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Everything's Not Lost: Pushing Back Against Class Certification With Debevoise's Maura Monaghan

The co-chair of the commercial litigation group at Debevoise & Plimpton has a message for defendants facing a certified class: "Don't take counsel of despair."

By Ross Todd
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Sometimes when a class has been certified, defendants feel like the leverage has shifted so far in the plaintiffs' favor that there are no more litigation options.

But when the Litigation Daily caught up with **Maura Monaghan**, the co-chair of the commercial litigation group at **Debevoise & Plimpton**, she had a message for folks sitting in that situation: "Don't take counsel of despair."

When I asked "Who's the Best You've Ever Seen?" Monaghan's colleagues at Debevoise pitched her as someone who is particularly skilled at finding creative ways to fend off class certification—even in cases where the class has already been certified.

Case in point: Monaghan represented client Medicredit Inc. in a case where the debt collection service provider faced a certified class of more than 7,500 to whom it had sent a letter on behalf of a Texas hospital. Medicredit was accused of making a false threat of legal action violating the Fair Debt Collection Practices Act. But in 2020, after Monaghan argued that the class didn't meet several of the required conditions for certification, including commonality, typicality, and predominance, the Fifth Circuit decertified it.

Maura Kathleen Monaghan, with Debevoise & Plimpton.

"I think which Rule 23 element is most likely to get the court's attention is going to vary from case to case," Monaghan said. I rattled off commonality, typicality, predominance, superiority, ascertainability, and standing before asking her whether it's better to hone in on one or go for a "death by a thousand cuts' approach. Monaghan pointed out that a lot of the Rule 23 elements overlap. "Commonality obviously also has a relationship to typicality, which has a relationship to adequacy of

representation," she said. But Monaghan said the flipside of her "don't despair" message is that it's useful for defendants to think strategically about class certification issues and how they intersect with the merits of a case "from the very beginning."

"Even if you're in a situation where you're going to bifurcate discovery, for example, you want to be using the time that you're making your case with respect to the individual plaintiff to also cast a shadow down the road over what's going to happen to the class," Monaghan said. "In terms of what those issues are, that's going to vary from case to case but we've certainly seen for example, that the changes in jurisprudence coming from the appellate courts and the Supreme Court in areas like standing, for example, having repercussions for class actions." Monaghan said you have to stay on top of everything that's going in terms of the individual causes of action so that you can think about how those issues permeate the class.

As with all commercial litigation, Monaghan said that the briefs are critical "because that's where most of the story gets told." But she noted that oral argument is often where a lawyer can explain why a particular case is different than a run-of-the-mill class action that a judge might have seen 100 times before. She said that in preparing for oral argument on class certification issues she tries to be as attentive to her adversary's argument as she is to her own.

"That can be hard because you start to believe your own arguments. You feel you're in the right. You tend to maybe be a little dismissive of the other side's arguments or just have this sort of organic revolt in taking them too much to heart," Monaghan said. "But I think the best way to prepare for a skeptical question is to really delve into what the adversary has said, what you think the fairest points that you need to be able to counter are, and by being mooted by colleagues who are looking at the issue with fresh eyes." Here, she says that associates tend to get a lot of joy out of grilling a partner, and she encourages them to do that.

But she added it's also important to recognize lifelines from the judges during oral argument and to take them when they're offered. In the case she handled for Medicredit, for example, Judge Edith Jones stopped Monaghan a little less than four minutes into her argument to say "I'm helping you out" after pointing out that the plaintiff's debt could involuntarily be reported credit bureaus—meaning that the letter wasn't necessarily threatening litigation.

Monaghan said in these kinds of complex arguments you can't be too wedded to your script. "You need to prepare, prepare, prepare and then set it aside in a lot of ways," she said. 'Where that helps is you're reading not only the literal question, but the body language, the context—all of those things to tell you whether this is something where you need to draw this thing out of or this is something you need to embrace and carry forward in order to get your argument across the finish line."