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Beyond The Class Action Fairness Act

Law360, New York (January 30, 2009) -- The asymmetrical nature of class action litigation — i.e., it costs plaintiffs little or nothing to make class allegations and it may cost the defendant a great deal to respond to them — is oft-lamented.

Reforms in class action practice (most notably, the Class Action Fairness Act of 2005) have addressed some class action abuses and errors by, among other things, expanding the jurisdiction of federal courts.

Generally, federal courts have shown that they are much more resistant to certification of nationwide or multistate consumer class actions where federalism and due process concerns are implicated by such treatment.

Among other things, these developments provide relief from "drive by" certifications (where a state court certifies a class at the outset of the case, sometimes without even hearing from the defendant) and appropriately raise the bar for multistate class action certification motions.

So far, so good. They do little, however, to protect defendants from the sometimes enormous costs of class discovery, even in cases where the class allegations are facially deficient or easily refuted.

Defendants have increasingly sought to avoid the costs of unnecessary class discovery and briefing by moving to strike class allegations from the complaint early in the case. A sizable cross-sample of federal cases indicates that courts will grant such a motion about 50 percent of the time.

In many instances, motions to strike are granted because the plaintiff has not timely filed a motion to certify a class, but, in others, defendants have demonstrated to the court's satisfaction that there is a fatal flaw in the class certification allegations and that a class can never properly be certified.

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In doing so, the defendant often argues that a combination of choice of law, federalism, and due process principles precludes the application of a single body of substantive law to all class members.

Additionally, defendants may argue that, apart from differences in applicable law, extrinsic evidence demonstrates that the facts differ among class members, e.g., that the vast majority of consumers have not encountered — or at least have not complained about — the alleged product defect.

Plaintiffs object to motions to strike, and some courts may be reluctant to grant them, because, one, they may seem to be procedurally unusual and, two, they ask the court to determine that a case will never be suitable for class treatment without complete discovery on class allegations.

Specifically, plaintiffs may claim that a motion to strike class allegations has no basis in Rule 12(f) of the Federal Rules of Civil Procedure, that such a determination is premature (especially where the defendant relies on extrinsic evidence), and that a successful motion to strike may cut off the plaintiff's right to appeal an adverse class certification ruling under Rule 23(f).

These objections should not dissuade courts from striking allegations that are defective or where there is no credible basis to believe that the plaintiff can meet his burdens under Rule 23.

First, a motion to strike class allegations may not be expressly contemplated by Rule 12(f), but, under Federal Rule of Civil Procedure 23(d)(1)(D), courts have discretion to "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D).

Additionally, some courts have local rules that expressly permit the court to disallow or strike class allegations, independently of Rule 12(f). Rule 23(d)(1)(D), with its express application to pleadings, provides a proper instrument for motions to strike class allegations from complaints.

Since Rule 23(d) does not specify a time frame for its invocation, a motion to strike class allegations can be brought at any time when the district court is "conducting an action under [Rule 23]," and is unaffected by the progress of discovery.

Nor is a defendant's motion to strike class allegations necessarily premature simply because class discovery has not been completed. To the contrary, a successful motion to strike class allegations might properly convince the court that no amount of discovery will allow the case to be properly certified as a class action under Rule 23.

If, on the face of the complaint, a plaintiff cannot satisfy all five requirements under Rule 23 (the four prerequisites of Rule 23(a) and at least one of the three situations under Rule 23(b)), no discovery should be imposed on the defendant.

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According to the Supreme Court, “[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claim ...” Gen. Tel. Co. of the SW v. Falcon, 457 U.S. 147, 160 (1982).

In such circumstances, no justification exists for insisting on the expensive ceremony of class discovery and briefing.

Besides, courts may mitigate against any harsh results by allowing the plaintiff, in appropriate circumstances and where it would not be futile to do so, the opportunity to amend the complaint to fix technical deficiencies in pleading class allegations.

Still, and even if the plaintiff has alleged a prima facie case suitable for class treatment, simple facts and evidence may nevertheless warrant an order striking class allegations.

For example, with respect to numerosity, the defendant may be able to demonstrate with objective data that only a small number of people could meet the proposed definition of the class.

Similarly, in some cases, data maintained by the defendant — such as warranty records or evidence that the product was customized for individuals — will be sufficient to demonstrate that the plaintiff’s claims are not typical of the class he seeks to represent.

Of course, where there is perceived “informational” disparity between the parties, courts may be reluctant to rely on extrinsic evidence to strike class allegations before the completion of discovery.

Courts have been and should be willing to consider extrinsic evidence, however, when the plaintiff has identified no compelling reason to doubt its accuracy and no reasoned basis to expect that the implications from that evidence will be negated by evidence that has yet to emerge.

Remember that a motion to strike class allegations is not a motion to dismiss under Rule 12(b)(6) and does not dispose of substantive claims. As such, there is no obvious reason why the court should ignore unambiguous and direct evidence and limit its analysis to the four corners of the complaint.

Finally, under Rule 23(f), a federal court of appeals has the discretion to accept interlocutory appeals from orders granting or denying class action certification.

Generally, a Rule 23(f) petition is appropriate where the order granting or denying class certification signals the “death knell” of the litigation for the plaintiff or the defendant, where the order presents fundamental or unsettled issues of law, or where the decision is manifestly erroneous.

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Since an order striking class allegations might meet these criteria but is not technically an order denying class action certification, a question arises whether plaintiff has the opportunity to seek an interlocutory appeal under Rule 23(f).

First, the court's authority to strike deficient or unsupportable class allegations is not affected by the prospective appellate opportunities the plaintiff may have.

This is particularly true where, as in the case of Rule 23(f), the basis for appeal is purely discretionary and the court of appeals may deny the petition for any or no reason at all.

Plaintiffs wishing to appeal from stricken class allegations under Rule 23(f) might urge the court to accept the appeal by arguing that an order striking class allegations amounts to a functional equivalent of an order denying class certification.

In any event, since a losing party does not have a right to appeal an adverse certification order — only a potential, highly discretionary one — this objection hardly supports denying a meritorious motion to strike.

Ultimately, Rule 23 is a procedural device, and a plaintiff's request to serve as a class representative is not a substantive claim or right.

As such, courts should not confuse the standard for striking class allegations with the standard for dismissing substantive claims under Rule 12(b)(6).

Meaningful class action reform is good, but courts can and should accomplish more by being willing to strike deficient or unsupportable class allegations without requiring burdensome and unnecessary class discovery and briefing in cases that have no reasonable prospect of certification.

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