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Effective Class Action Discovery Strategies

Best Practices for Depositions, Expert Witnesses and E-Discovery

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Tuesday, March 24, 2009

Overview

- Removal and CAFA
- Motion to Stay Discovery Pending Dispositive Motion Practice and Class Certification Timing Issues
- Bifurcation of Class Versus Merits Discovery
- Class Discovery and Timing Issues
- Class Certification and Rule 23
- E-Discovery
- Special Considerations
  - Settlement

Removal Under CAFA

- Longstanding barriers to removal eliminated by CAFA:
  - Prevents plaintiffs from including claims against in-state defendant to avoid removal
  - Allows removal without consent of all defendants
  - Eliminates prohibition on removal of diversity class action more than one year after action is commenced
  - Allows discretionary, interlocutory appellate review
- Threshold CAFA elements:
  - Amount > $ 5 million and 100 or more class members
  - One class member and one defendant citizens of different states (“minimal diversity” vs. “complete diversity”)

Removal Under CAFA (cont'd)

- Discovery to establish removal jurisdiction
  - Plaintiff seeking remand of class action may pursue discovery against defendant(s) to determine if diversity jurisdiction exists. *See Schwartz v. Comcast Corp.*, No. Civ.A. 05-2340, 2005 WL 1799414 (E.D. Pa. July 28, 2005)
- Who carries the burden on remand motions under CAFA?

Motions to Stay Discovery Pending Dispositive Motions

- Rule 26(c)(1): Prevents "undue burden or expense"
- Stay proper where likelihood that such motion may result in narrowing or outright elimination of discovery outweighs likely harm to be produced by delay. *See 19th St. Baptist Church v. St. Peters Episcopal Church,* 190 F.R.D. 345, 349 (E.D. Pa. 2000)
- "Where a pending motion to dismiss may dispose of the entire action and where discovery is not needed to rule on such motion, the balance generally favors granting a motion to stay." *Weisman v. Mediq, Inc.,* No. 95-1831, 1995 U.S. Dist. LEXIS 5900, at *5 (E.D. Pa. 1995)

Class Certification Timing Requirements

- Rule 23: Certification motion at "early practicable time"
- Local rules in some courts require motion to be filed within a certain timeframe, usually 90 days. (*E.g.*, D.D.C., E.D. Pa., N.D. Ohio, C.D. Cal., M.D.N.C., N.D. Tex.; 120 days: W.D.N.Y)
- Can parties stipulate around filing deadline?
  - *See Pinero v. Jackson Hewitt Tax Serv. Inc.*, No. 2:08-cv-03535, 2009 WL 43098, __ F. Supp. 2d __ (E.D. La. Jan. 7, 2009)

Bifurcation – Considerations, Strategy And Practical Effects (or Not)

- When should you engage the court?
- Court may order discovery to proceed concurrently if bifurcation would result in significant duplication
- Pre-certification discovery
  - Gather evidence for opposition to certification motion
  - Develop evidence on merits defenses
- Determining what is relevant to ***certification*** and what is relevant to the ***merits*** becomes a gray area with which most courts do not want to be bothered

Class Discovery

- Discovery of Lead Plaintiff/preparing lead plaintiff
  - When should I depose the named plaintiff(s)?
- Discovery of and from absent class members
  - Is this permitted prior to certification?
  - Fed. R. Civ. P. 23(d)
- Plaintiff's discovery - Shot Gun or Sniper?

Class Discovery – Use of Experts

- Experts may not provide opinions on legal issues or ultimate issues of material fact
  - *See, e.g., Fogarazzo v. Lehman Bros.*, No. 03 Civ. 5194 (SAS), 2005 WL 361205 (S.D.N.Y. Feb. 16, 2005). Class certification experts may not opine on legal issues or on the ultimate merits of the case, but generally are restricted to the issue of whether plaintiffs' allegations *are capable of being proved on a common basis for all class members*
- Expert testimony at certification stage subject to *Daubert* analysis. *See Rhodes v. E.I. du Pont de Nemours & Co.*, No. 6:06-cv-00530, 2008 WL 2400944, at *10 (S.D. W. Va. Jun. 11, 2008)

Use of Discovery in Class Certification Motions

- Commonality & Numerosity
  - Class-Wide Discovery
- Typicality
  - Claim of Named Plaintiff versus Class Members
- Adequacy of Representation - Discovery on Class Counsel
  - Relationship between Class Counsel and Named Plaintiff
  - Fee Structure

E-Discovery Obligations and Attendant Costs and Strategies

- Will the federal rules help or hinder efforts to keep costs down and to mitigate production obligations?
- Given federal disclosure obligations, when should parties confront issue of what disclosures are relevant to certification?
- 2006 amendments to Fed. R. Civ. P. 26
- A 2007 study showed that one in five corporate defendants settle litigation to avoid the costs of electronic discovery

E-Discovery Obligations and Attendant Costs and Strategies (cont'd)

- *Bell Atlantic v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955 (2007)
  - Court cited the high cost of discovery in revising the motion to dismiss standard and rejected the idea that "a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,'" noting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* at 1967

E-Discovery Obligations and Attendant Costs and Strategies (cont'd)

- Are experts required?
  - *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008) – Magistrate held that any challenge to or defenses of search methodology in producing e-discovery must be scrutinized under Rule 702, and supplemented, if necessary, by *Daubert* hearings
    - "[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of [Rule 702]"
- Discovery abuses could lead to sanctions

Special Considerations – Settlements

- Fed. R. Civ. P. 23
  - Requires court approval of any settlement that effects dismissal of a class action
    - Court must determine if settlement is fair, reasonable, adequate and not a product of collusion
  - Requires disclosure of side agreements between class counsel and any defendant
  - Requires plain language notice to class members
  - Affords second opportunity for class members to opt out after terms of settlement are known
  - Imposes new procedures for selection of class counsel
  - Sets new standards for attorneys' fee awards

Special Considerations – Settlements (cont'd)

- Settlements under CAFA
  - Restrictions on awards of attorneys' fees in "coupon" settlements
  - Notice of proposed settlement must be provided to appropriate federal and state officials
  - Restrictions on payment by class members to class counsel that would result in net loss
  - Prohibits settlement awards that discriminate based on geographic location

Special Considerations – Settlements (cont'd)

- Coupon settlements after CAFA
  - Coupon settlements arguably abused:
    - *Figueroa v. Sharper Image Corp*., 517 F. Supp. 2d 1292 (S.D. Fla. 2007) Post-CAFA, Court scuttled settlement where class members would receive $19 coupon to "fix" a $300 air purifier, while class counsel would receive $2 million fee

Questions?

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