Kitchen Sink Litigation Clogs the Judicial Pipeline

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Law360, New York (June 24, 2013, 1:00 PM ET) -- Modern litigation has evolved such that complaints are often filed with as many causes of action as possible, no matter how attenuated — not unlike an issue-spotting exam in law school. Under this "kitchen sink" approach, defendants must navigate a mire of claims, some of which lack any merit or are duplicative, before reaching the true issues in the case. The natural result is an increase of time and fees expended by the parties, greater drain on the time and resources of the court, and difficulty reaching the merits.

Part of the strategy with this approach — assuming there is one — is the hope that with enough claims, something will stick and make complete dismissal unlikely. This in turn may provide leverage against a defendant, who after facing months of expensive litigation, may offer a settlement more favorable to the plaintiff.

However, when the dust settles, many of the attenuated and meritless claims will likely be dismissed, withdrawn or otherwise fail, which raises the question whether the plaintiff is still the prevailing party. And, where available, is the plaintiff entitled to such an award of attorneys' fees, should fees be reduced or, worse yet, awarded to the defendant instead. In other words, who are the winners and losers in kitchen sink litigation?

Kitchen Sink Litigation

Kitchen sink litigation is an issue facing all federal and state jurisdictions, but it has seen increasing incidence over the past 20 years to the point where today, it is almost expected. This trend caused a judge at the U.S. District Court for the Northern District of Illinois, in Chrysler Credit Corp. v. Anthony Dodge Inc., to observe the following:

> [J]udges of some experience, confronted with a seemingly limitless number of alleged causes of action, usually get a creeping suspicion (eventually borne out by the evidence) that the complainant's lawyer relies on many arguments because they lack faith in any of them ... [T]his lack of commitment lowers over their briefs like dense clouds. Quantity is a poor proxy for quality in court pleadings. Rarely, given the limitations of space, can the analysis in mega-multiple claim briefs be more than perfunctory and superficial; rarely are conclusions more than conclusory; rarely is there focus. Like wheat unseparated from chaff, the individual merits of these voluminous claims, if any, appear undistinguished.[1]

Sorting through 14 claims, the court in Chrysler Credit granted judgment on the pleadings on six claims[2] — a good example of the weeding courts are expected to undertake as a matter of course in order to reduce the claims to those that have actual merit.

Plaintiffs often make use of this kitchen sink approach in anticipation of early motion practice to ensure that it will have claims that survive this judicial weeding process.[3] However, this often serves to ratchet up the defense response.

As another example, in Edgenet Inc., filed in the U.S. District Court for the Eastern District of Wisconsin, the plaintiff "alleged seemingly every claim it c[ould] imagine" and, responding in kind, defendants filed a motion to dismiss "challeng[ing] nearly every aspect of every claim, leaving the court to determine to what

extent this action w[ould] proceed, if at all."[4] Ultimately, only two out of the plaintiff's 10 claims survived,[5] but likely not before tens, if not hundreds, of thousands of dollars were expended by the parties, and the case had been pending for more than 1 1/2 years.

As such, although the kitchen sink approach may offer a strategic advantage under certain circumstances, it may still negatively impact the end result. For example, in one case before the U.S. District Court for the Northern District of Texas, the court found that "counsel's 'all-but-the-kitchen-sink' approach to litigation has unnecessarily increased the time, and thus fees, expended by all parties."[6] As a result, although awarding summary judgment, the court found that the plaintiff included in its "briefs and appendix argument and documents that are simply irrelevant to the claims between these parties," and that it would be exacting in any award of attorneys' fees to plaintiff.[7]

Despite the apparent popularity of this all-in approach, throwing in everything but the kitchen sink is not always, if ever, in a party's best interest. Rather, plaintiffs may be better advised "to consider whether it is to their advantage to continue to cast as wide a net as possible, or whether they would be better served by focusing their efforts on the claims that have merit."[8] Moreover, although a "party may state as many separate claims or defenses as it has, regardless of consistency" (Fed. R. Civ. P. 8 (d)(2)), in filing such cases, counsel are still bound by the requirements of Rule 11 and the "practice of 'throwing in the kitchen sink' at times may be so abusive as to merit Rule 11 condemnation."[9]

What remains unclear is exactly where the line is drawn between imaginative pleading and frivolous claims.

For example, the Uniform Trade Secrets Act, where adopted, generally preempts and expressly displaces common law tort claims based on misappropriation of information.[10] As such, where a kitchen sink complaint alleges a claim for statutory misappropriation and numerous other common law tort claims with the same basis, this would appear to go beyond the Rule 11 line where the claims are expressly preempt by statute.

However, counsel are wary, as they should be, of raising such concerns with the court, in particular where kitchen sink pleading has become common practice. Courts, on the other hand, have yet to reign in such frivolous claims through their own inherent discretionary powers. Nonetheless, as the kitchen sink trend continues to grow and clog the judicial pipeline, courts may be forced to curb such tactics and strategy.

Who is the Prevailing Party?

With so many claims at issue in kitchen sink litigation, a critical question is which party is the prevailing or successful party if there are mixed results — which is almost always the case. For example, if the plaintiff asserts 17 claims and the defendant defeats 15, but damages are awarded to the plaintiff on the remaining claims, who really "won?" This issue is significant because it may be determinative of which party is considered the "prevailing party" for purposes of awarding attorneys' fees, where such an award is permitted.

In American jurisprudence, the general or so-called "American rule" is that each party pays for their own attorneys, regardless of the outcome of the litigation.[11] However, statutory and contractual exceptions exist to that rule, permitting the "prevailing" or "successful" party to recover its fees and costs from its opponent, but only on those claims for which the statute provides such recovery.[12]

Ordinarily these statutes do not define the term "prevailing party" or "successful party," which has resulted in considerable case law attempting to craft a workable definition.[13] Moreover, even among those statutes that do define "prevailing party," the definition is not uniform.[14]
Consequently, courts have adopted a number of tests depending upon the particular statute at issue and the number of claims involved.

For example, in Hensley v. Eckerhart, the U.S. Supreme Court addressed whether a partially prevailing plaintiff in a civil rights action may recover attorneys' fees under 11 U.S.C. § 1988 for legal services on unsuccessful claims.[15] The Supreme Court acknowledged that the standard for making this determination has been framed in various ways and explained that a typical formulation is that a party can be considered the prevailing party "if they succeed on any significant issue in litigation that achieves some of the benefit the parties sought in bringing suit."[16] By design, this definition is flexible and requires factual inquiry even in the context of a single claim, so what does it mean when there are multiple claims and mixed results?
A variety of tests have been developed across federal and state jurisdictions in an effort to resolve this expensive question. However, five approaches that measure the success of the litigation and claims with varying degrees of flexibility are commonly employed:

(1) In cases where there are competing claims, counterclaims and setoffs all tried together, and both parties achieve a level of affirmative success, some courts adopt a "net judgment" approach in which the prevailing party is simply the party that obtains a net judgment in its favor.[17]

(2) Many courts employ a more flexible approach that looks at the purpose and results of the litigation as a whole, which may require the consideration of the language of the contract or statute that forms the basis for the attorneys' fees award, the number of claims brought by the parties, the importance of each of the claims relative to the entire litigation, and the amounts awarded on each claim.[18]

(3) In cases involving multiple claims with varied success, other courts have applied formulaic or proportionality approach test in order to reduce the amount of attorneys' fees awarded to those fees related to the party's successful claims.[19]

(4) Some courts will group related claims and will award fees for time spent on unsuccessful theories so long as they were related to a successful claim.[20] On the other hand, if several claims are based upon different facts or legal theories, the court may decline to award fees "for those unsuccessful, separate and distinct claims."[21]

(5) Courts confronted with multiple claims and mixed results may simply refuse to award fees to either side.[22]

In addition to these general approaches, specific statutory frameworks may require entirely different standards for analyzing cases with multiple claims.

It should also not be forgotten that in applying the tests described above, a party may not be entitled to a fee award if it has pursued frivolous or marginal claims.[23] "[W]here the pursuit of multiple claims inflates the total hours beyond what is reasonable for the litigation, a reduction is clearly appropriate."[24] Moreover, a "court may wish to discourage a plaintiff's counsel from wasteful 'kitchen sink' pleading and will therefore refuse to compensate a successful plaintiff for hours spent preparing a plainly meritless alternative theory."[25]

On the other hand, defense counsel are seemingly held to a different standard because defendants must defend against all of the plaintiffs' claims regardless of merit.[26] And, at least under some statutory schemes, a prevailing defendant is usually only entitled to recover its fees in "exceptional circumstances," which require that the plaintiff's claims be "frivolous, unreasonable or groundless."[27]

Conclusion

The potential advantages gained early on in the litigation by employing a kitchen sink style approach must be weighed against the dangers and pitfalls waiting further down the road. Although each additional count in a complaint adds another potential avenue for relief, adding too many claims is often a sign of weakness.[28]

Further, by lumping frivolous claims with arguably colorable claims, both the plaintiff and plaintiff's counsel "risk losing all credibility with the court."[29] And, in the end, the failed "kitchen sink" claims may cost the client a chance at recouping some or all of its attorneys' fees and, in fact, may expose them to a greater risk of paying the opposing party's attorneys' fees.

Regardless of how the lawsuit ends, as one court has correctly observed, "[a] kitchen sink complaint, unless dismissed for some central jurisdictional or pleading flaw, is likely to be hard slogging, requiring that counts be worked through one by one."[30] Defendants may also choose to fight fire with fire, causing an escalation in the claims and defenses at issue in the litigation, costs and fees to the parties, and the duration of the case.[31] This will inevitably back up the court docket and become a burden on judicial resources.[32] Such litigation is cumbersome, often frustrates the judicial process and the parties, and there is often no clear winner despite the outcome of the case.

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