

PRECERTIFICATION

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I. Introduction

Class certification is properly recognized as perhaps the most critical point for class actions. Indeed, as courts and commentators regularly note, the denial of class certification “may sound the ‘death knell’” of the class action.² The initial period between the filing of a putative class action and the court’s ruling on class certification—the precertification period—is also an important phase. Proper consideration and utilization of available precertification procedures can significantly affect how the case will proceed, including the certification decision and even whether the certification issue is considered. A carefully prepared strategy—based on a full consideration and evaluation of case management issues, available procedural tools, and potential pitfalls during the precertification period—can limit the time and costs of the precertification stage while also optimizing prospects for either the grant or denial of class certification.

II. Case Management

A. EFFECTIVE MANAGEMENT OF THE CONDUCT OF CLASS ACTIONS

As in all cases, counsel in a class action are required to participate in Rule 26(f) and Rule 16 conferences.³ While the initial case management conference and related case management/scheduling orders are important in all cases, their significance is

1. The author gratefully acknowledges the contribution of Joseph Park in writing the first edition of this chapter. The author has brought the original work forward to reflect more recent developments in the law.

2. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)).

3. See FED. R. CIV. P. 16 & 26(f).

amplified in class actions because of the heightened stakes in class action litigation and the attendant high costs associated with prosecuting and defending class claims. Consequently, class actions generally require more active case management both by the courts and by the parties to achieve an efficient and cost-effective resolution of the numerous, complex, and often unique issues associated with class actions.⁴ Careful preparation in advance of the Rule 26(f) and Rule 16 conferences provides the parties with an opportunity, at an early juncture in the case, to influence the timing of the class certification decision, as well as the scope of permissible activities during the precertification period, including the availability and extent of any precertification discovery.

In connection with the initial case management conference and proposed case management/scheduling orders, the parties may address and advocate their respective positions about, *inter alia*: (1) the timing of the class certification motion, including briefing schedules; (2) whether and to what extent precertification discovery is necessary, including whether discovery will be bifurcated and whether discovery will be necessary from absent potential class members; (3) coordination with related cases, including whether the cases should be consolidated, coordinated under 28 U.S.C. § 1407,⁵ or stayed in deference to earlier filed actions in other jurisdictions; (4) whether it is necessary to appoint interim class counsel during the precertification period; and (5) whether potential dispositive motions, particularly those raising questions of law, should be heard prior to the class certification motion. Resolution of these and related case management issues identified in Rules 16(c)(2) and 26(f) will assist the court and the parties in laying a concrete road map for the precertification phase of the class action.

Express authority for a court's active management of class actions can be found not only in Rule 16 (setting forth the court's authority to issue scheduling and case management orders), but also in Rule 23(d), which specifically empowers the court to issue orders that:⁶

4. See generally MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21 (2004):

Because the stakes and scope of class action litigation can be great, class actions often require closer judicial oversight and more active judicial management than other types of litigation. Class action suits present many of the same problems and issues inherent in other types of complex litigation. The aggregation of a large number of claims and the ability to bind people who are not individual litigants tend to magnify those problems and issues, increase the stakes for the named parties, and create potential risks of prejudice or unfairness for absent class members. This imposes unique responsibilities on the court and counsel. Once class allegations are made, decisions such as whether to settle and on what terms are no longer wholly within the litigants' control. Rather, the attorneys and named plaintiffs assume responsibilities to represent the class. The court must protect the interests of absent class members, and Rule 23(d) gives the judge broad administrative powers to do so, reflecting the equity origins of class actions.

5. See also Chapter 14, "Multidistrict Litigation."

6. FED. R. CIV. P. 23(d)(1)(A)–(D).

- Determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
- Require the giving of appropriate notices to some or all class members to protect the class members and fairly conduct the action;
- Impose conditions on the representative parties or on intervenors; and
- Require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.

Importantly, Rule 23(d)(1)(E) provides a “catchall” provision, authorizing the court to issue orders to “deal with similar procedural matters.” This provision is interpreted broadly and is often cited as authority for many orders not specifically enumerated in Rule 23 or elsewhere.⁷ Under the broad authority granted by Rule 23(d)(1), courts can issue a wide-ranging variety of orders in aid of the effective management of class actions.⁸

B. PLEADING PRACTICE

The rules applicable to civil actions generally apply to class actions, including the pleading standards set forth in Rules 8 and 9.⁹ Class action complaints are subject to additional pleading requirements, however, as they must also contain factual allegations as to the prerequisites for class actions set forth in Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—as well as one or more of the grounds for class certification under Rule 23(b): (1) the potential risk of inconsistent results in separate actions; (2) the need for classwide injunctive relief; and/or (3) the predominance of common questions of fact or law and the superiority of class actions over separate actions.¹⁰ Local rules should also be consulted, as some local rules include specific provisions applicable to class actions, including required allegations, information to be included in case management statements, the Internet posting of case filings, and motion filing deadlines.¹¹ Additional requirements are

7. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1304 (2d Cir. 1990).

8. See generally 5 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* §§ 21.140–23.145 (3d ed. 1999).

9. FED. R. CIV. P. 8, 9.

10. FED. R. CIV. P. 23(a)(1)–(4), 23(b)(1)–(3); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (conclusory allegations reciting Rule 23 requirements inadequate: “[T]here must be an adequate statement of basic facts to indicate that each requirement of the rule is fulfilled.”); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (conclusory allegation regarding numerosity of class and impracticability of joinder insufficient); *Stambaugh v. Kan. Dep’t of Corr.*, 151 F.R.D. 664 (D. Kan. 1993) (“Conclusory allegations of discrimination on a class-basis are not enough.”). But see *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975) (speculative allegation regarding class size adequate where only relief sought was injunctive and declaratory relief); *Clark v. State Farm Mut. Auto. Ins. Co.*, 231 F.R.D. 405, 407 (C.D. Cal. 2005) (motion to strike class action allegations denied where class action allegations were conclusory).

11. See, e.g., C.D. CAL. L.R. 23-1, 23-2; N.D. CAL. L.R. 3-4, 3-7, 16-9, 23-1, 23-2; D. UTAH L.R. 23-1; S.D.N.Y. L.R. 4; N.D. TEX. L.R. 23.1, 23.2; W.D. TEX. L.R. CV-23 & Appendix A.

imposed on securities class actions subject to the Private Securities Litigation Reform Act, including stricter pleading requirements, a certification accompanying the complaint, and early publication of class notice.¹²

Just as class action complaints must comply with general pleading requirements, class action complaints are subject to attack by motions filed pursuant to Rules 9 and 12, including motions to dismiss, motions for judgment on the pleadings, motions for more definite statement, and motions to strike.¹³ Thus, the Supreme Court's recent rulings in *Bell Atlantic Corp. v. Twombly*¹⁴ and *Ashcroft v. Iqbal*,¹⁵ rejecting the traditional Rule 12(b)(6) standards in *Conley v. Gibson*,¹⁶ apply to motions to dismiss in class actions. Relying on the new "plausibility" standard under *Twombly/Iqbal*, courts are likely to show an increased willingness to dismiss class actions at the pleadings stage.¹⁷ The impact of *Twombly/Iqbal* may be short-lived, however, if pending legislation is enacted to overturn those decisions and codify the *Conley* standard for motions to dismiss: "A court shall not dismiss a complaint . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief."¹⁸

1. Jurisdictional and Standing Issues

Among the issues most frequently raised by Rule 12 motions are jurisdictional issues, including subject matter jurisdiction, standing, and mootness.

Class actions must comply with the jurisdictional requirements applicable to all federal actions. Thus, federal courts must have subject matter jurisdiction over the action, whether based on federal question or diversity.¹⁹ In that regard, Rule 23 is a

12. 15 U.S.C. §§ 77z-1, 78u-4; see also Chapter 19.H, "Securities Class Actions."

13. FED. R. CIV. P. 9(b), 12(b), (c), (e), (f); see also *Muniz-Rivera v. United States*, 326 F.3d 8 (1st Cir. 2003) (dismissal under Rule 12(b)(1)); *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) (dismissal under Rule 12(b)(2)); *Miller v. Champion Enters., Inc.*, 346 F.3d 660 (6th Cir. 2003) (dismissal under Rule 12(b)(6)); *Wesolek v. Layton*, 871 F. Supp. 2d 620, 638 (S.D. Tex. 2012) (dismissal of common law and securities fraud claims for failure to plead with particularity under Rule 9(b)); *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D.N.J. 2003) (motion under Rule 12(e)); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101 (C.D. Cal. 2003) (motion to strike under Rule 12(f)).

14. 550 U.S. 544 (2007).

15. 556 U.S. 662, 679–80 (2009).

16. 355 U.S. 41, 45–46 (1957).

17. See, e.g., *In re Toshiba HD DVD Mktg. and Sales Pracs. Litig.*, MDL No. 1956, 2009 WL 2940081 (D.N.J. Sept. 11, 2009) (relying on *Iqbal*, dismissed MDL consolidated complaint); *DeBlasio v. Merrill Lynch & Co.*, 2009 U.S. Dist. LEXIS 64848 (S.D.N.Y. July 29, 2009) (dismissal of securities class action under Rules 9(b) and 12(b)(6)); *Wright v. Gen. Mills, Inc.*, 2009 U.S. Dist. LEXIS 90576 (S.D. Cal. Sept. 30, 2009) (granting motion to dismiss, with leave to amend, class action against General Mills of misleading consumers on labeling of granola bars). But see *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009) (applying *Twombly* and reversing grant of motion to dismiss securities class action); *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009) (applying *Iqbal* and reversing dismissal of employment class action).

18. H.R. 4115, 111th Cong. (2009).

19. 28 U.S.C. §§ 1331, 1332(a).

procedural rule that governs the conduct of class actions in federal court and does not create subject matter jurisdiction where none exists.²⁰ In enacting the Class Action Fairness Act (CAFA) of 2005, however, Congress has significantly expanded the availability of diversity jurisdiction in the class action context.²¹

Constitutional Article III standing is also a jurisdictional prerequisite for the maintenance of a class action, as well as for class certification—*injury in fact, causation, and redressability*.²² Accordingly, at least one of the named plaintiffs must have standing as to each claim asserted against each defendant in a class action.²³ Likewise, the proposed representative plaintiffs must also have standing for the type of relief sought, for example, for prospective injunctive relief.²⁴ Where the only named plaintiff lacks standing, the court must dismiss the action.²⁵

Even where a named plaintiff has standing at the outset of the case, that plaintiff may lose standing during the pendency of the case if the plaintiff's claims become moot. Generally, when a named plaintiff's claim becomes moot prior to class certification, the entire action is dismissed.²⁶ If a named plaintiff's claim becomes moot after a class is certified, however, the entire action is not rendered moot because the class "acquire[s] a legal status separate from the interest asserted by [the named plaintiff]." ²⁷ Courts generally have held that a putative class action need not be

20. FED. R. CIV. P. 82; *Cramer v. Florida*, 117 F.3d 1258, 1264 n.16 (11th Cir. 1997).

21. See Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1332, 1335, 1453, 1603, 1711-1715). The Class Action Fairness Act is separately discussed in detail in Chapter 11, "The Class Action Fairness Act."

22. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279-80 (11th Cir. 2000) ("[B]efore undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.").

23. See *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 241 (2d Cir. 2007) (stating that there must be at least one plaintiff with standing as to each defendant named in the action); *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987) ("[A] claim cannot be asserted on behalf of [the] class unless at least one named plaintiff has suffered the injury that gives rise to that claim.").

24. See, e.g., *Bates v. United Parcel Serv. Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) ("Standing must be shown with respect to each form of relief sought, whether it be injunctive relief, damages, or civil penalties."); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001); *Elizabeth v. Montenez*, 458 F.3d 779, 784-85 (8th Cir. 2006).

25. See *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003) (entire action required to be dismissed where named plaintiff lacked standing at the outset of the case); *Foster v. Ctr. Twp. of LaPorte County*, 798 F.2d 237, 244-45 (7th Cir. 1986) (same).

26. *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 343 (3d Cir. 2003) ("[W]hen claims of the named plaintiffs become moot before class certification, dismissal of the action is required."); *Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 258 F. Supp. 2d 157, 159-61 (E.D.N.Y. 2003) (same).

27. *Sosna v. Iowa*, 419 U.S. 393, 401-02 (1975); *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 624-25 (6th Cir. 2005).

dismissed and may continue to be maintained where the named plaintiff's claim becomes moot while a class certification motion is pending.²⁸

Among the exceptions to the mootness rule is the “relation-back” doctrine, which is generally applied in cases with “inherently transitory claims” that are “capable of repetition, yet evading review.”²⁹ Under the relation-back doctrine, the certification of a class is deemed to “relate back” to the filing of the complaint, permitting the class action to proceed notwithstanding the mootness of the representative plaintiff's claim. Some courts have also applied the relation-back doctrine to permit a named plaintiff with a moot claim to move for class certification where the plaintiff's claim is rendered moot by a precertification offer of judgment under Rule 68.³⁰ The application of the relation-back doctrine has been extended to such cases to address the danger that defendants may use offers of judgment to “pick off” named plaintiffs at an early stage, which “would frustrate the objectives of class actions” and “invite waste of judicial resources.”³¹

2. Failure to State a Claim

Although the named plaintiff in a putative class action seeks to prosecute the claims of a class as a member and representative of the proposed class, the named plaintiff is also asserting his or her own individual claim. Thus, as with any individual action, the named plaintiff's claims can be, and often are, tested by motions to dismiss for failure to state a claim under Rule 12(b)(6) on any number of potentially applicable grounds, for example, lapsed statute of limitations, failure to allege a required element of a claim, failure to exhaust administrative remedies, and failure to plead with the specificity required under Rule 9(b). If a court dismisses the named plaintiff's claims prior to certification, courts will dismiss the complaint, rendering the class certification issue moot.³²

28. *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869–71 (7th Cir. 1978); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 975 (3d Cir. 1992).

29. *County of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991) (“Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interests expire.”); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (relation-back doctrine is an exception to the mootness rule, which applies when a claim is “capable of repetition, yet evading review”).

30. *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). *But see Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (“[A]n unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the District Court retained jurisdiction to adjudicate Gomez's complaint. That ruling suffices to decide this case. We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an amount payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not a hypothetical.”); *see also* Chapter 22, “Rule 68 Offers of Judgment.”

31. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (discussing danger of named plaintiffs being “picked off”); *Weiss*, 385 F.3d at 344 (“As sound as is Rule 68 when applied to individual plaintiffs, its application is staid when an offer of judgment is made to a class representative.”).

32. *McDuffy v. Worthmore Furniture, Inc.*, 380 F. Supp. 257 (E.D. Va. 1974).

Class claims can also be the subject of a Rule 12(b)(6) motion to dismiss or a Rule 12(f) motion to strike the class allegations in a complaint.³³ Often brought together or in the alternative,³⁴ motions to dismiss and/or strike class claims generally raise class certification issues—that the class claims should be stricken/dismissed because the complaint, on its face, demonstrates that one or more of the requirements for class certification under Rule 23(a) or 23(b) cannot be met.³⁵ Courts generally look upon such motions with disfavor, however, often concluding that class certification issues should be addressed in connection with a motion for class certification, after the parties have had the opportunity to undertake at least some discovery.³⁶ As one court concluded, “dismissal of class allegations at the pleading stage should be rarely done and . . . the better course is to deny such a motion because the shape and form of a class action evolves only through the process of discovery.”³⁷ In those instances where a defendant makes a preemptive motion to deny class certification based on the pleadings and before discovery, courts generally decide such motions under the Rule 12(b) standard applicable to motions to dismiss.³⁸

33. Some courts address the striking of class allegations under Rule 23(d)(1)(D) rather than Rule 12(f). *Markey v. La. Citizens Fair Plan*, No. Civ. A 06-5473, 2008 U.S. Dist. LEXIS 106051, at *5–6 (E.D. La. Dec. 30, 2008) (striking class allegations under Rule 23(d)(1)(D) instead of Rule 12(f)). Rule 23(d)(1)(D) authorizes the court to issue orders that “require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.” FED. R. CIV. P. 23(d)(1)(D).

34. See, e.g., *Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d 1120 (N.D. Cal. 2008).

35. *Robinson v. Wal-Mart Stores, Inc.*, 254 F.R.D. 396, 402 (S.D. Miss. 2008) (“In sum, the Court finds that because the class action proposed by Plaintiffs in their Amended Complaint can not be certified under Rule 23(b), they have failed to ‘state a claim to relief that is plausible on its face’ and, therefore, their class action should be dismissed.”); *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (“Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings.”); *Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 450 (D.R.I. 2002) (proper to dismiss class allegations if the plaintiff does not allege facts sufficient to make out a class).

36. See, e.g., *Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1495 (D.S.C. 1991) (denial of motion to dismiss class allegations in complaint because discovery is usually necessary to determine class certification issue); *Inter-modal Rail Emps. Ass’n v. Atchison, Topeka, & Santa Fe Ry. Co.*, 80 F.3d 348, 353 (9th Cir. 1996), *vacated on other grounds*, 520 U.S. 510 (1997) (improper to dismiss class claim under Rule 12(b)(6) before answer or discovery); *Gillibeau v. City of Richmond*, 417 F.2d 426, 432 (9th Cir. 1969) (“[C]ompliance with Rule 23 is not to be tested by a motion to dismiss for failure to state a claim.”); *Clark v. McDonald’s Corp.*, 213 F.R.D. 198, 205 n.3 (D.N.J. 2003) (“A defendant may move to strike class action allegations prior to discovery in those rare cases where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met.”).

37. *In re Wal-Mart Stores, Inc., Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007) (quotations omitted).

38. *Blihovde v. St. Croix County*, 219 F.R.D. 607, 614 (W.D. Wis. 2003) (“When there has been no discovery and the defendants challenge class certification on the basis of the allegations in the complaint only, the proper standard is the same as a motion to dismiss for failure to state a claim.”); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651 (D. Nev. 2009) (granting motion to deny class certification applying Rule 12(b)(6) standards).

C. PRECERTIFICATION DISCOVERY ISSUES

An important case management issue in class actions that should be addressed at the outset is precertification discovery, particularly since discovery in class actions raises issues unique to class actions.³⁹ Among the questions that may need to be addressed, depending on the nature and facts of the case, are the following:

- Is precertification discovery necessary?
- Should discovery be bifurcated?
- May defendants take discovery from unnamed class members?
- May defendants conduct discovery as to the named plaintiffs' finances?

In dealing with these and other discovery-related issues, courts have great latitude and discretion in authorizing or limiting precertification discovery.⁴⁰ Where it is apparent that the certification can be decided without the need for discovery, courts will deny requests for precertification discovery as “it would be a waste of the parties’ and judicial resources to conduct discovery on class certification.”⁴¹ In most cases, however, courts generally permit some discovery as to matters pertaining to class certification issues.⁴² Indeed, some courts have found it to be an abuse of discretion to deny certification-specific discovery.⁴³

Assuming that precertification discovery is deemed to be appropriate or necessary, a frequent issue that arises is whether discovery should be bifurcated by limiting precertification discovery to certification issues while deferring merits discovery until after the certification decision. “Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed.”⁴⁴ Whether discovery should be bifurcated is left to the sound discretion of the court.⁴⁵

39. For a more detailed discussion on this subject, see Chapter 6, “Discovery from Class Members.”

40. *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 210, 233–34 (3d Cir. 2006); *Miles v. Merrill Lynch & Co.* (*In re Initial Pub. Offering Sec. Litig.*), 471 F.3d 24, 41 (2d Cir. 2006) (district court has discretion to set parameters of discovery relevant to class certification and the scope of hearing on motion for class certification “to ensure that a class certification motion does not become a pretext for a partial trial of the merits.”); *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982); *Kamm v. Cal. City Dev. Corp.*, 509 F.2d 205, 209 (9th Cir. 1975).

41. *Walls v. Wells Fargo Bank, N.A.* (*In re Walls*), 262 B.R. 519, 524 (Bankr. E.D. Cal. 2001); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004) (“Discovery may not be necessary when claims for relief rest on readily available and undisputed facts or raise only issues of law (such as a challenge to the legality of a statute or regulation).”).

42. *Bryant*, 774 F. Supp. at 1484, 1495; *Stewart*, 669 F.2d at 328, 331.

43. See, e.g., *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309–11 (11th Cir. 2008) (abuse of discretion to decide whether class could be certified based on the pleadings).

44. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004).

45. See *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1571 (11th Cir. 1992) (for efficiency/fairness purposes, courts can limit discovery to certification issues and defer merits discovery); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.213 (2004) (“The court should ascertain what discovery

The primary justification for bifurcated discovery is judicial efficiency and economy—merits discovery needlessly delays the certification decision and, in the event that certification is denied, may be unnecessary.⁴⁶ Frequently, however, disputes arise as to whether specific proposed discovery relates to “merits” or “class” discovery, often requiring judicial intervention. Additionally, because facts relating to the merits can sometimes play an important role in the certification decision, “[a]rbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.”⁴⁷

Recognizing the potential for issues relating to bifurcated discovery, the Advisory Committee note to the 2003 amendments to Rule 23 makes the following comment:

In this sense, it is appropriate to conduct controlled discovery into the “merits,” limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between “certification discovery” and “merits” discovery.⁴⁸

Issues concerning whether discovery will be bifurcated and whether specific proposed precertification discovery will be permitted as “class” or “merits” discovery must be determined on a case-by-case basis, analyzing the particular facts and issues presented in particular cases, including the cost burdens on the parties.⁴⁹

Occasionally, defendants seek precertification discovery from unnamed proposed class members to obtain evidence relevant to determining, *inter alia*, the existence of common issues.⁵⁰ Courts have the discretion to permit precertification discovery from absent class members. Nevertheless, courts generally do not encourage discovery from absent class members and allow it only when it is not unduly

on class questions is needed for a certification ruling and how to conduct it efficiently and economically. Consider also staying other discovery if resolution of the certification issue may obviate some or all further proceedings. Discovery may proceed concurrently if bifurcating class discovery from merits discovery would result in significant duplication of effort and expense to the parties.”).

46. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004).

47. *Id.*; see also FED. R. CIV. P. 23 advisory committee note (2003) (“[D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial.”).

48. FED. R. CIV. P. 23 advisory committee note (2003); see also 3 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS: A MANUAL FOR GROUP LITIGATION AT FEDERAL AND STATE LEVELS § 7:8 (4th ed. 2002) [hereinafter NEWBERG] (“Discovery bifurcation will often be counterproductive in delaying the progress of the suit for orderly and efficient adjudication.”).

49. See *Nat’l Org. for Women, Farmington Valley Chapter v. Sperry Rand Corp.*, 88 F.R.D. 272 (D. Conn. 1980).

50. *Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 103 F.R.D. 635, 637 (D. Mass. 1984); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004).

burdensome and only upon a particularized showing of need.⁵¹ Where some discovery from absent and unnamed class members is permitted, courts should impose limitations to minimize time, costs, and burdens on such members.⁵²

An additional precertification issue arises from defendants' attempts to discover information concerning the named plaintiffs' finances. The justification for such discovery is that the named plaintiffs' ability to fund the costs involved in prosecuting class actions is relevant to whether they are adequate representatives of the proposed class.⁵³ There is a split of authority on whether such discovery is relevant and permissible. Some courts permit such discovery, finding that the named plaintiffs' financial resources are a relevant consideration in determining whether the plaintiffs would adequately represent the class.⁵⁴ Other courts deem such discovery irrelevant and prohibit defendants' attempts to obtain such discovery.⁵⁵ Other courts have noted that the ability to finance the litigation is relevant, but that it is the class counsel's ability to fund the litigation—not the named plaintiffs'—that is relevant to the issue of whether representation is adequate.⁵⁶

51. *Berenson Co.*, 103 F.R.D. at 637 (authorizing precertification discovery from absent class members where information sought was relevant to certification issue, the requests are made in good faith and are not unduly burdensome, and the information is not available from the proposed representative); *see also Mehl v. Canadian Pac. Ry.*, 216 F.R.D. 627, 631 (D.N.D. 2003) (precertification discovery from absent unnamed class members “not generally encouraged due to its potential for harassment and due to concerns regarding its practicality”); *Baldwin & Flynn v. Nat'l Safety Assocs.*, 149 F.R.D. 598, 600 (N.D. Cal. 1993) (“Defendants must have leave of court to take depositions of members of a putative class, other than the named class members—after first showing that discovery is both necessary and for a purpose other than taking undue advantage of class members.”).

52. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004):

If precertification discovery of unnamed class members is appropriate, the court should consider imposing limits beyond those contemplated by the Federal Rules of Civil Procedure. Such limits might include the scope, subject matter, number, and time allowed for depositions, interrogatories, or other discovery directed to class representatives or unnamed class members, and might limit the period for completing certification-related discovery. If some merits discovery is permitted during the precertification period, consider limits that minimize the time and effort involved, such as requiring the use of questionnaires or interrogatories rather than depositions, and consider limiting discovery to a certain number or a sample of proposed class members.

53. *See McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 559–60 (5th Cir. 1981).

54. *Id.*; *In re ML-Lee Acquisition Fund II*, 149 F.R.D. 506, 508–09 (D. Del. 1993); *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 8 n.3 (D. Me. 1991).

55. *Sanderson v. Winner*, 507 F.2d 477, 479–80 (10th Cir. 1974); *Klein v. Checker Motors Corp.*, 87 F.R.D. 5, 6 (N.D. Ill. 1979).

56. *See, e.g., Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991), *overruled on other grounds by Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015); *Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 175 (E.D. Pa. 1979); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.141 (2004) (“Precertification inquiries into the named parties' finances or the financial arrangements between the class representative and their counsel are rarely appropriate, except to obtain information necessary to determine whether the parties and their counsel have resources to represent the class adequately.”).

D. PRECERTIFICATION COMMUNICATIONS WITH UNNAMED PROPOSED CLASS MEMBERS⁵⁷

Courts have long recognized that while class actions “serve an important function in our system of civil justice,” they also present “opportunities for abuse.”⁵⁸ In particular, certain direct communications by parties and their counsel with unnamed members of a proposed class can be improper, unseemly, and abusive. For example, plaintiffs’ counsel might engage in improper in-person solicitation of potential class members.⁵⁹ On the other hand, defendants or their counsel might engage in misconduct by seeking to dissuade potential class members from participating in a class action or to undermine their cooperation with or confidence in class counsel through the use of false, incomplete, or misleading information.⁶⁰ The primary abuses are those communications “that mislead or otherwise threaten to create confusion and to influence the threshold decision whether to remain in the class.”⁶¹

To deal with the potential for abuse, under Rule 23, “a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.”⁶² Such authority is not without limits, however, as the court’s discretion is “bounded by the relevant provisions of the Federal Rules.”⁶³ In the context of orders restricting or prohibiting communications with putative class members, the court’s discretion is subject to the parties’ freedom of speech rights under the First Amendment.⁶⁴

E. TIMING OF CERTIFICATION: “AT AN EARLY PRACTICABLE TIME”

Prior to the 2003 amendments to the rule, Rule 23(c)(1)(A) directed courts to decide the class certification issue “as soon as practicable.” Under the 2003 amendments, the “as soon as practicable” language was changed to “at an early practicable time.”⁶⁵ As explained in the Advisory Committee notes to the 2003 amendments,

57. For a detailed discussion of this subject, see Chapter 2, “Ethical and Practical Issues of Communicating with Members of a Class.”

58. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

59. *Waldo v. Lakeshore Estates, Inc.*, 433 F. Supp. 782, 790 (E.D. La. 1977) (observing “the heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to ‘drum up’ participation in the proceeding”), *appeal dismissed without published opinion*, 579 F.2d 642 (5th Cir. 1978). *But see Foltz v. U.S. News & World Rep., Inc.*, 106 F.R.D. 338 (D.D.C. 1984) (proper for named plaintiffs in antitrust action to solicit contributions to defray costs).

60. *In re Sch. Asbestos Litig.*, 842 F.2d 671, 682 n.23 (3d Cir. 1988) (compiling cases).

61. *Id.* at 683.

62. *Gulf Oil*, 452 U.S. at 100.

63. *Id.*

64. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re Sch. Asbestos Litig.*, 842 F.2d at 680 (“Orders regulating communications between litigants . . . also pose a grave threat to first amendment freedom of speech. Accordingly, a district court’s discretion to issue such orders must be exercised within the bounds of the First Amendment and the Federal Rules.”) (citing *Gulf Oil*, 452 U.S. at 100).

65. FED. R. CIV. P. 23(c)(1)(A).

this modification was made to give courts more flexibility in the timing of the class certification decision because “[t]he ‘as soon as practicable’ exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the certification decision.”⁶⁶

Although Rule 23 does not provide any specific deadline for the filing of a motion for class certification, some district courts do impose a deadline pursuant to local rules. For example, in the Central District of California, the District of Utah, and the Eastern District of Louisiana, motions for class certification are required to be filed within 90 days of service of a class action complaint.⁶⁷ An unintended failure to strictly comply with such local rules will not necessarily result in the denial of class certification, as these courts are generally lenient in dealing with a party's failure to seek class certification in a timely manner.⁶⁸ Additionally, because a 90-day time limit may conflict with Rule 23(c)(1)'s directive that the court determine the certification issue “[a]t an early practicable time,” local rules imposing such deadlines may be unenforceable.⁶⁹ Nevertheless, prudence dictates that if a party anticipates that it will be unable to comply with any local rules that impose a time limit for the filing of a class certification motion, relief from such rules should be timely sought.

Although an early resolution of the certification question is generally desirable,⁷⁰ the actual timing depends on the specific facts and circumstances of each case, many of which can and should be addressed by the parties and the court early in the case.⁷¹ For example, whether precertification discovery is necessary and the extent and scope of such discovery will dictate how much time the parties will need before a certification motion can be filed. Whether discovery is bifurcated into “class” and “merits” discovery, the physical volume of the information produced during dis-

66. FED. R. CIV. P. 23 advisory committee note (2003) (citing THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT L. NIEMIC, *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES*, at 26–36 (Fed. Judicial Ctr. 1996) [hereinafter *FJC STUDY*] (In 60 to 80 percent of the cases where motions to dismiss and motions to certify were filed, rulings on motions to dismiss preceded the certification decision.)).

67. See, e.g., *Cottone v. Blum*, 571 F. Supp. 437, 440–41 (S.D.N.Y. 1983) (dismissal for failure to move for certification within 60 days per local rules); C.D. CAL. L.R. 23-3 (within 90 days of service of class action complaint); D. UTAH L.R. 23-1(d) (same); E.D. LA. L.R. 23.1(B) (91 days after filing complaint or removal); N.D. TEX. L.R. 23.2 (90 days).

68. See *Gray v. Greyhound Lines*, 545 F.2d 169, 173 n.11 (D.C. Cir. 1976); *Brown v. J.P. Allen Co.*, 79 F.R.D. 32 (N.D. Ga. 1978) (where no prejudice to defendant, failure to comply with local rule not determinative). But see *Carroll v. Blinken*, 99 F.R.D. 166 (S.D.N.Y. 1983) (dismissal of class action for unjustified four-week delay in filing motion for class certification).

69. *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 422 (W.D. Pa. 1984) (unnecessary to strictly comply with local rule requirement that class certification motion be filed within 90 days of filing); FED. R. CIV. P. 83(a)(1) (“A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075. . .”).

70. See *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 455 (7th Cir. 2007) (early certification decision necessary to, *inter alia*, avoid mootness problems).

71. See FED. R. CIV. P. 23 advisory committee note (2003).

covery, whether statistical analysis or other expert opinion is necessary to support or oppose certification, and similar discovery-related considerations will affect the timing of the certification decision.

An additional consideration is whether there are threshold issues or potentially dispositive issues that can be raised by a motion under Rule 12 or 56.⁷² Most courts are in agreement that a district court is free to rule on dispositive motions prior to deciding the certification issue—Rule 23(c)(1)’s “early practicable time” standard does not preclude district courts from ruling on dispositive merits issues prior to class certification.⁷³ But where a class action seeks money damages, certification must precede any determination of the merits to prevent “one-way intervention”—where absent class members have the ability to opt out of any class action where there has been an adverse merits determination.⁷⁴

As the timing of the certification decision is generally up to the discretion of the court,⁷⁵ based on the facts and circumstances in each case, one commentator has observed:

Initial class rulings may be made before, after, or simultaneously with the disposition of other motions. Accordingly, class rulings have been made before, contemporaneously with, and following disposition of a defendant’s motion to dismiss for failure to state a cause of action, lack of jurisdiction, lack of standing of the plaintiff, or improper venue. So also, initial class rulings have been made at various times in relation to motions for transfer of venue, consolidation under 28 U.S.C.A. § 1407, abstention or stay of proceedings, preliminary injunction, amendment of the complaint, a three-judge court, approval of a settlement, voluntary dismissal of the entire litigation, and motions for summary judgment.⁷⁶

Although the timing of the certification decision is generally left to the court’s discretion, it is still the court’s obligation to make the determination at an “early

72. See FJC STUDY at 33 (approximately 30 percent of cases terminated the action as a result of rulings on motions to dismiss or for summary judgment).

73. See *Schweizer v. Trans Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998); *Floyd v. Bowen*, 833 F.2d 529, 534–35 (5th Cir. 1987); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 616 (6th Cir. 2002) (“We have consistently held that a district court is not required to rule on a motion for class certification before ruling on the merits of the case”); see also BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* at 8 (Fed. Judicial Ctr. 2009) (Rule 23 permits courts to rule on motions to dismiss or for summary judgment before ruling on class certification; “Given the flexibility in the rules, the most efficient practice is to rule on motions to dismiss or for summary judgment before addressing class certification.”).

74. See, e.g., *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547–49 (1974); *Hudson v. Chi. Teachers Union*, 922 F.2d 1306, 1317 (7th Cir. 1991).

75. *Philip Morris Inc. v. Nat’l Asbestos Workers Med. Fund*, 214 F.3d 132, 134–36 (2d Cir. 2000) (district court has discretion regarding timing of certification decision, but it should occur before trial on merits); *Chavez v. Ill. State Police*, 251 F.3d 612, 629–30 (7th Cir. 2001) (better policy is to rule on certification before ruling on merits, but it is not error to rule on merits before certification).

76. 3 NEWBERG § 7:15.

practicable time.” Thus, one court has held that a district court could not deny a class certification motion on the basis that the plaintiff failed to timely move for class certification because the court itself had the onus of considering the issue.⁷⁷ Similarly, another court has rejected the proposition that the district court need not rule on certification until a party moves for class certification.⁷⁸ In fact, a court may act on its own initiative in deciding whether to certify a class.⁷⁹ A court may not, however, act on its own initiative to expand an individual complaint into a class action.⁸⁰

III. *Multiple Cases with Similar Issues and Multidistrict Litigation Proceedings*

Frequently, a class action pending in one federal jurisdiction is only one of many identical or similar actions pending in various jurisdictions throughout the country arising out of the same or similar set of facts and claims.⁸¹ A court facing such a situation will have a number of ways of potentially dealing with competing, conflicting, or overlapping cases, depending on the type of action (class action, consolidated cases, or individual cases) and the jurisdictions in which they are pending (same district, different district, or state court). The possible scenarios that a court can face are many, including one or more of the following:⁸²

- Multiple cases with similar class allegations, each of which might be appropriately certified under Rule 23, but which may overlap or conflict if more than one is certified;
- Cases alleging a nationwide class and cases seeking multistate or single state class certification pending in different courts at the same time;
- Cases filed as class actions in federal and state courts relating to the same type of transactions and involving some or all of the same parties;
- Cases filed by the same lawyers seeking to represent an overlapping or duplicative class of plaintiffs in order to obtain the most favorable forum;
- Cases filed by different lawyers competing for the fastest and most favorable rulings on class certification and appointment as class counsel;

77. *Trevizo v. Adams*, 455 F.3d 1155, 1161 (10th Cir. 2006).

78. *Bieneman v. City of Chicago*, 838 F.2d 962, 963 (7th Cir. 1988).

79. *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 559 (5th Cir. 1981) (“The trial court has an independent obligation to decide whether an action was properly brought as a class action, even where neither party moves for a ruling on class certification.”).

80. *Newsom v. Norris*, 888 F.2d 371, 380–82 (6th Cir. 1989) (vacating district court order converting an individual action into a class action and certifying the class).

81. For a more detailed discussion on this issue, see Chapter 14, “Multidistrict Litigation.”

82. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.25 (2004).

- Multiple individual actions or other forms of aggregate litigation pending in state or federal courts, raising the same issues and involving some or all of the same parties; or
- Prior unsuccessful class certification efforts in state or federal courts.

Whether courts and parties face one, or a combination, of the above scenarios, the critical issue is effective case management and coordination. Counsel should become familiar with the options available to the court in dealing with the situation and formulate a strategy based on an evaluation of the pros and cons as to each of these options in order to effectively advocate for the course of conduct that would best further the clients' interests.

Among the options and procedural mechanisms available to a court to manage situations involving multiple related actions are the following:⁸³

- Where related federal actions are pending in the same district, consider whether the cases can or should be consolidated before the same judge under Rule 42 for pretrial proceedings and, if appropriate, for trial.⁸⁴
- Where related federal actions are pending in different districts, consider whether the cases can or should be consolidated in one court: (1) through transfers under 28 U.S.C. § 1404(a) or 1406; or (2) by transfer to the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407.⁸⁵
- Where related federal actions are not capable of being consolidated in one district, consider whether the judges, parties, and counsel in the pending cases can coordinate proceedings in the related actions by, *inter alia*: (1) specially assigning a judge to the cases under 28 U.S.C. §§ 292 through 294; (2) designating a lead case and staying all other cases pending conclusion of the lead case; (3) holding joint telephonic hearings or conferences; (4) appointing joint experts under Federal Rule of Evidence 706 or special masters under Rule 53; (5) avoiding duplicative discovery; (6) clarifying class definitions; and (7) staying actions pending conclusion of another federal action.⁸⁶
- Where there are related state and federal actions, consider whether the state court proceeding(s) can be removed under the class action or “mass action” provisions of CAFA.⁸⁷
- Where there are related state and federal actions, consider whether coordination of the various proceedings is feasible by, *inter alia*, (1) jointly

83. See generally 3 NEWBERG §§ 9:13–9:37; MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 20, 21 (2004).

84. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.11 (2004).

85. *Id.* §§ 21.12–21.133.

86. *Id.* § 20.14.

87. 28 U.S.C. § 1332(d); see also Chapter 11, “The Class Action Fairness Act,” and Chapter 12, “Mass Actions Under the Class Action Fairness Act.”

deferring certification decisions and holding a joint certification hearing; (2) designating a court, jurisdiction, or state as the lead on certain proceedings; (3) staying cases until the conclusion of designated cases; (4) holding joint hearings on pretrial motions using coordinated briefs; (5) jointly appointing special masters or court-appointed experts; (6) jointly appointing lead counsel, committees of counsel, or liaison counsel; (7) coordinating pretrial discovery with the maintenance of joint document depositories, coordinated document productions, joint depositions, and coordinated discovery rulings; and (8) conducting joint comprehensive settlement discussions.⁸⁸

Where coordination is not feasible or efforts to coordinate have failed, federal courts can stay or dismiss their actions where certain conditions exist warranting the federal court's deference to parallel state actions.⁸⁹ Alternatively, as a measure of last resort, federal courts may enjoin parallel state proceedings. The ability of a federal court to enjoin a state court action, however, is subject to the Anti-Injunction Act, which prohibits federal courts from enjoining a state court action "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."⁹⁰ Nevertheless, federal courts on occasion have enjoined parallel or duplicative state court proceedings under the All Writs Act,⁹¹ and as necessary under the "in aid of its jurisdiction or to protect or effectuate its judgments" exception to the Anti-Injunction Act.⁹²

88. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.313 (2004).

89. *Id.* § 210.32.

90. 28 U.S.C. § 2283.

91. 28 U.S.C. § 1651.

92. See, e.g., *Carlough v. Am.-Chem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993); *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993).