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Effective Use of Motions To Deny Class Certification

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Class action defendants who have a strong basis for defeating class certification need not wait around until the plaintiffs move to certify a class before putting the issue to the test. In some instances, a more strategic and cost-effective approach involves filing a preemptive motion to deny class certification, long before discovery is completed. Used correctly, these motions can turn the tables on plaintiffs much earlier in the litigation, potentially saving the defendant significant litigation expense.

Plaintiffs often argue that early motions to deny class certification filed by defendants are "premature" because class discovery is not complete. Generally speaking, however, this argument is wrong. Rule 23 itself encourages the Court to resolve class certification "[a]t an early practicable time." Fed.R. Civ.P 23(c)(1)(A). As the Ninth Circuit has observed: "Rule 23 does not preclude a defendant from bringing a 'preemptive' motion to deny certification." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009); *see also Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985) (plaintiff bears the burden of showing "that discovery is likely to produce substantiation of the class allegations" and absent this showing, the refusal to allow class discovery is not an abuse of discretion).[1]

Defendants who file such motions do not take on any extra burden of proof by doing so. Even where a defendant files a motion to deny class certification, the plaintiff still bears the burden of proving that all requirements of Rule 23 have been met. This means plaintiff must "affirmatively demonstrate" all four elements of Rule 23(a) and at least one of the subsections of Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011). Plaintiff's burden is to "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (emphasis in original). The plaintiff "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id*.

Given this, where defendants have identified one or more Rule 23 requirements that plaintiffs simply cannot meet, it may make sense to get out in front of the issue using a motion to deny class certification. Indeed, courts have routinely granted defendants' motions to deny class certification, for example, where class representatives are not adequate[2] or when common issues do not predominate.[3]

While an early motion to deny class certification will not work in every case, when used effectively,

they can end class actions much sooner than usual and can save defendants significant litigation costs.

[1] Other circuit courts have also approved of early motions to deny class certification or motions to strike class allegations. *See, e.g., Richardson v. Dir. Fed. Bureau of Prisons*, 829 F.3d 273, 288 (3d Cir. 2016)("[W]e join the courts of appeals which have held that nothing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question."(cleaned up); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) ("nothing in the rules says that the court must await a motion by the plaintiffs … defendant may move for a determination of whether the action may be certified under Rule 23(c)(1)"); *Cook County College Teachers Union v. Byrd*, 456 F.2d 882, 885 (7th Cir. 1972)("One opposing a class action may move for an order determining that the action may not be maintained as a class suit.").

[2]*See, e.g., Cornejo v. Big Lots Stores, Inc*., 2023 U.S. Dist. LEXIS 94612 (E.D. Cal. May 30, 2023) (plaintiff who did not sign arbitration agreement not adequate to represent class members who are subject to such agreements); *Farr v. Acima Credit LLC*, 2021 U.S. Dist. LEXIS 126431 (N.D. Cal. July 7, 2021)(plaintiff who had opted out of arbitration provision could not satisfy adequacy or typicality under Rule 23(a) to represent class members who were subject to arbitration clause).

[3]*See, e.g., Payne v. Sieva Networks, Inc.*, 2024 U.S. Dist. LEXIS 133654 (N.D. Cal. July 24, 2024)(no predominance under Rule 23(b)(3) in TCPA action where plaintiff could not show how residential numbers would be identified using common proof); *Mattson v. New Penn Fin., LLC*, 2023 U.S. Dist. LEXIS 219491 (D. Or. Oct. 12, 2023) (no predominance where issue of whether plaintiff's mixed-use phone was "residential" or business would dominate the TCPA litigation), *adopted by Mattson v. New Penn Fin.*, LLC, 2024 U.S. Dist. LEXIS 232 (D. Or., Jan. 2, 2024).

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