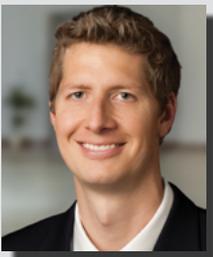




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Turning the Tables in Class Action Discovery: Conducting Merits Discovery Prior to Class Certification Remains a Viable Defense Strategy

Class actions often are lengthy and costly undertakings for defendants, and the discovery process can demand the most significant amount of resources. When discovery on class certification issues is then followed by merits discovery, it can seem as if the process never ends. There are, however, alternative strategies to get to the ultimate goal of a successful resolution. In cases where threshold factual or legal issues on the merits of the underlying claims may determine the viability of a class claim, a defendant should consider reversing the usual order of class action discovery and seek an initial discovery period on the merits issues. Doing so could quickly end a case before class certification issues are even considered. As discussed below, defendants have used this strategy in a number of class action cases, thus allowing the defendant to end the case prior to the burden and cost of full-blown class discovery.

Typical Class Action Defense Strategy Attempts to Limit the Scope of Precertification Discovery to Class Certification Issues

In most instances, a defendant facing a class action seeks to ensure that a plaintiff's precertification discovery is limited to what is necessary to permit the court to make an informed decision on whether a case should be certified as a class action. There are a number of tactics a defendant can use to do this. For example, the defendant can argue that a plaintiff's discovery requests are not proportional to the needs of the case and for the court to make the class certification decision. The recent amendments to Rule 26 added a proportionality standard to the discovery process, which requires an assessment of, among other things, the importance of the requested discovery in resolving the issues in the case and whether the burden or expense of the proposed discovery outweighs its likely benefit. These factors may limit the scope of precertification discovery as the expense to a defendant will usually far exceed the amount of a named plaintiff's claims.

Defendants also often ask courts to bifurcate discovery so that discovery into certification issues takes place first, and discovery into issues related to the merits of the claims only occurs if a class is certified. While there is not always a bright line between the two



types of discovery, discovery into certification issues relates to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof. Discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed. Recent Supreme Court precedent has given lower courts more leeway into considering the merits of the claims at the class certification stage, making it harder to argue that class discovery cannot touch on any merits issues. But courts sometimes still will agree to bifurcate discovery in this manner based on the rationale that class certification discovery should be straightforward and distinguishable from merits discovery.

Each of these strategies attempts to limit a defendant's discovery burden in the hope that a class is never certified and that discovery into the merits of the plaintiff's claims can be avoided. In many cases, this is a sound strategy.

When A Favorable Case Dispositive Factual Issue Exists, Seek To Limit Discovery to that Issue

In certain cases, it can be advantageous for a defendant to flip the order of class action discovery so that discovery into class certification issues is avoided altogether. This is a viable tactic when a plaintiff's legal claims contain favorable threshold factual issues. Discovery on just these threshold issues can result in summary judgment for the defendant before class issues are even addressed.

A good example of this strategy is *Hager v. Vertrue, Inc.*, 2011 WL 4501046 (D. Mass. 2011). There, the plaintiff filed a putative class action alleging that the defendants violated Massachusetts' unfair competition statute when she was deceived into enrolling into a membership program that was marketed on the defendants' website. During the initial scheduling conference, one of the defendants argued that discovery should be phased, with the first phase focusing on the merits of the plaintiff's claims, rather than issues related to class certification. The defendant supported its argument by predicting that it would be able to defeat the plaintiff's claim on summary judgment after the completion

of the first phase of discovery. After the court agreed to the phased discovery, evidence gathered during the merits discovery phase showed that the plaintiff had failed to read the webpage that she claimed was deceiving. As a result, in addition to determining that the marketing of the program at issue was not deceptive, the court found that the plaintiff was unable to demonstrate causation and granted the defendants' motion for summary judgment. The court then held that, because the plaintiff's claims were unsuccessful, there was no need to consider whether a class should be certified.

The approach has also gained approval in the circuit courts of appeal. In *In re Bayer Healthcare*, 752 F.3d 1065 (6th Cir. 2014), plaintiffs filed a putative class action alleging that the defendants made misrepresentations in their advertisements for flea and tick collars. During the case management conference, both parties agreed that the case would be determined by the issue of whether the defendants could produce studies that substantiated their advertising claims. As a result, the court limited the initial discovery to that threshold issue. Ultimately, and before any other discovery took place, the district court granted summary judgment for the defendant after it was able to produce evidence that supported its advertising claims. The Sixth Circuit subsequently affirmed the decision.

Additional instances where defendants have used this strategy are *Physicians Healthsource, Inc. v. Janssen Pharmaceuticals, Inc.*, 2014 WL 413534 (D.N.J. 2014), *Loreaux v. ACB Receivable Management, Inc.*, 2015 WL 5032052 (D. N.J. 2015) and *Degutis v. Financial Freedom, LLC* (M.D. Fla. 2013). In *Physicians Healthsource*, the plaintiff brought a Telephone Consumer Protection Act ("TCPA") claim that presented the threshold issue of whether faxes sent by the defendant were informational and, therefore, not actionable under the TCPA. Upon request from the defendant, the court bifurcated discovery so that the first phase would focus on discovery related to whether the faxes were informational or advertisements. During the second phase of discovery, the parties would conduct discovery on all other matters, including class certification issues. But before the second phase of discovery, the defendant would be allowed to file





a motion for summary judgment on the issue of whether the faxes were informational. The court based this decision on its finding that conducting discovery in this manner had the “potential to save the parties and the Court from the substantial costs and burdens associated with whole scale class action discovery.”

In *Loreaux*, the plaintiff brought a putative class action under the Fair Debt Collection Practices Act (“FDCPA”) alleging that a debt collection letter sent by the defendant listing an “amount due” different than the “Amount Owed” was false, deceptive or misleading. Shortly after discovery began, the defendant asked the court to limit discovery to plaintiff’s claim that the letter was false, deceptive, or misleading under the FDCPA. The defendant argued that the claim involved a narrow, potentially dispositive issue that was distinct from class discovery and that if its motion for summary judgment on the issue is granted it would dispose of the entire action, maximizing efficiencies and cost savings by rendering class discovery unnecessary. The court agreed and granted the defendant’s motion to bifurcate discovery.

Finally, in *Degutis*, the plaintiff filed a putative class action alleging that the defendants violated Florida’s deceptive

and unfair trade statute by forcing the plaintiff and other Florida homeowners to purchase their flood insurance when they were already covered by an existing policy with flood insurance. Before discovery began, the defendants filed a motion seeking a phased discovery schedule where discovery would first address the merits of the claim allowing plaintiff’s claim to be tested on summary judgment before class discovery. Noting that a trial court has discretion to permit pre-certification discovery as it sees fit, the court held that phasing discovery as requested by the defendant was appropriate and stayed class discovery until after it ruled on the defendant’s motion for summary judgment.

Conclusion

As demonstrated by the cases described above, when faced with a class action, a defendant should determine whether the plaintiff’s claim contains any threshold factual issues that could be favorably addressed during discovery. In those cases, the defendant should consider seeking to limit initial discovery to those issues and request the ability to seek summary judgment before class discovery. Doing so is a unique way to short circuit a class action and to avoid the time and expense of full scale class action discovery.





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