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## **An Updated Approach To Evaluating Class Certification Motions Based On Right Of Publicity Claims**

Several courts have taken significant steps toward protecting defendants from meritless nationwide class actions involving rights of publicity claims by making clear that such actions are not certifiable, attorneys Yehudah L. Buchweitz, Jessie B. Mishkin and Cameron M. Bonk say. This trend should encourage defendants to use the latest holdings to pursue dismissal at the pleadings stages in order to protect their rights, the authors say.



By YEHUDAH L. BUCHWEITZ, JESSIE B. MISHKIN AND CAMERON M. BONK

In a proliferation of recent putative class action cases

*Yehudah L. Buchweitz is a partner at the law firm of Weil, Gotshal & Manges LLP in its New York office, where he concentrates his practice in the areas of complex commercial litigation, class actions, and intellectual property and media litigation.*

*Jessie B. Mishkin is a counsel at the law firm of Weil, Gotshal & Manges LLP in its New York office, and concentrates her practice in the areas of complex commercial litigation, class actions, and intellectual property and media litigation.*

*Cameron M. Bonk is an associate at the law firm of Weil, Gotshal & Manges LLP in its Miami office, where she concentrates her practice in complex commercial litigation, class actions, and antitrust litigation.*

alleging claims for violations of state statutory and common law rights of publicity, plaintiffs' counsel have sought to bring broad, nationwide classes. A variety of defendants have been drawn in to such actions, and media businesses that are by definition regularly engaged with the display or use of persons' likenesses, including broadcasters, music licensors, and internet and other publishers, are particularly susceptible to these kinds of class actions. These putative classes can be massive in size, extremely expensive to litigate, and can present high monetary exposure based on some states' statutory damages laws. Even the threat of certification of a right of publicity class of hundreds of thousands or millions of individuals can (and does) coerce settlements irrespective of whether the lawsuit is meritorious.

Yet, inevitably these kinds of actions are unsuited for class certification. Most fundamentally, the actions are unsuited for class treatment because the right of publicity laws of the 50 states materially differ, but a whole host of individual issues arising from affirmative defenses and injury requirements are likely to plague

right of publicity putative classes and overwhelm the common ones. Courts until now have been reluctant to strike class allegations early, outside of certain discrete categories of lawsuits such as product liability actions. However, the recent trend in case law demonstrates that courts should be increasingly willing to fold nationwide right of publicity class allegations into the rubric of putative class actions that are ripe for early dismissal.

**The Right Of Publicity Varies Materially Among The States** The right of publicity, adopted out of the right of privacy originating with Samuel Warren and Louis Brandeis, provides individuals with the means for controlling the economic value of their public likeness, via a cause of action for the unauthorized commercial use of a person's name, image, and likeness ("NIL"). See Warren, Samuel D., and Louis D. Brandeis. "The right to privacy." *Harvard Law Review* (1890). A right of publicity was subsequently recognized as a cause of action in state common law and statutes, with a more copious body of law developing in states like New York and California, with celebrities and their estates at the forefront of monetizing their public personas, and spreading to other states and to more definitively encompass non-celebrity plaintiffs. That right then had to be carefully balanced by the courts against the right to freedom of expression and other intellectual property rights.

Because the right of publicity arose on a state by state basis, the required elements – as well as the numerous affirmative defenses, exemptions, and remedies – differ significantly from state to state. And, that is just the states that even recognize a cause of action for the misappropriation of someone's publicity. While class action plaintiffs are likely to seek to certify a nationwide class under the laws of just one state (often the states with more favorable statutory damages, like California or Illinois) courts that have carefully analyzed choice of law rules will generally find that the right of publicity law of one state cannot apply to non-resident putative class members, putting the conflicting laws of many states at issue. Once multiple states are in play, it becomes clear that right of publicity laws present "a crazy quilt of different responses at different times to different demands on the legislatures." J. Thomas McCarthy, *The Rights of Publicity and Privacy* 2d § 6:6 (2014). Thus, "[i]t is difficult to group the statutes into any sort of coherent 'types' or subspecies." *Id.* The significant variations in state right of publicity laws include:

- North Dakota and Wyoming do not recognize a right of publicity – in fact, the Wyoming legislature expressly considered and declined to adopt a right of publicity statute. See *Wyoming Legislature*, "Senate Joint Resolution 1 Digest," (<http://legisweb.state.wy.us/2015/Digest/SJ0001.pdf>) (last accessed May 3, 2017) (rejecting S.J. No. 0001 "Right of privacy-constitutional amendment," with 13 ayes – 17 nays).

- The scope of unlawful use varies. For example, Tennessee limits liability solely to uses for advertising and Illinois only bars use of a photo "to promote or entice the purchase of some other product." See Tenn. Code § 47-25-1105(a); *Thompson v. Getty Images (US), Inc.*, 2013 BL 175241 (N.D. Ill. July 1, 2013) ("the [Illinois Right of Publicity Act] prohibits the use of an

individual's image to promote or entice the purchase of some other product than the photograph itself").

- Statutes of limitation vary from one to six years. See *Alberghetti v. Corbis Corp.*, 476 F. App'x 154, 155 (9th Cir. 2012) (applying California's two-year statute of limitations for right of publicity suits); *Rivell v. Private Health Care Sys., Inc.*, 2009 BL 399131 (S.D. Ga. Aug. 24, 2009) (describing statutes of limitations for invasion of privacy torts in certain states as ranging from one to five years); Minn. Stat. § 541.05 (six-year statute of limitations for torts involving damages to personal property).

- Certain states do not allow (or limit) statutory or punitive damages, or vary in the amounts allowed. See *Rivell*, 2009 BL 399131 (finding measure of damages varied among 44 states, precluding class certification).

- Almost all states require a lack of consent as an element of the right of publicity claims, but some states permit implied consent, others require written consent, and what constitutes valid consent varies state by state. Compare *Jones v. Corbis Corp.*, 815 F. Supp.2d 1108, 1113 (C.D. Cal. 2011) ("Consent to use a name or likeness need not be express or in writing, but it may be implied from the consenting party's conduct and the circumstances of the case."), *aff'd*, 489 F. App'x. 155 (9th Cir. 2012)), with Ind. Code Ann. § 32-36-1-8(a) (requiring written consent for use of an aspect of a person's right of publicity for a commercial purpose).

- Some states exempt photographers displaying their work, and others exempt newsworthy events, public affairs, and sports broadcasts or accounts. See, e.g., 765 Ill. Comp. Stat. Ann. 1075/35(b)(5) (photographer exemption); Ind. Code Ann. § 32-36-1-1(c)(1)(B) (newsworthiness exemption); Haw. Rev. Stat. § 482P-7(a) (public interest exemption); Cal. Civ. Code. § 3344(d) (sports broadcast or account exemption).

The importance of the specific state laws at issue was demonstrated in *Marshall v. ESPN, Inc.*, 111 F. Supp. 3d 815 (M.D. Tenn. 2015), in which plaintiffs, current and former collegiate student-athletes who played National Collegiate Athletic Association (NCAA) Division I college football or basketball, alleged that a host of college athletic conferences, TV networks, and licensors profited from the broadcast and use of those student-athletes' NILs without permission in TV broadcasts. Plaintiffs' claims included causes of action for violations of Tennessee's right of publicity statute, the TPRPA. Upon the defendants' Rule 12(b)(6) motion, the U.S. District Court for the Middle District of Tennessee dismissed the right of publicity claims, finding that neither the Tennessee TPRPA statute nor common law confers a right of publicity in sports broadcasts. *Id.* at 825-828. The dismissal of the Tennessee right of publicity claims was also fatal to plaintiffs' antitrust claims, even though the proposed class included student-athletes from every state, because it was not the court's duty to canvass the law of every jurisdiction to determine whether plaintiffs stated a viable claim. *Id.* at 835, n.11. The plaintiffs' choice of law not only doomed their

claims at the earliest stages, but also demonstrates the impossibility of certifying a manageable and cohesive nationwide class alleging publicity violations, as any putative class member from Tennessee may have a much narrower scope of rights than a putative class member from a state that has not recognized as many specific exemptions. The Sixth Circuit unanimously affirmed the District Court's decision in *Marshall v. ESPN*, reasoning that plaintiffs' argument that "college players have a 'right of publicity' in their names and images as they might appear in television broadcasts" was "a legal fantasy" due to the Tennessee statute expressly allowing the use of a player's name or likeness in connection with any "sports broadcast." *Marshall v. ESPN*, 668 F. App'x 155, 157 (6th Cir. 2016).

Thus, there are numerous material differences that preclude the application of one state's right of publicity laws to a nationwide class, and in a class action governed by multiple states' laws, variances overwhelm common issues and render a class unmanageable. See, e.g., *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (finding "no manageable trial plan adequate to deal with individualized issues and variances" in 48 states' laws) *amended*, 273 F.3d 1266 (9th Cir. 2001). The differences also suggest the host of other independent, predominating individual issues inherent in right of publicity cases, even if a court were to apply the law of a single state to all claims – namely, whether each putative class member expressly or impliedly consented to each use; whether each image is protected by the First Amendment, statutory exemptions, and/or other affirmative defenses; and whether each putative class member was injured by each challenged use.

**Positive Developments For Defendants Vulnerable To Right of Publicity Class Action Lawsuits** A few years ago, several media defendants chose to settle right of publicity class actions rather than engage in costly discovery and roll the dice with certification of damages classes consisting of potentially hundreds of thousands, if not millions of class members. See, e.g., *Fraley v. Batman*, 638 F. App'x 594 (9th Cir. 2016); *Keller v. Electronic Arts, Inc.*, 2015 BL 276232 (N.D. Cal. Aug. 18, 2015). But in a recent trend, courts have been increasingly vocal about the many problems with nationwide right of publicity class actions, precluding certification.

In *Lightbourne v. Printroom, Inc.*, 307 F.R.D. 593 (C.D. Cal. 2015), the U.S. District Court for the Central District of California denied plaintiff's motion for certification of a nationwide class of potentially over a million members and seeking hundreds of millions of dollars in minimum statutory damages under California's right of publicity statute and common law, in part based on the overwhelming individual issues presented by the fact that the conflicting laws of multiple states would apply to putative class members. The plaintiff in this action had alleged that defendants had used student-athletes' NILs without their consent, in connection with providing services to NCAA schools' sale of photos of student-athletes through the schools' official athletic websites. The court analyzed the significant variances in the 50 states' right of publicity laws, including the fact that such a right of action does not exist in every state; that some states provide liability for all commercial uses of a NIL, while others impose liability only for uses in an advertisement; the different statutes of limi-

tations; and the different measures of damages available. *Id.* at 598–99. The court then found that the injury in a right of publicity case is to an intellectual property right, and, at least in California, the intellectual property owner's resident state has an interest in applying its own law to such an injury, while California's interests in applying its law to out of state plaintiffs' claims was at best attenuated. *Id.* at 599–600. The need to apply 50 states' right of publicity laws weighed against a finding of predominance, as each state's exclusions and remedies would require individualized inquiries. *Id.* at 602. The court further found that Rule 23(b)(3)'s superiority requirement was not met because determining "liability would require hundreds of mini-trials into the issues of consent and damages" and because California's right of publicity statute contains a mandatory fee shifting provision, leaving "little reason why a class action is more efficient than individual actions." *Id.* at 603 (quoting *Alberghetti v. Corbis Corp.*, 263 F.R.D. 571, 582 (C.D. Cal. 2010)). For these and other reasons, the court held that prosecuting the action on a classwide basis would necessitate "myriad individual inquiries" of each putative class member and each challenged use, and would render the class unmanageable. *Id.* at 603.

Similarly, in *Alberghetti v. Corbis Corp.*, the U.S. District Court for the Central District of California denied certification (and the Ninth Circuit affirmed) in a case where plaintiffs alleged violation of the right of publicity under California law based on photos being licensed through the defendant's online archives; the court found that the California-based class representative could not adequately represent class members bringing claims under the laws of the other 49 states. 263 F.R.D. 571, 581 (C.D. Cal. 2010), *aff'd*, 476 F. App'x 154 (9th Cir. 2012). In *Dryer v. Nat'l Football League*, the U.S. District Court for the District of Minnesota held, in the context of approving a class settlement, that certification would be "highly problematic" because multiple states' laws would likely apply to right of publicity claims, there was conflict among such laws, and "Minnesota has very little governmental interest in vindicating the publicity rights of non-residents or Plaintiffs who did not play football for a Minnesota team." 2013 BL 303903 (D. Minn. Nov. 1, 2013), *aff'd*, 787 F.3d 502 (8th Cir. 2015). With respect to potential individualized issues, the court questioned whether "a player with a distinctive hair-do, such as current Pittsburgh Steeler Troy Polamalu, deserved more compensation because his image is readily identifiable" and found that magnifying that type of "individual issue[] times 53 players on each of 32 teams' active rosters each year" demonstrated that "determining damages on either an individual or class-wide basis would be nearly impossible." *Id.* Likewise, in *Rivell v. Private Health Care Sys., Inc.*, the U.S. District Court for the Southern District of Georgia denied certification of a putative nationwide right of publicity class brought by the Medical Association of Georgia on behalf of all its members, in part because variations in state publicity laws – including the variations in statutes of limitations, damages, and elements of consent – defeated predominance and rendered even subclasses unmanageable. 2009 BL 399131 (S.D. Ga. Aug. 24, 2009).

Indeed, while several right of publicity class actions have settled prior to certification, it appears that no nationwide right of publicity class actions have been certified as of the time this article was written.

**Courts Should Resolve Uncertainty Regarding Striking Class Allegations Early** Against this backdrop, defendants – and courts – have a basis for piercing the pleadings and truly evaluating whether the class certification requirements have been met at the earliest stages, rather than merely accepting the class allegations as true and delaying the inevitable denial of certification following lengthy and expensive discovery. But while Rule 23 of the Federal Rules of Civil Procedure was adopted nearly 80 years ago, basic questions about the timing of when to certify – or dismiss – putative plaintiff classes remain unsettled.

A number of courts, however, have been willing to construe class allegations as ripe for motions to strike under Federal Rule of Civil Procedure Rules 12(b) or 12(f). While the propriety of a class action cannot always be determined on this procedural posture, there are circumstances where a complaint cannot set forth minimum facts required to establish the existence of a certifiable class, and the court may therefore strike or dismiss class allegations before the close of class discovery. *See, e.g., Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 & n.6 (9th Cir. 2009); *Lindsay Transmission, LLC v. Office Depot, Inc.*, 2013 BL 19223 (E.D. Mo. Jan. 24, 2013) (striking nationwide class allegations and finding that “[w]here it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings”); *Buonomo v. Optimum Outcomes, Inc.*, 301 F.R.D. 292, 295 (N.D. Ill. 2014) (striking in part plaintiff’s TCPA claims and holding that where the complaint makes clear that class certification is inappropriate, “a court may determine that class certification is inappropriate before the parties conduct class discovery”).

Courts have readily applied this deterrent to baseless class actions to certain categories of claims where individual issues consistently predominate over questions of law or fact common to putative class members, and similar class claims are “rarely . . . certified.” *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009). For example, the U.S. District Court for the Northern District of California in *Sanders v. Apple Inc.*, struck class allegations arising out of fraud and warranty claims, after recognizing that courts “routinely” hold that such claims are “difficult to maintain on a nationwide basis.” *Id.* Similarly, mass tort and product liability claims, which generally require fact intensive inquiries unique to each plaintiff and are therefore rarely sustainable as class actions, are also regularly stricken at the pleadings stage. *See, e.g., In re Yasmin and Yaz (Drospirenone) Mktg.*, 275 F.R.D. 270 (S.D. Ill. 2011); *Piemonte v. Viking Range, LLC*, 2015 BL 32725 (D.N.J. Feb. 9, 2015).

Indeed, in the right of publicity context, a California state appellate court has already recognized that class allegations should be stricken in cases alleging right of publicity violations– in that case, for the use of the names of millions of individuals in a magazine sweepstakes advertising campaign – noting the “unjustified and intolerable burden upon the court and the parties” from the individual questions related to each plaintiff, and the fact that the court would have to examine the “mental and subjective state” of each of the millions of plaintiffs, since in each case such individual appraisal is of the essence of the claim for damages.” *Stilson v.*

*Reader’s Digest Assn., Inc.*, 28 Cal. App. 3d 270 (Ct. App. 1972).

In short, while most courts have to date been reluctant to dismiss right of publicity class allegations prior to class discovery, it is clear that for categories of actions where similar class claims have rarely or never been certified, the court can and should grant an early motion to strike, to avoid wasting time, effort, and resources. Nationwide right of publicity class actions are a textbook example of a suits where class allegations can be stricken on the pleadings, because the allegations present the same problem, and necessitate the same result, as the cases that have addressed similar allegations and determined such claims make class treatment improper. And, because some states’ right of publicity statutes provide for an award of attorneys’ fees to a prevailing party, there is also little reason why a class action is more efficient than individual actions for many plaintiffs. The fundamental and fixed reasons such classes cannot be certified – including, but not limited to, the 50-state variation in the relevant law – put such class actions squarely in the category of claims that courts should strike early and often.

**Special Motions to Strike Also Provide a Vehicle to Dismiss Right of Publicity Class Actions** In right of publicity class action suits brought under certain states’ laws, media defendants also have the option of using state anti-SLAPP statutes to dismiss class claims before the costly discovery process begins. The California anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, was enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through litigation, and the Ninth Circuit recently affirmed the dismissal of a right of publicity suit on these grounds in *Maloney v. T3Media, Inc.*, 853 F.3d 1004 (9th Cir. April 5, 2017). In *Maloney v. T3Media*, Plaintiffs brought a putative class action alleging claims under California’s statutory and common law rights of publicity and Unfair Competition Law based on T3Media’s storage, hosting, and licensing through its website of photos depicting NCAA sporting events and student athletes, for which the copyrights were owned by the NCAA. *Id.* T3Media moved to strike the complaint pursuant to California’s anti-SLAPP statute, arguing that the federal Copyright Act preempted plaintiffs’ claims; that plaintiffs’ claims were barred by the First Amendment; and that California’s statutory right of publicity exemption for news, public affairs, or sports broadcasts or accounts protected them from liability for any publicity-right violations. *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1133 (C.D. Cal. 2015). The District Court for the Central District of California found, and the Ninth Circuit affirmed, that the Copyright Act preempted plaintiffs’ claims because (1) the nature of the work (photographs) falls within the subject matter of copyright and the “use of plaintiffs’ likenesses did not extend beyond the use of the copyrighted material it held” because plaintiffs could not identify some use of their likenesses “independent from the mere sale of the pictures” and (2) plaintiffs’ asserted claims were equivalent to the exclusive rights contained in the Copyright act because plaintiffs did not identify a use of their NILs independent of the display, reproduction, and distribution of the copyrighted photos in which they were depicted. *Id.* at 1136–40; *see also Maloney v. T3Media, Inc.*, 853 F.3d 1004 (9th Cir. April 5, 2017).

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**Conclusion** The class certification motion is a watershed moment that can mean the difference between hundreds of millions of dollars at risk, or plaintiffs being forced to prosecute their claims on an individual basis. Several courts have now taken a significant step toward protecting defendants from meritless nationwide class actions involving rights of publicity claims by making clear that such actions are not certifiable. In addition to providing media and other defendant corpora-

tions with much stronger defenses against plaintiffs putting on the settlement pressure, this trend should also encourage defendants to use the latest holdings to pursue dismissal at the pleadings stages in order to protect their rights. And, the courts should also be prepared to hold plaintiffs' feet to the fire early on, saving all parties the time and expense of litigating baseless class action lawsuits to their inevitable end.