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Fifth Circuit affirms district court's striking of class allegations and dismissal of inadequately alleged fraud-based claims

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Takeaway: We have written several articles about motions to strike class action allegations. *See, e.g., Motions to strike: Eighth Circuit reverses district court refusal to strike class allegations* (July 29, 2021). In a recent decision, Elson v. Black, --- F.4th ----, 2023 WL 111317 (5th Cir. Jan. 5, 2023), the Fifth Circuit added to the pro-motion to strike line of cases by affirming an order striking fraud-based class claims asserted under different state laws and which raised questions of individual reliance. The panel also affirmed the district court's ruling dismissing with prejudice fraud-based allegations lacking the required specificity. The *Elson* case provides defendants with a potent tool to fight fraud-based putative class actions, especially in the Fifth Circuit.

In *Elson*, fourteen women from seven states filed a putative class action against the sellers of a massager (the FasciaBlaster), alleging the sellers falsely advertised the product's health and weight loss benefits. The plaintiffs' claims included claims for consumer fraud and breach of warranty. They sought the certification of a nationwide class as well as seven state-based subclasses.

The cases were originally filed in California federal and state court (the state court case was apparently removed to the Central District of California), but the California federal court later consolidated and then transferred the cases to the Southern District of Texas, on the ground that the California court did not have personal jurisdiction over all of the defendants.

The defendants moved to strike the class allegations, arguing that plaintiffs' allegations raised issues of individual reliance that were patently unsuitable for class treatment. The defendants also moved to dismiss the substantive claims on the merits.

The district court granted the motion to strike. The sum total of the court's analysis was as follows: "Because the basis for the claims are misrepresentations, reliance on them will be a key factor with every potential plaintiff. Reliance is intrinsically an individual determination – what is sufficient for reliance of one person may not be the same for others. The court is not convinced that commonality is present as each potential plaintiff would have to show that their reliance was justified." 2023 WL 111317, at *2.

The court later granted defendants' motion to dismiss the plaintiffs' individual claims with prejudice.

On appeal, in an opinion authored by Circuit Judge Edith Jones, the Fifth Circuit affirmed the district court's ruling striking the class allegations, while affirming and reversing in part the district court's order dismissing the claims on the merits.

Although the panel agreed that the district court's analysis granting the motion to strike was "inappropriately brief," the panel determined that the district court did not abuse its discretion in

striking the class allegations, for two reasons.

First, plaintiffs did not satisfy their burden of presenting a sufficient choice of law analysis to the district court. The panel ruled: "different state laws govern different Plaintiffs' claims. The district court was required to consider differences in state law when discerning whether a class action is the appropriate vehicle for this suit. But the burden was on Plaintiffs to assure the district court that such differences in state law would not predominate over issues individual to each plaintiff in the litigation. They were thus obliged to provide 'an extensive analysis of state law variations' so that the district court could 'consider how those variations affect[ed] predominance.'" *Id*. at *3 (citations omitted).

Second, the named plaintiffs' allegations did not make for a "coherent class," given that they raised a multitude of individual differences, such as reliance on different alleged misrepresentations. The court ruled: "Discerning the truth or falsity of each representation would require a group-by-group analysis, complicated by the fact that the members of each group are from different states. Moreover, even within these groups, the possibility of class analysis disintegrates because the members did not rely on the same alleged misrepresentations. The district court focused on this point, which is a hallmark in this court's class action jurisprudence and is relevant to predominance as much as commonality. *Id*. (quoting *Castano v. Am. Tobacco Co*., 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.")).

And the fact that plaintiffs alleged seven state-specific subclasses did not save their class allegations, either, given that they failed to satisfy their "burden . . . to demonstrate to the district court how certain proposed subclasses would alleviate existing obstacles to certification." *Id*. at *4.

The court concluded: "As a thorough examination of the complaint reveals, Plaintiffs' claims are riddled with predominance issues and are unsuitable for class treatment." *Id*.

Regarding the district court's order granting the motion to dismiss, the panel largely affirmed that ruling, because plaintiffs had failed to allege their fraud-based allegations with the particularity required by Federal Rule of Civil Procedure 9(b). But the Court of Appeals reversed the district court's ruling dismissing express warranty claims on "puffery" grounds because it was not tied to any specific jurisdiction. Accordingly, the panel reversed "reverse[d] the dismissal of [the warranty] claims with instruction to reconsider the motion to dismiss in light of applicable state law." *Id*. at *6.