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CONSUMER

Product Labeling

In re: Dial Complete Marketing & Sales Practice Litig., No. 11-md-2263, 2017 WL 1155736 (D.N.H. Mar. 27, 2017) (McAuliffe, J.)

Consumers of certain soap products brought multi-district litigation against a soap manufacturer, alleging violation of various consumer protection laws for allegedly misrepresenting information about the antibacterial properties of its soaps. After a motion for class certification had been initially denied on grounds that, in relevant part, the proposed damages model did not provide sufficient detail to permit a full assessment of whether damages could be adequately calculated on a class-wide basis, Plaintiffs filed an amended motion for certification, supported by an expert witness declaration and testimony on this question.

The Court granted certification of the relevant state-by-state subclasses, reasoning after a detailed discussion of the relevant expert reports and arguments pertaining to reliability under *Daubert* that Plaintiffs' expert's damages model was capable of reliably calculating class-wide damages recoverable under Plaintiffs' theories of liability. As this was the key issue in the previous certification motion, the Court did not review other factors or elements here.

Martin v. Monsanto Co., No. 16-cv-2168, 2017 WL 1115167 (C.D. Cal. Mar. 24, 2017) (Walter, J.)

Plaintiffs brought suit against a fertilizer manufacturer, alleging violations of consumer protection and advertising laws for mislabeling its products' characteristics and efficiency. Plaintiffs sought class certification.

The Court granted the request, reasoning in support of its decision first that numerosity was satisfied on the basis of there being hundreds of thousands of class members at issue. In terms of commonality, the Court found numerous common issues existed, and similarly found Plaintiffs' claims sufficiently typical to those of the class, involving the same statements and the same manner of injury. The Court also found adequacy satisfied, reasoning in support of that finding that Plaintiffs had standing and lacked any conflict of interest with the proposed class.

Turning then to the question of predominance, the Court considered whether common issues would predominate for liability, and found the class to be sufficiently limited to purchasers of the product under the specific label in question. In that regard, under the objective purchaser test, no individual reliance would need to be shown. In terms of damages issues, the Court found the relevant expert's model was sound and common to the class, and thus adequate for the theory of liability in the case. Looking at superiority, the Court found individual cases were impractical due to cost and inefficiency, and that a class action was therefore the superior method of adjudication.

EMPLOYMENT

Overtime

Senegal v. Fairfield Industries, Inc., No. 16-cv-2113, 2017 WL 1134153 (S.D. Tex. Mar. 27, 2017)

Workers brought suit under the Fair Labor Standards Act ("FLSA") against their employer, alleging a failure to pay overtime amounts to crews staffing its geological survey teams as required by law. Plaintiffs sought conditional certification of a collective action.

The Court granted the motion after modifying the class and clarifying certain notice requirements. First considering the request for certification, the Court took Defendant's challenges in turn. While Defendant argued

that certain seamen class members were exempt under the FLSA and wrongly included in the proposed class, the Court found this merits question to be premature, and in any event noted that Plaintiff did not include seamen in the proposed class, instead limiting it to the seismic crew alone. However, as seamen had opted in, the Court dismissed them as class members. Next, while Defendant argued that pre and post shift claims required individualized analysis, the Court reasoned that this did not mean the proposed class was not “similarly situated.” Defendant also contended that its policies were appropriate, and that the overtime amounts in question were paid. Here, the Court found it sufficient that Plaintiffs and class members alleged that they were not paid overtime, and that they were all subject to the same common policy. While Defendant also made arguments concerning whether the different types of jobs present required different analyses, the Court found it sufficient that Plaintiff had only included the seismic team. Finally, while the Court agreed with Defendant’s contention that the class was broader than that originally referenced in Plaintiffs’ complaint, the Court found this issue cured by a broader class definition.

Turning next to the class notice, while Defendant argued that draft language communicating that the Court sponsored and approved the notice improperly suggested judicial bias, the Court found such notice proper under the FLSA. The Court then overruled certain minor notice objections, but sustained Defendant’s objection that the notice should read that class members may choose their own counsel, and that class members may be required to participate in discovery or hearings. Otherwise, the Court required Plaintiff to provide reasoning to support its request for automatic reminder notices.

Settlement Fairness

Roberts v. Marshalls of CA, LLC, No. 13-cv-04731, 2017 WL 1152967 (N.D. Cal. Mar. 28, 2017) (James, J.) Hourly employees of retail stores brought suit against employer, alleging failure to pay proper compensation during mandatory searches of shift personnel. The parties reached a proposed class action settlement and sought preliminary approval.

The Court denied the request on both class certification and settlement fairness grounds. Reasoning in support of its decision, the Court first found numerosity satisfied on grounds of there being 82,947 class members at issue. In terms of commonality, the Court found a variety of common claims capable of class-wide resolution.

The Court did however take issue with typicality and adequacy, generally on grounds that Plaintiffs had not identified how they shared job positions with the class or how the class members were all subject to the same search policies and procedures.

Turning then to Rule 23(b)(3) predominance, the Court found that individualized issues on damages would predominate over common ones, specifically with respect to the difference between managerial employees and non-managerial employees, former and current employees, and the different types of relief sought by each of those subcategories—which had not been accounted for in the settlement.

The Court also considered the fairness of the settlement, and while it found that (1) the settlement process had been conducted after a full and fair discovery process; and (2) there were no signs of fee problems or collusion, there were nonetheless two problems. First, the Court found that the structure improperly gave preferential treatment to certain class members, in that the settlement award did not account for hourly wage amounts or hours worked, instead opting for a weekly pay rate without differentiating between full-time and part-time employees (or the other categories mentioned under predominance). The Court also found the service award to be inappropriately disproportionate, paying as it did the named plaintiffs \$10,000 and \$20,000, while class members would likely receive only \$60. Finally, the Court observed that Plaintiffs had not adequately explained how they calculated the damages for each class member, or whether the amount chosen was the maximum that could be gained in the litigation.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Notice Plan

Wilson v. Anthem Health Plans of Kentucky, Inc., No. 14-cv-743, 2017 WL 1089193 (W.D. Ky. Mar. 21, 2017) (Russell, J.)

Plaintiffs brought suit under the Employee Retirement Income Security Act and other statutes, alleging that Defendant health plan failed to cover the treatment of certain mental health conditions. After a class was certified, Plaintiffs sought approval of a plan for notice of class pendency.

The Court granted the motion in part, allowing the parties seven days to file an updated draft notice with website information and the edits that the parties had agreed to after the filing of the motion. Reasoning in support of its decision, the Court found that the notice's language had been agreed upon by the parties, but that they had since reached new agreements about updated language. The Court also observed that using a website was fine as a useful supplement to a paper notice, and that a password was not necessary to access the website. The Court also found that the notice contained the statutorily required information, thus rendering the notice the best practicable notice to the class.

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