A First-Round Knockout for Defendants

Pre-Discovery Motions to Strike Class Allegations

By W. Marion Wilson and Sam VanVolkenburgh

Recent developments have produced conditions favorable to motions to strike class allegations based on the pleadings alone. Discover what to look for in pleadings and how to do it.

In class action litigation, success at the class certification stage can mean the difference between a case with a low-dollar settlement value and a case with enormous liability exposure. For this reason, the fight over class certification is often considered "the whole ball game." *Hartford Acc. & Indem. Co. v. Beaver*, 466 F.3d 1289, 1294 (11th Cir. 2006). But defending putative class actions, particularly pre-certification discovery, can become expensive long before the certification fight. Thus, there are strong incentives for defense counsel to attack the class allegations early in a case. One weapon in a defendant's arsenal is a motion to strike the class action allegations filed at the pleading stage, sometimes referred to as a pre-discovery strike motion.

If class certification is the "ball game," then—to mix sports metaphors—a successful motion to strike class allegations at the pleading stage is the equivalent of a "first-round knockout" in boxing. Even a partial victory can narrow the scope of the class claims, win considerable settlement leverage, and avoid or minimize expensive class-related discovery.

This article discusses the federal courts' growing reception to pre-discovery strike motions, examines the legal standards governing such motions, and identifies the types of class action complaints that are most susceptible to these motions.

An Improving Forecast for Strike Motions

The Federal Rules of Civil Procedure seem to contemplate pre-discovery strike motions. Federal Rule of Civil Procedure 23(c)(1)(A) directs judges to consider class certification "[a]t an early practicable time after a person sues or is sued as a class representative." Rule 23(c)(1)(A) does not require a court to wait until a plaintiff moves to certify a class before ruling on the certification question. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939–41 (9th Cir. 2009) (collecting cases). Nor does it prohibit a defendant from seeking

■ W. Marion Wilson is a senior associate with Morris Manning & Martin LLP in Atlanta. Mr. Wilson focuses his practice in the areas of commercial and product liability litigation, with a particular emphasis on acting as national coordinating counsel for corporate clients involved in class actions or complex, high-exposure litigation. He has been a DRI member since 2011. Sam VanVolkenburgh is an associate in the Class Action and Commercial Litigation practice groups of Morris Manning & Martin LLP. He has assisted with the defense of business disputes, tort claims, and related insurance coverage issues.

early resolution of the class certification question before discovery. *Id.*

Historically, however, courts have been "hesitant to delve deep into the merits of the plaintiff's class allegations" where there had been "no discovery whatsoever." *Smith v. Washington Post Co.*, 962 F. Supp. 2d 79, 90 (D.D.C. 2013). Pre-discovery strike motions were considered "an extreme remedy," *Lawson v. Life of the S. Ins. Co.*, 286 F.R.D. 689, 695 (M.D. Ga. 2012), to be granted only in "rare cases." *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 n.3 (D.N.J. 2003). Courts viewed them as attempts to "preemptively terminate the class aspects of… litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification." *Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1495 (D.S.C. 1991).

The courts' reluctance to embrace pre-discovery strike motions is understandable. The United States Supreme Court has held that a court may not rule on the certification question until it has conducted a "rigorous analysis" of the issue. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Such a "rigorous analysis" often requires a court to "probe behind the pleadings before coming to rest on the certification question." *Id.* On the one hand, the Supreme Court has acknowledged that "[s]ometimes the issues are plain enough from the pleadings." *Id.* On the other hand, however, it is only appropriate to rule on a motion to strike class allegations at the pleading stage if the "complaint itself demonstrates that the requirements for maintaining a class action cannot be met." *Landsman & Funk PC v. Skinder–Strauss Assocs.*, 640 F.3d 72, 93 n.30 (3d Cir. 2011).

But recent developments in the law have produced conditions more favorable to succeeding with strike motions. After *Twombly* and *Iqbal*, plaintiffs now are required to plead more detailed allegations than ever before, sharing more about the factual bases for their class claims. At the same time, the Supreme Court's recent decisions in *Comcast v. Behrend*, 133 S. Ct. 1426 (2012), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), have raised the standard necessary to achieve class certification. Further, the high-profile decision in *Pilgrim v. Universal Health Card LLC*, 660 F.3d 943 (6th Cir. 2011), affirming a trial court's pre-discovery strike of class allegations, has signaled to courts that such motions are properly granted under the right circumstances.

Legal Basis for Pre-Discovery Strike Motions

A "motion to strike class allegations" could fittingly describe any motion brought by a defendant for purposes of preemptively challenging class certification. The focus of this article, however, is on pre-discovery motions to strike based on the pleadings.

A pre-discovery strike motion can be styled in various ways—as a motion to strike the class allegations under Federal Rule of Civil Procedure 12(f), a motion to strike under Federal Rule of Civil Procedure 23(d)(1)(D), or, less commonly, as a motion to dismiss under Federal Rule of Civil Procedure12(b)(6).

Federal Rule 12(f)

Federal Rule 12(f) states that a court may strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter," acting either on its own or on a motion advanced by a party. Rule 12(f) does not expressly contemplate a motion to strike class allegations, but it generally can be invoked whenever it would make a trial less complicated or otherwise streamline the ultimate resolution of an action. *Rios v. State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727, 733 (S.D. Iowa 2007). Thus, courts have granted pre-discovery strike motions premised upon Rule 12(f). *E.g., Ott v. Mortg. Investors Corp. of Ohio*, No. 3:14-CV-00645-ST, 2014 WL 6851964, at *11, *18 (D. Or. Dec. 3, 2014) (striking subclass on Rule 12(f) grounds).

Federal Rule 23(d)(1)(D)

Federal Rule 23(d)(1)(D) is the more commonly cited basis for a pre-discovery strike motion. It provides, in relevant part, that courts conducting putative class actions may issue orders that "require that the pleadings be amended to eliminate" the class allegations. It is sometimes cited alone, but often it is cited in combination with Federal Rules 23(c)(1)(A) and 12(f). *E.g., Rehberger v. Honeywell Int'l, Inc.*, No. 3:11-0085, 2011 WL 780681, at *8 (M.D. Tenn. Feb. 28, 2011).

There are two advantages to relying on Rule 23(d)(1)(D) as the basis to strike, instead of or in addition to Rule 12(f). The first advantage is that Rule 23(d)(1)(D) expressly authorizes courts to strike class allegations, unlike Rule 12(f), which does not mention class allegations. *See, e.g., Bennett v. Nucor Corp.*, No. 3:04CV00291SWW, 2005 WL 1773948, at *2 (E.D. Ark. July 6, 2005) ("A motion to strike class allegations is governed by Rule 23, not Rule 12(f).").

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The second advantage relates to timing—under Rule 12(g)(2), a defendant cannot make a Rule 12(f) motion after it has already filed a previous motion under Rule 12. The same restriction does not apply to Rule 23(d)(1)(D) motions. *Dallas Cnty., Tex. v. MERSCORP, Inc.*, No. 3:11-CV-02733-O, 2012 WL 6208385, at *3 (N.D. Tex. Dec. 13, 2012). Similarly, Rule 12(f) motions must be filed "either before responding to a pleading, or if a response is not allowed, within 21 days after being served with the pleading." There is no such time limit for motions brought under Rule 23(d)(1)(D). *Cowit v. CitiMortgage, Inc.*, No. 1:12-CV-869, 2013 WL 940466, at *2 n.1 (S.D. Ohio Mar. 8, 2013).

Federal Rule 12(b)(6)

On rare occasions, courts have construed a motion to strike class allegations as a motion to dismiss the allegations under Federal Rule 12(b)(6). *E.g.,* Schilling v. Kenton Cnty., Ky., No. 10-143-DLB, 2011 WL 293759, at *1 (E.D. Ky. 2011); *Vlachos v. Tobyhanna Army Depot Fed. Credit Union*, No. 3:11-CV-0060, 2011 WL 2580657, at *1–2 (M.D. Pa. June 29, 2011). However, since there are better options as discussed above, it is inadvisable to rely solely on Rule 12(b)(6).

The Legal Standard

The key to succeeding with a pre-discovery strike motion is to show that "the complaint itself demonstrates that the requirements for maintaining a class action cannot be met," and "no amount of discovery will demonstrate that the class can be maintained." *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 284 F.R.D. 238, 245–46 (E.D. Pa. 2012).

The moving defendant must approach its strike motion in a manner similar to that used for a motion to dismiss, identifying legal rather than factual weaknesses in the class allegations.

To certify a class, a plaintiff must show that the proposed class meets all four prerequisites of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. A plaintiff must also show that the proposed class can be maintained under one of the three provisions of Rule 23(b). Finally, a plaintiff must satisfy a court that a class action is practical under various other tests, such as the test for ascertainability.

Attacking this standard during the pleading stage, a defendant must first show how the allegations in a complaint reveal a deficiency in one of these prerequisites, and then convince a court that "no amount of discovery or time will allow for plaintiffs to resolve deficiencies in [the] class definition[]." *In re Paulsboro Derailment Cases*, No. CIV. 12-7586 RBK/KMW, 2014 WL 1371712, at *3 (D. N.J. Apr. 8, 2014). If a defendant attempts anything less, most courts will deny the strike motion pending a "full-blown certification motion," reasoning that "the viability of a class depends on factual matters that must be developed through discovery." *Id.* (quoting 1 Joseph M. McLaughlin, McLaughlin on Class Actions §3.4 (7th ed. 2010)).

Many courts hold that because pre-discovery strike motions are brought solely on the basis of the pleadings, they are properly analyzed under the same standards of review that govern a Rule 12(b)(6) motion to dismiss. *E.g., Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 450 (D. R.I. 2002); *Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1495 (D. S.C. 1991). Under this standard, courts must take all well-pleaded allegations in the complaint as true, construe them in the light most favorable to a plaintiff, and resolve all doubts in favor of denying the strike motion. Thus, the moving defendant must approach its strike motion in a manner similar to that used for a motion to dismiss, identifying legal rather than factual weaknesses in the class allegations. *See, e.g., Wright v. Family Dollar, Inc.*, No. 10 C 4410, 2010 WL 4962838, at *1 (N.D. Ill. Nov. 30, 2010) ("[C]ourts may—and should—address the plaintiff's class allegations when the pleadings are facially defective and definitively establish that a class action cannot be maintained.").

The burden of proof that will apply depends on the procedural posture in which a defendant raises a strike motion. Because a pre-discovery strike motion arises in essentially the same posture as a Rule 12(b)(6) motion to dismiss, courts have held that the moving defendant bears the burden of proof, as on a Rule 12(b)(6) motion. *See, e.g.*, *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, No. 12-CV-02432-WYD-KMT, 2013 WL 5448078, at *3 (D. Colo. Sept. 27, 2013); *Romano v. Motorola, Inc.*, No. 07–CIV–60517, 2007 WL 4199781, at *2 (S.D. Fla. Nov. 26, 2007); *Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 450-51 (D. R.I. 2002). *But see* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* §3.4 (11th ed. 2014) (advocating identical treatment for all motions to strike, regardless of whether brought solely on the pleadings or based on additional facts). Motions to strike based on materials outside the pleadings, typically after discovery, on the other hand, are more in the nature of preemptive motions to deny class certification. When reviewing such a strike motion, a court should make a factual rather than legal determination, and it is appropriate to place the burden of establishing a prima facie case in support of certification on the plaintiff, as the burden would be in a motion to certify the class. *Blihovde v. St. Croix Cnty, Wis.*, 219 F.R.D. 607, 613–14 (W.D. Wis. 2003).

Grounds for Successful Motions to Strike

While any legal deficiency in the class allegations is fair game, certain types of deficiencies are particularly good candidates for pre-discovery strike motions. The most commonly successful challenges rely on the Rule 23(a) typicality, the Rule 23(b) predominance, and the ascertainability requirements.

Federal Rule 23(a)(3) Typicality—Overbroad Class Definitions

One of the most common grounds for granting a pre-discovery strike motion is an overbroad class definition. For example, a plaintiff may define the class to include individuals who have not suffered any injury. In the Second Circuit, the courts frame this argument as a standing problem. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006). But when a defendant faces an overbroad class definition, the defendant can also challenge certification based on Federal Rule 23(a) typicality requirement. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (describing Rule 23 as "statutory standing"); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 262 (3d Cir. 2009) (noting that overbreadth "impacts the Rule 23 requirements of commonality, typicality, and predominance of common issues"); *McGarvey v. Citibank (S.D.) N.A.*, No. 95-C-123, 1995 WL 404866, *4 (N.D. Ill. July 5, 1995) ("Courts faced with an overbroad class definition may deny certification for want of typicality.").

> Generally, a claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and is based on the same legal theory. Although the typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members, the named plaintiff's claims must share the same essential characteristics as the claims of the class at large.

Buonomo v. Optimum Outcomes, Inc., 301 F.R.D. 292, 296–97 (N.D. Ill. 2014) (internal

quotations omitted). Because the Supreme Court has held that courts may evaluate class certification issues before Article III standing issues if the former are "logically antecedent" to the latter, *Ortiz,* 527 U.S. at 831, overbroad class definition questions may be dealt with via a typicality challenge raised in a strike motion.

An overbroad class argument is appropriate when the class definition includes people who were not injured. *See, e.g., Loreto v. Procter & Gamble Co.*, No. 1:09-CV-815, 2013 WL 6055401, at *4 (S.D. Ohio Nov. 15, 2013) ("A class is overbroad if it includes significant numbers of consumers who have not suffered any injury or harm."); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1125 (N.D. Cal. 2011). Closely examining a plaintiff's allegations is essential here; the key is to identify any logical gaps between the nature of the injury and the definition of the class. For example, if a claim states that the injury arose from *buying* a product, but the class includes all *owners* of the product, it may be overbroad because it also includes all persons that received the product as a gift. Conversely, if a claim states that the injury arose from *use* of the product, but the class is defined as all *purchasers* of the product, the class may be overbroad because it includes those who bought the product but never used it.

Sanders v. Apple Inc., 672 F. Supp. 2d 978 (N.D. Cal. 2009), is a good example of a successful strike motion based on an overbroad class definition. *Sanders* was a putative class action filed on behalf of "all persons who purchased a 2007 20-inch Aluminum iMac desktop computer designed, manufactured, and sold by" Apple. *Id.* at 981. The complaint alleged that Apple falsely advertised the iMacs as capable of displaying "[m]illions of colors at all resolutions." *Id.* at 983. The plaintiffs asserted fraud and unjust enrichment claims, claiming that they relied on the false representations about the display in purchasing their iMacs. Critically, however, the proposed class was defined around mere ownership of an iMac, regardless of whether the putative class member had been injured by the alleged false representations. The court struck the class allegations because the class definition "necessarily includes individuals who did not purchase their 20-inch Aluminum iMac, individuals who either did not see or were not deceived by advertisements, and individuals who suffered no damages." *Id.* at 991. *See also Edwards v. Zenimax Media Inc.*, No. 12-CV-00411-WYD-KLM, 2012 WL 4378219, at *5 (D. Colo. Sept. 25, 2012) ("I find that this definition is inadequate because it is overbroad and includes Colorado residents who presumably purchased Oblivion from anyone, anywhere, at any time regardless of whether he or she was ever injured by or even experienced the alleged Defect.").

Federal Rule 23(a)(2) Commonality

A few courts have granted pre-discovery motions to strike for lack of commonality between parties. *E.g., Ross-Randolph v. Allstate Ins. Co.*, No. CIV. A. DKC 99-3344, 2001 WL 36042162, at *5–7 (D. Md. May 11, 2001). However, the commonality and predominance requirements substantially overlap, and it is more common for courts to strike class allegations based on a lack of predominance of classwide questions under Federal Rule 23(b)(3).

Federal Rule 23(a)(1) Numerosity

Although uncommon, a pre-discovery strike motion for an obvious failure of numerosity is theoretically possible. *Cf. Miller v. Motorola, Inc.*, 76 F.R.D. 516, 518 (N.D. Ill. 1977) (granting motion to strike class of 20 individuals). Some local rules require that class action allegations contain an estimate of the number of persons in the class, which may add some early clarity to the numerosity issue. *E.g.*, L.R. 23.1 (A)(2)(b) (N.D. Ga.).

Federal Rule 23(a)(4) Adequacy of Representation

At least one decision has held that the filing of a putative class action by a pro se plaintiff is grounds to strike the class allegations. *Jaffe v. Capital One Bank*, No. 09-CIV-4106 (PGG), 2010 WL 691639, at *10 (S.D.N.Y. Mar. 1, 2010). Since this is a defect that a plaintiff can correct, however, motions to strike based on inadequacy or lack of counsel may not succeed. *See Bank v. Am. Home Shield Corp.*, No. 10-CV-4014, 2013 WL 789203, at *3 (E.D.N.Y. Mar. 4, 2013) ("[T]he issue will be moot if… [the pro se plaintiff] seeks appointment of someone other than himself to serve as class counsel.").

Federal Rule 23(b) Predominance

Federal Rule 23(b)(3) requires that common questions of law and fact predominate over any individual questions and that a class action be superior to other methods for fair and efficient resolution of the conflict. Some types of claims are simply less suitable for class treatment because, by their very nature, they require individualized fact analysis. Such claims can be identified at the pleading stage. Thus, lack of predominance is a viable basis for granting a pre-discovery motion to strike, although, as discussed below, a minority of courts thinks that "predominance questions are, by their nature, ill-suited to resolution on a motion to strike." *Ott v. Mortgage Investors Corp. of Ohio*, No. 3:14-CV-00645-ST, 2014 WL 6851964, at *16 (D. Or. Dec. 3, 2014).

The most commonly successful challenges rely on the Rule 23(a) typicality, the Rule 23(b) predominance, and the ascertainability requirements.

One characteristic of a strike-susceptible complaint is claims that allege unreasonable behavior by the defendant. Usually, reasonableness is a fact-specific inquiry that must be analyzed on a claim-by-claim basis. For example, in the wake of Hurricane Katrina, plaintiffs filed numerous class actions against insurers that denied coverage. *E.g., In re Katrina Canal Breaches Consol. Litig.*, No. CIV.A. 05-4182, 2009 WL 1707923, at *1 (E.D. La. June 16, 2009). In one representative case, the district court struck class allegations that were based on breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Louisiana laws prohibiting bad faith by insurers, and breach of fiduciary duty. The court reasoned, "These claims inherently require individualized fact-specific inqui-

ries because they depend upon whether the Defendants failed to properly adjust and pay for Hurricane Katrina-related property claims." *In re Katrina Canal Breaches Consol. Litig.*, No. CIV.A. 05-4182, 2009 WL 1707923, at *6 (E.D. La. June 16, 2009). Elaborating, the court observed,

> this Court would have to delve into individualized inquiries regarding the nature and extent of a property owner's damage, the source of damage (*i.e.*, wind versus flood), the timing and adjustment of claims, the market conditions when that claim was adjusted, whether each class member complied with his post-loss duties, how much each class member was paid and for what damage that payment was made, and whether any supplemental payments were timely and sufficient to satisfy the claim.

Id.

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Similarly, if a case involves complicated issues of liability, causation, or both, such as cases involving multiple contracts with different terms or multiple instances of wrongful conduct, the class allegations may be subject to striking. For example, in *Duvio v. Viking Range Corp.*, No. CIV.A. 12-1430, 2013 WL 1180948, (E.D. La. Mar. 20, 2013), a putative class action was brought on behalf of all "purchasers of Viking home appliances that are used in the kitchen or for outdoor cooking," including "dishwashers, refrigerators, stoves, ovens, outdoor grills, food preparation surfaces, and microwave ovens." *Id.* at *1. The plaintiff's theory was that each model of Viking appliance was "unreasonably defective" in design. *Id.* The court granted a motion to strike based on the pleadings for the following reasons:

> Given the vast array of products at issue, proving the defectiveness of each and every Viking product ever sold in the United States would entail numerous engineering experts and individual trials to determine causation, which not only present efficiency problems that are contradictory to the purpose of class actions, but also defeats the requirement of commonality because there is not a common question among the members of the purported class.

Id. at *4.

Another category of claims that are susceptible to strike motions is claims that require proof of reliance or a particular state of mind, as in warranty or fraud actions. *McRary v. Stifel, Nicolaus & Co., Inc.*, 687 F.3d 1052, 1059 (8th Cir. 2012) ("[T]he complaint does not sufficiently allege materially uniform misrepresentations and omissions that were made to all members of the class. Instead, the complaint focuses on omissions and misrepresentations that were made to Thompson and McCrary and their individual reliance on those misrepresentations."); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Relevant Prods. Liab. Litig.*, 275 F.R.D. 270, 276–77 (S.D. Ill. 2011) ("[E]stablishing causation will require (1) an examination of each class member's medical history, including pre-existing conditions and use of other medications; (2) an evaluation of potential alternate causes for the alleged injury; and (3) an assessment of individualized issues pertaining to each class member's prescriber…."). *But cf. Plascencia v. Lending 1st Mortgage*, 259 F.R.D. 437, 447 (N.D. Cal. 2009) (reliance "may be presumed in the case of a material fraudulent omission.").

In addition, a nationwide class claim that implicates the law of numerous states is often ripe for a motion to strike. *E.g., Pilgrim*, 660 F.3d at 947 (noting that where "the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute."); *Becnel v. Mercedes-Benz USA, LLC*, No. CIV.A. 14-0003, 2014 WL 2506506, at *2 (E.D. La. June 3, 2014) (granting defendants' pre-discovery strike motion, in part, because the court anticipated "serious manageability issues" in applying the laws of the 50 states and the District of Columbia to plaintiff's numerous state law claims); *In re Yasmin*, 275 F.R.D. at 275 ("The commonality and superiority requirements Rule 23(b)(3) cannot be met unless all litigants are governed by the same legal rules.").

However, courts are generally not receptive to motions to strike on the ground that proving damages would require a plaintiff-specific inquiry. Rather, various courts have held that individual damages calculations will not prevent class certification. *See, e.g., In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). *But see Roach v. T.L. Cannon Corp.*, 3:10-CV-0591 TJM/DEP, 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013) (rejecting class certification and plaintiff's contention that "damages need not be considered for Rule 23 certification even if such damages might be highly individualized").

Ascertainable Class

To certify a class, courts require that (1) the class definition be objective, and (2) the class is ascertainable. This requirement is not found in Federal Rule 23(a) or (b), but it is a judicially created practical rule that is universally adopted, at least for purposes of 23(b)(3) actions. *See Shelton v. Bledsoe*, No. 12-4226, 2015 WL 74192, at *3–4 (3d Cir. Jan. 7, 2015) (exploring nature and history of requirement that class be ascertainable). The purpose of the ascertainability requirement is to ensure it is possible to give adequate notice to class members and to determine after the litigation has concluded who is barred from litigating again. *See* 1 McLaughlin on Class Actions §4:2 (11th ed. West 2014).

Ascertainability relates to the ease with which the putative class members can be identified: "[a]n identifiable class exists if its members can be ascertained by reference to objective criteria." *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 Fed. App'x 782, 787 (11th Cir. 2014). These "objective criteria" should be "administratively feasible," meaning that the identifying class

members should be "a manageable process that does not require much, if any, individual inquiries." *Id.* Ideally, determining who is in a class should entail "ministerial review" of relevant records or other evidence rather than an "arduous individual inquiry." *Wooley v. Jackson Hewitt Inc.*, No. 07 C 2201, 2011 WL 1559330, at *4 (N.D. Ill. Apr. 25, 2011).

A court is likely to find a class definition that contains inherently vague or ambiguous language facially invalid. *See, e.g., Conigliaro v. Norwegian Cruise Line Ltd.*, No. 05-21584-CIV, 2006 WL 7346844, at *3 (S.D. Fla. Sept. 1, 2006) (class of cruise passengers "who suffered either physical injury, and/or emotional injury, and/or had their cruise ruined" was impermissibly vague); *Avila v. Van Ru Credit Corp.*, No. 94–C–3234, 1994 WL 649101, at *2 (N.D. Ill. Nov. 14, 1994) (denying certification to class of residents who received collection demand "similar to" those attached to the complaint because definition was facially vague and ambiguous).

Even if a class definition uses plain and definite language, courts will find that a class is not ascertainable if membership in the class is based on subjective criteria, such as states of mind. *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 97 (S.D.N.Y. 2010). Class definitions based on these elements do not serve the purpose of class litigation since they "would essentially require a mini-hearing on the merits of each case." *Forman v. Data Transfer*, 164 F.R.D. 400, 403 (E.D. Pa. 1995).

The need for the class definition to be based on objective criteria mandates that the class be defined in terms that are not central to the underlying merits of the dispute. Otherwise, the class may be labelled a "fail-safe" class. A fail-safe class is "a class that cannot be defined until the case is resolved on its merits." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012). As explained in one decision, "Such a class is prohibited because it would allow putative class members to seek a remedy but not be bound by an adverse judgment—either those class members win or, by virtue of losing, they are not in the class and are not bound." *Id.* The problem with "fail-safe" classes is that they impose no risk on the absent class members in the event of a judgment adverse to the class, since the class definition is structured so that the class will not exist if the defendant is not found liable. *Schilling*, 2011 WL 293759 at *6 (citing *Kamar v. RadioShack Corp.*, 375 Fed. App'x 734, 736 (9th Cir. 2010)).

Brazil v. Dell Inc., 585 F. Supp. 2d 1158 (N.D. Cal. 2008), offers a good example of a fail-safe class. *Brazil* involved a class defined as all persons or entities who are citizens of California who purchased Dell computer products that Dell falsely advertised as discounted. *Id.* at 1166-67. The court found this to be a classic "fail-safe" class because "[t]o determine who should be a member of these classes, it would be necessary for the court to reach a legal determination that Dell had falsely advertised." *Id. See also Sauter v. CVS Pharmacy, Inc.*, No. 2:13-CV-846, 2014 WL 1814076, at *9 (S.D. Ohio May 7, 2014).

A challenge to class ascertainability is most effective when paired with a challenge based on an overbroad class definition. Under the ascertainability requirement, plaintiffs need to define a class in objective and definite terms, and this often leads plaintiffs to simplify the class definition. As discussed above, however, an overly simplistic class definition is more likely to be found overbroad, for example, by encompassing individuals who have not been injured. Canny defense counsel may be able to pin a plaintiff between these two opposing restrictions so that it is (or appears) virtually impossible to satisfy both. For example, consider a product liability class action based on a strict liability design-defect theory for which the plaintiff, attempting to comply with the ascertainability requirement, initially defines the class as all persons who have purchased the product since 2011. The defendant objects that this class is overbroad because it encompasses numerous individuals who have suffered no injury. The plaintiff amends the class definition, defining it as all persons who have purchased the product since 2011 and who have suffered injury because of the specific defect at issue. Now the defendant argues that the class definition is amorphous and indefinite, rendering it impossible to determine who is in the class without a mini-trial for each class member. The plaintiff is trapped.

Class Certification Denied in Related Litigation

Although collateral estoppel principles cannot bind members of putative classes that were never certified, federal courts are expected "to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). As such, relying on the principles of comity, several courts have granted pre-discovery strike motions when class certification has been denied in a predecessor action. *E.g.*, *Baker v. Home Depot USA, Inc.*, No. 11 C 6768, 2013 WL 271666, at *1 (N.D. Ill. Jan. 24, 2013); *Edwards v. Zenimax Media Inc.*, No. 12-CV-00411-WYD-KLM, 2012 WL 4378219, at *3 (D. Colo. Sept. 25, 2012).

Relying on the principles of comity, several courts have granted pre-discovery strike motions when class certification has been denied in a predecessor action.

Conclusion

There are many reasons to consider filing a pre-discovery motion to strike class allegations. A successful motion can be tantamount to victory, ending the class certification fight before it even really begins. A partially successful motion may limit the scope of the claims, reducing the costs of discovery and increasing a plaintiff's leverage. Even an unsuccessful motion may persuade a judge to limit discovery, force plaintiffs to reveal more about their theory of a case, and provide a valuable opportunity to expose the judge to any flaws in the putative class action. Accordingly, when a defendant is served with a class action complaint, it should immediately review the complaint to determine whether the class allegations are susceptible to a motion to strike at the pleadings stage. FD