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BANKRUPTCY

Oil and Gas

In re: Vanguard Natural Resources, LLC, No. 17-30560, 2017 WL 5573967, (Bankr. S.D. Tex., Nov. 20, 2017) (Isgur, J.)

Plaintiffs brought suit for oil and gas royalties in a bankruptcy proceeding, alleging they were underpaid due to deductions made of post-production costs in their royalty calculation, which violated their agreements. Plaintiff filed a motion under Bankruptcy Rule 9014 to apply Bankruptcy Rule 7023 to certify a class action concerning its administrative priority claim.

The Court denied the motion, reasoning in support of its decision first that the Fifth Circuit had not addressed the question of whether a bankruptcy court may certify a class on such a claim, and looking to a Texas decision holding that it could not certify a class because an administrator could not already be an “authorized agent” of a class under Rule 3001(b). The Court found this to be debtors’ argument, but held that such a class could be certified conditionally, with Rule 23 being available for all contested matters. The Court found this permissible due to the lack of Fifth Circuit precedent and the presence of other applicable precedent.

The Court then considered whether to certify this class, applying a Fifth Circuit test and finding that: (1) the class was not certified pre-petition; (2) the putative class had received notice by mail to all known creditors and by publication otherwise of the claims bar date; (3) certification would adversely affect the bankruptcy proceeding because the bar date had already passed, the plan was already consummated, no claims had been filed outside of the creditor in the case, and discharged claims would be resurrected needlessly; and (4) there was no benefit to resurrecting discharged claims. As such, the Court declined to certify the class.

The Court did not analyze Rule 23, finding that the individual claims of putative class members were not tolled because the members had notice, and did not file claims. However, the Court stated it would allow any individual claimants to demonstrate any appropriate circumstances for tolling their claims.

CONSUMER

Exercise Device

Brickman v. Fitbit, Inc., No. 15-cv-02077, 2017 WL 5569827 (N.D. Cal. Nov. 20, 2017) (Donato, J.)

Consumers brought an action alleging misrepresentation against a device creator under Florida and California laws, alleging the advertised sleep functionality was misrepresented. Plaintiffs sought certification of a California class and a Florida class.

The Court granted certification, except as to Plaintiffs’ Florida negligent representation claim. Reasoning in support of its decision, the Court first found numerosity and adequacy satisfied. In terms of typicality, the Court rejected Defendant’s contention that a plaintiff’s deposition testimony, which purportedly alleged a different legal theory than that asserted in the complaint, was dispositive so as to unravel Plaintiff’s nexus to class-wide claims of misrepresentation.

Next evaluating commonality and predominance as one, the Court found the common issues to be predominant in this case, where Defendant marketed the same packaging, data, statements, and products to each class member. While Defendant argued that: (1) damages were individualized; (2) online shoppers never saw the statements; (3) some purchasers never understood or relied on the statements; and (4) the quasi-contract and unjust enrichment claims were too fact specific for classwide treatment, the Court found these arguments persuasive only as to the Florida claim for negligent misrepresentation, which did in fact turn on a showing of individual reliance. Accordingly, this claim was excluded for class treatment.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Wildman v. American Century Svcs., LLC, No. 16-cv-00737, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017) (Kays, J.)

Plaintiffs brought suit for violation of the Employee Retirement Income Security Act (“ERISA”), alleging breach of fiduciary duty with respect to retirement plan investments, and sought class certification.

The Court granted certification, reasoning in support of its decision first that Defendant’s contentions related to standing and the proposed class definition’s inclusion of members who lacked standing due to absence of injury due to their own individual investment decisions were beside the point, as the crux of the matter and injury in question was Defendant’s conduct.

Turning next to Rule 23, the Court found numerosity satisfied by virtue of the presence of over 2,000 plan participants. For commonality, the Court found Defendant simply repeated its standing arguments as to individual investment plans, arguing each plan was unique and there was not one sole plan of many participants. The Court found Plaintiff had made a minimally sufficient argument alleging common claims based on Defendant’s conduct upon the whole class, although without articulating common questions of law and fact. Nonetheless, the Court found commonality satisfied.

In terms of typicality, the Court found Plaintiff alleged the plans could be grouped as a whole in the class claims, rather than adjudicated individually. While Defendant argued that individual defenses were available for some of the Plaintiffs on statute of limitations and release of claims, the Court rejected that contention and found typicality satisfied. Adequacy was similarly satisfied.

Looking next at Rule 23(b)(1) (under subsections (A) and (B)), Plaintiff argued that the class could be certified as “impossible or unworkable” as individual adjudications under both subsections. While Defendant argued that such treatment was improper because monetary damages were sought, the Court found this was not a bar for this type of certification.

EMPLOYMENT

Snipes v. Dollar Tree Distribution, Inc., No. 15-cv-00878, 2017 WL 5754894 (E.D. Cal. Nov. 28, 2017)

Plaintiff brought wage and hour suit against their employer, alleging exclusion of compensable time and failure to provide uninterrupted meal/rest periods, in addition to civil penalties under California’s PAGA statute. Plaintiff moved for certification of a variety of classes and subclasses.

The Court granted certification. Reasoning in support of its decision, the Court found numerosity satisfied on grounds of there being 783 employees in the class. In terms of commonality, the Court found the claims involved questions common to the class, while in typicality, the Court found Plaintiff’s claim to be predicated on uniform policies and practices applicable to the class. For adequacy, the Court found Plaintiff possessed alignment with the class and willingness to represent the class, and counsel to be well qualified.

Turning then to Rule 23(b)(3) predominance, the Court found that common questions clearly predominated over individualized inquiries. While Defendant argued that Plaintiff had not offered expert testimony regarding calculation of class-wide damages; the Court found this did not by itself defeat certification, and that the use of weekly timesheets and time punches could be calculated against the rate of pay to determine damages. The Court found this bare calculation to be sufficient to allege class-wide damages could be measured.

FAIR DEBT COLLECTION PRACTICES ACT

Privacy

Dinaples v. MRS BPO, LLC, No. 15-cv-01435, 2017 WL 5593471 (W.D. Pa. Nov. 21, 2017) (Ponsor, J.) Plaintiffs brought suit for violation of the Fair Debt Collection Practices Act ("FDCPA"), alleging that Defendant's use of QR codes on the outside of envelopes used for mailing exposed unencrypted account numbers. Plaintiffs sought class certification.

The Court certified the class, reasoning in support of its decision that numerosity was satisfied on grounds of there being 264 consumers in the same county as Plaintiff. The Court further found the class ascertainable from Defendant's records. The Court also found commonality, typicality, and adequacy easily met. Turning to predominance and superiority, the Court found that the FDCPA was designed with class actions as the enforcement mechanism due to low individual awards and statutory damages caps, and as such was more efficient in this case.

The Court then looked at Defendant's arguments that Plaintiff was a serial filer, or that the class was too narrowly tailored to only a single county, and rejected them as not decisive of certification.

SETTLEMENT ISSUES

District Court Settlement Approval

Kaufman v. American Express Travel Related Svcs. Co., Inc., No. 16-1691, 2017 WL 6044109 (7th Cir. Dec. 7, 2017) (Manion, J.)

After Plaintiffs sued a credit card company for breach of contract, unjust enrichment, and statutory fraud related to prepaid gift cards allegedly given with a lesser value than stated, as well as with limitations and fees not known by purchasers, a class action settlement was reached. After the United States District Court for the Northern District of Illinois granted final approval, Intervenor's appealed.

The Seventh Circuit found no abuse of discretion in granting final approval, and affirmed. Reasoning in support of its decision, the Court considered four issues on appeal.

First, the Court considered whether the district court's decision not to require briefs (as opposed to motions for fees) in support of the settlement prior to the objection deadline was improper, finding that briefs were not explicitly required for settlement approval, and that due process was preserved by Rule 23's notice requirements, not unstated briefing obligations.

Second, the Court rejected Intervenor's argument that the district court gave too much weight to the parties' argument that an arbitration provision may have been a barrier to resolution of the litigation absent settlement, reasoning that the arbitration argument was a potential bar to the class action's success, with precedent supporting a fatal reversal upon appeal to the class if it had gone on with the case.

Third, the Court rejected the argument that the settlement's release of claims was overbroad, reasoning that because there was no evidence that the claims alleged to be unduly released were likely to be brought, the district court had no duty to rebut every possible allegation that might somehow be brought in the future.

Fourth, the Court rejected Intervenor's contention that their share of the fee awards given to counsel in the matter should have been larger, reasoning that while the district court had found that significant value had been added to the settlement through the work of Intervenor's counsel so as to merit 34% of the total fee award, it had also criticized Intervenor's counsel as well.

Securities; No Monetary Compensation

In re: Hewlett-Packard Company Shareholder Derivative Litigation, Nos. 15-16688, 15-16690, 2017 WL 5712130 (9th Cir. Nov. 28, 2017) (McKeown, Murgula, & Rufe, JJ.)

After a settlement was reached in a shareholder derivative action brought in the United States District Court for the Northern District of California, which provided for corporate governance reforms but no monetary compensation, Objectors appealed.

The Ninth Circuit found no abuse of discretion and affirmed. Reasoning in support of its decision, the Court analyzed the district court's process, finding that it conducted extensive hearings responding to Objectors' claims, and found that the settlement saved the class from a strong challenge on a motion to dismiss, and thus determined that governance reforms were a meaningful accomplishment. After narrowing the release of claims and finding no evidence of fraud, the district court reviewed the strength of the case and found it weighed in favor of settlement, which the Ninth Circuit found did not constitute abuse of discretion.

The Court also reviewed whether there was sufficient notice for objectors to present claims, and found the district court had approved the settlement after sufficient time and notice to entertain objections.

Contempt of Settlement Order

Gascho v. Global Fitness Holdings, LLC, Nos. 17-3577 /3578 /3579 /3804 /3805 /3821 /3822 /3825 /3826 /3827, 2017 WL 5474427 (6th Cir. Nov. 15, 2017) (Thapar, J.)

Gym members brought class action against owners and operators, alleging misrepresentation of terms of membership. After a settlement was reached providing for \$1.3 million in compensation, Defendant was later held in contempt by the United States District Court for the Southern District of Ohio for failing to meet obligations relating to the fee and incentive awards. Defendant appealed.

The Sixth Circuit reversed and remanded, reasoning in support of its decision that contempt as an enforcement mechanism was only available for violations of a definite and specific court order, proven by clear and convincing evidence. The Court found that the terms of the settlement agreement were such that Defendant was not bound by any obligations until all appeals were exhausted, and the district court had ordered Defendant to pay under those terms. Thus, the Court found the obligation may have been specific at once, but was not definite (and fee awards could have been altered) until the passage of the window of appeal.

While Plaintiffs argued that Defendant had an implied obligation to conserve funds during appeals, the Court found the district court's order did not require this, and Plaintiffs had not requested it. The Court then considered Defendant's argument that it was unable to comply, finding that Defendant was required to show that its inability was not self-induced and that it took all reasonable steps to comply. The Court found Defendant had paid its distribution to the class before the order had become definite and specific, and thus the district court erred in holding contempt.

Finally, the Court considered whether Defendant's officers were personally liable for its contempt order, finding precedent holding that this was the case only when Defendant's actions occurred by the officers' contumacious conduct—which had not been present here.

Objector Fee Award

In re: Southwest Airlines Voucher Litig., No. 11-cv-8176, 2017 WL 5295372 (N.D. Ill. Nov. 13, 2017) (Kennelly, J.)

After Plaintiffs sued an airline for failing to honor drink vouchers issued without expiration dates, a class action settlement was reached whereby Defendant re-issued the vouchers. In the course of settlement

approval, an objector contested the requested fee and incentive awards, and subsequently appealed them. On appeal, those awards were reduced. After another dispute in which Objector objected to class counsel's request for a supplemental fee award, and agreed to drop that objection in exchange for supplemental awards of coupons to class members (but no fees or awards for Objector or Objector's counsel), Objector subsequently filed a motion seeking fees and incentive awards. Objector argued that this award should come from class counsel's fees rather than Southwest.

The Court denied the motion, detailing the history of the dispute and pointing out that on many occasions prior to the motion Objector's counsel had affirmatively stated that it would not be seeking fees. The Court found that granting Objector's motion would violate the terms of the agreement on class counsel's supplemental fee award if allowed, and also trigger a clause allowing termination of the settlement by Defendant in such circumstances, which the Court decided this was not the prudent course of action to take.

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