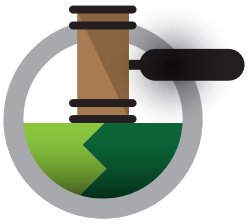
CLASS ACTIONS

LIFE AFTER CLASS CERTIFICATION



In class actions, the certification of a class has always been a critical point—and one often seen as the end of the road for defendants. But some are finding innovative ways to keep fighting even after a class is granted.

"Traditionally, when a class was certified, it could feel like something of a death knell for a defendant's case," says Michelle Gillette, a Crowell & Moring partner who heads the firm's Food and Beverage Industry Practice. Faced with the prospect of damages multiplied by thousands of class members, along with plaintiffs' attorneys' fees, companies tended to shy away from the uncertainty and risk posed by continuing down the road to trial on a case with a certified class. "After certification, defendants often wanted to settle quickly to get out from under that threat," she says. "Now, however, defendants are continuing the fight by filing motions for decertification—and they're winning."

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At the initial class certification stage, a court does not presuppose that plaintiffs would ultimately succeed in marshaling the common proof necessary; it simply gives them the *opportunity* to collect evidence to prove their claims on a classwide basis, based on promises made in their certification motion. "Once discovery closes, plaintiffs no longer need to be given the benefit of the doubt—they must have actual evidence to prove their claim on a classwide basis," says Gillette. "So some defendants are now asking the court to decertify the class after discovery closes, arguing that plaintiffs cannot deliver on earlier promises to support the class claims using common proof."

One reason for doing so was created with the U.S. Supreme Court's 2013 *Comcast v. Behrend* decision, which requires a plaintiff's damages model to be consistent with the evidence supporting his theory of liability. "If the plaintiff's certification motion promised certain evidence to support his damages model, the defendant has the opportunity to go back and argue that plaintiff did not and cannot provide what he promised," says Gillette. This could involve, for example, price-premium damages models. Here, plaintiffs might claim they paid a premium for a product based on a claim such as "all natural" and so are due a refund of the full purchase price of the product. But the defendant could argue that the chosen damages model does not account for evidence that the product had some actual value for many customers that must be subtracted from the full purchase price. So, the argument would be, the full-refund model is flawed and cannot be proven on a class-wide basis—and therefore, the class should be decertified.

That type of strategy was at the heart of the Ninth Circuit's *Brazil v. Dole Food Company, Inc.* ruling in October 2016, which rejected the plaintiff's price-premium model. "The decision confirmed the idea that in order to certify a damages class, a plaintiff must present a damages model that provides a method of calculating damages using proof common to the class. If this is not done, defendants should consider moving for decertification," says Gillette.

TARGET: SLACK FILL

Today, plaintiffs are not only claiming that labeling is false, they are also claiming that the visual presentation of a product is misleading. "The issue of slack fill, where product packaging includes empty space, is starting to blow up in the class actions arena," says Crowell & Moring partner Michelle Gillette. Products ranging from lattes served with room for foam to containers of candy have come under fire.

Here, prevention is key. Among other things, says Gillette, companies should document their rationale for using slack fill in packaging to show that it is functional, consider the use of transparent packaging, and be sure that labeling of weight and volume is clear.