



Fifth Circuit Affirms District Court's Grant of a Motion to Strike Class Allegations

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Categories:

[Class Action Defense](#)

The Fifth Circuit Court of Appeals recently affirmed the grant of a pre-discovery motion to strike class allegations. In *Elson v. Black*, 14 women from seven states sought to bring a putative class action against the defendant companies, alleging that the defendants falsely advertised its FasciaBlaster product. Specifically, the plaintiffs alleged that the FasciaBlaster had been falsely advertised as a product that would eliminate cellulite, help with weight loss, and relieve pain. The district court, in a three-sentence opinion, struck the class allegations, finding that the class failed to establish commonality. The next day, the district court dismissed the remainder of the plaintiffs' claims in their entirety.

While the Fifth Circuit Court of Appeals found the district court opinion to be "inappropriately brief," it agreed that the class could not be certified, nor could the plaintiffs establish their claims of fraud. However, the appellate court reversed and remanded the district court's ruling dismissing two plaintiffs' express warranty claims, finding that the court failed to apply the law of a specific jurisdiction.

The appellate court held that the class could not be certified under Rule 23(a)'s commonality requirement and Rule 23(b)(3)'s predominance requirement. *First*, the plaintiffs' claims were governed by different states' laws, and the plaintiffs were unable to meet their burden establishing that "such differences in state law would not predominate over issues individual to each plaintiff in the litigation." *Second*, the plaintiffs failed to establish that they were a coherent class, due to their individualized factual differences. More specifically, not all plaintiffs had the same issues regarding the FasciaBlaster – some complained that it did not reduce cellulite; some complained it did not address their pain or health concerns; and others complained it did not help them lose weight. The plaintiffs "did not rely on the same alleged misrepresentations," and, therefore, they could not establish a coherent class. The plaintiffs'

claims were thus “riddled with predominance issues” and therefore unsuitable for class treatment.

This ruling is important because it is a rare example of a successful motion to strike class allegations at the pleading stage. Such a motion is an important tool because class actions that make it past a motion to dismiss threaten businesses with potentially substantial defense costs associated with class-wide discovery. While at the outset parties may appear to have common issues that would warrant class certification, a closer look at the claims may indicate that they are, in fact, too individualized to be certified as a class, and therefore a motion to strike class allegations could be appropriate.

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