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MOTION PRACTICE

CLASS ALLEGATIONS

A defendant in a newly filed class action may be well served by filing a motion to strike class allegations, along with the usual motion to dismiss for failure to state a claim for relief, says attorney Kevin Ranlett in this BNA Insight. ''Although there are risks to broaching class certification at the very outset of the case, the rewards can be even greater still—such as eliminating the need for classwide discovery and the potential exposure to massive classwide liability,'' the author says.

Control Class Action Costs by Filing an Early Motion to Strike the Class Allegations

BY KEVIN RANLETT

Discovery usually is the largest expense in defending a class action. Plaintiffs typically serve far-reaching discovery requests, which they justify as needed to gather evidence concerning class certification and the merits of the entire class's claims. The cost of litigating discovery motions, taking and defending depositions, responding to interrogatories, and preserving, gathering, reviewing, and producing documents can be enormous. Rather than endure this gauntlet and then oppose the plaintiff's eventual motion for class certification, defendants often can avoid the bleeding altogether by filing a pre-discovery motion to strike the class allegations.

Kevin Ranlett is a partner in Mayer Brown's Washington, D.C., office and is a member of the firm's Consumer Litigation & Class Action and Supreme Court & Appellate practices. Ranlett is also co-editor of Class Defense (classdefenseblog.com), the firm's blog on class action law and policy, and can be reached at kranlett@mayerbrown.com.

Even if the motion is unsuccessful or the judge allows the plaintiff leave to amend the class definition, a motion to strike class allegations can result in a narrowing of the proposed class—which limits both the defendant's potential liability and the scope of its document-preservation and discovery obligations. And the plaintiff's amended class definition may expose new defects, such as by revealing that each class member's claims turn on a host of individualized inquiries. At the very least, the motion gives the defendant an early opportunity to communicate its message to the judge that the class is not certifiable.

Although some courts disfavor motions to strike class allegations, the U.S. Supreme Court explained 30 years ago that such a motion may be the appropriate vehicle to decide the ''certification question'' when ''the issues are plain enough from the pleadings.''[1] Today, many courts have recognized that class allegations should be struck when ''no proffered or potential factual development offers any hope of altering th[e] conclusion'' that

[1] *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

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the proposed class does not satisfy the requirements for class certification under Federal Rule of Civil Procedure 23 or the state-law equivalent.[2]

Best Arguments for Motion to Strike Allegations

So what types of arguments work best for a motion to strike class allegations? At this stage, defendants generally should make legal challenges to the propriety of the class that can be resolved entirely on the pleadings (or by considering judicially noticeable documents). If the defendant makes evidence-based arguments, the court may be persuaded by the plaintiff to defer the entire motion until after discovery. Or worse yet, the court might reject the defendant's argument in its early form and then refuse to reconsider the issue after it has been fully fleshed out at the motion-for-class-certification stage.

Here are some ideas for legal arguments to consider making at the pleading stage in a motion to strike class allegations:

■ **Nationwide or multi-state classes pursuing state-law claims.** If the defendant can show that plaintiffs' state-law claims are governed by the differing laws of multiple states, courts may strike the class on predominance or superiority grounds.[3]

■ **Unascertainable class definitions.** Are class members impossible to identify using an objective and easily administrable method? Or is the class a so-called ''failsafe'' class—a term that means that class members cannot be identified without conducting individualized inquiries into the merits of their claims? Courts have granted pre-discovery motions to strike class allegations when the defendant was able to show that the class definition alleged that the complaint was unascertainable.[4]

■ **Overbroad class definitions.** Does the class definition include people who were not injured and therefore lack standing to sue? Courts have granted motions to strike such overbroad class definitions.[5] Alternatively, perhaps it is the length of the period the class definition covers that is too broad, because older claims would be time-barred (either by a statute of limitations or a contractual limitations period). Courts have granted motions to strike in order to narrow class periods.[6]

■ **Personal-injury and property-damage classes.** Are the plaintiffs seeking recovery for personal injuries or property damage that could have resulted from a variety of causes? Courts have struck class allegations when it is apparent from the complaint that individualized questions of causation would preclude a finding that common issues predominate over individualized ones.[7]

■ **Fraud and warranty classes.** Are the plaintiffs pursuing claims for which reliance or knowledge is an element? Courts have struck class allegations in such cases, because, as a matter of law, the need to show that, for example, each class member relied on the alleged misrepresentation precludes a finding of predominance.[8]

■ **Classes piggybacking on recalls or voluntary repair or replacement programs.** Are the plaintiffs suing over a problem that the defendant has been remedying for members of the proposed class on a voluntary basis? If so, the court might strike the class on predominance or superiority grounds.[9]

■ **Copycat class actions.** Is the class action a carbon copy of another class action in which class certification was denied? Principles of comity—and collateral estoppel, if the lawyers recycled the same figurehead plaintiff as well as the allegations of the first complaint—can supply the basis for a motion to strike class allegations.[10]

■ **Inadequate class representatives.** Most challenges to the adequacy of the class representative

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[2] *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *see also, e.g.*, *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 444-45 (5th Cir. 2007) (affirming pre-discovery motion ''to dismiss'' class allegations); *Vandenbrink v. State Farm Mut. Auto. Ins. Co.*, 2012 BL 198799, at *3-4 (M.D. Fla. Aug. 3, 2012) (granting pre-discovery motion to strike class allegations); *Arango v. Work & Well, Inc.*, 2012 BL 184834, at *3-4 (N.D. Ill. July 24, 2012) (same, citing Federal Rules of Civil Procedure 12(f), 26(c)(1)(A) and 23(d)(1)(D)); *Manning v. Boston Med. Ctr. Corp.*, 2012 BL 101008, at *9 (D. Mass. Apr. 18, 2012) (granting pre-discovery motion to strike class allegations); *Rikos v. Procter & Gamble Co.*, 2012 BL 343557, at *7 (S.D. Ohio Feb. 28, 2012) (same); *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009) (''Where the complaint demonstrates that a class action cannot be maintained on the facts alleged, a defendant may move to strike class allegations prior to discovery'' under ''Rule 12(f).''); *Hovsepian v. Apple, Inc.*, 2009 BL 271894, at *2 (N.D. Cal. Dec. 17, 2009) (''Under Rules 23(c)(1)(A) and 23(d)(1)(D), as well as pursuant to Rule 12(f), this Court has authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained.''); *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 n.3 (D.N.J. 2003) (''A defendant may move to strike class action allegations prior to discovery in those rare cases where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met.'').

[3] *See, e.g.*, *Pilgrim*, 660 F.3d at 945; *Lawson v. Life of S. Ins. Co.*, 2012 BL 252832, at *6-10 (M.D. Ga. Sept. 28, 2012).

[4] *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, 2012 BL 147219, at *2-5 (E.D. La. June 6, 2012); *Schilling v. Kenton Cty.*, 2011 BL 21837, at *5-8 (E.D. Ky. Jan. 27, 2011); *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008).

[5] *See, e.g.*, *Pilgrim v. Universal Health Card, LLC*, 2010 BL 65210, at *2 (N.D. Ohio Mar. 25, 2010), *aff'd*, 660 F.3d 943 (6th Cir. 2011); *Sanders*, 672 F. Supp. 2d at 991.

[6] *See, e.g.*, *Jimenez v. Allstate Indem. Co.*, 2010 BL 214319, at *6-7 (E.D. Mich. Sept. 15, 2010).

[7] *See, e.g.*, *In re Yasmin & Yaz (Drospirenone) Mkt. Prods. Liab. Litig.*, 275 F.R.D. 270, 276-77 (S.D. Ill. 2011); *Ardoin v. Stine Lumber Co.*, 220 F.R.D. 459, 463 (W.D. La. 2004); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 208 F.R.D. 625, 631-32 (W.D. Wash. 2002).

[8] *See, e.g.*, *Bauer v. Dean Morris, L.L.P.*, 2011 BL 228775, at *4-7 (E.D. La. Sept. 7, 2011); *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1147-48 (N.D. Cal. 2010).

[9] *See, e.g.*, *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1152-53 (N.D. Cal. 2010).

[10] *See, e.g.*, *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1278-80 (W.D. Wash. 2012); *Edwards v. Zenimax Media, Inc.*, 2012 BL 249568, at *3-6 (D. Colo. Sept. 25, 2012); *Chetta v. State Farm & Cas. Co.*, 2007 BL 213396, at *1 (E.D. La. Apr. 25, 2007).

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would benefit from discovery. But sometimes the named plaintiff's ineligibility to represent a class is apparent from the complaint alone, as when the plaintiff is proceeding pro se or is obviously related to or employed by class counsel. Courts have granted motions to strike class allegations under those circumstances.[11]

■ **Atypical class representatives.** Does the complaint reveal that the plaintiff's claims would be subject to a defense that is inapplicable to other class members—as when the complaint makes wage-and-hour claims but the named plaintiff is a manager who may have been partly responsible for the alleged violations? Or do the allegations show that each plaintiff's and class member's claims depend upon his or her own unique interactions with the defendant? If so, courts might be willing to strike the class allegations on the pleadings.[12]

■ **Class members' claims are arbitrable.** Sometimes, the defendant cannot move to compel arbitration of the named plaintiff's claims for a one-off reason that would not bar attempts to compel arbitration of the claims of some or all of the absent class members. For example, perhaps the named plaintiff exercised a contractual right to reject the arbitration provision. Or perhaps the arbitration agreement is unenforceable under the law of the named plaintiff's home state, but would be enforceable under the laws of other states where class members reside. If so, courts may grant motions to strike the class allegations—either because the absent class members are subject to enforceable arbitration agreements or because the enforceability of those agreements is an individualized question that defeats predominance.[13]

■ **Claims statutorily barred from class actions.** Some state laws create causes of action that may be pursued on an individual—but not class-wide—basis. For example, some states' consumer-protection acts forbid class actions.[14] And New York bars class actions seeking statutory damages.[15] At least in state court, a class action violating one of these statutes would be a prime candidate for a motion to strike class allegations. These statutes may also be the basis for a challenge in federal court. In a splintered 4-1-4 decision, the Supreme Court held in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[16] that federal courts must follow Federal Rule of Civil Procedure 23 rather than state laws limiting the availability of class actions. But lower federal courts have reached differing conclusions as to whether these state laws might still bar federal-court class actions after *Shady Grove*, such as when a federal law—like the Telephone Consumer Protection Act—specifies that a class action may be brought only if consistent with state law.[17] In an appropriate case, a defendant in federal court might try a motion to strike class allegations on these grounds.

Conclusion

In sum, defendants in newly filed class actions may be well served by filing a motion to strike class allegations along with the usual motion to dismiss for failure to state a claim for relief. Although there are risks to broaching class certification at the very outset of the case, the rewards can be even greater still—such as eliminating the need for classwide discovery and the potential exposure to massive classwide liability.

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[11] *See, e.g., Jaffe v. Capitol One Bank*, 2010 BL 43041, at *9-10 (S.D.N.Y. Mar. 1, 2010).

[12] *See, e.g., Schilling*, 2011 BL 21837, at *10-11; *Wright v. Family Dollar, Inc.*, 2010 BL 283294, at *3-4 (N.D. Ill. Nov. 30, 2010).

[13] *See, e.g., May v. Nation Safe Drivers, Inc.*, 2010 BL 303660, at *3 (D. Minn. Dec. 22, 2010); *cf. Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 728 (9th Cir. 2007) (affirming denial of class certification ''because [the defendant's] intent to seek arbitration of the class would necessitate a state-by-state review of contract conscionability jurisprudence,'' thereby causing ''predominance [to be] defeated'').

[14] *See, e.g.*, Miss. Code § 75-24-15(4).

[15] *See* N.Y.C.P.L.R. § 901(b).

[16] 130 S. Ct. 1431 (2010).

[17] *Compare, e.g., Holster v. Gatco, Inc.*, 618 F.3d 214, 217-18 (2d Cir. 2010) (affirming rejection of federal-court TCPA class action in light of New York law barring class actions for statutory damages) *with Bais Yaakov v. Peterson's Nelnet, LLC*, 2012 BL 271335, at *1, *5-7 (D.N.J. Oct. 17, 2012) (denying motion to ''dismiss the class action portion of the complaint'' under same New York law).