FEBRUARY 27, 2019

Don't miss the chance to strike out class actions

by C. Allen Garrett Jr. , James F. Bogan III

Takeaway: Many courts instinctively have a negative view of motions to strike. For decades courts have referred to such motions – at least when directed to individual allegations under Rule 12(f) – as "disfavored," a "drastic remedy," and even a "dilatory tactic." *See, e.g., Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001). But class actions present unique burdens on both courts and defendants. And Rule 23 supports filing early challenges to class allegations. *See, e.g.*, Fed. R. Civ. P. 23(d)(1)(D) (authorizing court to enter order requiring "that the pleadings be amended to eliminate allegations about representation of absent persons"). A recent order granting a motion to strike class claims challenging allegedly overweight baseball bats confirms that, when faced with a seemingly un-certifiable class, defendants should carefully consider taking a shot at striking the class allegations at the outset.

The *Wisdom* court strikes out class claims based on overweight baseball bats

In *Wisdom v. Easton Diamond Sports, LLC*, No CV 18-4078 DSF (SSx), 2019 WL 580670 (C.D. Cal. Feb. 11, 2019), Plaintiff Ricky Wisdom brought a putative class action against sports-equipment manufacturer Easton Diamond Sports, LLC ("Easton"), alleging a variety of claims arising out of his purchase of a new baseball bat for his son. According to Mr. Wisdom, the bat's label said it was a 22-ounce bat, when in fact it weighed more than 23 ounces. Because the bat was too heavy, he alleged, his son could not use the bat to play youth baseball.

Mr. Wisdom sought the certification of a nationwide class, consisting in material part of all persons who purchased an Easton bat "where such bats were purchased in new condition and were labeled as being a lighter weight than they actually were." *Id*. at *6. The district court first found the class definition "vague and overbroad," because Mr. Wisdom purchased only one bat (one of many Easton bat models), "but he nevertheless [sought] to certify a class of purchasers of all Easton bats that were incorrectly labeled to understate their actual weight." *Id*.

But the court went further, ruling the class allegations inherently un-certifiable: "To determine whether Defendant is liable to the entire proposed class, the trier of fact will be required to determine many factual questions not susceptible to common answers, for example, whether each model of bat (and each specific bat) purchased by each class member was overweight, whether each class member relied on the bat's label or weight when purchasing the bat, and whether each class member was injured by the alleged mislabeling." *Id*. The court concluded "it is obvious at this stage of the proceedings that classwide relief is not available." *Id*.

The Sixth Circuit affirmed an early motion to strike class allegations back in 2011

The *Wisdom* decision constitutes the latest in a long line of federal decisions striking class allegations. The Sixth Circuit issued an important decision affirming the grant of a motion to strike in a putative nationwide class action challenging allegedly deceptive advertising of a healthcare discount program. *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 843 (6th Cir. 2011). The district court granted an early

motion to strike because the claims of the putative class members would be governed by the laws of the state where those class members resided. Id. at 946. The Court of Appeals found this ruling "sound and far from an abuse of discretion for three basic reasons." *Id*.

First, "different laws would govern the class members' claims," because Ohio's choice-of-law rules looked to the place of injury in determining the governing law. *Id*. at 946-47. Second, "any potential common issues of fact cannot overcome this problem," because (among other reasons) the defendants' advertising "varied to account for the different requirements of each State's consumer-protection laws." *Id*. at 947-48. Third, "this conclusion is consistent with the decisions of this court and several others" that have denied class certification where the claims of the class would require the examination of multiple states' laws. *Id.* at 948-49.

The *Pilgrim* court defended the district court's early rejection of the class allegations, noting Rule 23's directive that courts determine whether to certify a class "at an early practicable time." *Id*. at 949 (citing Fed. R. Civ. P. 23(c)(1)(A)). Although the class plaintiffs vaguely claimed to need discovery, "[t]o this day, they do not explain what type of discovery or what type of factual development would alter the central defect in this class claim." *Id*. Because the applicability of multiple states' laws constitutes "a largely legal determination" which "no proffered or potential factual development offers any hope of altering," the district court properly addressed the issue at the outset. *Id*.

A growing body of decisions have scrutinized certifiability issues at the outset

Although *Pilgrim* presented the obvious certification problem of class claims implicating multiple states' laws, other courts have employed similar reasoning to reject class claims based on the individualized inquiries inherent in the substance of the claims. As in *Wisdom*, other courts have granted motions to strike based on overbroad or "fail-safe" class definitions. *See, e.g., Oom v. Michaels Cos. Inc.*, No. 1:16-cv-257, 2017 WL 3048540, at *4-*5 (W.D. Mich. July 19, 2017) (granting motion to strike where "fail-safe" class definition included "only those customers that Plaintiffs claim are entitled to relief" and where class could not satisfy typicality, commonality, or predominance requirements of Rule 23); *Edwards v. Zenimax Media Inc*., No. 12-CV-00411-WYD-KLM, 2012 WL 4378219, at *5 (D. Colo. Sept. 25, 2012) (granting motion to strike where overbroad class included persons who purchased product "regardless of whether he or she was ever injured"); *Stearns v. Select Comfort Retail Corp*., 763 F. Supp. 2d 1128, 1151-52 (N.D. Cal. 2010) (granting motion to strike where class definition included persons who "already have received refunds" for allegedly defective product).

And similar to *Wisdom's* second ground for striking the class allegations, other district courts have granted motions to strike where a highly-individualized inquiry would be required for each and every class member. *See, e.g., Lawson v. Life of the S. Ins., Co.*, 286 F.R.D. 689, 697 (M.D. Ga. 2012) (granting motion to strike where plaintiff could not satisfy predominance requirement as a matter of law); *Vandenbrink v. State Farm Mut. Auto. Ins. Co*., No. 8:12-CV-897-T-30TBM, 2012 WL 3156596, at *3 (M.D. Fla. Aug. 3, 2012) (striking class allegations where critical issues to be resolved "will be individual in nature"); *MRI Assocs. of St. Pete, Inc. v. State Farm Mut. Auto. Ins. Co*., 755 F. Supp. 2d 1205, 1207-08 (M.D. Fla. 2010) (dismissing class allegations as "inappropriate" where claims arose from individualized benefits determinations).

You can't get a strikeout without throwing the ball

Some class actions lend themselves to threshold challenges to standing or to the viability of the plaintiffs' claims. But others state a claim, even where the defendant vigorously disputes the substance

of the allegations. These claims can be expensive to defend, especially where the claims arguably authorize far-reaching electronic discovery. Such cases warrant careful scrutiny of class certification issues at the outset, to evaluate whether an early motion to strike may be viable. And if the claims appear ultimately un-certifiable, a class defendant would be well advised to take a shot at securing an early order striking the class allegations.