KCC Class Action Services

KCC Class Action Digest
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INSIDE THIS ISSUE

Consumer	pg. 1
Employment	pg. 1
Settlement Issues	pg. 2
Telephone Consumer Protection Act	pg. 2

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CONSUMER

Advertising

In Re: KIND LLC "Healthy and All Natural" Litigation, Nos. 15-md-2645 and 15-mc-2645, 2021 WL 1132147 (S.D.N.Y. Mar. 24, 2021) (Pauley, J.)
Plaintiffs brought consumer action against a health bar and granola company, alleging false advertising of products as "all-natural" and "non-GMO" in violation of New York, California, and Florida laws. Plaintiffs moved for certification, to which Defendant countered with a motion to exclude an expert witness, and objections to two testimonial reports.

The Court granted certification on Rule 23(b)(3) only, granted the motion to exclude one report, and denied the rest. Reasoning in support of its decision, the Court first noted that numerosity was unchallenged, and the class likely in the millions. In terms of commonality, the Court found the allegation of uniform misrepresentations was sufficient. In terms of typicality, while Defendant first argued that class representatives had not purchased any of the product in question since 2015, and therefore never came in contact with variants in labeling, the Court found these variations to be slight, and that the relevant claims shared the prevailing characteristics at issue. The Court also found no issue with the fact that Plaintiffs never purchased Health Grains Clusters, finding that the labeling issues for this product were common with the other products at issue. Thus, the Court found typicality was met, and determined adequacy was also met on these grounds.

In evaluating ascertainability, the Court found it facially satisfied, but looked at Defendant's arguments about variant labeling and requiring receipts as well. The Court found all class members proposed would have seen at least one variant, and that all variants were covered by the allegations. The Court also found lack of receipts was not fatal to certification, as such a requirement would severely constrict consumer actions.

Turning to Rule 23(b)(3) predominance, the Court found the different statutes in question could be considered by common elements of deceptive act, materiality, and injury. Analyzing deceptive act and materiality, Defendant argued that resolution of various factors required individualized inquiries, but the Court found common issues would predominate over each of these. For injury, the Court found no concern with Plaintiffs' approach at the certification stage.

In terms of superiority, the Court found factors of economics and manageability weighed in favor of a class action.

Looking at Rule 23(b)(2) for purposes of class-wide injunctive relief, the Court found the injunctive relief class to be distinguishable from the monetary relief classes. However, citing a Second Circuit decision from 2020, *Berni v. Barilla S.p.A.*, holding that past purchasers could not maintain an injunctive class on misrepresentation, in that consumers who know the truth about a mislabeled product would be unlikely to suffer the same harm by purchasing it again, the Court rejected the request for certification under Rule 23(b)(2).

EMPLOYMENT

Wilson v. La Jolla Group, No. D077134, 2021 WL 940283 (Cal. Ct. App. Mar. 12, 2021) (Guerrero, J.)
Plaintiff signature-gatherers brought wage and hour class action against their former employer, alleging that they were misclassified as contractors. Plaintiffs sought class certification, which was denied on grounds of predominance and superiority.

On appeal, the California Court of Appeal affirmed the order in part and reversed in part, remanding the matter to the lower court for reconsideration on only one cause of action. Reasoning in support of its decision, the Court looked at predominance. While Plaintiffs argued that the lower court had solely denied certification because it would be necessary to show individual damages due to distinctions between individual class members in location, rate, time records, and circumstances, the Court reasoned instead that the lower court had not limited its comments to damages questions only, but found that Plaintiffs had not shown that common questions of law and fact would predominate. The Court ruled this reasonable due to findings indicating that individual showings on liability would be needed, and not merely on damages issues. Plaintiffs here argued that the misclassification of common questions was over-arching and therefore predominant over any individualized issues, but the Court found the lower court reasonably determined that misclassification was not the sole issue for determining liability.

The Court then found this applied in almost every cause of action alleged in the instant case. However, the Court noted a difference with respect to the cause of action alleging a failure to provide itemized wage statements. On this issue the Court found this claim under statutory liability depended on whether misclassification had occurred, regardless of individual circumstances. Therefore, the Court found the lower court had abused its discretion on this cause of action.

The Court then looked at Plaintiffs' argument that the lower court erred in denying a motion for reconsideration. The Court found no error due to new facts, circumstances, or law that might require a reconsideration of its determination made on longstanding certification principles. Therefore, the Court affirmed the order, except to the extent it was mooted by partial reversal on the wage statements claim.

SETTLEMENT ISSUES

Fee Award

Reyes v. Experian Information Solutions, Inc., No. 16-cv-00563, 2021 WL 1310961 (9th Cir. Apr. 8, 2021) (Wilson, J.)
After the parties in a Fair Credit Reporting Act suit reached settlement and the lower court granted preliminary approval, including a 35% fee award to class counsel, the case was reassigned. Class counsel then moved for a fee award of 33%, which the United States District Court for the Central District of California reduced to 16.67%, on the basis that doing otherwise would result in a windfall. This appeal followed.

The Ninth Circuit reversed and remanded, reasoning in support of its decision first that the benchmark award in similar cases is 25%. The Court found the lower court should have provided a reasonable explanation for why the benchmark was unreasonable, given the fact that counsel was successful and that the lodestar amount supported a 25% award. The Court also found the windfall determination to be unwarranted, as the lower court had compared mega-fund cases to the instant case involving more complexity and risk. Accordingly, the decision was reversed and the matter remanded to the district court.

TELEPHONE CONSUMER PROTECTION ACT

Calls

Abdallah v. FedEx Corp. Servs., Inc., No. 16-cv-3967, 2021 WL 979143 (N.D. Ill. Mar. 16, 2021) (Pechman, J.)
Plaintiff brought suit for violation of the Telephone Consumer Protection Act ("TCPA"), alleging violation by virtue of the placement of hundreds of "trace calls" to his cell number despite its listing on the do-not-call registry. Plaintiff moved for class certification.

The Court denied certification, reasoning in support of its decision first that in terms of numerosity, while the Court found no evidence from Plaintiff of any other "wrong number" trace calls to other class members, and that Defendants had provided uncontested evidence showing the calls were the result of a database glitch specific to Plaintiff's number being misidentified as belonging to over a thousand anonymous FedEx customers before the issue was corrected, Defendants had initially produced a sufficient amount of records on 150 numbers believed to be potentially responsive, sufficient to infer that the entire class as a whole would be infeasible for joinder.

Turning to typicality and adequacy however, the Court found Plaintiff's unique circumstances showed he could not be considered a class representative, and that he had not shown evidence to the contrary. The Court also noted Plaintiff would be able to use a unique defense that would separate him from any other class members as well. As such these elements were not met.

Fisher v. TheVegasPackage.com, Inc., No. 19-cv-01613, 2021 WL 1318315 (D. Nev. Apr. 8, 2021) (Dorsey, J.) Plaintiff brought suit for violation of the TCPA against Defendants, alleging the use of an auto-dialer without prior express consent to sell vacation packages. The Court entered a default against Defendants for failure to respond, and Plaintiff moved to certify a nationwide class and conduct limited discovery.

The Court granted the motions, reasoning in support of its decision first that in terms of numerosity, the Court found the requirement met by the placing of calls to thousands of consumers. For commonality, the Court found class members had suffered the same injury in receiving an unconsented advertising call via auto-dialer. For typicality, the Court found Plaintiff's claims likewise stemmed from the same calls to satisfy the element. For adequacy, the Court found no conflict of interest, and that counsel was qualified.

The Court then looked at Rule 23(b)(2) and found injunctive relief would apply to the entire class.

For Rule 23(b)(3) predominance, the Court found Plaintiff had met the heightened burden of showing predominance by demonstrating relevant facts in the pleadings, and that the Defendants had failed to raise concerns regarding evidence of consent. The Court also found superiority met by the economics of the class action method in pursuing TCPA claims.

The Court then granted leave to conduct limited discovery to establish a notice plan, ascertain individual class members, determine class-wide damages, and identify Defendants' assets, without requiring the conference between the parties usually required by Rule 26(f).

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