After gathering these facts, the plaintiffs’ attorneys must consider the following:

- Is the defendant company large enough to make the class suit worth bringing?
- Are the individuals behind the corporation liable on any theory and, if so, do they have sufficient available assets to make the class suit worth bringing? This is especially important when a defendant with sufficient wealth cannot be sued or when the defendant company has gone out of business. Under state unfair and deceptive acts and practices statutes, controlling officers who have knowledge of an illegal practice and who fail to exercise their authority to stop it may incur personal liability. Officers and employees may be liable for their individual acts and those arising from their status as agents of the defendant company or on a theory of conspiracy to violate the law.
- What other individuals and companies may be liable? Is the original defendant a member of a corporate group? Part of a conspiracy? Acting or appearing to act as the agent for another?
- Even if an individual such as a salesman does not have many assets, there may be an advantage to joining them as a defendant, both to facilitate discovery and to lessen the chance of their disappearance as a witness.
- Financial institutions that finance the purchase of goods or services on credit should not be overlooked as possible defendants. Such institutions may have some legal responsibility in consumer transactions, at least pursuant to the Federal Trade Commission Holder Rule.
- Does the defendant have insurance? This is often difficult to find out. The existence of certain types of insurance may be revealed in filings with government agencies (for example, by car dealers). Otherwise, insurance coverage should be one of the first items requested in discovery if it is not produced voluntarily as required by Federal Rule 26(a)(1)(D). Some states require that certain types of businesses be bonded. Some unusual types of coverage may apply to the particular defendant or the particular claim. For example, many automobile dealers carry substantial coverage against consumer protection and Truth in Lending claims. Most debt collectors have coverage against FDCPA liability. The standard form commercial general liability policy contains a coverage called “advertising liability,” which may provide coverage for false advertising claims.

Footnotes


186 Defendant classes, though rare, should be considered under appropriate circumstances for damages claims under Rule 23(b)(3). The utilization of class certifications in Rule 23(b)(1)(B) and 23(b)(2) cases is more problematic. See, e.g., Tilley v. TJX Cos., Inc., 345 F.3d 34, 39–43 (1st Cir. 2003) (rule authorizing certification of class when party opposing class has acted on grounds generally applicable to entire class is generally not applicable to proposed defendant classes; furthermore, without other factors that might cause substantial impairment or impediment for absent class members, anticipated stare decisis effect of judgment on absent defendants did not justify certification for defendant class of individual retailers under rule authorizing certification when suit might “substantially impair or impede” ability of absent class members to protect their interests in subsequent cases).