Evaluating Class Actions:
How Do You Know When You've Got One?

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We have all had the realization in looking at one of our client's cases that: "If this happened to my client, it must have happened to a lot of other people." Which generally leads to the conclusion that there may be a class action.

A threshhold question, of course, (which often cannot be answered in the absence of formal discovery), is whether the same thing did, in fact, happen to a lot of other people, or whether the client's circumstances are simply the result of some accident or anomaly or something that somehow fell through the cracks.

But because the styling of a petition or complaint as a "class action" carries so many other implications, (many of them problematic), it is advisable to evaluate the action properly and weigh your options before pursuing a class action suit.

Class Action Advantages

Some of the advantages in pursuing a case as a "class action" include: **(i)** opportunity to "represent" additional plaintiffs; **(ii)** opportunity to earn "common benefit" fees; **(iii)** suspension of prescription for existing and/or potential future clients;[1] **(iv)** increased leverage for settlement purposes;[2] **(v)** coordination between and among plaintiffs and counsel; **(vi)** potential cost-sharing and other economies of scale; and **(vii)** development and presentation of the full nature, scope and ramifications of the defendant's conduct.

At the same time, the potential disadvantages are significant.

Potential Disadvantages of Class Action Litigation

Some of the disadvantages in pursuing a case as a "class actions" include: **(i)** potential removal of the action to Federal Court;[3] **(ii)** may limit or otherwise alter the claims that are asserted;

(iii) may limit or otherwise alter the defendants that are named; **(iv)** potentially better and/or more aggressive defense counsel; **(v)** will likely encourage exceptions, motions to dismiss, and other more aggressive motion practice; **(vi)** delay in discovery and prosecution of merits while class certification is litigated;[4] **(vii)** bi-furcation of class versus merits discovery;[5] **(viii)** interlocutory appeal of certification;[6] **(ix)** encouragement of "copy cat" suits, "competing" suits, "interlopers" and/or objectors; **(x)** potential loss of autonomy in prosecution of client's action; **(xi)** risk of MDL transfer to an inconvenient venue;[7] **(xii)** risk of being shut out of the prosecution of the class action;[8] **(xiii)** potential "fighting over" or other sharing of common benefit fees;[9] **(xiv)** higher litigation, notice and/or other administrative costs and expenses;[10] **(xv)** potential contamination of stronger cases by allowing defendants to attack weaker cases; and/or **(xvi)** potential skepticism, hostility or other adverse reaction politically, by the public, by other future potential clients, and/or by the courts.

Understanding Commonality

In colloquial parlance, "common" can be used to identify any point of similarity. Yet it is important to recognize that similarity is not the same thing as commonality for class certification purposes.

An issue is "common" for class certification purposes only where the proof for one person will be sufficient to satisfy a finding of proof for another member of the class.

Two intersectional collisions at the same light may be similar, for example, but the determination of who ran the red light in one case doesn't tell you anything about who ran the red light in the other case.

If, however, the light is broken, and the Highway Department is a defendant in both cases, then the liability of the Highway Department may be a "common" issue under Louisiana Code of Civil Procedure Article 591 and Federal Rule 23.

Or, as a result of a chemical spill, taking another example, approximately 92% of the persons within a five-mile radius experience burning eyes and nosebleeds. Hence, the effects of the exposure could be said to be "common". But they are common only in the sense that they are similar. The fact that Plaintiff A is determined to have experienced burning eyes and nosebleeds doesn't, in and of itself, tell the fact-finder anything about what was, or wasn't, experienced by Plaintiff B.

Whether exposure presents a *risk* may be common, because the risk is likely true (or not true) for everyone.

But the damages caused by the exposure are not "common" for class action purposes; they are only similar.

"True Class Actions" versus Aggregation of Claims

The critical distinction which must be made at the outset of any evaluation process is the determination of whether the case is, at its essence, what I call a "true class action" or merely an aggregation of individual claims.

In a "true" class action, the claims will not exist absent the class. In most cases, the damages are too small to warrant individual prosecution. Other factors which may prevent individual filings may include ignorance (in the case of fraud, for example), fear of retaliation (in an employment case, for example), or real-world business considerations (when, for example, a plaintiff would be suing a client, customer, creditor, supplier or trading partner). The plaintiff, ideally, should not have to take any specific, individual, affirmative step to prove his or her claims. The defendant, or a third party, would have a database or other business records from which damages could be quantified and class membership or other eligibility parameters could be ascertained. The plaintiff, ideally, simply has to sit around and wait to receive a check in the event the litigation is successful at the end of the case.

In other situations, (which are sometimes filed, or prosecuted, or even certified as "class actions"), there are numerous independently viable actions which have been filed, or likely will be filed, or at least could be filed, irrespective of the certification of a class. While there may be hundreds or thousands or even millions of absent class members whose rights are at stake in the event of formal certification, the denial of certification will not, as a practical matter, terminate the litigation. Moreover, the victims will typically not be identifiable from the defendant's or a third party's set of business records and/or some element of damages will typically be subjective or otherwise unliquidated. Hence, whether suing as an individual plaintiff, a class representative, or an absent class member, the claimant will have to take some type of affirmative steps to establish his or her entitlement to relief. This type of case, from my perspective, is not a "true" class action; the class certification (if any) is primarily a tool to promote and enhance judicial economy; the case is, in any event, inherently an aggregation of individual claims.

Key Distinctions

True Class Action	*Aggregation of Claims*
Essentially One Case	Many Individual Cases
Only Fee is "Common Benefit" Fee	Both Individual Client Contingency and/or "Common Benefit" Fees
Success Hinges on Class Certification	Case Viable Without Class
One Retainer Agreement / File / Set of Common Benefit Expenses	Need Separate Retainer Agreements / Files / Allocations of Case Costs (both Shared v. Individual, and as between Individual Clients)

Essential Questions for Evaluating the Viable Class Action Case

- **Are there individualized questions of reliance?** If so, a class action generally cannot be certified.[11] In some cases, where the fraud can be described as a material omission, rather than an affirmative representation, or where the fraud is committed against a single unitary entity (*e.g.* a market, or a trust), then one may be able to eliminate individual questions of reliance.[12] In the alternative, can the claim be stated as some other type of action – *e.g.* breach of contract – where reliance is not required? Are the contracts or other representations standard, or individually negotiated? Is there a standard single set of written representations, or does the case rely on the existence of oral communications?

- **Would the certification implicate the substantive laws of more than one State?** If so, a class action generally cannot be certified.[13] In the alternative, is it viable to limit class members to the residents of one State? Or can viable claims be asserted under Federal Law?

- **Is there is single source of causation?** Particularly in toxic tort and other "mass accident" cases, where there are multiple sources of exposure or other causation, the action likely cannot be certified.[14] In the alternative, can a viable civil conspiracy be alleged to render all defendants solidarily liable?[15]

- **Is comparative fault an issue?** If so, a class action likely cannot be certified.[16]

- **Is the conduct complained of truly "common" or (even if widespread) simply similar?** Is it the result of a single or systematic practice or policy? Or is it simply the result of independent actors who happen to make similar decisions? Are the decisions and policies centralized? How many different decision-makers or policy-makers are there? Are we dealing with simply a collection of similar, yet unrelated, mistakes or anomalies? – Is there some way to frame the case as emanating from a single failure or policy?

- **Can the class members be identified from a computer database or other business records of the defendant and/or a third party?**

- **Can the relief "be awarded without requiring a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case" and is "capable of calculation by means of objective standards and not dependent in any significant way upon the intangible, subjective differences of each class member's circumstances," or will it "require additional hearings to resolve the disparate merits of each individual's case"?** [17]

  If the answer to this last question is "yes", you might just have yourself a class action.

ENDNOTES

1. *See* LA. CODE CIV. PRO. ART. 596; Pitts v. La. Citizens, 2008-1024 (La. App. 4th Cir. 1/7/09), 4 So.3d 107; *see also, generally,* American Pipe & Const. Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). For more recent Federal cases, *see, e.g.,* Taylor v. UPS, 554 F.3d 510 (5th Cir. 2008); Fauvergue v. U.S., 86 Fed.Cl. 82 (Fed.Cl. 2009).

2. The settlement or dismissal of a class action must be approved by the Court. Previously, it was unclear whether this requirement applied to only certified classes or to any case which had been filed as a putative "class action." Many courts took the position that the rule existed (at least in part) to prevent an individual from filing a suit as a purported "class action" solely to advance his or her own interests, intending from the beginning to be "paid off" without any real intention of representing the putative class. *See, e.g.,* Roper v. Consurve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978). However, both the Federal and Louisiana provisions have been amended to make it clear that the requirement only applies to case which have been previously "*certified*" as class actions. *See* FED. RULE CIV. Pro. 23(e); LA. CODE CIV. PRO. ART. 594(A)(1). Nevertheless, in styling a complaint or petition as a class action, the putative class representative and counsel are technically certify that they will faithfully protect and advance the interests of the putative class. *See* FED. RULE CIV. Pro. 23(a)(4); LA. CODE CIV. PRO. ART. 591(A)(4).

3. *See* 28 U.S.C. §1332(d).

4. *See* FED. RULE CIV. Pro. 23(c)(1); LA. CODE CIV. PRO. ART. 592(A)(3).

5. For an excellent treatment of "class" versus "merits" *see,* In re IPO Sec. Lit., 471 F.3d 24 (2d Cir. 2006).

6. *See* FED. RULE CIV. Pro. 23(f); LA. CODE CIV. PRO. ART. 591(A)(3)(b).

7. *See* 28 U.S.C. §1407.

8. *See* FED. RULE CIV. Pro. 23(g); *see also, e.g.,* LA. CODE CIV. PRO. ART. 592(E).

9. *See, e.g.,* FED. RULE CIV. Pro. 23(h); LA. CODE CIV. PRO. ARTS. 594(C), 594(D) and 595.

10. *See, e.g.,* LA. CODE CIV. PRO. ART. 592(B)(3); *see also, e.g.,* FED. RULE CIV. PRO. 23(c)(2) and (d)(1)(B).

11. *See, e.g.,* Castano v. American Tobacco, 84 F.3d 734 (5th Cir. 1996); Banks v. New York Life, 1998-0551 (La. 7/2/99) (on rehearing), 737 So.2d 1275; *see also, e.g.,* LA. CODE CIV. PRO. ARTS. 591(C) and 592(E)(5).

12. *See, e.g.,* Scott v. American Tobacco, 2004-2095 (La. App. 4th Cir. 2/7/07), 949 So.2d 1266, *writ denied,* 973 So.2d 740 (La. 2008), *cert. denied,* 128 S.Ct. 2908 (2008); Klay v. Humana, 382 F.3d 1241 (11th Cir. 2004); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975); Basic Inc. v. Levinson, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988); Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *see also,* Bridge v. Phoenix Bond & Indemnity Co., 128 S.Ct. 2131 (2008); ***but see, e.g.,*** Regents of the University of California v. Credit Suisse First Boston, 482 F.3d 372 (5th Cir. 2007).

13. *See, e.g.,* Cole v. General Motors Corp., 484 F.3d 717 (5th Cir. 2007); Castano, supra, 84 F.3d 734.

14. *See, e.g.,* Brooks v. Union Pacific, 2008-2035 (La. 5/22/2009), 13 So.3d 546; Ford v. Murphy Oil, 96-2913 (La. 9/9/97), 703 So.2d 542.

15. *See, e.g.,* Scott, supra, 949 So.2d 1266; ***but see, generally,*** Bell Atlantic v. Twombly, 127 S.Ct. 1955 (2007) (pleading standard for claims of civil conspiracy); *see also, e.g.,* Stoneridge Investment Partners v. Scientific Atlanta, 128 S.Ct. 761, 769 (2008) (rejecting aider and abettor liability for securities violations).

16. *See, e.g.,* Castano, supra, 84 F.3d 734; Banks, supra, 737 So.2d 1275.

17. Allison v. CITGO Petroleum Corp., 151 F.3d 402, 414-415 (5th Cir. 1998).