword, and is often a subject of debate amongst class counsel. On the positive side, having more than one class representative means that, if one falls away at trial or before, there is a backup. However, having multiple named class representations poses other problems, and can backfire particularly at the class-certification stage if differences between the class representatives' experiences make it appear class treatment is inappropriate. Thus, when thinking about naming class representatives, and how many to name, you should consider the likelihood the case could actually proceed to trial, as well as the risks multiple named plaintiffs present to class certification.

However, once you are in trial, you win or lose with your named plaintiff(s). Don't let the defense try to muddy and overcomplicate the case by injecting into the case issues relating to absent class members.

"Aggregate damages" is the name of the game

When trying a class action, perhaps the most important factor to keep in mind is that you only need to prove aggregate class damages. This is critical. Class counsel *does not* have to prove the amount of each individual class members' damages. The California Supreme Court made it clear years ago that class-action trials proceed by proving classwide, not individual, damages.

> Due process does not prevent calculation of damages on a classwide basis. The Supreme Court has assumed the use of such a method. In many cases such an aggregate calculation will be far more accurate than summing all individual claims.

(*Bruno v. Sup. Ct.* (1981) 127 Cal.App.3d 120, 129 n.4.)

Defense counsel will often try to ignore this rule, and defend class trials by arguing that plaintiff must prove that each class member was damaged by the challenged conduct. This is simply wrong. The law supports calculation of aggregate, classwide damages. This rule greatly simplifies the trial of class actions.

Indeed, in *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 747, the Court of Appeal cited *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, stating that it is "precedent for determining aggregate classwide damages through a process of logical inference . . . ." (*Bell*, *supra*, at 747.) The underlying rationale for this pragmatic approach is that "aggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions and promotes the economic and judicial access for small claims objectives of Rule 23.'" (*Id.* at 751, n.24.)

Thus, when trying a class action, focus exclusively on classwide, aggregate damages. Do not let defense counsel distract you or the Court with arguments relating to proof issues as to individual class members' damage claims.

Distribution of class damages and cy pres – a non-adversarial administrative process

Another manner that defendants may attempt to confuse the issues, or defend a class action, is to argue that any class-action judgment must include a distribution award, and this necessarily requires that the Court take evidence of each class members' individual damages. As set forth above, the amount of each class member's individual damages does not have to be proven in a class-action trial. Rather, California courts have adopted a non-adversarial, administrative process for distribution of classwide damages following trial. California law is as follows with respect to distribution of classwide aggregate damages.

> If the defendant in a class action is found liable, and there is a finding at trial as to the amount of classwide damages, each class member's individual entitlement to damages may be litigated in a nonadversary administrative claims procedure with a lowered standard of proof. In such a claims procedure, the allocation of the total sum of damages among the individual class members 'is an internal class accounting question that does not directly concern the defendant . . .'

(*In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 417 (internal citations omitted).)

Thus, "'the allocation of that aggregate sum (of the judgment) among class members is an internal class accounting question that does not directly concern

the defendant.'" (*Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 759.) The way the process works is that "[a]fter 'the defendant's total damage liability is paid over to a class fund . . . individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof.'" (*Ibid.*)

Once classwide, aggregate liability is determined at trial, judgment is entered in that classwide amount. Subsequently, in a non-adversarial, accounting proceeding overseen by the Court, the damages are distributed to class members. Issues regarding distribution of damages to class members pose no obstacle to the class trial. Class counsel should oppose all efforts to insert issues of distribution into the class action trial.

In that same vein, defendants will sometimes argue that classwide damages should not be awarded, or should revert to defendant, if the class member entitled to the award cannot be identified. This is incorrect under the law. Amounts from the aggregate, classwide liability that cannot be distributed do not revert to the defendant or defeat those class members' claims. Rather, they go to the next best use, also referred to as a cy pres fund. Judge Richard Posner of the Seventh Circuit Court of Appeal, in *Hughes v. Kore of Indiana Enterprises, Inc.* (7th Cir. 2013) 731 F.3d 672, recently described the importance of cy pres funds in distributing classwide awards:

> In a class action the reason for a remedy modeled on cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or of the judgment, in the rare case in which a class action not dismissed pretrial goes to trial rather than being settled) to the class members.

(*Id.* at 676.)

Conclusion: Class-action trials are manageable

By the time you reach the stage where a class action is ready to go to trial, much work has been accomplished. The class has been certified. Discovery has been completed. Merits challenges have been defeated.

At that point, with so much successful work accomplished, class counsel should be ready and willing to try the case. It will often result in a recovery greater than would have been attainable in a settlement. It is not that difficult, complex, expensive, or different from an individual case, and it can be tried effectively. And class-action trials are fun – you are almost always dealing with big, high-stakes cases, and large defense firms with talented counsel. Defendants are, to an extent, shooting at ghosts: They so desperately want to defend against the class members' claims, but their only courtroom target is the named plaintiff. If you have done the work-up right, you can feel confident that your named plaintiff will survive, and there will be a class-wide judgment.

Taking big class actions to trial sends the right message to defendants that cases will not be settled for less than their fair value. There is no reason, except perceived complexity, that these cases should not be tried more often in California courtrooms.


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