KCC Class Action Services

KCC Class Action Digest
September 2019

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INSIDE THIS ISSUE

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ANTITRUST

Pharmaceutical

In Re: Niaspan Antitrust Litigation, No. 13-md-2460, 2019 WL 3816829 (E.D. Pa. Aug. 14, 2019) (DuBois, J.) Plaintiffs brought suit against pharmaceutical companies, alleging antitrust and other violations by defendants in orchestrating a "pay for delay" strategy by way of intellectual property litigation and settlements to unlawfully restrain trade. Direct Purchaser Plaintiffs brought a motion for certification.

The Court granted class certification, reasoning in support of its decision that numerosity was satisfied by virtue of there being 48 putative class members, which created a presumption that joinder was impracticable, even if six of them were merged with others in the class. The Court's finding was further supported by factors such as class member resources and geographic dispersion.

In terms of commonality, the Court found three common issues in the case. For typicality, the Court found the claims in the case revolved around market-wide activity, so as to be sufficient. In terms of adequacy, the Court rejected Defendants' assertion of a conflict amongst the class (which was that the class had bought generic drugs, while the named Plaintiffs had bought the brand-name drugs), but found this did not render Plaintiffs inadequate, nor did the variance in possible damages theories rise to the level of a fundamental conflict.

Turning to predominance, the Court considered Plaintiffs' expert testimony on class-wide proof of antitrust injury, and found this was sufficient to show predominance, despite a number of challenges by Defendants.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Foster v. Adams & Associates, Inc., No. 18-cv-02723 (N.D. Cal. Sep. 11, 2019) (Corley, Mag. J.) Plaintiffs brought suit for violation of the Employee Retirement Income Security Act ("ERISA") against their employer and certain associated entities alleging breaches against fiduciary duty in participating in prohibited transactions and failure to make required disclosures. Plaintiffs moved for certification.

The Court granted the motion, reasoning in support of its decision first that in terms of numerosity, the Court found 2,766 participants in the plan to be sufficient. For commonality and typicality, the Court found a variety of common claims and that all allegations were alleged to have been visited upon the class as a whole, with no unique defenses at issue.

In terms of adequacy, the Court found counsel was satisfactory and one of the named Plaintiffs was unchallenged, but noted that Defendant had challenged another plaintiff on the grounds of personal animosity against Defendant, citing potential discrimination claims that could be raised in a separate litigation. The Court found no evidence suggesting that this would rise to the level of a conflict of interest precluding this plaintiff's serving as class representative.

Turning then to Rule 23(b), the Plaintiffs argued that certification was proper under multiple subsections, reasoning that this case was similar to other ERISA litigation and that certification was appropriate under subsections (1)(A) or (1)(B) due to the effect any individual judgment would have upon the whole of the class. The Court also found certification was appropriate under subsection (2) in seeking injunctive or declaratory relief for the class. As such, the Court found it unnecessary to evaluate whether Rule 23(b)(3) had been satisfied.

INSURANCE

Medical

Byorth v. USAA Casualty Insurance Co., No. 17-cv-153, 2019 WL 4170251 (D. Mont. Sep. 3, 2019) (Cavan, Mag. J.)
Plaintiffs brought suit against a medical insurance provider, alleging various breaches of fiduciary duty and contract, and violation of Montana's Unfair Trade Practices Act. Plaintiffs moved for certification of five subclasses.

The Court granted certification for the declaratory and injunctive relief claim limited to a specific subclass, and appointed counsel as adequate, but denied the motion in all other respects. Reasoning in support of its decision, the Court first noted that in terms of numerosity, the class proposed in the motion was defined more narrowly than the definition appearing in the operative amended complaint. However, the Court noted that Defendant had not challenged class size and had removed the case from state court under the Class Action Fairness Act requiring a class of more than 100. As such, the Court found numerosity could be reasonably inferred, and that the requirement could be relaxed when seeking injunctive and declaratory relief.

In terms of commonality, the Court found a variety of questions that were common to each subclass, so as to satisfy the element. For typicality, while Defendant argued that the named Plaintiffs' claims were distinguishable from those of the class, the Court found these did not need to be substantially identical, and that the similar injuries alleged from the same course of conduct was sufficient. For adequacy, the Court found no dispute and no evidence of conflict of interest.

In terms of satisfaction of Rule 23(b), Plaintiff requested that four classes be certified as meeting predominance and superiority under Rule 23(b)(3), and the injunctive relief class as meeting Rule 23(b)(2). The Court found a variety of individual inquiries would be needed to determine liability, requiring review of each individual member's file by the jury, medical records for each claimant, billing documents, and other individualized assessments. As such, the Court found predominance was not met for the four subclasses, and therefore superiority was not satisfied either.

Looking next at the Rule 23(b)(2) subclass, the Court found that certification was appropriate, in that Plaintiffs did not seek damages under this claim, but only injunctive and declaratory relief not otherwise available under the statutes at issue, and which would be applicable upon the class as a whole. Accordingly, the Court found this subclass could be certified.

OIL & GAS

Zehentbauer Family Land, LP v. Chesapeake Exploration, L.L.C., No. 18-4139, 2019 WL 3820259 (6th Cir., Aug. 15, 2019) (Gilman, J.)
Plaintiff landowners brought suit against oil and gas companies, alleging that they had improperly calculated royalties owed for gas and oil profits, resulting in underpayment. After class certification was granted, Defendants appealed, arguing predominance was not met.

The Sixth Circuit affirmed certification, reasoning in support of its decision first that the main common question in the matter was the method of calculation of the royalties itself, rather than the actual calculations made, and that the theory based on individual calculations had been dropped by Plaintiffs. Thus, the only common question in the case centered around the lease language in the form contracts used. While Defendants also argued there was no merit to Plaintiffs' remaining theory, the Court found merits questions were not appropriate at the certification stage.

The Court also looked at two cases cited by the Defendants in which similar certification orders were vacated, but found both cases materially distinguishable, and that here, Plaintiffs had accounted for the missing factors used in reaching those decisions.

PRISONERS

Howard v. Cook County Sheriff's Office, No. 17-cv-8146, 2019 WL 3776939 (N.D. Ill. Aug. 12, 2019) (Kennelly, J.)
Plaintiff correction officers and other jail workers sued county and sheriff's office, alleging a system-wide failure to curtail sexual harassment by male detainees, in violation of state and federal laws and the 14th Amendment. Plaintiffs sought class certification.

The Court granted the motion after modifying the class definition. Reasoning in support of its decision, the Court first reviewed motions to exclude from both parties as relevant to the certification question, excluding certain expert testimony from both sides.

Turning then to class certification, the Court found the class definition ascertainable, and that 2,000 members was sufficiently numerous. For commonality, the Court found the Title VII claim of a hostile environment was sufficient alone. For typicality, the Court found that although Plaintiffs' job duties varied, this was irrelevant to the common question, and that the only difference was of degree rather than kind, so as to meet the element.

In terms of adequacy, the Court found the class included supervisors, but that no named Plaintiff worked in a supervisory capacity, prompting the Court to modify the class definition to exclude supervisors.

In terms of Rule 23(b)(3) predominance, the Court found it satisfied by virtue of the various common questions, and that individual damage issues did not defeat certification. The Court also found Defendants had not provided enough evidence to demonstrate that any affirmative defenses posed an obstacle to predominance.

PRIVACY

In Re: Google Inc. Cookie Placement Consumer Privacy Litigation, No. 17-1480, 2019 WL 3559113 (3rd Cir. Aug. 6, 2019) (Ambro, J.)
Plaintiffs brought suit against Defendant, a website advertising provider, claiming Defendant's cookie installation invaded users' privacy in violation of the California constitution and common law. After the United States District Court for the District of Delaware approved an agreed settlement where the only benefit was to six *cy pres* recipients, one objector appealed the certification and the settlement, arguing that the benefit belonged to the class, which had been inadequately represented.

The Third Circuit vacated the approval order and remanded the case, reasoning in support of its decision primarily that while a settlement providing relief to *cy pres* recipients only was not necessarily impermissible on the basis of any precedential authority, in this particular case, certification and fairness requirements may not have been satisfied, but a full conclusion could not be drawn without further analysis by the district court.

Reviewing the district court's approval, the Court found that while the district court had held nine fairness factors were satisfied, it had only provided a cursory analysis, and that while additional relevant factors were mentioned, they had not been applied. The Court found this was not a sufficiently rigorous analysis, particularly in that it failed to include a review of the class-wide release terms for fairness to the class, or the *cy pres* recipients' prior business relationships with Defendant for potential conflicts of interest. As such, the Court found this was an abuse of discretion.

For certification, the Court found the objector's argument on inadequate representation was predicated on the settlement approval itself, and thus decided to leave this to the district court on remand to analyze.

TELEPHONE CONSUMER PROTECTION ACT

Faxes

Advanced Rehab & Medical, P.C. v. Amedisys Holding, LLC, No. 17-cv-01149, 2019 WL 4145239 (W.D. Tenn. Aug. 30, 2019) (Breen, J.)
Plaintiff brought suit for violation of the Telephone Consumer Protection Act ("TCPA") against an in-home health care company, alleging the receipt of unsolicited faxes. Plaintiff sought class certification.

The Court granted the motion, reasoning in support of its decision, in terms of Rule 23, first that numerosity was unchallenged, and satisfied by a proposed class of more than 6,000 members. For commonality, the Court considered Defendant's argument that individualized inquiries would be needed in order to identify unique defenses, but found that Plaintiff had outlined four common questions so as to satisfy this element, and that these had not been refuted. For typicality, the Court rejected Defendant's argument as to an affirmative defense. In terms of adequacy, the Court found Defendant's arguments concerning affirmative defenses and costs of experts were speculative and asking Plaintiff to meet an impossible standard, and that adequacy had been otherwise established.

Turning then to Rule 23(b)(3) predominance, Defendant argued that individual inquiries would predominate in the case concerning affirmative defenses and proof of express prior consent. Here, the Court agreed in part in that there were some individual inquiries needed, but found that questions surrounding the determination of liability for the common questions were likely to predominate, and that the individual issues were not overwhelming.

E&G, Inc. v. Mount Vernon Mills, Inc., No. 17-cv-318, 2019 WL 4034951 (D.S.C. Aug. 22, 2019) (Cain, J.)
Plaintiff brought suit for violation of the TCPA, alleging receipt of an unsolicited fax. Plaintiff sought class certification.

The Court denied the motion, pointing primarily to a lack of predominance and superiority. Here, the Court found three individualized inquiries at issue: (1) whether the class members had given express consent; (2) whether Defendant authorized the fax to be sent to each class member categorically (as authorization was only given to send the fax to full-service hotels); and (3) whether Defendant authorized the fax to be sent to each class member individually. As such, the Court found predominance was not met, and did not discuss the other elements.

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