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STRIKE 'Em Out! Motions to Strike Class Action Allegations — an Effective Litigation Management Tool

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The unbalanced nature of class action litigation often forces defendants to pay dearly to respond to allegations which cost the plaintiff very little to make.

However, within the Federal Rules of Civil Procedure is a mechanism by which class action defendants can attempt to minimize this cost by seeking to strike the class allegations either at the outset of the litigation or any time prior to a full-scale class certification hearing.

Federal Rule of Civil Procedure 23(d)(1)(D) allows a defendant to file a motion to strike class action allegations and enables the court to issue an order "requir[ing] that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons." A motion to strike class allegations may be made at any point during litigation of a class action, and can therefore be filed even before the plaintiff has formally moved for class certification.

Indeed, the Federal Rules of Civil Procedure require a court to determine whether an action should be certified as a class "at an early practicable time after a person sues or is sued." There are also analogous state laws and various common law precedents which allow for such relief in the state courts.

A motion to strike class allegations provides class action defendants with the unique opportunity to quash a class action lawsuit without being forced to pay the enormous costs associated with discovery or settle the claim to avoid expensive and prolonged litigation. Indeed, our firm



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has repeatedly achieved successful results with such motions over the years. Hence, a class action defendant should always consider whether there is a possibility of getting the class allegations stricken from the complaint.

In some cases, a court will not grant a class action defendant's motion to strike class allegations when the court feels additional discovery is needed to accurately determine the viability of the class. See, e.g., *Bearden v. Honeywell*. This type of ruling, however, should by no means dissuade a class action defendant from moving to strike the class action allegations early in the litigation.

Several class action defendants have been successful in convincing the court to strike class allegations from the complaint by showing that the proposed class does not meet the predominance requirements of Rule 23(b)(3) due to the presence of individualized questions of fact or law.

While the predominance requirement

of Rule 23(b)(3) is similar to the commonality requirement of Rule 23(a)(2), the predominance standard is more difficult for plaintiffs to meet than the standard for commonality. Therefore, while defendants may certainly challenge a plaintiff's ability to show that the proposed class meets the commonality requirement to maintain a class action, defendants often focus instead on the more exacting predominance requirement.

For example, as a result of Hurricanes Katrina and Rita, several class action lawsuits were initiated against insurers regarding alleged improper adjustment of claims.

In response, many of the insurers filed motions to strike the class allegations from these complaints due to a lack of predominance of class-wide questions of fact. Because of to the individualized determinations required for insurance recoveries, many of these defendants succeeded in having class action allegations eliminated. See, e.g., *Spiers v. Liberty Mutual Fire Insurance Co.*

Courts have also stricken or dismissed class action allegations in other contexts based on lack of predominance.

For example, numerous courts have found class action allegations facially deficient in cases where the plaintiffs have alleged the defendant insurers improperly used a third-party computerized bill review tool to assist in adjusting claims for medical payments or personal injury protection benefits.

In one such case, the court denied the plaintiff leave to amend the complaint to allege a class action, as any amendment would be "futile and frivolous" as a matter of law, because there were too many individualized issues in a case of this nature, relating to the specifics of treatment, for a class action ever to be appropriate (*Lucido v. Deerbrook Insurance Co.*).

While it is more common for courts to strike class allegations based on a lack of predominance of class-wide questions of fact or law, there have been instances where the class allegations in the complaint were stricken due to lack of commonality of questions of law or fact for all class members under Rule 23(a)(2).

For instance, in *Ross-Randolph v. Allstate Insurance Co.*, plaintiffs who purchased motor vehicle liability insurance from the defendant insurer claimed that it fraudulently induced them into not waiving personal injury protection coverage within the policy, and then did not pay the claims after plaintiffs were injured. The court found that the plaintiffs failed to satisfy the class requirements of commonality and predominance, and thus granted the insurer's motion to strike the class allegations.

Defendants have also successfully had class allegations stricken from a complaint based on the plaintiff's failure to show that a putative nationwide or multistate class met the predominance requirement of Rule 23(b)(3). When the defendant can show that there is a variation in the applicable state law such that application of a single body of substantive law to all class members is not possible, a court may strike the class allegations from the complaint.

For example, in *Chilton Water Authority v. Shell Oil Co.*, the plaintiffs sought to certify a nationwide class action against Shell Oil Company, alleging claims of fraud, strict liability and negligence. The court struck the class allegations, explaining that "resolution of this matter on a class basis would require the court to apply

multiple variations of state law to several claims and innumerable claimants," and therefore plaintiffs had not satisfied the predominance requirement to maintain a class.

In fact, courts routinely strike nationwide and multistate class action allegations based on variations in state law, and defendants can and should consider bringing such motions to limit the scope of the proposed class. See, e.g., *Castano v. Am. Tobacco Co.*

Defendants have also been able to convince courts to strike class allegations from a complaint based on the plaintiff's inability to show that the proposed class meets the numerosity requirements of Rule 23(a)(1), which provides that class treatment is appropriate only when "the class is so numerous that joinder of all members is impracticable." See, e.g., *Miller v. Motorola*.

Some courts have recognized the validity of motions to strike class allegations during the pleading stage, but have held that upon such motion the burden of proof will shift to the defendant to show that class treatment is inappropriate under the standard of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

However, many courts have held that the party seeking class certification bears the burden of showing that all of the requirements of Rule 23(a) and (b) are met, even in the event of a defendant's motion to strike class allegations. The latter view appears to be more widely accepted.

Overall, courts seem most likely to grant motions to strike class allegations in cases where the proposed class on the face of the complaint does not meet the stringent predominance requirements of Rule 23(b)(3) and additional discovery would be unlikely to produce evidence that the class should be maintained.

Ultimately, getting class allegations stricken from the complaint will turn on the defendant's ability to persuade the

court of the deficiencies of the proposed class as well as the court's level of comfort in determining that class treatment is inappropriate prior to full discovery.

Accordingly, when a defendant is served with a class action complaint, it should review the complaint allegations to: (a) determine whether the plaintiff has in fact alleged all the class action prerequisites; (b) assess whether the plaintiff's claims raise individualized inquiries that defeat Rule 23(b)(3)'s predominance and manageability requirements; and (c) in the event of a purported multistate class, determine whether state law variations exist such that application of a single body of substantive law to all putative class members is not possible.

If these types of deficiencies are identified, the defendant should consider moving to strike or dismiss the class allegations, or moving for a summary denial of class certification.

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