Strafford

Presenting a live 90-minute webinar with interactive Q&A

Strategically Limiting Discovery in Class Litigation: Tactics for Defense Counsel

Leveraging Motions to Stay, Bifurcation Motions and
Cost-Shifting Motions to Reduce Discovery Time and Expense

WEDNESDAY, FEBRUARY 10, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Ryan Bangert, Partner, **Baker Botts**, Dallas

Jessica B. Pulliam, Partner, **Baker Botts**, Dallas

Katherine F. Murray, Of Counsel, **Paul Hastings**, Los Angeles

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-871-8924** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 35.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

STRATEGICALLY LIMITING DISCOVERY IN CLASS LITIGATION: TACTICS FOR DEFENSE COUNSEL

Faculty:

Katherine F. Murray, Paul Hastings LLP
Jessica B. Pulliam, Baker Botts LLP
Ryan Bangert, Baker Botts LLP

BAKER BOTTS

PAUL HASTINGS

LIMITING CLASS DISCOVERY

- Recent Changes to the FRCPs
- Seeking a Stay of Discovery
- Bifurcating Discovery
- Pre-certification *Daubert* Challenges
- Cost-Shifting Motions
- Unnamed Class Members

LIMITING CLASS DISCOVERY

- **Recent Changes to the FRCPs**
- Seeking a Stay of Discovery
- Bifurcating Discovery
- Pre-certification *Daubert* Challenges
- Cost-Shifting Motions
- Unnamed Class Members

CLASS ACTIONS CAN BE SUBJECT TO ABUSE

- Because class action lawsuits present opportunities for abuse, "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." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

- "[I]t bears repeating that '[c]lass action are unique creatures with enormous potential for good and evil.'" *Besinga v. United States*, 923 F.2d 133, 135 (9th Cir. 1991).

- "Neither the judges on this panel nor other federal judges so far as we are aware have denied that the class action is a worthwhile device, and indeed is indispensable for the litigation of many meritorious claims. But like many other good things it is subject to abuse." *Thorogood v. Sears, Roebuck and Co.*, 627 F.3d 289, 294-95 (7th Cir. 2010).


CASE IN POINT
by Tom Fishburne
OUT-OF-PROPORTIONALITY
WHAT'S THIS?
IT'S A MOTION TO PRODUCE THE DEFENDANT'S ENTIRE ESI INFRASTRUCTURE, YOUR HONOR
FINE. I'LL PAY THE @#$&% PARKING TICKET!
CaseCentral
©2010
CASECENTRAL.COM/CASE IN POINT

RECENT CHANGES TO THE FRCPS

"The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results." — Chief Justice Roberts

EFFECTIVE DATE OF CHANGES

The amendments will govern in all civil cases commenced on or after **December 1, 2015**, and "insofar as just and practicable, all proceedings then pending."

CHANGES TO RULE 26(B)(1)

Language removed from Rule 26(b)(1):

- "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

- Language allowing discovery "reasonably calculated to lead to the discovery of admissible evidence."

NEW WATCHWORD IS "PROPORTIONALITY"

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. — Fed. R. Civ. P. 26(b)(1).

PROPORTIONALITY IN CLASS ACTIONS

- The proportionality standard arguably should limit pre-certification discovery to what is necessary to permit the court to make an informed decision on class certification.

- Proportionality also should limit the scope of pre-certification discovery.
  - Expense to defendants will often dwarf the amount of the named plaintiff's claims.
  - The size of the named plaintiff's claims may be balanced, however, against the need to determine whether a class should be certified.

COURTS HAVE BEGUN INTERPRETING THE NEW RULE 26 LANGUAGE

- *Carr v. State Farm Mut. Auto. Ins*., 2015 U.S. Dist. LEXIS 163444 (N.D. Tex. Dec. 7, 2015):
  - The Committee Notes to the amendments: "restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations. Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."
  - Held: The amendments to Rule 26 "do not alter the basic allocation of the burden on the party resisting discovery to . . . specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of proper discovery."
- *Roberts v. Clark Cnty. Sch. Dist.,* 2016 U.S. Dist. LEXIS 3590 at *21-22 (D. Nev. Jan. 11, 2016):
  - Citing Chief Justice John Roberts' 2015 Year-End Report on the Federal Judiciary: "The 2015 amendments to Rule 26(b)(1) emphasize the need to impose 'reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.' The fundamental principle of amended Rule 26(b)(1) is 'that lawyers must size and shape their discovery requests to the requisites of a case.' The pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. This requires active involvement of federal judges to make decisions regarding the scope of discovery." (internal citations omitted).

OLD RULE 37(E): FAILURE TO PROVIDE ESI

Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

NEW RULE 37(E): FAILURE TO PRESERVE ESI

Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(a) presume that the lost information was unfavorable to the party;

(b) instruct the jury that it may or must presume the information was unfavorable to the party; or

(c) dismiss the action or enter a default judgment.

NEW RULE 37(E)

- Requires that, to impose "death penalty" sanctions or a sanction of a negative inference, a court must find the following:
  - (1) information should have been preserved;
  - (2) information was lost because party failed to take reasonable steps to preserve;
  - (3) information cannot be restored or replaced through additional discovery;
  - (4) party acted with intent to deprive the requesting party of the information.

- Absent intent, sanctions must be "no greater than necessary to cure the prejudice."

LIMITING CLASS DISCOVERY

- Changes to the FRCPs
- **Seeking a Stay of Discovery**
- Bifurcating Discovery
- Pre-certification *Daubert* Challenges
- Cost-Shifting Motions
- Unnamed Class Members

TRIAL COURTS HAVE DISCRETION TO STAY DISCOVERY FOR "GOOD CAUSE"

The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. — F.R.C.P. 26(c)(1).

TRIAL COURTS HAVE DISCRETION TO STAY DISCOVERY FOR "GOOD CAUSE"

- The federal rules do not provide for a blanket stay of discovery pending resolution of dispositive motions.

- Courts generally disfavor protective orders staying discovery pending decision on an early dispositive motion.

- Courts will reject conclusory assertions concerning the need for a stay; instead, they require specific and particularized showings of fact.

FACTORS TO ARGUE WHEN YOU SEEK A STAY

- Strength of motion precipitating the stay
- Whether discovery is needed to decide the motion
- Breadth of requested discovery
- Burden to respond to discovery
- Prejudice to the Plaintiff from a stay

EXCEPTION IN SECURITIES CLASS ACTIONS

- The Private Securities Litigation Reform Act ("PSLRA") reverses the presumption favoring discovery.

- "In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u–4(b)(3)(B)

ERICA P. JOHN FUND V. HALLIBURTON

- Defendants in "fraud-on-the-market" securities class actions must be permitted to rebut presumption of reliance by showing absence of price impact.

- On remand from the Supreme Court, Halliburton secured a stay of discovery pending class certification while it contested price impact.

LIMITING CLASS DISCOVERY

- Changes to the FRCPs
- Seeking a Stay of Discovery
- **Bifurcating Discovery**
- Pre-certification *Daubert* Challenges
- Cost-Shifting Motions
- Unnamed Class Members

ONE SOLUTION: BIFURCATED DISCOVERY

- What does it mean to bifurcate discovery?
  - Separate discovery of class certification issues from discovery of merits issues.
  - Conduct only discovery of class certification issues until a class is certified.
  - Defendants often want bifurcated discovery; plaintiffs generally do not.

BASIS FOR SEEKING BIFURCATED DISCOVERY

- A court may, "for good cause," limit the scope of discovery or control its sequence to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1)

- The 2003 Advisory Committee Notes to Rule 23 recognize that bifurcation "is appropriate to conduct controlled discovery . . . limited to those aspects relevant to making the certification decision on an informed basis."

BASIS FOR SEEKING BIFURCATED DISCOVERY

- It is the burden of the party resisting discovery (*i.e.*, proposing bifurcation) to show that good cause exists to limit discovery.
  - *New England Carpenters Health and Welfare Fund v. Abbott Labs.*, No. 12 Civ. 1662, 2013 WL 690613 (N.D. Ill. Feb. 20, 2013).
  - *Hines v. Overstock, Com, Inc.,* No. 09 Civ. 991, 2010 WL 2775921 (E.D.N.Y. July 13, 2010) ("[D]efendant bears the burden of establishing 'good cause" for [bifurcated discovery].").
  - *Exemar v. Urban League of Greater Miami, Inc.*, (S.D. Fla. June 26, 2008) ("Bifurcation is the exception rather than the rule. [] The burden rests with the moving party to show that bifurcation is necessary.").

BUT WHAT IS A "MERITS" ISSUE AND WHAT IS A "CLASS" ISSUE?

- A "class" issue is one that relates to one of the requirements of class certification under Federal Rule of Civil Procedure 23.
- Rule 23(a): a plaintiff must demonstrate (1) Numerosity, (2) Commonality, (3) Typicality, and (4) Adequacy.
- Rule 23(b)(1) applies where either (a) class certification is warranted to protect the defendant from inconsistent obligations vis-à-vis other class members, or (b) where, in practical effect, resolving one class member's claims would impede or impair other class members from protecting their interests.
- Rule 23(b)(2) applies where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]"
- Rule 23(b)(3) applies where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for adjudicating the controversy."

WHETHER SOMETHING IS A "MERITS" ISSUE OR A "CLASS" ISSUE IS NOT ENTIRELY CLEAR

- Courts have recognized that "the distinction between merits-based discovery and class-related discovery is often blurry, if not spurious." *In re Plastics Additives Antitrust Litig.,* 2004 WL 2743591, at *3 (E.D. Pa. Nov. 29, 2004)

- "The lines between 'merits discovery' and 'certification discovery' are sufficiently blurred as to make any distinction based on these terms meaningless." *Waterbury Hosp. v. U.S. Foodservice, Inc.*, 2007 U.S. Dist. LEXIS 7320, at *9 (D. Conn. Feb. 1, 2007)

RECENT JURISPRUDENCE HAS BLURRED THE LINES BETWEEN CLASS AND MERITS DISCOVERY

- The Old View: *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 185 (1974):
  - We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

- *In re Initial Public Offering Securities Litigation,* 471 F. 3d 24 (2d Cir. 2006):
  - (1) [A] district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement . . . .

THE SUPREME COURT HAS NOT HELPED TO CLARIFY THESE ISSUES

- *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011):

  A court may certify a class only if it "is satisfied, after a rigorous analysis" of the relevant facts and issues, that each requirement of Rule 23 has been satisfied. "**Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim**."

- *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013):

  Repeatedly, we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Such an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim. That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

- *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013):

  Although we have cautioned that a court's class-certification analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim" . . . Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent--but only to the extent--that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied"

WHETHER SOMETHING IS A "MERITS" OR A "CLASS" ISSUE WILL DEPEND ON THE CASE

- False Advertising Class Actions:
  - Product efficacy, testing and safety issues are usually considered to be "merits."
  - "All natural" cases – whether products/ingredients are "all natural" or "100% natural" are typically merits questions.
- Cases brought under state statutes:
  - Company's policies regarding compliance with statute could be both "class" and "merits" (*e.g.*, CA's Song-Beverly Credit Card Act, Cal. Civ. Code Section 1747.08)
- Employment Discrimination Class Actions:
  - *See, e.g.*, *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294 (S.D.N.Y. 2012) (granting discovery of statistical data relevant to both class and merits)
- Wage and Hour Class Actions
  - *See, e.g.*, *Paulino v. Dollar General Corp.*, No. 12 Civ. 75, 2013 WL 1773892 (N.D.W.V. Apr. 25, 2013) (granting discovery of class list, and personnel and payroll records); *Ho v. Ernst & Young, LLP*, No. 05 Civ. 4867, 2007 WL 1394007(N.D. Cal. May 9, 2007) (granting discovery of time and activity records).
- But most of the time, you'll know it when you see it.

WHAT ABOUT DAMAGES ISSUES?

- Until recently, damages issues were not addressed at the class certification stage.
- Enter *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013):
  - Reversed class certification in an antitrust case, concluding that Plaintiffs' expert had not shown how damages and liability could be shown on a class-wide basis where damages model accounted for four possible theories of antitrust injury, when district court had limited case to single theory of antitrust impact.
  - Courts should examine the proposed damages methodology at the certification stage to ensure that it is consistent with the classwide theory of liability and capable of measurement on a classwide basis.
  - Establishes that "[c]alculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case."133 S. Ct. at 1433.

COMCAST'S IMPACT ON CLASS DISCOVERY

- *Comcast* has been interpreted as "reiterat[ing] a fundamental focus of the Rule 23 analysis: The damages must be capable of determination by tracing the damages to the plaintiff's theory of liability. So long as the damages can be determined and attributed to a plaintiff's theory of liability, damage calculations for individual class members do not defeat certification." *Lindell v. Synthes USA*, No. 11-02053, 2014 WL 841738, at *14 (E.D. Cal. Mar. 4, 2014).
- But *Comcast* **does not** mean that precertification discovery into damages issues is fair game. Defendants should draw a distinction between actual computation of damages and a plaintiff's ability to compute damages on a classwide basis.
- As the Ninth Circuit has explained, *Comcast* holds that, under rigorous analysis, "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva v. Medline Indus., Inc*., 716 F.3d 510, 514 (9th Cir. 2013).
- Thus, at the class certification stage, courts must examine Plaintiffs' damages models, the relationship of those models to Plaintiffs' legal theories, and whether damages can be calculated on a classwide basis. However, plaintiffs do not need to actually calculate or reveal the amount of each individual's damages at class certification.

Therefore, discovery of actual damages issues prior to class certification remains premature, even under *Comcast*.

ARGUMENTS TO MAKE WHEN SEEKING BIFURCATED DISCOVERY

- Manual for Complex Litigation suggests that the prime considerations in whether bifurcation is efficient and fair include whether merits-based discovery is sufficiently intermingled with class-based discovery and whether the litigation is likely to continue absent class certification.

- When ruling on motions to bifurcate class certification and merits discovery, courts consider :
  - (1) expediency - whether bifurcated discovery will aid the court in making a timely determination on the class certification motion;
  - (2) economy - the potential impact that a grant or denial of certification would have upon the pending litigation and whether the definition of the class would help determine the limits of discovery on the merits;
  - (3) severability - whether class certification and merits issues are closely enmeshed.

Harris v. comScore, Inc., No. 11 CV 5807, 2012 WL 686709, at *3 (N.D. Ill. Mar. 2, 2012); *accord Reid v. Unilever U.S., Inc.*, No. 12 C 06058, 2013 WL 4050194, at *31 (N.D. Ill. Aug. 7, 2013).

ARGUMENTS TO MAKE WHEN SEEKING BIFURCATED DISCOVERY

- Expediency:
  - Where merits discovery is likely to delay the filing of the class certification motion
  - Manual for Complex Litigation (Fourth), § 21.14: "Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary."
  - *Lake v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893 (N.D. Ill. 2013) (granting bifurcation in a case alleging damage from a hair care product where issues of numerosity, commonality, and typicality required extensive discovery prior to discovery on the merits and, therefore, "proceeding with merits discovery may delay the parties' submission of their briefs on the class certification issue")
  - *Harris v. comScore, Inc.,* 2012 WL 686709, at *3 (N.D. Ill Mar. 2, 2012) (granting bifurcation largely because proceeding with merits discovery "which may well involve the review of millions of documents not directly relevant to the issues of class certification, may delay the parties' submission of supplemental briefing on the class certification issue")
  - Better to make this argument before plaintiff files his/her motion for class certification and before the parties have agreed to a briefing schedule.

ARGUMENTS TO MAKE WHEN SEEKING BIFURCATED DISCOVERY

- Economy
  - Bifurcation is more economical where denial of class certification will effectively end the litigation.

    Harris v. comScore, Inc., 2012 WL 686709, at *4 (N.D. Ill Mar. 2, 2012) (finding that "the limited statutory damages available to Plaintiffs [in a consumer fraud case] are likely an insufficient motivation to litigate in the absence of class certification").

  - However, this is not a strong argument if Plaintiff insists that he/she will proceed with litigation even if class certification is denied. (*i.e.*, where plaintiff is alleging significant losses)
    - *See* Manual for Complex Litigation § 21.14, at 256 (bifurcation not appropriate if litigation likely to proceed without certification).

ARGUMENTS TO MAKE WHEN SEEKING BIFURCATED DISCOVERY

- Severability
  - Where there will be substantial overlap between merits and class certification issues, bifurcation may not be warranted as it will not create efficiencies.
  - *Dukes*, 131 S. Ct. at 2551-52: The class certification analysis "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are en-meshed in the factual and legal issues comprising the plaintiff's cause of action."
  - *Camilotes v. Resurrection Health Care Corp.*, 286 F.R.D. 339, 345 (N.D. Ill. 2012): "Because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action, the court's rigorous analysis frequently entails some overlap with the merits of the plaintiff's underlying claim.").
  - Manual For Complex Litigation (Fourth) § 11.213: Concurrent discovery is more efficient when bifurcation "would result in significant duplication of effort and expense to the parties."

WHY DEFENDANTS MAY NOT WANT BIFURCATION

- Plaintiffs may use Defendants' request for bifurcation against them on class certification, when Defendants challenge Plaintiffs' evidence or experts:
  - *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011):

    It was after all [Defendant] which sought bifurcated discovery which resulted in a limited record at the class certification stage, preventing the kind of full and conclusive *Daubert* inquiry [Defendant] later requested. While there is little doubt that bifurcated discovery may increase efficiency in a complex case such as this, it also means there may be gaps in the available evidence. Expert opinions may have to adapt as such gaps are filled by merits discovery, and the district court will be able to reexamine its evidentiary rulings.

AS A GENERAL RULE

"Allowing some merits discovery during the precertification period is generally more appropriate for cases that are large and likely to continue even if not certified. On the other hand, in cases that is unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden."

–Manual for Complex Litigation (4th) § 21.14 (2006).

LIMITING CLASS DISCOVERY

- Changes to the FRCPs
- Seeking a Stay of Discovery
- Bifurcating Discovery
- **Pre-certification *Daubert* Challenges**
- Cost-Shifting Motions
- Unnamed Class Members

USE OF EXPERTS AT THE PRECERTIFICATION STAGE

- Problem: Plaintiffs increasingly are relying upon expert testimony to meet the class certification requirements of Rule 23.

- Solution: Defense counsel should aggressively challenge reliability of expert testimony at the class certification stage.

- Question: What standard should be used to test reliability at the certification stage?

UNSETTLED STANDARD FOR TESTING RELIABILITY

- The Supreme Court suggested in dicta that a full-blown *Daubert* analysis may be required. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011).
  - "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. **We doubt that is so**...."
- However, the Supreme Court avoided the question in *Comcast v. Behrend*, 133 S. Ct. 1426, 1432 (2013), reversing class certification on grounds that a damages model based on expert testimony was a poor "fit" for the theory of liability.

UNSETTLED STANDARD FOR TESTING RELIABILITY

The standard for testing expert reliability at the class certification stage remains unsettled, causing a circuit split:

Full *Daubert*:

- *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010).
- *Sher v. Raytheon Co.*, 419 Fed. App'x 887 (11th Cir. 2011).
- *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015).

Daubert Light:

- *In re Zurn Pex Plumbing Products Liability Litig.*, 644 F.3d 604 (8th Cir. 2011).
- *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011).

SOME PRACTICAL APPLICATIONS

- Challenge experts who are unqualified.
  - *IBEW Local 90 Pension Fund v. Deutsche Bank AG*, 2013 WL 5815472 (S.D.N.Y. Oct. 29, 2013).
- Challenge experts who offer "ipse dixit" opinions.
  - *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010).
- Challenge experts who use flawed methodologies.
  - *IBEW Local 90 Pension Fund v. Deutsche Bank AG*, 2013 WL 5815472 (S.D.N.Y. Oct. 29, 2013).
- Challenge experts whose opinions lack a proper "fit" with the theory of liability.
  - *Comcast v. Behrend*, 133 S. Ct. 1426 (2013).
- Challenge experts who offer legal conclusions.
  - *In re Conagra Foods Inc.*, 302 F.R.D. 537 (C.D. Cal. 2014).

LIMITING CLASS DISCOVERY

- Changes to the FRCPs
- Seeking a Stay of Discovery
- Bifurcating Discovery
- Pre-certification *Daubert* Challenges
- **Cost-Shifting Motions**
- Unnamed Class Members

"ASYMMETRICAL" DISCOVERY

- Defense counsel should consider seeking to shift precertification discovery costs to the plaintiff.
- *Boeynaems v. LA Fitness International, LLC*, 285 F.R.D. 331, 334–35, 341 (E.D. Pa. 2012):
  - Recognized "asymmetrical" discovery burdens: plaintiffs' "very few documents" compared with defendant's "millions of documents and millions of items of electronically stored information."
  - Cost shifting is proper in cases where (1) "class certification is pending," and (2) the discovery requests are "very extensive" and "very expensive," unless there are "compelling equitable circumstances to the contrary."
  - In the instant case, because the defendant had "borne all of the costs of complying with Plaintiffs' discovery to date," the court ruled that the plaintiffs should pay for any "additional discovery."
  - Accordingly, there is persuasive precedent for shifting the cost of precertification discovery to the plaintiff.
  - *See also Schweinfurth v. Motorola, Inc.*, No. 1:05CV0024, 2008 WL 4449081, at *2 (N.D. Ohio Sept. 30, 2008) (splitting precertification discovery costs evenly between the parties).

COST-SHIFTING E-DISCOVERY

- Rule 26: upon a showing of good cause, a court may issue a protective order to protect a party from whom discovery is sought.
- Good cause: exists where the burden and expense of compliance with the proposed discovery outweighs its likely benefit.
- Two approaches to showing undue burden or expense.
  - 1. Show that your client's electronic documents are kept in an inaccessible format (e.g., on disaster recovery tapes).
  - 2. Show that it would take an inordinate amount of time, manpower, and expense for your client to retrieve the requested documents.

THE *ZUBULAKE* FACTORS

When is it appropriate to shift the costs of electronic document production?

Under *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003)., the court should consider:

- The Benefit Factors (The Marginal Utility Test)
  - (1) The extent to which the Requests are specifically tailored to discover relevant information
  - (2) The availability of such information from other sources
- The Cost Factors
  - (3) The cost of production compared to the amount in controversy
  - (4) The total cost of production compared to the resources available to each party
  - (5) The relative ability of each party to control costs and its incentive to do so
- The Remaining Factors
  - (6) The importance of the issues at stake in the litigation
  - (7) The relative benefits to the Parties of obtaining the information

PROPORTIONALITY ALSO MAY PLAY A ROLE

- The proportionality requirement gives defendants an additional factor to argue in favor of cost shifting.

- In practice, the *Zubulake* factors anticipate the proportionality analysis.

LIMITING CLASS DISCOVERY

- Changes to the FRCPs
- Seeking a Stay of Discovery
- Bifurcating Discovery
- Pre-certification *Daubert* Challenges
- Cost-Shifting Motions
- **Unnamed Class Members**

UNNAMED CLASS MEMBERS

- The rules for discovery of unnamed class members are stricter than the general discovery regime: The named plaintiff must demonstrate that the information is needed for certification, and discovery may be limited to "a certain number or a sample of proposed class members." *See* Manual for Complex Litigation (Fourth) § 21.14 (2004).
- Subject to the First Amendment, courts may limit communications from plaintiff's counsel with potential class members to prevent abuse and ethical violations. *See Hauff v. Petterson*, 2009 WL 4782732, at *32 (D.N.M. Dec. 11, 2009).
- Some courts have gone further and restrained plaintiffs from discovering information from defendants about potential class members to protect privacy rights. Under the opt-in approach, plaintiffs cannot obtain information relating to unnamed class members from defendants unless the concerned individuals consent. *Best Buy Stores, L.P. v. Superior Court*, 40 Cal. Rptr. 3d 575, 577 (Cal. Ct. App. 2006).

BELAIRE NOTICES

- Under the opt-out approach, the presumption is reversed: The plaintiff may obtain information about unnamed class members unless the latter object.
- *Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554 (2007):
  - Prior to disclosure of the putative class members' (employees) contact information, parties must provide the putative class with written notice ("*Belaire* Notice") of the potential disclosure of contact information and an opportunity to opt out of the disclosure.
- *See also Pioneer Electronics (USA), Inc. v. Super. Ct.*, 40 Cal. 4th 360 (2007) (requiring the same notice for consumers).

CREATING A *BELAIRE* NOTICE

- If the parties agree to provide a *Belaire* Notice, they should send a letter to putative class members (through a third party administrator) advising them that:
  - If they do not want their contact information disclosed to plaintiff's counsel, they must return a postcard (or send an e-mail or call a 1-800 number) so stating;
  - Putative class members are not precluded from a subsequent settlement or judgment in the lawsuit if they opt out of the disclosure and that the court has not certified the class or ruled on the merits.
- Because plaintiffs are requesting the private information, employers can insist that plaintiffs bear the cost of the mailing, or at most, the plaintiff and employer should split the cost.

QUESTIONS?

Katherine F. Murray, Paul Hastings LLP
katherinemurray@paulhastings.com

Jessica B. Pulliam, Baker Botts LLP
jessica.pulliam@bakerbotts.com

Ryan Bangert, Baker Botts LLP
ryan.bangert@bakerbotts.com

BAKER BOTTS

PAUL HASTINGS