

At A Glance

Class Certification: Product Liability and Consumer Class Actions

Overview

Courts increasingly grant or deny class certification with the benefit of expert economic and statistical analysis. NERA experts are experienced in producing rigorous empirical analyses to assess whether Rule 23 requirements are met. We also regularly evaluate the analyses produced by opposing experts and assess whether they meet the *Daubert* criteria for admissibility.

Key Areas of Expertise

The analysis that is most helpful at the class certification stage may differ in personal injury class actions from no-injury class actions, and in cases alleging product defects from those involving misrepresentations of product features or performance. Empirical analysis—using sales data, public demographic information, or the results of specially designed surveys—can help inform the class certification inquiry in a wide range of product liability and consumer class actions.

Representations and Omissions. Class actions in product liability often involve claims of misrepresentations, omissions, and deceptive marketing practices. In these instances, key issues at the class certification stage can include establishing how consumers interpreted key communications, whether those communications were material to their decisions, and whether they relied upon the alleged misinformation in making a decision. If differences are found across consumers in their exposure and reliance on representations, it undermines the proposition that the impact of the misrepresentation can be proven for all class members using common evidence (Rule 23(b)(3)). NERA experts have experience in evaluating the extent to which alleged omissions and misrepresentations may be the basis for defining a class.

Potential Defect Rates. Product liability class actions often start when a product failure or defect is identified. Such failures give rise to potential claims of a systemic problem or “product defect.” In such instances, statistical analysis of samples of products can help establish the extent to which a specific problem is closely linked with unique conditions or circumstances. NERA experts have experience in designing samples and analyzing product use and product failure data to identify relevant patterns.

Coherence of Proposed Class. Product liability class actions presume that an aggrieved pool of consumers exists who have experienced the alleged issue. In the precertification stage, a key analysis is whether the alleged putative class is properly defined. Questions frequently arise as to the size, socio-demographic characteristics, perceptions, and behaviors of various segments of any proposed class. Careful analysis of the putative class may identify how different circumstances or preferences may have affected experience with a product, raising commonality and typicality concerns or delineating potential subclasses. NERA experts work with a wide range of data sources and client records to understand the composition of putative classes.

Migration of Class Members Between States. In class actions filed in state court, migration of class members across state lines raises problems for class certification. Migration analysis can quantify the extent of the relevant population's movement across states and is appropriate when the injuries of some class members may have been sustained in a state other than the one where the lawsuit has been filed. For example, migration analysis may be useful in pharmaceutical litigation where injuries develop over time. In this case, proposed class members could have taken the product while living in one state before moving to another state where the class is being formed. Migration analysis has most often been applied in cases involving health-related issues, but has also been successfully applied outside the setting of personal injury class actions.

Sample Client Experience

Class Action to Compel Medical Intervention:

A class action lawsuit alleged that a tobacco company owed medical treatments for illnesses associated with smoking. NERA experts provided statistical evidence on issues of commonality of the proposed class seeking certification across a number of states. To generate accurate estimates, we accounted for demographic patterns—including mortality and morbidity—and how these patterns were related to smoking behaviors. For example, many current residents had been smoking for many years before moving to the current state of residence and had therefore incurred their smoking-related injury elsewhere. The analysis required us to aggregate and manage large, complex data sets from multiple sources, including data from the US Census.

Construction Defect Class Action: Plaintiffs in a roofing products case claimed the manufacturer misrepresented the product's future performance. Working for the defendants, NERA experts designed and analyzed a survey of a sample of putative class members. The survey revealed that the majority of homeowners had purchased the homes from a developer, had no direct involvement in the purchase of the product, and typically had not seen any warranties or marketing materials. These results were used as evidence that the manufacturer could not have misrepresented the product's performance to those consumers.

Consumer Class Action: A consumer class action lawsuit was filed against Sprint and other major wireless carriers accusing them of "locking" the handsets with software preventing consumers from porting their handset to other carriers' networks. Among other evidence, plaintiffs offered a survey of consumers allegedly demonstrating that consumers expected to be able to transfer their handsets to other carriers. NERA's survey and sampling experts testified to serious flaws in the survey and sampling conducted by plaintiffs, providing evidence that the results generated did not meet *Daubert* standards. Ultimately the opposing expert's testimony was excluded.

About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

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