COST-EFFECTIVE CLASS ACTION DEFENSE

Jessica L. Fuller Lewis Roca Rothgerber Christie LLP

Class action spending continues to rise. Clients are projected to spend $2.39 billion in legal fees in class action cases in 2018.[1] So, if your company is named as a defendant in a class action, how can you and your outside counsel defend the case efficiently and effectively? This article will identify legal strategies and practical tips for how class action defendants can control legal fees and costs while zealously defending class action litigation.

MOVE TO STRIKE CLASS ALLEGATIONS

Not every putative class action can be maintained as such under Federal Rule of Civil Procedure 23 or state equivalents. Where it is apparent from the face of the pleading that plaintiff cannot meet the requirements of certification, defendants should consider filing a motion to strike class allegations at the outset of the litigation. A motion to strike class allegations argues that, regardless of what any class discovery could adduce, the plaintiff will not be able to certify the putative class for any number of reasons. For example, an unascertainable class definition, disparate experiences among class members that will necessarily lack commonality, or alleged violations of differing state laws that would lack predominance could all form the basis of a motion to strike class allegations.

These motions are grounded in Rule 23, which does not impose a time limitation (only "an early practicable time") for the court to rule on class certification and permits orders that eliminate class allegations from the pleadings.[2] However, some courts treat a motion to strike class allegations as a traditional motion to strike or motion to dismiss under Rule 12, so be conscientious of the jurisdiction and precedent on this issue.

However it is framed, a motion to strike class allegations at the start of the case can be beneficial whether granted or not. If granted, the class claims are stripped from the complaint, only the named plaintiff's individual claims remain, and exposure to the defendant is drastically reduced. Typically, a defendant can then litigate or settle the individual claims at a fraction of the expense. However, even if the court denies the motion to strike class allegations, it can serve to educate the court about key deficiencies in plaintiff's class claims, and the court's reasoning on denial can help guide case management and defense strategies as the case proceeds.

IDENTIFY AND MOVE TO DISMISS IMPROPER CLASS CLAIMS

In addition to Rule 23 grounds, class action defendants should immediately analyze whether any of the claims asserted by the named plaintiff are improper in the class context. For example, the Colorado Consumer Protection Act excepts class actions from its provisions on a defendant's liability for damages.[3] New Mexico's Unfair Practices Act prohibits the recovery of statutory penalties to class members and requires they prove actual damages.[4] So, particularly where a putative class action asserts violations of state statutes, defense counsel should scour those statutes for any limitations on class claims. Defendants should address any such issues in a motion to dismiss to narrow the claims and requested damages that will steer class discovery.

BIFURCATE OR STAGE CLASS DISCOVERY

The scheduling or case management order in a class action should not be a formulaic exercise – it is an opportunity for de-

fendants to be creative and economical. Defendants should carefully consider how to frame case deadlines and discovery limitations in an efficient manner. For example, defendants may seek to bifurcate discovery into two or more phases to tee up key class certification issues first and reserve merits discovery for only if and when plaintiff can certify the class. To do so, defendants should be prepared to articulate how class certification discovery and merits discovery will not be duplicative or overlapping, making a bifurcated approach more efficient for the parties and the court. If the court previously denied defendant's motion to strike class allegations, defendants should use the court's analysis to structure and manage discovery – i.e., if there was one factor the court believed plaintiff was entitled to probe through class discovery, defendants should request to phase discovery to address just that issue first with an opportunity to renew the motion to strike class allegations at the conclusion of that initial discovery phase.

ATTACK THE MERITS

If the putative class claims are premised upon a key legal issue, a defendant may want to file an early motion for summary judgment against the named plaintiff on an individual basis. For instance, defendants may tackle questions of statutory interpretation or retroactivity of a judicial decision on an individual basis well in advance of expensive class discovery or class certification proceedings. Indeed, the best way to effectuate this strategy is to implement it from the start: seek a case management order that sets an early summary judgment deadline and briefing schedule, plus a stay of class discovery in the interim. If the defendant prevails on summary judgment against the named plaintiff, the individual claims are dismissed with prejudice. Although the ruling does not bind the absent class members because the class was not certified, it would likely have the same practical effect.

DEFEND AGAINST THE NAMED PLAINTIFF(S)

In the face of a putative class action, defendants should not forget about the individual case asserted by the named plaintiff. Defendants should analyze and develop unique defenses to plaintiff's claims. These defenses – from lack of standing to statute of limitations – can help defeat typicality, attack representativeness, or leverage an individual settlement before reaching class certification.[5]

SETTLEMENT

Not every class action should be fought to the death. In some cases, the most efficient and productive resolution for a class action defendant is to negotiate a settlement. Defendants can choose to explore an individual settlement with just the named plaintiff(s) or a class settlement that would bind absent class members.

An individual settlement will resolve the litigation and dismiss plaintiff's claims with prejudice. It will not, however, bind the putative class members whose claims will be dismissed without prejudice. This approach is well-suited in situations where plaintiff's counsel is unlikely to identify another putative class representative to file a subsequent class action over the same dispute.

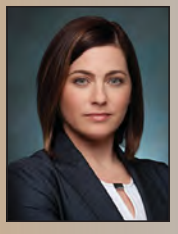
Alternatively, class settlements may provide defendants with an economical resolution of a large-scale business problem on their own terms. In a class settlement, defendants gain control over the nature and timing of the relief to the class and obtain finality and certainty that no subsequent litigation will follow. Defendants will pay more for a class settlement, not only in terms of relief to the class and attorneys' fees to class counsel, but also defense fees and costs to navigate preliminary court approval, class notice, final approval proceedings, and any settlement administration process. Nevertheless, devoting resources that would otherwise be spent litigating to a long-term business solution that extinguishes all exposure can be the more economical approach in certain cases. The timing of exploring class settlement also matters: the price tag of settlement is sure to increase the more time plaintiff's counsel invests in the case and if the court grants class certification. Defendants should not hesitate to proactively discuss class settlement in advance of class certification proceedings, and even class discovery, in cases where the company needs a business solution to a wide-spread dispute.

ACTIVELY MANAGE JOINT DEFENSE GROUPS

If a putative class action attacks an industry as a whole, your company may be named alongside several other competitors. It is both typical and advantageous for defendants to form a joint defense group to coordinate strategies and share costs, such as with expert witnesses. However, a large and unwieldly defense group is fertile ground for an unanticipated spike in fees. Class action defendants and their outside counsel should formulate a plan to manage joint defense group communications from the inception of the litigation. This plan should include, but not be limited to, the frequency and method of joint defense group meetings or calls, economical staffing for any such conferences, and leadership among the group to set the agenda and efficiently lead meetings. Some cases also benefit from formally appointing "liaison counsel" to streamline conferrals and other communications to and from plaintiff's counsel. A class action defendant that initiates this dialogue from the outset sets clear expectations and parameters, and actively manages legal fees.

SELECT THE RIGHT TEAM

Class actions are often bet-the-company litigation, but that does mean defendants must break the bank with an oversized legal team from the largest firms boasting astronomical hourly rates. Many mid-size and regional firms have class action defense expertise that rivals larger firms with more reasonable rates, plus greater familiarity with the forum and the judge. If you are in a position to hire outside counsel to defend your company in a putative class action, weigh all of the options and, most importantly, inquire about any proposed legal team's specific track record of controlling fees and costs in previous class actions – including the specific issues addressed above. These strategies, among others, can help companies aggressively and cost-effectively defend class action litigation.



Jessica Fuller is a partner at Lewis Roca Rothgerber Christie LLP with a commercial litigation and class action defense practice. Jessica utilizes various strategies to defend her clients from class action liability and achieve their business goals, including defeating class certification, crafting class settlements, and defending class rulings on appeal.

1 BTI Consulting Group, *BTI Practice Outlook 2018: Changes, Trends and Opportunities for Law Firms.*
2 Fed. R. Civ. P. 23(c)(1)(A), (d)(1)(D).
3 C.R.S. § 6-1-113(2).
4 NMSA 1978 § 57-12-10(E).
5 *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) ("when the defendant's 'affirmative defenses (such as … the statute of limitations) may depend on facts peculiar to each plaintiff's case,' class certification is erroneous") (citing *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liability Litig.*, 693 F.2d 847, 853 (9th Cir. 1982)).