

CENTRAL DISTRICT CLASS ACTIONS, A CATCH 22

CIVIL PROCEDURE

By Brian Kabateck

Do you ever find yourself in a situation where you were about to devour a scrumptious piece of cake only to watch it magically disappear from your plate before you could take a bite? Plaintiffs encounter something very similar when filing for class action certification in the Central District of California.

The Central District Local Rules give plaintiffs 90 days to file a motion for class certification after they file their claim. The Federal rules also flexibly provide for certification at "an early practicable time." At the same time, the Supreme Court requires a rigorous analysis prior to certifying a class. The question on everyone's mind is: How do we gather enough information for the rigorous analysis required by the court and still comply with the strict 90-day filing period at the pleading stage? Or, can we eat the cake provided by the flexible Federal rules before the Central District takes it away?

Cake and class actions are similar in more ways than one might think. Both are potentially capable of filling us with a sense of contentment. And, if we are deprived of either one - a piece of cake or a class action certification - an overwhelming feeling of disappointment is inevitable.

Class actions were established to provide people who have no means or incentive to pursue their rights with the opportunity to have their day in court. They also carry the added benefit of promoting efficiency in litigation. In fact, class actions are the single most powerful way large groups of people can bring the same claim in court.

Of course, the court must give its permission to groups that wish to form a class. And this is where things get tricky. Supreme Court precedent, the Federal Rules of Civil Procedure, and local rules, govern the issue simultaneously when filing class actions in the Central District.

The Supreme Court in *General Telephone Co. of Southwest v. Falcon*, (457 U.S. 147, 160 (1982)) laid out the requirements for successful class certification. According to the opinion, courts must conduct a rigorous analysis to decide whether the certification requirements have been met. This rigorous analysis rule was born out of a need to require more precise pleadings and reasonable specificity for class certification. But even more than that, the decision to require more initial information and a more thorough analysis was designed to protect class members.

Federal Rule of Civil Procedure 23 governs the timing requirements of class action certification. The rule provides that courts have to decide whether or not to certify a class at an early practicable time. This language was added as a result of amendments made in 2003. Prior to those amendments, the rule required certification as soon as practicable. The 2003 modification was part of a series of amendments aimed at codifying the best practices that courts developed over the years to effectively and fairly supervise class action litigation. Changing the language to an early practicable time

suggests that, depending on the complexity of the issue, the courts may take more time to make a decision and to enable plaintiffs to gather the information they need. As the Advisory Committee Notes suggest, the realities of trial sometime require additional time to obtain information needed to carry out the rigorous analysis required by the Supreme Court.

The Supreme Court and the Federal Rules make this clear: In the interest of more precise pleadings and best practices, some flexibility is necessary in the class certification process. The Local Rules of the Central District of California (23-3), however, provide for only 90 days to file a motion for class certification after the complaint has been filed. Ninety days might seem like a generous stretch of time. But when taking the realities of trial into consideration, 90 days are rarely enough. Generally, a defendant has 20 days after service to respond to a complaint. Extensions of at least 30 days are then freely given. In fact, the Central District allows the parties to stipulate to a 30-day extension to respond without a court order. If the defendant files a Rule 12 motion, the motion will not be heard for at least another 21 days. Thus, a minimum of 71 days out of the 90 can pass before many cases move past the pleading stage.

So, is it possible to have your cake and eat it too when it comes to class certification? Can one really have precise pleadings and a rigorous analysis when 71 days of the 90 allocated for finding information are already spoken for?

In more complex cases, the information needed to support class certification is rarely readily available. Plaintiffs either need to be given the opportunity to conduct some pre-certification discovery or courts need to be more understanding of the fact that limited time produces limited amounts of quality information. Judges in the Central District have discretion to waive the 90-day rule, but there have been instances when they have refused. If a waiver is not granted, the plaintiff is faced with the following dilemma. He can either file a motion for class certification prematurely without sufficient supporting evidence or conduct a discovery and risk dismissal for failure to file within the 90 days as mandated by the local rule. Failure to comply with the 90-day rule is grounds alone for denying class certification in the Central District of California.

To answer the question we have all been waiting for: It does not seem possible to have it both ways when it comes to class certification. In the majority of cases, additional time is needed to acquire enough information for courts to do a rigorous analysis. Ninety days, keeping in mind the realities of trial, are only enough in the simplest of cases. Certainly, most class actions tend to allege systematic and widespread wrongdoing, and that usually requires a complex set of facts. If Central District judges don't readily give waivers to these kinds of complex cases, then the rule has the potential of defeating the very purpose of class action litigation by dismissing most, if not all, of the serious, complex and meritorious, claims. And that would make many plaintiffs and their lawyers sick to their stomachs.

Brian Kabateck is a consumer rights attorney and founder of Kabateck Brown Kellner in Los Angeles. He represents plaintiffs in mass torts litigation, class actions, insurance bad faith, insurance litigation, and commercial contingency litigation.