KILPATRICK TOWNSEND

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Motions to strike class allegations: Ninth Circuit vacates order striking class allegations, ruling class discovery must go forward

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Takeaway: In a prior post, we reported on a Central District of California decision granting an early motion to strike class allegations. *Don't miss the chance to strike out class actions* (Feb. 27, 2019). But on appeal, the Ninth Circuit vacated the district court's ruling, emphasizing that a district court should be reluctant to conclude – without class discovery – that individual issues predominate. *Wisdom v. Easton Diamond Sports, LLC*, --- Fed. Appx. ---, No. 19-55742, 2020 WL 5960939 (9th Oct. 8, 2020). The *Wisdom* district court and appellate decisions animate the tug-of-war in this procedural arena, where a district court might be willing to jettison a seemingly un-certifiable class at the outset, but where an appellate court (especially the Ninth Circuit) remains protective of a class plaintiff's ability to conduct class discovery. While the effort failed in *Wisdom*, a motion to strike class allegations can still be a viable strategy for a class defendant faced with weak or otherwise implausible class allegations.

The Ninth Circuit vacates the *Wisdom* district court's order striking class allegations

In *Wisdom v. Easton Diamond Sports, LLC*, No CV 18-4078 DSF (SSx), 2019 WL 580670 (C.D. Cal. Feb. 11, 2019), Plaintiff Ricky Wisdom brought a putative class action against sports-equipment manufacturer Easton Diamond Sports, LLC ("Easton"), alleging a variety of claims arising out of his purchase of a new baseball bat for his son. According to Mr. Wisdom, the bat's label said it was a 22-ounce bat, when in fact it weighed more than 23 ounces. Because the bat was too heavy, he alleged, his son could not use the bat to play youth baseball.

Mr. Wisdom sought the certification of a nationwide class, consisting in material part of all persons who purchased an Easton bat "where such bats were purchased in new condition and were labeled as being a lighter weight than they actually were." *Id*. at *6. The district court first found the class definition "vague and overbroad," because Mr. Wisdom purchased only one bat (one of many Easton bat models), "but he nevertheless [sought] to certify a class of purchasers of all Easton bats that were incorrectly labeled to understate their actual weight." *Id*.

But the court went further, ruling the class allegations inherently un-certifiable and striking those allegations under Federal Rule 12(f): "To determine whether Defendant is liable to the entire proposed class, the trier of fact will be required to determine many factual questions not susceptible to common answers, for example, whether each model of bat (and each specific bat) purchased by each class member was overweight, whether each

class member relied on the bat's label or weight when purchasing the bat, and whether each class member was injured by the alleged mislabeling." *Id*. The court concluded "it is obvious at this stage of the proceedings that classwide relief is not available." *Id.*

Wisdom appealed and the Ninth Circuit reversed. *See* 2020 WL 5960939. The panel viewed the district court's resolution of the class issues on a motion to strike as premature and therefore an abuse of discretion. According to the panel, Wisdom's allegations sufficed to warrant class discovery, which discovery might undermine the district court's "premature" conclusion that individualized issues predominated. *Id*. at *1. The panel emphasized Wisdom's class allegations for violations of California's False Advertising and Unfair Competition Laws, which utilize a "reasonable consumer test" that requires only a "probability that a significant portion of the general consuming portion or of targeted customers, acting reasonably, could be misled." *Id*. Under this test, "[i]ndividualized proof of injury and reliance is *not* required." *Id*. (emphasis in original). The district court further erred by dismissing the class allegations without leave to amend, which is only authorized when it is clear that amendment would be futile. Accordingly, the panel vacated the district court's order and remanded the case to the district court to give Mr. Wisdom the opportunity to conduct class discovery. *Id*. at *2.

In 2011, the Sixth Circuit endorsed an early motion to strike class allegations

Despite the Ninth Circuit's ruling in *Wisdom*, early motions to strike can be successful. In 2011, the Sixth Circuit issued an important decision affirming the grant of a motion to strike in a putative nationwide class action challenging allegedly deceptive advertising of a healthcare discount program. *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 843 (6th Cir. 2011). The district court granted an early motion to strike because the claims of the putative class members would be governed by the laws of the state where those class members resided. *Id*. at 946. The Court of Appeals found this ruling "sound and far from an abuse of discretion for three basic reasons." *Id*.

First, "different laws would govern the class members' claims," because Ohio's choice-of-law rules looked to the place of injury in determining the governing law. *Id*. at 946-47. Second, "any potential common issues of fact cannot overcome this problem," because (among other reasons) the defendants' advertising "varied to account for the different requirements of each State's consumer-protection laws." *Id*. at 947-48. Third, "this conclusion is consistent with the decisions of this court and several others" that have denied class certification where the claims of the class would require the examination of multiple states' laws. *Id*. at 948-49.

The *Pilgrim* court defended the district court's early rejection of the class allegations, noting Rule 23's directive that courts determine whether to certify a class "at an early practicable time." *Id*. at 949 (citing Fed. R. Civ. P. 23(c)(1)(A)). Although the class plaintiffs vaguely claimed to need discovery, "[t]o 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." *Id*. Because the applicability of multiple states' laws constitutes "a largely legal determination" which "no

proffered or potential factual development offers any hope of altering," the district court properly addressed the issue at the outset. *Id*.

A number of decisions have scrutinized certifiability issues at the outset

Although *Pilgrim* presented the obvious certification problem of class claims implicating multiple states' laws, other courts have employed similar reasoning to reject class claims based on the individualized inquiries inherent in the substance of the claims. Some district courts, for example, have granted motions to strike based on overbroad or "fail-safe" class definitions. *See, e.g.*, *Oom v. Michaels Cos. Inc*., No. 1:16-cv-257, 2017 WL 3048540, at *4-*5 (W.D. Mich. July 19, 2017) (granting motion to strike where "fail-safe" class definition included "only those customers that Plaintiffs claim are entitled to relief" and where class could not satisfy typicality, commonality, or predominance requirements of Rule 23); *Edwards v. Zenimax Media Inc*., No. 12-CV-00411-WYD-KLM, 2012 WL 4378219, at *5 (D. Colo. Sept. 25, 2012) (granting motion to strike where overbroad class included persons who purchased product "regardless of whether he or she was ever injured"); *Stearns v. Select Comfort Retail Corp*., 763 F. Supp. 2d 1128, 1151-52 (N.D. Cal. 2010) (granting motion to strike where class definition included persons who "already have received refunds" for allegedly defective product).

And several district courts in the Eleventh Circuit have granted motions to strike where a highly-individualized inquiry would be required for each and every class member. *See, e.g., Lawson v. Life of the S. Ins., Co*., 286 F.R.D. 689, 697 (M.D. Ga. 2012) (granting motion to strike where plaintiff could not satisfy predominance requirement as a matter of law); *Vandenbrink v. State Farm Mut. Auto. Ins. Co.*, No. 8:12-CV-897-T-30TBM, 2012 WL 3156596, at *3 (M.D. Fla. Aug. 3, 2012) (striking class allegations where critical issues to be resolved "will be individual in nature"); *MRI Assocs. of St. Pete, Inc. v. State Farm Mut. Auto. Ins. Co.*, 755 F. Supp. 2d 1205, 1207-08 (M.D. Fla. 2010) (dismissing class allegations as "inappropriate" where claims arose from individualized benefits determinations).

Every class defendant should evaluate whether to file a motion to strike

Some class actions lend themselves to threshold challenges to standing or to the viability of the class plaintiff's claims. But some class actions cannot be attacked on a motion to dismiss, even where the defendant vigorously disputes the substance of the allegations. These claims can be expensive to defend, especially where they support far-reaching discovery. Given these practical realities, a class defendant should always evaluate whether to file an early motion to strike, particularly in those jurisdictions that have been receptive to such motions in the past. If the claims appear ultimately un-certifiable, a class defendant would be well advised to take a shot at securing an early order striking the class allegations, even if an order striking the class claims might be appealed and face review by a skeptical panel as in *Wisdom*.