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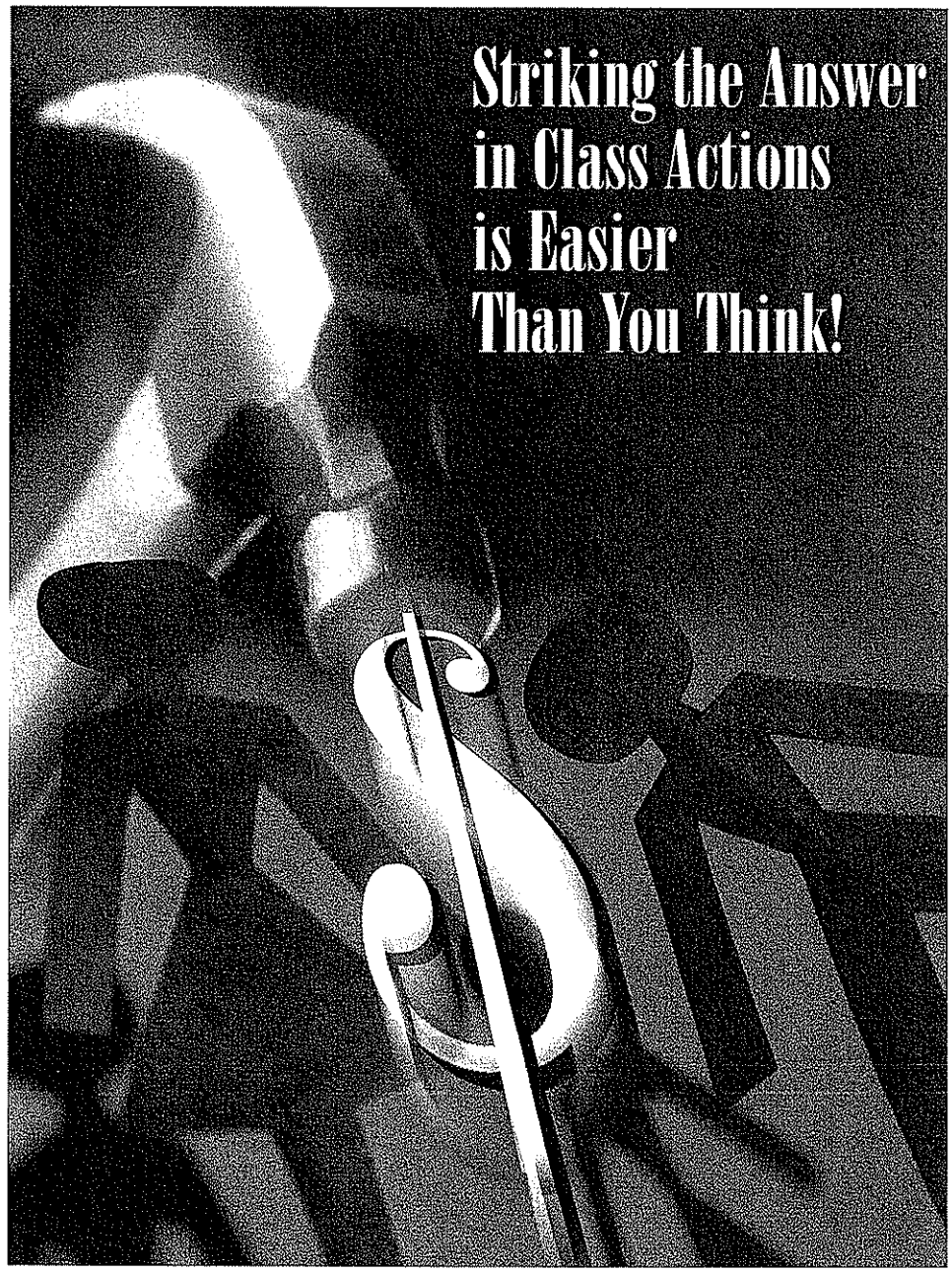

Striking the Answer in Class Actions is Easier Than You Think!

by Aashish Y. Desai

In class action litigation under federal law, defendants often seek an award of attorneys' fees and costs against the plaintiffs in their answers. While this knee-jerk reaction may be appropriate in certain circumstances, it is not appropriate when the underlying basis for recovery is for wage and hour violations of the Fair Labor Standards Act ("FLSA") or California's Unfair Competition Law ("UCL"). Class counsel should consider the value of taking the unusual step of filing a Rule 12(f) motion to strike the defendant's prayer for attorneys' fees and costs from its answer.

The Legal Standard

Under Federal Rule of Civil Procedure 12(f), the court may strike from any pleading "any redundant, immaterial, impertinent or scandalous matter." The function of a Rule 12(f) motion to strike is to avoid the expenditure of time and money that may arise from litigating spurious issues by dispensing with those issues prior to trial. (*Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994).) Moreover, a motion to strike may be granted when the "damages sought are not recoverable as a matter of law, or when the prayer for fees is baseless." (*K.H. v. Mount Diablo Unified School District*, 2005 WL 1656895 at *1 (N.D.

Cal. 2005).) Of course, courts must view the pleading in the light most favorable to the pleader. (*California v. United States*, 512 F.Supp. 36, 39 (N.D. Cal. 1981).) Thus, a motion to strike should not be granted unless it is clear that the matter may be stricken or could have no possible bearing on the subject matter of the litigation. (*LeDuc v. Kentucky Central Life Insurance Co.*, 814 F.Supp. 820, 823 (N.D. Cal. 1992).)

Defendants Are Not Entitled to Attorneys' Fees under the FLSA

Section 216(b) of the FLSA provides, in pertinent part, that courts shall, "in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant." (29 U.S.C. § 216(b).) The plain language of § 216(b) shows that Congress intended for a mandatory award of attorneys' fees to plaintiffs who prevail in FLSA actions. (*See Alyeska Pipeline Serv.Co. v. Wilderness Soc'y*, 421 U.S. 240, 262, n. 34 (1975).) The Supreme Court determined that Congress specifically authorized fee-shifting in certain instances, but noted that the FLSA does not authorize attorneys' fees for prevailing defendants. (*Id.* at 264 n. 37.) In fact, Congress' mandate to the courts to award attorneys' fees and costs only to successful FLSA plaintiffs was intended as an incentive for private litigants to act as "private attorneys general" to vindicate their FLSA rights in court. (*Laffey v. Northwest Airlines*, 746 F.2d 4, 11 (D.C. Cir. 1984), *cert. denied*, 742 U.S. 1021 (1985).)

Defendants Are Not Entitled to Attorneys' Fees under the UCL

Attorneys' fees are not specifically recoverable in UCL actions. (*Cortez v. Purolator Air Filtration Products, Inc.*, 23 Cal.4th 163, 173 (2000).) Most successful class practitioners request attorneys' fees for litigating a UCL claim under the "Private Attorney General" doctrine. The "Private Attorney General" doctrine is one of the several exceptions to the general rule that each party must pay his or her own attorneys' fees. (*Gray v. Don Miller & Associates, Inc.*, 35 Cal.3d 498, 505 (1984).) This doctrine, which has been codified in C.C.P. § 1021.5, rests upon the recognition that privately initiated lawsuits are often essential to effectuate fundamental public policies embodied in constitutional statutory provisions; and that, without providing a mechanism for awarding attorneys' fees, these private actions would not be brought by competent counsel. Thus, where a plaintiff sues under the UCL, fees may not be recovered by a prevailing defendant. (*See, e.g., Walker v. Countrywide Home Loans, Inc.*, 98 Cal.App.4th 1158, 1169 (2002).) There is no public benefit in defending a UCL claim.

A Defendant's Prayer for Attorneys' Fees is not Supported by any other Theory

Under the Federal Rules of Civil Procedure, a defendant may be entitled to attorneys' fees for bad faith, vexatious or oppressive litigation or as a disciplinary sanction under Rule 11. (*EEOC v. Hendrix Coll.*, 53 F.3d 209, 211-12 (8th Cir. 1995).) However, in a federal class action wage and hour case, the defendant will not likely be able to support a claim for "bad faith, vexatious, or oppressive litigation" at the pleading stage; and Rule 11 can never provide a basis for the inclusion of a prayer for fees in any type of litigation, including, of

course, class actions.

Bad Faith, Vexatious, Wanton or Oppressive Reasons for Litigation

Though attorneys' fees are generally not allowed to prevailing defendants in FLSA actions, prevailing defendants may recover fees if they show that the plaintiff, as a losing party, litigated "in bad faith, vexatiously, wantonly, or for oppressive reasons." (*Alyeska Pipeline Serv.Co.*, 421 U.S. at 258-259.) To obtain fees under this theory, a defendant would have to first show that it is the "prevailing party," and second, that plaintiffs litigated the action in bad faith. (*EEOC*, 53 F.3d at 211.) But, during the pleading stage of the litigation, it is legally impossible for a defendant to *prove* that it is the "prevailing party." (*Id.* at 210-11.) A defendant cannot seek legal fees at this stage under the theory that a plaintiff is litigating in bad faith, vexatiously, wantonly or for oppressive reasons; thus, this basis does not provide defendants with legal authority for the inclusion of its prayer for attorneys' fees in its answer.

Recovery of Attorneys' Fees as Disciplinary Sanctions under Rule 11

Rule 11 states that sanctions may be imposed by motion but "shall be made separately from other motions or requests." Of course, Rule 11 sanctions may also be imposed on the court's own initiative. (F.R.C.P. 11(c); *Mount Diablo School District*, 2005 WL 1656895 at *3.) In fact, Rule 11 states that sanctions can be imposed when a party has made "either an inaccurate or unreasonable representation to the court." (*Id.* at *3.) However, there is no need for a defendant to preserve the right to attorneys' fees under Rule 11 by including a prayer for attorneys' fees in its answer. In fact, a defendant must first wait to see if the plaintiff has engaged in actions that violate Rule 11; *then* it may properly file a separate motion to seek such sanctions. (*Mount Diablo Unified School District*, 2005 WL 1656895 at *3.) Thus, Rule 11 provides no legal authority for the inclusion of a prayer for attorneys' fees in a defendant's answer.

The Practical Benefit for Class Members

Allowing a defendant to maintain its request for attorneys' fees may only serve to dissuade class members from participating in the federal class action. Often, defendants argue that they can hold the absent class members liable for their "mammoth attorneys' fees and costs" and thereby thwart participation in an FLSA collective class action. But simply denying or defeating the allegations of an overtime complaint under the FLSA does not entitle a defendant to its attorneys' fees. (*Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1993), *cert. denied*, 513 U.S. 875 (1994) (holding that defendants are not entitled to attorneys' fees for successfully defending FLSA action).) Of course, absent class members are unlikely understand this convoluted legal principle – a fact sometimes exploited by defendants attempting to secure commitments of non-participation in the class action suit.

Conclusion

Simply denying the allegations of an overtime class action complaint does not entitle a defendant to its attorneys' fees when the underlying claims are based upon the FLSA and UCL. Moreover, Rule 11 places on the movant an extremely high burden to meet and does not provide a basis for the inclusion of a prayer for attorneys' fees in a defendant's answer in any type of litigation. Thus, class counsel should strongly consider the value of filing a motion to strike the defendant's prayer for attorneys' fees in its answer to the complaint when either the underlying cause of action does not support a defendant's request for attorney's fees or the defendant's request is based upon F.R.C.P. 11.

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