The Superiority Requirement of Rule 23 Packs a Big Punch

By Eric P. Voigt

The partner at your firm has just assigned you to a federal class action involving millions of dollars in claimed damages. He wants to know the probability of defeating class certification. The partner tells you to start with the text of Rule 23(b)(3)—the relevant subsection for class actions seeking monetary damages. You open your civil procedure rule book and see that subsection (b)(3) requires common issues of law or fact to predominate (predominance requirement) and requires the proposed class to be superior to other available methods to resolve the dispute (superiority requirement). The partner wants you to focus on the superiority requirement and answer three questions: (1) Can class certification be denied based only on the superiority requirement? (2) What alternatives to a class action do courts evaluate? (3) Must an alternative to a class action, such as an individual lawsuit, be superior to the proposed class to defeat certification? After hours of researching secondary sources and cases, you find the following answers.

First, although often overlooked by advocates (and courts), the superiority requirement can be the sole basis to deny class certification. Rule 23(b)(3) states “questions of law or fact common to class members [must] predominate over any questions affecting only individual members, and that a class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy.” The “and” in subsection (b)(3) is very important: both the predominance and the superiority requirements must be satisfied before the class may be certified. As a result, a defendant can defeat a motion for class certification simply by demonstrating that the proposed class is not the superior method to resolve the dispute. Alternatively, the defense could take the initiative and move to strike the class allegations or move to deny class certification. A potential advantage of affirmatively attacking certification is that the defendant could persuade the court to limit initial class discovery to information related only to the superiority requirement. On the other hand, the named plaintiffs have a higher hurdle: they have to prove not only that the proposed class is the superior method but also that Rule 23’s other requirements are satisfied.

Second, a class action must be superior to all other available methods that could “fairly and efficiently” resolve the controversy. The Advisory Committee authoring the superiority requirement, which was added to Rule 23 in 1966, used the plural form in discussing what alternative methods should be considered; the plural is used in the text of Rule 23(b)(3) (“superior to other available methods”) and used several times in the Advisory Committee Notes (e.g., “alternative procedures”). In addition, most courts and leading commentators agree that a judge should evaluate each alternative to the class mechanism that the defense raises. If a court determines that the proposed class is not superior to at least one alternative, it should deny certification.

In analyzing the fairness and efficiency of other methods available to the putative class, courts usually examine only litigation procedures, such as individual lawsuits and test cases. But the Advisory Committee and its prominent member, Professor Charles Alan Wright, have directed courts to evaluate non-judicial alternatives. Although a few courts have held otherwise (including the Seventh Circuit), most courts presented with this issue have concluded that non-judicial alternatives are relevant to a superiority analysis. Common non-judicial alternatives discussed in case law are voluntary refund programs and pending or completed proceedings by federal and state administrative agencies. A refund program is simply a policy under which companies voluntarily compensate consumers for damages allegedly caused by their products or actions. The refund program may be an ongoing satisfaction-guaranteed policy or may be established in response to a threatened or pending class action. A governmental proceeding may include a pre-litigation consent decree between a defendant and a state attorney general or federal agency. Once a court concludes that a refund program or governmental proceeding “fairly and efficiently” remedies the injuries, it may deny class certification on that sole basis because the proposed class would not be the “superior” method.

Third, the superiority requirement is a one-way street—the class mechanism must be “superior to other available methods” to resolve the dispute. The Third and Fourth Circuits have concluded that the proposed class must be the best procedure to remedy the injuries. The other available methods, however, do not have to be superior to the proposed class. Although some courts have determined that a particular alternative was superior to the class action, Rule 23(b)(3) does not require such a determination. Thus, if an alternative method is just as good as a class action, then class certification should be denied.

You report your ideas to the partner. He is pleased to learn that the superiority requirement may be the sole basis to deny certification, that courts should evaluate judicial and non-judicial alternatives to a class action, and that the alternatives do not have to be superior to the proposed class. To explain how the firm’s client should implement any voluntary refund program, you hand the partner a recently published article, A Company’s Voluntary Refund Program for Consumers Can Be a Fair and Efficient Alternative to a Class Action, 31 Rev. Litig. 617 (2012). The partner then tells you to expect greater responsibilities in the pending class action.

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