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Motions to strike: Eighth Circuit reverses district court refusal to strike class allegations

by Joe P. Reynolds

Takeaway: As we have written on a number of occasions, many courts instinctively have a negative view of motions to strike class allegations. Still, a motion to strike can be a viable strategy for a class defendant faced with weak or otherwise implausible class allegations. See *Motions to strike class allegations: Ninth Circuit vacates order striking class allegations, ruling class discovery must go forward* (October 27, 2020), *TCPA: district court strikes class allegations due to individualized issues of consent and revocation* (July 31, 2019), and *Don't miss the chance to strike out class actions* (February 27, 2019). The Eighth Circuit recently followed the Sixth Circuit and ruled that class allegations may be dismissed on a motion to strike where it is "apparent from the pleadings that the class cannot be certified." *Donelson v. Ameriprise Fin. Servs., Inc*., 999 F.3d 1080, 1086 (8th Cir. 2021). This reinforces that a motion to strike class allegations may be warranted when defending against clearly un-certifiable claims.

In *Donelson*, Plaintiff Mark Donelson brought a putative class action against Ameriprise Financial Services, Inc., Mark Sachse (his former broker and investment advisor), and a number of Ameriprise officers, alleging violations of § 10(b) and § 20(a) of the Securities Exchange Act, as well as breach of fiduciary duty under § 206 of the Investment Advisors Act. According to Donelson, Sachse badly mishandled his investment account by, among things, misrepresenting the account value, trading on margin when expressly instructed not to, and misrepresenting reparations Ameriprise would make for problems with his account. 999 F.3d at 1086. He further alleged that other Ameriprise clients had similar experiences with Sachse and sought to represent a putative class.

The defendants moved to strike the class allegations and moved to compel arbitration, based upon an arbitration provision in the agreement Donelson signed when he first became an Ameriprise client. The district court denied the motion to compel arbitration, ruling the agreement to arbitrate failed for a number of reasons, including lack of consideration. The district court also denied the motion to strike class allegations, noting their "general disfavor" and ruling that plaintiff was "entitled to explore whether class action treatment might be available," since a single common question "will do," and there were broad allegations about misrepresentations and wrongful conduct by the defendants. *See Donelson v. Ameriprise Financial Servs., et. al*., No. 4:18-cv-01023-HFS, ECF 75, at 11 (W.D. Mo. Dec. 3, 2019) (citations omitted).

The Eighth Circuit reversed. The panel ruled the arbitration agreement was enforceable. With respect to the motion to strike, the panel noted that "[s]triking a party's pleading . . . is an extreme and disfavored measure." *Donelson*, 999 F.3d at 1092. But the panel also observed that "federal courts are split as to whether class-action allegations may be stricken under Rule 12(f) prior to the filing of a motion for class-action certification when certification is a clear impossibility." *Id*. Ultimately, the panel agreed with the Sixth Circuit that is "sensible … to permit class allegations to be stricken at the pleading stage" if it is

"apparent from the pleadings that the class cannot be certified." *Id*. Thus, the panel ruled that "a district court may grant a motion to strike class-action allegations prior to the filing of a motion for class-action certification." *Id*. Among other things, the panel reasoned that "unsupportable class allegations bring 'impertinent' material into the pleading" and "permitting such allegations to remain would prejudice the defendant by requiring the mounting of a defense against claims that ultimately cannot be sustained." *Id*.

The panel analyzed how the plaintiff's allegations fared under a Rule 23 analysis. As a matter of law, the panel ruled that plaintiff could not maintain a class action because the class claims would either not be cohesive (Counts I and II) or the relief sought was not available (Count III). The panel also ruled that "a significant number of individualized determinations must be made in deciding whether the class members' claims have merit." *Id*. In conclusion, the panel ruled it was "apparent from the pleadings that Donelson could not certify a class." *Id*.

In addition to the Rule 23 analysis, the panel appears to have been persuaded by the clear arbitrability of the dispute. The provision required arbitration of "all controversies that may arise between us," except for "putative or certified class actions." Thus, after deciding the arbitration agreement was enforceable, the panel observed that the class allegations "were all that stood in the way of compelling arbitration." *Id*. at 1092.

Moving forward, a district court in the Eighth Circuit must consider, on a Rule 12(f) motion, whether it is "apparent from the pleadings that the class cannot be certified." It remains to be seen how broadly or narrowly this standard will be applied. We have seen an increasing willingness by some courts to look closely at whether a plaintiff's allegations satisfy Rule 23. In this way, a Rule 12(f) motion to strike serves as an additional means for deciding whether to allow a class action to proceed (where the "apparently" would not be certifiable). While we wait to see how this evolves, a motion to strike remains a viable option for many class action defendants, even if every Rule 12(f) legal standard includes the line that is an "extreme and disfavored measure."