Why class counsel must think like a trial lawyer

There are many obstacles on the way to class certification, but Spokeo isn't one of them

By Dan LeBel

Successfully prosecuting a class action is often compared to the physical act of threading a needle. The procedural hurdles to obtaining class certification and the technical requirements of the statutes commonly in play provide defendants with seemingly endless opportunities to convince the court to dispose of – or hobble – your case.

Clearing each potential obstacle requires vision and patience but doesn't have to be the hyper-technical process class counsel often make it out to be.

Many class-action specialists deeply enjoy the intellectual nature of navigating the procedural maze of certification and dissecting the latest wave of case law following a Supreme Court ruling on Rule 23, Article III standing, or their favorite federal statute. And planning and building a case that will pass through the eye of the needle can lead to a myopic, intellectual approach that lacks heart. This is a great danger in a hotly contested, long-running action.

Plaintiffs' counsel often think of class-action litigation as a different animal requiring a different skill set from say personal injury litigation – more technical, less emotional. There is of course an emphasis on procedure and substantive law and a focus on distilling the facts down to the bare necessities and what can be shown to be common on a classwide basis. But executing on the fundamental principles of preparing any plaintiffs' case so that it has an emotional appeal can make the difference in whether the case survives long enough to pass the procedural and substantive tests. Below we sketch out a few common obstacles of the moment (mandatory arbitration and class action waivers aside) then present some fundamental techniques

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and concrete strategies to navigate to the other side.

Some real problems

Defendants' emotional appeal: "There's been no injury"

The concept of the "no injury" class action is a favorite frame for class action defense counsel. In this defense theme, the corporate defendant is merely an innocent victim of the plaintiff (who has conspired with class counsel) or of class counsel (who uses the plaintiff as a pawn in a shakedown lawsuit). Defendants use this frame especially when it is clear that the defendant's conduct is illegal. The reasoning goes something like: defendant's violation of a statute is merely a "technical violation;" it's the plaintiff or her attorneys who are the real bad actors here for harassing the defendant with the lawsuit; therefore defendant's illegal acts should be excused.

Turning the focus from defendant's illegal conduct to the plaintiff, defense counsel argues that the plaintiff (and sometimes each potential class member) must prove an injury to something other than his or her legal rights. There is some instinctive appeal to it as few people want to be pulled into "frivolous" conflict.

The obvious flaw to the "no injury" theme is that many, if not the vast majority, of consumer protection laws were enacted because a legislature decided that the common law was inadequate to inhibit some specific business acts and took action by creating new law.

For example, the Fair Debt Collection Practices Act (the "FDCPA") made calling a consumer's telephone before 8 a.m. or after 9 p.m. to attempt to collect a debt illegal.[1] Congress enacted a statutory scheme to discourage offensive collections activity with statutory penalties of up to $1,000 for each violation and attorney fee-shifting in favor of prevailing consumers.

In our example, the consumer seeking to enforce the statute shouldn't have to put on evidence to show that receiving collections calls at 1 a.m. caused harm. Congress has already found the conduct harmful and prescribed a penalty. But many defendants would argue there's "no injury" caused by the violation of the statute by a 1 a.m. collections call unless the plaintiff proves something along the lines of: she was asleep at the time of the call, she heard and was awakened by the call, she knew at the time she heard it that it was a call from a debt collector, and so on. According to defendants, despite the language of the statute and Congressional intent, there's "no injury" until proven otherwise.

But success in bringing classwide claims often relies on a statutory scheme such as the FDCPA putting aside the issue of individualized proof because gathering and presenting individualized evidence to show the particular harm suffered by each member of a 10,000 person class would render the class treatment unmanageable.

SCOTUS: Tolerance for blurred lines

The Roberts' Court has repeatedly demonstrated a penchant for producing lengthy opinions that fail to provide clear instructions to litigants and the lower courts but produce fodder for either side to claim victory.[2] At some point in history if you were a plaintiff's attorney filing a class action you could be pretty sure you had both the facts and the law on your side. Today's ever-changing playing field based on Supreme Court interpretation of issues such as rule 23, arbitration agreements, and Article III standing, creates uncertainty whether the courts will agree that the law is on your side. Needless to say, this presents substantial issues for a plaintiff's attorney faced with the possibility of a decade-long case.

The most recent of these cases with the potential for wide-ranging impact but which seems to do little to clarify the law is *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540. If you've read any articles about class-action litigation in the past 10 months, you're probably familiar with *Spokeo* already, so only the most cursory details will be provided here.

In *Spokeo,* defendants challenged plaintiff's standing under Article III of the Constitution claiming there was no "case or controversy" where plaintiff alleged a violation of the Fair Credit Reporting Act but failed to establish any particular concrete harm flowing from that statutory violation. With no concrete harm, standing cannot exist and therefore neither does jurisdiction in the federal court system. Spokeo claimed its statutory violation was antithetical to harm. It argued that, when it published false information about plaintiff, this worked in plaintiff's favor because the falsehoods were more favorable to him than the true facts.

Defendants had been making the "no injury" argument for years in one form or another. So when the Supreme Court took up *Spokeo* there was much trepidation that the Court might issue an expansive opinion. Worst case scenario would be that Congress lacked power to enact statutes providing Constitutional standing where there previously was none and therefore statutory damages were not available unless the class representatives as well as each member of a potential class could individually prove they were harmed in order for a class action. This could have meant extinction for private enforcement of a wide swath of federal regulation meant to protect consumers.

Fortunately, the eight-justice Supreme Court only went so far as to send the case back to the Ninth Circuit, explaining that plaintiffs could lack standing to pursue some violations of the Fair Credit Reporting Act, but the Ninth Circuit's treatment established that plaintiff suffered a "particularized" injury but must also determine whether it was also "concrete." Of course this only adds to the apparent tightrope putative class representatives must walk in alleging facts sufficient to support plaintiff's claims, but not so specific that the allegations

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could not be extrapolated to the class as a whole. In its failure to provide a decisive ruling, the opinion provides useful language for both sides that the lower courts will have to parse.

Certainly, there are some gains to be made here. In a back-door way, the ruling undermines CAFA (the Class Action Fairness Act), because if the defendant removes a case from state court under CAFA but the federal court determines there's a lack of standing due to Article III, the plaintiff and class may then be free to pursue their claims back in state court. But more importantly, I believe considerable opportunity exists in alleging and arguing for a concrete injury to present a compelling case that illustrates to courts (and the public) why our consumer protection statutes are important and how corporate conduct that violates those statutes causes real harm to real people.

Strength and opportunities

Let's now turn to how we can bolster our cases by digging in to the heart of our case and countering defense tactics with a strong offense. Rather than weakening the class action, I will attempt to show that embracing the emotional underpinning of the case will fortify the case against a variety of things that could otherwise cause failure.

Your client

First, before litigation is initiated, ensure the named plaintiff cares about her case! A large percentage of class actions involve conduct where the plaintiff and others were harmed in a way that is not "catastrophic" or life changing. More typically, a class action is based on a defendant's cheating many people out of small sums of money. So while the total loss may be enormous, each victim of the conduct has only a small stake in the litigation. The likelihood of putting forth a potential class representative who lacks the determination to stick the case out to the end is exacerbated by the race to the courthouse to be "first to file": A race where there seem to be dozens more participants each year. When the law firm's goal is to find a client – any client – as soon as possible in order to be first to file, it's obvious things can go wrong.

Second, even if wonderful potential class representatives come to the law firm, class counsel (consciously or not) often minimize their direct contact with them. Lead counsel may communicate through paralegals or associates, and even then, only when necessary to gather or pass along critical information. Of course this is a logical and efficient approach from a business standpoint, but results in lost opportunities.

The proposed class representative acts as a stand-in for, and must be typical of, the absent class members. If defendant's spotlight on the named plaintiff uncovers distinctions that defeat her 'typicality,' then the class can't be certified. As such, class counsel doesn't want the named plaintiff to have any rough edges that would make her stand out from the other members of the proposed class. Great trial lawyers know they must be able to stand in their client's shoes so that they may better tell their story. Class counsel too often miss this opportunity to bring authenticity to the claims in the case. If the client doesn't care about the case, or the client cares but her advocate cannot effectively convey it, why should the court care?

Prepping the class rep for depo

One of the biggest surprises in my career came when I became dissatisfied with the way I had learned "depo prep" at the class-action specialist plaintiffs' firms I worked for following law school. I decided to try Don Keenan and David Ball's "Reptile" techniques in prepping my clients for their testimony. Many of the partners I worked under were skilled at crafting technical arguments but light on trial experience.

My old way of preparing clients was pretty straightforward. Start with something like: "Your deposition is not the place to tell your story. We have other ways to get your story before the court . . ." Next, work on client-control: "If the question is, 'can you tell me what time it is?' the answer is 'yes' not 'it's 9:30 a.m.'"

Then lead a tour of all the terrain defense counsel could be expected to cover, checking off the elements of our causes of action and class certification to ensure that the plaintiff was able to articulate favorable responses. I'd try to uncover potential surprises, reveal defense attorneys' common scare tactics and I'd generally have a good time doing it. It's a controlled, satisfying experience. You put in a lot of work and feel like you've done all you can for the good of the case. But the overall tenor of these sessions has something of the feel of a tutor prepping a student for an exam – I felt like there was something important missing.

The "Reptile" method[3] is more akin to a talk-therapy session. There is a progression and three phases of preparation – (1.) Questions, 2.) Establish the Major Truths, and (3.) Role-Playing. (If you're not already familiar, I recommend buying or borrowing the book before the next time you prepare a client for testimony.) The one aspect of preparation I want to highlight in this article for its surprising efficacy in the class-action context is during the "Questions" phase, uncovering any guilt feelings the plaintiff may have related to the case or the events that led to her filing the case.

My previous assumption was that the plaintiff's feelings about the case were pretty straightforward. The plaintiff was ripped-off and had enough anger and indignation toward the defendant's conduct to commit to take on the responsibility of representing a class of similarly situated consumers against the defendant, and that was all I needed to know as far as plaintiff's feelings about the transaction. I had thought "victim's guilt" (where the plaintiff blames herself for the wrongful conduct of the defendant) was something that only happened in other types of cases. The dynamic is well known to experienced personal injury attorneys or

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prosecutors. A pedestrian run down by a drunk driver in a crosswalk might think, "I should have reacted more quickly." Or a sexual assault victim has thoughts like, "Maybe I shouldn't have been out so late. It would have never happened if I hadn't dressed that way."

But class-action plaintiffs who were victims of false advertising, illegal fees, or debt collection abuse often have these same feelings to one degree or another. And if they're there, you're a lot better off unearthing them during preparation than leaving them buried for defense counsel to exploit.

I was amazed the first time I followed this method of preparation. A client who had purchased a product and suffered "only" economic harm was sobbing in my conference room over her guilt in having bought the product. She would have had no way of knowing in advance that the product was defective, but logic isn't the source of our emotions. I've found that where the case has been subject to considerable media attention (which is the case with many class actions) the clients' feelings can be heightened.

Uncovering the guilt, helping your client explore it, and then get past it can be a powerful experience; one that brings you closer to the client and improves your ability to tell their story in an authentic way. Doing that makes it relatable to a wider audience and triggers the desire in your audience (whether juror or judge) to do something to make it right.

Getting clients' emotions on the table and overcoming their feelings of guilt not only helps the plaintiff and her counsel tell a compelling story, but also makes the client more dedicated to the cause. This is important where the plaintiff may have only a nominal economic interest, the defendant may try to "buy-off" or harass the plaintiff, and the case might well go on for a decade.

Know your audience

Due to the issues discussed above – and many others – the trial court is in position to dispose of, or severely limit, your case. The court must care about your case. The cynical among us might think judges are immune to emotional appeals or there's something wrong with presenting a case in a way that appeals to emotion. Again, this is particularly true in the class action context. But there is no doubt the assigned judge has feelings about class action litigation, the statutes forming the substance of the case, consumers suing banks and corporations, your case in particular, you, your opposing counsel, etc. So first, you must "know your judge." Familiarity with his or her previous opinions, personality, political leanings, and personal preferences aids in tailoring your arguments and procedural tactics to that individual.

Second, your case should appeal to the widest possible audience. This point is less obvious to class-action specialists who typically don't look at litigation as preparing for trial but rather focus on the major hurdles along the way – to defeat defendant's dispositive motions, to force the defendant to produce the necessary discovery, and get the case certified.

Appellate specialists love to talk about preparing each case for appeal at the trial court level. And of course this point is highly applicable in the class-action context where many appeals are taken. But often overlooked is the related point that there's a strong possibility that *multiple trial court judges* will rule at some point in your case.

Because most judges show little deference to the "rule of the case," this factor can prove dispositive. And even the same judge will be willing to revisit a previous decision. Further, a magistrate judge ruling on discovery or assigned to provide an advisory opinion on a particular motion such as class certification, must care about your case. The court's law clerks must care. Your mediator must care. As a consequence, it's often not good enough to clear a particular hurdle once; there's a heightened need to maintain a solid foundation to survive the scrutiny of potentially different personalities and preferences.

Tell your story

Accepting the theory that class counsel would be well-served in presenting a compelling story built on at least equal treatment of emotional, factual, and legal foundations, it raises the question: how do we do it? One powerful technique is using some variation of a "Brandeis Brief" early and often in the case.

Named for Justice Louis Brandeis while he was an attorney representing the State of Oregon before the Supreme Court, the "Brandeis Brief" focuses on citation to sources drawn on the hard and social sciences instead of an emphasis on citation to the applicable law. I use the term more loosely.

The most effective briefs on behalf of class actions include a thorough analysis of the law, yes, but should also tell the story of the living, breathing, human who brought the case and seeks to represent the class. While this may be obvious to readers who specialize in personal injury or employment law, I believe the class-action community has much to learn from you.

Because of the nature of class certification, the proposed class representative must be interchangeable with any other class member as far as the claims brought, the harm suffered, and (to a great degree) the relief sought. The named plaintiff must be a round peg – just like each class member.

Conclusion

In sum, it's a time where having the facts and the law on your side may not be enough to assure classwide victory. Class counsel have long emphasized the persuasive fundamentals of *logos* (appeal to logic) and *ethos* (appeal to honesty and authority), but shied away from *pathos* (appeal to emotion). A return to the emotional underpinning of persuasion will help to advance our cause case-by-case as well as at the policy-making level.

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Endnotes:

[1] 15 U.S.C. 1692(c)(a)(1)
[2] *Justices Are Long on Words But Short on Guidance," NY Times*, Adam Liptak Nov. 17, 2010 (https://nyti.ms/2k1rcwC) *"Vague Opinions and Frustration in Lower Courts," NY Times*, Nov. 18, 2010 (http://www.nytimes.com/imagepages/2010/11/18/us/18rulingsGrfxA.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article)
[3] David Ball and Don Keenan, *Reptile: the 2009 Manual of the Plaintiff's Revolution*; Balloon Press, 2009.

Based in San Francisco, Daniel LeBel prosecuted complex securities, antitrust, and consumer law cases against some of the country's largest corporations for national litigation firms prior to opening his own practice. The Consumer Law Practice *focuses on providing a client-centered approach to consumer class actions and prosecuting individual automobile dealer fraud and "lemon" law cases. Dan's writings on class-action litigation have been published internationally.*


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When not practicing law, Dan seeks balance by spending time with his daughters, snowboarding, and seeking out new sports and adventures.

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