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Fiat Lux: Tracing A Standard of Review for Class Certification Orders

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**Fiat Lux: Tracing A Standard of Review for Class Certification Orders**

By

Curtis E.A. Karnow*

And you may ask yourself  
Well...How did I get here?*

1 The Rule of Stated Reasons

Trial judges are comforted by the usual standard of review, which is in plain English that their decisions are assumed to be right, if only in the sense that the appellant usually has the burden of showing otherwise. Doctrines of harmless error and others tend to focus on the result below and, if the record supports the result, urge affirmance. The record might be barren, it might reveal a trial judge’s incorrect rationale, but if the result is otherwise supportable the trial judge is usually affirmed.¹

But there are few situations in which appellate courts focus on the reasons provided and will reverse if the reasons do not support the result or the reasoning is wrong; even if the result has support in the record. I came across this in California state law, as I was having a look at the standards of review of decisions to certify (or not) class actions. This is the standard, distinguished from the usual rule:

> Under ordinary appellate review, we do not address the trial court's reasoning and consider only whether the result was correct. [Citations] But when denying class certification, the trial court must state its reasons, and we must review those reasons for correctness. [Citations] We may only consider the reasons stated by the trial court and must ignore any unexpressed reason that might support the ruling.²

We might call this, for shorthand, the *rule of stated reasons*.³ We must distinguish a different rule, which applies generally, including in the class certification context:

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* Judge of the California Superior Court, County of San Francisco.
* Talking Heads, “Once In A Lifetime”.
¹ E.g., Jon B. Eisenberg, et al., CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶ 8:15, 8:224 (as of September 2015 update) (general rule is affirmance on any correct ground).
³ See generally, e.g., Jon B. Eisenberg, et al., CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶ 8:225 (as of September 2015 update). This state rule does not appear to have a federal analogue. Compare, e.g., William
A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.\(^4\)

This rule is ordinary. It is routine to reverse if there is no factual support for a decision or the trial judge gets the law wrong. It is not this routine rule I am interested in here, although as we will see later some courts rely on the routine rule as if it necessarily justified the rule of stated reasons; which it does not, for one may have the former without the latter.

There is a third rule of review, also seemingly routine which we should distinguish:

> We must “[p]resum[e] in favor of the certification order ... the existence of every fact the trial court could reasonably deduce from the record....”\(^5\)

This third rule is part of the broader and usual standard I alluded to in the beginning of this Note, which, if one enjoyed the sound of old fashioned words, one might call the rule of all intenments.\(^6\) Under that broad rule, when the record is silent the order is generally affirmed.\(^7\) In the class certification context, the more general, broader rule of intendment is not effective. If nothing “illuminates the court’s thinking” on the reasons for the determination, the case is reversed and remanded.\(^8\) The rule of intendment does not apply.\(^9\) What then, is this narrower third rule which does apply in the certification context? It is not clear; but it may just mean that when a judge does explain himself or herself in a way that suggests reliance on facts, the appellate court will indulge the trial court ruling if there is any basis in record to do so.

I have briefly outlined these various standards of review because, as we shall see, the opinions that develop the rule of interest here—the rule of stated reasons—ultimately dissolve into the distant mists of the past, sometimes doing so by conflating the rule of stated reasons with these other standards of review.

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Rubenstein, NEWBERG ON CLASS ACTIONS §§ 7:53, 14:19 (2013); Vallario v. Vandehey, 554 F.3d 1259, 1264 (10th Cir. 2009).

\(^4\) Fireside Bank v. Superior Court, 40 Cal. 4th 1069, 1089 (2007).

\(^5\) Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1022, quoting Sav-On, 34 Cal. 4th at 329.

\(^6\) From a case almost a century ago: “In an appeal on the judgment roll alone every intendment possible is in favor of the judgment or order appealed from, and if error does not affirmatively appear, it will be sustained, if there is any possible ground on which it can be sustained.” Myers v. Canepa, 37 Cal. App. 556, 560 (1918). A newer case to the same effect is Seibert v. City of San Jose, No. H040268, 2016 WL 3085205, at *9 (May 31, 2016).

\(^7\) E.g., Elena S. v. Kroulik, No. D068831, 2016 WL 2943411, at *1 (Cal. Ct. App. May 18, 2016) (“A judgment or order of the lower court is presumed correct. All intenments and presumptions are indulged to support it on matters as to which the record is silent”); A.G. v. C.S., 246 Cal. App. 4th 1269, 1281 (2016).

\(^8\) Tellez v. Rich Voss Trucking, Inc., 240 Cal. App. 4th 1052, 1064 (2015). The trial judge found that a party had failed to adhere to the court’s procedures to contest tentative rulings, and was thus barred from argument; which (and here’s the error) in the judge’s view obviated the need to explain himself. Tellez, 240 Cal. App. 4th at 1060; 1064 n.12.

\(^9\) Only the concurring justice suggested the rule was so in e.g. Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522, 546 (2014) (Chin, J., concurring).
The rule of stated reasons is odd, and has been repeatedly called out as different from the usual approach. Why, then, did it develop? Below, I provide a guided tour to the genealogy, and show its origins are lost to us. I end with some thoughts as to why, nevertheless, the rule is as it is, and its implications for the work of trial judges and lawyers.

II Tracing The Rule

One might start almost anywhere in the last few years with a decision reviewing a certification (or decertification) order, and then trace the citations down through the ages; well, through the decades anyway. Significantly, this is one of the few areas of law where I have seen only the citation or repetition of the rule; never a rationale. Despite frequently introducing it as an exception to the usual standard of review, no court has felt an obligation to explain it. This both makes it relatively simple to trace the rule, but leads to the ultimate frustration of never discovering at least an historical explanation for its development.

In the appendix, I walk the reader through scores of cases. I start with two cases and follow them back in what I term the main sequence. I then check my work, as it were, fifteen times by using fifteen other recent cases as starting points to retrace these steps, and I find that in all of these tracings, the citation chain usually touches down first on Linder11 and then, most significantly, through Linder to Clothesrigger.12

For cases decided after Linder in 2000, it is probably the single most cited case in support of the rule of stated reasons, with eight of cases in what I term the main sequence citing it directly. In a single paragraph, The Californian Supreme Court in Linder recites a series of standards it means to apply:

Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. The denial of certification to an entire class is an appealable order (Richmond v. Dart Industries, Inc., supra, 29 Cal.3d at p. 470; Daar v. Yellow Cab Co., supra, 67 Cal.2d at pp. 698-699), but in the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed “unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]” (Richmond v. Dart Industries, Inc., supra, 29 Cal.3d at p. 470). Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal “ ‘even though there may be substantial evidence to support the court's order.’ ” (Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644, 655 [22 Cal.Rptr.2d 419], quoting Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal.App.3d 605, 612 [236 Cal.Rptr. 605]; see National Solar Equipment Owners' Assn. v. Grumman Corp. (1991) 235 Cal.App.3d 1273, 1281 [1 Cal.Rptr.2d 325].) Accordingly, we must examine the trial court's reasons

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for denying class certification. “Any valid pertinent reason stated will be sufficient to uphold the order.” (Caro v. Procter & Gamble Co., supra, 18 Cal.App.4th at p. 656.)

I extract the rules. First, I note the premise of deferral to the trial judge, especially because of the practical aspect of the certification order. The initial use of the word ‘because’ suggests, accurately I think, that this reason explains the rules that are about to be recited; I will return to this in § IV of this Note.

Next, we see the certification order is appealable; then we see what I have termed the ‘routine’ rule (see above text at note 4) which looks to substantial evidence and a lack of legal error. But then the opinion seems to either say that the next rule recited—our focus, the rule of stated reasons—is either equivalent to this routine rule or that the rule of stated reasons is explained or justified by the routine rule.

We have already seen above that such an equivalence is false. I also suggest it is not at all obvious that the one justifies or explains the other. The citation to Richmond gives it away: Richmond only recites the routine rule, not the rule of stated reasons, which is why I term it a dry hole. The cases on which Richmond relies, Occidental and Fletcher, too are dry holes. And we need not look far for cases in which the routine rule patently applies without any suggestion that a failure to state reasons is fatal. An appellate court might well insist on substantial evidence but still indulge the lower court with the rule of intendments. Indeed, the standard of review which insists on ‘substantial evidence’ but nevertheless so indulges the trial court uses rules which are “natural and logical corollary[ies]” of each other; the tests actually go hand-in-hand.

At least as of Linder, we have no explanation for the quite distinct rule of stated reasons.

So where can we turn to, after Linder? We follow its clues. It relies on Caro, which as Linder notes relies on Clothesrigger; and National Solar. We will say no more about National Solar, because it just relies on Richmond, a dry hole, and on Clothesrigger.

We have come then to Clothesrigger, a 1987 decision directly relied on by not only Linder, but four other cases in the main sequence, and many other cases as well. This is the decisive moment in the development of the rule of stated reasons.

Clothesrigger discuss standards of review twice. The first time, it recites the rule of stated reasons, analogizing to

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14 Richmond v. Dart Indus., Inc., 29 Cal. 3d 462, 470 (1981) (“For example, in the absence of other error, this court will not disturb a trial court ruling on class certification which is supported by substantial evidence unless (1) improper criteria were used (see Occidental Land, Inc. v. Superior Court (1976) 18 Cal.3d 355, 361 [134 Cal.Rptr. 388, 556 P.2d 750]); or (2) erroneous legal assumptions were made (Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442, 446 [153 Cal.Rptr. 28, 591 P.2d 51]).’)
15 See note 14.
non-statutory situations [which] involve issues where the appellate focus is on the means used by the trial court. The right result is an inadequate substitute for an incorrect process. Thus the appellate scrutiny should be on the reasons expressed by the trial court in the context of counsel's arguments not merely whether the trial court reached a result which can be justified by implication.\(^{21}\)

In this connection Clothesrigger has single, lonely citation: “9 Witkin, Cal.Procedure (3d ed. 1985) Appeal, § 262, p. 269.”\(^{22}\) We will return to this shortly. A few lines later, Clothesrigger recites a different standard: Richmond’s routine rule.\(^{23}\) And indeed the result in Clothesrigger probably stems from the application of this last standard, the Richmond rule, because the court does, first, try to figure out what the trial judge probably meant and, secondly, criticizes what he did say.\(^{24}\) It does not appear that the trial judge’s result could have been rescued on appeal if only it had stated his thinking correctly or more explicitly. If I am right, we have the first of two wonderful twists: here, that the rule of stated reasons—at least in the class certification context—was born in a case where it did not apply. But we are not shocked at this.\(^{25}\)

We turn to the second twist, and Clothesrigger’s novel articulation of the rule of stated reasons. As I indicated, there is one cite for this: the Witkin treatise. For those outside of California, know that Bernard Witkin’s treatises on California procedural\(^{26}\) and substantive\(^{27}\) law are frequently cited by judges and lawyers as summaries of extant law.\(^{28}\) The treatise pages cited in the 1987 Clothesrigger opinion are no longer generally available, but through the kind assistance of the Witkin publishers\(^{29}\) I have reviewed the section Clothesrigger referred to. The original hardback volume entry has nothing directly on point. It provides examples of where judges must state their reasons. Some of them are because a statute says so, such as in cases of a motion for a new trial, motion for a nonsuit, and where a so-called statement of decision is mandated. I note this further, below in § III. Then Witkin notes non-statutory bases: where a judge fails to rule on the merits.\(^{30}\)

\(^{21}\) 191 Cal. App. 3d at 611-12 (emphasis supplied).
\(^{22}\) B. Witkin, CALIFORNIA PROCEDURE, Appeal § 262 (3d ed. 1985).
\(^{23}\) 191 Cal. App. 3d at 612.
\(^{24}\) 191 Cal. App. 3d at 613. Indeed, the trial judge’s reasons are quoted at some length. Id. at 610-11.
\(^{26}\) B. Witkin, CALIFORNIA PROCEDURE (5th ed. 2008).
\(^{27}\) B. Witkin, SUMMARY OF CALIFORNIA LAW (10th ed. 2005).
\(^{29}\) My thanks to Thomson-Reuters’ John K. Hanft for making a photocopy of the old text available.
\(^{30}\) The cite is to Gosnell v Webb, 60 Cal. App. 2d 1, 5 (1943) (“it appears that the trial court has declined to pass upon the merits of a motion”).
and similar situations\textsuperscript{31} where the judge plainly misunderstands the rule,\textsuperscript{32} or the judge was biased. In the cases briefly described in the last few footnotes relied on by Witkin, the court \textit{expressly} got the law wrong, or \textit{expressly} refused to rule. That’s why the appellate court refused to indulge the trial judge and refused to assume he was right.

So the 1985 Witkin treatise sheds no light: these cases do not tell us why the rule of stated reasons should be imported to the class certification context. We don’t know why \textit{Clothesrigger} cited the treatise. It’s a dry hole. But in another wonderful example of the eternal self-reflexive nature of legal citation, here’s a second twist: the 1987 update to this section of the treatise relies, without comment, on – \textit{Clothesrigger}.\textsuperscript{33}

We might guess how the rule of stated reasons was quietly born in the 1987 \textit{Clothesrigger} case. It is, after all, not too far a leap from (i) the routine rule\textsuperscript{34} which reviews substantial evidence and legal error, but assumes the criteria are met, to (ii) a rule which, unable to determine if the lower court was aware of the evidence or the law, declines to assume the criteria are met. A court might invoke the routine rule that so “long as that [trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld,” but, finding no expression of correct reasons, reverse.\textsuperscript{35} Later, that might look like the application of the rule of stated reasons.

Too, there is a price to pay under the first, routine rule: the court of appeal must review the entire record without direction from the trial judge. And because trial judges are fact finders in certification motions,\textsuperscript{36} the court of appeal may have to guess how the trial judge resolved conflicts in the evidence, or weighed the evidence. But also this: without some assurance that the trial judge has really thought about practicalities, the case might unfold into chaos, and wasted years of litigation. It’s happened.\textsuperscript{37}

This allusion to practicality is, I suggest, a hint to the deeper reasons for the rule of stated reasons. I take these up next.

\textbf{III \hspace{1em} The Rule’s Rationale}

If history sheds no light, we might reach to kindred areas of law to learn the reason for the rule. As the Witkin treatise notes, some statutes simply require a statement of reasons. Judges are required after a bench trial to render a written statement of decision to support the judgment.\textsuperscript{38}

\begin{itemize}
  \item\textsuperscript{31} The cite is to \textit{Kyne v Kyne}, 60 Cal. App. 2d 326, 332 (1943) (court expressly refused to rule on the issues).
  \item\textsuperscript{32} The cite is to \textit{Lippold v. Hart}, 274 Cal. App. 2d 24, 26 (1969) (court expressly used wrong test).
  \item\textsuperscript{33} The cite to \textit{Clothesrigger} was carried forward to the current edition, 9 B. Witkin, \textit{Californai Procedure}, Appeal § 349 at p.402 (5th ed. 2008).
  \item\textsuperscript{34} Recall the routine rule: “A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.” \textit{Fireside Bank v. Superior Court}, 40 Cal. 4th 1069, 1089 (2007).
  \item\textsuperscript{35} \textit{Rosack v. Volvo of Am. Corp.}, 131 Cal. App. 3d 741, 750 (1982).
  \item\textsuperscript{36} See below note 55.
  \item\textsuperscript{37} \textit{Duran v. U.S. Bank Nat. Assn.}, 59 Cal. 4th 1, 29 (2014).
  \item\textsuperscript{38} C.C.P. § 632 ; CRC 3.1590 et seq.
\end{itemize}
California’s Code of Civil Procedure requires a statement of reasons for a new trial. But the appellate remedy here is not, as it appears to be in the class certification motion, to reverse and remand. Rather the appellate courts shift from an abuse of discretion standard to a de novo review. Judges must make such a record when they dismiss criminal charges. Federal courts are required to state their reasons when issuing preliminary injunctions, but not it seems state courts. State judges do have to issue written orders explaining their reasons when deciding motions for summary judgment, and without that record the case is reversed and remanded to get it. In the federal system, written findings are required when reviewing parole determinations and when departing from sentencing guidelines.

In the context of this Note, it is especially interesting that court review of an administrative agency involves an evaluation of whether the agency has made a sufficient record—an “adequate statement of reasons”. With that statement of reasons, when the agency decision is plainly within the scope of the agency’s expertise, courts defer to that expertise:

“In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support...” [Citation.] When making that inquiry, the “court must ensure that an agency has adequately considered all relevant factors, and has

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39 C.C.P. § 657.
43 Penal Code § 1385(a). See e.g., People v. Ray, No. C035003, 2001 WL 1627987, at *2-3 (Cal. Ct. App. Dec. 18, 2001) (“Notwithstanding the deferential standard of review, we must reverse and remand this matter to the trial court for two reasons. First, the court's minute order does not include a reviewable statement of reasons for its decision”) (unpublished).
46 C.C.P. § 437c(g).
48 E.g., Misasi v. U.S. Parole Comm’n, 835 F.2d 754, 758 (10th Cir. 1987).
49 United States v. Salem, 597 F.3d 877, 888 (7th Cir. 2010); United States v. Baham, 215 F. App’x 258, 261 (4th Cir. 2007); United States v. Bell, 371 F.3d 239 (5th Cir. 2004).
50 Logan v. Principi, 71 F. App’x 836, 838 (Fed. Cir. 2003); Donovan v. Local 6, Washington Teachers’ Union, AFL-CIO, 747 F.2d 711, 715 (D.C. Cir. 1984); see also e.g., Native Vill. of Point Hope v. Salazar, 378 F. App’x 747, 748 (9th Cir. 2010). See also, Levi Family P’ship, L.P. v. City of Los Angeles, 241 Cal. App. 4th 123, 131-32 (2015) (agency must find facts to enable judicial review).
demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.”\(^{51}\)

Reviewing administrative determinations involves the same ordinary, routine rule I mentioned at the outset of this Note, where the review determines if there is substantial evidence and if the correct law was employed (above, text at note 4). Courts review for “legal error and substantial evidence.”\(^{52}\) In part, this is the result of the agencies’ role in fact finding;\(^{53}\) the substantial evidence test is premised on the inferior’s tribunal’s fact finding powers.

Given the great deference provided to agencies, it is essential that the \textit{process and methods} used by the agency are correct, for that likely ends up being the sole assurance of a legitimate determination. That is, the extent of deference correlates with the extent to which the agency’s process of determination is procedurally correct. In some cases the harmless error standard is not applicable.\(^{54}\)

So it is that in the context of administrative review we have a requirement of written reasons (as well as the routine rule of reversing where there is no substantial evidence, or the legal standards are mistaken). These are also the rules that apply when an appellate court reviews a trial judge’s class certification motion. In both situations, we have (i) an exceedingly important, usually decisive, order, and (ii) a very high level of deference, premised in part on (iii) the fact finder role of the original forum (the agency or trial judge).\(^{55}\)

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\(^{55}\) Trial judges are fact finders in certification motions, and can weigh or disbelieve evidence as they wish. For example, they may give little weight to boilerplate “identical and undetailed declarations,” \textit{Mora v. Big Lots Stores, Inc.}, 194 Cal. App. 4th 496, 508 (2011) and more weight to declarations with specific and individualized detail, id. at 509. See generally \textit{Mies v. Sephora U.S.A., Inc.}, 234 Cal. App. 4th 967, 981 (2015); \textit{Dailey v. Sears, Roebuck and Co.}, 214 Cal. App. 4th 974, 991 (2013); \textit{In re Initial Pub. Offerings Sec. Litig.}, 471 F.3d 24, 41 (2d Cir. 2006), decision clarified on denial of reh’g sub nom. \textit{In re Initial Pub. Offering Sec. Litig.}, 483 F.3d 70 (2d Cir. 2007); \textit{Sav-on Drug Stores, Inc. v. Superior Court}, 34 Cal. 4th 319, 333-34 (2004).
Those factors go far in explaining the use of these rules of review.

Most of the other situations I mapped out above where a statement of reasons is required also involve decisive moments in the case. Most obviously, summary judgment motions and the statement of decision required to support the ultimate determination in a case are of such import; so too when a criminal case is dismissed. And there is considerable discretion involved in dismissing charges and sentencing (although not usually in the summary judgment context), and a very high level of discretion in deciding cases as a fact finder which results in a statement of decision.

Both these factors are present in class certification motions.

As every lawyer who handles class actions knows, the certification motion is the decisive moment in a case. Very few of these cases actually go to trial: the moment of truth is the certification motion. Indeed, if the case is not certified the ‘death knell’ doctrine recognizes that it is in effect dead, and an immediate appeal may be taken. For everyone but the class representative, the case is actually over if the class is not certified; for them, the order really is dispositive.

It is also true that the deference accorded to trial judges is very high; at least, so read the opinions. What is interesting here is the reason for the deference: it has to do with the practicalities of the situation, factors that only the trial judge is in a position to explore. It is the trial judge who will have to handle the trial, who must manage the case, who can determine the feasibility of trying the case as a class action, with or without bifurcation, use of subclasses, severance of certain issues, phasing, perhaps extracting issues for class treatment, or the use of referees or special masters for e.g., damages calculation; and so on. Just as an administrative agency has a scope of expertise quite different from that of judges, so too trial judges have a presumed expertise on case and trial management which ought to be allowed as full rein as possible:

57 In re Baycol Cases I & II., 51 Cal. 4th 751, 760, 248 P.3d 681, 686 (2011) (“the action has in fact and law come to an end, as far as the members of the alleged class are concerned”). If the class representative then fails to appeal the denial, he or she may forever lose the right to do so. Munoz v. Chipotle Mexican Grill, Inc., 238 Cal. App. 4th 291, 308 (2015).
Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.\(^{60}\)

Just as the rule of stated reasons allows the reviewing court to observe that the agency’s substantial discretion has been exercised, so too in the class certification context the reviewing court wants assurance that the trial judge’s enormous discretion has been exercised. In both cases the reviewing court is in a very poor position to decide if the result is correct; it can only guard the process. And so it is that the process, the method, the procedures, are the focus when certification orders are reviewed.\(^{61}\) That review is impossible absent the rule of stated reasons. This standard is not, despite some language to the contrary,\(^{62}\) in derogation of the trial judge’s broad discretion; it is a concomitant.

IV Implications

This look at the standard of review and its rationale has implications for trial judges and the lawyers who brief class certification motions before them. The implication is a focus on manageability; the \textit{practical} stuff. Of course there are other factors which must be considered when evaluating a certification motion, such as numerosity, adequate representation by the plaintiff as well as by counsel, typicality, common questions, and so on,\(^{63}\) but generally these factors—perhaps aside from common questions—usually are not hotly contested; and more importantly the court of appeal can figure most of these just as well as a trial judge. The difficult issues have to do with the superiority of the class action over individual cases, the very closely related issue of the extent to which common issues predominate over individual ones, and so the general issue of manageability which embraces those matters.

In \textit{Duran}, our Supreme Court directed a very careful look at the manageability issues.\(^{64}\) The call has been repeated in other cases, with instructions that we look to “efficient and effective means” of resolving the underlying disputes.\(^{65}\) The point in certification motions is not, exactly, whether there are common issues or not; it is whether the balance of common and individual issues


\(^{61}\) E.g., Jon B. Eisenberg, et al., \textit{CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶ 8:225} (as of September 2015 update) (quoting multiple cases on the “criteria” and “analysis” and “reasons” and “process”). See this language from the primogenitor, \textit{Clothesrigger, Inc. v. GTE Corp.}, 191 Cal. App. 3d 605, 612 (1987) (“Our focus on correct process requires us to reverse even though there may be substantial evidence to support the court's order”) (emphasis supplied).


\(^{64}\) \textit{Duran v. U.S. Bank Nat. Assn.}, 59 Cal. 4th 1, 29 (2014).

makes the case **manageable**. Of course, this sort of practical evaluation is not done by comparing the raw number of common and individual issues. It is not an abstract weighing of ‘important’ or ‘significant’ issues (common or not) against issues which in some vague way are less important.

In fact the showing often will take the form of a trial plan—a practical outline of the number and types of witness likely to be testifying, matched to the elements of the claims and of the significant affirmative defenses. If statistics will be used, the plan will demonstrate that the analysis can actually be accomplished, perhaps by way of a pilot study. Presumably both sides contribute to the plan, plaintiffs in an effort to show how the class trial can be managed, and defendants hoping to demonstrate it cannot. If the class is certified, and later it appears the trial will not in fact be manageable, the court decertifies the class.

The trial plan is the parties’ forum for discussing the utility of the procedures noted above such as phasing, bifurcation, issue certification, and the rest, together with various means to expedite (and so manage) trial, such as the use of summaries of voluminous documents, statistics, stipulations, bench trials, a focus (if appropriate) on aggregate and not individual damages, summaries of noncontroversial depositions; and so on. It is not enough to list these procedures; the trial plan must actually explain how in the specific context of the case they will solve a specific manageability problem.

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66 Alberts v. Aurora Behavioral Health Care, 241 Cal. App. 4th 388, 394 (2015) (“the parties and the trial court focused almost exclusively on the existence of common issues, to the exclusion of the issue of manageability. Accordingly, we reverse and remand the matter for further consideration consistent with our holding”).


70 Duran, 59 Cal.4th at 22, 42.


72 *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 335 (2004).

73 See text at note 59.


76 Bruno v. Superior Court, 127 Cal. App. 3d 120, 129n.4 (1981); Bell v. Farmers Ins. Exch., 115 Cal. App. 4th 715, 758 (2004); Evans v. Lasco Bathware, Inc., 178 Cal. App. 4th 1417, 1430 (2009) (“although a trial court has discretion to permit a class action to proceed where the damages recoverable by the class must necessarily be based on estimations, the trial court equally has discretion to deny certification when it concludes the fact and extent of each member's injury requires individualized inquiries that defeat predominance”).

77 MANUAL FOR COMPLEX LITIGATION §§ 11.64, 12:332 (2016).

The parties and the trial judge may be handicapped in this, because the trial plan is proposed early in the life of the case: certification is to be sought as soon as practicable.\(^{79}\) The timing of the motion is very much within the discretion of the trial court so the judge, informed by the parties, should allow enough time for discovery sufficient to develop the trial plan. In the end, the parties should propose “innovative procedures”\(^ {80}\) and help the judge exercise his or her very broad discretion to determine whether trial is feasible, and so have an informed order of stated reasons—to enable the judge’s ruling to pass muster on appeal.

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Appendix: A Genealogy

To reduce confusion I use only the name of the case and its year (i.e. Daniels 1993). The full cites of the cases are provided at the end of this genealogy. My suggestion of a ‘dry hole’ means the rule under examination, the rule of stated reasons, is not discussed in the case. I note this dry hole status with a zero after the date of the case, thus “Occidental 1986-0”. Some cases so designated discuss nothing like the rule of stated reasons; others discuss only one of the other rules noted above, such as the rule of all intendments, or some other relative.

The most significant lines of descent here center on Linder, which in turn focuses on Clothesrigger - which is the key moment in the development of the rule of stated reasons.

A. Main Sequence

While there are many ways of tapping into this family tree, I start with a relatively recent case, Mies 2015. It relies on Knapp 2011. 
I also start with Hataishi 2014. It leads to Kalendenbach 2009 and Linder 2000.
Lockheed 2003-0 relies on Linder 2000 and Richmond 1981-0 (which is a dry hole).

\(^{79}\) Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 14:98 (Rutter: 2015); Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE § 1785.3 (3d ed.).

Timeout for Linder. Linder is a significant ancestor. It is directly relied on by e.g. Knapp, Bufil, Capital People, Quacchia, Sav-On, Lockheed, Corbett and Washington Mutual, and other cases.

Linder 2000 relies on Bartold 2000 and Richmond 1981-0.
Clothesrigger 1987 relies on Richmond 1981-0 and the Witkin Treatise.

Timeout for Clothesrigger. This case is relied on directly by Bartold 2000, National Solar 1991, Daniels 1993, Caro 1993 and other cases. Through Bartold 2000, Clothesrigger is the key case relied on by Linder 2000. Clothesrigger’s reliance on the Witkin Treatise is discussed in the main body of the Note.

Richmond 1981-0 relies on Fletcher 1979-0 and Occidental 1986-0. These are all dry holes.
Recall Caro relied on Petherbridge 1974-0. That relies on Gold Strike 1970-0 and Interpace 1971-0. Interpace 1971-0 relies on Platt 1964-0 which is a dry hole. Gold Strike 1970-0 relies on City of New York 1969-0; all are dry holes.

B. Tributaries

One way to check the main sequence is to look at other recent cases (i.e. those decided in the last few years) and see if they lead to a different set of ancestors. They do not. Here are 15 examples. In each case I recite enough of the lineage to make the point that in each instance the citations either (i) join the main sequence or (ii) terminate with a dry hole.

- Cochran 2014 relies on Knapp 2011.
- Benton 2013 relies on Jaimez 2010 (Jaimez relies on cases noted above in connection with Alberts 2015).
• Kight 2014 relies on Williams 2013.
• Martinez 2014 relies on Ayala 2014, Benton 2013, and Dynamex 2014-0. Dynamex is a dry hole.
• Aguirre 2015 relies on Linder 2000.
• Grogan-Beall 1982 relies on Altman 1978-0; Altman 1978-0 relies on Hamwi 1977-0.

Chronological Case Citations

• Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522, 530 (2014)
• Williams v. Superior Court, 221 Cal. App. 4th 1353, 1361 (2013)
• Williams v. Superior Court, 221 Cal. App. 4th 1353, 1361 (2013)
• Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1022 (2012)
• Capitol People First v. Dep't of Developmental Servs., 155 Cal. App. 4th 676, 689 (2007)
• Lockheed Martin Corp. v. Superior Court, 29 Cal. 4th 1096, 1106, 63 P.3d 913 (2003)
• Washington Mut. Bank, FA v. Superior Court, 24 Cal. 4th 906, 914 (2001)
• Clothesrigger, Inc. v. GTE Corp., 191 Cal. App. 3d 605, 611 (1987)
• Richmond v. Dart Indus., Inc., 29 Cal. 3d 462, 470 (1981)
• Fletcher v. Sec. Pac. Nat'l Bank, 23 Cal. 3d 442, 446 (1979)
• Occidental Land, Inc. v. Superior Court, 18 Cal.3d 355, 361 (1976)
• Interpace Corp. v. City of Philadelphia, 438 F.2d 401, 403 (3d Cir. 1971)
• City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969)
• Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 792-93 (10th Cir. 1970)