

Potential Class Cert. Pitfalls Lurking In Local Rules

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Is there a deadline to move for class certification? When is the deadline? Should the parties stipulate to an extension? And, if they do, will the court grant it? Don't be caught off guard. Every practitioner must carefully evaluate these questions at the outset of any putative class action to develop a cohesive strategy for addressing certification issues and avoid potential pitfalls lurking in the local rules.

Federal Rule of Civil Procedure 23

Rule 23 of the Federal Rules of Civil Procedure does not set a firm deadline to file for class certification, but requires only that the court determine class certification "at an early practicable time." FRCP 23(c)(1)(A). Notably, the current rule, adopted in 2003, reflects a more lenient standard than the earlier version, which required the court to determine class certification "as soon as practicable." The committee notes accompanying the change expressly recognized that while evaluation of the merits is not properly part of the certification decision, time may be needed for class discovery.

Local Rules and the 90-Day Deadline

While the majority of district courts leave the parties to address class certification as part of the Rule 16 scheduling order, several district courts have implemented local rules that mandate early deadlines for filing class certification motions. For example, the Central District of California requires that motions for class certification (other than those for putative securities class actions subject to the Private Securities Litigation Reform Act) must be filed "[w]ithin 90 days after service of a pleading ..." L.R. 23-3. Other districts have adopted similar deadlines, including the Northern District of Georgia, the Northern District of Texas, the Eastern District of Louisiana and the District of Utah.

These deadlines have been increasingly criticized as inconsistent with Rule 23 as modified. Last year, the Ninth Circuit described the Central District of California 90-day class certification deadline as "unrealistic in light of recent

case law regarding the need to establish a sufficient factual record at the class certification stage.” Balser v. Hain Celestial Group Inc., 640 Fed.Appx. 694, 696–97 (9th Cir. 2016). The decision cited approvingly to a Federal Judicial Center resource calling on judges to ignore such local rules. *Id.* (citing Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges 9 (3d ed. 2010) (“local rules calling for specific time limits on class certification should be ignored as inconsistent with federal rules and obsolete.”)).

But litigants cannot afford to ignore the local rules; there are numerous decisions enforcing the 90-day deadline and striking class allegations for failure to comply. See, e.g., Watson v. Schwarzenegger, 347 Fed.Appx. 282, 284–85 (9th Cir. 2009) (finding district court did not abuse discretion in denying motion for relief from 90-day deadline imposed by local rules because unfamiliarity with rules and delay in filing motion did not constitute excusable neglect); Klune v. Ashley Furniture Industries Inc., (striking class allegations for failure to comply with 90-day deadline); Main v. Electronic Data Systems Corp., 168 F.R.D. 573, 577 (N.D. Tex. 1996) (same).

Moreover, while plaintiffs and defendants frequently stipulate to an extension, strategic considerations may lead either party to press for enforcement of the strict deadline.

Enforcement of the 90-Day Deadline and Failure to Comply

Because district courts have broad discretion to manage their docket, the 90-day deadline to move for class certification is routinely upheld unless the parties can show enforcement has denied them the ability to engage in precertification discovery necessary to determine the existence of a class. See Perez v. Safelite Group Inc., 553 Fed.Appx. 667, 669 (9th Cir. 2013) (holding challenge to local rule imposing 90-day certification deadline was without merit, but finding refusal to grant extension in the specific circumstances presented was an abuse of discretion). Compare Balser, 640 Fed.Appx. at 696–97.

As recently amended, Rule 26 now permits parties to serve document requests as early as 21 days after service of the complaint with responses due 30 days after the Rule 26 conference. With these changes, the failure to act promptly to seek class discovery may impede the parties’ ability to show good cause necessary to obtain an extension. Moreover, the lack of diligence in pressing for necessary discovery may itself weigh against certification. See Robertson v. FedEx National Ltl Inc., (“Plaintiff’s lack of due diligence is a strong indication that he and his attorneys will not ‘fairly and adequately protect the interests of the class.’”).

In practice, enforcement of the 90-day filing deadline varies wildly from judge to judge. Some judges routinely enter schedules extending the deadline for as long as the parties might agree. But others are known to deny any motion to continue the deadline. Litigants are well advised to investigate the judge’s practices regarding class certification as early as possible.

Pitfalls and Strategic Considerations Surrounding Stipulations to Extend

Looking for more time to develop their positions, or anxious to forestall litigation costs, parties frequently bank on entry of a stipulation to extend the 90-day deadline for filing a motion to certify. As we saw above, the district court might not cooperate. But, there may also be strategic reasons to press for speedy resolution of class issues. And, what if your opponent balks? Banking on an extension may give your adversary a strategic advantage in the class certification battle.

Defendants frequently seek to slow the pace of litigation to avoid front-loading costs and permit for motion practice challenging the pleadings. These considerations may warrant agreement to extend the class certification deadline. But, if early motion practice does not resolve the case, stipulating to extend the class certification deadline may increase costs dramatically by permitting plaintiffs to proceed with time-consuming and often excessively expensive discovery, which will not necessarily be limited to class discovery. Also, if the defendant believes there are strong

arguments to defeat certification, while the merits of the case may be more problematic, agreeing to an extension may give the plaintiff a chance to try to impermissibly cloud the certification question with bad facts developed through merits discovery. In short, depending on the specific circumstances presented, there may be good reason for defendants to press for enforcement of the 90-day deadline to move for certification. And, if plaintiffs are not prepared, they could find themselves at a significant strategic disadvantage.

On the other hand, if plaintiffs are well prepared, and move quickly with class discovery, they may seek to gain an advantage by refusing to stipulate to an extension. This is especially true where the facts strongly favor certification, while the merits of the case may be less certain. Indeed, if plaintiffs press forward with early class discovery, and file a motion to certify within 90-days, defendants may find themselves opposing class certification at the same time they are challenging the complaint through a motion to dismiss. And if defendants have not acted diligently to pursue class discovery from plaintiffs, the plaintiffs' refusal stipulate to an extension may leave the defendants at an extreme disadvantage in the battle over class certification.

Conclusion

In sum, class action practitioners must be aware of, and advise their clients regarding, the local rules and strategic considerations for addressing class certification motions early in any putative class action. Failure to analyze these issues promptly can have drastic and costly consequences.

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