Defeating or Limiting Class Actions

With Early Dispositive Motions

Leveraging Summary Judgment, Motions to Dismiss or Strike Allegations, and Other Tactics to Dispose of or Limit Claims

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Defeating or Limiting Class Actions with Early Dispositive Motions

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Strafford Webinar
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Key early dispositive motions

- Motion to compel arbitration
- Motion to dismiss
- Motion to strike/deny class certification
- Motion for summary judgment
Motion to compel arbitration

Advantages:
• Arbitration is faster, cheaper, and simpler than litigation.
• Might be able to stay discovery or litigation on the merits.
• Immediate interlocutory appeal under 9 U.S.C. § 16.
• Even an unsuccessful motion can have tactical benefits.

Disadvantages:
• A win isn’t a win.
• Individual or class arbitration?
Logistics for motions to compel arbitration

• Timing: “Use it or lose it.”

• Can proceed as a quasi-motion to dismiss or motion for summary judgment. *See Guidotti v. Legal Helpers Debt Resolution, LLC, 716 F.3d 764 (3d Cir. 2013).*

• Either party can request arbitration-related discovery.

• Appeals:
  
  – Automatic appeal if motion denied. *See 9 U.S.C. § 16(a).*
  
  – No appeal if motion granted, unless case also dismissed or party obtains leave to appeal under 28 U.S.C. § 1292(b). *See 9 U.S.C. § 16(b).*
Staying merits discovery and litigation during pendency of arbitration fight

• **Stay is automatic:** When motion to compel arbitration is filed, under the Federal Arbitration Act, “a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

• Thus, any discovery or litigation must pertain to arbitrability. *See, e.g.*, *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999).
Staying merits discovery and litigation during pendency of arbitration fight (cont’d)

• The stay of merits discovery and litigation should continue on appeal.

• But watch out for the circuit split over whether the stay is automatic or discretionary.


  – Discretionary: *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 907-10 (5th Cir. 2011); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004); *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990).
Arbitration: recent developments

• Pace of adoption of arbitration by companies increasing.
• Increased certainty regarding the enforceability of bars on class arbitration in light of Concepcion and American Express.
• Plaintiffs refocusing on contract-formation and unconscionability challenges.
• Plaintiffs are using arbitration.
• Regulatory backlash (e.g., CFPB, NLRB).
Arbitration and class waivers

A quick refresher:

- *AT&T Mobility LLC v. Concepcion* (2011)
Arbitration: *AT&T Mobility LLC v. Concepcion*

- California’s *Discover Bank* rule deems consumer arbitration agreements in form contracts to be unconscionable.
- Holding: Section 2 of the FAA preempts *Discover Bank* rule.
- Majority rejected the dissent’s argument that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.”
Arbitration: *Compucredit Corp. v. Greenwood*

- Plaintiffs argued that claims under the federal Credit Repair Organizations Act are exempt from arbitration.
- **Holding:** These claims are subject to arbitration. Congress must act with “clarity” if it wishes to override the FAA’s presumption that all claims are arbitrable.
Arbitration: *Am. Express Co. v. Italian Colors Rest.*

- Plaintiffs contended that they could not feasibly vindicate their federal antitrust claims in arbitration on an individual basis.
- Holding: “Effective vindication of statutory rights” defense to arbitration rejected.
- Bonus for class certification oppositions:
  
  “Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights. To begin with, it is likely that such an entitlement, invalidating private arbitration agreements denying class adjudication, would be an ‘abridg[ment] or modif[ication]’ of a ‘substantive right’ forbidden to the Rules, see 28 U.S.C. § 2072(b). But there is no evidence of such an entitlement in any event. *The Rule imposes stringent requirements for certification that in practice exclude most claims.*”
Arbitration: remaining issues

Pockets of resistance to arbitration remain in state court, particularly in California.


- Special notice requirements for arbitration agreements?

- Does the FAA even apply? *Imburgia v. DirecTV*
Arbitration: the plaintiffs’ bar responds

• New emphasis on contract formation and unconscionability.
  – Contract formation: how were the contract terms presented and how were they accepted?
  – Unconscionability: watch out for old clauses and distorted applications of unconscionability doctrine.

• “We’d like class arbitration, please.” Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013).

• Mass arbitration filings.
  – The power of social media.
  – So why are class actions “superior” to individual arbitrations?
Arbitration: storm clouds on the horizon?

National Labor Relations Board


• *D.R. Horton* rejected by courts—so far, by Second, Fifth, Eighth, and Ninth Circuits. But NLRB still going?

CFPB:

• Section 1028 of Dodd-Frank Act authorizes CFPB to conduct a study of arbitration and “**prohibit or impose conditions or limitations** on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”

• Arbitration study released in March 2015.
Arbitration: the silver lining of the losing motion

• Early shot at deposing named plaintiffs.
• Can highlight typicality, adequacy, and predominance issues.
  – For contract-formation challenges, did the plaintiff just make it necessary to conduct a file-by-file review to see if class members were given copies of their contracts?
  – For browserwrap agreements, did the plaintiff evade arbitration by creating an individualized issue as to notice of the terms?
  – For substantive challenges to arbitration agreements, did the plaintiff just create a new state-law variation?
Motion to dismiss

• Enormous impact on settlement potential.
• For defendants, can help set up a later motion to decertify the class or for summary judgment.
• Can ask for discretionary stay of discovery.
Motion to dismiss: common issues

Personal jurisdiction

• *Daimler AG v. Bauman*: barring “exceptional circumstances, the only states that can exercise general personal jurisdiction over a corporation are its state of incorporation and the state of its principal place of business.

• *Walden v. Fiore*: for specific personal jurisdiction, the defendant’s relationship with the forum must “arise out of contacts that the defendant *himself*” —not the plaintiff—creates.
Motion to dismiss: common issues

• Pleading deficiencies
  – Don’t let the plaintiff exploit a vague complaint.
  – Even if the plaintiff is given leave to amend, you’re educating the judge on your theory of the case.

• Missing legal elements
  – Watch out for attempts to “plead around” individualized issues.
  – For example, to avoid individualized questions about causation and injury, plaintiffs have been resorting to no-injury theories of liability.
Motion to dismiss: common issues

Standing

• Did the named plaintiff suffer an injury in fact?
  – Did the plaintiff buy the challenged product, service, or security or see the challenged disclosure? (Watch out for “class standing” arguments.)
  – *Spokeo Inc. v. Robins*: Can Congress confer Article III standing upon a plaintiff who suffered no concrete harm?

• Are the named plaintiffs’ claims moot?
  – *Campbell-Ewald Co. v. Gomez*: Does a rejected Rule 68 offer of judgment for full relief moot the named plaintiff’s claims?
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Motions to Strike Class Allegations

- Rule 23(d)(1)(D): “[i]n conducting an action under this rule, the court may issue orders that . . . require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.”
- Rule 12(f) sometimes cited (erroneously?).
- *McCrary v. Stifel, Nicolaus & Co.*, 687 F.3d 1052, 1059 (8th Cir. 2012) (“class claims that fail to meet the requirements of Rule 23 may be properly dismissed by granting a Rule 12(b)(6) motion”).
Motions to Strike Class Allegations

• “Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claim . . . .” Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982).

• Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 949 (6th Cir. 2011).

• Mills v. Foremost Ins. Co., 511 F.3d 1300 (11th Cir. 2008).
Strategy: Motions to Strike Class Allegations

- How receptive is the jurisdiction to these?
- Move on pleadings alone vs. with evidence?
- Focused on one aspect of Rule 23 vs. preview of full-blown class cert. briefing?
- Will losing this motion give plaintiff momentum for class certification? Make settlement more difficult?
- Will this motion devalue the strength of a strong motion to dismiss?
Strategy: Motions to Strike Class Allegations

- Will this motion likely result in a stay of class discovery?
- Value in educating the judge early on class issues?
Strategy: Motions to Strike Class Allegations

- Potential areas of focus:
  - Commonality
  - Ascertainability
  - Fail-safe class
  - Plaintiff failed to seek certification within local rule time period
Strategy: Motions to Strike Class Allegations

- *In re Katrina Canal Breaches Litig.*, 401 Fed. App’x 884 (5th Cir. 2010) (per curiam)
Motion to Deny Class Certification

- “Nothing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question.” Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 939-40 (9th Cir. 2009).
Strategy: Motion to Deny Class Certification

- Consider for threshold issue requiring limited discovery (e.g., numerosity, adequacy of representation, ascertainability)
- Timing – if court finds motion premature or will not decide it quickly, may be giving plaintiffs a preview of your opposition to class cert.
- Denial could make it much more difficult to defend class cert.
Strategy: Motion to Deny Class Certification

Early Summary Judgment Motion on Named Plaintiff’s Claim

• Court may properly consider a defendant’s summary judgment motion on a named plaintiff’s claim prior to ruling on class certification. *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1289 (11th Cir. 2001); *Schwarzschild v. Tse*, 69 F.3d 293, 297 (9th Cir. 1995).
Strategy: Early Summary Judgment Motion on Named Plaintiff’s Claim

- How much discovery needed to file motion? Will plaintiff be allowed to take early institutional discovery to defend the summary judgment motion?
- Limit motion to facts of individual claim?
- Will winning this motion result in substitution of a better class representative?
Strategy: Early Summary Judgment Motion on Named Plaintiff’s Claim

- Potential win/win scenario? (Issue of fact means class cert. more likely to be denied.)
- Partial summary judgment motion that educates court on why class cert. inappropriate (e.g., statute of limitations)?
Seeking a Stay or Limitation on Discovery

- Formal motion to stay may be preferable strategy.
- *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007): Supreme Court “hope[d] to avoid the potentially enormous expense of discovery” in cases that warrant dismissal, expressing a concern that “a plaintiff with a largely groundless claim [may] be allowed to 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.” *Id.* at 558-59.
Seeking a Stay or Limitation on Discovery

- *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009): “[b]ecause respondent’s complaint is deficient under Rule 8, *he is not entitled to discovery*, cabined or otherwise.” (Emphasis added.)

- *Limestone Development Corp. v. Village of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (explaining that, in *Twombly*, “[t]he [Supreme] Court was concerned lest a defendant be forced to conduct expensive pretrial discovery in order to demonstrate the groundlessness of the plaintiff’s claim,” and concluded that “the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim”).
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I’ve lost one of these early motions. Now what?
Interlocutory appeal of denial of motion to compel arbitration

• Denials of motions to compel arbitration are appealable immediately. See 9 U.S.C. § 16(a).

• The same is true of refusals to reconsider an order denying a motion to compel arbitration. See Oblix, Inc. v. Winiecki, 374 F.3d 488 (7th Cir. 2004).
Interlocutory appeal of denials of motion to dismiss or for summary judgment

• Usually not appealable as of right.

• If the order denying the motion effectively grants or denies an injunction, then it’s immediately appealable under 28 U.S.C. § 1292(a).

• If the motion was based on the defendant’s absolute or qualified immunity, then it may be appealed under the collateral order doctrine. See Behrens v. Pelletier, 516 U.S. 299, 306-07 (1996).

• Otherwise, must ask for permission to appeal under 28 U.S.C. § 1292(b).
Interlocutory appeals of denials of motions to dismiss or for summary judgment (cont’d)

28 U.S.C. § 1292(b)

• “When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals ... may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.”

• No automatic stay pending appeal.

• Timeliness: no express deadline to ask district court, but if district court certifies appeal, must petition court of appeal within 10 days—a period that can’t be extended.

• Scope of review: everything in the order, not just the controlling question.
Interlocutory appeal of denial of motion to strike class allegations

Federal Rule of Civil Procedure 23(f):

• “A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”
Sorry.

A plaintiff can petition for review of an order granting a motion to strike class allegations because it “den[ies] class-action certification.” Fed. R. Civ. P. 23(f). See Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 111 n.2 (4th Cir. 2013); In re Bemis Co., 279 F.3d 419, 421 (7th Cir. 2002).

But an order denying a motion to strike class allegations isn’t appealable. The order is neither “granting [n]or denying class-action certification,” as required by Rule 23(f).
Questions?

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