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K. Craig Wildfang & Stacey Slaughter

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WALKING THE TIGHTROPE – JUDICIAL MANAGEMENT OF THE CHALLENGES POSED BY COORDINATION OF DISCOVERY BETWEEN SIMULTANEOUS CLASS AND INDIVIDUAL ACTIONS

K. Craig Wildfang and Stacey Slaughter[1]
Robins, Kaplan, Miller & Ciresi, L.L.P.,
Minneapolis, MN

INTRODUCTION

Efficiency. Relevance. Fairness. These are the values that any court must balance managing complex litigation before it. This balancing is a challenge in any complex, multi-party litigation, but it becomes even more challenging in an action with both class plaintiffs and individual (non-class) plaintiffs. Such cases were formerly quite rare, typically arising only in mass tort or product liability cases. In the last few years, however, such cases have become much more common in other types of actions, including antitrust and securities cases. You will hear the panel on this topic discuss the many issues and problems that arise at each stage of complex ligation that involves class and individual actions proceeding simultaneously against one or more common defendants ("simultaneous actions"), from initial pleadings, through discovery and motion practice, mediation/settlement, trials and all the way through to appeals. However, since any comprehensive treatment of these issues would occupy hundreds of pages, this paper will focus principally on just the issues related to discovery in simultaneous actions.

DISCOVERY IN SIMULTANEOUS ACTIONS

The Manual for Complex Litigation prescribes that discovery in complex cases should be driven by an emphasis on the "orderly and cost-effective acquisition of relevant information."[2] But when courts attempt to coordinate discovery in simultaneous actions, it can be difficult to identify how best to serve efficiency, relevance, and fairness when ruling on discovery issues raised by the parties involved. Consider the following two scenarios that courts can face when managing the discovery process in a simultaneous action – scenarios that invite the possibility of "mischief" by increasing the risk of inconsistent judicial orders or one party gaining an unfair advantage over the other parties involved:

1. Class Plaintiffs move the court to compel discovery related to a particular issue ("Issue X"). The court orders and receives formal

1 Both authors are partners in the firm of Robins, Kaplan, Miller & Ciresi L.L.P.
2 *Manual for Complex Litigation* §(4th ed. 2004).

briefing on Issue X and hears oral argument. The court is now ready to rule on Issue X. Individual Plaintiffs – having attended the hearing and reviewed the motion papers filed by the Class Plaintiffs – then send a letter to the court stating that because Individual Plaintiffs soon plan to file their own motion to compel discovery on Issue X, the court should postpone deciding Class Plaintiffs' motion until it has heard Individual Plaintiffs' position on Issue X. Class Plaintiffs oppose this request on the grounds of undue delay, but Defendants support the Individual Plaintiffs' request because they usually prefer delay. Should the court stay its decision until it has heard from the Individual Plaintiffs, or should it rule now?

2. Individual Plaintiffs serve a discovery request that requires Defendant to identify and produce any document that Defendant has produced or will produce to Class Plaintiffs. Defendant refuses to comply with this request, deeming it an improper "blockbuster" that is not limited to the discovery of evidence relevant to the Individual Plaintiffs' claims (*e.g.,* evidence related to class certification, but not the merits). Individual Plaintiffs then move the court for an order compelling Defendants to comply with their request, emphasizing they merely seek to ensure that Defendant does not withhold documents relevant to the simultaneous action from the Individual Plaintiffs while producing such documents to the Class Plaintiffs. But Defendant replies that granting Individual Plaintiffs' request would let Individual Plaintiffs unfairly exploit a broader range of discovery that only Class Plaintiffs merit due to their class claims. How should the court rule on Individual Plaintiffs' motion?

Any court confronted with these scenarios will have to grapple with a variety of arguments from the parties couched in concerns for efficiency, relevance, and fairness. The critical question is whether each of these values deserves equal weight in the court's decision-making process when coordinating discovery in a simultaneous action, or whether one of these values is presumptively more important than the others – and whether such prioritization may ultimately be the only way for the court to advance the lesser-ranked values over the course of the entire litigation (even if such prioritization admittedly undercuts these lesser-ranked values during the discovery process).

This paper explores this question in the context of the two scenarios above, serving to expose the underlying interests in conflict and the solutions that courts can utilize (and have utilized) to minimize the risk of "mischief" involved. This paper concludes, however, that whatever the best solution to these scenarios may be, courts must articulate them in a manner that clarifies what values must take priority in the management of simultaneous action discovery, thereby highlighting the importance of formal motion practice over more informal dispute resolution procedures.

EXAMINING THE INTERESTS: THE "CONCURRENT RESOLUTION" SCENARIO

Should a court coordinate discovery in a simultaneous action so as to ensure that it has heard from both Class Plaintiffs and Individual Plaintiffs before deciding any major discovery issue – or should it decide such issues on a "first come, first served" basis? The interests of the relevant parties – the Class Plaintiffs, the Individual Plaintiffs, the Defendant(s), and the court itself – are ultimately best examined via the efficiency/

relevance/fairness rubric that inherently pervades all discovery practice. We conclude that these interests are best served by the court entering an early Case Management Order anticipating the issues discussed herein and providing for procedures to be followed by the parties to maximize efficiency, relevance and fairness in discovery, and minimizing the opportunities for mischief. However, even a well-drafted CMO may not always solve the problems posed by the two scenarios above.

Efficiency. For the Defendant(s), Class Plaintiffs, and the court, this value tends to point to the same conclusion: The court should decide Issue X *now* because it has been briefed, and the instant parties should not be forced to accept further delay when the discovery clock is already ticking and disputes over costly, time-consuming discovery obligations must be resolved. Indeed, the court has a vital interest in ensuring that the discovery timeline for Class Plaintiffs' case is not held hostage by Individual Plaintiffs' motion practice. But Individual Plaintiffs can also cite a compelling "efficiency" interest in their defense: While judicial efficiency may not be served by delaying Class Plaintiffs' motion, a broader efficiency is advanced by the court deciding Issue X just once, rather than issuing two separate orders in response to two separate motions.

Relevance. While "relevance" is the watchword of federal discovery practice, its application to the concurrent resolution scenario raises a question-begging proposition. Individual Plaintiffs may plausibly claim to have dispositive legal or factual insights on the relevance of Issue X that Class Plaintiffs lack – insights the court should consider before reaching definitive conclusions, via Class Plaintiffs' motion, about whether Issue X is relevant to the entire simultaneous action. The only way the court can determine if Individual Plaintiffs have such delay-worthy insights to offer, however, is by granting a delay that allows the Individual Plaintiffs' to flesh out this argument. At the same time, the Defendant(s) may fairly object that any concern the court might have about delay-worthy insights on relevance is more than offset by the broad view of "relevance" that already exists under federal discovery rules. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.12 (1978) ("[T]he court should and ordinarily does interpret 'relevant' very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation." (internal quotation marks omitted) (citation omitted)).

Fairness. Putting aside concerns about expense and delay phrased in terms of what is "fair" to the parties involved, the concurrent resolution scenario raises a further fairness-based dilemma for the court to consider: the risk of inconsistent adjudication. Simply put, if the court rules on Class Plaintiffs' motion now, the court must gamble that it will reach the same conclusion with respect to Individual Plaintiffs' later motion. But what if the Individual Plaintiffs – or the Defendant(s), for that matter – demonstrate the court's ruling on Class Plaintiffs' motion was incorrect? Certainly, the odds of this happening are enhanced if the court rules on Class Plaintiffs' motion now and thereby informs Individual Plaintiffs and Defendants as to what judicial conclusions they must rebut. This reality in turn may also foster an even greater impression of unfairness among the parties. Indeed, if the court denies Class Plaintiffs' motion, the Individual Plaintiffs may deem it "unfair" to be stuck with the task of "changing the court's mind" (versus getting a blank slate), since the court is bound to defend its prior ruling.

EXAMINING THE INTERESTS: THE "CONCURRENT PRODUCTION" SCENARIO

Should a court coordinate discovery in a simultaneous action so as to enable Individual Plaintiffs to obtain the fruits of Class Plaintiffs discovery requests – or does such "piggy-backing" impermissibly burden the Defendant(s) and let Individual Plaintiffs

unfairly exploit discovery-based advantages that belong to Class Plaintiffs alone? The interests of the relevant parties – the Class Plaintiffs, the Individual Plaintiffs, the Defendant(s), and the court itself – are ultimately best examined via the efficiency/relevance/fairness rubric that inherently pervades all discovery practice.

Efficiency. When it comes to efficiency, both Individual and Class Plaintiffs have a relatively easy argument to make: It should not cost much (at least in theory) for the Defendant(s) to produce the same set of documents to Individual and Class Plaintiffs, and such production will ensure a level playing field between all the parties involved. But the Defendant(s) may also plausibly maintain that "efficiency" in simultaneous action discovery cannot be maintained unless all parties involved are encouraged to avoid duplicative efforts. In other words, if the Individual Plaintiffs can simply "piggy-back" on whatever discovery requests are filed by the Class Plaintiffs, then the Individual Plaintiffs are stripped of sufficient incentive to avoid unnecessary duplication and think carefully about what independent discovery requests they decide to serve. Nevertheless, Individual Plaintiffs may be permitted to supplement their specific discovery needs without undue burden to Defendants.

Relevance. If the value of "efficiency" tends to favor Individual Plaintiffs in the concurrent production scenario, the value of "relevance" likely favors the Defendant(s). After all, a simultaneous action would not exist but for Individual Plaintiffs that have refused to raise class action claims themselves or be consolidated into Class Plaintiffs' lawsuits. It thus seems inappropriate to presume that all discovery "relevant" to the interests of the Class Plaintiffs as a "class" – interests the Individual Plaintiffs neither seek to represent nor to join – must be equally "relevant" to the Individual Plaintiffs' claims, thereby warranting a concurrent production order. This is especially true when one considers that many of the discovery requests that Class Plaintiffs are liable to serve on the Defendant(s) will be "relevant" to an issue that Individual Plaintiffs cannot claim to share: the achievement of class certification. Yet, the final word on this issue may belong to the liberal nature of the discovery rules themselves and a refusal to accept the idea that "each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel." *Ward v. Ford Motor Co.*, 93 F.R.D 579, 580 (D. Colo. 1982). However, Individual Plaintiffs will likely have many overlapping issues for which class discovery will be relevant. Thus, courts can and do encourage Individual Plaintiffs to tailor any separate discovery requests so that they are relevant to any specific claims Individual Plaintiffs claim but are not duplicative of class' claims. A new wrinkle to this problem has arisen as a result of several federal courts of appeal raising the bar for class certification. *See e.g., In re Initial Public Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Luskin v. Intervoice-Brite, Inc.,* 261 Fed. Appx. 697 (5th Cir. 2008); Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011); *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009); *but see also, Gooch v. Life Investors Ins. Co.*, __ F.3d ___, 2012 U.S. App. LEXIS 2643 (6th Cir. 2012) (holding that district court's failure to resolve factual issues on class certification was harmless error). These appellate courts have now said that, in deciding motions for class certification, district courts not only *may*, but *must* make any factual findings that are necessary to support class certification. These might include findings on the merits of certain claims. This means that individual, non-class plaintiffs are at risk of having the court make findings that would be adverse to, or even dispositive of, their claims, but with no procedural vehicle to protect their interests. So the "class" versus "merits" distinction that federal courts have wrestled with for the last 40 years under Fed. R. Civ. P. Rule 23, may no longer have much meaning, at least for discovery purposes.

Fairness. Whether a concurrent production order would serve the interests of efficiency or relevance appears to hinge on how closely Individual Plaintiffs' discovery interests align with those of Class Plaintiffs. "Fairness," however, prompts a different concern: What about the explicit limits that federal discovery rules place on how much discovery can be sought by each party? Rule 33, for example, states that "[u]nless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories." The Defendant(s) may thus argue that a concurrent production order really means giving each Individual Plaintiff the unfair benefit of 50 interrogatories – the 25 provided under Rule 33 and the 25 already served by Class Plaintiffs. And if "fairness" in discovery is largely the product of negotiation between the parties, the Defendant(s) may be less willing to enter into such negotiations, since the chance of "piggy-backing" is liable to undercut any compromises they might make.

WEIGHING POSSIBLE SOLUTIONS

Both the concurrent resolution and concurrent production scenarios reflect the difficult problems that courts must face when coordinating the discovery process in simultaneous actions. Efficiency, relevance and fairness may illuminate the dimensions of these problems, but they do not afford any easy answers in terms of how courts should solve them. Instead, these values only further reveal that any feasible solution to these problems will likely entail the prioritization of one of these values above the other two (all the while recognizing that long-term achievement of all three values depends on this). With this in mind, the following possible "solutions" either have been or could be implemented by courts in simultaneous actions to address the kinds of difficulties reflected by the concurrent resolution and concurrent production scenarios.

Command-and-Control (Efficiency). One way to deal with the problems posed by the concurrent resolution and production scenarios is through a Case Management Order requiring coordination as a way to prevent such problems from arising in the first place. Under this "efficiency-driven" model, the court vests the right to serve and argue discovery entirely with Class Plaintiffs, who in turn must coordinate with Individual Plaintiffs. Whatever the Defendant(s) produce, in turn, may be equally used by Class and Individual Plaintiffs. This is the model that Judge Denise Cote adopted in the *Worldcom* fraud litigation, wherein Judge Cote held that: "There shall be no separate discovery conducted in any of the Individual Actions unless issues unique to one or more Individual Actions are identified to the Court and permission is obtained to conduct such separate discovery." *In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), slip op. at 13 (S.D.N.Y. May 22, 2003).

Intermediate Coordination (Relevance). In contrast to Judge Cote's top-down efficiency-driven approach to discovery in simultaneous actions, a "relevance-driven" model aims to preserve the liberal character of federal discovery practice. Under this model, the concurrent resolution scenario reduces to the view that Individual Plaintiffs should be heard – even if in a small way (*e.g.*, a letter) – on why Issue X is "relevant" before deciding Class Plaintiffs' motion. As for concurrent production, a relevance-based model weighs in favor of letting Individual Plaintiffs "piggy-back" on Class Plaintiffs requests so long as these requests are relevant to Individual Plaintiffs' claims (*i.e.*, Defendants do not have to share documents that relate only to class certification issues). *Cf. Sauer v. Exelon Generation Co.*, 2011 U.S. Dist. LEXIS 90511, at *15 (N.D. Ill. Aug. 15, 2011) (ordering defendants to produce documents from three related cases because the documents likely contained information relevant to plaintiffs' case).

Situational Pragmatism (Fairness). Despite its lofty title, a fairness-driven model for coordinating discovery in simultaneous actions requires courts to do what they normally do outside the simultaneous action context: consider every issue on the merits and afford each party's interests the *separate* respect they deserve. Such a model thus makes it easy to resolve the concurrent resolution scenario: the court should rule on Class Plaintiffs' motion now (*i.e.*, even if efficiency is not served by doing so) because Class Plaintiffs filed their motion first and in a manner seeking review apart from the Individual Plaintiffs. As for concurrent production, fairness tends to militate against letting Individual Plaintiffs piggy-back on Class Plaintiffs' discovery, if only because the opposite result seemingly risks eliminating the limits on discovery prescribed by the Rules.

CONCLUSION

None of the three models identified above constitutes a perfect approach to resolving the wide variety of issues that courts must face when coordinating discovery in simultaneous actions. Courts may have to choose between various models in dealing with different discovery issues – for example, using a efficiency-based model to handle discovery requests, while using a fairness-based model to resolve discovery disputes. Courts may also end up adopting certain models early in the litigation only to later reject such models as infeasible or unmanageable in the face of novel factual or legal circumstances. Regardless of how this whole process unfolds, however, courts should take care to memorialize their decision-making through carefully considered Case Management Order, formal opinions, and motion practice that are ultimately accessible not just to the immediate parties involved, but the next set of litigants who happen to get caught up in a simultaneous action. Yet, such advice admittedly tends to contravene the Manual for Complex Litigation, which indirectly suggests that when it comes to managing complex litigation in general, courts should be in the practice of "[a]voiding formal motions in discovery disputes."[3]

Formal motion practice is neither cheap nor fast. Nevertheless, its overriding virtue is that it lets courts articulate both to the parties and to the world a reasoned basis for decision that can make a difference in future disputes in the instant litigation, as well as in future cases. In short, no simultaneous action is an island – and courts that recognize this through formal motion practice will set the standard for how future courts pursue the values of efficiency, relevance, and fairness in such actions. Such judicial guidance is certainly to be preferred to mere gut-based assumptions about what is or is not possible when it comes to simultaneous action discovery. Thus, while every case is different and comes with its own unique set of issues to consider, courts should not shy away from issuing formal opinions (despite the potential delay and expense involved) when doing so can help put to rest questions like: Do courts often hear separate discovery motions on the same issue from Class and Individual Plaintiffs? Is it common for Individual Plaintiffs to serve discovery requests that piggy-back on the discovery requests filed by Class Plaintiffs? When production of such requests has been ordered, is the scope of discovery limited in any way?

The Honorable Pamela Rymer has observed that:

> [T]o give reasoned decisions is part of what judging is all about. The heart of judging, after all, is judgment . . . . Even if the Federal Rules do not require a statement of reasons, fairness does. Simply to 'grant' or

3 *Manual for Complex Litigation* § 11.424 (4th ed. 2004).

> 'deny' looks arbitrary; so does ignoring or overlooking a point that was argued by the loser. Instead, to touch all the bases with at least a summary reason not only looks reasonable, but leaves lawyers and litigants alike with the feeling they've had their due: their day in court. Coincidentally, it avoids error: forcing yourself to articulate reasons makes it less likely that you will miss a critical link. Finally, in my experience, to spell out grounds for a ruling reduces both the incidence of appeal and the risk of reversal. It is therefore a benefit to the system as well.[4]

Hence, while meet-and-confers and informal dispute resolution may be cost-effective methods for simultaneous action litigants to resolve their discovery disputes, courts should not rely on these mechanisms as ways to avoid declaring what the law requires of these litigants – especially when the litigants want such a ruling, and the long-term interests of efficiency, relevance, and fairness cannot be served by anything less.

4 Hon. Pamela Ann Rymer, *The Trials of Judging*, 4 GREEN BAG 57, 58-59 (2000).