

MAY A COURT CONSIDER SUMMARY JUDGMENT
BEFORE REACHING THE ISSUE OF CLASS CERTIFICATION?¹

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Parties often disagree about whether a motion for summary judgment may be filed, heard or ruled upon prior to a class certification decision. While there are cases supporting both sides of this issue, the greater weight supports allowing the trial judge discretion to determine summary judgment first. In exercising this discretion, courts often consider the following factors: 1) the merits of the plaintiff's claim and any doubts as to those merits; 2) efficiency with regard to the parties and the court; and 3) the potential for prejudice to the plaintiff or the putative class.

The Federal Rules of Civil Procedure:

Rule 56 of the Federal Rules of Civil Procedure states “[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, *at any time*, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.”² Although this language does not define the timeframe within which it is proper for the trial court to *rule* on such a motion for summary judgment, the words “at any time” clearly allow such a motion to be *brought* prior to class certification.

The evolution of Rule 23 supports providing discretion to the trial judge in determining the order of motions. A 1964 proposed amendment to Rule 23 suggested that, “As soon as practicable after the commencement *and before the decision on the merits* of an action brought as a class action, the court shall determine by order whether it is to be maintained as such.”³ The portion reading “...and before the decision on the merits...” was disapproved by a

substantial majority of the committee and the remaining language was approved.⁴ It is obvious that the drafters of Rule 23 wanted to eliminate from the Rule language requiring that class certification issues *precede* rulings on motions for summary judgment.

Recent changes to Rule 23 have again emphasized the rulemakers' intentions on this issue. Rule 23 was amended again in 2003. Prior to that amendment, it read, "*As soon as practicable* after commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." (emphasis added). After the amendment, Rule 23 reads, "When a person sues or is sued as a representative of a class, the court must – *at an early practicable time* – determine by order whether to certify the action as a class action."⁵ This change of language indicates an obvious effort to lessen any urgency associated with class certification.

The advisory committee has noted that the pre-amendment language of Rule 23 "neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision."⁶ The advisory committee went on to expressly recognize that "[t]he party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified."⁷ This language supports the many court holdings in which trial judges have used their discretionary power to decide a motion for summary judgment before reaching the issue of class certification. It recognizes a defendant's right to move for dismissal or summary judgment and obtain a judgment prior to a ruling on class certification.

Case Law:

The case law illustrates the existence of court discretion and the factors behind that discretion. In *Wright v. Schock*,⁸ plaintiffs brought suit alleging violations of federal and state

securities laws and common-law fraud in connection with their purchase of promissory notes. Plaintiffs sought to have a class certified, but the trial court ruled on two of the defendants' motions for summary judgment prior to ruling on a motion for class certification. The Ninth Circuit affirmed this exercise of discretion, pointing out that the history of Federal Rule of Civil Procedure 23 showed that its framers considered and rejected a provision requiring courts to make a ruling on class certification prior to making any rulings on the merits. "Under the proper circumstances – where it is more practicable to do so and where the parties will not suffer significant prejudice – the district court has discretion to rule on a motion for summary judgment before it decides the certification issue."⁹ The court cited cases from several other circuits holding similarly.¹⁰ The Ninth Circuit's language is strong and requires not just prejudice to the parties, but *significant* prejudice to the parties to remove from the judge's discretion the ability to rule on motions for summary judgment prior to reaching class certification.

Parties seeking to defer a ruling on summary judgment motions until after class certification commonly rely on the United States Supreme Court decision in *Eisen v. Carlisle & Jacquelin*.¹¹ The *Wright* decision expressly rejected the plaintiff's reliance on *Eisen*.¹² As the *Wright* court explained, *Eisen* merely prohibits "preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* *Eisen* does not address the separate question of the order in which motions for summary judgment and class certification must be addressed. "Neither Fed. R. Civ. P. 23 nor due process necessarily requires that the district court rule on class certification before granting or denying a motion for summary judgment."¹³

Similarly, the Sixth Circuit rejected reliance upon *Eisen* to delay summary judgment. In *Thompson v. County of Medina, Ohio*,¹⁴ the plaintiff sought certification of a class alleging that

conditions in a county jail violated the inmate's constitutional rights. The trial court granted summary judgment to the defendant before addressing the class certification issue. The plaintiff appealed, citing *Eisen*. The Sixth Circuit stated that *Eisen* and its progeny:

...merely stand for the proposition that when a district court is determining whether a class action may properly be maintained under Federal Rule of Civil Procedure 23, the relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action. These cases do not establish a broad rule that in all cases the determination of the propriety of a class action must precede any consideration of the merits.

Thompson, 29 F.3d at 241.

The Second Circuit has also agreed. In *Schweizer v. Trans Union Corp.*,¹⁵ the court stated that *Eisen v. Carlisle & Jacqueline* did not require that class certification be addressed first. “There is nothing in Rule 23 which precludes the court from examining the merits of the plaintiff's claims on a proper Rule 12 motion to dismiss or Rule 56 motion for summary judgment simply because such a motion precedes resolution of the issue of class certification.”¹⁶

The Eleventh Circuit has joined these other circuits. In *Kehoe v. Fidelity Federal Bank & Trust*,¹⁷ a motorist sued the defendant bank for allegedly purchasing his personal information from the Florida Department of Motor Vehicles without his permission. He then moved for class certification. The trial judge entered summary judgment for the defendant because the plaintiff had not shown any actual damages. While remanding the case on the issue of other potential statutory damages, the Eleventh Circuit expressly approved deciding a motion for summary judgment prior to reaching the class certification issue. The court stated, “Additionally, Kehoe argues that the district court erred in entering final summary judgment without considering the merits of the pending motion for class certification. However, it is ‘within the court’s discretion to consider the merits of the claims before their amenability to class certification.’”¹⁸

In determining whether such discretion should be exercised, some courts have set forth various factors to weigh. In *Thornton v. Mercantile Stores Company, Inc.*,¹⁹ three employees brought a Title VII suit alleging employment discrimination and sought to certify a class. The trial judge granted summary judgment before reaching the class certification issue. The court noted that “ruling on a dispositive motion prior to addressing class certification issues may be appropriate where there is sufficient doubt regarding the likelihood of success on the merits of plaintiff’s claims, where inefficiency would result, or where neither plaintiffs nor members of the putative class would be prejudiced.”²⁰ The court acknowledged that “[i]ndeed, the vast majority of courts have held that dispositive motions may be considered prior to ruling on a motion for class certification.”²¹ One key factor in the *Thornton* case was that the defendant willingly assumed the risk of stare decisis protection, rather than the protection of res judicata. The court did not feel that it was the place of the plaintiffs or the court to deter the defendant from assuming that risk.²²

When the defendant is the party filing the motion for summary judgment, and the defendant is willing to settle for limited protection, the majority of courts seem willing to let them do so. For instance, in a similarly decided case, *Smith v. Network Solutions, Inc.*,²³ a plaintiff desiring to register internet domain names brought suit against a domain name registrar claiming the registrar’s failure to remove expired names from its system resulted in a monopoly on the names. The court, faced with a motion for class certification from the plaintiff and a motion for summary judgment from the defendant, decided to resolve the summary judgment issue first, stating that at least in some cases it may be in the interest of judicial economy to resolve such a motion first.²⁴ The court elaborated by pointing out, just as the *Thornton* court had, that such a course of action might be appropriate where there is sufficient doubt regarding

likelihood of success on the merits of the plaintiff's claims, where inefficiency would result, or where neither plaintiffs nor members of the putative class would be prejudiced.²⁵ This court also noted that the defendant moving for summary judgment before class certification assumed the risk of stare decisis protection as opposed to res judicata protection.

Some courts appear to base their decisions entirely on whether the defendant is willing to assume the risk of a judgment that will not bind the class. In *Kim v. Commandant, Defense Language Institute, Foreign Language Center*,²⁶ the trial court granted the defendant's motion for summary judgment prior to a decision on class certification. The court specifically rejected the contention that it was improper for a court to rule on the merits of the case prior to ruling on class certification. "Where the defendant assumes the risk that summary judgment in his favor will have only stare decisis effect on the members of the putative class, it is within the discretion of the district court to rule on the summary judgment motion first."²⁷ The court found it particularly appropriate for the trial court to rule on the motion for summary judgment where early resolution of that issue seemed likely to protect both the parties and the court from needless and costly further litigation.²⁸

The Seventh Circuit appears to be the least supportive of deciding motions for summary judgment prior to addressing class certification, but even that Circuit has done so under certain circumstances. In *Cowen v. Bank United of Texas, FSB*,²⁹ borrowers brought suit alleging that a courier fee was a finance charge that was not disclosed by the lender in violation of the Truth-in-Lending Act. They attempted to certify a class and the defendant filed a motion for summary judgment. The trial court granted the motion without addressing the class certification issue. The Seventh Circuit affirmed, referring to the modified language of Rule 23(c). "It is true that Rule 23(c)(1) of the civil rules requires certification as soon as practicable, which will usually be

before the case is ripe for summary judgment” but “‘usually’ is not ‘always,’ and ‘practicable’ allows for wiggle room.”³⁰

There is a minority of cases to the contrary. For example, in *Adair v. Johnston*,³¹ a former employee brought fraud claims against her former employer claiming she was wrongfully denied retirement benefits. The court stated that “[g]enerally speaking, courts should address motions for class certification before ruling on dispositive motions.”³² The court then elected to resolve the class certification issue before addressing the defendant’s motion for summary judgment. Unfortunately, the court did not elaborate further on any of the factors affecting its decision. Although the *Adair* case comes to a different conclusion with regard to which issue should be decided first under the circumstances of that particular case, its language is likely overbroad, laying down a *general* rule and not discussing the factors to be considered.

The weight of authority shifts if the question is whether summary judgment should be granted after class certification, but before notice to the class. In *Schwarzschild v. Tse*,³³ a group of investors brought suit alleging violations of the Securities and Exchange Act and California Corporations Code. The plaintiffs moved for class certification and the trial judge granted certification. The judge then granted summary judgment to the defendants before issuing an order approving class notice. This court stated that “district courts generally do not grant summary judgment on the merits of a class action until the class has been properly certified and notified.”³⁴ The court went on to say this is because the “purpose of Rule 23(c)(2) is to ensure that the plaintiff class receives notice of the action well *before* the merits of the case are adjudicated.”³⁵ However, the court went on to affirm the grant of summary judgment, stating that summary judgment may be granted before class certification or before class notice if the

defendant is willing to waive its right to have notice circulated to the class under Rule 23(c)(2).

³⁶ In such a case, the summary judgment may only be binding upon the named plaintiffs.

Secondary Sources

The Manual for Complex Litigation likewise states “[t]he court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues before deciding on certification; however, such rulings bind only the named parties.”³⁷ The text goes on to say “[m]ost courts agree, and Rule 23(c)(1)(A) reflects, that such precertification rulings on threshold dispositive motions are proper, and one study found a substantial rate of precertification rulings on motions to dismiss or for summary judgment.” The cited study found that the rate of precertification rulings on motions to dismiss was about 80% in three of the four districts studied and about 60% in the fourth.³⁸ It further stated that “[a]pproximately three out of ten cases in each district were terminated as a direct result of a ruling on a motion to dismiss or for summary judgment.”³⁹ The study found that parties often filed either motions to dismiss or summary judgment, and judges generally ruled on those motions in a timely fashion, often dismissing a case in whole or in part. “These rulings on the merits often preceded rulings on class certification...”⁴⁰ The study noted that federal courts of appeal had taken divergent views on whether ruling on a motion to dismiss or motion for summary judgment may precede a ruling on class certification, with the Third and Ninth Circuits approving the practice and the Seventh generally disapproving the practice. As discussed *supra*, the Eleventh, Second and Sixth Circuits appear to have joined the majority in recognizing the court’s discretion to rule on motions for summary judgment prior to reaching the issue of class certification.

Other treatises recognize the right of a trial judge to settle summary judgment matters prior to addressing class certification issues as well. Wright & Miller's Federal Practice and Procedure states a "[d]efendant also may move for summary judgment prior to the class certification." 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §1798 (3d ed. 2005); *see also* HERBERT B. NEWBERG AND ALBA CONTE, NEWBERG ON CLASS ACTIONS § 7:3 (4th ed. 2002) (discussing moving for dismissal or summary judgment prior to class determination); 32B AM. JUR. 2D, *Federal Courts* § 2042 (2005) (recognizing the "one way intervention" risk to defendant).

CONCLUSION

Substantial caselaw and secondary authority allow the trial judge discretion in determining whether to consider summary judgment before class certification. While no one rule can fit every case, courts are generally open to hearing such summary judgment motions if the defendants are willing to take the "one-way" intervention risk. The rulemakers clearly intended summary judgment to be available, and the most recent changes to Rule 23 have emphasized this intent. Hearing such summary judgment motions can lead to judicial economy and can save the litigants substantial time and money.

Class certification is not a neutral decision – it creates substantial and, if the case is meritless, unfair pressure on the defendant to settle. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996)("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. . . . These settlements have been referred to as judicial blackmail.");

In re General Motors Corp. Pick-up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 784-85 (3d. Cir. 1995)("Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth."); HERBERT B. NEWBERG AND ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 11.14 (3rd ed. 1992) ("In general, after a class is certified, particularly in a class action for damages, there is a great likelihood of settlement before trial because of the increased assessment by defense counsel of exposure to substantial liability."); *id.* at § 11.11 ("the bargaining power of a class representative for purposes of settlement is less before a class ruling than after a class certification"). Because a class certification can exert extreme pressure on a defendant to settle a case – even one without substantial merits – hearing an early summary judgment motion can result in a more just result.

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² FED. R. CIV. P. 56(b) (emphasis added).

³ COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 34 F.R.D. 325, 386 (1964) (emphasis added).

⁴ COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE, *Judicial Conference – Ninth Circuit* (Second Supplemental Report), 37 F.R.D. 499, 522 (1965).

⁵ FED. R. CIV. P. 23(c)(1) (emphasis added).

⁶ FED. R. CIV. P. 23 advisory committee's note (2003 amendments).

⁷ *Id.*

⁸ 742 F.2d 541 (9th Cir. 1984).

⁹ *Id.* at 543-44.

¹⁰ *See e.g., Project Release v. Prevost*, 722 F.2d 960, 963 & n.2 (2d Cir. 1983); *Pharo v. Smith*, 621 F.2d 656, 663-64 (5th Cir. 1980); *Vervaecke v. Chiles, Heider & Co.*, 578 F.2d 713 (8th Cir. 1978); and *Acker v. Provident Nat'l Bank*, 512 F.2d 729, 732 n.5 (3d Cir. 1975).

¹¹ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974).

¹² *See Wright*, 742 F.2d at 545.

¹³ *Id.*

¹⁴ 29 F.3d 238 (6th Cir. 1994).

¹⁵ 136 F.3d 233 (2d Cir. 1998).

¹⁶ *Schweizer*, 136 F.3d at 239 (quoting *Lorber v. Beebe*, 407 F. Supp. 279, 291 n.11 (S.D.N.Y. 1976)).

¹⁷ 421 F.3d 1209 (11th Cir. 2005),

¹⁸ *Id.* at 1211, n.1.

¹⁹ 13 F. Supp. 2d 1282 (M.D. Ala. 1998).

20 *Id.* at 1289 (internal citations omitted).
21 *Id.*
22 *See id.* at 1290.
23 135 F. Supp. 2d 1159 (N.D. Ala. 2001).
24 *See id.* at 1165.
25 *See id.*
26 772 F.2d 521 (9th Cir. 1985).
27 *Id.* at 524.
28 *See id.*
29 70 F.3d 937 (7th Cir. 1995).
30 *Id.* at 941; *see also* *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466 (7th Cir. 1997) (same result with
31 similar language).
32 221 F.R.D. 573 (M.D. Ala. 2004).
33 *Id.* at 576.
34 69 F.3d 293 (9th Cir. 1995).
35 *Id.* at 295.
36 *Id.*
37 *See id.* at 297.
38 MANUAL FOR COMPLEX LITIGATION § 21.133 (4th ed. 2005).
See Thomas E. Willging, Loral L. Hooper & Robert J. Niemic, EMPIRICAL STUDY OF CLASS ACTIONS IN
FOUR FEDERAL DISTRICT COURTS: FINAL REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 29-32, at
30 (Federal Judicial Center 1996).
39 *Id.* at 33.
40 *Id.* at 8.