Counsel's Advisory

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PREEMPTIVE STRIKE AFFIRMED:
PLAINLY DEFICIENT CLASS CLAIMS DISMISSED AT PLEADINGS STAGE

by
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Last month, in *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011), the U.S. Court of Appeals for the Sixth Circuit affirmed a trial court's grant of a motion to strike class allegations, making a strong case for attacking class certification on the pleadings – *before* class discovery – in certain instances.

In *Pilgrim*, the plaintiffs brought a putative nationwide class action against the defendants, asserting that the defendants' marketing of a membership program for access to a network of low-priced healthcare providers was deceptive and violated state consumer protection statutes. The class purportedly encompassed over 30,000 people from all fifty states. Plaintiffs alleged that the newspaper advertisements – in the form of "advertorials" – deceived people into believing they were news articles, and labeled the program as "free" even though it required a nonrefundable registration fee and only gave members one month without charging a membership fee.

At the responsive pleading stage, one of the defendants moved to strike the class allegations, arguing that because the consumer protection laws of all fifty states must be applied, common issues could not predominate as a matter of law. The district court granted the motion, and the Sixth Circuit affirmed.

The plaintiffs argued that they should have been allowed to take class discovery and file their own motion for class certification in their own time. The Sixth Circuit rejected that argument as promoting waste and inefficiency, observing that Rule 23(c)(1)(A) encourages a decision "at an early practicable time" in the litigation and holding that either plaintiff *or* defendant may move for a determination of the class certification issue. The court cautioned that a district court must undertake a rigorous analysis of the class certification prerequisites, which may require delving into the merits of the case. Thus, there will be times where class discovery is required to decide the class certification issue. But sometimes it is just so plain from the pleadings that no class could be certified that the issue simply cries out for early, efficient resolution:

> The problem for the plaintiffs is that we cannot see how discovery or for that matter more time would have helped them. To this day, they did not explain what type of discovery or what type of factual development would alter the central defect in this class claim. The key reality remains: Their claims are governed by different States' laws, a largely legal determination, and no proffered or potential factual development offers any hope of altering that conclusion, one that generally will preclude class certification.

The court then held that the district court properly concluded that each class member's claim would be subject to the law of the state where she lived, rejecting the plaintiffs' attempt to impose the law of the defendants' residence on class members across the nation:

> the State with the strongest interest in regulating such conduct is the State where the consumers – the residents protected by its consumer-protection laws – are harmed by it. That is especially true when the plaintiffs complain about the conduct of companies located in separate States . . ., diluting the interest of any

> one State in regulating the source of the harm yet in no way minimizing the interest of each consumer's State in regulating the harm that occurred to its residents.

The court also noted that no potential common fact issues could salvage the case from the need to apply fifty states' laws. Moreover, it concluded that the defendants' program did not operate the same way in every state, and that the plaintiffs thus would have to make different particularized showings for individual plaintiffs, including what different advertisements showed in various states.

The decision in *Pilgrim* is strong authority supporting the efficiency of a motion to strike class allegations where it is clear from the complaint that the proposed class would involve the application of fifty states' laws, which cannot be performed consistent with the predominance and superiority requirements of Rule 23(b)(3).

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