The Low Spark of Motions to Strike Class Allegations

By Michael Donovan , *Law.com Contributor*
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Defense counsel and certain courts have employed a new tactic to thwart class actions at the pleading stage – the motion to strike class allegations. But does this new tactic have any basis in the Federal Rules of Civil Procedure, or is it a fabricated conflation of procedures? On close examination, the low spark of this new motion is clear.

A motion to strike class allegations at the pleading stage finds little if any textual basis in the Federal Rules. Rule 12(f), which permits a "motion to strike" for "redundant," "impertinent" or "scandalous" matters, says nothing about purportedly inadequate class allegations. On this score, the Third Circuit has held expressly that a Rule 12(f) motion to strike generally should not be granted. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 188 (3d Cir. 1986) ("a court should not grant a motion to strike . . . unless the insufficiency . . . is clearly apparent." (internal quotes omitted)).

Recognizing this truism, defense counsel often do not rely on Rule 12(f), and instead contend that certain provisions of Rule 23 – when "read together" – nonetheless allow courts to strike class allegations at the pleading stage. But the two provisions usually cited – Rule 23(c)(1)(A) and Rule 23(d)(1)(D) – do not permit or even contemplate such a motion. In context, both provisions actually contradict the argument that class allegations may be stricken at the pleading stage.

Before 2004, Rule 23(c)(1)(A) required that the determination whether to certify a class be made "as soon as practicable after commencement of an action." Effective December 1, 2003, this language was amended to require instead that "the court must – *at an early practicable time* – determine by order to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A) (emphasis added). According to the Advisory Committee Notes, the "as soon as practicable" language was changed because class certification decision-making at the pleading stage did not reflect prevailing practice and because "[t]ime may be needed to gather information necessary to make the certification decision." Advisory Committee Notes to 2003 Amendments. In other words, Rule 23(c) was amended expressly to forestall class action decision-making until *after* the pleadings have closed and the parties have conducted discovery. *See id.* (noting that it might make sense for a court to rule on dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified.).

To be sure, Rule 23(d)(1)(D) permits orders that "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). But this provision expressly concerns the "conduct" of a class action *after* a class has been certified under Rule 23, because it is prefaced by the general phrase: "In conducting an action under this rule, the court may issue orders that: . . . (D)." *Id.* Considered in its actual context, subpart (D) merely allows a court to exclude opt-outs, bar uncooperative opt-ins, decertify an existing class, or otherwise cabin an already certified class to precise persons so all the parties will know who will be bound by a final

judgment. By its own terms, Rule 23(d)(1)(D) has no application to a pre-certification decision and cannot authorize a self-defeating motion to strike class allegations at the pleading stage.

Defense counsels' typical citation of two cases does not cure this absence of textual support, because the *dicta* in both cases is taken out-of-context and addresses Rule 23 before it was amended in December 2003. In *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982), the Supreme Court considered and rejected the Fifth Circuit's so-called "across-the-board rule" in which Title VII class actions for race discrimination would be certified almost automatically where unequal employment practices were alleged. *See id*. It was in this context the Court observed that "[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." *Id*. But this observation is *dicta*, because the Court then held that the plaintiff's class certification motion (which occurred after the defendant answered interrogatories) should not have been granted based on the "across-the-board rule," as the plaintiff's claim about discriminatory *promotion* practices did not also encompass class claims about discriminatory *hiring* practices. *Id*. at 159-160. The lesson from *Falcon* is that a class decision should not be made one way or the other based on an "across-the-board rule" absent complete development of the record and "rigorous analysis" of the representative claims.

The same is true for *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 n.3 (D.N.J. 2003), also cited by defense counsel. While commenting that some class allegations may be stricken at the pleading stage, the court in *Clark* actually refused to strike the plaintiffs' class allegations based on the plaintiffs' amended complaint. *Id*. at 226. The court struck instead the allegations of a *defendant class* of national McDonald's franchises, reasoning among other things that the plaintiff had not visited those franchises, did not know whether they were ADA accessible or not, and could not establish as a matter of law that it would be fair for those franchises to be represented by a New Jersey franchise owner in a defendant class. *See id*. Thus, it was in the context of *defendant class* allegations and the myriad differences in defendant legal interests that the *Clark* court struck the allegations at the pleading stage.

The very different legal principles applicable to the pleading and proof of a *defendant class*, where discovery cannot and will not alter the different legal interests among defendant class members, distinguish the *Clark dicta* from plaintiff class allegations. This difference in party perspective is central to whether representative litigation may be decided as a matter of law at the pleading stage.

Contrary to the strained arguments in favor of a motion to strike, the general rule in the Third Circuit is that "[i]n most cases, some level of discovery is essential to [the class certification] evaluation." *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93 (3d Cir. 2011). In *Landsman*, the Court vacated an order striking class allegations at the pleading stage because the "ruling was premature." *Id*. Quoting its own precedent in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), the *Landsman* Court again "emphasized the importance of discovery as part of the class certification process." 640 F.3d at 93 (citing and quoting *Weiss*, 385 F.3d at 347-48). The Court also echoed the 2003 Advisory Committee Notes, explaining that concerns for "the directives of Rule 23" and "sound judicial administration . . . were the basis for setting down a 'rigorous analysis' requirement in *Hydrogen Peroxide*, where we recognized that changes in Rule 23 reflected the need 'for a thorough evaluation of the Rule 23 factors.'" *Id*. (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008)). The Court then held that "[d]iscovery is necessary for the district court to conduct the 'rigorous analysis' it is tasked with" when addressing the class certification decision. *Id*. at 95.

As *Landsman* demonstrates, motions to strike class allegations are disfavored, even after *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on which defense counsel often also rely. *E.g*., *Weske v. Samsung Elecs. Am., Inc*., 934 F. Supp. 2d 698, 706-07 (D.N.J. 2013); *In re Paulsboro Derailment Cases,* No. 13-784, 2014 WL 1371712 at *3 (D.N.J. Apr. 8, 2014). "Numerous cases . . . have emphatically denied requests to strike class allegations at the motion to dismiss stage as procedurally premature." 934 F. Supp. 2d at 707 (citations omitted).

Some courts and commentators say that motions to strike may be appropriate to address so-called "fail-safe" class definitions. A "fail-safe" class is one where the "proposed class definition is in essence framed as a legal conclusion" or where the class definition would not allow class members to be identified without a

liability determination. *Likes v. DHL Exp.*, 288 F.R.D. 524, 531-32 (N.D. Ala. 2012); *see also*, *e.g.*, *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010) ("The fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established."). Examples of a fail-safe class are where the definition uses a phrase like "wrongfully collected premiums" or "illegal automatic withdrawals." *See*, *e.g.*, *Heffelfinger v. Electronic Data Sys. Corp.*, 2008 WL 8128621, at *11 (C.D. Cal. Jan.7, 2008) (finding class definition which included "workers who were denied overtime in violation of the law" to be fail-safe); *Lewis v. Capital Mortgage Investments*, 78 F.R.D. 295, 310 n.15 (D. Md. 1977) (finding fail-safe a class definition which used phrase "wrongfully induced").

But the proper response to a fail-safe class is to grant leave to amend the definition, not to strike all the class allegations. *See*, e.g., *In Re Autozone, Inc., Wage and Hour Employment Practices Litig.*, 289 F.R.D. 526, 546 (N.D. Cal. 2012) ("Rather than denying certification on the basis of the fail safe definition, the Court would have discretion here to redefine the class."); *Melton ex rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 289 (D.S.C. 2012) ("It is better in these circumstances, when practical and possible, to refine the class definition before flatly denying class certification on that basis."); *Heffelfinger*, 2008 WL 8128621, at *10 ("Given the difficulties with the proposed class definition set forth in plaintiffs' motion, the court has discretion either to redefine the class or to afford plaintiffs an opportunity to do so.").

Other courts and commentators insinuate that choice of law issues may justify the striking of class allegations at the pleading stage. But most decisions have declined to consider such questions at the dismissal stage "[a]bsent factual content that would allow [the] Court to determine which other state laws would apply." *McGuire v. BMW of North America, LLC*, No. 13-7356, 2014 WL 2566132 (D.N.J. June 6, 2014) (Linares, J.). Virtually all of the cases addressing the choice-of-law issue have done so in connection with a fully discovered and briefed class certification motion, not a motion to strike at the pleadings stage. *See*, *e.g.*, *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 465 (D.N.J. 1998) (deciding issue at class certification stage after full discovery and briefing, and permitting plaintiffs to renew their certification motion);[1] *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 180-183 (3d Cir. 2014) (holding that the proper time to consider choice of law issues for a nationwide litigation class was at the class certification stage); *Maniscalco v. Brother Int'l Corp.*, 709 F.3d 202, 210 (3d Cir. 2013) (deciding choice of law issue at summary judgment stage), cast in doubt by, *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012) and *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (holding that state law prohibiting class action conflicted with Rule 23 and was preempted); *Gray v. Bayer Corp.*, No. 08-4716, 2011 WL 29775768 (D.N.J. July 21, 2011) (Linares, J.)(deciding choice of law issue after discovery and full briefing of class certification motion); *Laney v. Am. Std. Cos.*, No. 07-3991, 2010 WL 3810637 (D.N.J. Sept. 23, 2010) (deciding choice of law issue after full discovery and full briefing of class certification and summary judgment motions); *Payne v. FujiFilm U.S.A., Inc.*, No. 07-385, 2010 WL 2342388 (D.N.J. May 28, 2010) (same); *In re Ford Motor Company Ignition Switch Products Liability Litig.*, 174 F.R.D. 332 (D.N.J. 1997) (same).

Courts and commentators also say that motions to strike may be appropriate to address "impermissibly overbroad" class definitions. But this contention is often premature because it typically depends on factual assertions that lack any evidentiary basis. Absent any record evidence of non-impacted class members, the court cannot legitimately perform the "rigorous analysis" required by the Third Circuit to make such a decision. *See Landsman*, 640 F.3d at 95.

Likewise, most of the authorities addressing allegedly "overbroad" class definitions have done so only after a fully discovered and fully briefed class certification motion. *See*, *e.g.*, *Allen v. Holiday Universal*, 249 F.R.D. 166, 171-172 (E.D. Pa. 2008) (granting class certification after a fully briefed motion and rejecting the defendant's argument that the class definition was "overbroad."); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 384-385 (3d Cir. 2013) (affirming district court's rejection of a proposed class action settlement after full briefing and examination of a "statistical regression analysis."); *Simon v. Am. Tel. & Tel. Corp.*, No. 99-11641, 2001 WL 34135273, *9-*10 (C.D. Cal. Jan. 26, 2001) (denying class certification after a fully briefed motion in antitrust "tying" case where "some class members would not have had [broadband] access at all . . . and would not be able to prove 'injury in fact'"); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010) (affirming denial of class certification after full briefing and consideration of expert testimony); *Bishop v. Saab Automobile A.B.*, No. 05-0721, 1996 WL 33150020 (C.D. Cal. Feb. 16, 1996) (denying class

certification after fully discovered and briefed class certification motion).

The very advanced stages of these precedents all reinforce the point that a motion to strike class allegations should not be addressed at the pleading stage. *See Chaney v. Crystal Beach Capital, LLC*, 2011 WL 17639, at *2 (M.D. Fla. Jan. 4, 2011) (denying portion of motion to dismiss seeking to strike class allegations, where plaintiffs had not moved for class certification). The *Chaney* court articulated the sound basis for this principle: "'[T]he shape and form of a class action evolves only through the process of discovery, and it is premature to draw such a conclusion before the claim has taken form.'" *Id.* (quoting *Motisola Malikha Abdallah v. Coca–Cola Co.*, 1999 WL 527835 (N.D. Ga. July 16, 1999) (*citing Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir.1975)). The First Circuit has elaborated on the principle, by cautioning against striking class allegations based solely on the pleadings, stating that "'striking a pleading is a drastic remedy and...it is often sought by the movant simply as a dilatory or harassing tactic.'" *Manning v. Boston Medical Center Corp.*, 725 F.3d 34, 59-60 (1st Cir. 2013) (vacating district court order striking class and collective action allegations from complaint) (citation omitted).

Besides, even if the initial definitions were insufficient, they could be refined at the class certification stage. *See*, *e.g.*, *Korrow v. Aaron's, Inc.*, No. 10-6317(MAS), 2013 U.S. Dist. LEXIS 157272, *14-15 (D.N.J. July 13, 2013) (plaintiff clarified proposed class definition in response to defendant's position on class certification); *Kalow & Springut, LLP v. Commence Corp.*, No. 07-3442(JEI), 2012 U.S. Dist. LEXIS 173785, *3 n.2 (D.N.J. Dec. 7, 2012) ("a court is not bound by the class definition proposed in the complaint") (citation omitted).

In sum, the new tactic of moving to strike class allegations at the pleading stage has little if any basis in proper procedure. The low spark of this tactic should not be used by courts to deprive class members of any potential recovery absent "rigorous analysis" based on appropriate discovery. A gun that doesn't make any noise is still a gun.

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[1] The court in *Chin* relied in part on *In re Ford Motor Company Ignition Switch Products Liability Litig.*, 174 F.R.D. 332 (D.N.J. 1997), which was also decided after a fully discovered and briefed class certification motion. Recent revelations about similar ignition switch defects in General Motors cars cast substantial moral if not legal doubt on the wisdom of the decisions in *Chin* and *In re Ford*. *See* Barry Meier and Hilary Stout, Victims of G.M. Deadly Defect Fall Through Legal Cracks, The New York Times, B1 (Dec. 30, 2014), http://www.nytimes.com/2014/12/30/business/victims-of-gm-deadly-defect-fall-through-legal-cracks.html?_r=0
