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## CIVIL RIGHTS

### *Prisoners*

*Sweeney v. Commissioner, Indiana Department of Correction*, No. 17-cv-3550, 2018 WL 2046009 (S.D. Ind. May 2, 2018) (Lawrence, J.)

Prisoners brought suit against a correctional facility, alleging that the facility's incoming mail policies restricting acceptable forms of correspondence violated the First Amendment. Plaintiffs moved for certification.

The Court granted the motion, reasoning in support of its decision first that numerosity was satisfied by virtue of there being 25,000 class members. The Court then found commonality satisfied by virtue of the claimed allegation. For typicality, the Court found that constitutionality of the policy affected all class members and that Plaintiffs' claims were typical of those of the class. For adequacy, the Court found no conflicts and that counsel was qualified.

Finally, the Court found Rule 23(b)(2) was met, in that Plaintiffs sought declaratory and injunctive relief with respect to the class as a whole.

## CLASS CERTIFICATION

### *Admissibility of Evidence*

*Sali v. Corona Regional Medical Center*, No. 15-56460, 2018 WL 2049680 (9th Cir. May 3, 2018) (Mendoza, J.)

Registered nurses brought suit for wages against their employers. After the United States District Court for the Central District of California denied class certification for lack of typicality, adequacy, and predominance, Plaintiffs appealed.

The Ninth Circuit reversed and remanded, reasoning in support of its decision first that in terms of typicality, the district court had struck a declaration as inadmissible and because of this Plaintiffs had not shown typicality of injuries with the class. The Court held this decision to be erroneous, as the evidence's inadmissibility at trial was not a bar to certification at this stage.

The Court then found that one named plaintiff had been found inadequate by the district court, but that certification could proceed with another named plaintiff the Court found adequate. The district court had also found counsel inadequate, but the Court found that the district court only looked at counsel's alleged negligent acts and not at the much larger record of involvement in the case. As such the Court noted the district court had abused its discretion, although it could still find inadequacy going forward based on sufficient evidence.

Turning to predominance, the Ninth Circuit observed that the district court had found two subclasses did not satisfy predominance. First, the rounding-time subclass was found to require individual inquiry into members' actual hours worked. Here, the Ninth Circuit found actual work time was not the proper basis for review, but instead time under the employer's control, which was employer-focused and could be decided on a class-wide basis. Second, the wage statement subclass had been found to require individualized inquiries as well. Here, the Ninth Circuit found that the district court erred in finding this was an individual issue because of the controlling question of the employer's intent, and noted that a damage calculation question would not defeat predominance anyway.

## EMPLOYEE RETIREMENT INCOME SECURITY ACT

*Clark v. Duke University*, No. 16-cv-1044, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018) (Eagles, J.)  
Plaintiffs brought suit against their employer and certain investment committees for violation of the Employee Retirement Income Security Act (“ERISA”), alleging problems with record-keeping services and prudent investment options in certain retirement plans. Plaintiffs moved for class certification.

The Court granted the motion, reasoning in support of its decision that numerosity and ascertainability were undisputed and thus satisfied, and counsel also satisfied adequacy. In terms of commonality and typicality, the Court found a variety of common issues, and reasoned that Plaintiffs’ claims were typical of those of the class. In the process, the Court rejected Defendants’ contention concerning the statute of limitations being a bar to commonality. While Defendants made several arguments regarding the adequacy of the putative class representatives, the Court rejected each, reasoning that they were hypothetical or irrelevant.

Turning then to Rule 23(b), the Court found subsection 23(b)(1)(A) applicable, in that any decision in the litigation could establish incompatible duties for Defendants, as well as 23(b)(1)(B), that an individual adjudication would apply to the class as a whole. While Defendants argued that Plaintiffs’ seeking of monetary relief precluded certification under those subsections, the Court noted that monetary relief was sought for the whole plan.

## EMPLOYMENT

### *Washington State Court*

*Chavez v. Our Lady of Lourdes Hospital at Pasco*, No. 94592-6, 2018 WL 1866918, (Wash. Apr. 19, 2018) (Fairhurst, J.)

Nurses brought suit against their employer, alleging violation of applicable wage and break time laws. After the trial court denied Plaintiffs’ motion for class certification on grounds of a lack of predominance and superiority, and an appellate court affirmed, Plaintiffs sought further review.

The Washington Supreme court reversed and remanded, finding that predominance and superiority were established. Reasoning in support of its decision, the Court first considered predominance, finding that the predominant common issue in the case had been established—whether Defendants failed to ensure Plaintiffs could take breaks and record missed breaks. The Court rejected the trial court’s insufficiently supported ruling that individual issues of shift length and nurse type would predominate.

In terms of superiority, the Court observed that the trial court had found the element unsatisfied because joinder was possible and nine subclasses (corresponding to the purported individualized issues mentioned in the predominance analysis) were unmanageable. The Court however disagreed, finding joinder was impracticable with more than 40 plaintiffs, thus making the class action a superior device. For the subclasses, the Court found that these distinctions were issues concerning damages, and that the liability case could proceed under a simple common question, so as not to be unmanageable. The Court then found directly that superiority was satisfied.

## INSURANCE

### *Cost Sharing Payments*

*Common Ground Healthcare Cooperative v. U.S.*, No. 17-877C, 2018 WL 1833427 (Fed. Cl. Apr. 17, 2018) (Sweeney, J.)

Plaintiff health care insurer brought suit against the federal government alleging that cost-sharing payments via the federal government were not being paid under the Affordable Care Act (“ACA”). Plaintiff sought class certification.

The Court granted the motion, reasoning in support of its decision that in terms of numerosity, the count of hundreds of insurers as class members was sufficient. In terms of commonality, the Court found five common issues satisfactory for the element, and also found that predominance was satisfied, reasoning that the only individualized issues related to damages, and could be easily resolved by plan enrollment form data. The Court then found Rule 23(b)(2) satisfied on grounds that Defendant had allegedly refused to act in a way that harmed the entire proposed class.

In terms of typicality, the Court found Plaintiff and the class subject to the same conduct, alleged the same claim, and sought the same relief. For adequacy, the Court found Plaintiff lacked conflicts with the class and counsel was well-qualified. For superiority, the Court found manageability of damages issues to be a minimal problem, and that joinder would be more complicated and costly than a class action.

## SECURITIES

*Cooper v. Thoratec Corporation*, No. 14-cv-0360, 2018 WL 2117337 (N.D. Cal. May 8, 2018)(Wilken, J.)

Investors brought suit against a medical device manufacturer and its officers, alleging misrepresentations concerning medical issues relating to a device, which would have adversely affected stock prices. Plaintiffs moved for class certification.

The Court granted the motion, reasoning in support of its decision that numerosity, commonality and typicality were uncontested, and thus satisfied. The Court then considered Defendants’ contention regarding adequacy, which related to whether the timing of Plaintiffs’ purchases had an impact on the scope of investors they could represent in the litigation, and rejected it, reasoning that misrepresentations concerning the product at issue were spread across a time period such that Plaintiffs shared the same theory as other investors and were thus adequate.

The Court then addressed predominance, considering two main arguments from Defendants. First, the Court considered whether Plaintiffs could rely on the *Basic* presumption of reliance without showing front-end price impact. There, the Court found Plaintiffs had submitted an expert report and Defendants had introduced an expert report confirming the same, and found that this was sufficient to allege price impact, such that Plaintiffs need not allege separate theories of inflation. The Court also looked at Defendants’ arguments that alleged corrective disclosures failed to show a significant price impact due to market awareness and lack of new information, and found both flawed. The Court found Plaintiffs’ theory on this point was sufficient to proceed, even if price impact was eventually shown to have been minimal. Additionally, the Court found that Defendants had continued to make misrepresentations about the product beyond the period in question, and therefore denied Defendants’ requests for subclasses or a shorter class period, and allowed Plaintiffs to proceed on the same theory with the extended class period.

Second, the Court considered Defendants' contention that damages had not been shown on a class-wide basis, rejecting it on grounds that Plaintiffs' expert report showed a reasonable calculation of class-wide damages, and that damages issues alone would not bar certification regardless.

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