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THE EXPERT PERSPECTIVE

"A newsletter from our experts to our community of litigation clients"

Vista Energy Group Litigation Support Services

Our newsletter is published every six weeks and presents lessons we have learned from our experience in providing expert litigation support in the various cases in which we have assisted.

Defining the Class Under Rule 23: Expert Advice is Required

In securities-related class-action litigation, defining and certifying the injured class is not highly difficult since both the population of the injured class (shareholders) and the injuries (financial losses) can be empirically derived and proven. However, when the alleged injury derives from an act of material commission or omission on the part of a defendant, defining the class and the injury can be daunting, and must be done very carefully. This can include claims such as underpayment of royalties, product liability, misleading advertising, real estate fraud, product mislabeling, and others. In federal litigation, Rule 23 outlines the requirements for class certification as well as the grounds for challenging that designation.

We have been involved in a class action litigation in which the plaintiff survived dismissal and accomplished a great deal of useful discovery at significant cost, but then failed to adequately define the injured class, resulting in a dismissed action for lack of class certification. In one such instance, we worked very hard to convince our client, a law firm representing the proposed class, to define the proposed class in such a way as to articulate a class that was large in number, but shared very common characteristics with regard to the relatively small injuries to each party. We calculated that the class we advocated for would have numbered several hundred thousand readily identifiable plaintiffs and that the class had sustained very common and easily articulated injuries well in excess of several hundred million dollars in aggregate. Our client chose instead to propose a class that was very narrow and had far fewer parties in total, but that had very large individual injuries. This small class was very difficult to define because of the highly technical single factor that was used in the definition. In addition, it was difficult, if not almost impossible, to identify the individual members of the proposed class due to a lack of articulate population data. This instance teaches that balancing the client population, injury, and damages against the requirements of numerosity, commonality, typicality, and adequacy should be done in close cooperation with experts who will be able to provide substantial evidence against the claim that the class has not been adequately defined under Rule 23. Conversely, opposing certification will also require the participation of experts to present evidence against the assertion of Rule 23 requirements being met.

In 2011, in a case involving a class action against Walmart (131 S. Ct. 2541, 2551 (2011)), the Supreme Court made it clear that pleading the mere existence of Rule 23 requirements was not adequate and that plaintiffs will now have to prove having met these requirements. Further, the Supreme Court required that the District Courts consider the merits of the underlying claims for certification and perform rigorous analysis to evaluate the merits of those claims as presented. Factual determinations necessary to a certification ruling must be proven by a preponderance of the evidence. Alternatively, refuting the merits of those claims will also require evidence provided by well-qualified experts. Class certification is now clearly a matter of fact and to a lesser degree solely a matter of law. We would urge plaintiffs in non-securities related class-action litigation to engage and listen closely to competent experts in order to assure that the fate of their case will not follow the course that we experienced in the case described above. That firm expended substantial resources only to fail because expert advice was not taken.

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