KCC Class Action Services

KCC Class Action Digest
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CONSUMER CREDIT

Rench v. TD Bank, N.A., No. 13-cv-00922, 2018 WL 264121 (S.D. Ill. Jan. 2, 2018)(Yandle, J.)
Plaintiff sued a credit company, alleging violations of the Truth in Lending Act, the Illinois Prizes and Gifts Act and the federal RICO act, for using scratch-off tickets to arrange product demonstrations in which participants would be forced to apply for credit cards and be charged for purchases not made. Plaintiff sought certification of three classes.

The Court granted class certification, reasoning in support of its decision first that numerosity was satisfied on grounds of there being over 2,000 people involved, half of which were in Illinois, and that 300 had their TD credit card account used via the applications. In terms of commonality, the Court found the same statutes and legal questions in each claim to be class-wide and containing various common issues. For typicality, the Court found each class member's claim rooted in the same factual nexus, beginning with the scratch cards. Adequacy was also satisfied.

Turning then to predominance, the Court looked at each class: for the RICO class, the Court found the case revolved around Defendants' actions toward the allegedly defrauded class members, and reasoned that the fact that each individual was orally solicited was not enough to defeat predominance. Likewise, for the other two classes, the Court found that information on the scratch cards would determine liability under the law, and the making of individual phone calls (an argument put forward by Defendant) was not relevant. Accordingly, the Court found predominance was satisfied.

INSURANCE

Feller v. Transamerica Life Insurance Co., No. 16-cv-01378, 2017 WL 6496803 (C.D. Cal. Dec. 11, 2017) (Snyder, J.)
Plaintiff insurance owners brought suit against an insurance company, alleging that certain insurance policies shared standardized language specifying a monthly deduction rate increase to be imposed on all holders, and Defendant had charged in excess of that amount in violation of various state laws. Plaintiffs sought class certification under Rule 23(b)(2) and (b)(3).

The Court granted the request. First considering the requirements of Rule 23(a), the Court found numerosity satisfied on grounds of there being at least 2,969 policyholders subject to the alleged increases in California.

In terms of commonality, the Court rejected Defendant's argument that the policy term in question was ambiguous, reasoning that this was irrelevant to the question of whether the case was susceptible to class-wide proof given that the policy terms were shared by all class members, and that the Defendant acted in a uniform manner toward all class members by applying the policy the same way. Turning to typicality, the Court found that the plaintiffs all shared the same claims, and alleged common class-wide injuries from the same treatment, satisfying typicality.

In terms of adequacy, while Defendant argued that the proposed class representatives had conflicts due to certain policy events, and that one representative lacked personal jurisdiction, the Court relied upon the Ninth Circuit Court of Appeals' decision in *Blackie v. Barrack*, which held that conflicts only prevent certification on adequacy when they are "apparent, imminent, and on an issue at the very heart of the suit." The Court found Defendant's arguments to be foreclosed by the class definition, and that the personal jurisdiction argument had likewise been foreclosed by the Court's finding of personal jurisdiction previously.

The Court next turned to Rule 23(b)(3) predominance, first rejecting Defendant's contention that individual policy questions would predominate, finding that the common issue in all claims was Defendant's conduct

toward the class with respect to similar provisions. The Court found that there was no evidence of any differences in negotiation that might yield a unique interpretation of contract terms or subjective intent to overcome the similarity of uniform policy terms. Accordingly, predominance was satisfied. In terms of damages, the Court found Plaintiff's damages model sufficient to prove damages on a class-wide basis by way of "rote arithmetic." The Court also found superiority satisfied by combining claims into single class action.

The Court also looked at Rule 23(b)(2) as a separate ground for certification with respect to injunctive/declaratory relief, finding that the same reasoning under predominance applied—that the common issues revolve around Defendant's uniform conduct toward the class, making it appropriate to order injunctive or declaratory relief applicable to the class. Reviewing ascertainability, the Court found the class definitions precise and objective, with resolution of any disputes as to class membership available by way of Defendant's own records.

NOTICE

Desrosiers v. Perry Ellis Menswear, LLC, Nos. 121-122, 2017 WL 6327106 (Ct. App. N.Y. Dec. 12, 2017) (Fahey, J.)
Plaintiff brought wage action against a menswear company, alleging that he was misclassified as an intern rather than an employee, and thus entitled to appropriate wages. After agreeing to postpone class certification until completion of pre-certification discovery, the parties agreed to an individual settlement. A plaintiff moved under the relevant state procedural rule (CPLR 908) for notice of settlement and case dismissal to be given to the class, despite the argument that this statute only applied to certified class actions. The trial court granted the motion, and after appeal, an appellate court affirmed. Defendant appealed.

The Court affirmed the appeal, holding that upon disposition of any proposed class action, notice must be given to the class regardless of whether a class had been certified. Reasoning in support of its decision, the Court noted that the relevant statutory text was ambiguous on whether notice requirements applied only to certified classes, and found similarity in Federal Rule of Civil Procedure 23(e), noting that certain federal jurisprudence requires notice in certain circumstances to avoid abuse to the class.

The Court also noted that the sole precedent on this matter in New York was *Avena v. Ford Motor Co.*, a 1982 case which had never been overruled or used as the basis for statutory amendment in response to its holding, which matched the logic of the federal jurisprudence of Rule 23. The Court found it compelling that *Avena* had survived 35 years without being overruled, and the legislature had never amended the statute, despite criticism from the bar and various legal commentaries. As such, the Court found the *Avena* case correctly contained the legislative intent on CPLR 908, and thus affirmed the underlying appellate orders, concluding that notice must be provided to the class of any disposition of a proposed class action, regardless of whether any class had ever been certified. The Court left the manner of notice undecided.

TELEPHONE CONSUMER PROTECTION ACT

Faxes

Etter v. Allstate Insurance Company, No. 17-cv-00184, 2017 WL 6594069 (N.D. Cal. Dec. 26, 2017) (Alsup, J.)
Plaintiff brought suit for violation of the Telephone Consumer Protection Act ("TCPA"), alleging that Defendant sent unsolicited faxes without permission or consent, which did not include appropriate opt-out notices. Plaintiff sought certification of two classes based on the 2016 fax and an earlier 2015 fax.

The Court denied certification to the 2015 fax class, and granted certification for the 2016 fax class.

In support of its decision, the Court first looked at standing with respect to the 2015 class. The Court found no proof Plaintiff had received the 2015 fax, and found that Plaintiff could not rely on discovery to produce evidence of the fax he could not itself produce. Accordingly, certification was denied.

Turning then to the 2016 class, the Court first found numerosity satisfied on grounds that there were over 10,000 class members. Next, the Court found commonality satisfied on grounds that the question of whether the fax in question was considered "advertising" under the TCPA was sufficient. For typicality, the Court found Plaintiff's claims to be reasonably coextensive with the class. The Court also looked at whether Etter's number was also used as a business line as well as his personal line, but found that no authority or analysis had been submitted as to how the answer to that question would materially affect the substance of the TCPA claim. As such, the Court found typicality satisfied.

Noting no dispute to adequacy, the Court moved to predominance, considering whether the affirmative defense of consent was an individualized issue, and finding that general testimony about company practices would lead to common proof on consent. The Court found similarly with respect to the affirmative defense of established business relationships. Finally, Plaintiff cited *Bais Yaakov v. FCC* regarding the failure to include opt-out notices, and the Court found this was a merits question and that it was also a common one for purposes of predominance.

After finding superiority satisfied, Defendants contested ascertainability on grounds that their call log records were insufficient for that purpose, but the Court found ascertainability was met by the fact that objective criteria would determine class membership, and that it was sufficient, but not necessary, to use even incomplete records for this, relying on precedent from the United States Court of Appeals for the Ninth Circuit, *Briseno v. ConAgra Foods, Inc.*, as support for this holding. The Court also reasoned that Defendants should not get a free pass for failing to maintain records, and thus found superiority satisfied.

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