



Creative Class Action Defense Strategies

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I. Exhaust the benefits of *Dukes v. Wal-Mart*, 131 S. Ct. 2541 (2011).

- a. *Dukes* is not just about statistical evidence of discrimination. There are a number of good holdings on class action fundamentals.
- b. First, the Court confirms what more and more circuit courts of appeal have been saying in the last few years—the plaintiff must make factual showing that elements of Rule 23 are met, and the court must make a rigorous analysis to confirm that the requirements are met. Just because that inquiry will overlap with the merits of the case is not a problem.

Dukes, 131 S. Ct. at 2551-52 (“Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.... Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.... Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation.”) (citations omitted).

- c. Next, *Dukes* sharply limits the ability of a plaintiff to certify a class under Rule 23(b)(2), which should be reserved for cases seeking class-wide injunctive relief.

No Rule 23(b)(2) class can be certified where individual award of monetary relief are sought. *Id.* at 2557-58 (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.... Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3).”)

Thus, more plaintiffs will be required to pursue certification under Rule 23(b)(3), which requires showing of predominance and superiority.

- d. *Dukes* imposes a higher threshold on demonstrating commonality. Typically, courts pay little attention to the issue of commonality, holding that it is supposed to be an easy standard to meet. *Dukes* holds that it should be more difficult.

Showing commonality requires not just showing common questions, but showing an ability to generate common answers through class-wide proof. *Id.* at 2550-51 (“The crux of this case is commonality—the rule requiring a plaintiff to show that ‘there are questions of law or fact common to the class.’ Rule 23(a)(2). That

language is easy to misread, since ‘[a]ny competently crafted class complaint literally raises common questions.’ For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification.... Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. What matters to class certification ... is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”)

II. Take advantage of new decisions that lower the burden of proving the amount in controversy when removing (at least in the Seventh Circuit).

- a. There have been multiple helpful Seventh Circuit decisions in 2011.

Back Doctors, Ltd. v. Metro. Prop. & Cas. Ins. Co., 637 F.3d 827 (7th Cir. 2011) (reversing remand); *Blomberg v. Serv. Corp. Int'l*, 639 F.3d 761 (7th Cir. 2011) (same); *ABM Sec. Serv., Inc. v. Davis*, 646 F.3d 575 (7th Cir. 2011) (same); *Keeling v. Esurance Ins. Co.*, 2011 WL 4448578 (7th Cir. Sept. 26, 2011) (same).

- b. The *Back Doctors* case holds that there is no presumption against removal or jurisdiction.

Back Doctors, 637 F.3d at 830 (“There is no presumption against federal jurisdiction in general, or removal in particular. The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions.”)

- c. The defendant is the proponent of jurisdiction, and the defendant’s “plausible” estimate of amount in controversy will control unless the plaintiff can show it is legally impossible for the amount in controversy requirement to be met.

Id. at 830 (“When removing a suit, the defendant as proponent of federal jurisdiction is entitled to present its own estimate of the stakes; it is not bound by the plaintiff’s estimate. Once this has been done, and supported by proof of any contested jurisdictional facts, the presumption is the one stated in *St. Paul Mercury*: the estimate of the dispute’s stakes advanced by the proponent of federal jurisdiction controls unless a recovery that large is legally impossible.”); *Blomberg*, 639 F.3d at 764 (“[5] Once the proponent of federal jurisdiction has explained plausibly how the stakes exceed \$5,000,000, *cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much.”);

- d. A removing defendant does need some evidence to support their “plausible” estimate of the amount in controversy, but not much.

The decisions seem inconsistent regarding how strong a removing defendant’s initial showing of amount in controversy must be to control. *Back Doctors* clearly rejects the need for a defendant to prove amount in controversy by preponderance. 637 F.3d at 830 (“Only jurisdictional facts, such as which state issued a party’s certificate of incorporation, or where a corporation’s headquarters are located, need be established by a preponderance of the evidence.”). But *Blomberg*, decided two weeks later by a different panel, states the preponderance standard for amount in controversy. 639 F.3d at 763 (“If the party opposing federal jurisdiction contests the amount in controversy, the proponent must ‘prove those jurisdictional facts by a preponderance of the evidence.’”)

But multiple cases, including *Blomberg*, also seem to articulate a much lower standard, where the defendant simply needs to make a plausible or good faith estimate. *Back Doctors*, 637 F.3d at 832 (“the defendant is entitled to present a good-faith estimate of the stakes.”); *Blomberg*, 639 F.3d at 763 (“A good-faith estimate is acceptable if it is plausible and adequately supported by the evidence.... This burden thus is a pleading requirement, not a demand for proof.”); *ABM*, 646 F.3d at 478 (“[o]nce the proponent of federal jurisdiction has explained plausibly how the stakes exceed \$5,000,000, the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much.”).

- e. A plaintiff’s statement in the complaint that less than the jurisdictional threshold is being sought does not control unless that statement is a binding limit on recovery.

Back Doctors, 637 F.3d at 830 (“disclaimers in the complaint block removal only if state law makes them effective as caps on damages, which Illinois law does not”) citing *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511-12 (7th Cir. 2006).

- f. And, even if the statement in the complaint is a binding limit on the plaintiff’s recovery, that may not control in a class action because the named plaintiff does not have total control over what the class ultimately receives.

Back Doctors, 637 F.3d at 830-831 (“Back Doctors has a fiduciary duty to its fellow class members. A representative can’t throw away what could be a major component of the class’s recovery. Either a state or a federal judge might insist that some other person, more willing to seek punitive damages, take over as representative. What Back Doctors is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under \$5 million.”)

- g. Other circuits impose a higher standard on removing defendants to prove an amount in controversy.

Unlike the Seventh Circuit in *Back Doctors*, other circuits do impose a presumption against removal and federal jurisdiction. *Barbour v. Intern. Union*, 640 F.3d 599, 615 (4th Cir. 2011) (“Put simply, removal statutes must be construed narrowly, and any doubt about the propriety of removal should be resolved in favor of remanding the case to state court.”) (citations omitted); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000) (“doubts regarding whether removal jurisdiction is proper should be resolved against federal jurisdiction”).

Many circuits require a removing defendant to prove by a preponderance of the evidence, or a reasonable probability, that the amount in controversy requirement is met. *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 48-49 (1st Cir.

2009) (reasonable probability); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2nd Cir. 2006) (same); *Bartnikowski v. NVR, Inc.*, 307 Fed. Appx. 730, 734 (4th Cir. 2009) (preponderance of evidence); *Smith v. Nationwide Property and Cas. Ins. Co.*, 505 F.3d 401, 404-05 (6th Cir. 2007) (same); *Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009) (same); *Lewis v. Verizon Communications, Inc.*, 627 F.3d 395, 400-01 (9th Cir. 2010) (same); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 752 (11th Cir. 2010) (same).

Some circuits also impose a higher burden where the plaintiff alleges that less than \$5 million is at stake in the complaint, without considering whether that allegation is binding or could later be amended. There, a removing defendant must show a “legal certainty” that \$5 million is in controversy. *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir.2006); *Lowdermilk v. U.S. Bank Nat'l Ass'n.*, 479 F.3d 994, 999-1000 (9th Cir. 2007).

III. Consider making an early and preemptive attack on class certification allegations.

- a. A defendant can file Motion for Judgment on the Pleadings under Rule 12(c) or a Motion to Strike Class Allegations under Rule 23(d)(1)(D).

Hylaszek v. Aetna Life Insurance Co., Case No. 94 C 5961, 1998 WL 381064, at *2, n.1 (N.D. Ill. July 1, 1998) (“Rule 12(c) is an appropriate means by which to adjudicate the [plaintiffs]’ class allegations.”); *Narwick v. Wexler*, 912 F. Supp. 342, 344 (N.D. Ill. 1995) (granting motion to strike class allegations brought under FRCP 23(d)(1)(D)).

- b. The defendant can file the motion at any time to resolve the issue of whether class treatment is appropriate.

Board of Education of Township High School District No. 214, Cook County, Illinois v. Climatemp, Inc., Case Nos. 79 C 3144, 79 C 4898, 1981 U.S. Dist. LEXIS 11092, at *5 (N.D. Ill. Feb. 20, 1981) (“This procedure is useful in bringing into focus issues the resolution of which governs the broader question of whether a class action is maintainable.”).

- c. A Rule 12(c) motion is decided based on pleadings and judicially-noticed facts.

Roberts v. Babkiewicz, 582 F.3d 418, 419 (2d Cir. 2009) (On a Rule 12(c) motion, the court considers “the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice...”); *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) (per curiam) (“A motion brought pursuant to Fed.R.Civ.P. 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts.”).

- d. A Rule 23(d)(1)(D) can introduce new factual matter, which could permit discovery.

NBL Flooring, Inc. v. Trumbull Ins. Co., Case No. 10–4398, 2011 WL 4481918, at *1 (E.D. Pa. September 27, 2011) (A Rule 23(d)(1)(D) “motion to strike should not be granted ... if discovery is a necessary prerequisite to determining whether class certification is appropriate.”); *Lang v. DirecTV, Inc.*, 735 F. Supp. 2d 421, 438 (E.D. La. 2010) (In the context of a Rule 23(d)(1)(D) motion, “in most cases a certain amount of discovery is essential in order to determine the class action issue and the proper scope of a class action.”) (internal quotations omitted).

- e. The advantages are: the potential for expedited resolution; the defendant gets the opportunity to frame the issues by filing the opening brief; and, the defendant gets the last word in the reply brief.

- f. The disadvantages are: some jurisdictions shift the burden to the defendant; the motion will tell the plaintiff where their case is weak, allowing them to plug any holes; and, an early adverse ruling could make settlement more difficult.

Ramos v. U.S. Bank Nat. Ass'n, Case No. CV 08-1150, 2009 WL 3834035, at *4 (D. Oreg. Nov. 16, 2009) (“[I]n the context of a motion to strike class allegations, in particular where such a motion is brought in advance of the close of class discovery, it is properly the defendant who must bear the burden of proving that the class is not certifiable.”); *Romano v. Motorola, Inc.*, Case No. 07-CIV-60517, 2007 WL 4199781, at *2 (S.D. Fla. Nov. 26, 2007) (“Defendants, in contending that class certification in this case is precluded as a matter of law, have the burden of demonstrating from the face of plaintiffs' complaint that it will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove.”) (internal citation and quotation omitted); *Bessette v. Avco Financial Services, Inc.*, 279 B.R. 442, 451 (D. R.I. 2002) (Prior to discovery, “the burden is not on the party seeking class certification, rather, as the non-moving party, all reasonable inferences must be construed in her favor.”).

IV. Oppose class certification by citing individualized issues that Plaintiff raised to resist dismissal.

- a. Plaintiffs often survive motions to dismiss by trying to introduce ambiguity.
- b. Plaintiffs argue that statute of limitations should be equitably tolled because they did not learn of violation until after a transaction was completed.

Amparan v. Plaza Home Mortgage, 2008 WL 5245497, *4 (N.D. Cal. Dec. 17, 2008) (denying motion to dismiss on statute of limitations grounds because “it is possible that a reasonable person in plaintiff’s position would not have detected the negative amortization allegedly built into the loan.”); *Socop–Gonzalez v. I.N.S.*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) (equitable tolling is appropriate “in situations where, despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim” (internal quotation and alteration marks omitted)); *Cassese v. Washington Mut., Inc.*, 2008 WL 8652499, at *10 (E.D. N.Y. June 27, 2008) (“the doctrine of equitable tolling could forestall operation of [TILA] if the defendants engaged in concealment or fraud, preventing the timely filing of suit”).

A plaintiff who must demonstrate equitable tolling may not be typical of the class because they are subject to a unique defense. *Plascencia v. Lending 1st Mortg.*, 259 F.R.D. 437, 445 (N.D. Cal. 2009) (denying class certification on TILA claim because adjudicating equitable tolling issues would “require the type of individualized evidence that is inappropriate in the liability phase of a class action”).

- c. Sometimes a plaintiff claims that disclosures were misleading even though the uniform written disclosures provided to the class clearly provide the information that plaintiff claims is lacking. The plaintiff may try to avoid dismissal by arguing that the written disclosures were obscured by oral misrepresentations or by conflicting statements in other documents, such as advertising they saw.

Jordan v. Paul Financial, 644 F. Supp. 2d 1156, 1166 (N.D. Cal. 2009) (denying MSJ because “there is a factual dispute as to whether reference in the loan documents to both the APR and the finance charge as “yearly” rates of interest would have been confusing to an ordinary consumer.”); *Ramanujam v. Reunion Mortg., Inc.*, 2011 WL 446047, at *3 (N.D. Cal. Feb. 3, 2011) (a lender’s oral statements inconsistent with the written disclosure can create TILA liability).

Relying on statements outside of allegedly uniform written disclosures can preclude typicality and predominance. A plaintiff who was subject to unique oral misrepresentations or received written disclosures that were different than other class members is not typical. *Jordan v. Paul Financial*, 2009 WL 192888, at *6-7 (N.D. Cal. January 27, 2009) (finding no typicality and denying class certification where litigation would focus on named plaintiff’s understanding of allegedly ambiguous loan documents). And, if only a certain combination of disclosures are

misleading, then you have to evaluate each individual class member to see if they received the same misleading oral or other disclosure.

- d. Claims regarding contractual language often must claim that contract was ambiguous because many provisions of contract support defendants' case.

Monaco v. Bear Stearns Residential Mortg. Corp., 554 F. Supp. 2d 1034, 1043 (C.D. Cal. 2008) (“in determining whether the TILA disclosures accurately reflect the terms of the parties’ legal obligation, a claim that said terms are ambiguous is relevant to the analysis”).

This can preclude predominance because once parol evidence regarding the meaning of the contract is allowed, the individual borrower’s knowledge and past experience become relevant to the meaning of the contract. *Jim Ball Pontiac-Buick-GMC, Inc. v. DHL Exp. (USA), Inc.*, 2011 WL 815209, at *7 (W.D. N.Y. March 02, 2011) (“plaintiff has failed to establish that common questions of law and fact predominate, as individualized inquiries will be required for each potential class member” due to alleged ambiguities in the contract).

- e. If the complaint does not affirmatively plead ambiguities like equitable tolling or oral misrepresentation, use a motion to dismiss to push plaintiffs into making arguments that might save the complaint but doom class certification. You may want to file a motion to dismiss in a class action that you would not file in an individual case.

Or, get admissions from plaintiff during deposition. A named plaintiff’s theory of what went wrong is often very different than what is alleged in the complaint. So even if a complaint alleges that uniform written disclosures are misleading, taking the plaintiff’s deposition will often secure testimony that the named plaintiff never read the written disclosure, never formed any ideas of what the written disclosure meant, never relied on the written disclosure, and maybe doesn’t even speak English. Perhaps the named plaintiff thinks the third-party loan broker misled him with oral statements about the loan terms. You can often get great testimony from a named plaintiff on what they think their case is about that you can use to show that their circumstance is unique, precluding typicality, or that an individualized determination is needed to see if other class members share in their circumstances, precluding predominance. Never assume the plaintiff’s testimony will be identical or even similar to the allegations of the complaint.

V. Argue that the existence (not the amount) of damages is an individualized issue that precludes class certification.

- a. Plaintiffs often claim they were tricked into getting a product, such as a loan with terms like a balloon payment, an adjustable interest rate, or a loan that allows for negative amortization.
- b. But to determine whether the loan or other product the plaintiff purchased was harmful to them, you have to ask: what other options were there? For home and car loans, the person likely needed a loan of some kind—were loans with different terms available to this person?
- c. That’s an individual question relating to the person’s financial condition. If they don’t like this loan, what other type of loan did they qualify for? “Re-underwrite” to see what else they could have received.
- d. There’s also the individual question about what type of loan the plaintiff would have taken. Some people would have wanted a fixed rate loan. Some may have needed a low payment for a short period of time, and taken a balloon to get it. Some may have only been planning to stay for a few years, and taken a short-term ARM to get a lower interest rate. All of that will impact what other kind of loan the person would have received.
- e. How do alternative loans compare with the loan plaintiff is complaining about? Would the plaintiff have gotten a better deal with other loans than with subject loan? Perhaps the adjustable rate loan the plaintiff received wound up producing very low interest rates.
- f. If plaintiff could not or would not have received a loan with more favorable terms, that person didn’t suffer the damage allegedly suffered by the class, and isn’t typical of the class.

“To satisfy the typicality prong and thus warrant class certification, [plaintiff] must demonstrate that the alleged harm he suffered ... is the same harm the proposed class is alleged to have suffered.” *Newman v. RCN Telecom Services, Inc.*, 238 F.R.D. 57, 64 (S.D.N.Y. 2006) (plaintiff was atypical of the class because he “was not harmed by misrepresentations/omissions he alleges to have injured the class.”); *see also Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, (D. Md. 2001) (plaintiff’s claim for reimbursement of medical bills from his insurer was not typical of the putative class where plaintiff suffered no damage because plaintiff had never had to pay the bills); *McClain v. South Carolina Nat. Bank*, 105 F.3d 898, 903 (4th Cir. 1997) (plaintiff’s “claims [were] ‘atypical’ from the claims of the rest of the class” because she “did not suffer a cognizable injury similar to the injuries suffered by the other class members.”).

- g. A plaintiff who did not suffer the alleged damage also has an adequacy problem.

“A proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation.” *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006)); *see also Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001) (that named plaintiff “was neither a typical nor adequate class representative and was subject to unique defenses” was “independently sufficient to support the denial of class certification.”); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (regardless of whether the issue is framed in terms of the typicality or adequacy requirement, “class certification is inappropriate where a putative class representative is subject to unique defenses ...”); *Gartin v. S & M Nutec LLC*, 245 F.R.D. 429, 434 (C.D. Cal. 2007) (class certification denied where the court held plaintiff was “ill-suited to represent absent class members” after she admitted she never saw or relied on any of the allegedly deceptive statements); *Kuei-I Wu v. Mamsi Life & Health Ins. Co.*, 269 F.R.D. 554, 564 (D. Md. 2010) (noting “an overlap between the requirement of adequacy of representation and the requirement of typicality,” the court held that certification was inappropriate where the plaintiff’s “role as sole class representative is tenuous at best” due to the existence of several unique defenses).

- h. Even if plaintiff can show that he suffered damages, there is still a predominance issue because you need to look at each class member’s circumstances to see if they suffered damages.

Although numerous courts have held that individual questions regarding the amount of damages does not defeat predominance, individual questions regarding the existence of damages does defeat predominance. “That the individuals were allegedly defrauded in a similar manner does not establish common injury. Regardless of similarity in the nature of alleged harm, each [class member] will inevitably need to provide proof that his or her damages resulted from his or her own transaction, a conclusion that demonstrates the predominance of individual, not common issues.” *Lester v. Percudani*, 217 F.R.D. 345, 352 (M.D. Penn. 2003) (denying class certification where individual circumstances surrounding each putative class member’s transaction presented the court “with the prospect of hundreds or thousands of individual hearings”); *Endres v. Wells Fargo Bank*, No. C 06-7019 PJH, 2008 WL 344204, *12 (N.D. Cal. Feb. 6, 2008) (predominance was lacking where “an assessment of each customer’s spending patterns, overdraft transaction details, credit card balances, interest rates, and payment practices” was required to determine whether challenged overdraft fees were more expensive than an alternative overdraft policy).

VI. Demand a trial plan as part of plaintiff's showing of superiority.

- a. Showing that a class action is superior to individual trials is required by Rule 23(b)(3). Superiority requires showing that trying issues on a class-wide basis is manageable.

FRCP 23(b)(3)(D) (among the “matters pertinent” to superiority analysis are “the likely difficulties in managing a class action”).

- b. A trial plan can show if class-wide trial is manageable.

Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1278-79, (11th Cir. 2009) (“This reality poses serious challenges to the efficiency and manageability of a class action proceeding. Yet Vega has done nothing to acknowledge these issues or propose a trial plan that would feasibly address them, and the district court does not appear to have given any meaningful consideration to how this case, with its individualized claims and defenses, would be tried.”).

- c. A trial plan describes the issues to be presented at trial and how they will be proved on a class-wide basis.

Fed. R. Civ. P. 23 advisory committee's notes (“A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certifications to present a trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.”)

- d. There is significant authority for the idea that a trial plan should be included as part of plaintiff's showing of superiority. Both the FRCP Advisory Committee Notes and the Manual for Complex Litigation reference the need for a trial plan.

Id.; Manual for Complex Litigation (Fourth) § 21.142 (2004) (“For the most part, courts determine manageability by reviewing affidavits, declarations, trial plans, and choice-of-law analyses that counsel present.”)

- e. Numerous courts have recommended trial plans in superiority analysis.

Vega, 564 F. 3d at 1279, n.20 (“[T]he proposal of a workable trial plan will often go a long way toward demonstrating that manageability concerns do not excessively undermine the superiority of the class action vehicle. Moreover, there is a direct correlation between the importance of a realistic, clear, detailed, and specific trial plan and the magnitude of the manageability problems a putative class action presents. We therefore recommend that district courts make it a usual practice to direct plaintiffs to present feasible trial plans, which should include proposed jury instructions, as early as practicable when seeking class certification.”); *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of America*, 453 F.3d 179, 186, n.7 (3rd Cir. 2006) “We believe that the pre-certification

presentation of the aforementioned trial plans represents an advisable practice within the class action arena ...”); *Robinson v. Texas Automobile Dealers Ass’n*, 387 F.3d 416, 425 (5th Cir. 2004) (“The district court abused its discretion by finding that this class action is the superior method for adjudicating this controversy and by not conducting any kind of analysis or discussion regarding how it would administer the trial.”).

- f. A trial plan is not required. If a case presents relatively straightforward issues, it may not be necessary to put together a formal trial plan to demonstrate superiority. But if the issues are complex at all, the plaintiff’s failure to include a trial plan should weigh against them.

Feder v. Electronic Data Systems Corp., 429 F.3d 125, 139 (5th Cir. 2005) (“We did not hold in *Robinson*, however, that the submission of a trial plan was a prerequisite for a finding of superiority. Instead, we stated that a court must consider how a trial on the alleged causes of action would be tried.”); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961, n.4 (9th Cir. 2005) (“We decline Ford’s suggestion that the district court’s failure to adopt a trial plan or to articulate how the class action would be tried was an abuse of discretion.”)

- g. Beyond simply playing defense and pointing out that plaintiff did not provide a trial plan, go on offense and do your own plan to show that trying cases on an individualized basis is superior to class-wide trial. Give the judge competing plans of how the case will look tried as a class action, and how it would like tried individually, and show that individual trials are superior because there will be no efficiencies gained through a class-wide trial. List all of the witness you would need to call at a class-wide trial and all the evidence you would need to introduce.