"The Virgin Birth Mule: Trying the Class Action"

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Mr. Morrison’s business leadership was recognized by his appointment as executive vice president, general counsel, chief administrative officer and secretary to Policy Management Systems Corporation. He served this international technology company, listed on the New York Stock Exchange, for seven years until the sale of the company to Computer Sciences Corporation. His corporate responsibilities included leadership of several business areas; Quality, where he led global process re-engineering and certification; Business Ethics and Conduct, where he led worldwide compliance and education; Law, where he was the Chief Legal Officer; and Corporate Governance, where he led the implementation of new governance structures and controls.

Mr. Morrison received a Bachelor of Business Administration from the University of Michigan in 1971, a Juris Doctor from the University of South Carolina in 1975. In 1997, he completed the Advanced Management Program at the Harvard Graduate School of Business.
I. Spectrum of Class Relief

This presentation will provide an analysis of recent class action litigation, summarizing class issues before the Supreme Court, the decisions of which will continue to shape the way an attorney litigates class action cases. A class may arise from one cinematic event such as an airplane crash or train derailment, or a class can arise from discriminatory treatment over the span of a decade based on which 1.5 million plaintiffs seek injunctive relief, as recently alleged in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). Because most class actions find an end in either settlement or dismissal, attorneys rarely try class actions. The high costs associated with litigating a class action, coupled with an unpredictable exposure to damages, provide companies with minimal incentive to "go the distance" and try a class action lawsuit. But more class actions should be tried to verdict because (1) during the trial the court can alter or amend the class definition or even decertify the class, (2) defendants can win jury verdicts against many class representatives, and (3) fully developed trial records provide for complete appellate review and reversal of adverse verdicts.

Class actions cast a large and dark shadow over our civil justice system. One empirical study of federal class action settlements over a two year period revealed that district court judges approved 688 class settlements "involving nearly $33 billion." Brian Fitzpatrick, *An Empirical Study of Class Action Awards and Their Fee Awards*, 7 J. Emp. Legal Studies 4, at 811 (Dec. 2010) (examining 2006 and 2007 as a sample for federal class action settlements). Most of these class action settlements involved securities law litigation, which accounted for forty percent of the settlements in 2006 and thirty five percent of the settlements in 2007. *Id.* Labor and employment law and consumer law remained at distant second and third, accounting for fourteen and twelve percent of the number of class settlements, respectively. *Id.*

II. Before Trial: Certification and the "Death-Knell"

Class certification is most often seen as the "death knell" for a case. *See generally Falk v. Dempsey-Tegler & Co., Inc.*, 472 F.2d 142 (9th Cir. 1972). To class action litigants, the pre-trial battle fought at the certification stage is regularly and reasonably perceived as the last battle. An attorney litigating a class action case must take into account constitutional considerations, the importance of challenging insufficient expert evidence, and the proper use of Rule 23 regarding class certification.
A. Due Process

In his article, Class Action Defendants' New Lochnerism, Mark Moller assesses a class defendant's evidentiary hurdles under the historical notions of due process. 2012 Utah L. Rev. 319 (2012). He notes that case law dealing with issues of due process in class actions focuses primarily on the rights of absent class members. Id. The due process rights of defendants are analyzed much less frequently. Id. Plaintiffs and courts use "the class action device to pressure institutional defendants to provide relief for undeserving claims." Id. at 320. Moller argues that this amounts to a deprivation of property without due process of law unless class issues really are found to predominate after a rigorous examination by the trial court.

Plaintiffs commonly argue that "adversarial resolution of each class member's claim would pose 'insurmountable practical hurdles' for plaintiffs and impose enormous ancillary costs on courts. Id. at 387 (quoting Hilao v. Estate of Marcos, 103 F.3d 767, 786-87 (9th Cir. 1996). They also contend that "limitations on defendant's opportunities to present individualized evidence" does not violate due process because "evidentiary shortcuts are tolerably accurate in the run of cases." Id.

Theoretically, "no person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV § 1. But even after Wal-Mart v. Dukes, some courts have erroneously emphasized efficiency over predominance. See Butler v. Sears, 702 F.3d 359 (7th Cir. 2012). With that in mind, a defense attorney must make every use of the Rule 23 prerequisites and other potentially dispositive arguments before heading into trial.

B. Rigorous Review: Bring Daubert to Certification

This year marks the twentieth anniversary of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), a decision that has shaped two decades of litigation. In Daubert, the Court held that (1) the "general acceptance test" is not a necessary precondition to admissibility under the Federal Rules of Evidence and (2) the trial judge has the task of ensuring that the expert is qualified, the expert's testimony is based upon a reliable foundation, and the expert's testimony is relevant to the case. Id.

Jurisdictions differ on whether Daubert is applicable at the class certification stage. For example, the Third Circuit stated that “[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis.” In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008). More directly, the 11th Circuit stated, “the district court must perform a full Daubert analysis before certifying the class if the situation warrants.” American Honda Motor Co. v. Allen, 600 F.3d 813, 815–
16 (7th Cir. 2010). On the other hand, the district court in Dukes held that Daubert did not apply in class certification proceedings. Commenting on this aspect of the district court's ruling, the Supreme Court observed "we doubt that is so." Dukes, 131 S.Ct. at 3554-55 (emphasis added). In this way, the Supreme Court hinted that if it were properly presented with the question, it might well hold that Daubert applies in this context.

The Supreme Court's dictum left some courts unsatisfied. The Eight Circuit rejected the idea that a trial court is required to conduct “an exhaustive and conclusive Daubert inquiry” at the class certification stage. In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613-614 (8th Cir. 2011). Instead the court approved of “a focused Daubert analysis which scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.” Id.

Recently, the Supreme Court granted writ of certiorari from the Third Circuit in Comcast Corp. v. Behrend and will answer the following question: “Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” 133 S.Ct. 24 (2012). In the opinion to be reviewed, Third Circuit Judge Jordan had dissented in part arguing that damages could not be proved using evidence common to the class and that the district court abused its discretion in certifying a class because the plaintiffs' expert did not meet the demands of Daubert. Behrend v. Comcast Corp., 655 F.3d 182, 216 (3d Cir. 2011) (Jordan, J. dissenting).

By granting writ in the Comcast case, the Supreme Court should resolve the "doubt" previously expressed in Dukes as to whether Daubert is mandatory at the class certification stage. If the Court holds in the affirmative, this will heighten the evidentiary standard to be met by the putative class at the certification stage.

C. Class Certification Prerequisites Before "Predominance"

A party seeking class certification must first establish the prerequisites of Rule 23(a), namely: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a) (emphasis added).

1. Numerosity

Courts have long held that plaintiffs seeking to satisfy Rule 23's numerosity requirement need not provide a precise quantification of their class, since a court may make common sense assumptions to support a finding of
numerosity." Pecere v. Blue Cross and Blue Shield, 194 F.R.D. 66, 70 (E.D.N.Y. 2000). See also Wallace v. Powell, No. 3:09-CV-286, 2012 WL 6552134, *5 (M.D.Pa. Dec. 14, 2012) (stating there is "no single magic number" that exists to satisfy numerosity). Instead, plaintiffs must show "some evidence of or reasonably estimate the number of class members." Id. In Pecere, the court held that that the plaintiffs did not satisfy the numerosity requirement with a "bald assertion" that the class represented by plaintiffs was so numerous that joinder of all members is impracticable. Id.

In addition, the court stated "in determining whether a proposed class is so numerous that joinder of all members is impracticable, courts should examine the following factors: (1) judicial economy; (2) the geographic dispersion of class members; (3) class members' financial resources; (4) the ability of claimants to institute individual lawsuits; (5) knowledge of the names and existence of the potential class members; and (6) requests for prospective injunctive relief that would involve future class members." Id. The court concluded that while plaintiffs submitted affidavits of doctors and proposed numerical estimates based on the amount of policyholders, the plaintiffs failed to demonstrate how "the methodology used to reach this conclusion" was used a basis for determining a "reasonable estimate of the number of persons who fit within the proposed class." Id. "Just as there is a 'common sense assumption' to support a finding of numerosity, it should follow that the court may make a 'common sense assumption' against numerosity." Id. at 71.

Accordingly, to show numerosity plaintiffs must provide not only reliable evidence as to the class size, but also apply a reliable methodology to establish a reasonable estimate of persons who fall within the proposed class.

2. Commonality

In Dukes, the Supreme Court identified the commonality requirement as "the crux" of the case. 131 S.Ct. at 2550. The Court observed that "class members' claims depend upon a common contention such that the determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." Id. at 2551. The plaintiff must demonstrate "the capacity of class wide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation." Id. According to the Supreme Court, Rule 23 requires "significant proof . . . that Wal-Mart operated under a general policy of discrimination." Id. at 2554. Without evidence of a company wide policy, the Court held that the plaintiffs failed to prove commonality. Id. at 2555.

This decision clarifies what a plaintiff is required to show to meet Rule 23's commonality test. To merit class certification, the plaintiffs must demonstrate, not only that they suffered a "violation under the same provision of law," but that the claims of every member of a putative class will "productively be
litigated all at once." *Id.* at 2551.

3. **Typicality**

In *Rapcinsky v. Skinnygirl Cocktails*, LLC, the court denied certification under the typicality requirement, based on the plaintiff's particular varying and unique circumstances in purchasing defendant's product. No. 11 Civ. 6546 (JPO), 2013 WL 93636, at *5 (S.D.N.Y. Jan. 9, 2013). The court reasoned that a representative's claim must be "typical of the class so as to prevent a false prophet from being the standard for the entire class." *Id.* Here, the plaintiff was unique because, while he sought to represent putative class members in New York and Massachusetts, he brought the claim under New York law even though he had originally purchased the product in Massachusetts. *Id.* Using the typicality analysis, the court concluded that the particularities of the plaintiff's own allegations separated him from those of other putative class members such that "as goes the claim of the named plaintiff, so go the claims of the class." *Id.* at *6 (quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)).

To satisfy the typicality requirement a court must:

Compare the situation of the proposed representative to that of the class as a whole by considering the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims.

*In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597 (3d Cir. 2009).

4. **Representative and "Superiority"**

In *In re Aqua Dots Products Liability Litigation*, plaintiffs alleged that children swallowed a large quantity of small toy beads and became ill, some seriously, because of a chemical used to coat the toy beads. 654 F.3d 748, 750 (7th Cir. 2011). The distributor recalled the product and instructed consumers to take the product away from children and to contact the distributor in exchange for a non-defective replacement. *Id.* In addition, the distributor offered consumers a comparably priced toy and honored money-back requests. *Id.* Accordingly, approximately 600,000 Aqua Dots kits were returned. *Id.* The purchasers of 500,000 kits received refunds. *Id.* Although plaintiffs' children were not harmed nor did they seek a refund, plaintiffs challenged the adequacy of the recall program, sought a full refund under the Consumer Product Safety Act, and sought punitive damages under state law. *Id.*
Initially, the panel on multidistrict litigation denied plaintiffs' motion for class certification and the Seventh Circuit granted an interlocutory appeal under Federal Rules of Civil Procedure 23(f). Id. The lower court had denied certification using a "policy approach." Id. The lower court found that returning the product was "superior" to pursuing litigation. Id. On appeal, the Seventh Circuit held that the plaintiffs had standing based on their financial loss, but, in opposition to the district court, the court held that a recall campaign is not a form of adjudication under the federal rules. Id. Finally, the circuit court held that the district court correctly denied the class but for the wrong reasons. Id. at 751. Instead of employing a Rule 23(b)(3) "superior" analysis based upon policy, the circuit court analyzed the facts related to the individual class representatives and denied certification under Rule 23(a)(4). In the opinion, Judge Easterbrook stated:

Plaintiffs want relief that duplicates a remedy that most buyers have already received, and that remains available to all members of the putative class. A representative who proposes that high transaction costs (notice and attorneys fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class member's interests. . . . [T]he principal effect of class certification, as the district court recognized, would be to induce the defendants to pay the class's lawyers enough to make them go away; effectual relief for consumers is unlikely.

Id. at 752.

The cases above illustrate that attorneys should frame arguments within the text of Rule 23(a) in order to defeat certification. Based on the makeup of the class seeking certification, a defense attorney must attack each of the Rule 23(a) factors while keeping an attentive eye on how and when to appeal, in the event certification is granted.

5. Rule 23(b) "Predominance"

As soon as is practicable after a class representative sues, the court must determine whether to certify the class as a class action. Fed. R. Civ. P. 23(c)(1)(A). The court must (a) "define the class and the class claims, issues, or defenses" and (b) "appoint class counsel under Rule 23(g)." Id. at 23(c)(1)(B). The court may always alter or amend the class as the case proceeds. See Fed. R. Civ. P. 23(c)(1)(C).

The court will grant certification when the Rule 23(a) requirements are met and when "the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). The
Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (holding that plaintiffs did not satisfy Rule 23(b)(3) predominance standard "given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure.").

Other important factors that impact the "predominance" inquiry may include the number of products involved, the number of defendants, or the number of defects claimed. See *In re Telecommunications Pacing Systems, Inc.*, 172 F.R.D. 271, 297 (S.D. Ohio 1997). See also *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996) (certification denied against manufacturer where class members stood in different positions relative to manufacturer's conduct).

In *Dukes*, the Court found that a class cannot be certified when a defendant "will not be entitled to litigate its statutory defenses to individualized claims." Allan Dinkoff, *Supreme Court Issues Far Reaching Decision in Wal-Mart v. Dukes*, 65 Consumer Fin. L.Q. Rep. 244, 245 (Fall/Winter 2011) (citing *Dukes*, at 2561). Therefore, "plaintiffs should find it more difficult to satisfy the predominance, manageability and superiority requirements of Rule 23(b)(3) in a class of any size." *Id.* In the products liability context, the defense may successfully argue that its affirmative defenses, such as product misuse or the statute of limitations, require individualized fact-finding at trial and thus defeat certification.

Because a district court is given broad authority to both monitor and reconsider its class certification decision as discovery unfolds under Rule 23(c)(1), an attorney must methodically bring to the court's attention the ways in which Rule 23(b)(3) is not satisfied. For example, a defendant may propound "class action manageability" under choice of law principles. See *Hale v. Enerco Group, Inc.*, No. 1:10CV00867, 2012 WL 678698, *4 (N.D. Ohio, Dec. 29, 2012). In *Hale*, the defendant sold heaters in 38 states in which plaintiffs had claimed economic loss for an alleged product defect. In resolving the conflicts of laws, the court held that the "law presumes that the law of the state where the injury occurred controls." *Id.* at *5. The court held "it is difficult to imagine how plaintiffs' desire to impose the law of a single jurisdiction upon all jurisdictions where large scale-injuries facilitates [commercial intercourse]. . . . [T]heir would frustrate the tort policies of individual states." *Id.* In denying plaintiffs' motion for class certification, the court concluded that while the claimed damages of each potential class member "are small and therefore individual suits are unlikely. . . . This does not, however, change the fact that the present lawsuit is a particularly weak candidate for class treatment." *Id.* "Nothing permits the court to overlook the predominance requirement of Rule 23(b)(3) because individual actions would probably not be litigated." *Id.* at 14.
An attorney must challenge the cohesiveness of the class by raising specific questions peculiar to each class member. By doing so, an attorney may defeat class certification even if the plaintiffs meet the requirements of Rule 23(a).

III. Trial

Assuming that the court has granted certification and does not "alter or amend" certification before final judgment, an attorney must enter a class action trial cognizant of its nuances. As with any trial, an attorney has three audiences: the jury, the judge, and the appellate court. First, an attorney must understand, as much as practicable, the worldview of each juror in order to craft those arguments that appeal most to those respective worldviews. Second, because a judge has little desire to be overturned on appeal, an attorney must highlight those discretionary decisions made by the judge, particularly as it relates to evidence about the entire class. Finally, the attorney must build a robust in-trial record that, if necessary, will illustrate to the appellate court discretionary abuse such as improper instruction to the jury, improper denial of probative evidence, or improper class certification under Rule 23. A constant and simultaneous awareness each audience will position an attorney to employ those arguments catered to the ear of each respective listener.

A. Juror Knowledge as to the Legal Effect of its Verdict

A class action jury verdict against a defendant company is somewhat akin to a death penalty in a criminal case. The jury must understand the full implications of its decision. Will the jury know and understand the true ramifications of its verdict, especially as it pertains to a damages determination for the class?

In re Air Crash Disaster, the court addressed the issue of whether counsel can inform juries of the "legal effect" of their verdict. 86 F.3d 498, 533 (6th Cir. 1996). The court held that a judge must consider: (a) whether the legal effect is closely related to the factual issue that the jury must decide; (b) whether informing the jury would provide useful context for the decision; and (c) whether a failure to inform the jury creates the risk that the jury will operate on a false assumption about the implication of its decision. Id. The court pointed out the trial court had allowed the jury to learn that, absent a finding that airline had acted willfully and wantonly, certain passengers on board the plane that crashed could not recover above a contractual liability limit printed on ticket. Id. The court reasoned:

We do not believe that hiding the legal consequences of a decision from a jury is the best or only means of coping with the danger of prejudice in a case like the one now before us. If we think the jury unable to grasp the importance of maintaining a legal distinction
between two liability tests, the answer, to paraphrase Thomas Jefferson, is not to take power from them, but to educate their discretion. . . . [I]f a jury is told of the reasons behind a certain legal distinction, either by the parties or by the court, there is no reason, other than a simple lack of faith in the abilities of our citizens, to think that they will not uphold the law. 

_Id._ at 533-34.

The court concluded that while this reasoning "does not extend to all situations," when "the consequences of the jury's decision depend on a legal issue that is inseparable from the factual issue in dispute" such an instruction is proper. _Id._ at 534. "If the jury is kept ignorant of the true legal context of the words it must apply to the facts of a case, it will invariably invent its own, replacement context. . . . [I]t is better that the jury be 'prejudiced' by the true version of the facts than by its own collective fictions." _Id._

**B. Trial Techniques**

In _Consorti v. Armstrong World Industries, Inc._, the court applauded the in-trial techniques, used by the district court, as "intelligent methodology" to condense the magnitude of facts and issues presented to the jury in this class action. 72 F.3d 1008 (2d Cir. 1995) _judgment vacated in other grounds_, 116 S.Ct. 2576 (July 1, 1996). In this case, the district court permitted counsel to provide the jury with specialized notebooks, which contained a photograph of each plaintiff with biographical information. _Id._ In addition, the court permitted the use of demonstrative evidence, such as charts and other visual aids, to distinguish the uniqueness of the plaintiffs from other members of the class. _Id._ Moreover, the district court judge allowed counsel to provide visuals aids, such as, time lines to help the jury differentiate between relevant periods in state of the art. _Id._ The judge encouraged the jury to take extensive notes. _Id._ Moreover, the judge gave the jury periodic cautionary and limiting instructions and used the verdict forms to carefully guide the jury through issues it needed to consider and resolve. _Id._ Finally, the court allowed counsel to periodically address the jury throughout the course of the trial on issues of the law and fact in order to prevent confusion. _Id._

An attorney should utilize and tailor each of these in-trial techniques to the facts of the class action to provide the jury with the knowledge to make an informed decision. An interim statement by counsel or calculated use of jury instructions could make a difference to the juror's perception of the issues and have an effect on the outcome of a verdict.
C. Jury Research

Jury research in consumer products liability class actions reveals juror bias, potential successful defense arguments, and inherent in-trial risks related to the jury verdict.

First, the research demonstrates the importance of the jury's perception of the class representatives. The research suggests that class representatives can be attacked as untrustworthy and undeserving of damages because of their individual uses of products. Research also reveals that jurors place a high value on seller/manufacturer fairness to consumers.

Second, research suggests varied lines of attack such as the representative plaintiffs' inadequate research of the product, the plaintiffs' failure to adhere to the manual and product safety guidelines, the plaintiffs' non-use of existing customer service options for resolution of their problems with the product, and the plaintiffs' election to file suit instead of following through with existing and reasonable consumer complaint mechanisms. In rebuttal, the defendant can successfully present its position as a manufacturer working to improve its product over time.

Finally, jury research indicates three risks inherent to class action verdicts. First, the "compromise verdict" is a common false dilemma for jurors when, as mentioned above, jurors remain unaware of the implications of the verdict. From a juror's perspective, especially in the class action context, there is no real downside for the defendant when the plaintiff seeks small compensatory damages based on his use of a product. Plaintiffs' alleged small compensatory damages multiplied by hundreds of thousands of class members, equates to a multi-million dollar verdict, but the uniformed jury does not know that. Second, rarely will plaintiffs' counsel select unappealing class representatives for the class. The class representatives often possess the "most appealing" and sympathetic plaintiffs from the class that can tell a captivating story to the jury. Third, if a manufacturer has made changes to the design of the product, some jurors will inevitably perceive product changes, and even updates in the user manuals, as flaws in the design of the product. This knowledge should enable an attorney to enter the courtroom with an open eye to inherent risks, and with that knowledge frame arguments to overcome false assumptions often held by jurors.

IV. Two Shots at Appeal

The prudent attorney has established the record over the life of the litigation to show, if necessary, that the lower court has committed reversible error. The petitioner will need to demonstrate that class certification was improper, that evidence submitted to the jury was improperly allowed or denied, or that the jury did not receive the proper instruction. Rule 23(f) applies to class action appeals and states:
A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.


The Committee Notes accompanying Rule 23(f) remarks: "The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23(f), Advisory Committee Note, 1998 Amendments. "Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Id. Moreover, the notes state:

[M]any suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

Id.

In Prado-Steinman ex rel. Prado v. Bush, the court vacated the district court's certification of the plaintiff class and provided the following factors as "guideposts" for determining whether to grant an interlocutory appeal. 221 F.3d 1266, 1274 (11th Cir. 2000). First, the court must consider whether the district court's ruling is likely dispositive of the litigation, creating the "death knell" for either party. Id. Second, a court should evaluate whether the petitioner has shown a substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion. Id. Third, a court should ask whether the appeal will permit the resolution of an unsettled legal issue that is "important to the particular litigation as well as important in itself." Id. Fourth, a court should consider the nature and status of the litigation before the district court (i.e. dispositive motions to add new class representatives or claims that may redefine the issues in the case). Id. Finally, a court should consider the likelihood that future events may make immediate appellate review more or less appropriate. Id. at 1274-75. A petitioner should consider how it satisfies each factor mentioned.
above, as the court noted that interlocutory appeals remain generally disfavored as "inherently disruptive, time-consuming, and expensive." *Id.* at 1276.

If the appellate court does not grant the defendant's interlocutory appeal or affirms class certification, an attorney must develop the record at trial. In the event defendant does not prevail at trial, an attorney has a "second shot" to appeal an adverse verdict with a complete trial record in hand.

V. Conclusion

Because so few certified class actions go to verdict, many questions remain unresolved. For example, what specific individualized evidence may the defense proffer, not only about the class representatives, but about the class in its entirety? If allowed, how will a court practicably manage the inevitable efficiency and monetary concerns in presenting individualized evidence? Must factual disputes be resolved at the certification stage in order to comply with Rule 23(a)? Finally, how much can the jury know about the aggregate effect of their damages determination?

Pay close attention to the Supreme Court's treatment of the evidentiary burdens placed upon plaintiffs in the class action context. This year, in particular, the Court should provide *Dukes*-like insight into litigating, and trying, class action cases.