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PERSPECTIVE

Are you sure you want to defeat class certification?

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You're a defendant who just successfully defeated a motion for class certification — or you've prevailed on a motion to decertify plaintiffs' class. Now what? Despite your procedural victory, do you know that you've advanced your client's interests by stopping the case from continuing as a class action?

While it is true that defeating certification is a case dispositive event for certain types of class actions, to the surprise of many practitioners, there are instances where this is not the case. In fact, there are circumstances where successfully preventing (or undoing) class certification can place a defendant in a worse position than had plaintiffs succeeded in certifying the class.

In many class actions, the typical claim is far too small for any individual class member want to pursue a separate action of their own. Said another way, each individual's claim, standing alone, has a negative value because the cost of litigating the claim would dwarf any potential recovery.

Thus, a class action — by collectively litigating the common issues for numerous individuals — is the only feasible means of allowing individuals with such negative value claims to obtain a remedy. See, e.g., *Cavin v. Home Loan Ctr. Inc.*, 236 F.R.D. 387, 396 (N.D. Ill. 2006) (holding that it is often the case that “the alternative to a class action is likely to be no action at all for the majority of class members.”).

When individual class members possess viable claims, however, a defendant that successfully opposes certification may create a litigation landscape that is disadvantageous for itself. While plaintiffs benefit from the efficiency and reduced costs that class actions provide, class actions can also protect a defendant from facing a host of similar lawsuits across the country.

And without certification, a defendant can never obtain “global peace” by reaching a global settlement with the class (and each of its named and absent class members). Instead, without certification, a defendant may only settle with each plaintiff on an individual basis,

without any binding effect on the other plaintiffs who possess their own separate claims.

A few concrete examples help illustrate how a defendant can be in a worse position after “prevailing” on class certification.

First, wage and hour class actions are an area where defendants may face individual actions if plaintiffs fail to obtain certification. In such cases, all or some of the former class members may possess viable independent claims that are worth pursuing after a failed certification attempt. For example, in *Beauperthuy v. 24 Hour Fitness*, 772 F.Supp.2d 1111 (N.D. Cal. 2011), the plaintiffs — former managers and trainers employed by 24 Hour Fitness — alleged they were misclassified as exempt employees, that defendant failed to properly document the amount of time they worked, and that defendant failed to compensate them for the time (and overtime) they worked.

Early on, the plaintiffs obtained conditional certification of their class, which 24 Hour Fitness strongly opposed. After discovery, 24 Hour Fitness brought a motion to decertify the class, which the court granted. However, that “victory” quickly evaporated when hundreds of individual plaintiffs filed their own petitions to compel arbitration against 24 Hour Fitness (the court having previously determined that the parties' employment contract provided the claims were subject to arbitration).

Shortly thereafter, 24 Hour Fitness filed its own petitions — over 300 of them in 21 different judicial districts — seeking to force plaintiffs to arbitrate their individual claims in the venue in which they had been employed. These competing petitions to compel arbitration resulted in years of protracted procedural battles over where the arbitrations should go forward and which law applied to each plaintiff's claims.

Ultimately, the former employees persuaded the court that the arbitrations should go forward in the Northern District of California. And while 24 Hour Fitness eventually entered into a settlement agreement with the plaintiffs, it came only through a long and expensive war that almost certainly could have been avoided if the case would have

proceeded as a class action.

The point is clear: From the perspective of time and money expended, it is difficult to say that 24 Hour Fitness was in a better position after the decertification of plaintiffs' class than it would have been in otherwise.

Class actions involving investment fraud or “Ponzi schemes” also may present difficulties for defense counsel if they are not certified. While many securities cases involve shareholders with a small amount of stock or other entity interest, there are situations where plaintiffs have invested a considerable amount in real estate, promissory notes, or even limited partnership interests to warrant individual actions. Therefore, as with wage and hour cases, when a number of former class members each have a sufficient financial interest in pursuing their own actions, defendants can face significant problems post decertification.

In *Cantor v. MetLife*, BD446497 (L.A. Super. Ct.), where defendants successfully opposed plaintiffs' motion for class certification brought in California state court. The plaintiffs alleged that agents and employees of MetLife and certain of its subsidiaries induced them to invest in a fraudulent investment scheme. Based on these inducements, the plaintiffs said they invested tens of millions of dollars in Diversified Lending Group in order to finance the premiums for MetLife insurance products. DLG ultimately collapsed and the plaintiffs received only a tiny fraction of their investment after the Securities and Exchange Commission seized and liquidated DLG's assets.

After years of litigation in state and federal court — plaintiffs having successfully sought remand after MetLife attempted to remove the case to federal court — the plaintiff investors moved to certify their class. But in January, the court denied plaintiffs' motion for class certification. Far from being a dispositive event, however, plaintiffs proceeded to file four separate actions, each of which joined together numerous individuals who were putative class members with individual claims as high as \$8 million. At the same time, the original named plaintiffs maintained their individual claims after the court's order

denying certification — claims that will soon go to trial.

Because of the defendants' successful opposition to certification, they now face a trial of four individual plaintiffs' claims. Consequently, MetLife and the other defendants face a dilemma that otherwise would not have been an issue: offensive non-mutual collateral estoppel. If the Cantor plaintiffs succeed on certain vital issues — such as the employment status of its agents and stockbrokers — then the defendants will be unable to attack those findings in the subsequently filed cases.

Findings on the same issue in the defendants' favor, however, cannot be binding on subsequent plaintiffs who are not parties to the *Cantor* action. And since the defendants face this problem because plaintiffs' claims are being adjudicated on an individual basis, this is a clear example of how a defendant can create significant problems by “winning” on certification.

What's the lesson? Again, there are many cases where defeating class certification effectively ends the lawsuit. But defendants' counsel should be mindful that there are circumstances where thwarting certification may result in very real economic concerns and legal pitfalls. In addition, plaintiffs' counsel should consider what strategies are available in the event a court denies class certification at any stage. For example, working to retain a significant portion of those class members who have viable individual claims is an important first step in ensuring that there are alternatives, should the court deny certification.

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