EVALUATING AND INITIATING THE CLASS ACTION SUIT

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I. IDENTIFYING A CLASS ACTION.

Class actions are unique types of lawsuits; frequently they are the only way for the "little guy" to bring his claim against corporate America. However, these opportunities must be chosen with care. From the plaintiffs' and plaintiffs' attorney's perspective, a detailed evaluation of a potential class action is imperative due to the enormous amount of resources that class actions consume in both time and money. Typically, a potential case is identified by a lawyer as he or she is discussing a general complaint or issue with the client. At some point during the investigation, the lawyer discovers that the client's case could be brought as a class action. Once a possible class action is identified, then a substantial investigation and evaluation must begin. A thorough analysis of a class claim involves four phases: (1) liability investigation; (2) damages assessment; (3) evaluating the defendant(s); and (4) evaluating the case using the Rule 23 standards.

A. Assessing Liability

Just as any new case evaluation begins with an assessment of liability and damages, so too does a class action. The liability analysis in a class action has many steps and is multi-focused. The primary question is whether there is sufficient information to show that defendant(s) participated in the alleged conduct. This investigative step is the same in a class action as it is in an individual case. Information is obtained from witnesses (frequently former employees), publicly available sources, internet searches, newspaper articles, public filings and Freedom of Information Act Requests, and may include the assistance of a private investigator and/or economist.

If the case passes the liability screening then the question becomes whether defendant(s) is liable to each member of the class in the same or similar manner. Rule 23(b)(3) classes exist only where common questions of law or fact predominate. If each member of the class requires a different analysis of the law or a separate set of facts to prove liability, then a class is not appropriate. The securities class action brought pursuant to the Private Securities Litigation Reform Act of 1995 (PSLRA) has been described as the "quintessential" class action - that is because the acts of the defendant company affect every member of the class in the same way and damages can be calculated based on mathematical formulas. Similarly, a group of direct purchasers from a price fixing defendant is well situated for class treatment.

A class is destined to fail when there are extensive individual issues of proof. This is particularly true in cases where the class alleges a fraudulent course of conduct by the defendant(s) that was carried out orally. In such a case the court would have to assess what each individual plaintiff heard and believed, thereby defeating the purpose of a class. Thus, there must not only be liability, it must be of

a type that affected the class homogeneously. If an investigation reveals liability on a classwide basis, then the attention is directed to damages.

B. Identifying Damages

Generally, class cases are taken on a contingency fee basis. Therefore, the attorneys for the class advance all the expenses and time necessary to prosecute the case. As such, damages are a focal point during the initial stages of the investigation. The attorneys evaluating a class case need to be able to quantify the class's damages. Ordinarily, the attorneys can use the information available to estimate what damages could be if the case is successful. If this figure is reasonably sound when compared to the amount of time and resources that will be expended on the case, then one can proceed to the next step in the assessment. However, if the value of damages requires more clarification (for example, damages resulting from a price fixing scheme require an advanced economic and statistical review to create the appropriate multiple regression analysis) then it is wise to employ an expert prior to filing your complaint to help quantify damages and add to your Rule 11 basis for filing the complaint. Experts are an essential tool in any class case and early involvement by the expert is often worthwhile.

Like the liability analysis, the damages analysis can be a make or break point for any case. The relationship between damages and liability is something of a sliding scale. Generally if the total damages are small, even a clear liability case might get passed. Conversely, if the total damages are astronomical, a tougher liability case may be worth the risk, especially if the area of law addressed in the claim is one with which the attorney is familiar.

C. Determining Collectibility

Once a plausible cause of action has been identified, and reasonable damages have been assessed, the pre-filing investigation turns to the issue of collectibility, i.e., can we collect from the defendant(s)? Even the promise of astronomical damages can be refused if the defendant is insolvent. If a defendant declares bankruptcy the case gets much more complicated and may have to be litigated in front of a bankruptcy judge with little or no experience in dealing with the legal issues at hand. Nevertheless, many companies have insurance policies which cover certain types of claims and may weigh in favor of bringing the claim, even in the face of near insolvency. For instance, officers and directors carry liability insurance which covers them in securities cases. A thorough case evaluation should include a review of the company's balance sheet as well as an assessment of any possible insurance coverage.

D. Rule 23 Analysis

A rigorous Rule 23 analysis follows a finding of liability and collectable damages. Any class complaint must be prepared to withstand an immediate attack via a motion to dismiss, therefore pre-class filings should be drafted to discourage as many of defendant(s)' arguments as possible. Without addressing the specifics of Federal Rule of Civil Procedure 23(a), a thorough evaluation includes a review of the following elements: (1) numerosity; (2) commonality; (3) typicality; (4) fair and adequate class representatives; and (5) predominance and superiority.

1. Numerosity is obviously important. If you do not have enough people, why bother with a class action? Courts generally refuse to state a magic number, but an argument can be made that 50 or fewer people could be properly joined under Fed.R.Civ.P. 20. Typically most classes are much, much larger. Even state classes routinely get beyond100 class members and nationally it is common to see classes in the thousands. In the In re Cigarettes Antitrust Litigation case currently pending before Judge Forrester in the Northern District of Georgia, the class maintains approximately 2,500 members. A recent case focusing on class size is Upshaw v. Ga. Catalog Sales, Inc., 2002 WL 745640 (M.D. Ga. 2002).

2. Commonality - Commonality and predominance are two issues that need to be addressed when considering liability in a class case. Obviously if you have a company that is doing bad things, like lying to people, but is smart enough to lie orally rather than in writing, then the commonality prong can be a problem at the class certification stage because the lies could have been told in different ways, by different people, etc.. In what is a perverse incentive for companies, deciding to mislead people orally is much safer because plaintiffs have problems getting a class certified if the harm is predicated on one on one interaction with a class member and an agent/employee of the defendants.

The issue of commonality arises most often in consumer cases where you have an agent telling a putative class member something. Even if the defendant's employees all work off the same general script, it is very difficult to get the class certified if the court believes that the final harm was done based upon reliance on an oral misrepresentation of fraud. This has been especially true in the 11th Circuit of late. See Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228 (11th Cir. 2000); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997); and Andrews v. American Telephone and Telegraph Co., 95 F.3d 1014 (11th Cir. 1996); Sikes v. Teleline, Inc. USA, 281 F.3d 1350 (11th Cir. 2002).

3. Typicality addresses some of the same concerns. Not only do the claims need to be factually and legally similar if not identical, but courts prefer the factual scenario where you have a lot of class members that have been harmed by the same scheme rather than class members being harmed in different ways.

4. Adequate Class Representation - Fed.R.Civ.P. 23(a)(4) requires that class representatives "fairly and adequately protect the interests of the class." In the Eleventh Circuit, this rule was interpreted in Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987), to require that (1) the class representatives' interests are not antagonistic to the interests of other members of the class, and (2) the class representatives, through their attorneys, are prepared to prosecute the action vigorously. Id. at 726, citing Griffin v. Carlin, 755 F.2d 1516, 1532 (11th Cir. 1985).[1] Since it was articulated in 1987, the Kirkpatrick interpretation has been regularly applied in the Northern District of Georgia (see, e.g., In re Miller Industries, Inc. Sec. Litig., 186 F.R.D. 680, 687 (N.D.Ga. 1999); Wells v. HBO & Co., 1991 WL 131177, *6 (N.D.Ga. 1991)) and by other courts within the Eleventh Circuit (see, e.g., In re Terazosin Hydrochloride Antitrust Litig., 203 F.R.D. 551, 554-555 (S.D.Fl. 2001); Fabricant v. Sears Roebuck, 202 F.R.D. 310, 314-315 (S.D.Fl. 2001); Morris v. Transouth Financial Corp., 175 F.R.D. 694, 697 (M.D.Al. 1997); In re Disposable Contact Lens Antitrust Litigation, 170 F.R.D. 524, 532 (M.D.Fl. 1996)). Judge Thrash of the Northern District of Georgia recently applied this standard in In re Theragenics Sec. Litig., 205 F.R.D. 687 (N.D.Ga. 2002), as follows:

The legal standard for adequacy of class representation is well established in the Eleventh Circuit. The standard involves inquiry into questions of whether Plaintiffs' counsel are qualified, experienced and generally able to conduct the litigation. Kirkpatrick, 827 F.2d at 726; Griffin v. Carlin, 755 F.2d 1516, 1532 (11th Cir. 1985). "[A]dequate class representation generally does not require that the named plaintiffs demonstrate to any particular degree that they will individually pursue with vigor the legal claims of the class." Kirkpatrick, 827 F.2d at 727. ... The fact that the proposed Class Representatives are allowing their counsel to prosecute the case demonstrates the exercise of good judgment and not abdication of their obligations as class representatives. Miller Industries, 186 F.R.D. at 687-88.

The approach taken by the Eleventh Circuit is well grounded in Supreme Court precedent. ... [T]he Supreme Court stated that "[r]ule 23(b), like the other civil rules, was written to further, not defeat the ends of justice. The serious fraud charged here is clearly in that class of deceitful conduct which the federal securities laws were largely passed to prohibit and protect against." Surowitz, 383 U.S. at 373-74, 86 S.Ct. 845. 205 F.R.D at 696. Although Theragenics is a securities fraud case, Kirkpatrick's interpretation of Rule 23(a)(4)'s adequacy requirement is in no way limited to securities cases; indeed, it has been applied in a recent horizontal price-fixing case in this District (see In re Polypropylene Carpet Antitrust Litig., 178 F.R.D. 603, 613 (N.D.Ga. 1997), and would be applicable to all types of class actions.

Despite the onerous appearance of this requirement, class representatives with moderate to lower levels of involvement in class cases routinely withstand adequacy challenges. See, e.g., Theragenics, 205 F.R.D. at 696-697; In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 336 (E.D.Mi. 2001)(class representatives were adequate despite varying methods of purchase, hypothetical conflicts in allocating damages, familial relationship with one of class counsel, lack of knowledge or interest in outcome); Bromine Antitrust Litigation, 203 F.R.D. 403, 410 (S.D.In. 2001)(adequacy requirement satisfied by designated representatives even though officers were ignorant of details of lawsuit and were relying upon their attorneys, and representatives' volume of purchases was low); In re Aluminum Phosphide Antitrust Litig., 160 F.R.D. 609, 614 (D.Ks. 1995)(adequacy requirement met despite no first-hand knowledge of facts and a small financial interest at stake); In re Catfish Antitrust Litig., 826 F.Supp. 1019, 1037 (N.D.Miss. 1993)(adequacy does not require detailed knowledge of facts, law, or legal procedure); In re Integra Realty Res., Inc., 262 F.3d 1089, 1112 (10th Cir. 2001)(representative of defendant class was adequate despite having far greater potential liability than other defendants and despite fact that settlement created a pool to offset some of its litigation costs).

5. Predominance & Superiority. In a Rule 23(b)(3) class action, issues relating to predominance and superiority are the most challenging from the plaintiffs' perspective. Predominance is the area in which defendants most frequently focus their defense of a class case, suggesting that there are too many individual questions of fact, legal issues, evidence, and/or damages relating to each class member that the case is inappropriate for class treatment. A thorough and complete pre-filing analysis will address these issues and provide the basis for plaintiffs' response to the inevitable motion to dismiss.

Minor factual inconsistences or differences between the case are not necessarily fatal to the case. If the class gets structured and managed properly almost all differences can be addressed fairly and efficiently. When plaintiffs move for class certification, and maybe even before, counsel should not just cite cases where certification was granted and hope that the court decides that the current case is similar. Plaintiffs' counsel need to be proactive and go back to their initial case evaluation stage and present the court with a plan of how to run the case. This involves a lot of work, but by presenting the court with a well thought out, well-structured plan, even if the court ultimately does not accept it in its entirety, courts become more comfortable with, and accepting of, the inherent burdens of managing a class action.

In some cases, industrious attorneys have prepared case or discovery management plans that include graphs depicting all the different variations in state law or factual circumstances that might be applied to some of the claims or subclasses. Defense firms routinely produce these types of charts as part of their institutional knowledge based on legal issues they run into regularly. There is no reason that plaintiffs' firms should not try to be just as organized and just as on top of current developments in the law especially if you keep hearing the same arguments from defense firms. An example of courts entertaining this kind of state law analysis issues can be found in the General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3rd Cir. 1995) at 815, 816. Needless to say, when presenting this type of information to the court, plaintiffs' counsel must have a cogent, logical method of subdividing the class up based on the claims, geographical location or whatever the distinguishing factors are. Obviously plaintiffs' attorneys should not let defense firms articulate the differences amongst the class members. Some courts have hinted that any case involving the application of all 50 states' laws to a class are inherently unmanageable. Sikes v. Teleline Inc. USA, 281 F.3d 1350 (11th Cir. 2002).

Another way to reassure courts is a proposal advocating the use of specific jury interrogatories that could be used to determine subclass specific issues. Some commentators have suggested that developing specific factual questions articulating different states' legal standards could be used to allow the jury to effectively rule on each state's subclass's claims in a relatively simple fashion. Remember that creativity is the key.

With regard to defense arguments' that individual factual issues predominate rather than common issues, plaintiffs' counsel must focus on the fact that defendant's behavior as the proximate cause for the harm to the class. Obviously this will vary greatly from case to case, but there will always be differences in the way class members were treated unless they have all used the same contract or the same form, or bought the same stock, etc. Uniformity of the defendant's conduct and how that is articulated to the court will be a determining factor whether or not the class is successfully certified.

II. CHOICE OF VENUE - STATE OR FEDERAL

The majority of class actions are brought in federal district courts; in fact, there is currently proposed legislation that would mandate that all class actions be brought in federal court. Despite the suspicion that the federal court system is generally more favorable to defendants, the federal courts are frequently a more

appropriate venue for a class action, given the size, complexity and magnitude of class cases. Moreover, a number of the major types of class cases that are routinely certified -- securities, antitrust and employment -- are all brought pursuant to federal statutes, and therefore must be brought in the federal courts.

In a non-federal question class case, diversity is the basis for jurisdiction in the federal court. To maintain diversity jurisdiction, each class member must satisfy the amount in controversy requirement of $75,000. Courts have held that individual claims under the limit cannot be aggregated to meet the requirement. Nevertheless, if the actual damage amount for each plaintiff is slightly under the $75,000 bar, one might consider adding the amount of appropriate punitive damages to each individual claim. In Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996), the Eleventh Circuit considered whether punitive damages could be aggregated in a class case to meet the jurisdictional bar. The court stated that "multiple plaintiffs may aggregate claims if they have 'a single title or right in which they have a common or undivided interest.'" Cohen, 204 F.3d at 1074 (citing Tapscott, 77 F.3d at 1357 (citation omitted)). The Tapscott court noted that punitive damages were "intended to serve the collective good" under Alabama law and therefore allowed aggregation for amount in controversy purposes. Cohen, 204 F.3d at 1075 (citing Tapscott, 77 F.3d at 1358-59).

The Tapscott decision was contrary to Lindsey v. Alabama Tel. Co., 576 F.2d 593, 595 (5th Cir. 1978), which held that under Alabama law, punitive damages could not be aggregated for jurisdictional purposes. Cohen, 204 F.3d at 1074. "Because the same state law [Alabama] governed punitive damages in each case, there [could] be no difference between the two cases in so far as the 'common and undivided interest' analysis." Id. The court, however, noted that laws in other states allowed aggregated punitive damage awards under the "common and undivided interest" analysis.[2] Id. at 1075, n.5.

More recently, the Eleventh Circuit held that attorney's fees recoverable under the Georgia RICO statute cannot be aggregated for the purposes of meeting the amount in controversy requirement for diversity jurisdiction. Darden v. Ford Consumer Finance Company Inc., 200 F.3d 753 (11th Cir. 2000). In Darden the defendant attempted to remove the case from state to federal court based on diversity jurisdiction, and following an appeal to the Eleventh Circuit, the case returned to the Georgia state court where it was originally filed. See also Leonard v. Enterprise Rent-A-Car, 279 F.3d 967 (11th Cir. 2002) for a good analysis of the amount in controversy question.

II. TYPES OF CLASSES

There are three types of classes under Rule 23(b), as well as opt-in classes pursuant to 29 U.S.C. §216(b), the Fair Labor Standards Act (FLSA).

As Rule 23 states, the (b)(1) class is a class in which the prosecution of individual actions might adversely affect other parties opposing the class or absent class members and section (b)(2) is the action in which the party opposing the class has acted or refused to act on grounds generally applicable to the class. The main differences between the (b)(1) and (b)(2) classes versus (b)(3) classes are the notice provisions and the ability of class members to opt out. Rule 23 (b)(3) classes

have to use the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort.

A. Rule 23(b)(1) - Class Actions Maintainable

"An action may be maintained as a class if the prerequisites of subdivision (a) are satisfied and in addition: (1) prosecution of separate actions by or against individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest." Fed.R.Civ.P. 23(b)(1).

1. The (b)(1)(a) Class

When deciding whether or not to certify a class under (b)(1)(a), the court has to decide whether separate actions are likely to result if a class is not certified. In re Dennis Greenman Securities Litigation, 829 F.2d 1539 (11th Cir. 1997). This is essentially a practical determination but if the court decides that separate actions are not likely to be brought for whatever reason including prohibitive cost, then the requirements of 23(b)(1)(a) have not been met. If the court decides that separate actions are probably going to be brought, it then has to decide whether those actions run the risk of creating inconsistent verdicts or adjudications. This prong is satisfied in cases where the defendant is obliged by law to treat class members alike.

Under 11th Circuit precedent, 23(b)(1)(a) is really only applicable to actions seeking injunctive or declaratory relief. In In re Dennis Greenman the court explicitly rejected class certification under 23(b)(1)(a) for a class seeking money damages. This prevents plaintiffs from asserting a claim for injunctive relief in order to certify a class under 23(b)(1)(a) even though the class' ultimate goal would be to recover money damages.

2. The Section (B)(1)(b) Class

Rule 23(B)(1)(b) classes have been referred to as limited fund classes. They generally concern a case where there is a fixed asset, a fund or some sort of property that all the class members have an interest in. In each situation, the court cannot decide interest of one class member without affecting the interests of all the class members. In re Dennis Greenman, 829 F.2d at 1546.

B. The Rule 23(b)(2) Class

The Rule 23(b)(2) class is commonly referred to as the civil rights class where class representatives are seeking broad injunctive or declaratory relief against some form of discrimination. Penson v. Terminal Transport Co., 634 F.2d 989 (5th Cir. 1981). Once again courts are wary of allowing a class primarily seeking monetary damages to use the (b)(2) provision under the guise of seeking injunctive relief.

When evaluating a class certification issue under (b)(2) the court has to decide what the class is really seeking - monetary relief or injunctive/declaratory relief. If the class counsel cannot convince the court that the class is primarily seeking injunctive relief, then the courts are not going to certify the class under (b)(2). Any claim advanced by the class for punitive damages or under a treble damage statute such as RICO or the antitrust statutes are probably going to be looked upon with disfavor by courts if you are seeking (b)(2) certification. Taylor v. Flagstar Bank FSB, 181 F.R.D. 509 (M.D. AL 1998). Again the courts exercise caution with regard to (b)(1)(a) and (b)(1)(b) and (b)(2) classes because of the above mentioned due process concerns which are the notice requirements and the ability to opt out. See Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983).

C. The Rule 23(b)(3) Class

The Rule 23(b)(3) class is the most common form of class action. Rule 23(b)(3) provides that one or more members of a class may sue as representative parties if the four requirements of numerosity, common questions, typicality and adequate representation are met, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commended by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action. Fed.R.Civ.P.23(b)(3).

As discussed herein, the requirements for this Rule are met where common issues predominate and the case can be well managed. See §D.5 above for a discussion of the predominance and superiority requirements.

1. Recent Eleventh Circuit Decisions Regarding Rule 23 Classes.

Several of the 11th Circuit decisions that any plaintiffs' attorney needs to consider are the level of burden that the plaintiff will encounter when proving each element of Rule 23. As long as the class counsel has done his work investigating prior to the class certification stage, certification should not be an insurmountable obstacle. Following are some recent cases that have addressed interesting and important class action issues. Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228 (11th Cir. 2000); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3rd 999 (11th Cir. 1997); and Andrews v. American Telephone and Telegraph Co., 95 F.3rd 1014 (11th Cir. 1996); Sikes v. Teleline Inc. USA, 201 F.3d 1350 (11th Cir. 2002); In Re Theragenics Corp. Securities Litigation, 205 F.R.D. 687 (N.D. Ga. 2002); Leonard v. Enterprise Rent A Car, 279 F.3d. 967 (11th Cir. 2002); Upshaw v. Ga. Catalog Sales, Inc., 2002 WL 74 5640 (M.D. Ga. 2002).

D. The FLSA 216(b) Class

An opt-in class action litigation can be brought against an employer pursuant to the Fair Labor Standards Act (FLSA) 29 U.S.C. §201 et. seq. Particularly, §216(b)

permits a claim to be brought by representatives on behalf of "similarly situated" individuals. 29 U.S.C.A. §216(b) provides:

Any employer who violates the provisions of section 206 [relating to minimum wage] or section 207 [relating to overtime and maximum hours] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. (Emphasis added).

In Hipp v. Liberty National Life Insurance Co., 252 F.3d 1208 (11th Cir. 2001), the Eleventh Circuit held that the decision to create and certify an opt-in class under §216(b) "remains soundly within the discretion of the district court." Id. at 1219 (citations omitted), and upheld the standard it had set in Grayson v. K Mart Corp., 79 F.3d 1086 (11th Cir. 1996), for determining what constitutes being "similarly situated." Hipp at 1219.[3]

Rule 216(b) classes are generally subject to a "two-tiered" certification analysis. First, the class is provided an initial certification which permits notice to all potential class members, and then the certification issue is addressed a second time following the close of discovery. See Hipp v. Liberty National; Bradford v. Bed Bath & Beyond, 184 F.Supp.2d 1342 (N.D.Ga. 2002).

IV. DELIVERING PROPER NOTICE TO CLASS MEMBERS

The typical method of delivering notice to class members in this jurisdiction and in others is by publication and direct mail. Some courts such as the Ninth Circuit seem to be embracing new technology by permitting electronic notification through mass e-mails and press releases. See 9th circuit Local rules. Notice and identification of class members are areas where the defendants normally have most of the information and plaintiffs' attorneys must use creativity in order to reach as many of the putative class members as they possibly can. In the antitrust context, defendants typically have good information regarding their customers, the class members. Similarly, information regarding class members in a securities claim is also readily available from defendant(s) so that all discovery requests should include an interrogatory and request for production of documents that requires defendant(s) to identify all class members by name and address (preferably on a disc or CD Rom). Another possibility to consider is placing ads in major trade publications relating to the industry, as well as the major news publication like the Wall Street Journal.

In an FLSA case, notice is frequently given following a preliminary class certification in order for potential members of the class to opt-in to the litigation. As all plaintiffs are current and/or former employees of the defendant in such a case, the court can order the defendant to provide the name of addresses of potential plaintiffs. The United States Supreme Court has held that district courts have discretion, in appropriate FLSA cases, to facilitate notice to potential plaintiffs.

Hoffman-LaRoche Inc. v. Sperling et al., 493 U.S. 165, 169, 110 S.Ct. 482, 486 (1989). The Court in Hoffman-LaRoche reviewed a district court's authorization to send a court-approved consent to all similarly situated employees in an age discrimination case, noting as follows:

Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure. Hoffman-LaRoche at 170, 486. The Court further stated, "[b]y monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative. Both the parties and the court benefit from settling disputes about the content of the notice before it is distributed." Hoffman-LaRoche at 172, 487.[4]

Subsequently, in Dybach v. State of Florida Dept. of Corrections, 942 F.2d 1562 (11th Cir. 1991), the Eleventh Circuit addressed whether district courts possessed the power to give notice of a collective action lawsuit for alleged violations of the overtime provisions of the FLSA to similarly situated employees. The Eleventh Circuit held that the 'broad remedial purpose of the Act,' is best served if the district court is deemed to have the power to give such notice to other potential members of the plaintiff class to 'opt-in' if they so desire and by the district court's exercise of that power under appropriate conditions. Dybach at 1567, citation omitted.

5. SCHEDULING ORDERS

When evaluating a class action and crafting the complaint, it is incumbent upon the plaintiffs' counsel to come up with a plan all the way through trial. That plan should be discussed with the judge and defense counsel when it is time to draft the scheduling orders. As stated in the Manual for Complex Litigation 3rd 2001, Section 21.212:

> Scheduling orders are a critical element of case management. They help insure counsel will complete the work called for by the management plan in timely fashion to prevent the litigation from languishing on the court's docket. Rule 16(b) requires that a scheduling order issue early in every case, setting deadlines for joinder of parties, amendment of pleadings, filing of motions, and completion of discovery. Scheduling orders in complex litigation should also cover other important steps in the process of litigation, in particular discovery activities and motion practice; scheduling orders should be informed by the parties' discovery plan submitted pursuant to Rule 26(f).

It is the plaintiffs' counsel's duty and responsibility to move the case along. Courts appreciate a respectful aggressiveness when it comes to presenting the court with a plan and a schedule and make every attempt to meet that schedule. As we all know, when you are dealing with a complex class action discovery takes time, money, effort, there are delays, there are late productions, a whole host of issues that may arise that may throw a wrench in the plan. But if you come up with a solid plan at the beginning of the case, or at least a solid plan concept about how the case should move along and at what pace, most judges and even defense attorneys are fairly flexible when it comes to accommodating the inevitable changes as the case progresses.

[1] Many of the recent reported cases that consider adequacy of class representatives are based on claims brought pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"). For instance, Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001), considered whether the PSLRA raised the adequacy standard in private securities litigation. (In a clarifying opinion, the Fifth Circuit Court of Appeals wrote that its prior opinion should not be read to hold that the PSLRA changed that circuit's "long-established standards for rule 23 adequacy of class representatives." Berger v. Compaq Computer Corp., 279 F.3d 313 (5th Cir. 2002)). Nevertheless, the Eleventh Circuit has its own long-standing adequacy standard, as set forth in Kirkpatrick.

[2] See Allen v. R & H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) (allowing aggregated class claims for punitive damages under Mississippi law).

[3] "This [Eleventh Circuit] Court expressed its view of the 'similarly situated' requirement in Grayson: '[T]he 'similarly situated' requirement of §216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance).' 79 F.3d at 1095." Hipp at 1219. This Court also stated, "'[P]laintiffs need show only that their positions are similar, not identical, to the positions held by the putative class members.' Grayson, 79 F.3d at 1096 (quoting Sperling v. Hoffman-LaRoche, Inc., 118 F.R.D. 392, 407 (D.N.J. 1988), aff'd. in part and appeal dismissed in part, 862 F.2d 439 (3d Cir. 1988), aff'd. 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989))." Hipp at 1217.

[4] The Supreme Court urged district courts to intervene early in collective action cases early, writing:

Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time. Hoffman-LaRocheat 171.