When Venue Dictates Tools For Early Class Cert. Challenges

By **Adrienne Koch** (May 4, 2020)

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Although a complaint in an individual lawsuit will rise or fall on the merits of the claims, in a class action the question of class certification is often just as important — if not more so.

As the U.S. Supreme Court recognized in Microsoft Corp. v. Baker in 2017, "a denial of class certification may sound the death knell for plaintiffs," and "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."[1]

Defense counsel that believes there is no basis for class treatment would therefore do well to try to bring that issue to a head early. How and when this can be done, however, may depend upon the court in which the action is pending.

Split Among the Federal Courts

Specifically, there is a split in the federal courts on the question of how early class allegations can generally be challenged. Some have held that class allegations can be challenged at the pleading stage, and will be analyzed under Federal Rule of Civil Procedure 12(b)(6).

Courts that adopt this approach hold that class allegations are subject to the pleading standard generally applicable under Federal Rule of Civil Procedure 8 (sometimes called the Iqbal/Twombly standard), which requires that a plaintiff plead factual allegations sufficient to "'state a claim to relief that is plausible on its face.'"[2] These courts readily dismiss class allegations at the pleading stage when they do not meet that standard.[3]

The approach that treats Federal Rules of Civil Procedure 8 and 12(b)(6) as the proper rubric for this analysis has recently been described as the majority view.[4] As one court applying that rubric explained: "If courts ignore the sufficiency of class allegations until plaintiffs move for conditional class certification, class allegations that fail to meet the minimum pleading standards under Twombly and Iqbal could nevertheless survive."[5]

Some courts, however, have instead held that a motion to dismiss class allegations must be analyzed under Federal Rule of Civil Procedure 12(f), which permits a federal court to strike from a pleading only "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." As those courts have noted, motions under Federal Rule of Civil Procedure 12(f) are "generally looked upon with disfavor."[6]

As a result, motions to strike class allegations under Federal Rule of Civil Procedure 12(f) are infrequently granted.[7] The U.S. District Court for the Western District of Pennsylvania, for example, explained that on a motion to strike class allegations under Federal Rule of Civil Procedure 12(f) "the plaintiff has the burden to prove that the requirements of Rule 23 are met, and the court must accordingly apply Rule 23."[8]

As a result, the question is not whether the prerequisites for class treatment are adequately alleged, but rather "whether class treatment is actually appropriate in the case."[9] As a result, courts that analyze challenges to class allegations under Federal Rule of Civil

Procedure 12(f) often find it premature to perform that analysis before there has been any discovery.[10]

An Alternative Path

What should counsel do in a case that is filed in a court that follows this latter approach? The March 16 decision in Russell v. Forster & Garbus LLP[11] illustrates an alternative path.

There, the deposition of the lead plaintiff revealed that he knew very little about the litigation: Among other things, he did not see the complaint until his deposition, did not meet with his counsel until more than a year and a half after the action was commenced, and had scant knowledge about the underlying claims.[12]

The case was filed in the U.S. District Court for the Eastern District of New York, which analyzes challenges to class allegations under Federal Rule of Civil Procedure 12(f).[13] But the defendants believed they could meet this standard: They moved under that rule to strike the plaintiff's class allegations immediately upon the completion of that deposition.[14]

The court agreed with the defendants that the issue was ripe for determination, but for a different procedural reason. Because the defendants' motion asked the court to deny class certification, the court ruled that it was not in fact a motion to strike under Federal Rule of Civil Procedure 12(f), but rather "a preemptive motion to deny class certification" under Federal Rule of Civil Procedure 23.[15]

This, however, was perfectly appropriate: As the court explained, although a determination of whether a case is appropriate for class treatment is "normally accomplished by plaintiff's motion for certification ... [t]he defendant need not wait for the plaintiff to act." Instead, the "defendant may move for an order denying class certification."[16]

Moreover, "[r]egardless of the moving party," on such a motion the plaintiff "will bear the burden of establishing" that the requirements for class certification are satisfied.[17]

Analyzing the motion under this rubric, the court agreed with the defendants that the plaintiff had "virtually no familiarity with [the] action and no understanding of his role as class representative," and concluded that he was "not an adequate class representative."[18] The court said:

Plaintiff is not qualified to serve as class representative because he has so little knowledge of and involvement in the class action that [he] would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys.[19]

Partly based on this conclusion and partly based on other conduct by the plaintiff's counsel (including "his failure to obey numerous court orders issued by this Court and others within this District"), the court also concluded that the plaintiff's counsel was not adequate to represent the putative class, as required under Federal Rule of Civil Procedure 23(a).[20] On these grounds, the court ruled that the case could not proceed as a class.[21]

The ruling in Russell did not result in a dismissal of the case; it continues, now based solely on the individual plaintiff's claims. But the claims of that single plaintiff undoubtedly warrant a substantially different settlement analysis (both for the plaintiff and for the defendants) than the prospect of a class of dozens or more. The ruling on class certification is thus plainly a game-changer.

The Lesson for Defense and In-House Counsel

Counsel facing a class action complaint should look for the earliest credible opportunity to challenge the class allegations. In some courts this may be at the pleading stage; in others, it may not.

But even if the case is filed in a venue that is not receptive to pre-answer motions to dismiss class allegations, that does not mean the plaintiff fully controls how and when the question of class certification will be decided.

In the federal courts, if facts surface early in discovery that make clear that one or more of the elements required to support such certification cannot be met, the defendant need not wait: A preemptive motion to deny certification may, in the Supreme Court's words, sound the death knell.

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[1] 137 S. Ct. 1702, 1708 (2017) (citation and internal quotation marks omitted; alteration in Microsoft). It is for this very reason that the Federal Rules of Civil Procedure permit a party to petition the Circuit Court for leave to appeal directly from an order granting or denying class certification. See Fed. R. Civ. P. 23(f).

[2] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

[3] See, e.g., Lafferty v. Sherwin-Williams Co., CV No. 1:17-06321-RBK/AMD, 2018 WL 3993448, *5-6 (D.N.J Aug. 21, 2018); Flores v. Starwood Hotels & Resorts Worldwide Inc., Case No. SACV 14-1093 AG (ANx), 2015 WL 12912338, *3-5 (C.D. Cal. May 18, 2015); In re Cirillo, Bkrtcy. No. 09-10324, Adv. No. 13-01002, 2014 WL 1347362, *4-5 (Bkrtcy. S.D. Tex. Apr. 3, 2014); In re Pradaxa Products Liability Litig., MDL No. 2385, 2013 WL 3791509, *4 (S.D. Ill. Jul. 18, 2013); accord Nicholas v. CMRE Financial Svcs., Inc., Civil Action No. 08-4857 (JLL), 2009 WL 1652275, *4 (D.N.J. Jun. 11, 2009).

[4] See Villegas-Rivas v. Odebrecht Constr., Inc., Civil Action No. 4:18-CV-1181, 2018 WL 4921922, *3 (S.D. Tex. Oct. 10, 2018) (collecting cases; citations and internal quotations omitted).

[5] Huchingson v. Rao, CV No. 5:14-CV-1118, 2015 WL 1655113, *3 (W.D. Tex. Apr. 14, 2015).

[6] See, e.g., Mayfield v. Asta Funding, Inc., 95 F. Supp.3d 685, 696 (S.D.N.Y. 2015) (citation and internal quotations omitted); accord Calibuso v. Bank of Amer. Corp., 893 F.Supp.2d 374, 383 (E.D.N.Y. 2012) (same language); Winfield v. Citibank, N.A., 842 F.Supp.2d 560, 573 (S.D.N.Y. 2012) ("Motions to strike are generally disfavored, and should be granted only when there is a strong reason for doing so.") (citation and internal

quotations omitted).

[7] See generally 5C Fed. Prac. & Proc. Civ. § 1380 ("motions [to strike] under Rule 12(f) are viewed with disfavor by the federal courts and are infrequently granted") (collecting numerous cases; footnotes and citations omitted).

[8] Royal Mile Co., Inc. v. UPMC, 40 F.Supp.3d 552, 578 (W.D. Pa. 2014) (emphasis added).

[9] Id. at 579 (emphasis in original).

[10] A similar dichotomy exists among the state courts. Compare, e.g., Tucker v. Pacific Bell Mobile Svcs., 208 Cal. App.4th 201, 211-214 (Cal. App. 1st Dist. 2012) (concluding that pre-answer challenge to class allegations should be analyzed in the same manner as pre-answer challenges to other allegations; "Where a complaint, on its face, fails to allege facts sufficient to establish a community of interest as to the elements of the class claims, it would be a waste of time and judicial resources to require a full evidentiary hearing when the matter can properly be disposed of by demurrer.") (collecting cases; citations and internal quotations omitted) and Kantzelis v. Commerce Ins. Co., 34 Mass.L.Rptr. 534 (Mass. Super. 2017) ([t]he standard to be applied" in deciding a pre-answer motion to dismiss class allegations is whether they contain "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief") (collecting authorities; citations and internal quotations omitted) with Glynn County v. Coleman, 334 Ga. App. 559, 561 (2015) ("While a defendants can certainly seek a ruling on a dispositive motion before certification of a class, it cannot use a dispositive motion as a vehicle to deny class certification").

[11] 17-CV-4274(JS)(AYS), 2020 WL 1244804 (E.D.N.Y. Mar. 16, 2020).

[12] 2020 WL 1244804 at *2

[13] See supra, n.6.

[14] Id. at *1, n.1.

[15] Id.

[16] Id. at *3 (quoting Fedotov v. Peter T. Roach & Assocs., P.C., 354 F. Supp. 2d 471, 478 (S.D.N.Y. 2005); other citations and internal quotation marks omitted).

[17] Id. (citations and internal quotations omitted).

[18] Id. at *5.

[19] Id. at *7 (citation and internal quotations omitted).

[20] Id. at *8.

[21] Id.