Using Parallel Government Litigation as a Defense

By Charles N. Insler

Arguments for Defeating Private Class Actions on the Heels of Agency or Attorney General Actions

On October 6, 2015, New York Attorney General Eric Schneiderman announced an inquiry into DraftKings and FanDuel, two of the largest daily fantasy sports companies. The following month, Attorney General Schneiderman sued each company in New York state court and sought a preliminary injunction that would force the companies to stop accepting wagers from New York, arguing that the companies were engaged in illegal gambling (rather than games of skill). An amended complaint now seeks the return of those wagers placed by New York residents.

Other states have launched investigations and lawsuits into FanDuel and DraftKings. Following these state actions, private litigants began to file their own lawsuits, starting a wave of class action litigation throughout the country. *See, e.g., Spiegel v. Fanduel, Inc.*, No. CV 15-08142-BRO, 2015 WL 6957993, at *1 (C.D. Cal. Nov. 10, 2015) (noting that plaintiffs seek to represent all individuals who deposited money into a DraftKings or FanDuel account before October 6, 2015, and all individuals who played daily fantasy sports on defendants' websites during the class period); *Carey v. DraftKings, Inc.*, No. 4:15-CV-1616 CDP (E.D. Mo. Oct. 23, 2015). As luck may have it, the state actions may offer FanDuel and DraftKings a chance for defeating future

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class certification motions. Parallel government proceedings, such as agency and attorney general actions, may present compelling reasons for defeating the superiority requirement found in Rule 23(b)(3).

A Class Action Is Not a Superior Method of Adjudication When There Has Been a Parallel Government Action

Before certifying a case as a class action, the moving party must demonstrate that a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In light of an attorney general's prior suit, particularly when there has been a settlement, such as an Assurance of Voluntary Compliance ("AVC") and/or a refund offer, the class action device may not represent a superior method of adjudication. *See Kamm v. California City Dev. Co.*, 509 F.2d 205, 211 (9th Cir. 1975) ("Since the purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of settling the controversy, it seems consistent with that purpose to determine whether any administrative methods of settling the dispute exist."); *Ostrof v. State Farm Mut. Auto Ins. Co.*, 200 F.R.D. 521, 532 (D. Md. 2001) ("[A]llowing for pursuit of claims in the administrative forum is often deemed superior to aggregating all the claims into a class action suit."); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 660 (Cal. Ct. App. 1993) ("The utility of class treatment declines when other effective and perhaps more efficient means exist to resolve the problem."). In these situations, defense counsel can persuasively argue that certifying a class action will subvert the attorney general's action, create disincentives for parties to promptly resolve government actions, and encourage spurious and duplicative lawsuits that serve only to enrich class counsel.

Following entry of an AVC, a company will often have to cease or modify certain practices, pay a fine, and/or make restitution. When the state collects a fine and overseas a refund procedure, a private lawsuit serves no useful purpose and does not assist the class members. "[W]here the [s]tate agreement is providing monetary relief to the [proposed class members] anyway, a class action seeking those same monies is unnecessary." *Brown v. Blue Cross and Blue Shield of Mich., Inc.*, 167 F.R.D. 40, 45 n.18 (E.D. Mich. 1996) (denying class certification based on the defendants' agreement with the Michigan Attorney General).

The *Brown* decision is not the only case to reach this conclusion. Courts around the country have found government actions to be superior to related class actions. *Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-CV-00018, 2006 WL 3359482, at *3 (N.D. Ohio Nov. 17, 2006) (collecting cases); *see also Kamm*, 509 F.2d at 211 (holding that the "class action was not a superior method of resolving the controversy" in light of actions by the California Attorney General and the Real Estate Commissioner of California); *Ostrof*, 200 F.R.D. at 532 ("adding a class action overlay in federal court makes little sense" particularly "where a remedy is available from an administrative agency which has expertise in a relevant field"); *Com. of Pa. v. Budget Fuel Co., Inc.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988) ("[W]here a state attorney general and a private class representative seek to represent the same class members, the *parens patriae* action is superior to that of a private class action."); *Wechsler v. Se. Properties, Inc.*, 63 F.R.D. 13, 16 (S.D.N.Y. 1972) ("The Attorney General has now concluded his proceeding. I find it to have been adequate to the purpose stated, and dismiss this [proposed class] action.").

> If there were to be dual proceedings, a defendant could be better served by waiting and consolidating related actions, rather than litigating and negotiating each action piecemeal.

Kamm's Seven Factors Speak to the Superiority Requirement

The *Kamm* court highlighted seven reasons for reaching its conclusion that the class action was not a superior method of resolving the controversy:

> (1) A class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level. (2) The class action would [be complex]. (3) Significant relief had been realized in the state action through (a) restitution to many members of the class; (b) [Defendants'] agreement to establish a program to settle future disputes; (c) a permanent injunction; and (d) a letter of credit in the amount of approximately $5,000,000 to guarantee funds for off-site improvements. (4) The state court retained continuing jurisdiction. (5) No member of the class is barred from initiating a suit on his own behalf. (6) Although the class action aspects of the case have been dismissed, appellants' action is still viable. (7) Defending a class action would prove costly to the defendants and duplicate in part the work expended over a considerable period of time in the state action.

509 F.2d at 212. Several courts have cited the *Kamm* factors in denying class certification on superiority grounds. *See, e.g., Imber-Gluck v. Google Inc.*, No. 5:14-CV-01070-RMW, 2015 WL 1522076, at *3 (N.D. Cal. Apr. 3, 2015) (applying the *Kamm* factors and finding certification unwarranted on superiority grounds); *Thornton*, 2006 WL 3359482, at *4 (same).

When appropriate, a defendant should analyze these seven factors, highlighting that a private class action will require a substantial investment of judicial time and "largely duplicate and [even] negate the work on the state level." *See Kamm*, 509 F.2d at 212. A defendant should also note any significant relief that has been realized in the state action. *See id.* An AVC will often leave open the possibility of individual suits by private parties, another important fact to mention under *Kamm*. *See id.* Finally, a defendant should emphasize that a class action will impose significant costs on their business while doing no more than duplicating the work expended in the state action. *See id.*

Three Additional Considerations Speak to the Superiority Requirement

Looking beyond the seven *Kamm* factors, there are several additional reasons that an attorney general's action is superior to that of a private class action. First, the attorney general or government agency may have superior knowledge of the subject matter. *See Ostrof*, 200 F.R.D. at 532 (noting that an administrative agency may have expertise in the relevant field, such as the insurance industry). Second, the attorney general will be able to prosecute the case with greater efficiency and expediency than private counsel. *See Budget Fuel Co.*, 122 F.R.D. at 186 (noting that "another set of counsel to represent the consumer class would only serve to delay the swift resolution of this matter and cause unnecessary costs to the class"). Third, and perhaps most importantly, a duplicative private class action serves only to enrich the lawyers. "Indeed, potential class members will often recover more [in an action brought by the state] than they would in a private action when costs and attorneys' fees are factored in." *Thornton*, 2006 WL 3359482, at *3.

Defense counsel should highlight this inefficiency, noting the law's entreaty that "monies recovered on behalf of the consumer class should be used to pay consumer claims and not additional plaintiffs' attorneys' fees and costs." *Budget Fuel Co.*, 122 F.R.D. at 186. Accordingly, when only the attorneys are likely to benefit from the class action procedure, the class action device does not offer a superior method of adjudication. *See Brown*, 167 F.R.D. at 45 ("[A]n action should not be permitted to proceed as a class action, despite the desirability of providing small claimants with a forum in which to seek redress, when it is unlikely to benefit anyone but the lawyers who bring it."); *see also Patillo v. Schlesinger*, 625 F.2d 262, 265 (9th Cir. 1980) (affirming the denial of class certification after noting that the "principal beneficiaries of the class action would be plaintiffs' attorneys"); *Ballard v. Branch Banking and Trust Co.*, 284 F.R.D. 9, 16 (D.D.C. 2012) (denying the motion for class certification where the "potential class recovery will be de minimus, especially in comparison to the petition for fees and costs....").

Identical Claims and Identical Relief Are Not Required

A plaintiff will likely argue that its lawsuit includes claims and relief that were not pursued by, or available to, the attorney general (such as statutory treble damages or punitive damages). These arguments can be easily refuted. There is no requirement that the government's action and the private class action present "identical relief via identical claims against identical defendants." *Farno v. Ansure Mortuaries of Indiana, LLC*, 953 N.E.2d 1253, 1275 (Ind. Ct. App. 2011) (affirming trial court's denial of certification on superiority grounds). Small differences between the respective lawsuits do not make the "state action so different a controversy that it should not [be] considered... in determining whether the class action [is] superior to alternative methods." *Kamm*, 509 F.2d at 213.

> Where a *class-wide* refund offer is in place, a company should highlight that the class action procedure proposes to graft needless and wasteful litigation onto a refund procedure that has already been expressly approved by a government entity.

Likewise, additional causes of action and other incidental benefits not available to an attorney general, may not "justify continuing this litigation." *See Wechsler*, 63 F.R.D. at 17. This includes the possibility of recovering treble damages or punitive damages. *Imber-Gluck*, 2015 WL 1522076, at *3 ("The possibility of recovering punitive damages through a class action is not sufficient to overcome the comprehensive relief already provided in the FTC settlement.").

A Defendant's Complete, Class-Wide Refund Offer Makes Any Class Action a Waste of Judicial Resources

The superiority standard of subparagraph (b)(3) "reflects a broad policy of economy in the use of society's difference-settling machinery." *Berley v. Dreyfus & Co.*, 43 F.R.D. 397, 398–99 (S.D.N.Y. 1967). As a result, a court should not create a class of interested litigants where one "is not already in existence." *Id.* To create a class action, with complicated, protracted litigation in the place of a "simple, amicable settlement procedure" serves no useful purpose. *Id.* at 399 (denying motion for class certification where the defendant had offered a complete refund to its customers).

Indeed, it "makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wa. 2003) (denying motion for class certification where the defendant had a refund and product-replacement program in place for individuals still in possession of the products at issue); *see also Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012) (denying motion for class certification and noting that the "wisdom of Plaintiffs' decision to forgo the Recall program is questionable...."). Where a *class-wide* refund offer is in place, a company should highlight that the class action procedure proposes to graft needless and wasteful litigation onto a refund procedure that has already been expressly approved by a government entity. A refund offer or offer of judgment to the *named plaintiff only* does not implicate the superiority requirement, for that offer, if rejected, has no legal effect. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016).

With a class-wide refund offer in place, the party who stands to gain the most from the class action is, predictably, the lawyers. Where available refunds afford class members a remedy comparable to one they could hope to achieve in court, "a class action would merely divert a substantial percentage of the refunds' aggregate value to the class lawyers." *Pagan*, 287 F.R.D. at 151. This is an inefficient use of judicial resources. After all, any "rational

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to support the court's bias in favor of FDA approval and action. The bottom line is that manufacturers of prescription drugs have another court saying that on certain decisions, the judgment of the FDA will not be second guessed by the judicial system.

Third, to the extent that plaintiffs attempt to circumvent genuine design defect claims by making a claim similar to the one made in *Yates*—that the formulation of the prescription drug at issue should contain less of the active ingredient—that door should be closed. As plaintiffs run into increasing headwinds on failure to warn claims, an easy secondary argument becomes that the prescription drug was defectively designed because it had too much active ingredient in it. The plaintiff's argument would be, in essence, that the injury occurred in this case because the drug was too strong. The *Yates* decision meets that on its head and rejects the argument wholesale.

The *Yates* decision also reflects the benefit of vigorously asserting a legal defense. Even when the legal authority supporting preemption in the brand-name prescription drug context appeared to be doomed, careful and continued prosecution of the argument eventually yielded good results. Manufacturing defendants should continue to assert and press legal defenses like preemption.

Conclusion

Substantial jurisprudence from the United States Supreme Court has developed the defense of federal preemption in the context of pharmaceutical products over the last several years. Although the actual holding in *Wyeth* did not support the broad application of preemption for brand-name prescription drugs, the subsequent decisions from the Court have provided sound support for the preemption defense in the context of generic prescription drugs. Now, *Yates* has reinjected the preemption defense into litigation alleging design defect in the manufacture of brand-name prescription drugs. The parameters of this new defense have not yet been defined, but its existence does provide encouragement to brand-name manufacturers defending claims against their products and creative uses of the *Yates* holding may expand the scope of that defense.

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class member[] would not choose to litigate a multiyear class action just to procure refunds that are readily available here and now." *Id.*

Certifying a Proposed Class May Create Disincentives for Prompt Settlement of Government Actions

The law and public policy favor the settlement of disputes. *Hilton v. Davita, Inc.*, 302 S.W.3d 157, 159 (Mo. Ct. App. 2009). This is particularly true with respect to class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. *Brown*, 167 F.R.D. at 44. But if every public action was followed by a copycat private action, there may be little incentive for defendants to work to promptly resolve these matters. If there were to be dual proceedings, a defendant could be better served by waiting and consolidating related actions, rather than litigating and negotiating each action piecemeal. *See Thornton*, 2006 WL 3359482, at *3 ("[I]f courts consistently allow parallel or subsequent class actions in spite of state action, the state's ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it.").

Conclusion

While these arguments have won the day in several class certification motions, there is no guarantee that they will prove effective in every case. There are certainly reported cases that have come down in favor of class certification. But, at a minimum, presenting these arguments may increase your odds. And whether it's your skill in setting up a fantasy lineup or setting up the certification arguments in a brief, we could all use better odds.