KCC Class Action Services

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CONSUMER

Fessler v. Porcelana Corona De Mexica, S.A. De C.V., No. 4:19-cv-00248 2022 WL 92773 (5th Cir., Jan. 10, 2022) (Jones, J.)
This case involved defendant's appeal of an attorneys' fees award in a class action settlement. Because the district court failed to account for counsel's time spent on unsuccessful claims and failed to compare the relief sought to that actually awarded, the Fifth Circuit vacated and remanded for the court to properly evaluate those factors.

Class counsel filed a motion seeking attorney's fees and expenses from two cases. Defendant challenged the request, disputing the number of hours expended on the claims. Defendant argued the hours used for lodestar calculation should be limited to hours worked for successful class members, not every putative class member. Defendant also sought a downward adjustment because of the limited results achieved.

The district court decided not to address the dispute in the computation of the lodestar itself, but instead opted to weigh a possible reduction from the lodestar under *Johnson v. Ga. Highway Express, Inc. (Johnson)*, 488 F.2d 714, 717–19 (5th Cir. 1974) (listing twelve factors to evaluate a fee award).

After considering the *Johnson* factors, the court rejected both Defendant's request for a downward adjustment and Class Counsel's multiplier. The court also held a downward adjustment was not warranted, finding the work done did not prove fruitless. Defendant appealed and argued the district court erred in calculating the lodestar and in refusing to decrease it.

The Fifth Circuit agreed, finding that the Class prevailed on only a fraction of its original claims. The Appeals Court pointed out, under Supreme Court precedent, work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved and therefore no fee may be awarded, citing *Hensley v. Eckerhart (Hensley)*, 461 U.S. 424 (1983). The Court also noted that when claims share a 'common core of facts' or 'related legal theories,' a fee applicant may claim all hours reasonably necessary to litigate those issues. Thus, according to *Hensley's* instruction, Class Counsel was not entitled to any fee recovery for hours expended on unsuccessful claims unless the district court found a "common core of facts" or "related legal theories."

Even assuming the district court had adequately supported its conclusion that unsuccessful claims were intertwined with those that proved successful, the Fifth Circuit found that the district court still failed to properly analyze the award in relation to the results obtained, pointing out that the district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. According to the Appeals Court, the district court made no such comparison.

The Appeals Court also held that district court erred in justifying the award by comparing the proportion of the fee award to the class benefit with that of inapposite cases. The Court found that the district court's justification of an award based on an inapt other case comparisons further illustrated how the court's analysis missed the mark emphasizing that the fee award should approximate what a client would be expected to pay in a comparable case, citing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010) and *Hensley*.

EMPLOYEMENT

FLSA

Waters v. Day & Zimmermann NPS, Inc., No. 1:19-cv-11585, 2022 WL 123233 (1st Cir. Jan. 13, 2022)
Defendant moved to dismiss claims that the defendant failed to pay FLSA-required overtime wages based on *Bristol-Myers Squibb v. Superior Court of California (BMS)*, 137 S. Ct. 1773, 1779, 198 L.Ed.2d 395 (2017),

which held in view of the Fourteenth Amendment, state courts cannot entertain a state-law mass action if it includes out of state claimants with no connection to the forum state. Defendant claimed that under *BMS*, these claims could not be brought in a Massachusetts federal court. The defendant argued Federal Rule of Civil Procedure 4(k)(1) independently limits a federal court's exercise of personal jurisdiction with respect to out-of-state opt-in claimants added after service of process has been effectuated. The district court denied defendant's motion. The First Circuit affirmed the district court's decision finding no textual basis for concluding Rule 4 governs anything other than service of a summons. Apart from the text of Rule 4(k), the Court found history showed its limited purpose was to govern service of a summons, not to limit the jurisdiction of the federal courts after a summons has been served.

The Court did not find persuasive the contrary reasoning of decisions from two other circuits, *Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021), and *Vallone v. CJS Solutions Group*, 9 F.4th 861 (8th Cir. 2021) because both opinions relied on an erroneous reading of Rule 4, and failed to confront the fact that Rule 4(k) is a territorial limit on effective service of a summons, and thus could not be read to limit a federal court's jurisdiction after a summons is properly served.

PAGA

Cashon v. Encompass Health Rehabilitation Hospital of Modesto, LLC, No. 1:19-cv-00671 2022 WL 95274 (E.D. Cal. Jan. 10, 2022)
In this California Labor Code violations class action brought under California's Private Attorneys General Act (PAGA), the district court denied the motion for preliminary approval of a class action settlement. The court found indications of both arms-length bargaining and collusion which raised substantial concerns about the adequacy of representation. The court found several factors that pointed to possible collusion: (1) that the class action nature of the case only arose during mediation of plaintiff's individual claims, leading the court to find it plausible that the class action claims were an afterthought to achieve a settlement of Plaintiff's individual claims); (2) the agreement contained five clear sailing arrangements; (3) there was a question as to how much class discovery occurred before the mediation; (4) the information Defendants provided may not have been sufficient to calculate the value of Plaintiff's claims; and (5) a separate agreement provided Plaintiff with an additional $50,000.

The court was also concerned with the fees requested by Class Counsel and Plaintiff's enhancement request since it did not seem she took many actions or spent time to protect the class's interests; and, whether the basis for the release was adequately briefed.

Therefore, the court stated it was unlikely to grant approval of the settlement and denied the motion without prejudice.

ANTITRUST

Staley v. Gilead Sciences, Inc., No. 3:19-cv-02573 2022 WL 126116 (N.D. Cal. Jan. 13, 2022) (Chen, J.)
At issue in this antitrust case was defendant Teva's 12(b)(6) motion to dismiss individual cases filed by retailer plaintiffs Walgreen and CVS on the basis they were time-barred. Teva argued that the retailers could not claim the benefit of the earlier date that direct payor plaintiffs filed their class action suits because Teva was not a named defendant in those cases. The district court agreed and granted Teva's motion to dismiss.

The direct payor plaintiffs filed their class actions earlier mentioning that Teva was a co-conspirator in a scheme to delay entry of Teva's generics, but did not sue Teva. Walgreen and CVS did not file their respective suits until approximately a year later and did name Teva as a defendant.

The retailers included in their complaint a paragraph relating to the statute of limitations, alleging that, under *American Pipe & Construction Co v. Utah (American Pipe)*, 94 S. Ct. 756 (1974), plaintiffs were members of

the putative class on whose behalf a class action was filed earlier and the filing of that class action tolled the statute of limitations applicable to plaintiffs' claims.

Teva disagreed and argued Walgreen and CVS could not rely on the earlier-filed class actions and instead could only reach back to the four years prior to the filing of their own complaint since Teva was not a named defendant in the prior cases. In reply, the retailer plaintiffs contended that the class action tolling doctrine extended the applicable limitations period when a later-filed non-class action names a defendant that was identified as a co-conspirator but not a defendant in the earlier-filed class action.

The court determined that tolling under *American Pipe* was not appropriate.

FALSE ADVERTSING

Singh v. Google LLC, No. 5:16-cv-03734 2022 WL 94985 (N.D. Cal. Jan. 10, 2022) (Freeman, J.)
Plaintiff sought to represent a class of all persons and entities who advertised and paid for clicks through AdWords, where the clicks originated from the Google Display Network. The court denied a motion for class certification under Rule 23 of the Federal Rules of Civil Procedure.

Google argued that plaintiff and the class did not have standing, but the court concluded that plaintiff had standing because he alleged by relying on the misrepresentations, he paid more than he otherwise would have paid, or paid for the advertisements when he otherwise would not have done so.

Although the court found that there was no dispute that the putative class was sufficiently numerous, it held that plaintiff did not satisfy most of the other requirements of Rule 23(a) because his claims and defenses were not typical of those of the putative class and because he was an inadequate class representative.

The court also held that plaintiff failed to satisfy requirements of Rule 23(b)(3).

The court stated under applicable law, the Court must separate the issues subject to "generalized proof" from those subject to "individualized proof" to determine whether plaintiff had satisfied the predominance requirement of Rule 23(b)(3). The court found the class cannot include individuals who were not exposed to the misrepresentations and the Court would need to conduct individual inquiries to determine if given class members viewed the misrepresentations before assessing any of the other requirements for the claims.

The court found that the requirement under Rule 23(b), that plaintiff show damages, could be measured on a class wide basis was not met because the damages model was not tethered to his theory of liability and violated *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (at the class certification stage any model supporting a plaintiff's damage case must ensure that it is consistent with its liability case.)

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