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Commentary

Discovery Prior To Class Certification: New Considerations And Challenges

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> "The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition. It was expected from the outset that they would be important, but experience has shown them to play an even larger role than was initially foreseen."
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> *Fed. R. Civ. P. 26 advisory committee's note, explanatory statement concerning 1970 amendments of the discovery rules.*

Some might call this 1970 Advisory Committee comment an understatement. Others might characterize it less charitably. But it is clear that, in many cases, discovery does not simply play an important role — its strategic use guides the course (and in some cases, spells the end) of the litigation. Indeed, the Supreme Court has recognized the irony that the prohibitive costs and burdens imposed by modern-day discovery may tip the scales of justice unduly toward settlement of actions without regard to the merits of the action. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Accordingly, in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal,* the Court indicated that *any* discovery prior to a motion to dismiss in certain circumstances would raise the specter that "a plaintiff with 'a largely groundless claim' [would] 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Twombly*, 550 U.S. at 558 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (205) (internal citation omitted).; *see also Iqbal*, 129 S. Ct. at 1953. This bright line is sensible in the motion to dismiss context, where a court is asked to make a purely legal determination and assume that the well-pleaded facts of the complaint are true in order to judge whether a plaintiff has nudged his claims over the threshold of plausibility.

But the considerations underlying the Court's analysis in *Twombly* and *Iqbal* are not limited to the motion to dismiss context. They apply with equal, if not greater, force in other determinations of "threshold issues" such as class certification. Class certification, like motions to dismiss, requires a court to determine if a plaintiff has sufficiently supported his allegations such that the claims should be tried using the class action mechanism. And, if a plaintiff succeeds in crossing this threshold, certification may be the "defining moment" in the litigation despite the fact that certification of a class is not a determination on the merits of the suit. The difference, of course, is that class certification requires some (at least) preliminary

consideration of the merits of a plaintiff's claims and, as a result, discovery generally commences prior to a motion for class certification. Indeed, an increasing majority of federal courts of appeal have endorsed a "rigorous assessment" of whether a plaintiff has met the requirements of Rule 23.

While defendants have welcomed this development because it appears to mean that courts will employ a more searching inquiry in deciding whether to certify a class, it also means parties are likely to focus on pre-certification discovery far more than before precisely because they anticipate searching review at the class certification stage, potentially shifting discovery costs to the time period before certification as well. This new focus on pre-certification discovery presents both opportunities and challenges for defendants seeking to defeat class certification.

Timing Of Class Certification Motion

The pressure exerted by the discovery prior to a class certification motion in the past was often negligible because motions for class certification frequently followed closely behind resolution of motions to dismiss. As a result, any settlement pressure imposed by discovery generally was tied to the outcome of the certification motion (as the parties looked prospectively at what discovery would be required if the case was proceeding to trial on the merits as a class action) as well as the parties' respective evaluation of the merits of the claims at issue. Thus, while class certification often "put[] a bet-your-company decision" to a defendant, *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001), the discovery conducted prior to that motion did not place the same settlement pressure on a defendant.

The 2003 amendments to Federal Rule 23 made two important changes to the rules governing the timing of the class certification decision. First, they replaced the requirement that district courts decide class certification "as soon as practicable after commencement of an action", Fed. R. Civ. P. 23(c)(2002)(amended 2003), with the instruction that the determination should be made "at an early practicable time." Fed. R. Civ. P. 23(c); *see also e.g.*, Cal. Cent. Dist. L.R. 23-3 (requiring proponent of class certification in a non-PSLRA case to file its motion for class certification within 90 days after service of the class action complaint). The alteration in the language of the rule did not change the focus on addressing the threshold class certification issue relatively early in the litigation. Indeed, regardless of how it is phrased, the purpose of the early certification requirement is to provide the parties with information concerning the scope of, and the rights implicated by, the action and to protect the parties from prejudice. 5 Moore's Federal Practice § 23.81 [1] (Matthew Bender 3d ed. 2009). Early certification helps the parties to identify what is at stake in the case so that litigation strategies may be chosen accordingly. In addition, a failure to decide certification early in the proceedings leaves open questions as basic as who is or will be bound by any judgment in the action, the scope of (merits) discovery and trial, and what procedures the parties will need to complete before trial, all of which creates uncertainty for the parties and makes appellate review more difficult. *Id*.

However, the Advisory Committee notes explain that the change in phrasing reflected the understanding that "[t]ime may be needed to gather information necessary to make the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial." Fed. R. Civ. P. 23 advisory committee's note of 2003. The Advisory Committee notes further advise that "[i]n this sense, it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis." *Id.* Thus, the revised language is intended to allow courts flexibility in timing certification determinations, but a court is nevertheless expected to actively manage a case to ensure that the certification decision is not unjustifiably delayed. Moore's Federal Practice 3d § 23.81[1] (citing Advisory Committee notes). 5 Moore's Federal Practice § 23.81 [1] (Matthew Bender 3d ed. 2009) (citing Fed. R. Civ. P. 23 advisory committee's note of 2003).

The second change made by the 2003 amendments that may affect the timing of the certification decision is the removal of the language previously included within Rule 23 permitting "conditional" certification. Fed.R.Civ.P. 23 (2002) (amended 2003). With respect to this change, the Advisory Committee notes stated that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Advisory

Committee Notes to 2003 Amendments to Rule 23. Although Rule 23 still allows class certification decisions to be altered or amended up to the time of final judgment, this change, particularly in combination with the alteration to the language concerning the timing of the class certification decision, may also cause courts to delay a decision (and briefing) on class certification in order to assure that there has been sufficient time to develop an evidentiary record to support a grant or denial of certification.

Since the 2003 amendments, the federal courts have struggled with the application of this guidance to the class certification determination. The growing consensus in the federal courts appears to be that it is appropriate to conduct a "rigorous analysis" at the class certification stage based on the court's evaluation of factual evidence and expert testimony, but the scope of that inquiry and the evidence necessary to undertake it are still uncertain. What is clear, however, is that effective litigation strategy will necessitate consideration of the implications of this rigorous standard. All bets are off and the parties should (and must) determine anew how much discovery is appropriate prior to class certification and what that discovery should include. In turn, decisions regarding these issues will require the parties to balance the importance of getting the class certification ruling "right" with keeping expenditures (in both time and money) at a level commensurate with the stage of the litigation. Critical to achieving this goal is (1) a clear understanding of what may be required under rigorous review from an evidentiary perspective and (2) the implications of those requirements for discovery planning and implementation.

Requirements Of 'Rigorous Review'

The Supreme Court has held that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiffs' cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963). The Court has emphasized that this determination may require a court to "probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160. Thus, a class action may only be certified if the trial court is satisfied, "after a rigorous analysis" that the requirements of Rule 23 are met. *Id*. at 161. These statements provide some general guidance, but in practice, courts have differed in applying them. Some recent decisions provide clues as to what is and is not sufficient for purposes of meeting the requirements of Rule 23 which are instructive for purposes of understanding and defining the proper scope of pre-certification discovery.

Beginning with the Second Circuit's decision in *In re Initial Public Offerings Sec. Litig.,* 471 F.3d 24 (2d Cir. 2006) ("*In re IPO*"), federal courts in a growing number of circuits have endorsed the view that class certification should be subject to rigorous analysis by the district court, including the consideration of expert testimony from both sides and an examination of the merits issues that overlap the class certification requirements under Rule 23. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3rd Cir. 2009) ("*In re Hydrogen Peroxide*") ("In deciding whether to certify a class under Fed. R. Civ. P. 23, the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties"); *In re IPO,* 471 F.3d at 45 (vacating district court's grant of class certification based on court's determination that plaintiffs had not made a sufficient showing to meet these requirements); *see also Vallario v. Vandehey*, 554 F.3d 1259, 1265 (10th Cir. 2009); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009); *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 380 (5th Cir. 2007); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008) ("*In re New Motor Vehicles*"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).

However, as is so often the case with judicial standards, the devil is in the details. Different courts have articulated different versions of what such a "rigorous review" might look like and the Supreme Court has not spoken on the issue. As a result, parties (and courts) attempting to understand what is required under this evolving standard benefit as much from looking at what courts have deemed insufficient to meet the standard as what courts have said about the actual requirements.

What is insufficient to meet the requirements of a more rigorous review? Several decisions caution that a plaintiff attempting to meet the requirements of Rule 23 inquiry must provide more than promises, assertions, or assurances. *See, e.g., In re Hydrogen Peroxide*, 552 F.3d at 318, 320-21; *In re IPO*, 471 F.3d at 40, 42. These courts reject the use of presumptions in favor of class certification and require plaintiffs to make more than "some" or a "threshold" showing because such a showing is "incomplete" with respect to the evidence required for a district court to make the findings that Rule 23 requirements are met. *In re Hydrogen Peroxide*, 552 F.3d at 321 (requiring plaintiff to make only a "threshold showing" "misapplies" Rule 23); *In re IPO*, 471 F.3d at 42 (finding that "some showing" is insufficient to meet the requirements of Rule 23); *Blades v. Monsanto Co.*, 400 F.3d 562, 571 (8th Cir. 2005) (rejecting "assumptions", "presumptions" and "conclusions" offered by plaintiff's expert as insufficient to establish that antitrust impact could be proved on a classwide basis); *In re New Motor Vehicles*, 522 F.3d at 29-30 (remanding case to district court for further consideration of full evidentiary record on motion for class certification).

What type of evidentiary showing may be required? Relatively few courts have provided specific guidance on what type of evidence might be necessary for a district court to consider at this stage. The *Hydrogen Peroxide* court quoted extensively from the Advisory Committee notes to the 2003 amendments to Rule 23 and emphasized several factors. First, the evidence required to rule on class certification should assist the court in judging how a trial on the merits would be conducted if a class was certified. 552 F.3d at 311. The Court went on to explain that deciding that issue will require a "rigorous assessment" of the available evidence and method of methods by which plaintiffs propose to use that evidence. *Id*. at 311-312. The court opined that this inquiry will necessarily require a preliminary inquiry into the merits to allow the court to consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on the issues would take. *Id*. at 317-18. The court emphasized that such an inquiry was not inconsistent with the need to avoid a determination on the merits because any decisions reached at the class certification stage would not bind the fact finder when merits issues arise. *Id*. The *Hydrogen Peroxide* court then concluded that this required plaintiffs to meet each of the Rule 23 requirements by a preponderance of the evidence. *Id*. at 320. Several courts have also concluded that weighing the testimony of experts presented by both sides is integral to this rigorous analysis. *See, e.g., Id*. at 323; *In re IPO*, 471 F.3d at 42; *Blades*, 400 F.3d at 575.

Implications For Discovery Planning And Implementation

The implications of these changes will likely differ depending on the type of claims at issue. While courts have been fairly active in requiring a strong evidentiary showing to support class certification in antitrust cases, for example, decisions on certification of securities class actions have not emphasized this requirement as much. Thus, it is still unclear what any particular court in any particular circuit will require for parties to meet or defeat class certification. Nevertheless, the trends outlined above underscore that close review and adherence to Rule 23 standards requires careful management of the discovery schedule. Proactive consideration of this question will assist the parties and the court. Moreover, attention to these issues could forestall unintended results, such as unnecessary frontloading of discovery expenses due to the incentive for both parties to make a strong evidentiary showing to support or oppose class certification. While by no means an exhaustive list, set forth below are three considerations.

Changes to the pleadings? As an initial matter, the potential implications of the rigorous analysis standard may influence the way plaintiffs plead their class action allegations. While it may once have been most advantageous to plead a single broad class over an extensive time period, such allegations may be less likely to pass muster under a rigorous analysis. Plaintiffs may narrow their class definitions (including both who would be included in the putative class and the time period covered) or may pursue subclasses in an effort to meet these requirements. This could, in turn, reduce the scope (and associated cost) of certification-related discovery from the outset by, for example, shortening the time frame covered by the action (and therefore the quantity of data to gather and analyze).

Conversely, such changes may not make sense given that the court can narrow a proposed class *sua sponte*. Plaintiffs may still choose to plead classes more broadly, expecting that the class will be narrowed. In-

deed, because each subclass must independently meet the requirements of Rule 23, plaintiffs likely have a disincentive to parse their complaints too finely. *See, e.g.,* Fed. R. Civ. Proc. 23(c)(5); *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) ("each subclass must independently meet the requirements of Rule 23 for the maintenance of a class action"). But in this circumstance, the rigorous analysis required of the class as proposed may enable defendants to highlight the evidentiary issues created by the plaintiff's proposal much earlier in the litigation (such as during the initial scheduling conference). Setting the stage in this way may, in turn, place defendants faced with a broad class at an advantage in terms of what the court will require of plaintiffs.

Expansion in pre-certification discovery time and expense. Regardless of whether the "rigorous review" standard affects the way class action complaints are pled, the requirement is likely to create an incentive for the parties to expand the scope of pre-certification discovery. Indeed, although Rule 23 directs courts to make a certification decision at an "early practicable" time, the more that a putative class action requires an examination of issues related to the merits, the later that "practicable" time is likely to become. 5 Moore's Federal Practice § 23.84 [3] (Matthew Bender 3d ed. 2009). Indeed, the rigorous analysis requirement may mean that Plaintiffs are less likely to be comfortable with an early deadline for class certification motions, and may instead seek more time to gather evidence and develop their expert testimony. However, plaintiffs sometimes have an interest in resolving class certification early to increase pressure on defendants and to keep their early investments in the case at a manageable level. These factors may cause Plaintiffs to resist such elongated deadlines as contrary to their interest in the belief that discovery could enable defendants to multiply the grounds for challenges to class propriety, emboldening their arguments that the class would be overly complex, unmanageable and not superior to an individual adjudication.

Regardless, a more rigorous focus on the evidentiary record at the certification stage may place defendants in a Catch 22 situation. If defendants assert that discovery should be limited prior to class certification, they may have difficulty arguing that plaintiffs have failed to meet their burden. Conversely, if defendants contend that plaintiffs must assemble a strong evidentiary record to succeed on their certification motion, that position may result in greater discovery expense earlier in the litigation because discovery requests are more likely to seek information related to the merits.

Nevertheless, a district court has discretion to circumscribe the extent of discovery relevant to Rule 23's requirements in order to assure that the class certification motion does not become a pretext for a partial trial of the merits. 5 Moore's Federal Practice § 23.85 [1] (Matthew Bender 3d ed. 2009). Accordingly, the parties should be prepared to discuss the timing of the certification decision and whether discovery can (or should) be bifurcated into class and "merits" discovery at the initial scheduling conference. Defendants may benefit from creative approaches to these scheduling challenges — a proposal that plaintiffs file their motion for class certification and that defendants be allocated sufficient time prior to filing their opposition to conduct additional, targeted discovery, for example, could be beneficial both in collecting evidence to oppose the motion and in requiring plaintiffs to devote resources to supporting their motion early in the case (potentially resulting in more reasoned discussions regarding settlement).

On the other hand, in some cases a defendant may wish to file a motion for summary judgment concurrently with its opposition to class certification. This approach may be beneficial to a defendant because it allows the judge to see enough of the evidence to understand both why the case should not go forward and why proceeding would create multiple individual issues of fact, thereby precluding class certification. In such cases, defendants may wish to resist bifurcation of discovery despite the potential for greater upfront costs in the hope that the investment will result in an earlier end to the litigation. In either event, early evaluation of the costs and benefits of these options in the context of the facts of the case will build the foundation for a stronger overall litigation strategy.

Premium on defining "class" discovery. Although each case will require planning unique to its facts, courts and commentators have provided some guidelines as to what might properly be termed "class" discovery. The distinction is not easy to draw because class certification issues may be intertwined with the merits. Frequently, pre-certification discovery will include information required to identify the nature of the issues

that will be presented at trial, such as whether the common impact claimed by putative class plaintiffs in an antitrust case can be shown by evidence common to the class. *See, e.g., Hydrogen Peroxide*, 552 F.3d at 325. In that situation, the court may allow controlled discovery into the merits, limited to those merits aspects of the case that are relevant to making the certification decision. 5 Moore's Federal Practice § 23.85 [1] (Matthew Bender 3d ed. 2009). The Advisory Committee Notes to the 2003 amendments observe that "[a]ctive judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between 'certification discovery' and 'merits discovery.'" Fed. R. Civ. P. 23 advisory committee's note of 2003.

The Standing Committee on Rules of Practice and Procedure explained in its report proposing the amendments to Rule 23 that such discovery should relate to "the nature of the issues that will be tried; whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof; and what trial-management problems the case will present." *In re Hydrogen Peroxide*, 552 F.3d at 319 (quoting *Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 10 (2002)). Although this listing is little more than a summary of the requirements of Rule 23, those requirements grow "teeth" with the advent of the "rigorous review" standard. A plaintiff seeking class certification will need to focus on the evidence required to show that these requirements are met so that a district court can make the required findings, rather than merely assuming the facts favoring class certification. *See, e.g., In re Hydrogen Peroxide*, 552 F.3d at 320.

One likely implication of this increased scrutiny may be more frequent use of expert testimony by both sides. Indeed, a growing number of courts are using expert testimony as a key piece of their analysis in deciding motions for class certification. *See, e.g., Id.* at 323; *In re IPO*, 471 F.3d at 42; *Blades*, 400 F.3d at 575. Given this trend, it likely makes sense to schedule expert report disclosures on class issues early in the litigation. Careful attention to this issue may yield important benefits for defendants. Historically, class action plaintiffs disclosed experts at the class certification stage only to "rebut" a defendant's expert's testimony. This strategy may no longer be acceptable to courts undertaking a rigorous review of the class certification motion because these courts will expect plaintiffs to offer expert testimony as part of the basis for their motion. Requesting that the court require plaintiffs to disclose what (if any) expert testimony they will offer to support their motion before the motion is filed may be another means to shift the burden of proof to plaintiffs in practice (as well as theory).

Conclusions

"[A]n order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination . . .)" *Szabo*, 249 F.3d at 676. A more rigorous assessment of whether a plaintiff has met the requirements of Rule 23 is thus both necessary and appropriate. But a party's ability to navigate these requirements in a cost-effective and efficient manner will depend on careful planning and consideration of their discovery implications. ■

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