Trying Class Actions: The Complex Task of Managing and Resolving Individual Issues in Class Trials

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I. INTRODUCTION

A class action tried to verdict is an "exceedingly rare beast."[1] This is because class actions almost always settle if a class is certified.[2] The court's ruling on plaintiff's motion for class certification is thus the "main event" in a class action.[3] An order granting class certification—which aggregates the claims of potentially millions into one case—places significant pressure on defendants to settle even "questionable claims" in the face of potentially "devastating loss[es]."[4] Yet this traditional path to a class action settlement is being turned on its head by the increasing trend of class action plaintiff's lawyers bringing class actions to trial and seeking higher payouts.[5] One class action scholar, Professor Robert

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1. Duran v. U.S. Bank Nat'l Ass'n, 325 P.3d 916, 920 (Cal. 2014).

2. Vince Morabito & Jane Caruana, *Can Class Action Regimes Operate Satisfactorily Without a Certification Device? Empirical Insights from the Federal Court of Australia*, 61 AM. J. COMP. L. 579, 604 (2013) ("The various empirical studies conducted in the United States have revealed unambiguously that 'cases with a certified class invariably lead to class settlements . . . .'").

3. BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK § 5.01 (Matthew Bender ed., 2016).

4. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011); *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 455 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."); *see also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (noting that by "increas[ing] the defendant's potential damages liability and litigation costs," class certification often forces a defendant to "abandon" even a "meritorious defense").

5. *See* Redman v. Radioshack Corp., 768 F.3d 622, 628 (7th Cir. 2014) (noting "realistically, class counsel" are the ones who run the litigation and not the "named plaintiffs"), *cert. denied sub nom.* Nicaj v. Shoe Carnival, Inc., 135 S. Ct. 1429 (2015).

Klonoff, predicts "a significantly larger number of class action cases will go to trial . . . ."[6] Professor Klonoff notes in recent years a number of high-profile class actions have gone to trial—including those involving Whirlpool washing machines and Apple iTunes software—which he sees as an "important new trend" that "will only accelerate" as litigants become more bullish about their chances at trial.[7] This prediction of more class action trials dovetails with the trend that the number of class actions is growing.[8]

With more class action trials on the horizon, courts are beginning to grapple with the numerous unanswered procedural issues class action trials present. The primary issue is how courts can manage and resolve factual or legal variations among class members' claims—such as issues relating to causation, reliance, and damages—that are typically determined through individualized proceedings and evidence. This trial issue is inextricably related to most defendants' primary argument in opposing class certification. Defendants argue that the plaintiff's ability to prove the case on behalf of a class "turns on individual issues because [the] . . . challenged conduct was not uniform across" the proposed class.[9] But there is little guidance on how courts should approach individual issues at trial after the class is certified.

Under Federal Rule of Civil Procedure 23 and other state rules that authorize class actions, courts generally should certify classes where identical issues of law and fact can be decided in one fell swoop.[10] The named plaintiff's evidence must prove the claims of the entire class.[11] Class certification also requires the putative class representative to prove that common issues among class members predominate and the class action is superior to other

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6. Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1572 (2016).

7. *Id.* at 1645; *see also* Cara Salvatore, *Jury Awards $20M In Dish Telemarketing Class Action Trial*, LAW360 (Jan. 19, 2017), https://www.law360.com/trials/articles/882907/jury-awards-20m-in-dish-telemarketing-class-action-trial.

8. Aebra Coe, *The 5 Practice Areas Poised for a 2017 Growth Spurt*, LAW360 (Oct. 18, 2016), https://www.law360.com/articles/852647/the-5-practice-areas-poised-for-a-2017-growth-spurt; Emily Field, *The 3 Practice Areas that Will Grow in 2016*, LAW360 (Nov. 12, 2015), https://www.law360.com/articles/726241/the-3-practice-areas-that-will-grow-in-2016.

9. ANDERSON & TRASK, *supra* note 3, at § 5.01.

10. FED. R. CIV. P. 23(a)(2).

11. *Id.* at 23(a)(3).

methods for resolving the dispute.[12] Class treatment is appropriate only if it strikes a sensible balance between the interests of efficiency and preserving a defendant's right to litigate the merits of individual claims.[13] But certification should be denied when the individual putative class members' claims depend on unique issues and evidence. The requirement of predominance under Rule 23(b)(3) is not satisfied if "individual questions . . . overwhelm the questions common to the class."[14]

> An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."[15]

What has caused problems is there is often an impulse to certify now and deal with the individual questions later. In the face of numerous individual issues, plaintiffs often press to allow procedural shortcuts at trial by using statistical extrapolation techniques—dubbed "Trial by Formula"—to conduct trials without letting defendants challenge the claims of individual class members. Defendants counter that procedural shortcuts deny them the right to present individual evidence constitute a denial of their due process rights.

Courts, practitioners, and scholars cannot delay addressing how individual issues can be resolved in a class action trial. Courts are increasingly requiring a trial plan with a plaintiffs' class-certification motion that addresses not only how plaintiffs would present their claims but also any individualized issues that would be raised in defense of their claims.[16] Indeed, certification—and cases tried to verdict that are sustained on appeal—frequently turns on whether a proposed trial plan achieves the efficiencies offered by

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12. *Id.* at 23(b)(3).

13. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432–33 (2013).

14. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1196 (2013).

15. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (alteration in original) (quoting 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:50 (5th ed. 2012)).

16. JOSEPH M. MCLAUGHLIN, 2 MCLAUGHLIN ON CLASS ACTIONS § 8:1 (13th ed. 2016).

class treatment while preserving a defendant's rights to present a meaningful defense.[17] But there are no clear answers on how defendants can meaningfully defend themselves if individual issues crop up.

This article explores the interplay between a defendant's due process right in a class action trial to present individual evidence, the manageability of individual issues at trial, and when it is necessary to conduct individual class-member discovery. The article first looks to how courts can manage individual issues in class action trials and finds there are no easy solutions, except to deny certification when cases cannot be proven with common evidence. The article then analyzes the views and trial strategies of both plaintiffs and defendants. The plaintiff's bar believes a class action trial is basically the same as a regular two-party trial. The defense view is that a class trial looks much different: defendants must be given the opportunity to litigate every defense to each class member's claim, which may necessitate separate mini-trials. In the coming age of class action trials, individual class-member issues cannot be swept away, consistent with due process.

II. COURTS MUST EFFECTIVELY MANAGE INDIVIDUAL ISSUES DURING TRIAL BECAUSE DEFENDANTS HAVE A DUE PROCESS RIGHT TO OFFER INDIVIDUAL EVIDENCE

A recent California Supreme Court case, *Duran v. U.S. Bank National Association*,[18] provides a prime example of how *not* to conduct a class action trial and why managing individual issues is so important to certification and trial. In *Duran*, the court reversed on state law and federal due process grounds a wage-and-hour class-action judgment premised on extrapolation evidence rather than the presentation of individualized proof and defenses.[19] To adjudicate the claims of 260 bank employees who alleged they had been misclassified as exempt from California's overtime laws, the trial court devised a plan to determine the extent of the defendant's liability to all class members by extrapolating from a random sample.[20] The court heard testimony on the work habits of 21 plaintiffs, and, "based on testimony from the small sample group, the

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17. *Id.*
18. 325 P.3d 916 (Cal. 2014).
19. *Id.* at 945.
20. *Id.* at 920.

trial court found that the *entire* class had been misclassified."[21] The trial court "extrapolated the average amount of overtime reported by the sample group to the class as a whole."[22]

In reversing the class action judgment, the court deemed this use of extrapolation to be "profoundly flawed" because it "prevented [the defendant] from showing that some class members were exempt and entitled to no recovery."[23] The California Supreme Court explained courts cannot "abridge" the presentation of a "defense simply because that defense [is] cumbersome to litigate in a class action" and "'a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.'"[24] The court emphasized "[t]hese principles derive from both class action rules *and principles of due process*."[25] These due process requirements were violated when the trial court "extrapolate[d] classwide liability from a small sample" and "refus[ed] to permit any inquiries or evidence about the work habits of [class members] outside the sample group."[26]

Duran admonished trial courts to manage individual issues at the class-certification stage before these issues haunt litigants at trial:

> Trial courts must pay careful attention to manageability when deciding whether to certify a class action. In considering whether a class action is a superior device for resolving a controversy, *the manageability of individual issues is just as important as the existence of common questions uniting the proposed class*. If the court makes a reasoned, informed decision about manageability at the certification stage, the litigants can plan accordingly . . . .[27]

Manageability of individual issues is important because a defendant cannot be precluded from presenting "individual issues at trial when

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 935 (second alteration in original) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366 (2011)).
25. *Id*. (emphasis added).
26. *Id.*
27. *Id.* at 931–32 (emphasis added).

those issues legitimately touch upon relevant aspects of the case being litigated."[28]

While *Duran* amounted to a clear due process violation, the court did not elaborate on the scope of this due process right to defend against claims of individual class members. *Duran* noted though "defendants may not have an unfettered right to present individualized evidence in support of a defense,"[29] and "[n]o case . . . holds that a defendant has a due process right to litigate an affirmative defense as to each individual class member."[30] The court only generally held that "a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions."[31]

The U.S. Supreme Court has yet to address this due process issue but has rejected trials by formula under Federal Rule of Civil Procedure 23. In *Wal-Mart Stores, Inc. v. Dukes*, the Court rejected an extrapolation-based approach to classwide adjudication.[32] Under the plan endorsed by the Ninth Circuit, "[a] sample set of the class members would be selected," and the "percentage of claims determined to be valid would then be applied to the entire remaining class . . . without further individualized proceedings."[33] The Supreme Court unanimously "disapprove[d]" of that procedure, labeling it "Trial by Formula."[34] The Court explained that, "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[35]

The Due Process Clause guarantees the right of any party to litigate all of the issues raised.[36] For a defendant, this does not merely include rebutting any affirmative elements of a claim but also includes the fundamental right to present any and all defenses.[37]

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28. *Id.* at 931.
29. *Id.* at 935.
30. *Id.* at 937.
31. *Id.* at 935.
32. 564 U.S. 338, 366–67 (2011).
33. *Id*. at 367.
34. *Id.*
35. *Id*. (citations omitted).
36. United States v. Armour & Co., 402 U.S. 673, 682 (1971) (The "right to litigate the issues raised" is "guaranteed . . . by the Due Process Clause . . . .").
37. Lindsey v. Normet, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (internal quotation marks omitted).

Thus, "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."[38] But even after *Dukes*, courts have split on whether it violates due process to facilitate classwide adjudication by permitting the use of extrapolation to relieve individual class members of their burden of proof and by eliminating the class-action defendants' right to raise individualized defenses.[39]

A. Class Actions Cannot Alter Substantive Law

Defendants are pressing due process arguments because a class action is merely a "procedural device" that "may not be used to abridge a party's substantive rights."[40] As the California Supreme Court noted long ago, "[c]lass actions are provided *only* as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."[41] A plaintiff who would lose on the merits if she sues as an individual should still lose if she raises the same claim in a class action. A class action is a valuable mechanism for incentivizing counsel to bring low-value claims that might have never been brought. But certification does not alter the merits of a case by changing the liability standard or foreclosing defenses a defendant could otherwise bring in an individual action. In short, "[t]here is a difference between allowing the resources that certification brings to polish a diamond hidden in the rough and allowing the pressure that certification brings to create a diamond from coal."[42]

Instead of proffering a manageable plan for resolving individualized issues before entering judgment, plaintiffs will often attempt to blur or ignore the distinctions between class members, which is a troubling example of how

> dissimilarity creates subtle distortions in the presentation and assessment of claims and defenses

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38. Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013).

39. Petition for Writ of Certiorari, Wal-Mart Stores, Inc. v. Braun, No. 14-1123, 2015 WL 1201367, at *2 (Mar. 13, 2015).

40. Duran v. U.S. Bank Nat'l Ass'n, 325 P.3d 916, 935 (Cal. 2014).

41. City of San Jose v. Superior Court, 525 P.2d 701, 807 (Cal. 1974) (emphasis added).

42. Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1043 (2005).

> that either inflate or dilute the perceived value of the overall class claim . . . . [T]hese distortions [include]: "cherry-picking" (the tendency of aggregate proceedings to generalize from examples that do not fully represent the diversity of individual claims), "claim fusion" (the process by which claims in the aggregate merge to assume characteristics that no individual claim possesses), and "ad hoc lawmaking" (the manipulation of substantive rules to assist in resolving or preventing practical difficulties that arise in the course of adjudicating dissimilar questions of fact and law).[43]

Thus, "aggregating distinct individual claims into a class obscures [the] differences among class members" in ways that can have substantive consequences and tend to distort the assessment of the merits.[44]

Dissimilarity among the class has unintended consequences: "Plaintiffs' counsel find creative ways to infuse the class claim with the best of its dissimilar aspects"; "judges find innovative ways to make any vestiges of dissimilarity disappear from the case" (e.g., the trial plans in *Duran* and *Dukes*); and "[d]efendants in turn try to counter these efforts by tarring the class with the least desirable traits of members with the weakest claims."[45]

This is why the class-certification briefing is focused on whether the core issues in the case are amenable to class proof. If review of individual questions requires a mini-trial on thousands of claims, the case could drag on for a lifetime.[46] Plaintiffs' lawyers, however, are not incentivized to define classes that have identical claims; they are incentivized to define proposed classes as broadly as possible to encompass the maximum number of class members with injuries. But a broad class is likely to include materially dissimilar members, such as class members without injury or those subject to unique affirmative defenses. A rational defendant will seek to counter this strategy and introduce individualized evidence to defeat

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43. *Id.* at 1003 (footnote omitted).
44. *Id.* at 1010.
45. *Id.* at 1014.
46. *See, e.g.*, Galloway v. Am. Brands, Inc., 81 F.R.D. 580, 585–86 (E.D.N.C. 1978) (estimating that adjudicating putative class members' individualized damage claims would "consume well over one hundred years").

the claims of those class members that do not have meritorious claims.

B. With the Defendant's Right to Present Individual Evidence Entrenched, the Importance of Class Action Trial Plans Will Only Increase

If individual issues cannot be managed, a class action should never be certified in the first place. This is why a growing number of courts have looked to the plaintiff seeking class certification to propose a viable trial plan showing "how the . . . trial could be conducted."[47]

> The preparation and execution of a workable trial plan for a proposed class action [is] among the most challenging and complex undertakings faced by courts and litigators. At bottom, the formulation of a class action trial plan is an attempt to reconcile the tension between the fact that class litigation is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," and the law that procedural rules "shall not . . . modify any substantive right," such as the obligation . . . to present individual proof.[48]

While trial plans are helpful, some courts only require plans *after* certification.[49] At the very least, a tentative trial plan should be

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47. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996); *see also* Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1188–89 (9th Cir. 2001) (noting that the party seeking class certification bears the burden of presenting a suitable and realistic plan for trial of the class claims); Robinson v. Texas Auto. Dealers Ass'n, 387 F.3d 416, 426 (5th Cir. 2004) (discussing how, on certification, the court must confront how a case will be tried and must avoid "a figure-it-out-as-we-go-along approach"); Ross v. RBS Citizens, N.A., 667 F.3d 900, 905 (7th Cir. 2012) (noting that the "courts' increased use of class-action trial plans" is due to "the 'critical need . . . to determine how the case will be tried'" (quoting FED. R. CIV. P. 23 advisory committee's note); MANUAL FOR COMPLEX LITIGATION § 22.756 (4th ed. 2004) ("A trial plan . . . will help determine whether a trial will be manageable and meet all the Rule 23 certification standards."); *id.* at § 22.93 ("Judges often require the parties to submit detailed trial plans early in the case and to modify the plans as the case develops.").

48. MCLAUGHLIN, *supra* note 16, at § 8:1 (internal citations omitted).

49. *See, e.g.*, In re Conagra Foods, Inc., 302 F.R.D. 537, 580 (C.D. Cal. 2014) ("Thus, if at some point [the court] determines that some or all of plaintiffs' classes can be certified, it will direct plaintiffs to submit a trial plan for its

(footnote continued)

required at the time of certification because it bears on the certification criteria and will help the court determine if a class action trial is feasible.[50]

III. PLAINTIFFS MUST PROVE CLASSWIDE LIABILITY WHILE ACCOUNTING FOR DISSIMILARITY AMONG THE CLASS

This analysis reveals a class action plaintiff may prevail at trial only by proving common allegations and resolving any remaining individualized disputes. Class action trials share many similar attributes to single-plaintiff trials:

> the rules of evidence do not differ, nor . . . the phases of the trial, nor most of the jury's instructions or verdicts. What distinguishes class suits is the multitude of plaintiffs in the class and the recurring question of whether issues to be tried are common to all of the class members or individualized to each class member.[51]

A federal securities fraud class action is one type of case some courts have found suitable for a class action trial. The basic theory for most securities fraud cases is simple. If every plaintiff purchased stock from a company whose share price was inflated by the defendants' allegedly fraudulent statements, then whether the statements were fraudulent and whether they led to inflated stock prices are issues common to every member of the class. In the opening trial phase, "the finder of fact determines whether the defendants made material misrepresentations or omissions with scienter on which plaintiffs reasonably relied in purchasing or selling the security" that caused them loss.[52] If "the trial court finds that plaintiffs are entitled to a rebuttable presumption of reliance . . . for purposes of establishing class-wide liability at the first phase of the trial, the class is entitled to . . . invoke the fraud on the market presumption of reliance to

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consideration. . . . Because the court is not in a position to certify classes now, it need not address the question of a trial plan in any greater detail at this time.").

50. Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 773 (7th Cir. 2013) (finding decertification appropriate because the plaintiffs' trial plan did not present a feasible way of determining the plaintiffs' damages; instead, calculating damages would have "require[d] 2341 separate evidentiary hearings . . .").

51. WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 11:1 (5th ed. 2016).

52. MCLAUGHLIN, *supra* note 16, at § 8:2 (citations omitted).

establish the reasonable reliance element."[53] Defendants are then "entitled to present evidence rebutting the presumption of reliance as to individual class members with any showing that particular class members did not rely on the integrity of the market price in reaching their investment decisions."[54]

For example, following a jury determination of class-wide liability in the first phase of a federal securities fraud action, one court authorized sending a questionnaire to class members requiring them to answer the following question which, if answered affirmatively, would support obtaining additional discovery from class members:

> If you had known at the time of your purchase of [issuer's] stock that defendants' false and misleading statements had the effect of inflating the price of [issuer's] stock and thereby caused you to pay more for [issuer's] stock than you should have paid, would you have still purchased the stock at the inflated price that you paid? YES_ NO_.[55]

This example illustrates that courts and litigants must be mindful of managing individual issues and allowing the defendant the opportunity to conduct relevant class member discovery.

A. *The Existence of Individual Issues Requires Courts to Allow Defendants to Conduct Discovery on Class Members Especially When Liability Is Presumed Based on Evidentiary Presumptions*

A presumption merely shifts the burden of proof to the defendant like turning the questions of reliance and causation into defenses rather than affirmative burdens for the plaintiff to prove. Courts have applied rebuttable evidentiary presumptions in the hopes of having to avoid considering burdensome—and likely repetitive—individualized questions of fact on various elements like reliance. There is nothing inherently wrong with presumptions; courts have created hundreds of presumptions over the years.[56] But a rebuttable

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53. *Id.*

54. *Id.*

55. Jaffe Pension Plan v. Household Int'l, Inc., 756 F. Supp. 2d 928, 933–34 (N.D. Ill. 2010).

56. 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5122.1 (2d ed. 2005) ("[T]he common law recognized (footnote continued)

presumption in a single-plaintiff suit cannot be mutated into an irrebuttable presumption for a class action. Consistent with the due process principles set forth in *Dukes* and *Duran*, a defendant has the right to rebut a presumption it is liable on a classwide basis.[57] Presumptions must be "just that"—a presumption that can "be rebutted by appropriate evidence."[58]

Evidentiary presumptions are increasingly used in class actions as panaceas to avoid individual issues, but they provide no such solution. For example, for an employee's wage-and-hour claim for missed meal breaks in California, there is a "rebuttable presumption" of a statutory violation when the employer does not have a record of the meal break because the employer is required to keep these records.[59] While the employer has a right to rebut that presumption, there is little guidance on how that can be done. For the defendant to have a meaningful opportunity to rebut an adverse presumption of a violation, evidence from individual class members about their own experience with meal breaks is required. If there is no record of a meal break, it is likely that only the individual employee would possess this "evidence." The defendant then would have to be given some chance to conduct discovery on the class members.

Likewise, in the consumer-fraud context, courts are increasingly applying presumptions of reliance to relieve class members of their burden when a misrepresentation or omission is material.[60] The California Supreme Court, for example, has allowed an "inference" of reliance in a case in which sellers of freezers and frozen foods had "memorized a standard statement" that was "recited by rote to every member of the class."[61] Courts certifying consumer fraud class actions on the basis of a presumption of reliance acknowledge as a theoretical matter that "defendants may introduce

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scores of such presumptions."); *id.* at § 5125 (providing a non-exhaustive list of more than 200 presumptions).

57. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 446 (1973) (noting the rules that "creat[e] a presumption which operates to deny a fair opportunity to rebut it violates the due process clause").

58. Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 811 (2011).

59. Brinker Rest. Corp. v. Superior Court, 273 P.3d 513, 545 (Cal. 2012) (Werdegar, J., concurring); *see also* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1047 (2016) (noting a similar concept under federal labor law when "employers violate their statutory duty to keep proper records").

60. *See, e.g.*, Jordan v. Paul Fin., LLC, 285 F.R.D. 435, 465–66 (N.D. Cal. 2012) (applying presumption of reliance where "all class members received the same representations" in "nearly identical loan documents").

61. Vasquez v. Superior Court, 484 P.2d 964, 971–73 (Cal. 1971).

evidence to rebut the inference of reliance,"[62] but few have given serious attention to the question of how it would be manageable to do so in a class setting.[63]

The defendant then has a need to conduct class discovery to rebut presumptions and to show that individual class members have no case. Though not explicitly permitted by the rules of civil procedure, court's must be "flexible" and allow this discovery consistent with due process and the needs of the case.[64] Courts apply a balancing test designed to suss out whether the defendant is acting in good faith.[65] A good-faith basis for the discovery then should not be denied. The days when class member discovery "is rarely permitted" should be over.[66]

Assuming the case goes to trial, the question becomes how a defendant presents its favorable evidence obtained in discovery. If there is a class of thousands, is the court supposed to allow the defendant to call hundreds or thousands of class members to rebut the adverse presumption as to them? If not, the presumption is not truly rebuttable; it would be an irrebuttable presumption that would be inconsistent with due process. And a case that requires thousands of mini-trials on liability and damages issues should not have been certified in the first place. Rebuttable presumptions thus raise multiple unanswered questions of how the presumption can be rebutted in a way consistent with the defendant's due process rights.

To avoid mini-trials, litigants may be tempted to introduce at trial declarations of individual class members. These are classic

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62. *E.g.*, Wiener v. Dannon Co., Inc., 255 F.R.D. 658, 669 (C.D. Cal. 2009).

63. Geoffrey Wyatt & Nina Rose, *How Presumption of Reliance May Violate Due Process*, LAW360 (Sept. 10, 2013), www.law360.com/articles/470814/how-presumption-of-reliance-may-violate-due-process.

64. *See, e.g.*, Tierno v. Rite Aid Corp., No. C-05-02520-TEH, 2008 U.S. Dist. LEXIS 112461, at *16 (N.D. Cal. July 8, 2008) ("The law on discovery directed to absent class members is flexible. Discovery from absent class members is 'neither prohibited nor sanctioned explicitly' by the Federal Rules.") (citation omitted).

65. *Id.* at *17 (holding that the defendant must demonstrate three factors to justify discovery on absentee class members: (1) "the information sought is relevant"; (2) the information is "not readily obtainable from the representative parties or other sources"; and (3) "the request is not unduly burdensome and made in good faith").

66. Garden City Employees' Retirement Sys. v. Psychiatric Solutions, Inc., No. 3:09-882, 2012 WL 4829802, at *2 (M.D. Tenn. Oct. 10, 2012) (noting that absent class member discovery "is rarely permitted" and denying defendants leave to propound interrogatories on absent class members in order to determine whether they relied on allegedly material representations that were the basis of a presumption of reliance).

examples of hearsay.[67] Courts reject proposals by class counsel to meet their burdens of proof with "affidavits and sworn questionnaires as substitutes for traditional individualized proofs" since those class members are "not subject to cross-examination."[68] Even if courts allowed declarations to be introduced, they would have to devise a way to efficiently conduct cross-examinations.

In short, a defendant has the right to rebut presumptions and the plaintiff's case-in-chief with individual evidence gathered through discovery propounded on individual class members. Courts and litigants cannot "invent new theories of liability to avoid having to consider the circumstances of individual class members."[69] The rise in the use of presumptions and other procedural shortcuts will coincide with the rise of more class discovery.

IV. THE FUTURE OF MANAGING INDIVIDUAL ISSUES IN CLASS ACTION TRIALS

With the specter of more class action trials looming, courts are now being forced to determine how these cases can be resolved at trial in an efficient manner consistent with a defendant's due process rights. There are no easy answers, which is why the Supreme Court recently confirmed that Rule 23 "imposes stringent requirements for certification that in practice exclude most claims."[70] To avoid these issues at trial, lower courts must undertake a "rigorous analysis" at the certification stage and cannot certify a class unless plaintiffs offer "evidentiary proof" that "affirmatively demonstrate[s]" the requirements of Rule 23(b)(3) are satisfied.[71] It

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67. FED. R. EVID. 801(c).

68. MCLAUGHLIN, *supra* note 16, at § 8:6 (citing In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 619 (W.D. Wash. 2003) ("in action alleging damages from purchase of PPA-containing products, rejecting plaintiffs' proposal that class members could submit affidavits to demonstrate their membership in class and damages")); O'Connor v. Boeing N. Am., Inc., 197 F.R.D. 404, 415 (C.D. Cal. 2000) (using questionnaires at the claims stage would abrogate defendants' statute of limitations defense, which was not based on "easily verifiable 'objective' criteria" and noting the "futility of reliance on questionnaires [given the] complex individualized inquiry" in purported class action); Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 345 (4th Cir. 1998) (reversing certification after trial in which defendant "was often forced to defend against a fictional composite [plaintiff] without the benefit of deposing or cross-examining the disparate individuals behind the composite creation").

69. Erbsen, *supra* note 42, at 1013.

70. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

71. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).

is a waste of resources to litigate a class action if there is no reasonable possibility that a class action verdict would be upheld.

There is no one-size-fits-all inquiry on what amount or magnitude of individual issues will preclude certification or make a trial unmanageable. Courts are increasingly affirming that certification may be proper even where "*damages or some affirmative defenses* peculiar to some individual class members" will "have to be tried separately."[72] Courts thus have affirmed certification where "the district court [i]s careful to preserve [the defendant's] opportunity to raise any individualized defense it might have at the damages phase of the proceeding"[73] or other defenses.

In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court addressed the propriety of plaintiffs' use of statistical evidence in a wage-and-hour class action, finding statistical evidence can be used in class actions like any other case and rejecting the argument that there should be "broad rule against the use in class actions" of statistical or "representative evidence."[74] The Court concluded that "categorical exclusion" in class actions "would make little sense," noting that such evidence is sometimes

> 'the only practicable means to collect and present relevant data' establishing a defendant's liability. In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class."[75]

The Court thus found that, because Tyson Foods had failed to keep proper records, statistical proof would have been admissible in an individual case under a presumption of liability for failing to keep records.[76]

The Court distinguished the statistical evidence rejected in *Dukes*. In *Dukes*, the putative class members "were not similarly situated" and, thus, "[p]ermitting the use of that sample in a class

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72. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (emphasis added); *see also* In re Linerboard Antitrust Litig., 305 F.3d 145, 163 (3d Cir. 2002) (explaining "individualized facts of fraudulent concealment may be adjudicated in the same fashion and at the same time as individual damages issues").

73. Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1168 (9th Cir. 2014).

74. 136 S. Ct. at 1046.

75. *Id.* (citation omitted).

76. *Id.* at 1040, 1058.

action . . . would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action."[77]

The Court did not address the "question [of] whether uninjured class members may recover" but noted it "is one of great importance."[78] Chief Justice Roberts, in concurrence, questioned whether the verdict could stand because there did not appear to be any feasible way to separate the injured class members from the uninjured class members.[79] The Chief Justice reasoned that under well-established standing principles "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[80] He cautioned that the district court must ensure the "jury's damages award goes only to injured class members" or the "award cannot stand."[81] In other words, there has to be a way to separate the wheat from the chaff.

Few proposals have surfaced about how to litigate class action cases using statistics after *Dukes* and *Tyson Foods*. Professor Jay Tidmarsh proposes a "modified trial-by-statistics approach" that claims to "reap[] many of the benefits of trial by statistics, minimize[] its costs, and satisf[y] *Wal-Mart*'s critique."[82] The proposal suggests courts randomly select a statistically representative sample from the class to try to verdict and then extrapolate the result from the sample to the whole class.[83] The results of these sample cases would be averaged and that amount would be deemed the presumptive award for each class member.[84] The court would then have to enter judgment for this amount for each class member unless either party rebuts the presumption with individualized proof of damages.[85] Tidmarsh argues, unlike trial by formula, this presumptive-judgment approach gives the parties the power to contest both liability and damages with individualized evidence.[86] But he explains a party has no incentive to do so unless the party can expect a better outcome after factoring in the costs of individual

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77. *Id.* at 1048.
78. *Id.* at 1050.
79. *Id.* at 1053 (Roberts, C.J., concurring).
80. *Id.*
81. *Id.*
82. Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 MINN. L. REV. 1459, 1464 (2015).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

litigation.[87] He concludes that "[a]lthough using presumptive judgments is not a panacea for all aggregated proceedings involving individualized damages, this modified trial-by-statistics approach provides a new and useful technique to resolve a large swath of complex cases."[88] This proposal represents a start to the debate about how class action trials can be fairly litigated with statistical shortcuts, if at all.

These issues with class action trials counsel in favor of a rigorous class certification standard that actually tests how a class action trial could resolve the claims of dissimilar class members. Civil procedure scholar Allan Erbsen opines that the current "predominance" approach to class certification—examining whether the class members' circumstances are more similar than different—is misguided because "the extent of dissimilarity among class members' circumstances turns out to be a much more important indicator of whether claims are suitable for class action treatment than the extent of any similarity."[89] Professor Erbsen recommends that the "certification inquiry should not ask whether class members' circumstances are more similar than different, but rather whether their circumstances are sufficiently different to preclude resolving their claims in a single proceeding."[90]

Now that manageability is the watchword of class action lawyers, there will be competing visions of what a manageable trial looks like. The California Supreme Court's only guidance so far on this concern is that "a defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability" whereas "[d]efenses that raise individual questions about the calculation of *damages* generally do not defeat certification."[91] The Ninth Circuit has also held "damage calculations alone cannot defeat certification."[92]

The extent to which damages calculations can preclude certification remains an issue since some cases would require a defendant to introduce substantial individual evidence to rebut thousands of individual's damages requests. With so many enduring

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87. *Id.*
88. *Id.*
89. Erbsen*, supra* note 42, at 1001–02.
90. *Id.* at 1002.
91. Duran v. U.S. Bank Nat'l Ass'n, 325 P.3d 916, 932 (Cal. 2014).
92. Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979, 986 (9th Cir. 2015).

issues with class action trial procedure, it is safe to predict these issues will continue to be fiercely litigated.

A. *Plaintiff's View of the Class Action Trial Is to Frame It as the Same as a Regular Trial*

On many levels, a class action trial is like any other trial. There are no special rules for class action trials besides the discretion and control given to trial courts in all complex cases.[93] Plaintiff's goal at trial is to mask any differences between the lead plaintiff and the absent class members. Counsel then will seek to "fashion a class-action trial in a manner similar to an individual trial, which is likely the judge's natural proclivity anyway."[94] Plaintiff then will seek to conduct the trial "much like a regular trial" and to minimize any "unique issues that may relate to class status." [95]

Plaintiff will want to emphasize that defendant's false advertising or bad conduct harmed as many people as possible, yet plaintiff does not want the case devolving into individual issues related to absent class members or the certification analysis. Plaintiff will seek to "sharply curtail" issues related to absent class members because the case "has already been certified as a class action, and the named representative plaintiff's claims are the only ones to be litigated."[96] The problem with this view is that the certified class acquires a separate "legal status" from the interests of the lead plaintiff.[97] The class's claims are being litigated too. If there is a serious disconnect between the named plaintiff's claims and certain members of the class who may not have a claim, plaintiff's counsel will seek to avoid those issues.

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93. *See, e.g.*, Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 792 n.2 (10th Cir. 1970) ("[T]he trial judge maintains a great degree of control over the conduct of a class action trial."); Linder v. Thrifty Oil Co., 2 P.3d 27, 34 (Cal. 2000) ("[T]rial courts must be accorded the flexibility to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process.") (internal quotation marks omitted).

94. Joshua H. Haffner, *When the Class-Action Case Does Not Settle*, PLAINTIFF MAG., 2 (Jan. 2015), http://www.plaintiffmagazine.com/images/issues/2015/01-january/reprints/Haffner_When-the-class-action-case-does-not-settle_Plaintiff-magazine.pdf.

95. *Id.* at 1–2.

96. *Id.* at 2.

97. Sosna v. Iowa, 419 U.S. 393, 399 (1975).

Plaintiff's counsel know that the trial court can decertify the case any time "before final judgment."[98] Counsel thus will seek to avoid letting defendants retry certification, "something defendants may strenuously attempt" because, according to this view, "oftentimes in a class action the best defense a defendant has is to certification, not liability."[99] In short, plaintiff's counsel wants to keep the spotlight on the lead plaintiff chosen by counsel and stop defendants from building a record that would support decertification after trial. Under this view, the defendant's due process rights at trial are an afterthought. The unnamed class members that also seek to hold defendant liable are just "ghosts"[100] and any inquiry on these ghosts is just a sideshow.

B. The Defendant's View Seeks to Defend Against Both the Plaintiff and Absent Class Members That May Be Subject to Unique Defenses

Like a regular trial, a defendant will vigorously contest the named plaintiff's claims and seek to win on the merits. Defendants, though, do not have to worry about only the named plaintiffs—there can be thousands of "ghosts" seeking to recover too. These absent class members may be subject to individual affirmative defenses. This is why class certification is so important—it tests whether a class action trial would be fair and allows the defendant to adjudicate its affirmative defenses. This is why defendants argue class certification should only be granted where the proposed class members are so similarly situated that their claims can actually be tried based on common evidence. If the cases cannot be tried on common evidence, the defendants will seek to embrace the sideshow.

Justice Thomas articulated the defendants' concerns with a trial based on an improper certification:

> District courts must also *ensure continued compliance with Rule 23 throughout the case*. When a district court erroneously certifies a class, then holds a trial, reversal is required when the record shows that improper certification prejudiced the defendant. And an *incorrect class certification decision almost*

98. FED. R. CIV. PROC. 23(c)(1)(C).
99. Haffner, *supra* note 94, at 2.
100. *Id.* at 4.

> *inevitably prejudices the defendant*. When a district court allows class plaintiffs to prove an individualized issue with classwide evidence, the court relieves them of their burden to prove each element of their claim for each class member and *impedes the defendant's efforts to mount an effective defense*.[101]

Besides attempting to prevail on the merits, the defendant's strategy is to demonstrate an inability to mount a class action defense.

The defendant seeks to attack an incorrect class certification decision as soon as it is made. The goal is to strategically pursue every opportunity to prepare for a motion to decertify—before, during, and after trial. The first step is to begin class discovery to demonstrate variability of the absent class members. If the court denies the defendant the ability to conduct class discovery, the denial should be put on the record, and the defendant should fix the issue and renew its request. If the defendant has no ability to conduct class discovery, this might be enough to show prejudice on appeal. Class discovery will likely need to be done in conjunction with experts, both to counter plaintiff's experts and to show class variability. The goal is to introduce evidence at trial showing class variability and individual issues.

Before trial, the defendant should explain in its trial plan the individualized evidence it needs to introduce. The goal is to show the defendant needs to conduct separate mini-trials if plaintiff seeks to sweep aside individual differences with its classwide evidence. Likewise, the defendant will seek to attack plaintiff's classwide evidence with motions in limine and throughout trial. Defendants should "now argue, whenever possible, that (1) the statistical evidence in question would not have been admissible in an individualized trial, (2) the circumstances are more like *Dukes* (in which class members were not similarly situated), and (3) the evidence is unreliable or unsound under *Daubert*."[102] The goal is to paint plaintiff's representative evidence as being statistically inadequate, as being based on implausible assumptions, and as violating the defendant's due process rights by permitting class members to recover without proving the same individualized elements and confronting the same individualized defenses as plaintiffs pursuing individual claims. The defendant will "press for

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101. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1053 (2016) (emphasis added) (Thomas, J., dissenting).

102. Klonoff, *supra* note 6, at 1603.

due process limits on the use of statistical evidence" and other common evidence in class actions.[103]

Likewise, the defendant will want to submit jury instructions before trial that show why the proposed class action trial would be unmanageable. Defendants must object to jury instructions that seek to diminish evidentiary burdens[104] or variations in state law,[105] both for purposes of trial and appeal.

At trial, the defendant will continue on the same path, highlighting due process rights violations and insisting every element of every claim be proven as to each absentee class member. This means insisting that plaintiff's common evidence prove each element on a class wide basis. In rebuttal, the defendant might call hundreds or thousands of witnesses for individualized fact finding and separate mini-trials. The argument is that there is either a due process violation or the burden on the court system from all the individual fact finding "would be simply intolerable."[106] If the court denies the defendant the ability to put on individual evidence to defend itself because it would be too burdensome, this demonstrates decertification is warranted. Under this scenario, the "demanding"[107] standard of predominance cannot be ensured through trial and the questions of law and fact common to class members do not "predominate over any questions affecting only individual members" under Fed. Rule Civ. Proc. 23(b)(3). The goal is to show that allowing the defendant to introduce individual evidence would be unmanageable and decertification is warranted.

On a micro level, the defendant has every right to weed out class members without damages or no case. As Chief Justice Roberts explains, "Article III does not give federal courts the power

103. *Id.*

104. *See, e.g.*, Action House, Inc. v. Koolik, 54 F.3d 1009, 1013 (2d Cir. 1995) (striking down jury instruction as "not consistent with New York law, which requires a finding of actual damages before punitive damages may be awarded").

105. Courts overwhelmingly reject certification when multiple states' laws apply because such a class is fundamentally unmanageable where "variances in state law overwhelm common issues and preclude predominance . . . ." Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 596 (9th Cir. 2012). Nor can a court condense the subtle variances of each state's law into "a kind of Esperanto instruction." In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

106. Brown v. Electrolux Home Prods., Inc., 817 F.3d 1225, 1240 (11th Cir. 2016) (vacating certification finding "individual damages defeat predominance if computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable") (internal quotation marks omitted).

107. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).

to order relief to any uninjured plaintiff, class action or not."[108] On a macro level, the defendant will challenge the use of statistical evidence at every turn. Even "[l]eaving aside the merits of a given technique, challenging the plaintiff's ability to use random sampling will both (1) demonstrate to the court the difficulties of presenting varied factual issues in a single trial, and (2) force the plaintiff into presenting repetitious evidence that may alienate the jury."[109]

While defending on the merits, the defendant should be equally focused on building a record to make a post-trial motion to decertify the class. Even if a defendant "loses" the trial on the merits, a decertification order after trial is tantamount to a win because the plaintiff cannot recover anything on behalf of a class. The California Supreme Court in *Duran* approved of moving to decertify after trial. In that case, the defendant moved *again* to decertify the class after trial, arguing that "because trial evidence revealed wide variations among class members, individual issues predominated as to both liability and restitution."[110] The court affirmed the lower court's judgment reversing the trial court because courts "have the obligation to decertify a class action if individual issues prove unmanageable"[111] or the "trial plan proves unworkable."[112] A defendant then may need to move to decertify multiple times and remind the court it "*always* retains the option of decertification."[113]

Federal courts also have the power to decertify a class after a jury verdict and before final judgment is entered.[114] The Second Circuit affirmed this principle and held district judges have the power to decertify a class after a jury verdict, rejecting Seventh

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108. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring).

109. ANDERSON & TRASK, *supra* note 3, at § 7.10.

110. Duran v. U.S. Bank Nat'l Ass'n, 325 P.3d 916, 925 (Cal. 2014).

111. *Id.* at 932.

112. *Id.* at 933.

113. Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391, 439 (Cal. Ct. App. 2012) (emphasis added).

114. FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *see also* FED. R. CIV. P. 23(c)(1) advisory committee's notes to 2003 amendment ("A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings."); 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785.4 (3d ed. 2016) ("Reference to the final judgment [in Rule 23(c)(1)(C)] . . . mak[es] clear that after a determination of liability it may be permissible to amend the class definition or subdivide the class if it becomes necessary in order to define the remedy or if decertification is warranted.").

Amendment arguments from a nixed class awarded millions at trial because the lead plaintiff failed to prove a key element of the case with class-wide evidence.[115] Because courts have the "affirmative duty of monitoring its class decisions in light of the evidentiary development of the case," the "power to decertify a class after trial when appropriate is therefore not only authorized by Federal Rule 23 but is a corollary."[116] This case encourages the strategy of showing the lead plaintiff failed to prove the case as to every class member making decertification necessary.

In short, a defendant's view of the class trial looks nothing like plaintiff's. The defendant is fighting a two-front war, one on the merits and another on the class-action trial procedures themselves. The defendant needs to make the record clear to support decertification after trial and to preserve issues for appeal.

V. CONCLUSION

Class actions can serve several laudable goals, such as overcoming the deterrent effect to high litigation costs for low-value claims and promoting judicial economy. But to achieve these goals, courts and litigants must consider due process concerns and class-member discovery in this age when more class actions are tried to verdict. While most class actions will continue to settle, a more refined set of class action trial procedures will help guide the threshold certification analysis. It is difficult to determine when a class action is manageable until there are more documented examples of how individual issues were successfully managed. The future of class action litigation hangs in the balance until courts can provide guidance on how to manage individual issues in a class trial consistent with due process. Class action trial guidance will come with experience. Still, the lack of any easy solutions suggests courts should deny class certification unless the plaintiff generates a viable blueprint to handle factual variations at trial.

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115. Mazzei v. Money Store, 829 F.3d 260, 266 (2d Cir. 2016).
116. *Id.* at 266–67 (internal quotation marks omitted).