



COMMERCIAL DIVISION UPDATE

BY GEORGE BUNDY SMITH AND THOMAS J. HALL

Commonality Requirement for Class-Action Certification

A consistently vexing issue faced by Commercial Division judges deciding whether to grant class certification is determining when questions common to the class predominate over questions affecting individual class members.

As one court has stated, “The predominance requirement that ‘questions of law or fact common to the class...predominate over any questions affecting only individual members’ unquestionably is the most troublesome one” in the class-action statute.¹

This statutory predominance requirement of CPLR §901(a)(2) has obvious sound rationales, not the least of which is promoting effective joint representation by ensuring a confluence of interests among class members. Yet courts have long recognized that requiring absolute uniformity among class members is both unrealistic and inconsistent with the long-standing policy favoring the maintenance of class actions and the liberal construction of the class action statute.

Given these countervailing considerations, courts grappling with the predominance requirement have rightly eschewed the application of rigid criteria in favor of a pragmatic and ad hoc approach to the inquiry. As the courts have often acknowledged, there is no mechanical way to determine when class issues predominate over individual issues. Rather, to implement the class-action statute effectively, judicial discretion must be exercised in making this determination.

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Recent Commercial Division Decisions

Two recent Commercial Division decisions demonstrate the breadth of this exercise of judicial discretion in making the determination of whether class issues predominate. Although the factual allegations underlying the two cases were strikingly similar, entirely different outcomes were reached.

In *Alix v. Wal-Mart Stores, Inc.*,² Albany County Justice Richard Platkin denied class certification to plaintiffs who alleged that Wal-Mart systematically deprived hourly workers of wages through a variety of unlawful practices, such as falsifying time records, refusing to pay overtime wages, and requiring employees to work “off the clock” without compensation. The court found that plaintiffs had failed to satisfy the predominance requirement as plaintiffs did not allege that every hourly employee of defendant was deprived of pay, and did not allege that the employees who were deprived of pay were deprived in the same manner or to the same extent:

What plaintiffs allege is that defendant’s business policies, practices and objectives allowed for (and indeed may have encouraged) systematic abuses of hourly associates in order to maximize profits of the company. While there may indeed thus be general facts common to all hourly employees, establishing defendant’s

liability and determining damages will nonetheless inevitably require a specific analysis conducted on an employee-by-employee basis.³

The court concluded:

While proof of this atmosphere of unrelenting pressure to cut payroll costs may be relevant, it primarily serves as a backdrop to the fact-specific inquiries that must, of necessity, occupy center stage in this litigation. In order to establish entitlement to relief, not to mention proper apportionment of damages, plaintiffs must adduce specific evidence as to which associates worked ‘off the clock,’ on what occasions, and for how long.⁴

Justice Platkin recognized that narrowing the scope of the class from all defendant’s hourly employees to only those employees “who ever failed to receive regular compensation for work performed, or who ever worked more than forty hours in a given week without [overtime] compensation,” would limit class membership to those entitled to relief.⁵ Yet, he rejected this solution because “it would render the class incapable of ascertaining without the Court delving into the specific details of a putative class member’s individual employment history.”⁶

Less than a month later, in *Lamarca v. Great Atlantic and Pacific Tea Co.*,⁷ New York County Justice Herman Cahn certified the class of “all regular full-hourly employees of Defendant who have been, or will be employed in Defendant’s supermarkets...whom Defendant has required or permitted to perform work in excess of 40 hours per week without overtime wages.”⁸ Plaintiffs in *Lamarca* alleged that the supermarket chain A&P engaged in, among other things, a regular practice of forcing employees to work “off the clock” to extract uncompensated extra work from employees and also made improper meal deductions from paychecks. In certifying the class, the court found that class issues predominated

over individual issues even though plaintiffs did not allege that each class member was underpaid in the same manner or to the same extent:

Rather, plaintiff's argument is that the defendants' stores are run and managed in the same ways and that this created a 'company pandemic of uncompensated work.' Whether plaintiffs can prove this is a question for another day. It does not bear on the issue of commonality. Indeed, the 'fact that questions peculiar to each individual may remain after resolution of the common question is not fatal to the class action.' The paramount issue is defendants' claimed conduct.⁹

Why such starkly different outcomes given the similarity of facts? Of course, other facts and nuances likely factored into the disparate results reached. However, what emerges from a close review of these and other cases addressing the commonality issue is that, in exercising judicial discretion, three related analytical factors usually drive the result. Each is addressed below.

The first analytical factor is whether the court finds the "predominance balance" tips towards the defendant's common conduct towards the proposed class or towards the individual class members' claims. For example, if in a fraud action the defendant made different misrepresentations to different class members, the court may conclude that individual questions of reliance predominate and thus preclude class certification.¹⁰ However, where the defendant made a common misrepresentation to all class members, the court may find that class issues predominate.¹¹

In *Alix*, the court chose to focus more on the nature of the particular dispute each class member had with the employer, and less on the allegations of overriding wrongful conduct by the employer. From this perspective, the unique facts and circumstances of each class member's claim were apparent, and in the court's view predominated over the class issues. In *Lamarca*, by contrast, the court examined the dispute with a focus on the defendant employer's overriding conduct, and from that perspective the peculiar details of each class member's dispute were subsumed by the overarching common allegation linking the plaintiffs together—that defendant's policies deprived plaintiffs of statutory wages. From this view, each individual class member's dispute with the employer was simply the peculiar manifestation of the central objectionable conduct of the defendant.

Other Decisions

Other recent Commercial Division decisions further demonstrate the profound effect that the judicial lens from which the dispute is viewed has on the certification analysis. For instance, in *CLC/CFI Liquidating Trust v. Bloomingdales, Inc.*,¹² Justice Bernard Fried denied class certification to vendors who alleged the defendant department store had a "uniform policy and practice of improper conduct towards vendors."¹³ The court found the predominance requirement had not been satisfied because analysis of the allegations required a vendor-by-vendor analysis: "To certify the class of vendors, plaintiffs must show that the claims against defendants allow for mass proof, rather than proof on an individualized basis."¹⁴ The court concluded: "Plaintiffs have failed to show that the class is more bound together by mutual interest in settlement of a common question than it is divided by individual members' interest in matters peculiar to it."¹⁵

These recent decisions do appear to support the notion that whether questions common to the class predominate over questions affecting individual class members is "the most troublesome one" in New York's class-action statute.

On the other hand, in *Cox v. Microsoft Corp.*,¹⁶ a suit arising out of Microsoft's alleged violations of New York's antitrust statute, the plaintiffs alleged that Microsoft's anticompetitive behavior caused consumers to pay inflated prices. Justice Karla Moskowitz granted class certification to all persons who purchased Microsoft products after a certain date. In so holding, the court rejected Microsoft's argument that class certification should be denied because each class member would need to show that he or she suffered harm. The decision focused instead on the common allegation that "Microsoft was able to charge inflated prices for its products as a result of its deceptive actions and that these inflated prices passed to customers."¹⁷

Despite the obvious significance of the choice regarding whether the court focuses on the defendant's conduct or the individual class members, it is sometimes difficult to glean from the opinions the qualitative and quantitative factors involved in making the determination. Though the *Alix* court recognized that there was an element of commonality linking the class allegations that the defendant engaged in a systematic effort to reduce payroll by illicit means, it concluded this common element was mere "background" because defendants' liability ultimately turned on the treatment of individual class members, who were not allegedly treated in exactly the same way.

In contrast, faced with similar allegations, the court in *Lamarca* found that the "paramount issue is defendants' claimed conduct."¹⁸ The *Lamarca* court rationalized that if class action status were denied because class members had disparate claims, this would effectively preclude all class-action wage disputes (except in cases that allege the defendant mistreated each class member in identical fashion) and severely limit the availability of class actions, a result contrary to long-standing New York policy and the rationale underlying the modern class action statute.

Injury and Analysis

The second and related analytical factor driving the commonality determination concerns where the court fits the notion of injury into the analysis. For the courts in *Alix* and in *CLC/CFI*, commonality of injury was central to the determination that individual issues predominated over class issues because injury is a prerequisite to liability. They concluded that a class that includes both individuals who have and have not been injured is simply unworkable because the defendant would have no liability to a portion of the class. Further, a more narrow class definition would not cure the problem as determining damages would "inevitably require a specific analysis conducted on an employee-by-employee basis."

By contrast, the courts in *Lamarca* and *Cox* placed less weight on the individual injury analysis, viewing it principally as an element of damages not particularly pertinent to the class certification analysis. Thus, the court in *Cox* rejected the argument that class certification should be denied because some retailers did not raise their prices in response to Microsoft's allegedly monopolistic tactics. As the court reasoned, "this argument goes to the amount of dollar damages individual class members suffered and is not determinative

of the question of class certification.”¹⁹ The court in *Lamarca* concluded that, if liability is found, “the issue of damages for each plaintiff can be addressed with regards to the plaintiffs individually.”²⁰

Defining Class Membership

The third analytical factor affecting the determination of whether class issues predominate is how the class is defined. In *Lamarca*, the court’s conclusion that class issues predominated was aided by the fact that the class was limited to those employees “whom Defendant has required to perform work in excess of 40 hours per week without overtime wages.”²¹ Given the narrow scope of the class, the court’s conclusion that class issues predominated is perhaps unsurprising.

In *Alix*, the plaintiffs defined the proposed class more broadly, as all hourly employees of defendants in the state of New York after a specified date. The court explicitly rejected a possible narrowing of class to those employees who were denied compensation due them, reasoning that such a definition would require the court to look at the merits of individual claims to determine class membership. The principal authority upon which *Alix* relied for this point provides that a class definition which requires individualized examinations is impermissible because it “would defeat the class action’s goal of saving judicial time and resources.”²²

This analysis points to a fundamental tension for practitioners seeking class certification. If a class is defined narrowly, class issues are more likely to predominate. However, the court may need to engage in more individualized analysis to determine who qualifies as a member of the class, which could run counter to the class action’s purpose. If a class is defined broadly, determining class membership would likely demand fewer judicial resources, but class issues are less likely to predominate because of the greater variation among class members.

In light of these considerations, determining when a proposed class definition requires too

much individualized analysis could presumably turn on a combination of complex factors, such as the relationship between the class requirement and the nature of the claim, the difficulty of determining when the class requirement is satisfied, the number of potential class members, or the potential use of a special master to determine eligibility for class membership. While the court in *Alix* found a narrower class definition unworkable because determining class membership would require an examination of each employee’s employment records, the court in *Lamarca* did not see this as a barrier to class certification.

Conclusion

The purpose of analyzing these issues that appear to drive the class certification decision is not to suggest there should be, or even could be, rigid rules to constrain courts faced with these issues. Whether, for instance, in a given case the predominance analysis tips towards the defendant’s conduct affecting the class or towards the impact that conduct had on individual class members will presumably depend on numerous case-specific factors, including the number of ways in which the alleged wrongful policy is manifested, the pervasiveness of the alleged policy, the size of the potential class and so forth. Perhaps appellate review of these decisions will provide further guidance, for example on the impact that differences in damages among class members has on the predominance determination.

In any event, these recent decisions do appear to support the notion that whether questions common to the class predominate over questions affecting individual class members is “the most troublesome one” in New York’s class action statute. As a leading commentator has observed: “The factors that must be considered before determining whether to permit an action in class form are so flexible that equally reasonable minds can flex them either way.”²³

Practitioners will be well-served by being cognizant of the broad judicial discretion involved, and by presenting their arguments with a keen focus on these choices that can drive the judicial determination of whether class issues predominate over individual ones.



1. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 96, 434 N.Y.S.2d 698, 706 (2d Dept. 1980).
2. 16 Misc.3d 844, 838 N.Y.S.2d 885 (Albany Co. June 11, 2007).
3. *Id.* at 853, 838 N.Y.S.2d at 893.
4. *Id.* at 854, 838 N.Y.S.2d at 893.
5. *Id.* at 851, 838 N.Y.S.2d at 891.
6. *Id.*
7. 16 Misc.3d 1115(A), 2007 WL 2127354 (N.Y. Co. July 3, 2007).
8. *Id.*, 2007 WL 2127354, at *1-2.
9. *Id.*, 2007 WL 2127354, at **4.
10. *Katz v. NVF Co.*, 100 A.D.2d 470, 473-74, 473 N.Y.S.2d 786, 789 (1st Dept. 1984).
11. *King v. Club Med, Inc.*, 76 A.D.2d 123, 127, 43 N.Y.S.2d 65, 67 (1st Dept. 1980).
12. 17 Misc.3d 1118(A), 2007 WL 3101249 (N.Y. Co. Sept. 7, 2007).
13. *Id.*, 2007 WL 3101249, at *1.
14. *Id.*, 2007 WL 3101249, at *4.
15. *Id.*, 2007 WL 3101249, at *5.
16. 10 Misc.3d 1055(A), 809 N.Y.S.2d 480 (N.Y. Co. July 29, 2005).
17. *Id.*
18. *Lamarca*, 2007 WL 2127354, at *4.
19. *Id.*
20. *Id.*
21. *Id.*, 2007 WL 2127354, at *1-2.
22. *Mitchell v. Barrios-Paoli*, 253 A.D.2d 281, 291, 687 N.Y.S.2d 319, 325 (1st Dept. 1999).
23. Siegel, *New York Practice*, §141 (4th ed. 2007).

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