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ANTITRUST

In Re: Zetia (Ezetimibe) Antitrust Litigation, No. 18-md-2836, 2020 WL 4917625 (E.D. Va. Aug. 21, 2020) (Smith, J.)

Direct Purchaser Plaintiffs in a multi-district pharmaceuticals antitrust litigation sought class certification, which was reviewed by a magistrate judge, challenged by the Defendants, and brought to the Court for a *de novo* interpretation of the magistrate's Report and Recommendation ("R&R").

The Court overruled Defendants' objections and approved the R&R in full to grant certification, only amending in part the class definition in accordance with its own previous orders. Reasoning in support of its decision, the Court analyzed the motion under Rule 23, only addressing Defendants' challenges. For numerosity, the Court noted the class size of 25 was in the "gray area" requiring a more thorough review of the relevant factors. The Court agreed with the R&R that the interests of judicial economy, geographic dispersion, and lack of ability to bring individual suits strongly weighed in favor of certification, and found that joinder would be impracticable.

Turning next to adequacy and typicality, the Court reviewed the R&R's analysis of the three proposed representatives (all business entities). For the first, the Court found Defendants' objections as to recent criminal conduct of the representative outweighed by that representative's conduct in the litigation thus far. For the second, the Court found Defendants' objections (that the representative was merely a shell company for counsel to control litigation) went against the R&R's specific findings of its independence. For the third, the Court found Defendants' arguments that the representative was subject to a unique defense for lacking an antitrust injury were inconclusive and went against the R&R finding that this would not overwhelm the litigation. As such, the Court found all three representatives adequate.

For predominance, the Court also found Defendants' argument that the R&R ignored evidence of a need for individualized inquiries into antitrust injuries to be unsupported, and agreed with the R&R that Defendants had not provided convincing evidence against predominance.

In Re Glumetza Antitrust Litigation, Nos. 19-cv-05822, 19-cv-06138, 19-cv-06839, 19-cv-07843, 19-cv-08155, 20-cv-01198, 20-cv-05251; 2020 WL 4732333 (N.D. Cal. Aug. 15, 2020) (Alsup, J.)

Direct Purchaser Plaintiffs in a multi-district pharmaceutical antitrust litigation moved for class certification. The Court granted the motion after modifying the class definition to exclude future class members.

Reasoning in support of its decision, the Court first considered commonality and predominance. In that regard, the Court noted that antitrust claims "readily" meet the predominance requirement, and that the Defendants did not contest that common issues predominate on liability. Instead, Defendants objected on (1) class-wide injury and damages; (2) antitrust impact; and (3) the conclusions of Plaintiffs' expert on these issues. However, the Court found that the expert's theory simply relied on Plaintiffs proving the first part of their case, which would confirm the causation theory once proven. The Court also found the damages model would be confirmed by common evidence of pricing, could be adapted to exclude opt-out plaintiffs and post-pricing discounts, and that the Court could simply exclude time-barred class members from recovery. As such, the Court found commonality and predominance satisfied.

In terms of typicality, while Defendants argued that the named plaintiffs are all assignees of different time periods, and thus atypical, the Court found this was not a bar to representing a class on the same claims. For adequacy, the Court looked at Defendants' argument that the named plaintiffs had not diligently pursued the case, and found the argument vague and speculative, and insufficient to undercut adequacy. In terms of superiority, the Court found no inability of management, and that the interest of adjudicating all claims in a single forum where common issues are likely to predominate was sufficient, despite the fact that some larger companies had chosen to file separate individual suits.

For numerosity, the Court found the issue uncontested, and that 81 members were sufficient. For ascertainability, the Court found the class definition turned on objective criteria, dates, and purchases, but that it remained an open class inclusive of people who had not yet purchased the drug and who could not properly receive notice at this time. As such, the Court determined the class to be certified must be limited by the date of the certification order.

EMPLOYMENT

Martin v. Johnson Controls Fire Protection, LP, No. 19-cv-00514, 2020 WL 4747849 (W.D. Wash. Aug. 17, 2020) (Jones, J.)

Plaintiff sprinkler inspector brought suit against a fire protection systems company, alleging failure to pay prevailing wages for public works contracts per state statutes, as well as failing to pay overtime. Plaintiff moved for certification.

The Court granted the motion, reasoning in support of its decision first that Defendant did not dispute numerosity, typicality, or adequacy.

Accordingly, the Court focused on the other elements. In terms of commonality, the Court found Plaintiff had alleged a single course of conduct at issue, which if resolved would address all claims in the class, even though damages might require some level of individualized calculation. Thus, the Court found commonality established.

In terms of predominance, the Court found the contract terms under which each class member was employed were similar enough that common questions would predominate over individual ones.

Likewise, for superiority, the Court found the predominance of common questions was sufficient to satisfy interests of judicial economy, and noted that opting for complaint procedures within the Department of Labor would not be a sufficient alternative forum due to administrative time-bars. As such, the Court found superiority satisfied.

PRIVACY

Gaston v. LexisNexis Risk Solutions, Inc., No. 16-cv-00009, 2020 WL 5235340 (W.D. N.C. Sep. 2, 2020) (Bell, J.)

Plaintiffs brought privacy statute suit (under the Driver Privacy Protection Act) after their personal information provided to police in earlier car accidents appeared in crash reports through a legal professional database information portal without their consent. Plaintiffs moved for certification of a nationwide class for declaratory and injunctive relief and monetary damages under two subclasses. Each party also moved for summary judgment.

The Court certified a class under Rule 23(b)(2) only, and granted summary judgment in part for Plaintiffs. Most relevant here, the Court began its class certification analysis with ascertainability and numerosity. In that regard, the Court found the class members could be identified by records in the crash reports, and that the volume of such individuals was indisputably numerous, estimated at over 250,000.

Turning to commonality, the Court found two common questions at issue, and that at least one could be commonly answered so as to resolve an issue central to the class claims. However, the Court also reviewed Defendant's argument that commonality could not be found due to the individualized nature of preparing each accident report, finding this narrow reading would bar any injunctive relief of conduct plainly violating the statute, and declined to accept that interpretation. Nonetheless, the Court limited commonality to the North Carolina class members, as there was no evidence in the record that the process of preparing the reports was factually similar in other states.

In terms of typicality, the Court found Plaintiff's claims were typical of the class claims, and rejected Defendant's defense against injunctive relief on the ground that Plaintiff's evidence did not establish a likelihood of using motor vehicle records underlying every class claim. For adequacy, the Court found this was unchallenged, and that the representative and counsel were adequate.

Looking next at Rule 23(b)(1), the Court found this section did not apply, as there was no evidence of likely prejudice from incompatible standards or leaving claimants without a remedy. For Rule 23(b)(2), the Court found both requirements met, for a showing of an act or refusal to act in the same manner to the whole class, and that final injunctive relief would be appropriate despite the argument that each crash report might have been disclosed under different facts. For Rule 23(b)(3), the Court found the class action was not a superior framework for adjudicating money damages claims by virtue of Defendants' intention to seek individualized assessment of damages recovery rights. As such, the Court found only Rule 23(b)(2) an appropriate basis for certification.

SECURITIES

In Re Willis Towers Watson PLC Proxy Litig., No. 17-cv-1338, 2020 WL 5361582 (E.D. Va. Sep. 4, 2020) (Trenga, J.)

Plaintiffs brought shareholder suit alleging that material misrepresentations and omissions within the context of a proposed merger approval violated the Securities Exchange Act. Plaintiffs moved for certification.

The Court granted the motion after modifying the class. Reasoning in support of its decision, the Court first considered the primarily contested issue of predominance with respect to Plaintiffs' damages model. Despite various attacks on speculative analysis, the Court found that most of these would be measured after the merits inquiry, and that the damages model was sufficient for the certification stage to show predominance. For superiority, the Court also found that a class action was superior for securities claims.

Looking next at Rule 23(a), the Court began with ascertainability, and found it necessary to exclude stockholders who sold shares before a certain date, but otherwise held the class ascertainable. For numerosity, the Court found this was uncontested. For commonality, the Court found the above predominance analysis had sufficiently addressed this element.

For typicality, the Court found typicality satisfied, and addressed Defendants' arguments that Plaintiffs' claim was subject to a limitations defense, involved a purchase too late to be typical and support from the investment advisors to the merger. The Court found the limitations defense would be properly raised later at the merits stage, and that the other factors did not bear on materiality in the misrepresentations alleged, or in showing causation and damages.

For adequacy, the Court found Plaintiffs adequate to provide vigorous prosecution, but Defendants argued a lack of knowledge and control, especially in failing to bring an earlier appraisal action. The Court found none of these arguments sufficient to defeat adequacy.

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