STAY CURRENT
A Client Alert from Paul Hastings

PAUL HASTINGS

June 2011

Bifurcated Discovery in Class Actions: An Effective Strategy to Prevent the Continuation of the Unmeritorious Lawsuit

BY THE COMPLEX LITIGATION AND TRIAL PRACTICE

Consumer class action lawsuits are expensive. Case after case confirms this fact. Recognizing this, many consumer class action lawsuits are filed without a proper class representative, solely so that discovery may be initiated to locate a plaintiff with a "legitimate" claim. As counsel for the named plaintiffs search for someone, anyone, to step into the lawsuit in the place of the original plaintiffs, the defendant faces substantial cost in discovery alone, and that cost takes many forms. It includes dollars spent, employee hours lost, possible reputational harm in the market place, and a general distraction from day-to-day operations. In light of that reality, the Paul Hastings Complex Litigation and Trial Practice employs a number of strategies in an effort to reduce that cost.

One of those strategies is to pursue bifurcated discovery. Assuming a case survives a demurrer or a motion to dismiss, and after consultation with the client to ensure the strategy is appropriate for the particular case, Paul Hastings will often seek to bifurcate discovery into two phases: (1) pre-class certification discovery, and (2) post-class certification discovery. In the pre-class certification phase, discovery would be limited to the issues relevant to the class-certification analysis, inclusive of the plaintiff's standing to pursue the asserted claims. If a class is certified and makes it to the post-class certification phase, discovery will focus on the "merits" of the underlying claims. Where a court agrees to bifurcate discovery, the costs of pursuing "merits" discovery can be delayed or eliminated.

This alert discusses the reasoning behind and the practical implications of pursuing a bifurcated discovery plan in consumer class action cases, and how that strategy can adroitly be used to block the claims of improper class representative plaintiffs in their entirety.

Background

Limiting discovery to class-related issues until such time as class certification is decided is permitted under various state and federal laws, including the California Code of Civil Procedure and Rule 26(c) of the Federal Rules of Civil Procedure. In cases pending in federal court, bifurcated discovery also helps to expedite the decision on class certification in accord with Federal Rule of Civil Procedure 23(c)(1), which requires that class determination be made "as soon as practicable." This makes sense, as the underlying "merits" questions—the basis of the representation in a false-advertising case; the thinking behind a business strategy in an unfair competition case—are often irrelevant to the class-certification analysis and only add to the cost of defending a case destined for certification denial.

Several cases provide support for limiting discovery in putative class actions. In *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 440-41 (2000), for example, the California Supreme Court noted that "a class certification motion is appropriate before the parties engage in substantial discovery." A few years later, in *Lockheed Martin Corp. v. Superior Court (Carrillo)*, 29 Cal. 4th 1096, 1125 (2003), the Court held that certification of a class action may not be "conditioned upon a showing that class claims for relief are likely to prevail" (citing *Linder*, 23 Cal. 4th at 443). In *Sav-On Drug Stores, Inc. v. Superior Court (Rocher)*, 34 Cal. 4th 319, 326 (2004), the California Supreme Court noted that the central issue in a class certification motion is whether the questions that will arise in the action are common or individual, not the plaintiffs' likelihood of success on the merits of their claims. Thus, a defendant seeking to bifurcate discovery can argue that a plaintiff does not need to obtain "merits" information such as the defendant's companywide procedures or accounting practices to ascertain who constitutes a potential class member.

Practical Implications

In cases where a plaintiff is unlikely to satisfy the requirements for class certification, limiting discovery to class-related issues may help move the case toward final resolution sooner than if a plaintiff were allowed to pursue merits-based discovery prior to a class certification hearing.

In addition, bifurcating discovery will limit the amount of information a defendant needs to disclose early on in the case. This is extremely valuable in cases where a plaintiff demands that a defendant provide class member contact information. Plaintiffs often seek this information immediately upon filing suit, to secure a backup class representative should the named plaintiff fail.[1] Defendants are often very reluctant to provide this information, both for privacy and business reasons. California law regarding the ability of a putative class action plaintiff to force a defendant to identify the names and contact information of potential class members has been fractured, therefore, bifurcating discovery may help to avoid having to produce this information.[2] If, for instance, earlier focus can be placed on the plaintiff's standing (or lack thereof), a defendant may improve its chances of not having to produce class member contact information.

The California Court of Appeal recently addressed the issue of class member contact information in *Starbucks Corp. v. Superior Court (Lords)*, 194 Cal. App. 4th 820 (2011). In *Starbucks*, the Court dismissed the plaintiff's discovery request for job applicants' contact information, holding that the privacy concerns of putative class members vastly outweighed any benefits of disclosing their identities. Putative class members in *Starbucks* were former job applicants with marijuana convictions more than two years old, which by California law were removed from public record. Importantly for defendants, the Court recognized that "[p]recertification class discovery is not a matter of right. Class actions rest on considerations of equity and justice. Before allowing class counsel to find a viable class representative, trial courts must apply a balancing test and weigh the actual or potential abuse of the class action procedure against the potential benefits that might be gained."[3]

Starbucks was right in recognizing that recent law has called for application of a balancing test in determining whether to allow discovery of absent class members' contact information. It is through the lens of this balancing analysis that some clarity on the law emerges. First, where the plaintiff never had standing as a class member, courts may discuss a balancing test, but almost uniformly dismiss the request. Second, where the class certification arguments themselves appear weak or unfounded, courts may apply a strong-form balancing test adopted from *Parris v. Superior Court (Lowe's H.I.W., Inc.)*,[4] which *Starbucks* recently reinforced.

In each of these scenarios, seeking bifurcated discovery will help a defendant avoid having to produce information such as consumer contact records. Results cannot be guaranteed, as there is case law that

applies a weaker form of balancing, but on the whole, it is more likely than not that seeking bifurcated discovery will prevent having to produce, among other things, customer contact information during the initial stages of discovery.

Scenario 1: Plaintiff Has No Standing

Case law has recognized that the strongest argument against having to produce sensitive information such as customer contact records is that the original plaintiff lacked standing to bring the case. Courts have nearly uniformly recognized that requiring production of customer contact information in this scenario would amount to an abuse of discretion.

In *First American*, the plaintiff was unable to prove that he was ever in the class that he purported to represent.[5] To establish a suitable representative, the plaintiff demanded the identities and addresses of people who would fit into the potential class. The court refused to allow the plaintiff's attorneys to use him as a placeholder to obtain more appropriate clients, reversing the trial court's ruling and rejecting the discovery request.[6] The court noted that while the trial court "did not expressly engage" in a balancing test, it was unnecessary to remand in light of the evidence.[7] Where the plaintiff never had standing and the rights of future putative class members remained intact, "the potential for abuse of the class action procedure is overwhelming, while the interests of the real parties in interest are minimal."[8]

Following the *First American* analysis, early focus on the named plaintiff's standing through bifurcated discovery may be a way to avoid having to produce records such as customer contact information. Aside from otherwise assisting in a case defense, early focus on the plaintiff allows both the defendant and the court to understand and to argue whether plaintiff's discovery requests are genuine or merely an attempt to file a case to find a case. Where a plaintiff has no standing to begin with, courts agree that requiring production of information such as absent class members' data would be improper.

Scenario 2: Discovery Request Fails Under the Balancing Test

If a plaintiff survives a standing inquiry, the court will then implement a balancing test to decide whether to grant a precertification discovery. In the test developed in *Parris*, trial courts must weigh potential abuses of the class action procedure against the rights of the parties, including potential class members, under the circumstances.[9] Such a balancing test typically entails weighing the privacy concerns involved with permitting the discovery against the right of class members to pursue future legal action. Considerations include whether future action would be time barred, or any other reason why class members might be denied relief if the particular action were unable to proceed.[10]

Courts implementing the *Parris* balancing test tend to find in favor of the defendants or limit the discovery afforded where either the underlying claims appear weak or something else about the attempt to certify a class is amiss. In *Best Buy Stores, L.P. v. Superior Court (Boling)*, for example, the court allowed limited discovery, but with rigid conditions, after noting that the named representative was also class counsel.[11] Absent class members had to affirmatively opt in, "and only those persons who affirmatively request this be done in a writing signed by the person" would have their information disclosed.[12]

In the recently issued *Starbucks* decision, another California appellate district implemented the *Parris* balancing test to find in favor of the defendant. The Court reversed the trial court and refused to allow the disclosure of contact information of former Starbucks job applicants with minor marijuana convictions more than two years old. It applied the *Parris* balancing test, finding only minimal benefits to the parties but significant privacy concerns with "outing" someone as having a marijuana conviction that, because of prior California law, should have been eliminated from public record. The Court noted

that California courts had previously intervened in analogous situations, preventing the compelled disclosure of information through discovery orders where it would unduly impinge on the privacy rights of innocent third parties.[13]

Again, bifurcated discovery would help to achieve a similar result. Allowing the plaintiff to characterize discovery seeking customers' or absent class members' contact information as "merits" discovery yields the ground to the plaintiff. Instead, by bifurcating discovery into two phases, defendants can spotlight issues that will help arguments seeking to avoid production—the named plaintiff has no standing, class members would not want their information produced and/or something else is amiss in the case.

Conclusion

As the above analysis suggests, seeking bifurcated discovery in putative class actions can help on many fronts. It can keep costs down by minimizing the amount of discovery required to be produced during the initial stages of the litigation. In addition, it can aid in arguing against having to produce sensitive records such as absent class members' contact information until after the court decides whether class certification is appropriate. In cases where the named plaintiff lacks standing to sue, plaintiff's counsel will have a more difficult time locating a substitute named plaintiff if it does not have access to discovery such as absent class members' contact information, which in turn, will help defeat class certification.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Chair, Complex Litigation and Trial Practice
Dennis S. Ellis
1.213.683.6264
dennisellis@paulhastings.com

Joshua G. Hamilton
1.213.683.6186
joshuahamilton@paulhastings.com

Katherine F. Murray
1.213.683.6273
katherinemurray@paulhastings.com

Orange County

Glenn D. Dassoff
1.714.668.6227
glenndassoff@paulhastings.com

Donald L. Morrow
1.714.668.6291
donaldmorrow@paulhastings.com

Palo Alto

Peter M. Stone
1.650.320.1843
peterstone@paulhastings.com

San Diego

Christopher H. McGrath
1.858.458.3027
chrismcgrath@paulhastings.com

San Francisco

Grace A. Carter
1.415.856.7015
gracecarter@paulhastings.com

John P. Phillips
1.415.856.7027
johnphillips@paulhastings.com

Sean D. Unger
1.415.856.7056
seanunger@paulhastings.com

[1] California has a "policy of great liberality in permitting amendments to the pleadings at any stage of the proceeding." *Berman v. Bromberg*, 56 Cal. App. 4th 936, 945 (1997). Under California Code of Civil Procedure section 473, a court may "in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party." In recognition of these policies, California courts have permitted amendments to substitute new plaintiffs when the named plaintiffs are no longer able to maintain the alleged claims, so long as the defendant is not prejudiced. Such amendments are more likely to be permitted when it is established that the case is one that can be certified, rather than one in which the original plaintiff never had standing to sue. *See, e.g., First Am. Title Ins. Co. v. Super. Ct. (Sjobring)*, 146 Cal. App. 4th 1564, 1577 (2007) ("We cannot permit attorneys to make an 'end-run' around Proposition 64 by filing class actions in the name of private individuals who are not members of the classes they seek to represent and then using precertification discovery to obtain more appropriate plaintiffs."). Thus, it behooves a defendant to defeat the case before a substitute plaintiff can be located, and before the case progresses into merits discovery.

[2] Older case law, like *Budget Finance Plan v. Superior Court (McDowell)*, 34 Cal. App. 3d 794, 799-800 (1973), forced pre-certification discovery of this information without much discussion or analysis. More recently, however, courts have recognized that the class action process can be abused and have warned against incentivizing the filing of a class action as a means to search for a proper claim and party. *See, e.g., First Am.*, 146 Cal. App. 4th at 1564. While some courts continue to require production of the information, and adhere to the *Budget Finance* understanding, other courts have refused to require production of the information where such production was unnecessary or would be abusive. *See, e.g., Cryoport Sys. v. CNA Ins. Co.*, 149 Cal. App. 4th 627 (2007).

[3] *Starbucks Corp.*, 194 Cal. App. 4th at 825.

[4] *Parris v. Super Ct. (Lowe's H.I.W., Inc.)*, 109 Cal. App. 4th 285 (2003).

[5] *First Am.,* 146 Cal. App. 4th at 1564.

[6] The exception to the above is the limited situation where putative class members are unable to discover their status as potential members. The court in *CashCall, Inc. v. Superior Court (Cole)* declined to adopt the bright-line rule that a trial court is **required** to deny a motion for precertification discovery, without applying a balancing test, where a plaintiff has never had standing. 159 Cal. App. 4th 273, 285-86 (2008). In *CashCall*, the potential class members were in a unique situation where they only fit into the class if the defendants had secretly monitored their telephone conversations. Without the precertification discovery requests, potential class members were unable to discover whether their rights had been violated. The court thus granted discovery after weighing the facts under the balancing test.

[7] *First Am.*, 146 Cal. App. 4th at 1576-77.

[8] *Id.* at 1577; *see also Cryoport Sys. v. CNA Ins. Co.,* 149 Cal. App. 4th 627 (2007) (refusing to allow the plaintiff of a potential class action to amend his complaint to substitute new plaintiffs because he never had standing. The court relied on *First American* to reject the plaintiff's precertification discovery requests, finding that a plaintiff without standing clearly had no interest of his own in the litigation).

[9] Parris, 109 Cal. App. 4th at 300-01.

[10] *See First Am.,* 146 Cal. App. 4th at 1577; *Cryoport*, 149 Cal. App. 4th at 634.

[11] *Best Buy*, 137 Cal. App. 4th 772 (2006).

[12] *Id.* at 778. This is contrasted by the Supreme Court's approach in *Pioneer Electronics*, where the Court rejected an opt-in process, but did so based on a very different set of facts.

[13] *Starbucks*, 194 Cal. App. 4th at 828. A small number of California appellate cases, those from District 7, have applied a more plaintiff-friendly balancing test. Purporting to rely on the California Supreme Court's decision in *Pioneer*, the court in *Puerto v. Superior Court (Wild Oats Markets, Inc.)*, 158 Cal. App. 4th 1242, 1250 (2008), balanced the individual's reasonable expectation of privacy against a serious invasion of that privacy. Although similar to the *Parris* test, it creates a tougher burden for defendants to overcome. Indeed, the two cases applying this test to precertification discovery, *Puerto* and *Crab Addison, Inc. v. Superior Court (Martinez)*, 169 Cal. App. 4th 958 (2009), both granted the precertification discovery requests. Companies defending against these discovery requests should avoid and attempt to steer the court away from applying this weak form balancing test.