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Defining Class Membership: Bringing and Defending Challenges

Evaluating Ascertainability, Overbreadth and Fail-Safe Class Issues that Impact Certification

TUESDAY, AUGUST 21, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

Class Ascertainability

Recent Decisions

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Ascertainability

Involves situations where the court would be forced to engage in an individualized analysis of objective evidence to determine who qualifies as a class member. Examples:

- The court must conduct a "mini trial" in order to determine who is in the class.
- Evidentiary and logistical issues make it difficult (or impossible) to accurately identify with objective proof who is in the class.
- The court must conduct an assessment of an individual's state of mind in order to determine whether he or she belongs in the class.

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Ascertainability

- Vague Terms
- Lack of Objective Proof
- No Records
- Mini Trials for Factual Findings

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Ascertainability: Vagueness

Heisler v. Maxtor Corp., No. 5:06-cv-06634-JF (PVT), 2010 WL 4788207 (N.D. Cal. Nov. 17, 2010):

Plaintiffs sought to certify a class of "[a]ll end-user persons or entities who purchased in the United States . . . a [Maxtor Hard Drive] sold by Maxtor Corporation or an authorized Maxtor retailer or distributor that have ***experienced a failure*** and (a) reported ***the failure*** to Maxtor and/or Seagate (the "Reporting" Class) and (b) who did not report ***the failure*** to Maxtor and/or Seagate (the "Non-Reporting" Class)."

The court denied the class certification motion, finding that the identity of class members was unascertainable, in light of the vague nature of the term "failure":

"Plaintiffs' definition fails to explain clearly what constitutes a 'failure' of the subject hard drives . . . . [T]here is a real concern that the term could be interpreted too broadly, encompassing even hard drive problems resulting from operator error . . . . Plaintiffs' proposed class definition [does not] include[] objective limitations that would exclude temporary failures or failures occurring as a result of factors other than manufacturing defects." *Id*. at *2-3.

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Ascertainability: Vagueness

Korsmo v. Am. Honda Motor Co., No. 11 C 1176, 2012 U.S. Dist. LEXIS 65709, at *15-16 (N.D. Ill. May 10, 2012):

In a consumer fraud action alleging that Honda misrepresented to buyers that Honda Certified Pre-Owned vehicles were inspected and maintained by Honda, and not Honda dealerships, the District Court denied plaintiff's motion for class certification because it was impossible to determine who was deceived by the alleged false advertising. "Under the facts of this case, individual inquiries would be necessary to determine each buyer's motivations for buying a Honda Certified Used Vehicle and which buyers, if any, were deceived by the use of the phrase 'Honda Certified Used Car.'" Therefore, "[s]ince Plaintiff's proposed classes include consumers who were not deceived and suffered no harm, the proposed classes are not sufficiently definite to warrant class certification."

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Ascertainability: Lack of Objective Proof

Mann v. TD Bank, N.A., No. 09-1062 (RBK/AMD), 2010 U.S. Dist. LEXIS 112085 (D.N.J. Oct. 20, 2010):

Plaintiffs brought suit under the New Jersey Consumer Fraud Act, alleging that TD Bank failed to adequately disclose to consumers that their prepaid gift cards are subject to a $2.50 monthly "dormancy fee" beginning one year after a card's date of purchase.

Plaintiffs' proposed class included "[a]ll New Jersey persons and entities who ***purchased or received*** [Defendants'] gift cards on which dormancy fees were assessed from 2004 to the present."

The court rejected class certification, because identifying a large number of class members would require individualized inquiries:

"Plaintiffs' proposed class is too indeterminate because it would require individual hearings to establish who qualifies as a class member. Although Defendants can produce records identifying purchasers of cards that incurred dormancy fees, *recipients are not required to register their cards* . . . . [T]here is no systematic means for determining who ultimately received those cards or when purchasers gave their cards away. The Court would have to conduct fact-finding hearings to evaluate anecdotal evidence from each putative plaintiff and then determine whether individual plaintiffs could be credibly linked to one of the cards on Defendants' list at a time when the card incurred a dormancy fee. *This would require just the sort of individualized mini-trials that [courts have consistently rejected]* . . . ." *Id.* at *39.

Ascertainability: Lack of Objective Proof

Biediger v. Quinnipiac Univ., No. 3:09cv621 (SRU), 2010 U.S. Dist. LEXIS 50044 (D. Conn. May 20, 2010):

Plaintiff brought a putative Title IX class action on behalf of "women who have not and will not enroll at Quinnipiac because of Quinnipiac's allegedly discriminatory athletic programming."

Determining class membership would require an individualized and subjective assessment of each potential class member's state of mind:

> "[The proposed class] is sufficiently amorphous and unwieldy to upset the efficiency that a class action is supposed to achieve . . . . [It] could conceivably be every person who decided, or who will decide, not to attend Quinnipiac. That pool would then have to be narrowed ***by determining the members' motivations for their decision not to enroll in the University*** . . . . [The court] cannot imagine how the class's membership could be identified objectively and without inordinate time and expense."

Id. at *13-14.

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Ascertainability: Lack of Objective Proof

In re Vioxx Prods. Liab. Litig., No. 09-3713, MDL No. 1657 Section: L, 2012 U.S. Dist. LEXIS 78954, at *8, 12 (E.D. La. Jun. 6, 2012):

District court struck class allegations from the complaint because "Plaintiffs seek to represent a class that is defined by inherently subjective criteria," therefore, "[t]he class is not ascertainable." Where the proposed class definition included members who consented to a settlement agreement "for fear of losing their retained counsel," the district court concluded that "fear" was too subjective. "No such class could ever be certified" because "ascertaining the class cannot be done by any objective method."

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Ascertainability: Plaintiff or Defendant Has No Records for Objective Proof

Determining class membership from objective proof is impossible because of the loss of data.

Sevidal v. Target Corp., 189 Cal. App. 4th 905 (2010):

No record of who saw erroneous "MADE IN USA" slug on website.

Solo v. Bausch & Lomb Inc., 2009 WL 4287706 (D.S.C. 2009):

The need for mini trials and the class's failure to preserve receipts for over-the-counter lens solution makes class membership unascertainable.

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Ascertainability: Mini Trials for Factual Findings

Johnson v. Int'l Paper Co., 270 F.R.D. 640, 642-45 (M.D. Ala. 2010):

In toxic tort case, rejecting proposed class definition of all those who experienced contamination of their property and a resulting diminution in property value; determining which property owners actually experienced contamination would "require additional [scientific] evidence, and factual findings by the court before class members could be identified."

In re Vioxx Prods. Liab. Litig., No. 09-3713, MDL No. 1657 Section: L, 2012 U.S. Dist. LEXIS 78954, at *10 (E.D. La. Jun. 6, 2012):

Class allegations stricken from the complaint where class membership would "depend on individualized and subjective inquiries regarding the motivations of individual plaintiffs."

Recap

- The class definition . . .
  - Must be **precise**
  - Must define a class that is **objectively identifiable** at the **outset**
  - Must **not involve mini trials** to determine membership
  - Must **not require resolution of merits issues**
  - Must not sweep in large numbers of **people with no claim**

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Recap

- Beware of class definitions that . . .
  - Cite statutes
  - Use values words (*e.g.*, improper, wrongful)
  - Use legal conclusions (*e.g.*, fraudulently)
  - Use the word "all" (*e.g.*, "all purchasers")
  - Depend on class members' subjective feelings
  - Would require mini trials
  - Require documents that are likely lost or discarded

Quantum Physics for Lawyers: Fail-Safe Classes

Defining Class Membership: Bringing and Defending Challenges, Part II

21 August 2012

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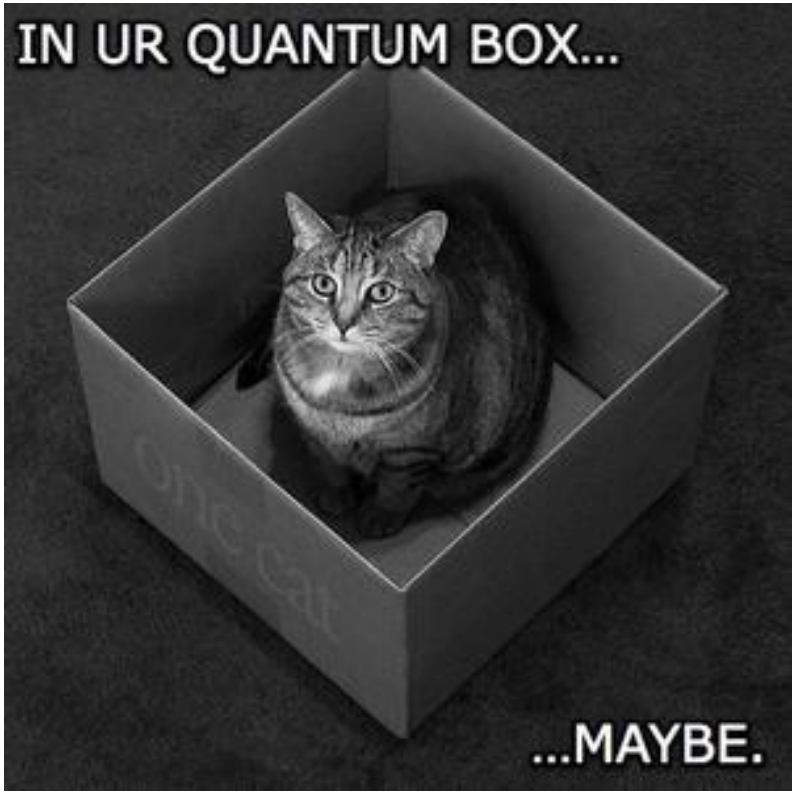
This is Erwin Schroedinger:

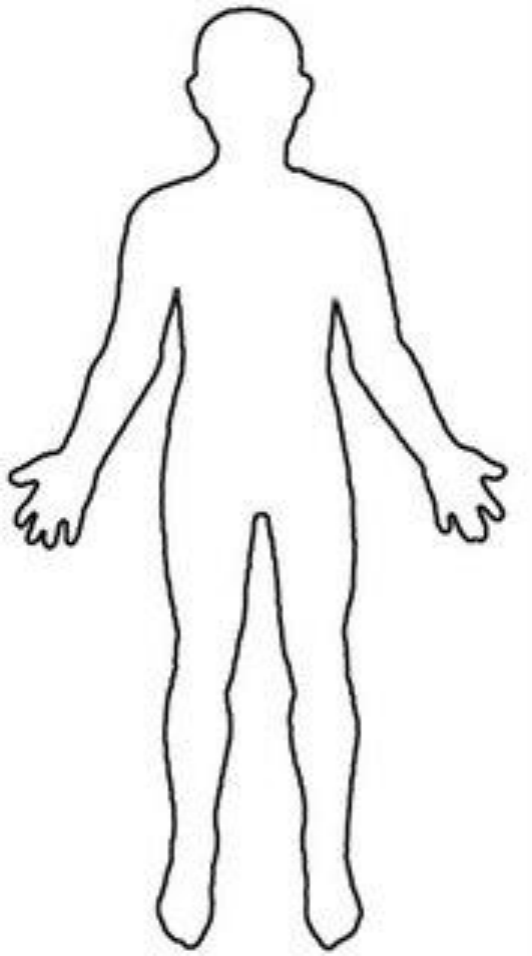
- Renowned physicist
- 1887-1961.
- Ph.D. University of Vienna, 1910.
- Nobel Prize, 1935 (for work on wave equations)
- Cat lover – maybe.

This is his cat:



- Put cat in box with (1) container of poison, and (2) decaying beryllium atom.
- When atom decays, container opens.
- Until you check atom, can't tell if it decayed.
- So, until that time, cat is both dead and alive.
- **Have to open the box to know which**.

Fail-Safe classes create Schroedinger's Class Member



- Might be a member of class.
- Might not.
- **We won't know until jury verdict.**

Or, in more formal terms …

- "**'[F]ail-safe' class:** one that is defined so that **whether a person qualifies as a member depends on whether the person has a valid claim**. Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment."

- *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 825 (7th Cir. 2012).

Verdict embedded in definition

- "All Louisiana residents (or their heirs, successors, or assigns) who were **charged excessive fees** and/or charges by a member of the Defendant Class by or through Dean Morris, L.L.P."

- "Resolving whether a particular individual falls within the class definition would require ascertaining whether Dean Morris had in fact charged that individual excessive fees or expenses."
- *Bauer v. Dean Morris, L.L.P.*, 2011 U.S. Dist. LEXIS 100399, *14 (E.D. La. Sep. 7, 2011).

Embedded factual inquiry

- "All persons who purchased automobile insurance from State Farm in the United States, except those who purchased such policies in the States of New Hampshire or Georgia, who paid State Farm for coverage entitling them to receive a Ten Dollars ($10.00) per day payment **while their cars were not usable** due to a loss to their cars which would be payable under comprehensive or collision coverages, and who did not rent a car while their vehicles were not usable, and who, since March 11, 1995, have been paid for a claimed loss under their comprehensive or collision coverages and were not paid the Ten Dollars ($10.00) per day for each day that their car was not usable as a result of that claimed loss."

- "The meaning of 'usable' in the rental provision is a central issue in this lawsuit and is not objectively ascertainable from State Farm's payment of a claimed loss."
- *Pastor v. State Farm Mut. Auto. Ins. Co*., 2005 WL 2453900, *1, *3 (N.D. Ill. Sep. 30, 2005).

References to relative positions

- "all periodontists, oral surgeons, and similar medical-dental professionals … who purchased the Implant Product in the United states, received marketing materials about Implant Product's success rate, and **have had to replace the Implant Product at a rate higher than warrantied** within the applicable statute of limitations."

- "In order to determine who is a member of the putative class, the Court would first have to make a legal determination on the defendant's warrantied rate of failure."
- *Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617, 630 (S.D. Fla. 2008).

References to memory or state of mind

- "Plaintiffs Burt Xavier and James Franklin seek to represent a state-wide class of asymptomatic Marlboro smokers and recent quitters who are more than fifty years old and **have at least a twenty-pack-year smoking history** …"

- "while the arithmetic total of an individual's Marlboro-smoking history is an "objective" question, it remains a *question,* and its answer depends on each individual's *subjective estimate* of his or her long-term smoking habit."
- *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1078, 1089 (N.D. Cal. 2011).

References to legal rights

- “All persons who (i) paid for title insurance issued by defendant Fidelity National Title Insurance Company in connection with the refinancing of a residential mortgage loan on property located in Ohio that was completed on or after February 15, 2000, (ii) **were entitled to receive** the "reissue" or "refinance" rate for title insurance pursuant to Section 8 or Section 9 of the Filed Rates (for transactions prior to February 1, 2002) or PR-9 or PR-10 of the Filed Rates (for transactions February 1, 2002 to the present), and (iii) paid more than the "reissue" or "refinance" rate for such title insurance. ”

- *Randleman v. Fidelity Nat'l Title Ins*. Co., 646 F.3d 347, 351 (6th Cir. 2011).

References to outcomes of legal defenses

- “All persons against whom Defendant sued since July 21, 2009, **on time barred debt** based on written instruments, such as credit card agreements, as calculated from the last payment due date available in Defendant's records. ”

- Defendant’s “records show that an independent inquiry had to be conducted to determine whether Clavell's debt's statute of limitations had indeed run.”
- *Clavell v. Midland Funding LLC*, 2011 U.S. Dist. LEXIS 65721, *4, *12 (E.D. Pa. Jun. 21, 2011).

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Drafting or Challenging Class Definitions

Best Practices

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Class Definition: A Threshold Question

Recent decisions indicate courts are asking a threshold question before they even begin to analyze whether a case satisfies the requirements of Rule 23: Is there a fair and efficient way to determine who falls in the proposed class?

In light of this judicial trend:

Plaintiffs must put additional care in crafting class definitions.

Defendants should carefully scrutinize proposed class definitions to determine whether they are subject to challenge on the ground of ascertainability.

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A Weak Class Definition Is Vulnerable to a Motion to Strike

Pilgrim v. Universal Health Card, LLC, 2011 WL 5433770 (6th Cir. Nov. 10, 2011)

Affirming grant of motion to strike class allegations where it was obvious that the class would require the application of 50 states' laws, making it unmanageable.

In re Vioxx Prods. Liab. Litig., No. 09-3713, MDL No. 1657 Section: L, 2012 U.S. Dist. LEXIS 78954, at *7 (E.D. La. Jun. 6, 2012)

"Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings."

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Purposes of the Class Definition:

- Identify Who Will Be Bound and Should Receive Notice
- Give Defendant Due Process Notice of the Scope of the Claims It Is Facing
- Case Management Tool

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Ascertainability

When creating a class, beware of:

- Not Identifying the Class
- Vague Terms
- Lack of Objective Proof
- Overbreadth
- No Records
- Mini Trials for Factual Findings
- Fail-Safe Classes

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Class Definition Issues

Identifying the Class – Who Are the Plaintiffs?

A class must be identifiable as a class. If, for example, plaintiffs wish to bring a consumer fraud claim that requires that the plaintiff was deceived in some manner and damaged by the deception and the membership in the proposed class requires only the purchase of the product, the class would not be certified because it would include buyers who were not deceived.

Oshana v. Coca-Cola Co., 472 F.3d 506, 513 (7th Cir. 2006):

"[Besides proving that Rule 23(a) and (b) are met,] [t]he plaintiff must also show . . . that ***the class is indeed identifiable as a class*** . . . . It is axiomatic that for a class action to be certified a 'class' must exist . . . . ***[C]lass definitions must be definite enough that the class can be ascertained***."

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Class Definition Issues

Vague Terms

Plaintiff does not adequately set forth precisely what the case is about:

Heisler v. Maxtor Corp., No. 5:06-cv-06634-JF (PVT), 2010 WL 4788207 (N.D. Cal. Nov. 17, 2010)

Where Plaintiffs sought to certify a class of "[a]ll end-user persons or entities who purchased in the United States . . . a [Maxtor Hard Drive] sold by Maxtor Corporation or an authorized Maxtor retailer or distributor that have ***experienced a failure*** . . . ," the court denied class certification because "failure" was too vague.

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Class Definition Issues

Lack of Objective Proof

Determining class membership would require an individualized and subjective assessment of each potential class member's state of mind.

In re Vioxx Prods. Liab. Litig., No. 09-3713, MDL No. 1657 Section: L, 2012 U.S. Dist. LEXIS 78954, at *8, 12 (E.D. La. Jun. 6, 2012). Where the proposed class definition included members who consented to a settlement agreement "for fear of losing their retained counsel," the district court concluded that "fear" was too subjective. "No such class could ever be certified" because "ascertaining the class cannot be done by any objective method."

Class Definition Issues

Overbreadth

Involves situations where the proposed class definition likely includes large numbers of individuals who have not suffered a legally cognizable injury and thus have no standing to bring suit.

O'Shea v. Epson Am., Inc., 2011 U.S. Dist. LEXIS 105504 (C.D. Cal. Sept. 19, 2011)

Where a Plaintiff brought suit under the California Unfair Competition Law (UCL) against Epson, alleging misrepresentation through a deceptive label on printer boxes, and sought to certify a nationwide class of persons who "between August 28, 2005 and class certification, purchased, not for resale, an Epson Stylus NX-series printer," the court refused to certify the proposed class, finding that it would potentially include many individuals who never saw or relied upon the deceptive label in question, and thus lacked standing to sue.

Class Definition Issues

No Records

An objectively ascertainable class definition may stem from unavailability of evidence.

Sevidal v. Target Corp., 189 Cal. App. 4th 905 (2010)

No record of who saw erroneous "MADE IN USA" slug on website. Where Plaintiffs alleged that the Defendant advertised that certain products were made in the USA when they were not, the slug appeared due to a computer programming glitch, and the Defendant was under no obligation to maintain records of who visited the "Additional Info" tab where the glitch occurred, the trial court determined that it was impossible to determine who was in the class and who was bound by the litigation, and the appellate court affirmed.

Class Definition Issues

Mini Trials for Factual Findings

If the court has to take on the administrative burden of making numerous fact-intensive inquiries (mini trials) to determine class membership, class certification will be denied.

Mann v. TD Bank, N.A., No. 09-1062 (RBK/AMD), 2010 U.S. Dist. LEXIS 112085 (D.N.J. Oct. 20, 2010)

Court denied class certification where Plaintiffs brought suit for consumer fraud act, alleging that the Defendant Bank failed to adequately disclose to consumers that their prepaid gift cards are subject to a $2.50 monthly "dormancy fee" beginning one year after a card's date of purchase, and the Plaintiffs' proposed class included "[a]ll New Jersey persons and entities who ***purchased or received*** [Defendants'] gift cards on which dormancy fees were assessed from 2004 to the present," because identifying a large number of class members would require individualized inquiries: "The Court would have to conduct fact-finding hearings. . . . *This would require just the sort of individualized mini-trials that [courts have consistently rejected] . . . .*" *Id.* at *39.

Class Definition Issues

Fail-Safe Class

A class is not ascertainable where the named plaintiffs propose a class definition that incorporated a legal conclusion (e.g., all consumers who were wrongfully denied).

Genenbacher v. Centurytel Fiber Co. II, LLC, 244 F.R.D. 485, 488 (C.D. Ill. 2007)

"[A] class definition is called a 'fail safe' class [when] the class definition precludes the possibility of an adverse judgment against class members; the class members either win or are not in the class [and are not bound by an adverse judgment]."

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Last Thoughts

- Manual for Complex Litigation (4th) § 21.222, at 270 (class definitions must "avoid subjective standards (*e.g.*, a plaintiff's state of mind) or terms that depend on resolution of the merits (*e.g.*, persons who were discriminated against)")

- 2 Alba Conte & Herbert Newberg, Newberg on Class Actions
- § 6:14 (4th ed. 2002) ("[A] definition in terms of objective characteristics of class members avoids problems of circular definitions which depend on the outcome of the litigation on the merits before class members may be ascertained")

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Why Not Just Amend? Ascertainability & Other Flaws

Defining Class Membership: Bringing and Defending Challenges, Part IV

21 August 2012

Andrew Trask

McGuireWoods LLP

Rule 23(c)(1)(B)

- Court must define
  - Class
  - Claims
  - Defenses

So why is ascertainability an issue?

- Can’t you just amend the definition?

Sometimes you can …

- "Defining a class so as to avoid, on one hand, being overinclusive and, on the other hand, the fail-safe problem is more of an art than a science. Either problem can and often should be solved by **refining the class definition rather than by flatly denying class certification on that basis**."

- *Messner v. Northshore* Univ. Healthsystem, 669 F.3d 802, 825 (7th Cir. 2012).

- *See also*
  - *O'Donovan v. Cashcall, Inc.*, 2012 U.S. Dist. LEXIS 91549, *2 (N.D. Cal. Jul. 2, 2012) (class definition finalized post-certification).
  - *Dashiell v. Van Ru Credit Corp.*, 2012 U.S. Dist. LEXIS 104043, *7 (E.D. Va. Jul. 23, 2012) (vague definition of FDCPA class could be cured by amendment).

But sometimes amendment doesn't work.

- "Generally, amendments to a class definition are liberally permitted. However, considering the factual scenario in the subject proceeding, **amendments will not provide a cure for all of the problematic issues perceived by the court**."

- *Gilliand v. Capital One Bank*, 2012 Bankr. LEXIS 3069, *7-*8 (Bankr. N.D. Miss. Jul. 16, 2012).

And sometimes the court will dismiss class allegations first.

- "Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings."

- *John v. Nat'l Sec. Fire & Cas. Co*., 501 F.3d 443, 445 (5th Cir. 2007).

Poorly-defined class may indicate lack of commonality

- Lower court tried to redefine “indefinite” class
- 7th Circuit held that problems with definition stemmed from lack of commonality. (Rule 23(a)(2).)
- Also found problems with proposed injunctive relief. (Rule 23(b)(2).)

- *Jamie S. v. Milwaukee Pub. Schools*, 668 F.3d 481 (7th Cir. 2012).

Poorly-defined class creates superiority problems

- "A serious, and perhaps insurmountable, manageability problem arises if each member has to litigate separate issues to establish his or her right to recover individually."

- *Rowden v. Pacific Parking Sys.,* 2012 U.S. Dist. LEXIS 95296, *10 (C.D. Cal. Jul. 2, 2012).

Individualized issues can make it impossible to define class - 1

- Complex, multi-defendant condominium fraud case
- "The Court finds that it is impossible to adequately and precisely define a class given the facts of this action."

- *Oginiski v. Paragon Properties of Costa Rica, LLC,* 2012 U.S. Dist. LEXIS 86054, *15 (S.D. Fla. Jun. 21, 2012).

Individualized issues can make it impossible to define class - 2

- Alleges run-flat tires went flat, needed replacement more often.
- Problems:
- Couldn't ID all owners/lessees who originally bought in NJ.
- Couldn't ID all BMWs with run-flat tires.
- Couldn't ID after-market additions.
- Couldn't ID non-warranty replacements.

- *Marcus v. BMW of N. Am.*, 2012 U.S. App. LEXIS 16369, *19-20 (3d Cir. Aug. 7, 2012).

May not be as great a problem for Rule 23(b)(2) class

- "[B]ecause notice is not obligatory and because the relief sought is injunctive rather than compensatory, it is not clear that the implied requirement of definiteness should apply to Rule 23(b)(2) class actions at all."
- Rule 23(b)(2) " designed to cover 'actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, ***usually one whose members are incapable of specific enumeration***.'"

- *Floyd v. City of New York,* 2012 U.S. Dist. LEXIS 68676, *12 (S.D.N.Y. May 16, 2012) (internal citations omitted, emphasis in original).

But Rule 23(b)(2) is not license to ignore ascertainability

- "a class may be certified under Rule 23(b)(2) only if 'the party opposing the class has acted or refused to act on grounds that apply generally to the class'. The 'general application' of practices to be specified later—and that when specified may turn out to affect only subsets of the class, which may or may not include any named representative—is hard to evaluate."

- *Rahman v. Chertoff*, 530 F.3d 622, 627 (7th Cir. 2008) (Easterbrook, J.).