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Defending Competing and Repetitive Class Actions

Race to Judgment, First-to-File Rule, Venue Transfer, Consolidation, Anti-Suit Injunctions, and More

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DEFENDING COMPETING AND REPETITIVE CLASS ACTIONS

John E. Goodman

Multiple actions involving the same subject matter and the same defendant are a common feature of the U.S. class action landscape. This article will examine the problem of competing class actions, which presents a variety of challenges and options for the defendant and defense counsel. While each repetitive litigation situation stands on its own facts, being aware of the available options is a key to the formulation of a successful defense strategy.

Race to Judgment. One possibility is to defend each action on its own. In general, the first action to reach judgment on the merits, whether by settlement or litigation, will be conclusive as to all class members despite any competing litigation that remains pending, by virtue of res judicata and claim preclusion principles and the Full Faith and Credit Clause of the United States Constitution. *See, e.g.*, *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 797, 807 (1996). The preclusive effect of the first judgment, however, may well depend on how close the overlap is between the classes and claims asserted in the two actions.

While there are some potential benefits to defending multiple class cases simultaneously (particularly if a case in a more favorable forum is moving quickly), there are obvious downsides. The defendant's ability to control which case goes to judgment first is frequently limited, especially in the absence of settlement. Often, the cases in the venues that are the worst from the defendant's perspective are the cases that are put on the fastest tracks by plaintiff-friendly judges. In any event, the cost of defending multiple class actions at once can be prohibitive for all but the largest defendants. Further, defeating class certification in one jurisdiction will generally not have preclusive effect in another jurisdiction, particularly as between state and federal court class actions (a subject discussed below). These difficulties lead to the conclusion that, in most instances, a race to judgment strategy makes sense if the client's goal is resolution by settlement.

In that regard, the preclusive effect of settlement creates an incentive among competing class counsel to be the first to do so. Critics argue that it undercuts the interests of class members by setting up opportunities for a defendant to pursue a so-called "reverse auction," forcing class counsel to bid against each other to see who is willing to offer the cheapest overall class settlement. From the defense perspective, simultaneous negotiation with class counsel in multiple cases is inadvisable, and can lead to unnecessary difficulties in obtaining approval of the resulting settlement in the face of inadequate representation claims and other objections by counsel with whom settlement is not reached. However, the fact remains that a defendant facing numerous class actions has strong express or implied bargaining leverage with whichever set of counsel the defendant chooses to negotiate. That leverage is certainly not unfettered: the resulting class settlement still has to satisfy all requirements for class certification, save trial manageability. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). Further, the court considering the class settlement must find that it is fair, reasonable, adequate and in the best interests of class members;

and will likely have to do so in the face of objections from class members and would-be class counsel whose competing cases are being eliminated by the settlement.

First-to-File Rule. Where the competing class actions are each within the same state or are each filed in or removable to federal court, traditional principles of comity between courts can often provide an opportunity to effectively limit the litigation to the first-filed case, or at least consolidate all of the litigation before the judge with the first-filed case. How attractive this option is will depend, of course, on the defendant's evaluation of the desirability of the venue and trial judge in the first-filed case.

There is a longstanding rule of comity whereby a federal court in which a substantially identical action is filed has discretion to stay, dismiss or transfer the second-filed action in deference to the first-filed action. This is known as the "first-to-file" or "first-filed" rule. *See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.,* 342 U.S. 180 (1952). The rule provides that when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed to judgment. The potential use of the rule is less settled when one action is pending in state court. However, the Class Action Fairness Act (CAFA) and the Securities Litigation Uniform Standards Act (SLUSA) now make it easier to get most class actions removed to federal court than once was the case, mitigating this problem to a large degree. Many states have similar principles of comity among courts of equal jurisdiction which, as a matter of jurisdiction, discretion or statute, can give precedence to the court first seized of jurisdiction.

Venue Transfer. Complementing the first-filed rule and similar state court principles are transfer of venue tools available both in the federal system and in most state systems. Such a strategy, while not necessarily eliminating competing cases, can be useful in lodging such cases in fewer forums, potentially resulting in discovery and other efficiencies for the defendant.

Transfer of venue pursuant to 28 U.S.C. § 1404(a) is within the discretion of the court, considering all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum. The factors normally considered under this discretionary venue transfer statute include a number of private (including party and non-party convenience) and public (including administrative difficulties and the desirability of applying local law) interest factors, none of which is given dispositive weight. *See, e.g., In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004); *Jones v. GNC Franchising, Inc.* 211 F. 3d 495, 498-99 (9th Cir. 2000).

While the plaintiff's choice of forum is also normally accorded some weight, numerous courts have have accorded the choice less weight when the suit is brought as a class action, partly because the interests and convenience of the class as a whole are at stake. *See, e.g., Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947). Moreover, courts have found that the pendency

of a prior similar action in the proposed transferee forum strongly militates in favor of a 1404(a) transfer. *See, e.g., Continental Grain Co. v. The FBL*, 364 U.S. 19, 26 (1960).

Many states, by statute or rule of civil procedure, have transfer or dismissal options under principles similar to that of § 1404(a). *See, e.g., Ala. Code* §§ 6-3-21.1, 6-5-430; O.C.G.A. § 9-10-31.1(a); 735 ILCS 5/2-619(3).

Venue transfers of class actions can be an effective response to competing or overlapping actions, particularly if transfer to a district in which one or more cases are already pending can be obtained. Often the next step in such a strategy will be to seek consolidation of all cases pending in that district, which again can result in significant efficiencies in the litigation, as well as the avoidance of inconsistent rulings.

MDL Consolidation. Another option available to a defendant facing competing class actions with overlapping issues is to seek a transfer and pretrial consolidation of all cases into multi-district litigation (MDL) pursuant to 28 U.S.C. § 1407. Unlike the first-filed rule of comity, substantial identity of parties is not required. The mere presence of one or more common issues is enough. Also, unlike a motion under the first-filed rule or a § 1404(a) transfer motion, a motion for transfer to MDL not ruled upon by any of the judges assigned to any of the pending class actions. And unlike the "race-to-judgment" strategy, the object of MDL treatment is to bring all cases together for coordinated discovery and pretrial proceedings, including determination of class certification issues.

28 U.S.C. §1407 provides that, "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." The decision on whether to order MDL treatment with respect to overlapping actions is made by the Judicial Panel on Multidistrict Litigation (JPML), based upon considerations of public and private convenience and efficiency. *Id.* Cases transferred for MDL treatment are transferred and consolidated for pretrial purposes only, and must each be remanded to the original forum for any trial. *Id.*

Whether the JPML will grant MDL treatment depends in large part on the number of overlapping actions facing the defendant. In general, the fewer the number of overlapping cases, the more complex the common issues will have to be to justify MDL treatment. MDL transfer is also more likely when cases are young than when they are nearing trial.

MDL treatment affords several advantages for the defendant. It has the potential to lessen the overall costs of defense of a multiplicity of litigation. It avoids inconsistent rulings on pretrial matters, discovery, dismissal and summary judgment motions, and class certification. It brings all relevant players to the same bargaining table for purposes of settlement, and thereby enhances the prospects for an effective global resolution of the controversy. Counsel for all plaintiffs are forced

to coordinate their discovery efforts, so that the defendant does not have to deal with an endless series of different but overlapping discovery requests in each case, nor tender the same witnesses for deposition multiple times. This can substantially reduce the disruption of the defendant's business.

At the same time, MDL treatment also carries disadvantages. Plaintiffs' counsel forced to pool their resources often become a much more formidable collective adversary than the individual counsel would be if left to fend for themselves. Collectively, the combined mass of a large number of plaintiffs tends to enhance the leverage exerted, even by claims with relatively questionable merit. Among the consequences of this are that discovery often proceeds at a much faster pace, and discovery battles often become more difficult for the defendant to win, because any given discovery request is more likely to be relevant in some respect when several different cases are at issue than when there is only one. Consequently, the promise of overall cost savings that led the defendant to seek MDL treatment in the first place can often vanish in an ever-expanding quagmire of broadened discovery. MDLs also tend to generate publicity and a large amount of "copycat" or "tagalong" litigation that might not otherwise have been filed. Finally, cases not originally filed in the MDL court must be tried in the transferor courts in which they were originally filed, rather than in the MDL transferee court. All of these factors combine to result in an increased likelihood that the end result of the litigation in an MDL setting will be a class action settlement.

Anti-Suit Injunctions. Finally, under limited circumstances, it may be possible for a defendant to enjoin prosecution of a competing class case. To the extent a federal court is authorized to issue such an injunction, its authority derives from the All Writs Act ("AWA"), 28 U.S.C. § 1651, and exceptions to the Anti Injunction Act ("AIA"), 28 U.S.C. § 2283.

The AWA provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 2283. The AIA provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." In limited circumstances, these statutes together enable a federal court to take the extraordinary step of enjoining activity being undertaken in a state court, an injunction to which the state court must accede under the Supremacy Clause of the U.S. Constitution. Recognizing the extraordinary force of a federal injunction, the courts have likewise recognized that such should be used sparingly; the AIA's core message is one of respect for state courts. As such, in order to be sustainable on appeal, any injunction of a state proceeding must fit within one of the AIA's three exceptions:

- specific authorization by Act of Congress (not addressed here);
- injunctions "in aid of" the federal court's jurisdiction; or
- injunctions to "protect or effectuate" the federal court's judgments.

In Aid of Jurisdiction Exception. The "in aid of jurisdiction" exception to the AIA typically only applies when a *res* is at stake and thus only to actions *in rem*. However, the courts have also recognized an additional scenario in which an "in aid of jurisdiction" injunction is permissible: when a federal court has "retained jurisdiction over complex, *in personam* lawsuits," resolution of which is threatened by competing state court litigation. *See, e.g., In re Bayshore Ford Truck Sales, Inc.,* 471 F.3d 1233, 1251–52 (11th Cir. 2006). The most common use of this "'complex multi-state litigation exception'" is where a "complex and carefully crafted settlement" in federal court "would be undermined by a state court adjudication." *In re Bayshore*, 471 F.3d at 1252; *see also In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 239 (3rd Cir. 2002); *In re Baldwin-United Corp.*, 770 F.2d 328, 337-38 (2d Cir. 1985).

The "in aid of jurisdiction" has been used in other contexts in class action litigation, as well – if rather sparingly. In *Winkler v. Eli Lilly & Co.*, 101 F. 3d 1196, 1203 (7th Cir. 1996), for example, the Seventh Circuit, while vacating an AIA injunction as overbroad, held that the AWA and AIA "permit a district court . . . to issue an injunction to safeguard a pre-trial ruling like [a] discovery order. . . ." *See also Newby v. Enron Corp.*, 338 F.3d 467, 476 (5th Cir. 2003) (district court's stay of discovery in related state court action appropriate under All Writs Act); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 261 F. 3d 355, 364-69 (3rd Cir. 2001) (affirming injunction preventing opt-outs from using evidence, or engaging in motion practice, pertaining to settled class action claims in individual lawsuits; "the All-Writs Act and the Anti-Injunction Act do extend to discovery."). On the other hand, many courts have held that the mere existence of a parallel lawsuit that seeks to adjudicate the same *in personam* cause of action does not itself provide sufficient grounds for an injunction against a state action in favor of a pending federal action. Protection of a trial date in the federal court, for example, has been found to be insufficient to support an injunction against a competing state case. *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 430 (2d Cir. 2004).

Relitigation Exception. The AWA also permits injunctions against state proceedings where necessary to "protect and effectuate" the federal court's judgments. Known as the "relitigation exception," its applicability turns on principles of claim and issue preclusion, which are to be strictly and narrowly applied. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988). Because the state court's erroneous refusal to give preclusive effect to a federal judgment can be reviewed by state appellate courts and ultimately the U.S. Supreme Court, a federal court should ordinarily not dictate to a state court the preclusive consequences of the federal court's judgment.

The Supreme Court's decision in *Smith v. Bayer Corp.*, 564 U. S. 299 (2011), its most recent pronouncement on the relitigation exception, casts doubt on whether that exception has any vitality outside the context of a final federal judgment on the merits. *Smith* involved competing federal and state product liability class actions against the manufacturer of a prescription pharmaceutical. The federal case was filed approximately one month before the state action; both cases proceeded through discovery and toward class certification. The trial court denied class certification in the federal action, on predominance and commonality grounds, and Bayer then

sought an injunction from the federal court, seeking to have the state court prevented from entertaining plaintiffs' motion to certify a statewide class. The district court granted the injunction, a ruling upheld by the Eighth Circuit. The Supreme Court unanimously reversed.

The Court held that because the analysis for class certification under FED. R. CIV. P. 23 was a different question from the state court's analysis of its own class action rule, there was no identity of issues in the two actions regarding class certification. The Court also held that an unnamed member of a putative and uncertified class could not be deemed a party for preclusion purposes, and thus that there was no identity of parties. The Court noted awareness of the problem of "serial relitigation of class certification," but observed that the passage of CAFA enables defendants to remove most significant class actions to federal court, where either MDL consolidation under 28 U.S.C. § 1407, or "principles of comity" among federal courts, should minimize conflicting certification decisions.

In the wake of *Smith*, some courts have been disinclined to view as significant in any way previous certification denials. *See, e.g., Smentek v. Dart*, 683 F.3d 373, 376 (7th Cir. 2012) (rejecting notion of "mandatory comity" where district court did not follow other courts' class certification denials in earlier cases involving same alleged class); *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 551-52 (7th Cir. 2012) (vacating antisuit injunction based on class certification denial); *Heibel v. U.S. Bank Nat. Ass'n*, 2012 WL 4463771, at *4 (S.D. Ohio Sept. 27, 2012) ("neither comity nor *stare decisis* make the [earlier] court's decision binding on this court, nor does the decision relieve this court of its obligation to conduct an independent analysis"). Other courts have relied heavily on previous certification denials. *See, e.g., Edwards v. Zenimax Media, Inc.*, No. 12-cv-00411-WYD-KLM, 2012 WL 4378219, at *4 (D. Colo. Sept. 25, 2012) (denying certification; finding opinion denying certification in earlier competing class case highly persuasive and relevant"); *Ott v. Mortgage Investors Corp. of Ohio*, 65 F. Supp. 3d 1046, 1063 (D. Ore. 2014) (prior certification denial creates a "rebuttable presumption" against certification in later cases).

One weapon decidedly not in a defendant's arsenal in dealing with competing class actions is an antisuit injunction by a state court against a federal court. The law is settled that a state court has no authority to enjoin prosecution of federal court *in personam* proceedings, even if the state proceeding has been reduced to final judgment. *See Gen. Atomic Co. v. Felter*, 434 U.S. 12, 12 (1977) (per curiam); *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964).