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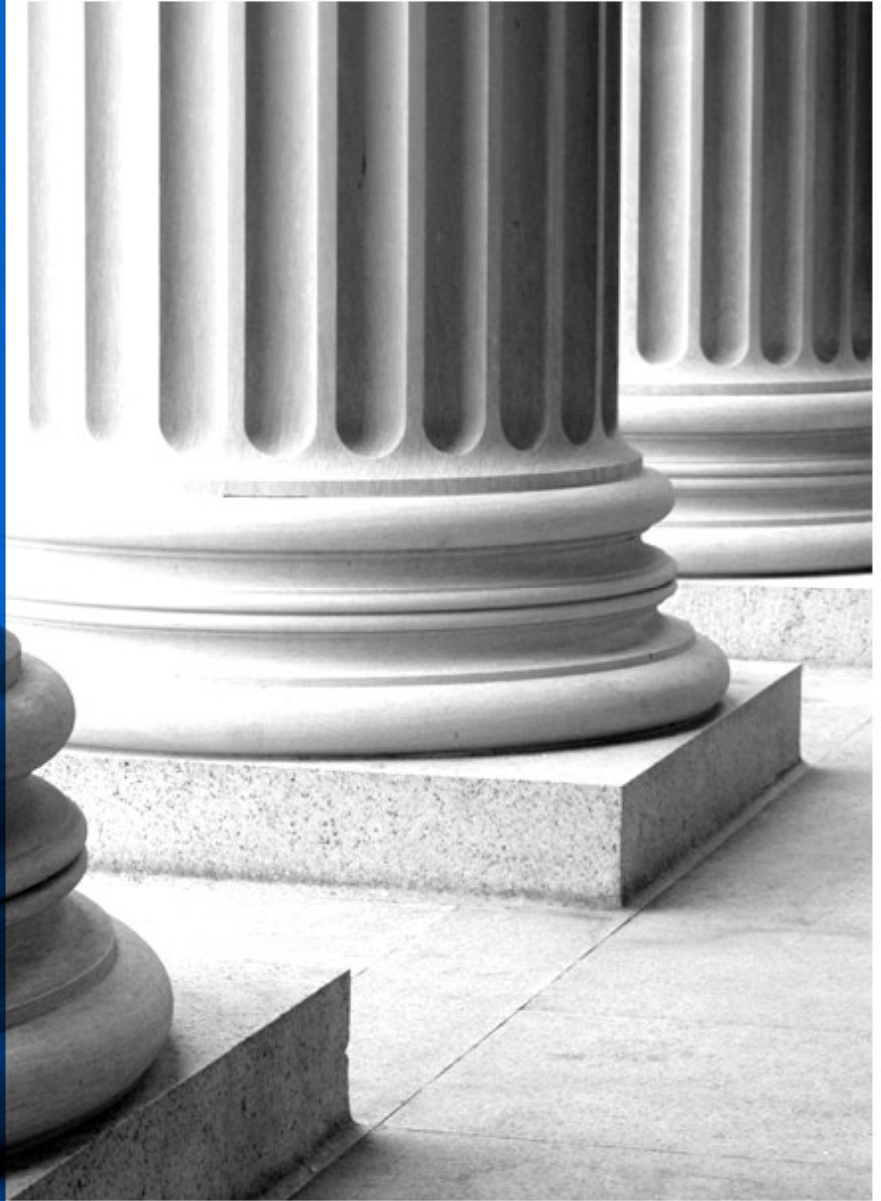
# MOTIONS TO STRIKE CLASS ALLEGATIONS

## Recent Trends & Practice Pointers

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Shook,  
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# Motions to Strike Class Allegations – Recent Trends & Practice Pointers

- Requirements of Rule 23
- Standard of review
- Burden of proof
- Jurisdictional considerations
- Timing considerations

# Procedural Device – Rule 12(f)

- The court may strike from a pleading “any redundant, immaterial, impertinent, or scandalous matter.”
  - The purpose of a Rule 12(f) motion is to avoid spending time and money litigating spurious issues.
    - *Lyons v. Bank of America*, 2011 WL 6303390 (N.D. Cal. Dec. 16, 2011).
    - *Sanders v. Apple, Inc.*, 672 F.Supp.2d 978 (N.D. Cal. 2009).

# Procedural Device – Rule 23(c)(1)(A)

- The court “[a]t an early practicable time . . . , must determine by order whether to certify the action as a class action.”
- The “early practicable time” directive indicates that courts may – and should – address the plaintiff’s class allegations when the pleadings are facially defective and definitively establish that a class action cannot be maintained.
  - See e.g., *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011); *In Re Yasmin and Yaz Marketing*, 275 F.R.D. 270 (S.D. Ill. 2011).

# Procedural Device – Rule 23(d)(1)(D)

- Expressly authorizes a motion to strike class allegations by allowing courts to issue an order “requiring that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.”
  - Rule 23(d)(1)(D) provides a proper instrument for motions to strike class allegations and is procedurally inseparable from Rule 23(c)(1)(A).
- Regardless of whether either party has moved for class certification, the court is in essence making a class determination.

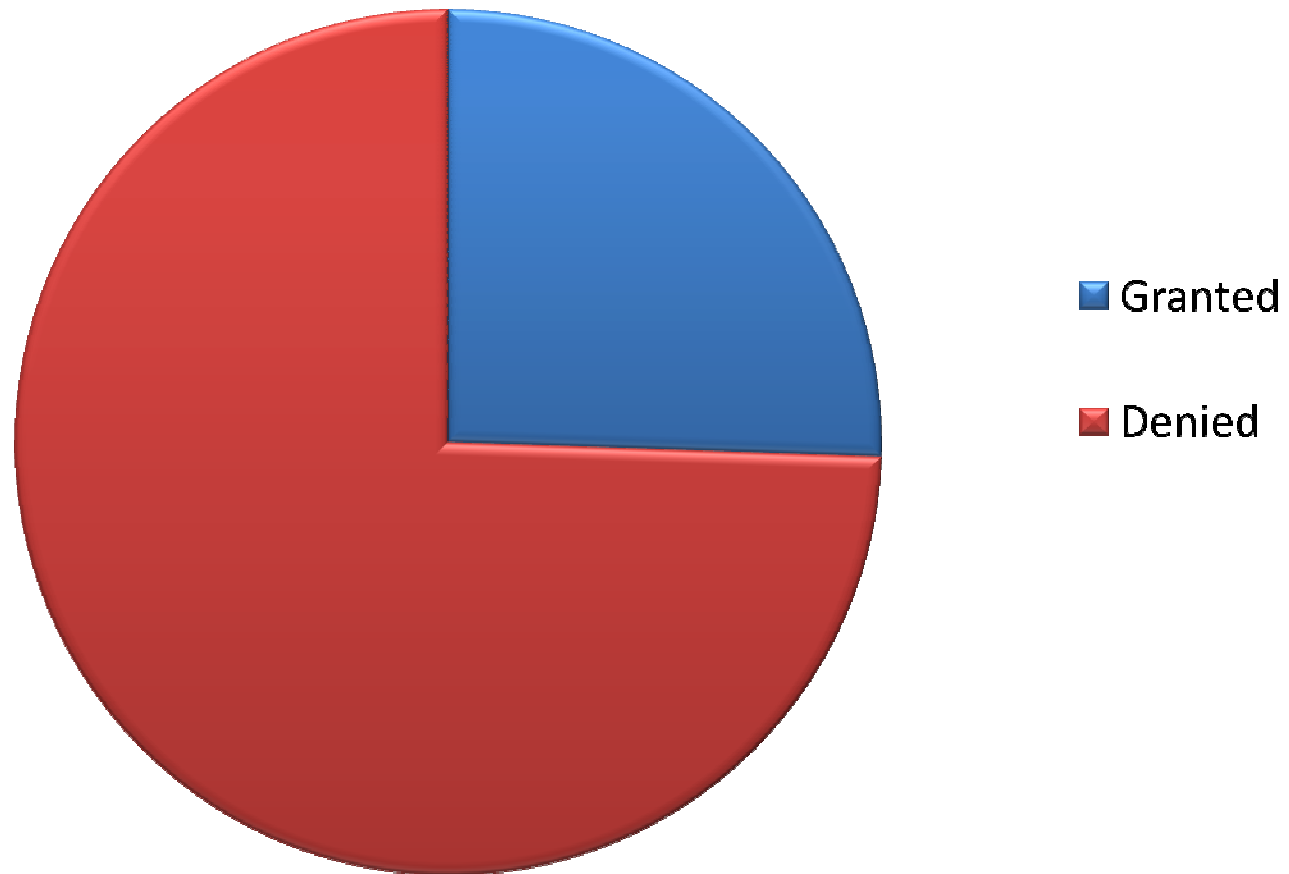
# Procedural Devices – Local Rules

- For example, the Northern District of Ohio has a local rule that encourages motions to strike class allegations.
  - L.R. 23.1(c) “. . . Nothing in this Rule shall preclude any party from moving to strike the class action allegations.”

# Motions to Strike Class Allegations are a Growing Trend

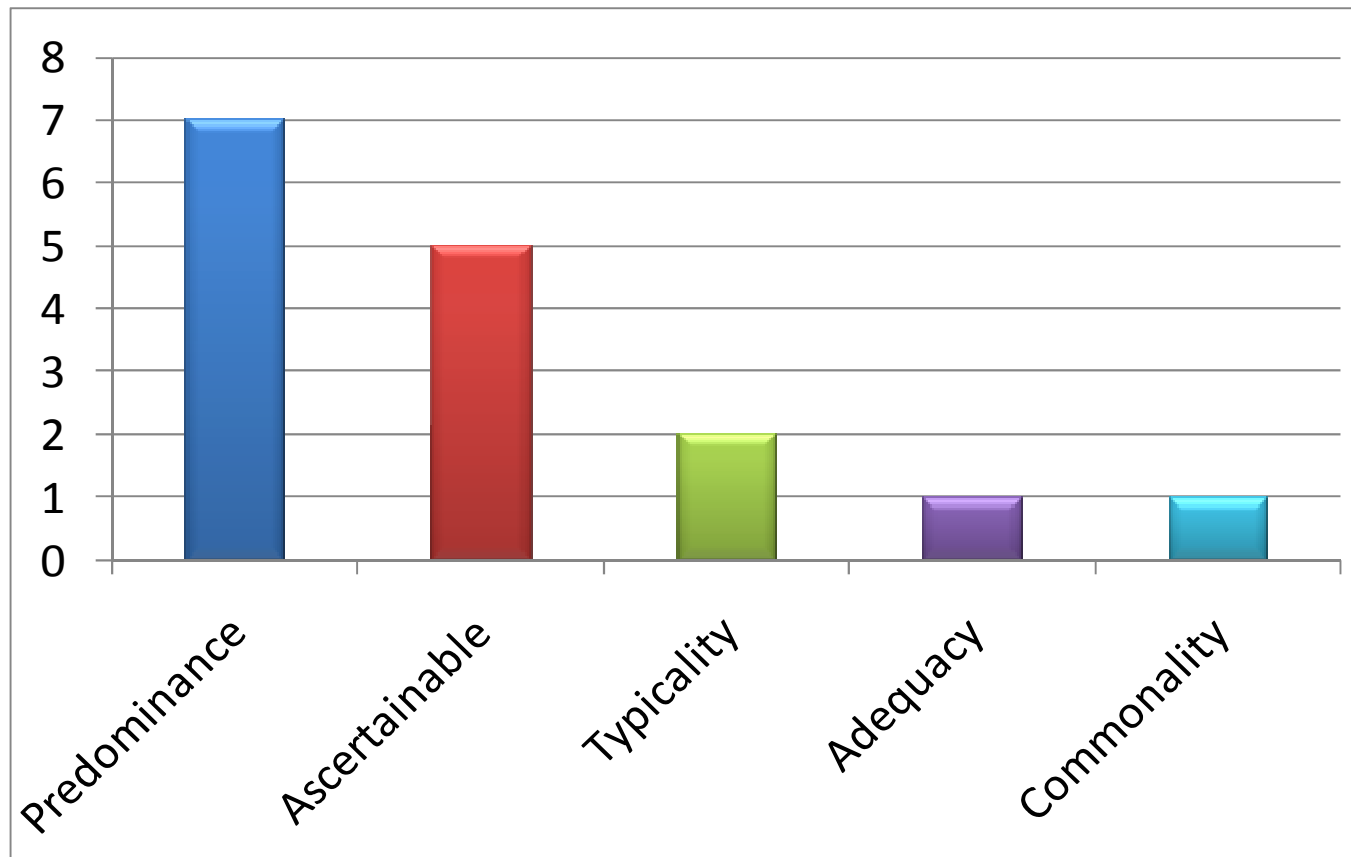
- Number of defendants filing motions to strike class allegations has significantly increased in the last 2 years.
- Defendants are increasingly using motions to strike class allegations early in the litigation in an effort to avoid the costs of unnecessary class discovery and briefing.

# Statistical Overview 2011 and to-date 2012





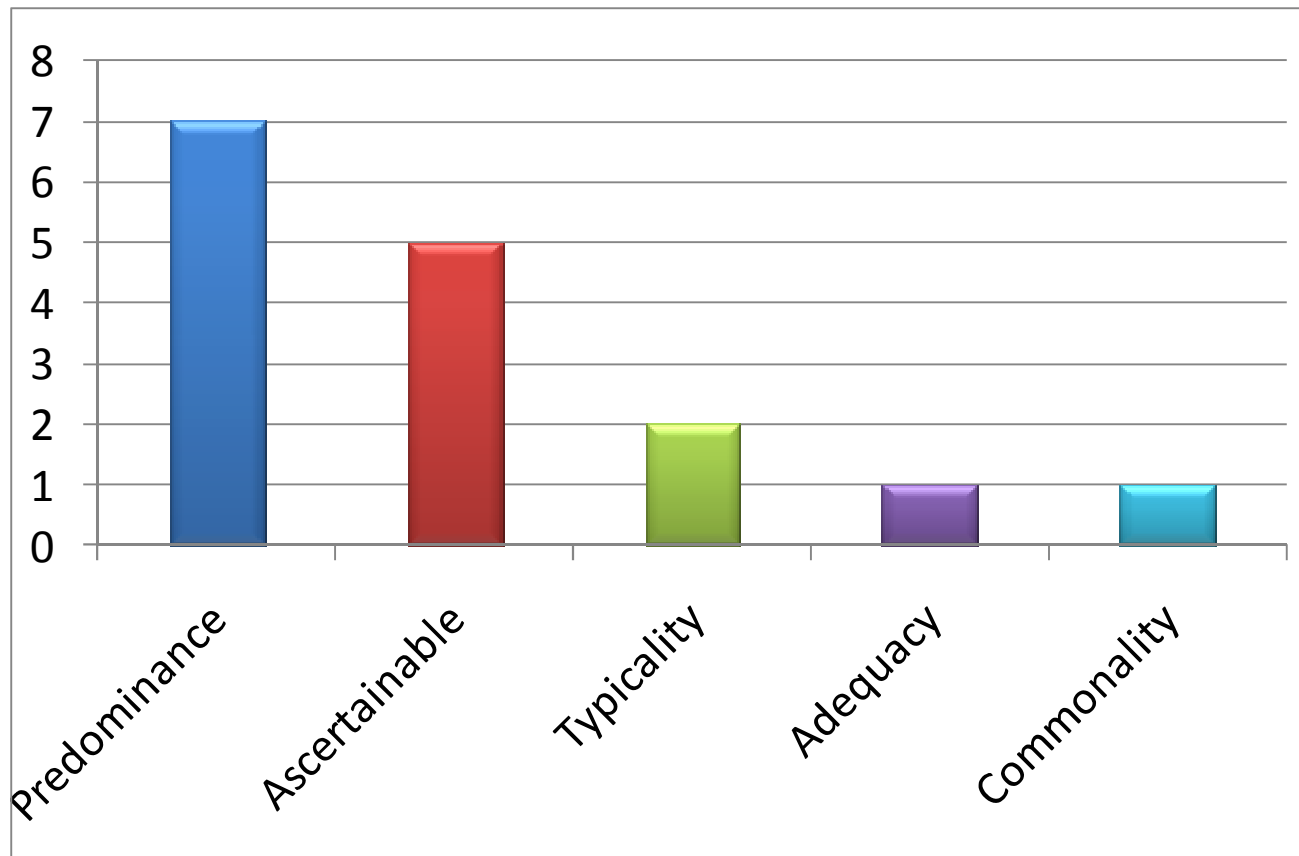
# Motions to Strike Class Allegations are Granted for Various Reasons



# Predominance

- Majority of motions to strike granted on predominance grounds.
  - *See, e.g., Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011) (granting defendant's motion to strike class allegations on predominance grounds).

# Motions to Strike Class Allegations are Granted for Various Reasons



# Ascertainability

- Courts have stricken class allegations on ascertainability grounds where:
  1. The proposed class was too broad;
  2. Contained class members who lacked standing; or
  3. Where individualized factual or legal inquiries were required to determine whether individuals were members of the proposed class.

# Burden of Proof – Minority View

- **Burden of proof shifts to the Defendant**
  - A minority of courts hold that, by moving to strike class allegations, the burden of proof shifts to the Defendant to show that class treatment is inappropriate under the standard **12(b)(6)** motion to dismiss for failure to state a claim.
    - Examples of jurisdictions that have shifted the burden:
      - Eastern District of Kentucky
        - » *Schilling v. Kenton County, KY*, 2011 WL 293759 (E.D. Ky. 2011)
      - Eastern District of Michigan
        - » *Jimenez v. Allstate Indem. Co.*, 2010 WL 3623176 (E.D. Mich. 2011)
      - District of Rhode Island
        - » *Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442 (D.R.I. 2002)

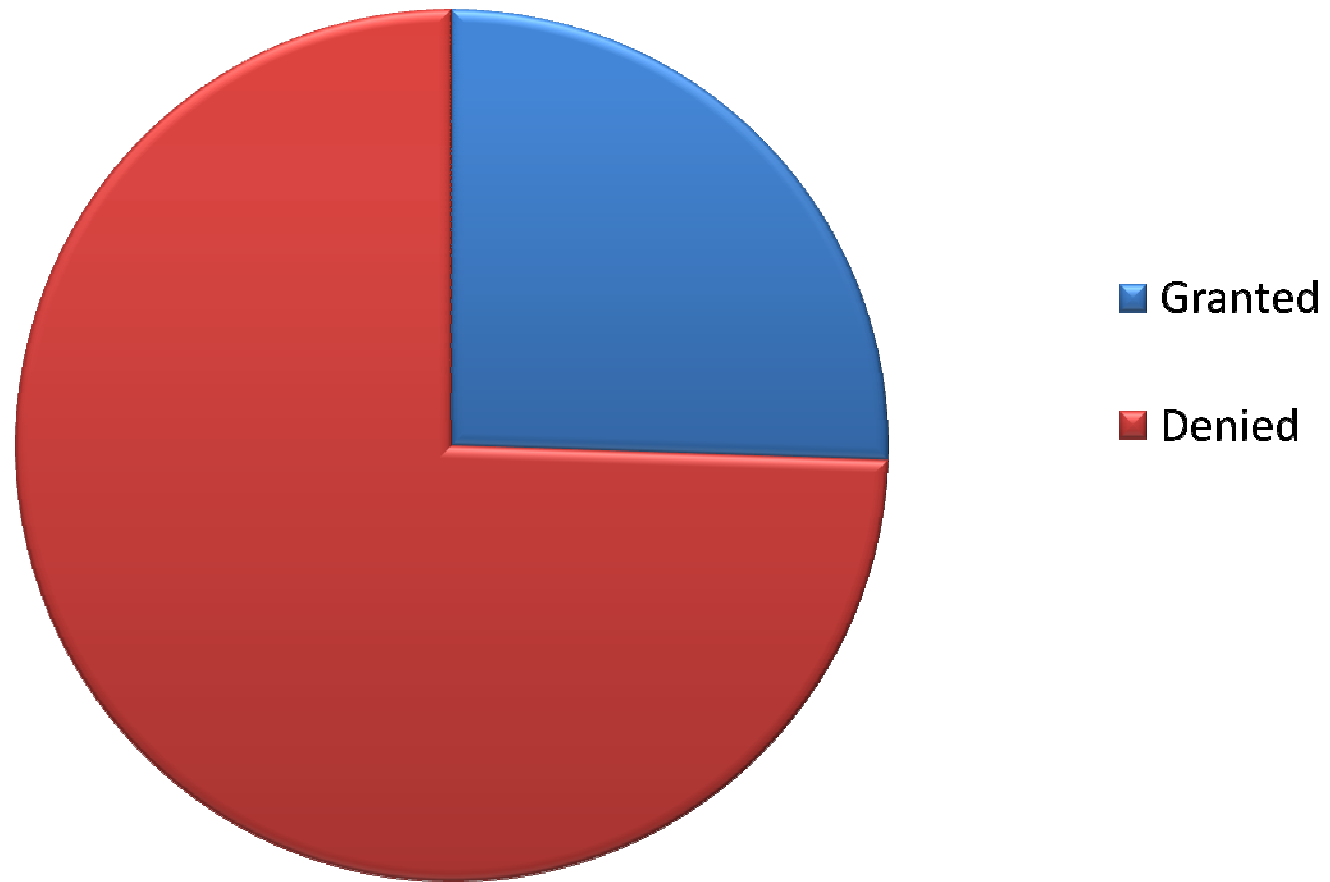
# Burden of Proof – Majority View

- **Burden of proof stays with the Plaintiff**
  - An order granting a motion to strike class allegations is tantamount to a denial of class certification after a motion to certify. It would be absurd to have the burden vary according to the procedural vehicle through which the determination is made.
  - Thus, the better view is that the **burden remains** with the **party seeking** class certification regardless of who moves the court to make the determination.
    - It does not make sense for the burden to shift to the Defendant just because they, rather than the plaintiff, filed a motion for class determination. *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607, 613-14 (W.D. Wis. 2003).

# Standard of Review

- Depending on the jurisdiction, how the motion is raised, and the predilections of the judge – motion to strike may be reviewed under a variety of standards:
  1. “Rigorous Analysis” standard applicable to class certification motions;
  2. “Well-Pleaded Complaint” standard applicable to Rule 12(b)(6) motions; or
  3. “Immaterial, impertinent, or scandalous” standard applicable to a motion under Rule 12(f).

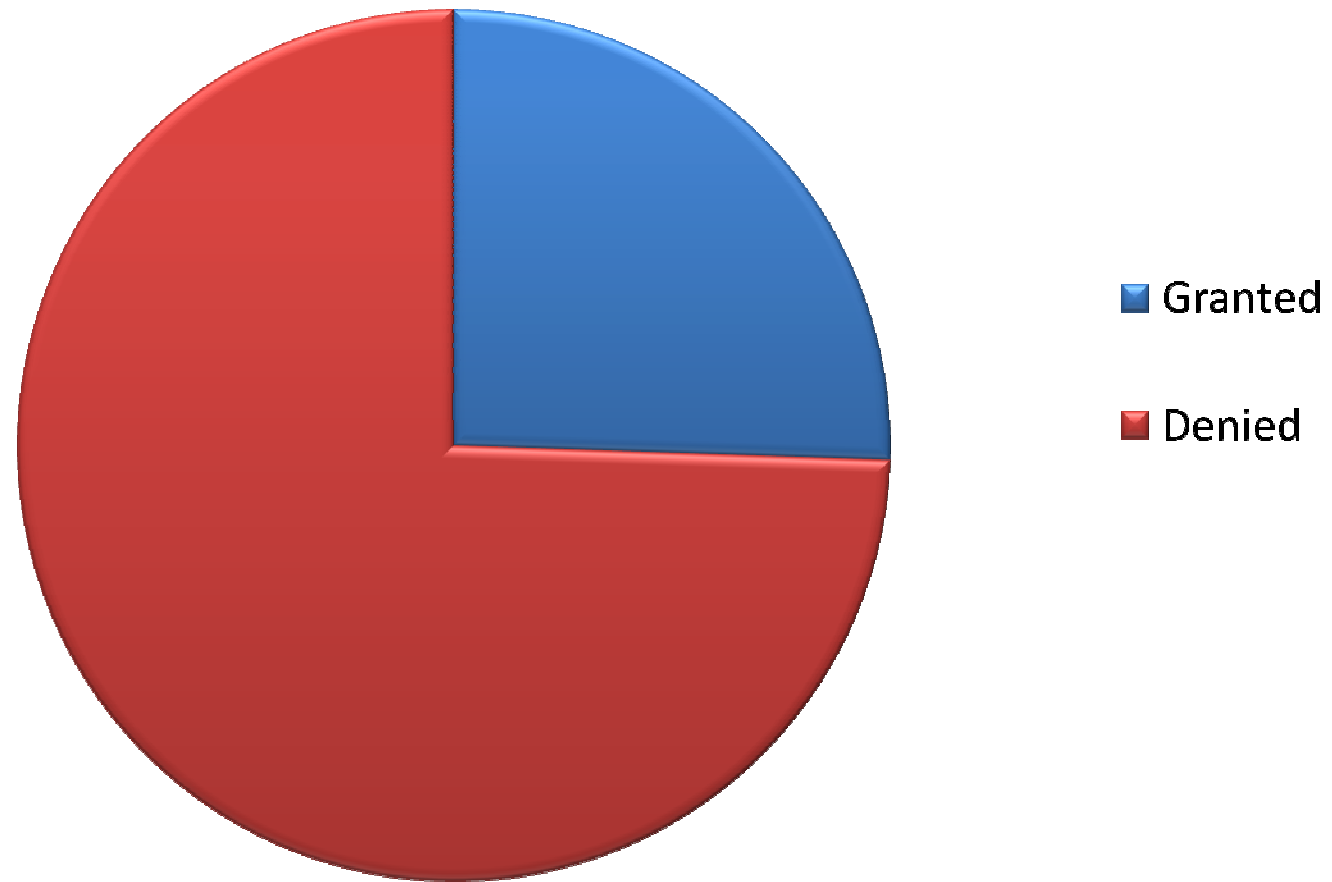
# Motions to Strike in 2011 and 2012



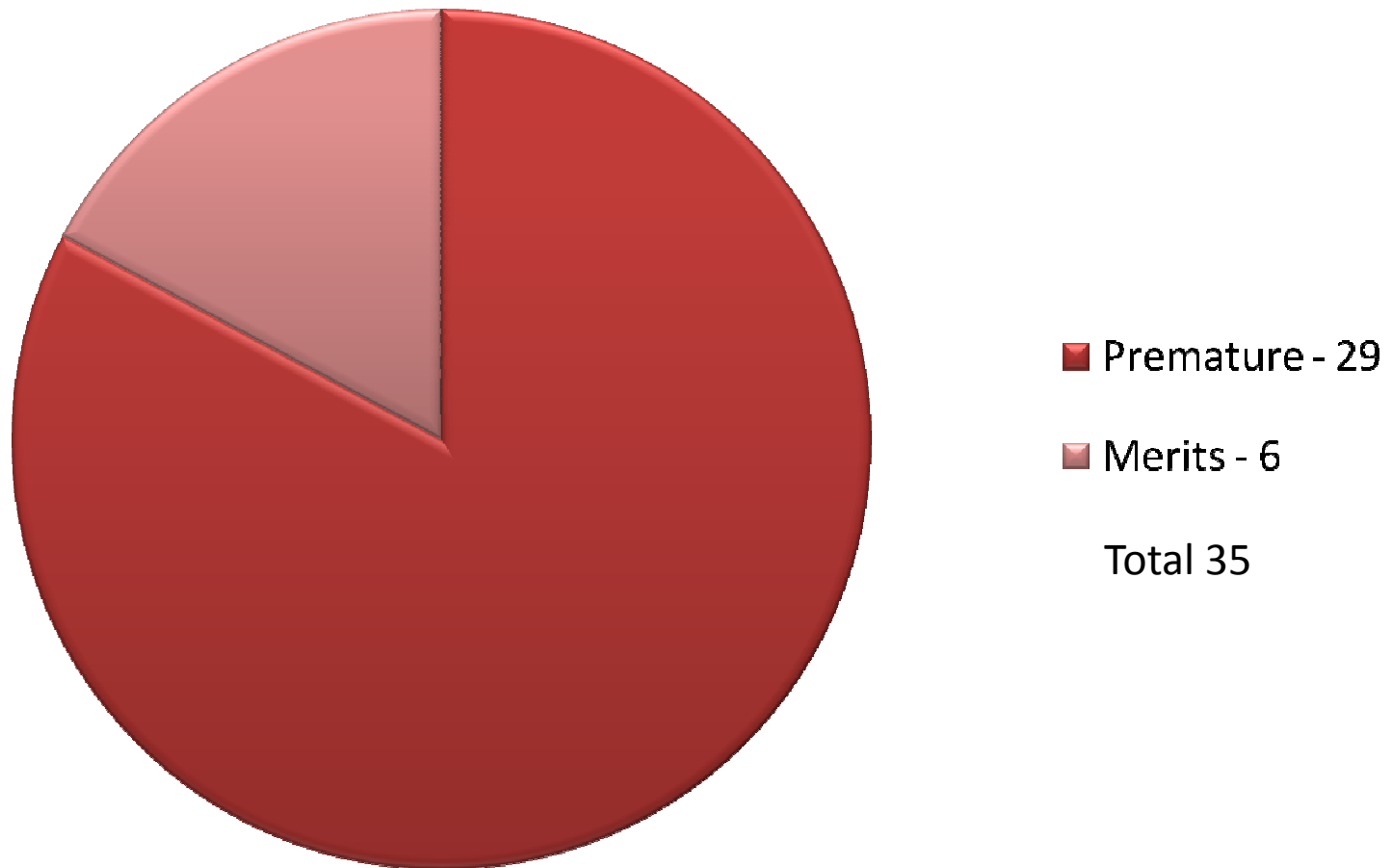




# Motions to Strike in 2011 and 2012



# Timing Considerations



# Timing Considerations

- Rule 23(c)(1)(A) provides that the court “[a]t an early practicable time . . . , must determine by order whether to certify the action as a class action.”
- A motion to strike class allegations may be made at **any point** in the litigation, and can therefore be filed even before plaintiffs have formally moved for certification.
  - *But see, e.g., Vlachos v. Tobyhanna Army Depot Fed. Credit Union*, 2011 WL 2580657, at \*2 (M.D. Pa. June 29, 2011) (“Because there is no motion for class certification pending, the defendants’ motion to strike will be denied as premature.”)

# ***Pilgrim v. Universal Health Card, LLC***

- Class Representatives:
  - Daniel Pilgrim (Pennsylvania resident)
  - Patrick Kirlin (Mississippi resident)
- Defendants:
  - Universal Health Card, LLC (Ohio)
  - Coverdell Inc. (Georgia)



# ***Pilgrim v. Universal Health Card, LLC***

- Defendants created a program designed to provide healthcare discounts to consumers. Membership gave consumers access to a network of healthcare providers that had agreed to lower their prices for members.
- Universal handled the advertisements, which encouraged consumers to visit its website or call its toll-free hotline to learn more about the program and to sign up for a membership.
- Coverdell was responsible for maintaining the network of healthcare providers and for reviewing Universal's advertising materials.

# Cut off set for free Universal Health Card

Public gets free card for 30 days just by beating the deadline to cover only the registration fee for the affordable care provided by over 561,000 Doctors, Dentists, Pharmacists and Hospitals

Hospital Emergency Rooms, Wal-Mart, Rite Aid, CVS, Walgreens, Kmart, Target, Pearle Vision, LensCrafters, American Dental Center and many more now accept the Universal Health Card

By Jonathan M. Moorhead  
Universal Media Syndicate

Now anyone can join the 6 million plus people who have already made the selection and are now getting access to the affordable health care they need.

These health care programs are now being provided by the Universal Health Card.

So, how is everyone getting the Universal Health Card? "It's easy; for the next 30 days we're letting everyone use it free," said Dr. Joseph Dietz, a senior health care advisor for the Universal Health Card. "Just call the National Hotline before the 48-hour deadline and cover only the \$18 registration fee. It's that simple," Dietz said.

Since no one can be refused, everyone can benefit from the savings. There are no medical exams required, no health questions to answer, or forms to fill out.

The Universal Health Card can now be claimed by anyone regardless of past or current health conditions. So anyone at any age can save on health care protection and prescription drugs without any confusion or red tape.

*"We're all one illness away from poverty ... But now the Universal Health Card helps ensure full access to quality medical care so patients get the affordable care they need when they need it."*

-Dr. Philip Howren  
Emergency Room Physician

For the next 48 hours, the new Universal Health Card is available to individuals and entire families and you don't have to be over 65 or have low income to get the new card.

All health care needs are being provided at affordable rates by over 561,000 health care professionals including Doctors and Hospitals locally and across the nation.

In addition there are twenty-four thousand Dentists across the country that provide the afford-



By Service: 1-800-677-4323  
By Fax: 908030  
By PCN: CLAIMER  
By Group: NCI



**STAYING ALIVE:** In a split second, lives change forever. This Emergency Room crisis reveals the impact and reality of those who are unprepared. That's why the new Universal Health Card is now giving full access to quality medical care throughout the country so patients get the care they need when they need it. So, all those who beat the 48-hour deadline by calling the National Hotline at 1-866-729-5807 and cover only the \$18 registration fee will get the full thirty day use of the Universal Health Card for free.

to get. The eye-care providers are among the best in the nation including Eye Masters, Lens-Crafters, Pearle Vision, Sears Optical, J.C. Penney and even Target.

But when an accident or serious illness strikes Universal Health Card holders are far better off than those without any health insurance because there are hospitals nationwide that now accept this health card.

"We're all one illness away from poverty ... But now the Universal Health Card helps ensure full access to quality medical care so patients get the affordable care they need when they need it," said Dr. Philip Howren, Emergency Room Physician.

With the high cost of health care, some families are rolling the dice hoping that an accident or catastrophic event will not occur.

That's why the Universal Health Card is saving the day for so many

ing off the hook," said Kenneth J. Geis, Director of the National Hotline. Our reason for the 48-hour deadline is simple; we want to make sure that everyone gets to speak to a real person who can instantly register and then issue the free

card. "But anyone who misses this deadline will have to wait until future periods are announced to the public sometime in the future," said Geis.

THE UNIVERSAL HEALTH CARD™				
	YES	NO	YES	NO
Doctor Visits	●		Vision/LASIK Surgery	●
Emergency Room	●		Podiatry	●
Diabetic Supplies	●		Maternity	●
Hospitalization	●		Chiropractic	●
Prescriptions	●		Mental Health	●
Hearing	●		Physical Therapy	●
Dental/Orthodontics	●		Nursing Home	●
Drug Rehabilitation	●	●	Air Ambulance	●
Hospice Care	●		Pediatrics	●
Specialists	●		Cosmetic Surgery	●

Source: Universal Health Card

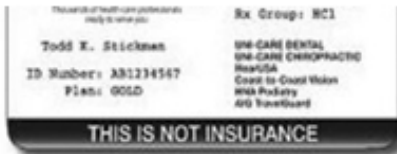
So how is everyone getting the Universal Health Card? "It's easy; for the next 30 days we're letting everyone use it free," said Dr. Joseph Dietz, a senior health care advisor for the Universal Health Card. "Just call the National Hotline before the 48-hour deadline and cover only the \$18 registration fee. It's that simple," Dietz said.

provide the affordable dental care services including: dentures, cleaning, fillings, crowns, root canals, braces, oral surgery, extractions and more for Universal Health Card holders.

And the best news is the Universal Health Card is now accepted at 57,000 pharmacies including the nation's largest: CVS, Rite Aid, Wal-Mart, Target, Kmart, Walgreens and many more.

The Universal Health Card prescription drug plan even allows everyone to choose name brand drugs instead of generic drugs. In fact, Universal Card holders can even get free home delivery of Diabetic testing supplies and insulin.

And when it comes to eye care, the Universal Health Card professionals are second to none. Now new glasses, contact lenses, and even sunglasses are easy for everyone



**THIS IS NOT INSURANCE**

for so many people. It is not health insurance. It's like a safety net of savings that gives everyone and their

family protection when none is available or they have too little protection.

Long term protection will also be extended to card holders at just forty-nine dollars a month, but now that everyone can get the card for free, it's so important that everyone in need of protection calls now and beats the 48-hour deadline. All that is needed is to cover just the registration fee that will provide the first thirty days of complete, affordable protection with the Universal Health Card for free.

"There are over 47 million people in the U.S. who don't have health insurance so we know the phones will be ring-

## How to get the FREE Universal Health Card

The National Toll Free Hotlines are now open. You cannot be refused. The Universal Health Card is being given away to all those who beat the 48-hour deadline to cover just the registration fee of only \$18 to get the 30 Day immediate savings on the personal care provided by over 561,000 Doctors, Dentists, Pharmacists and Hospitals. All you need to do is pick the care group you need below and call the Hotline number before the 48-hour deadline expires.

**SINGLE**



START CALLING AT 8:00 A.M.  
1-866-721-5807

**FAMILIES**



START CALLING AT 8:30 A.M.  
1-866-619-6786

### This is not insurance: No one can be refused, no medical exams, no waiting, no

It's easy because the card provides discounts for the essential care that will be provided by over 561,000 of doctors, dentists, pharmacists and hospitals with the free Universal Health Card. The Universal Health Card covers the medical services. Universal Health Card holders are entitled to a discount directly from the health care provider to beat the deadline to get the Universal Health Card. This helps everyone get the care they need. The discount is not a Medicare prescription drug plan, you do not have to be 65 to get the Universal Health Card. Administration: 700, Chicago, IL. 60631, 1-800-308-0374. The first offering is being limited to residents of AZ, AL, GA, LA, MD, MI, MN, NY, OH, PA, VA, WI, WY to have access to the Universal Health Card. Residents of all other states not listed must wait for future offerings.

## How to get the FREE Universal Health Card

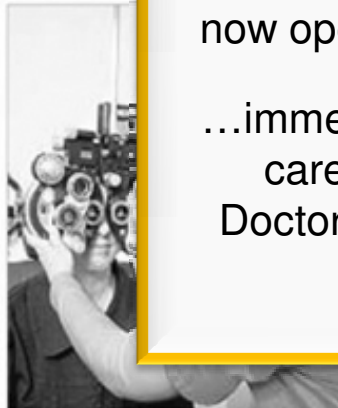
The National Toll Free Hotlines are now open. You cannot be refused. . .  
...immediate savings on the personal care provided by over 561,000 Doctors, Dentists, Pharmacists and Hospitals. . . .



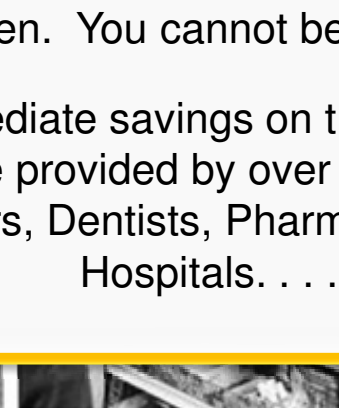
■ **HEALTHY TEETH:** Universal card holders don't worry about the high cost of dental care anymore because their protection includes: dentures, cleanings, fillings, crowns, braces and much more.



■ **ALWAYS A REAL PERSON TO TALK TO:** Even on Christmas Day, Universal Health Card holders can speak with registered nurses who are there to talk them through their concerns and answer questions.



■ **SEEING CLEARLY:** Everyone now gets affordable prescription glasses, contact lenses and even LASIK eye surgery from the best in the nation like: LensCrafters, Eye Masters, Pearle Vision and Sears Optical.



■ **GETTING FILLED:** Universal Health Card holders get access to over 5,000 FDA approved drugs at over 57,000 pharmacies including CVS, Rite Aid, Wal-Mart, Target, Kmart, Walgreens and many more.



# ***Pilgrim v. Universal Health Card, LLC***

- Plaintiffs' alleged that:
  - The newspaper ads, which were designed to look like news stories, were deceptive;
  - Defendants advertised the program as “free” when it included a monthly membership fee after the first 30 days; and
  - There were healthcare providers listed in the discount program that had never heard of the program.

# *Pilgrim v. Universal Health Card, LLC*

- Procedural History
  - Coverdell filed a Motion to Dismiss the Complaint under Rule 12(b)(6), which the district court granted.
    - The court found that Universal peddled and sold the memberships, making Coverdell too far removed from the transactions to qualify as a “supplier” under Ohio law or to have to answer to an unjust enrichment claim.
  - **Universal filed a Motion to Strike the Class Allegations,** which the district court also granted.

# ***Pilgrim v. Universal Health Card, LLC***

While there is “[n]o doubt [that] States have an independent interest in preventing deceptive or fraudulent practices by companies operating within their borders[,] . . . The State with the strongest interest in regulating such conduct is the State where the consumers – the residents protected by *its consumer-protections laws* – are harmed by it.”

– *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011) (emphasis in original).

# *Pilgrim v. Universal Health Card, LLC*

- Because the consumer-protections laws of each state must be applied, common issues did not **predominate**.
  - ***Program did not operate the same way in each State***
    - “A core part of the claim is that the program was worthless because the listed healthcare providers near the plaintiffs did not offer the promised discounts or because there were no listed providers near them in the first place. But to establish the point, the plaintiffs would need to make particularized showings in different parts of the country . . . Where and when featured providers offered discounts is a prototypical factual issue that will vary from place to place and from region to region.”
  - ***Ads varied pursuant to State consumer-protection laws***
    - “Even if, as plaintiffs claim, callers heard identical sales pitches, internet visitors saw the same website, and purchasers received the same fulfillment kit, these similarities establish only that there is *some* factual overlap, not a predominant one, among the claims . . . ”

# Timing Under *Pilgrim*

*bacco Co.*, 84 F.3d 734, 741 (5th Cir.1996) (“In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.”); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir.1996) (“[B]ecause we must apply an individualized choice of law analysis to each plaintiff’s claims, the proliferation of disparate factual and legal issues is compounded exponentially.” (citation omitted)), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In each of these cases, there were many common issues of fact, but none of that dissuaded the courts from refusing to certify class claims that would be measured by the legal requirements of different state laws.

The plaintiffs’ other objection to the district court’s class-action ruling goes to the timing, not the substance, of it. Given more time and more discovery, they say, they would have been able to poke holes in the court’s class-certification analysis. We think not.

[7] That the motion to strike came before the plaintiffs had filed a motion to certify the class does not by itself make the court’s decision reversibly premature. Rule 23(c)(1)(A) says that the district court should decide whether to certify a class “[a]t an early practicable time” in the litigation, and nothing in the rules says that the court must await a motion by the plaintiffs. As a result, “[e]ither plaintiff or defendant may move for a determination of whether the action may be certified under Rule 23(c)(1).” 7AA Charles Allen Wright et al., *Federal Practice and Procedure* § 1785; see also, e.g., *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 941–44 (9th Cir.2009); *Cook County College Teachers Union, Local 1600 v. Byrd*, 456 F.2d 882, 884–85 (7th Cir.1972).

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tion question whenever it wishes does not free the district court from the duty of engaging in a “rigorous analysis” of the question, and “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.” *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). The problem for the plaintiffs is that we cannot see how discovery or for that matter more time would have helped them. To 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. The key reality remains: Their claims are governed by different States’ laws, a largely legal determination, and no proffered or potential factual development offers any hope of altering that conclusion, one that generally will preclude class certification.

[9] That leaves one final point. After the district court granted the motion to strike the class allegations, it dismissed the action without prejudice for lack of jurisdiction. The jurisdictional determination is reversible. *Bank*, 649 F.3d 492, 500 (6th Cir.2011); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir.2010); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir.2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n. 12 (11th Cir.2009). This flaw, however, need not detain us or the parties. Even though parties may not establish subject matter jurisdiction in the federal courts by consenting to it, see *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), that does not mean they must remain in federal court even when they cannot do so on their own terms. The federal courts closely guard the entrance to jurisdiction but not the

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PILGRIM v. UNIVERSAL HEALTH CARD, LLC  
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# Conclusion

- Threshold Considerations:
  - Will a motion to strike affect the burden of proof?
  - What standard of review will be applied?
  - Any jurisdictional challenges?

# Conclusion

- Courts seem most likely to grant motions to strike class allegations in cases where the proposed class—on the face of the complaint—doesn't meet the stringent predominance requirement of Rule 23(b)(3) and additional discovery would be unlikely to produce evidence that the class should be maintained.
  - Carefully review the allegations to determine whether plaintiff's claims raise individualized inquiries that defeat a finding of predominance.
  - Determine if the defects are purely legal, such that plaintiff's allegations can be challenged early.



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# MOVING TO STRIKE CLASS ALLEGATIONS

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