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Motions To Strike Class Allegations: Here To Stay or Going out of Style?

By their nature, class actions, given the prospect of classwide liability and potentially millions (if not billions) in aggregated damages, are high-stakes endeavors. As a result, defending against a putative class action is an inherently expensive proposition — one that may significantly eclipse the costs of defending against an individual, one-off lawsuit. If a plaintiff's class action complaint withstands a threshold motion to dismiss, the defendant must proceed with burdensome discovery that typically entails voluminous document production, deposing the named plaintiffs, examining the plaintiffs' experts, hiring its own experts, defending the depositions of those individuals, and litigating any discovery-related motions. This is a time-consuming and costly exercise that can often take months (if not years) to complete and usually culminates with the class-certification stage — which is typically the decisive moment in the case.

But defendants have another way to dispose of a putative class entirely or to narrow its scope based on the pleadings alone, long before undergoing costly discovery: through a motion to strike class allegations. As some courts have recognized, these motions may be granted where the pleading demonstrates that a class could never be certified.

Some federal district courts have been slow to embrace these motions, perhaps due to a paucity of appellate decisions on the subject. For about a decade, the lone appellate authority has been the U.S. Court of Appeals for the Sixth Circuit, which endorsed motions to strike in *Pilgrim v. Universal Health Card, LLC*.[1] In *Pilgrim*, the plaintiffs asserted consumer protection and unjust enrichment claims against the provider of a medical discount program, alleging that the company had engaged in misleading advertising. The putative class included residents of all fifty states and the District of Columbia. The district court granted the defendant's motion to strike the class allegations because adjudicating each class member's claims would have required an individualized inquiry into the varying unjust enrichment and consumer protection laws across the country. The Sixth Circuit affirmed, rejecting the notion that striking class allegations prior to discovery is necessarily premature. As the Court of Appeals explained, "[t]he problem for the plaintiffs is that we cannot see how discovery or for that matter more time would have helped them." Delaying resolution of the class certification question until after needless and costly discovery would have been pointless.

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

The decision was a strong vote in favor of motions to strike class allegations, but over the next decade, no similar decision was issued from any other federal court of appeals. During that time, district courts in the Sixth Circuit warmed to motions to strike, while some district courts in other circuits remained wary of disposing of class allegations before a plaintiff formally moved for class certification. For example, in *Oom v. Michaels Cos*.,[2] a putative false-advertising class action involving custom framing services, the class was improperly defined to encompass just those entitled to relief, and "the Court s[aw] no way in which the proposed class c[ould] be modified to avoid this problem." By contrast, in *Reynolds v. Lifewatch, Inc*.,[3] a proposed nationwide class action involving allegations of consumer fraud in connection with a medical alert device, the court refused to strike the class allegations, even though they most likely implicated varying state laws, because motions to strike are "procedurally premature."

But the Sixth Circuit no longer stands alone at the appellate level in endorsing this tool for winnowing putative classes or striking them altogether where no amount of discovery is likely to bear on the certifiability of the proposed classes. Last month, the U.S. Court of Appeals for the Eighth Circuit joined the Sixth Circuit, in a decision that may fuel broader acceptance of these motions in the district courts.

In *Donelson v. Ameriprise Financial Services, Inc*.,[4] the named plaintiff opened an investment account with Ameriprise Financial under the guidance of his financial advisor Mark Sachse. The plaintiff alleged that Mr. Sachse "badly mishandled" his investment account by misrepresenting the account's value and trading on margins against the plaintiff's explicit instruction. The plaintiff sought to represent all of Mr. Sachse's similarly situated clients in a class action against him and Ameriprise Financial, asserting claims under §§ 10(b) and 20(a) of the Securities Exchange Act and § 206(a) of the Investment Advisor Act. While the district court denied the defendants' motion to strike the class allegations, the Court of Appeals reversed.[5]

According to the Eighth Circuit, the plaintiff's § 10(b) claim would have necessarily required a highly individualized inquiry into what (if anything) Mr. Sacshe supposedly told each of his clients, whether such purported misrepresentations were material and whether class members actually relied on those statements. The court also determined that the § 20(a) claim fared no better, because it was predicated on a violation of § 10(b) that was plagued by individual (as opposed to common) issues. Finally, because § 206(a) does not provide a cause of action for private litigants — much less class members — the Eighth Circuit reasoned that such a cause of action had to be stricken as well.

The central theme underlying the appellate court's decision was efficiency: Delaying the fundamental class certification inquiry would "needlessly force the parties to remain in court" when the answer to that question was already clear.[6] Because no amount of discovery could change the fact that each of the proposed class member's claims would require a highly individualized inquiry, the district court abused its discretion in declining to strike the class allegations.

Donelson demonstrates that motions to strike remain a viable tool for terminating or at least substantially limiting a putative class action in appropriate circumstances. The fact that now two federal appeals courts endorse this practice is likely to hold significant sway among federal district court judges in other circuits, particularly because those other jurisdictions do not currently have any binding authority rejecting motions to strike class allegations. As a result, a defendant who is confronted with a putative class action complaint should scrutinize the class allegations and consider challenging the certifiability of the claims in tandem with moving to dismiss the claims of the named plaintiff. Filing such a motion — which ordinarily would not be an expensive proposition — could obviate the need for burdensome and costly discovery or dramatically reduce the scope of such litigation.

Donelson also expands the types of motions to strike class allegations that have gained appellate approval. While *Pilgrim* provides a blueprint for challenging nationwide class allegations in light of varying questions of law, *Donelson* provides a roadmap for attacking claims that necessarily implicate highly individualized questions of fact. In this respect, *Donelson* may do more to broaden acceptances of motions to strike by district courts, as district courts historically have been reluctant to resolve at the pleading stage whether factual issues predominate.

In summary, *Donelson* provides important support for the motion to strike class allegations at the pleading stage, a critical tool for handling hopeless class actions and saving courts and parties the substantial expenses associated with litigating such cases through the class-certification stage.

[2] No. 1:16-cv-257, 2017 WL 3048540, at *7 (W.D. Mich. July 19, 2017).

[3] 136 F. Supp. 3d 503, 511 (S.D.N.Y. 2015).

[4] 999 F.3d 1080 (8th Cir. 2021).

[5] The plaintiff argued that the court lacked appellate jurisdiction over the denial of the motion to strike class allegations on the ground that such a ruling was not a final judgment. But the Eighth Circuit held otherwise, explaining that the ruling was issued as part of a broader order denying the defendants' motion to compel arbitration and that the entire order (including the parts addressing issues other than arbitration) was immediately appealable under the Federal Arbitration Act.

[6] *Id.* at 1092.

Recent Class Action Decisions of Note

Courts Grapple With Logic Underpinning Eleventh Circuit's Prohibition on Incentive Awards

***Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020)**

In an opinion written by Judge Kevin C. Newsom in September 2020, the U.S. Court of Appeals for the Eleventh Circuit outlawed incentive awards to class representatives, which had been a common feature of class action settlements in that circuit. The Court of Appeals reasoned that such awards are akin to a "bounty" or "salary" for plaintiffs' services in bringing the action and are foreclosed by a pair of 19th century Supreme Court opinions — *Trustees v. Greenough*[7] and *Central Railroad & Banking Co. of Georgia v. Pettus*[8] — which invalidated the granting of awards for "personal services and private expenses" to plaintiffs in representative actions.[9] As the Eleventh Circuit explained, while a class representative may be properly reimbursed for attorney's fees and expenses incurred in prosecuting a lawsuit, the modern-day incentive award "is roughly analogous to a salary" and therefore improper. Notably, a petition for *en banc* review remains pending at the time of publication; however, another panel of the Eleventh Circuit recently followed *Johnson*'s core holding in *In re Equifax Inc. Customer Data Security Breach Litigation*,[10] noting that it was bound by circuit precedent to vacate the incentive awards included in the class settlement.

In the ten months since *Johnson* was decided, district courts throughout the country have grappled with the court's reasoning and come to a few different conclusions. In the Eleventh Circuit, predictably, district courts have stricken incentive awards from class settlements, recognizing that they are bound by the decision in *Johnson*. See, for example, *Kuhr v. Mayo Clinic Jacksonville*,[11] in which the court approved class settlement but struck the incentive award. But the *Johnson* decision has generated mixed reactions from courts in other circuits. Some district courts only mention it in passing, declining to follow it given the long history of courts throughout the country approving incentive awards. See, for example, *Grace v. Apple, Inc.*,[12] in which the court declined to follow *Johnson* because the U.S. Court of Appeals for "the Ninth Circuit has not held that service awards violate Supreme Court decisions from the 1800s" and service awards in the Ninth Circuit "have long been approved." Other district courts seem to find the logic underlying the *Johnson* opinion persuasive, but nonetheless decline to follow it based on the ubiquity of incentive awards in class action litigation. See, for example, *Hart v. BHH, LLC*,[13] in which the court determined that the issue raised in *Johnson* was "deserving of congressional attention," and *In re Apple Inc. Device Performance Litigation*,[14] which recognized that "*Johnson* raises a valid issue."

Whether the Eleventh Circuit's ruling in *Johnson* will persuade other appellate courts to follow its lead remains to be seen. To date, two other circuit courts have considered and rejected similar arguments to strike incentive awards, with one case decided after (but not mentioning) *Johnson*. In a 2019 decision, the U.S. Court of Appeals for the Second Circuit held — without any elaboration — that the two 19th century Supreme Court cases relied upon by the Eleventh Circuit did not warrant invalidation of incentive awards, effectively rejecting the very reasoning that would later be offered by the *Johnson* court.[15] And in January 2021, a *per curiam* decision by the Sixth Circuit rejected an objector's argument that "service awards" to certain named plaintiffs "amounted to a bounty,"[16] though it did not mention the same 19th century Supreme Court cases or *Johnson*. Thus, at least for now, district courts in other circuits will have to decide for themselves on the proper approach to incentive awards, which are pervasive in class action settlement practice.

Sixth Circuit Distinguishes Admissibility Requirements for Nonexpert Evidence at Class Certification Stage and Joins Seventh Circuit in Declining To Apply Personal Jurisdiction Limits to Claims Asserted by Absent Class Members

***Lyngaas v. Ag*, 992 F.3d 412 (6th Cir. 2021)**

Judge Ronald Lee Gilman, writing for a panel of the Sixth Circuit, held that evidence submitted in support of a motion for class certification does not need to be admissible, "at least with respect to nonexpert evidence." The plaintiffs in *Lyngaas* alleged violations of the Telephone Consumer Protection Act based on the defendants sending unsolicited fax advertisements to over 46,000 different phone numbers. At the class certification stage, the district court relied on logs identifying each recipient of the advertisements in finding that the putative class met the implied

[7] 105 U.S. 527 (1882).

[8] 113 U.S. 116 (1885).

[9] *Johnson*, 975 F.3d at 1257.

[10] 999 F.3d 1247, 1281-82 (11th Cir. 2021).

[11] No. 3:19-cv-453-MMH-MCR, 2021 WL 1207878, at *1 n.1 (M.D. Fla. Mar. 30, 2021) (to be reported at — F. Supp. 3d —).

[12] No. 17-CV-00551-LHK, 2021 WL 1222193 (N.D. Cal. Mar. 31, 2021).

[13] No. 15cv4804, 2020 WL 5645984 (S.D.N.Y. Sept. 22, 2020), *appeal filed*, No. 21-15763 (9th Cir. April 27, 2021).

[14] No. 5:18-md-02827-EJD, 2021 WL 1022866 (N.D. Cal. Mar. 17, 2021).

[15] *See Melito v. Experian Mktg. Sols.*, Inc., 923 F.3d 85, 96 (2d Cir. 2019), *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677 (2019).

[16] *Shane Grp. Inc v. Blue Cross Blue Shield of Michigan*, 833 F. App'x 430, 431 (6th Cir. 2021) (per curiam).

requirement of ascertainability (*i.e.*, that class membership can be determined objectively and in an administratively feasible manner) and the express requirement of predominance (*i.e.*, that common questions outweigh individual ones). At trial, however, the district court ruled that the logs were inadmissible for lack of authentication. On appeal, the defendants argued that the class should never have been certified because the district court could not rely on inadmissible evidence at the class-certification stage. The panel rejected the defendants' argument, however, holding that evidence submitted in support of class certification does not need to be admissible to be considered. In doing so, the Court of Appeals expressed concern about turning an early stage of the litigation "into an evidentiary shooting match." Notably, the Sixth Circuit expressly limited its admissibility holding to "nonexpert evidence," without explaining the reasoning behind that distinction.

The same panel also held that the lower court had personal jurisdiction over the claims asserted by the out-of-state class members. According to the Court of Appeals, a court does not need to decide whether it has personal jurisdiction over out-of-state class claims because absent class members are not considered "parties" for certain jurisdictional purposes. With this determination, the Sixth Circuit aligned itself with the U.S. Court of Appeals for the Seventh Circuit in declining to apply basic personal jurisdiction limits to claims asserted by absent class members. Judge Amul R. Thapar dissented from this portion of the court's ruling, reasoning that the focus should not be on whether the class members were named as parties. Instead, Judge Thapar relied on "basic principles of jurisdiction" and noted that courts "must have jurisdiction over the parties for each claim they conclusively resolve" — which class actions seek to do. Finally, Judge Thapar noted that defendants should be able to rely on motions to strike nationwide class allegations from pleadings to avoid "the burdens of 'extensive class discovery'" where a court would not have jurisdiction over the out-of-state claims.

California District Court Dismisses 'Misleading' Vanilla Label Lawsuit

***Robie v. Trader Joe's Co.*, No. 20-cv-07355-JSW, 2021 WL 2548960 (N.D. Cal. June 14, 2021)**

Judge Jeffrey S. White of the United States District Court for the Northern District of California recently dismissed a consumer class action alleging that a defendant deceptively marketed its cereal by labeling it "Vanilla Flavored With Other Natural Flavors." The plaintiff alleged that the challenged label was likely to deceive reasonable consumers by convincing them that the cereal contained an appreciable amount of vanilla and other natural flavors when, in fact, the cereal contained only a trace amount of vanilla, and the predominant source of the vanilla flavor was artificial. The court granted the defendant's motion to dismiss for two reasons. First, the court noted that many of the putative class's claims were preempted by Federal Drug Administration (FDA) regulations that imposed "additional labeling requirements or requirements that differ from FDA regulations."[17] And second, even if the claims were not preempted, the court found that the label could not plausibly have deceived consumers by making them think that the cereal's flavor was derived exclusively from the vanilla plant. The court explained this was because there were no "words or pictures that suggest the vanilla flavor" was derived exclusively from the plant, and "nothing about the word 'vanilla' itself" suggests that the flavor comes exclusively from the vanilla plant. The court also reasoned that, to the extent that the reference to "vanilla" alone suggests the cereal uses the vanilla plant-based form, such representations were not deceptive because the plaintiff had conceded that at least some of that form was used in the cereal. Accordingly, the court dismissed the plaintiff's complaint.

Texas District Court Tackles Two Unresolved — and Uncommon — CAFA Issues at Once

***Madison v. Aviles*, No. 3:20-CV-2516-B, 2021 WL 2291016 (N.D. Tex. June 4, 2021), *appeal filed*, No. 21-90028 (5th Cir. June 15, 2021)**

Judge Jane J. Boyle of the United States District Court for the Northern District of Texas ruled on two unresolved jurisdictional issues under the Class Action Fairness Act (CAFA) in the same case. The plaintiffs had filed a class action complaint against an employee of a home security company, alleging that he used his position at the company to spy on customers through their home security systems. The case was originally not removable to federal court because all parties were Texas citizens. But the home security company — a citizen of Florida and Delaware — intervened as a defendant pursuant to Texas civil procedural rules and removed the case under CAFA, forcing the court to address two rare jurisdictional questions: whether an intervening defendant has the right to remove a case under CAFA and whether the "voluntary-involuntary" rule applies to CAFA.

Regarding the first question, the court assessed the potential applicability of *Home Depot U.S.A., Inc. v. Jackson*[18] — a 2019 Supreme Court decision holding that a defendant to a counterclaim does not have the right to remove cases to federal court. The court concluded that the Supreme Court's decision was limited to "counterclaims" and that the home security company

[17] *Robie*, 2021 WL 2548960, at *3.

[18] 139 S. Ct. 1743 (2019).

in *Madison* could remove the case because it had intervened as a defendant to plaintiffs' "petition." On the second question, the court considered whether the "voluntary-involuntary" rule — which prohibits defendants from removing an action that was nonremovable when filed unless the plaintiff takes a voluntary action that renders it removable — applies to CAFA. The court determined that the rule did not apply, reasoning that application of the rule to CAFA would allow plaintiffs to "avoid federal jurisdiction under CAFA based on their designation of the parties" despite the existence of probable intervenors, which could impede CAFA's broad purpose of expanding federal jurisdiction over class actions of national importance.

Despite deciding both of these CAFA questions in favor of federal jurisdiction, the court still remanded the case under the home-state exception to CAFA, reasoning that the class action complaint did not assert any claims against the home security company — *i.e.*, the entire basis of the lawsuit was the alleged conduct of the local employee. The case is currently pending appeal before the U.S. Court of Appeals for the Fifth Circuit.

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