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Strategies For Moving To Strike Class Allegations

Law360, New York (September 04, 2012, 11:03 AM ET) -- In the opening stage of a putative class action — before class discovery, before the certification motion — defendants may score an early victory by moving to strike the class allegations in the complaint. As the Sixth Circuit demonstrated in Pilgrim v. Universal Health Card LLC,[1] courts are becoming increasingly amenable to such early motions to strike where it is obvious from the pleadings that the class cannot be certified.

In considering a motion to strike, defense counsel should pay special attention to the procedural underpinnings of such a motion, the applicable burden of proof and standard of review, as well as potential jurisdictional and timing considerations.

Practice Tips for Motions to Strike Class Allegations

- Consult the local rules before filing a motion to strike class allegations.
- Focus the motion on predominance by showing intractable choice-of-law problems in nationwide class actions.
- Keep the burden on plaintiffs; the majority of courts hold that the burden of proof remains on the party seeking class certification.
- Understand the nuances of each jurisdiction, as the standard of review varies, and note that some jurisdictions are more receptive to motions to strike class allegations than others.

The Procedural Basis for a Motion to Strike Class Allegations

Federal Rules of Civil Procedure 23(c)(1)(A), 23(d)(1)(D) and 12(f) govern a motion to strike class allegations.

Rules 23(c)(1)(A) and 23(d)(1)(D)

Under Rule 23(c)(1)(A), a court must determine whether to certify the action as a class action "at an early practicable time." The "early practicable time" directive suggests that courts may and should address plaintiffs' class allegations at inception if "the pleadings are facially defective and definitively establish that the class action cannot be maintained."[2]

Rule 23(d)(1)(D) authorizes a motion to strike class allegations, allowing courts to issue orders "requiring that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." With its express application to pleadings, 23(d)(1)(D) is the appropriate procedural vehicle to develop motions to strike class allegations, and it is procedurally inseparable from 23(c)(1)(A).[3] Thus, regardless of whether either party has moved to certify the class, a motion to strike class allegations based on Rule 23(d)(1)(D) allows the court to make a class determination in the same manner intended by 23(c)(1)(A).

Rule 12(f)

While more broadly worded than its Rule 23 counterpart, Rule 12(f) also allows a court, on its own or by motion of either party, to strike from pleading "any redundant, immaterial, impertinent or scandalous matter" to avoid wasting "time and money litigating spurious issues." Several courts have relied on Rule 12(f) to strike class allegations.[4]

Local Rules

Some courts have local rules that expressly permit a motion to strike class allegations. For example, the United States District Court for the District of Columbia has a local rule that allows defendants to "move at any time to strike the class action allegations."[5] Similarly, the United States District Court for Northern District of Ohio has a local rule that permits such motions, noting that "[n]othing in [Local Rule 23] shall preclude any party from moving to strike the class action allegations."[6]

Vulnerable Targets for a Motion to Strike

Courts most frequently grant motions to strike class allegations on predominance and ascertainability grounds. And while the Rule 23(a) requirements of commonality, typicality and adequacy should also be considered, for they are typically less vulnerable to a motion to strike.

Predominance

Defendants have recently achieved the greatest success with motions to strike class allegations by targeting the 23(b)(3) predominance requirement. For example, in the Pilgrim case, the Sixth Circuit granted the motion to strike because consumer protection laws varied amongst states and the application of these differing laws created difficult choice-of-law problems and defeated the ability of common issues to predominate.[7] Therefore, actions involving laws that differ from state to state are vulnerable to a motion to strike class allegations.

Ascertainability

Targeting ascertainability has also yielded successful results for defendants. Courts have granted motions to strike class allegations where the proposed class was too broad, where the class contained members lacking standing[8] and where individualized factual or legal inquiries were required to determine who was actually a class member.[9]

The Burden of Proof

Defendants must consider how a motion to strike class allegations could affect the burden of proof.

The Majority View: the Burden Remains on the Party Seeking Certification

The better and more widely accepted view is that the burden remains with the party seeking class certification, regardless of who moves for the class determination.[10] As one court has noted, this view represents the more logical approach: “If the burden rested with the first filer of a motion, then if neither party made a motion, the court would have the burden to show that the Rule 23 requirements have been met when it makes a class determination on its own motion." [11]

The Minority View: the Burden Shifts to the Defendant

Some courts have held that, by moving to strike, the burden of proof shifts to the defendant to show that class treatment is inappropriate under the standard on a Rule 12(b)(6) motion to dismiss for failure to state a claim.[12] However, this is the minority view and is generally disfavored. As one commentator observed, “[a]n order granting a motion to strike class allegations is tantamount to a denial of class certification after a motion to certify.”[13]

Consequently, “[i]t would be incongruous to have the burden vary according to the procedural vehicle through which the determination is made.”[14]

Jurisdictional Considerations

Defendants must also consider the standard of review that will apply to their motion to strike class allegations. Depending on jurisdiction, the way in which motion to strike is procedurally raised, and/or the judge’s predilections, a motion to strike may be reviewed under the “rigorous analysis” standard applied to class certification motions, the “well-pleaded” complaint standard for 12(b)(6) or the “immaterial, impertinent or scandalous” standard of 12(f).[15]

For example, in the Pilgrim case, the Sixth Circuit noted that, “[t]o say that a defendant may freely move for resolution of the class-certification question whenever it wishes does not free the district court from the duty of engaging in a ‘rigorous analysis’ of the question.”[16]

Counsel should therefore take care to determine what standard of review is likely to apply in determining whether to file a motion to strike the class allegations.

In addition to the standard of review, some jurisdictions are more receptive to motions to strike class allegations than others. However, while such considerations always play a role in developing defense strategies, jurisdictional acceptance of motions to strike class allegations does not seem to be a serious limitation — with one exception.

The majority of published denials of motions to strike class allegations in 2011 and the first half of 2012 took place in California. While class actions are prevalent in California, it is likely a telling statistic that, during this time, of the opinions available on electronic databases, federal courts in California denied motions to strike class allegations on 17 occasions[17] and granted just one.[18]

This is not entirely surprising given the frequently repeated sentiment in this jurisdiction that “motions to strike class allegations are disfavored because a motion for class certification is a more appropriate vehicle for arguments pertaining to class allegations.”[19]

Despite the trend in California, jurisdictional dynamics certainly should not prevent defendants from filing such motions, but these dynamics remain a consideration in developing an overarching case strategy.

Timing: When to File

The final and potentially the most important consideration is the timing of filing a motion to strike class allegations. In recent years, the vast majority of motions to strike that were denied were denied as premature. While many courts interpret 23(c)(1)(A)'s "early practicable time" language as allowing for motions to strike class allegations at any time, this does not mean that motions to strike class allegations should always be filed prior to a motion for certification.

It is therefore important to assess whether the particular case lends itself to a motion to strike early in the litigation, for prematurely filing a motion to strike potentially risks weakening any future efforts to strike class allegations or other pleadings to dispose of the case.

Further, a minority of courts do not agree with the proposition that motions to strike can be filed before the plaintiff moves for class certification. These courts have overtly created timing restraints by ruling that "[b]ecause there is no motion for class certification pending, the defendants' motion to strike will be denied as premature."[20]

Notably, these restrictions are rare, and most courts do not place restrictions on motions to strike class allegations at the pleading stage. That the Sixth Circuit validated the ability to strike prior to certification in the Pilgrim case further decreases the likelihood that courts would adopt these types of restrictions in the future.

Pilgrim's Warning to Plaintiffs

The Pilgrim case serves as a warning to plaintiffs seeking to use costly discovery as a weapon to force an early settlement. In the case, when the plaintiffs objected to the district court's approval of the motion to strike class allegations and argued that "[g]iven more time and more discovery . . . they would have been able to poke holes in the court's class-certification analysis," the Sixth Circuit forcefully responded, "The problem for the plaintiffs is that [the court] cannot see how discovery or for that matter more time would have helped them."[21]

The Pilgrim case therefore provides a strong basis for the proposition that defendants do not need to engage in class discovery where it is obvious from the pleadings that the class cannot be certified. Thus, in the proper case, defendants may be able to use motions to strike class allegations as a powerful weapon to finish the battle before it begins.

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[1] 660 F.3d 943 (6th Cir. 2011).

[2] Wright v. Family Dollar, Inc., No. 10-C-4410, 2010 WL 4962838, at *1 (N.D. Ill. Nov. 30, 2010). See also In re Yasmin & Yaz (Drospirenone) Mktg., 275 F.R.D. 270, 275 (S.D. Ill. 2011) (same); Pilgrim v. Universal Health Card, LLC, 660 F.3d 943 (6th Cir. 2011) (noting that nothing in Rule 23 says that a court must await a motion by plaintiffs to certify the class before the defendant may move to strike the class allegations).

[3] See 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1795 (3d ed. 2012).

[4] Lyons v. Bank of Am., No. C 11-1232 CW, 2011 WL 6303390, at *7 (N.D. Cal. Dec. 16, 2011) (citing Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994)). See also Sanders v. Apple, Inc., 672 F. Supp. 2d 978, 990 (addressing the use of Rule 12(f) and noting that "[w]here 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.") (citing Thompson v. Merck & Co., No. C.A. 01-1004, 2004 WL 62710 (E.D. Pa. Jan. 6, 2004)).

[5] D.D.C. LCvR 23.1(b).

[6] N.D. Ohio LR. 23.1(c).

[7] See Pilgrim, 660 F.3d at 947 (noting that where "the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute.").

[8] See, e.g., Sanders, 672 F. Supp. 2d at 991 (explaining that ascertainability cannot be achieved if some class members lack standing).

[9] See, e.g., Schilling v. Kenton County., Ky., No. 10-143-DLB, 2011 WL 293759, at*8 (E.D. Ky. Jan. 27, 2011) (granting a motion to strike class allegations and explaining that "[b]ecause Plaintiffs' proposed definition is wholly dependent on a merits-based resolution of each potential class members' claims, the putative class is a mere apparition until judgment is rendered with respect to each individual claim.").

[10] See, e.g., Blihovde v. St. Croix County, Wis., 219 F.R.D. 607, 613–14 (W.D. Wis. 2003); Barabin v. Aramark Corp., 210 F.R.D. 152, 157 (E.D. Pa. 2002), aff'd, No. 02-8057, 2003 WL 355417 (3d Cir. Jan. 24, 2003) ; Thomas v. Moore USA, Inc., 194 F.R.D. 595, 597 (S.D. Ohio 1999).

[11] Blihovde, 219 F.R.D. at 613–14 (emphasis in original)

[12] See, e.g., Jiminez v. Allstate Indem. Co., No. 07-cv-14494, 2010 WL 3623176, at *3 (E.D. Mich. Sept. 15, 2010) ("When a defendant moves to strike class action allegations on the basis that class certification is precluded as a matter of law, the defendant bears the burden of establishing that the plaintiff will be unable to demonstrate facts supporting certification, even after discovery and the creation of a full factual record. When the defendant challenges class certification based solely on the allegations in the complaint, the standard is the same as that applied in deciding a motion to dismiss under Rule 12(b)(6). Generally, then, the opposing party has the burden of demonstrating from the face of the plaintiff's complaint that it will be impossible to certify the classes alleged by the plaintiff regardless of the facts the plaintiff may be able to prove.") (internal citations and quotations omitted). See also Bessette v. Avco Fin. Servs., Inc., 279 B.R. 442, 450 (D.R.I. 2002) (noting that where the question "is not whether the class should be certified, but whether the class allegations in the complaint should be stricken . . . the burden is not on the party seeking class certification, rather, as the non-moving party, all reasonable inferences must be construed in [the plaintiff's] favor.")

[13] 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 3:4 (8th ed. 2011).

[14] Id.

[15] Paul Karlsgodt, Practice Tip: Should a Defendant Challenge Certification Early and Often?, ClassActionBlawg.com, Oct. 28, 2010, http://classactionblawg.com/2010/10/28/practice-tip-should-a-defendant-challenge-certification-early-and-often/. See also, e.g., Pilgrim, 660 F.3d at 949 (applying the "rigorous analysis" standard); Vlachos v. Tobyhanna Army Depot Fed. Credit Union, No. 3:11-CV-0060, 2011 WL 2580657, at *1–2 (M.D. Pa. June 29, 2011) (applying the Rule 12(b)(6) standard); Sanders, 672

F. Supp. 2d at 990–91 (applying the Rule 12(f) standard).

[16] Pilgrim, 660 F.3d at 949 (citing Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160–61 (1982)).

[17] A search of electronic databases revealed that federal courts in California denied motions to strike class allegations in the following cases in 2011 and from January to July, 2012: Burden v. Selectquote Ins. Servs., No. C 10-05966 SBA, 2012 WL 2119405 (N.D. Cal. June 11, 2012); Casida v. Sears Holdings Corp., No. 1:11-cv-01052-AWI-JLT, 2012 WL 253217 (E.D. Cal. Jan. 26, 2012); Cholakyan v. Mercedes-Benz USA, LLC, 796 F.Supp.2d 1220 (C.D. Cal. 2011); Covillo v. Specialty Cafe, No. C-11-00594-DMR, 2011 WL 6748514 (N.D. Cal. Dec. 22, 2011); Fradis v. Savebig.com, No. cv-11-07275, 2011 WL 7637785 (C.D. Cal. Dec. 2, 2011); Green Desert Oil Group v. BP West Coast Prod., No. 11-02087, 2011 WL 5521005 (N.D. Cal. Nov. 14, 2011); Kas v. Mercedes-Benz USA, LLC, No. CV 11-1032-GHK, 2011 WL 5248299 (C.D. Cal. Oct. 31, 2011); Garcia v Lane Bryant, Inc., No. CV-F-11-1566-LJO, 2011 WL 5241177 (E.D. Cal. Oct. 31, 2011); Clerkin v. Mylife.com, Inc., No. C 11-00527 CW, 2011 WL 3809912 (N.D. Cal. Aug. 29, 2011); Fasugbe v. Willms, No. 2:10-2320-WBS-KJN, 2011 WL 3667440 (E.D. Cal. Aug. 22, 2011); Walker v. Life Ins. Co. of the SW, No. CV-10-9198-JVS, 2011 WL 7407656 (C.D. Cal. May 5, 2011); Henderson v. The J.M. Smucker Co., No. CV-10-4524-GHK, 2011 WL 1050637 (C.D. Cal. March 17, 2011); Clark v. Sprint Spectrum, L.P., No. CV-10-9702-CAS, 2011 WL 835487 (C.D. Cal. March 7, 2011); In Re Sony PS3 Other OS Litig., No. C-10-1811-RS, 2011 WL 672637 (N.D. Cal. Feb. 17, 2011); Murphy v. DIRECTV, Inc., No. 2:07-cv-06465-JHN-VBKx, 2011 WL 3328393 (C.D. Cal. Feb. 11, 2011); Rhoades v. Progressive Cas. Ins., No. 2:10-cv-0763-GEB-KJN, 2011 WL 397657 (E.D. Cal. Feb. 3, 2011).

[18] Lyons v. Bank of Am., NA, No. C-11-1232-CW, 2011 WL 6303390, at *7 (N.D. Cal. Dec. 16, 2011).

[19] In re Apple, AT&T iPad Unlimited Data Plan Litig., No. C-10-02553 RMW, 2012 WL 2428248, at *2 (N.D. Cal. 2012) (citing Thorpe v. Abbott Labs., Inc., 534 F. Supp. 2d 1120, 1125 (N.D. Cal. 2008)); Kazemi v. Payless Shoesource Inc., No. C 09-5142 MHP, 2010 WL 963225, at *2 (N.D. Cal. March 16, 2010)).

[20] See, e.g., Vlachos, 2011 WL 2580657, at *2.

[21] Pilgrim, 660 F.3d at 949.