Skadden

The Class Action Chronicle

1 / **Fifth Circuit Decision Signals Increasing Acceptance of Motions To Strike Class Allegations**

3 / **Recent Class Action Decisions of Note**

Eighth Circuit Holds CAFA Contains No Anti-Removal Presumption

Fifth Circuit Holds That Class Definitions Must Be Sufficiently Precise To Ascertain the Appropriate Class Members

Second Circuit Reaffirms That Proper Predominance Analysis Requires Consideration of All Legal Issues, Including Affirmative Defenses

Fifth Circuit Decision Signals Increasing Acceptance of Motions To Strike Class Allegations

The decision to grant or deny class certification is usually the most pivotal aspect of a putative class action. A denial of class certification frequently disposes of the case altogether, while a grant often leads to settlement.

Given these high stakes, courts have generally been reluctant to decide the question of class certification on the pleadings alone (*e.g.*, through a motion to strike), without the benefit of class-related discovery. And of course, rulings denying motions to strike class pleadings are interlocutory in nature and thus not appealable as of right. As a result, it is rare that an appellate court has the opportunity to weigh in on the practice.

One such opportunity arose earlier this year, in *Elson v. Black*, 56 F.4th 1002 (5th Cir. 2023). In that case, the U.S. Court of Appeals for the Fifth Circuit affirmed a lower court ruling granting a motion to strike class allegations on predominance grounds — both legal and factual — notwithstanding the plaintiffs' argument that subclasses could easily account for variations among class members.

In so doing, the Fifth Circuit became the third federal appeals court to embrace motions to strike class allegations.[1] It held that such motions **should** be granted where the pleadings make plain that the plaintiffs could never overcome the hurdles of Rule 23 certification.

The Rulings

Fourteen consumers brought a putative class action in the U.S. District Court for the Southern District of Texas against Ashley Black and her companies, alleging the defendants' FasciaBlaster massage product failed to provide its advertised benefits.

The plaintiffs claimed they purchased the FasciaBlaster based on marketing materials indicating the massager would aid in weight loss, removing cellulite, reducing scarring and relieving pain, but did not receive those touted benefits. Based on these allegations,

[1] *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) ("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."); *Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1092 (8th Cir. 2021) ("We agree with the Sixth Circuit that a district court may grant a motion to strike class-action allegations prior to the filing of a motion for class-action certification."), *cert. denied*, 142 S. Ct. 2675 (2022). Although the U.S. Court of Appeals for the Eleventh Circuit previously reversed a lower court's decision to strike class allegations as premature, it left the door open to such an outcome in future cases. *See Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 (11th Cir. 2008) ("In some instances, the propriety *vel non* of class certification can be gleaned from the face of the pleadings.").

the plaintiffs asserted breach-of-warranty and unjust enrichment claims under seven different states' laws. The plaintiffs sought to represent a nationwide class of FasciaBlaster purchasers in addition to seven state-based subclasses. The defendants both moved to strike the class allegations and dismiss the complaint for failure to state a claim.

In a three-sentence ruling, the district court struck the class allegations and accepted the defendants' argument that individual questions of reliance defeated commonality. Immediately after the Fifth Circuit denied the plaintiffs' petition for interlocutory review, the lower court dismissed the remaining claims. The plaintiffs then appealed both lower court decisions.

On appeal, the plaintiffs primarily argued that the lower court failed to "rigorously" analyze the Rule 23 requirements, specifically by failing to properly examine state law jurisprudence on reliance. Although the Fifth Circuit agreed that the district court's "order was inappropriately brief," it nonetheless affirmed the ruling, reasoning that it was substantively correct.

The Fifth Circuit began by expressly endorsing the propriety of moving to strike class allegations based on the pleadings. As the Court of Appeals explained, "[d]istrict courts are permitted to make such determinations on the pleadings and before discovery is complete when it is apparent from the complaint that a class action cannot be maintained" — *i.e.*, when the "class pleadings [are] deficient as a matter of law."

Applying these principles, the Fifth Circuit held that the plaintiffs could not possibly satisfy the requirement of predominance, reasoning that both highly individualized legal and factual issues overwhelmed any common ones. Regarding legal issues, the Court of Appeals reiterated that nationwide class allegations implicate the laws of every state and went so far as to declare that it is the plaintiff's burden (even at the motion to strike stage) to prove that such laws do not materially differ and can be applied on a classwide basis.

The Fifth Circuit determined that the plaintiffs failed to carry their burden, and it cited ample authority recognizing that there are substantial differences between the relevant warranty and unjust enrichment laws. As part of its ruling, the Court of Appeals rejected the plaintiffs' argument that any legal variations could be addressed through state-specific subclasses, reasoning that "'[s]ubclass' is not a magic word that remedies defects of predominance." Instead, the plaintiffs must affirmatively **show** how the subclasses would pave the way to certification.

With regard to factual issues, the Court of Appeals found that "numerous factual differences" indicate the plaintiffs could "in no way comprise a coherent class." This was so because class members received entirely different representations (advertisements) and purchased the alleged product for entirely distinct reasons (cellulite issues, pain relief, weight loss, etc.).

Implications

The *Elson* ruling is significant for multiple reasons. Most notably, the decision marks just the third time a federal appeals court has countenanced a decision on class certification at the pleading stage — without expensive, time-consuming discovery.

The decision is likely to spawn increased motion practice regarding class certification early on in putative class actions in the Fifth Circuit and may even be a harbinger of similar practices and rulings in other circuits. Nevertheless, even in circuits that have formally recognized the utility of motions to strike class allegations, district courts have generally approached such motions with caution. In light of this track record, defendants might carefully consider reserving threshold challenges to class certification for exceptional cases where the allegations plainly cannot satisfy the requirements of Rule 23.

Elson is also notable because it offers defendants multiple potential avenues for challenging class allegations at the outset of a case. With regard to legal predominance, most courts considering motions to strike have placed the burden on defendants to show that the relevant state laws implicated by a nationwide or multistate class action vary in material respects. The Fifth Circuit bucked that trend in putting the burden (even at the pleading stage) on the plaintiffs.

And as the Court of Appeals made clear, a plaintiff cannot avoid that burden by proposing state-specific subclasses, because a jury would still have to comprehend and then apply differing state laws in a single class proceeding.

Elson is also significant because it opens the door to challenging predominance based on individualized fact questions and issues. Most courts that have confronted such challenges have found them to be premature absent discovery as to the ability of a plaintiff to prove the elements of her claims on a classwide basis. But the Fifth Circuit's recent decision may be a signal to other courts that such challenges are viable even at the beginning of a case, particularly in deceptive marketing cases like *Elson*.

In short, *Elson* underscores the dual nature of the predominance inquiry. Even in situations where there is little legal variation, defendants may be able to terminate a proposed class action by pointing to factual differences among plaintiffs.

And because the striking of class allegations effectively terminates the case, defendants may wish to consider simultaneously moving to stay discovery or obtaining a stipulation to the same effect pending resolution of a threshold motion to strike to avoid costly discovery.

Recent Class Action Decisions of Note

Eighth Circuit Holds CAFA Contains No Anti-Removal Presumption

***Leflar v. Target Corp.*, 57 F.4th 600 (8th Cir. 2023)**

Writing for a panel of the U.S. Court of Appeals for the Eight Circuit, Judge David R. Stras held a district court judge "applied the wrong legal standard" by relying on a "nonexistent anti-removal presumption" when the lower court remanded a putative class action under the Class Action Fairness Act (CAFA).

The plaintiffs originally brought the action in state court against Target seeking injunctive relief for alleged violations of the Magnuson-Moss Warranty Act's "Pre-Sale Availability Rule" that requires sellers to make written warranties reasonably available to consumers. The defendant removed the case under CAFA and submitted three declarations attesting that the amount in controversy exceeded the $5 million minimum required. In response, the plaintiffs argued, and the district court agreed, that the case must be remanded on the ground that the amount in controversy did not satisfy the $5 million required.

On appeal, the Eight Circuit determined the lower court improperly applied an anti-removal presumption in its remand analysis that could not be squared with either the text of CAFA itself or prior binding U.S. Supreme Court precedent in *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014).

The Court of Appeals explained that "[c]ourts have become confused, however, about how to evaluate the amount in controversy at each step" of the CAFA removal process. At the pleading stage, "the test is whether 'the notice of removal plausibly alleges' that the case *might* be worth more than $5 million."

As the Eighth Circuit reasoned, there is no textual basis to disfavor removal under CAFA. In so reasoning, the Court of Appeals relied on prior Supreme Court precedent rejecting a presumption against removal on the ground that CAFA was expressly aimed at expanding federal jurisdiction over interstate class actions and making removal of such cases easier.

Accordingly, the district court's assertion that it was "*required* to resolve all doubts about federal jurisdiction in favor of remand" was erroneous. Judge Stras noted that this presumption may well have played a critical role, especially as the lower court simply did not acknowledge the possibility that Target's sales figures could plausibly meet the jurisdictional threshold.

Finally, the court held that the district court "compounded its error" by ignoring Target's third affidavit detailing the costs to comply with the requested injunctive relief. By refusing to engage with the defendant's arguments that compliance costs alone would be above $5 million, the lower court denied the defendant the right to establish its jurisdictional claims.

Fifth Circuit Holds That Class Definitions Must Be Sufficiently Precise To Ascertain the Appropriate Class Members

***A. A. ex rel. P.A. v. Phillips*, No. 21-30580, 2023 WL 334010 (5th Cir. Jan. 20, 2023)**

The Fifth Circuit held in a *per curiam* opinion that a district court erred in certifying a class action that failed to satisfy the implied Rule 23 requirement of ascertainability.

The plaintiffs — Medicaid-eligible children in Louisiana — brought suit against the Louisiana Department of Health, alleging that the department failed to provide them with intensive care services as required under the Medicaid Act, Title II of the Americans With Disabilities Act (ADA) and the Rehabilitation Act. Over the defendants' objections, the district court certified a class of Medicaid-eligible Louisiana youth (1) who had been diagnosed with a mental health or behavioral disorder and (2) for whom a medical practitioner had recommended intensive home- and community-based services (IHCBS) for treatment.

The Fifth Circuit agreed with the defendants that "the class definition [was] not ascertainable because it [was] not clear which services [were] included in the term 'IHCBS.'" The lower court had amorphously defined the class to include individuals who needed "intensive care coordination, crisis services, and intensive behavioral services," but "[t]hese three terms [were] not defined." Indeed, it was not clear what types of treatment services were "intensive," and clarity was "essential to evaluating whether an individual is a class member."

Finally, the panel rejected the plaintiffs' argument that the term IHCBS was the "functional equivalent" of well-defined services outlined by Louisiana state law. Ultimately, "the term IHCBS, as defined by the district court, [was] too vague to identify class members, and [] the class — as currently defined — [was] unascertainable."

Second Circuit Reaffirms That Proper Predominance Analysis Requires Consideration of All Legal Issues, Including Affirmative Defenses

***Haley v. Tchrs. Ins. & Annuity Ass'n of Am.*, 54 F.4th 115 (2d Cir. 2022)**

Judge John Walker Jr., on behalf of a U.S. Court of Appeals for the Second Circuit panel, recently wrote an opinion reaffirming that Rule 23(b)(3) "requires that a district court analyze defenses" in its predominance inquiry before certifying a class action.

In *Haley*, the plaintiffs brought a putative class action alleging that certain collateralized loans offered by defendant Teachers Insurance and Annuity Association of America (TIAA) violated the Employee Retirement Income Security Act's (ERISA's) "prohibited transactions" rules. The district court certified a class under Rule 23(b)(3) for each of the plaintiffs' claims but made no findings regarding purported variations in the loan agreements or whether potential statutory defenses figured into the certification decision.

The Second Circuit held that the lower court's failure even to discuss the question of whether affirmative defenses could bear on the predominance issue was an abuse of discretion. Judge Walker wrote that careful scrutiny under Rule 23 requires "a complete assessment of predominance," which itself "demands that a district court 'consider *all* factual or legal issues' and classify them as subject to either common or individual proof."

This inquiry "includes any affirmative defenses," which "do not carry 'less weight' on the class certification issue simply because the defendant will bear the burden of proof at the merits stage." Because the district court decided to exclude affirmative defenses from the basket of issues it examined in its predominance inquiry, it abused its discretion, the Second Circuit ruled.

Contacts

John H. Beisner
Partner / Washington, D.C.
202.371.7410
john.beisner@skadden.com

Geoffrey M. Wyatt
Partner / Washington, D.C.
202.371.7008
geoffrey.wyatt@skadden.com

Jordan M. Schwartz
Counsel / Washington, D.C.
202.371.7036
jordan.schwartz@skadden.com

Asher S. Trangle
Associate / New York
212.735.2676
asher.trangle@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000