

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Plaintiffs Should Be Prepared to Present Merits Evidence at the Class Certification Stage

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When courts are faced with determining whether the requirements to certify a class set forth in Rule 23 of the Federal Rules of Civil Procedure have been met—and, in particular, whether common issues predominate over individual ones—they often must address issues that go to the merits of the case. Accordingly, to prevail at the class certification stage, the named plaintiffs frequently must present evidence that goes to the merits of their claims in order to show that common issues predominate. That obligation is not new.

In *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011), the Supreme Court observed that “[f]requently that ‘rigorous analysis’ [of whether all class certification requirements are satisfied] will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.” Two years later, the Supreme Court



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reiterated the appropriateness of addressing merits issues (when necessary) at the class certification stage in *Amgen v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013), stating that “[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”

Consistent with *Wal-Mart* and *Amgen*, Southern District Judge Lewis J. Liman recently denied a motion for class certification in *Passman v. Peloton Interactive*, 2023 WL 3195941 (S.D.N.Y. May 2, 2023) (appeal pending), based on his finding that the named plaintiffs had failed to show that common issues predominate because they had failed to carry their burden with respect to a merits issue. Specifically, Judge Liman concluded

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that the plaintiffs had failed to demonstrate that the alleged misrepresentations on which they based their claims (i.e., that Peloton supposedly had misrepresented the extent of its library of product offerings) caused the putative class members to sustain a common injury (i.e., to pay more for Peloton products than they would have paid absent the alleged misrepresentations).

‘Passman v. Peloton Interactive’

The two named plaintiffs (named plaintiffs) alleged that Peloton, a company that sells stationary bicycles, treadmills, monthly subscriptions, and a digital application, violated two New York consumer fraud statutes—New York General Business Law (NYGBL) Sections 349 and 350—when, between April 9, 2018, and March 25, 2019, it stated on its website and other media that it offered subscribers an “ever-growing” or “growing” library of live and on-demand studio classes (collectively, the challenged statement). Named plaintiffs, who each purchased a monthly subscription membership, alleged that Peloton made the challenged statement despite knowing that it would be removing a large portion of its on-demand digital library. On Oct. 17, 2022, the named plaintiffs filed a motion to certify a class of “[a]ll purchasers of the Peloton hardware and the corresponding Peloton membership subscription from April 9, 2018, through March 25, 2019.” Peloton opposed the motion on three grounds: “named plaintiffs are inadequate and atypical class representatives; the named plaintiffs have failed to establish that common issues predominate; and proposed class counsel is inadequate.”

Relevant Legal Principles

In resolving the named plaintiffs’ motion to certify the proposed class, Judge Liman addressed each of Rule 23’s requirements. Under Rule 23(a), a party seeking class certification must demonstrate that: “the class is so numerous that joinder of all members is impracticable [“numerosity”]; there are questions of law or fact common to the class [“commonality”]; the claims or defenses of the representative parties are typical of the claims or defenses of the class [“typicality”]; and the representative parties will fairly and adequately protect the interests of the class. [“adequacy”].” Fed. R. Civ. P. 23(a).

A party seeking class certification also must meet one of the three requirements of Rule 23(b). One such requirement (and the requirement addressed in Passman) mandates “that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods of fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). This requirement, referred to as “predominance,” evaluates whether a proposed class is “sufficiently cohesive to warrant adjudication by representation.” Passman, 2023 WL 3195941, at *7 (quoting *Myers v. Hertz*, 624 F.3d 537, 547 (2d Cir. 2010)).

Application of Legal Principles to ‘Passman’

In applying the above legal principles, Judge Liman began with the four Rule 23(a) requirements and found that the named plaintiffs satisfied each. First, numerosity was not disputed, as the proposed class was “in the

thousands.” Second, Judge Liman concluded that the named plaintiffs had demonstrated commonality because under NYGBL Sections 349 and 350, the core issues as to whether the challenged statements were false and whether any such falsity was material required an objective inquiry (i.e., whether a reasonable consumer would have found the challenged statements materially misleading), and thus both falsity and materiality were “susceptible to classwide proof,” as each “turn[ed] upon an objective analysis that applies across cases.”

Third, Judge Liman concluded that the named plaintiffs had established typicality because the putative class members’ claims “arise[] from the same course of events”—they “paid for Peloton [H]ardware, and then continued to pay for subscription membership during the class period, during which time Peloton represented that its on demand class library would be ‘ever growing’”—and thus “each class member [will] make[] similar legal arguments to prove the defendant’s liability.” Finally, with respect to adequacy, Judge Liman found that although one of the two named plaintiffs was an inadequate class representative due to his complete lack of understanding both of the case and his role and responsibilities as a class representative, the other named plaintiff had a sufficient understanding of both matters to render him an adequate class representative.

After concluding that the named plaintiffs satisfied the Rule 23(a) requirements, Judge Liman turned to Rule 23(b) and found that here, the named plaintiffs faltered. To satisfy Rule 23(b), the named plaintiffs argued that the key issues in the case—falsity, materiality, injury, and damages—all could be resolved

through common proof, and thus they met the Rule 23(b)(3) requirement that common issues predominate over questions affecting only individual members. Although Judge Liman agreed that commonality existed for the issues of the falsity and materiality of the challenged statement (because, as noted above, they turn on an objective inquiry concerning the “reasonable consumer”), he found that the purported class’s injury and damages required analysis of issues unique to individual members. In reaching this decision, Judge Liman found it necessary and appropriate to examine merits issues.

Judge Liman began by explaining that the named plaintiffs were pursuing a “price-premium” theory of liability under NYGBL Sections 349 and 350, which, if successful, would enable them to establish commonality with respect to injury and damages. Under the price-premium theory, the named plaintiffs alleged that “the defendant’s misleading or deceptive advertising campaign caused a price premium, that the price premium was charged both to those who saw and relied upon the false representations and those who did not, and that, as a result of the price premium, the plaintiff was charged a price she would not otherwise have been charged but for the false campaign.”

Because the named plaintiffs relied on such a theory, Judge Liman found it necessary and appropriate for him to reach the merits question of whether a price premium in fact existed at the class certification stage because it “goes to the heart of whether individualized questions of fact and law predominate over common ones.” Judge Liman explained that the named plaintiffs’ burden at the class certification stage to demonstrate that a price

premium existed should “come as no surprise” based on Supreme Court decisions that approve of courts reaching merits questions when necessary to determine whether Rule 23’s requirements have been met.

Accordingly, Judge Liman evaluated the evidence presented by both parties—including expert submissions—and concluded that the named plaintiffs had failed to carry their burden to show the plausible existence of a price premium. Among other things, the named plaintiffs failed to present evidence indicating that the proposed class members had been exposed to the challenged statement or that the challenged statement had resulted in the proposed class members paying a higher price than they would have paid absent the challenged statement. Moreover, although it was the named plaintiffs’ burden to demonstrate the existence of the price premium, Peloton presented compelling evidence that the supposed price premium could not be shown, including because the challenged statement was contained in only a small subset of advertisements that very few purchasers actually viewed and because when the challenged statement appeared in Peloton’s marketing materials, it did not appear alone or as the most prominent marketing message. Without evidence of a price premium, the named plaintiffs could not establish commonality, because whether or not the challenged statement caused an injury to the putative class members would turn on how the challenged statement impacted individual class members’ purchasing decisions.

Judge Liman also observed that the named plaintiffs had failed to establish commonality

with respect to damages because they had “not demonstrated that there exists a model capable of measuring damages attributable to their theory of liability.” In particular, the named plaintiffs proposed damages model measured the impact of advertising that contained both the challenged statement and other marketing messages, and failed to present a damages figure that isolated the impact of the challenged statement alone. Based on the Second Circuit’s emphasis “that courts must consider whether damages are ascertainable on a common basis,” Judge Liman concluded that the lack of a sufficient damages model provided further support for his conclusion that the named plaintiffs failed to satisfy the predominance requirement of Rule 23(b)(3). *Id.* at *30 (citing *Roach v. T.L. Cannon*, 778 F.3d 401, 408 (2d Cir. 2015)).

Conclusion

Although the named plaintiffs argued that discovery still was open and therefore whether a price premium in fact existed was a question that should be reserved for summary judgment or trial, Judge Liman concluded, consistent with Supreme Court precedent, that the named plaintiffs had the burden to propound evidence at the class certification stage sufficient to support the existence of a price premium. Having failed to do so, the named plaintiffs were precluded from pursuing their claims on a classwide basis. When, as in *Passman*, merits issues arise at the class certification stage, the named plaintiffs should be prepared to present evidence sufficient at least to create an issue of material fact as to those issues.