# Best Practices for Defending a Class Action Complaint Before Even Filing a Response

**Michael R. McDonald**
**Caroline E. Oks**
Gibbons P.C.
Newark, New Jersey

Before responding to a class action complaint, there are several things defense counsel should consider. First, understand the facts of the case, including how your client conducts its business and the other parties involved. Second, is the litigation in the right forum -- is the plaintiff's complaint better addressed by arbitration, or, if litigation is the proper avenue, has it been filed in the correct court? Third, has the plaintiff failed to state a proper legal claim, such that a court could, if properly briefed, dismiss any or all of plaintiff's claims? Finally, if the plaintiff has brought a claim in the proper court that will survive a motion to dismiss, should the defendant make an offer of judgment?

## I. GATHER FACTS ON EVERY ASPECT OF THE CASE

Before getting into the legal merits of the complaint, defense counsel should meet with the client to understand the facts and assess the magnitude of the situation. In order to give the client a proper evaluation, the attorney must understand basic issues relating to the product or occurrence which is the subject matter of the complaint, the potential size of the class, how the business is run, the essential players, and the potential exposure to the Company. Thus, the first job is to commit the time and resources to gather the details, organize them, and continuously add to them throughout the life of the case.

The fact gathering process should include inquiries into the company's documents and electronically stored information in order to begin formulating a plan to gather, sort, and organize the documents and manage the technological tools to do so. Paramount in this process is issuing a litigation hold letter to ensure preservation and prevent spoliation. *See, e.g., Osberg v. Foot Locker*, 2014 U.S. Dist. LEXIS 104538, at *11-13 (S.D.N.Y. July 25, 2014).

It is also important to familiarize yourself with the judge and opposing counsel. Some judges may be more likely to grant class certification, and magistrate judges can have widely varying views on how discovery should be conducted. In addition, it is important to understand adversary counsel, particularly his or her level of experience in handling class-action suits. A cordial and professional relationship may help streamline discovery and avoid costly disputes.

Familiarize yourself with related litigation around the country. Often, the plaintiff's bar focuses on a trend of cases, so it is important to stay on top of how other jurisdictions are deciding similar issues. *See, e.g.*, *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (7th Cir. 2013) (certifying class for a defect in washing machines), *cert. denied* 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013) (same), *cert. denied* 134 S. Ct. 1277 (2014); *Spera v. Samsung Elecs. Am.*, 2014 U.S. Dist. LEXIS 45073 (D.N.J. 2014). This also provides an opportunity to begin investigating potential experts to hire, which may be helpful early on as they may provide insight on how best to approach the case.

## II. IS THE LITIGATION IN THE RIGHT FORUM?

### A. Invoking Arbitration

A defendant should consider invoking arbitration rights where it has a contractual relationship with the plaintiff, and there is a mandatory arbitration clause in the contract. By shifting litigation of the class claims into arbitration, the defendant could resolve the class claims at a

lower cost or curtail the class aspects of the case entirely, depending on the language of the arbitration clause. *See Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309, 2310-11 (2013) (courts must enforce arbitration agreements strictly according to their terms, including agreements containing class arbitration waivers). On the flip side, there are fewer procedural protections in arbitration proceedings than in the courts, similar cases can have very different results, and an arbitrator's ruling is much harder to appeal than a court decision.

Arbitration clauses that forego class actions or class-wide arbitration are not *per se* unreasonable. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). Although the Supreme Court left open the possibility that courts might find such clauses unconscionable on other grounds, so long as they do not conflict with the operation of the FAA, *id.* at 1750 n.6., subsequent decisions have largely ignored unconscionability arguments, *see, e.g.*, *Ramirez v. Freescore,* 2011 U.S. Dist. LEXIS 97374, *8 (C.D. Cal. Aug. 30, 2011); *Chavez v. Bank of Am.*, 2011 U.S. Dist. LEXIS 116630, *27 (N.D. Cal. Oct. 7, 2011). Accordingly, while the plaintiff may argue that there would be no vindication of the rights they seek to protect in their lawsuit, *see, e.g.*, *Raniere v. Citigroup Inc.*, 533 F. App'x 11, 13-14 (2d Cir. 2013), the mention of class actions in a statute does not create a right to class-action litigation that trumps the mandates of the FAA, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670-71 (2012).

## B. Removal

Where the plaintiff files a class action in state court, the defendant should consider removing the action to federal court. Federal courts may afford defendants an escape from plaintiffs' strategically chosen forums and the related risk of excessive jury awards in many state courts, and, can save defendants time and money through stricter, more cost-effective discovery rules and more efficient dispute resolution. In addition, federal judges tend to treat certification more rigorously and there is a more developed and more predictable body of precedent governing class certification, though federal courts may have more onerous electronic discovery obligations. Alternatively, state courts allow more flexibility in settling cases and, since they generally do not utilize computer-accessible docket systems, may be less likely to result in copycat suits.

### 1. Diversity Jurisdiction Based on the Class Action Fairness Act

CAFA grants federal courts original jurisdiction over any action in which (1) the proposed class has at least 100 members, 28 U.S.C. § 1332(d)(5)(B); (2) minimal diversity exists, meaning any one members of the class hails from a different state than any one defendant, 28 U.S.C. § 1332(d)(2)(A); and (3) the aggregate amount in controversy exceeds $5 million, excluding interests and costs. 28 U.S.C. § 1332(d)(6). There are exceptions to CAFA, such as where between one- and two-thirds of the class are citizens of the same state as the primary defendants, 28 U.S.C. § 1332(d)(3), or if the case concerns a "local controversy," 28 U.S.C. § 1332(d)(4)(A), among others.

The defendant bears the burden of showing that CAFA-based jurisdiction exists, *see Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009), but the burden is not an arduous one, *Evans v. Yum Brands, Inc.*, 326 F. Supp. 2d 214, 220 (D.N.H. 2004); *Lewis v. Ford Motor Co.*, 610 F. Supp. 2d 476, 484 (W.D. Pa. 2009). The defendant is also not restricted to the plaintiff's claims in establishing the amount in controversy. *ABM Sec. Servs. v. Davis*, 646 F.3d 475, 479 (7th Cir. 2011). Indeed, some plaintiffs have attempted to keep cases in state court by specifically disclaiming any damages over $5 million, *Morgan v. Gay*, 471 F.3d 469, 476 n.7 (3d Cir. 2006), but courts have held that the named plaintiff cannot limit damages of unnamed class members, *Grawitch v. Charter Communs.*, 750 F.3d 956, 959-60 (8th Cir. 2014); *Hoffman v. Nutraceutical Corp.*, 2014 U.S. App. LEXIS 6580, *5-8 (3d Cir. Apr. 10, 2014) (citing *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348(2013)).

### 2. Federal Question Jurisdiction

A party can remove a lawsuit "founded on a claim or right arising under" federal law. 28 U.S.C. § 1441(b). While a plaintiff may attempt to plead around federal question jurisdiction by asserting

only state law claims and simply not mentioning federal law, *Marcus v. AT&T Corp.*, 138 F.3d 46, 55 (2d Cir. 1998), the defendant may nevertheless invoke the "substantial federal question" doctrine to argue that "resolution of this case requires a resolution of a substantial question of federal law[,]" *Mass. v. Wampanoag Tribe of Gay Head (Aquinnah)*, 2014 U.S. Dist. LEXIS 89460, *18 (D. Mass. July 1, 2014).

## III. CONSIDER MOVING TO DISMISS THE CASE IN WHOLE OR IN PART

The defendant's first opportunity to rid itself of a meritless case is the motion to dismiss, which can also be used to prune bad claims and educate the court on its perspective of the case. Even a lost motion to dismiss may still frame the issues in a favorable light for the court. But, a defendant should, of course, choose not move to dismiss a complaint if it believes the court will likely deny the motion, or if the denial would eventually assist the plaintiff in certifying the class.

In evaluating a complaint, defense counsel should watch for some of the following issues:

### A. Standing

Frequently, plaintiff's counsel may file a class action complaint on behalf of a plaintiff who lacks standing. This may occur where the plaintiff has suffered no injury-in-fact or otherwise where there may not be a good fit between the named plaintiff's factual situation and the class-wide allegations. *See, e.g.*, *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62-63 (2d Cir. 2012). Or, the plaintiff may lacks standing to sue certain defendants, which often occurs in multi-defendant class actions. *See, e.g.*, *6803 Boulevard East v. DIRECTV*, 2014 U.S. Dist. LEXIS 48745, *11 (D.N.J. Apr. 9, 2014).

### B. Deficiencies in the Pleadings

The greatest advantage of a forceful attack on the plausibility of plaintiff's claim allows the defendant to begin casting doubts about the merits of the plaintiff's claims and framing its side of the case early on. The defendant can also pin down the plaintiff to her legal theory early on in the case, giving her less room to maneuver during the period leading up to class certification. However, the legal standard applicable to motions to dismiss is notoriously low, which allows the plaintiff to amend to address deficiencies. *See, e.g.*, *In re Cross Media Mktng. Corp. Secs. Litig.*, 314 F. Supp. 2d 256, 269 (S.D.N.Y. 2004) (dismissing complaint without prejudice to refiling of amended complaint).

Rule 8 provides the defendant with another source of ammunition during the early stages of the case. A defendant can challenge the sufficiency of allegations in the complaint and hold plaintiff to the "facial plausibility" standard of Rule 8. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is not enough under Rule 8 for a complaint to plead facts that are "merely consistent with" a defendant's liability, i.e., that might show a possible claim for relief but not a plausible claim; the factual allegations must cross the "plausibility" threshold to survive a motion to dismiss. *See, e.g.*, *Cortina v. Wal-Mart*, 2014 U.S. Dist. LEXIS 85941, *6-7, 13 (S.D. Cal. June 23, 2014) (holding that, under Rule 8, plaintiff must allege additional facts in the complaint, or provide evidence in exhibits, to show "the reasonableness of consumer expectations").

In addition, in cases pleading fraud, a plaintiff will be subject to the heightened pleading standard of Rule 9(b), which requires that "a party must state with particularity the circumstances constituting fraud or mistake." In consumer fraud class actions, this rule compels plaintiff to specify the "who, what, when, where and how" of the alleged fraudulent conduct. *See, e.g.*, *Macedo v. Deutsche Bank Nat'l Trust Co.*, 2014 U.S. Dist. LEXIS 54429, *5 (S.D. Cal. Apr. 17, 2014) (holding that to truly satisfy the rule "[p]laintiffs must plead enough facts to give defendants notice of the time, place and nature of the alleged fraud together with an explanation of the statement and why it was false or misleading").

### C. Substantive Legal Problems

Class action complaints often suffer from common substantive legal problems, permitting defendants to move to dismiss to quash plaintiff's claims as a matter of law. For example, the plaintiff will attempt to keep the complaint more generalized by not specifically alleging facts, such as in "no-

injury" products-liability or consumer fraud class actions, but the defendant should move to dismiss on the grounds that the plaintiff has not alleged an essential element of the claim. *See, e.g.*, *In re Toyota Motor Corp. Hybrid Brake Mktg.*, 915 F. Supp. 2d 1151, 1157 (C.D. Cal. 2013); *Loreto v. P&G*, 2013 U.S. Dist. LEXIS 162752, *10-12 (S.D. Ohio Nov. 15, 2013).

A defendant should also move to dismiss where the complaint is based on a novel legal theory or otherwise frivolous. *See, e.g.*, *Brown v. Ameriprise Fin. Servs.*, 276 F.R.D. 599, 606 (D. Minn. 2011) (dismissing complaint under Rule 11 where plaintiff "copied huge swaths from a complaint in a different case against a different defendant").

## IV. EARLY CHALLENGES TO CLASS CERTIFICATION

A successful early challenge to class certification may save a great deal of money in discovery costs early on. Rule 23 directs the District Court to determine whether class treatment is appropriate "[a]t an early practicable time." *Pilgrim v. Universal Health Card LLC*, 660 F.3d 943 (6th Cir. 2011) (citing FED. R. CIV. P. 23(c)(1)(A)). Accordingly, the defendant does not have to wait for the plaintiff to move for class certification in order to debate the proprietary of class treatment, and can instead move to deny certification. *See Bicek v. C&S Wholesale Grocers*, 2014 U.S. Dist. LEXIS 51975, *7 (E.D. Cal. Apr. 11, 2014). Doing so could potentially save the court and the parties from expensive discovery directed at a pointless debate of class treatment. *See Labou v. Cellco P'ship*, 2014 U.S. Dist. LEXIS 26974, *9-10 (E.D. Cal. Mar. 3, 2014).

Likewise, a motion to strike class allegations pursuant to Rule 23(d)(i)(D) may be worthwhile, but should only be pursued when it is clear from the face of the complaint that there is no feasible way a plaintiff could convince a court to certify a class. *See Duvio v. Viking Range Corp.*, 2013 U.S. Dist. LEXIS 38592, *20 (E.D. La. Mar. 20, 2013); *Stearns v. Select Comfort Retail Corp.*, 2009 U.S. Dist. LEXIS 48367, *55-58 (N.D. Cal. June 5, 2009) (striking class allegations where limiting the class to California residents would eliminate plaintiff, a Florida resident, as a class member). Courts across the country are slowly warming up to this type of dispositive motion, but the standard is high. *See Picus v. Wal-Mart Stores*, 256 F.R.D. 651, 653 (D. Nev. 2009) (using a 12(b)(6) standard to decide a motion to strike); *Eliason v. Gentek Bldg. Prods.*, 2011 U.S. Dist. LEXIS 94032, *7 (N.D. Ohio Aug. 23, 2011) ("While raising possibly valid concerns, Defendants' arguments on class certification are premature.").

## V. CONSIDER MAKING AN OFFER OF JUDGMENT

Rule 68 allows the defendant can make an offer of judgment to the plaintiff, but if the plaintiff declines the offer, then she may be responsible for any litigation costs incurred after the offer was made. FED. R. CIV. P. 68. Defendants can strategically use Rule 68 to "pick off" a named plaintiff by making an offer of judgment and then moving to dismiss plaintiffs' claims on mootness grounds. *See Radosti v. Envision EMI*, 717 F. Supp. 2d 37, 45 (D.D.C. 2010) (defendant made Rule 68 offer of judgment, then moved to dismiss plaintiffs' claims as moot); *Carroll v. United Compucred Collections*, 399 F.3d 620, 622 (6th Cir. 2005). The Supreme Court has permitted this tactic to succeed prior to certifying a class. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) ("a putative class acquires an independent legal status once it is certified under Rule 23"). Federal courts of appeal are split on the issue of whether an offer of judgment moots the class. *Compare Demasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) (a Rule 68 offer of judgment only moots a class action if it is made before the named plaintiff has moved for class certification), *with Diaz v. First Am. Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013) ("an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot").

Alternatively, the defendant can limit its ultimate costs by making a Rule 68 offer at the beginning of the case. If the plaintiff declines to accept the offer of judgment and then loses on class certification and winning more than the offer, she will be responsible for the remaining costs in the lawsuit. *See, e.g.*, *Stewart v. Cheek & Zeehandelar*, 252 F.R.D. 384, 386 (S.D. Ohio 2008).

## VI. CONCLUSION

Without question, every defendant has an incentive to obtain resolution of a class action in the quickest, most efficient way possible. There are many ways to do this at various stages of litigation, but the earlier and repeated challenges can help to defeat the high stakes of a class action, both financially and in terms of public perception. Thus, properly defending against class actions can have a profound impact on a company's bottom line.