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ARBITRATION

Williams v. U.S. Bancorp Investments, Inc., No. A156226, 2020 WL 3053475 (Cal. Ct. App. June 8, 2020) (Tucher, J.)

Plaintiff (who had been an absent class member in a similar action in which his subclass had been decertified) brought wage class action against their employer, alleging failure to pay overtime and meal and rest period premiums. Defendant now moved to compel arbitration of individual claims, on the grounds of collateral estoppel. The lower court granted the motion and dismissed the class claims with prejudice. Plaintiff appealed.

The California Court of Appeals reversed and remanded, reasoning in support of its decision first that the trial court order was appealable immediately in that while it was not a final judgment, the “death knell doctrine” applied because the arbitration of the sole plaintiff’s individual claims would terminate the class action, and not simply limit the scope of the class claims. The Court also denied Defendant’s argument that the lower court had not explicitly addressed class claims in its order, finding that it would have been improper to do so without class certification.

Turning to the question of collateral estoppel, the Court considered whether it applied to orders decertifying a class as a matter of law. After noting that Defendant had the burden to establish collateral estoppel as the party asserting it, the Court reviewed non-binding precedent on this issue, finding the California Supreme Court decisions in *Smith v. Bayer Corp.* and *Bridgford v. Pacific Health Corp.* relevant. Plaintiff argued that these cases were controlling, while Defendant argued the instant case was distinguishable on three grounds.

The Court looked at each potential distinction, finding first that the absent class members in *Burakoff* were not parties, following *Smith*’s holding that the term “party” cannot pertain to persons “whom the plaintiff was denied leave to represent.” Second, the Court found that Plaintiff had not been adequately represented in litigating *Burakoff*, as the decertification left those subclass members excluded from representation in the final judgment in the case. Third, the Court found Plaintiff therefore had no adequate opportunity to litigate the class certification in *Burakoff*, as a nonparty. As such, the Court found the instant case to be indistinguishable from the logic in *Smith*, and further noted that a similar conclusion had been reached in the United States Court of Appeals for the Seventh Circuit’s decision in *Thorogood v. Sears*, which was distinguishable from Defendant’s reliance on FLSA cases requiring absent members to opt in.

As a result, the Court held that under California law, an order decertifying a class has no preclusive effect on absent class members, and found that the trial court’s order must be reversed.

CONSUMER

Sanitary Products

Kurtz v. Costco Wholesale Corp., Nos. 17-cv-1856 & 17-cv-1858, 2020 WL 3480830 (2nd Cir. June 26, 2020) (Calebresi, Livingston, and Lohier, JJ.)

Plaintiff brought suit against retailers and sellers of flushable wipes, alleging false representation as to flushability of the product and correspondent inflated prices. After the United States District Court for the Eastern District of New York certified damages and injunctive relief classes, and after an appeal that was remanded for further development of the record, the district court reaffirmed its certification decision. Defendants appealed again.

The Court entered a summary order (with no precedential effect) reversing certification of the injunctive class and affirming certification of the damages class. Reasoning in support of its decision, the Court first examined Defendants’ contention that Plaintiff had not demonstrated adequacy and typicality. The Court found the conflict of interest in plumbing damages difference alleged by Defendants was not fundamental so as to violate Rule 23, and that the lower court had not erred on finding adequacy. The Court also found that the question of when

Plaintiff discovered the lack of flushability of the wipes was not relevant to typicality, as the theory of injury was predicated on a price premium. Therefore, the Court found typicality had been met.

In terms of injunctive relief, the Court noted that Plaintiff had not asserted that he intends to purchase additional flushable wipe products and therefore lacked standing for injunctive relief.

With respect to Rule 23(b)(3) predominance, the Court found that since the last appeal and remand, Plaintiff's expert had developed analyses that the lower court found admissible. The Court found Defendants' objections mainly went to probativeness, and decided the lower court had not erred in finding predominance met.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Amy G. v. United Healthcare, No. 2:17-CV-00413-DN-EJF, 2020 WL 3065414 (D. Utah June 9, 2020) (Nuffer, J.)

Plaintiffs brought suit for violation of the Employee Retirement Income Security Act ("ERISA") against an employment benefits plan insurer, alleging improper exclusion of coverage for wilderness therapy. Plaintiffs brought a motion for certification.

The Court denied the motion, reasoning in support of its decision first that in terms of commonality, the uniform policy alleged by Plaintiffs was not applied equally to all individuals' claims, and that the review of such claims greatly varied, as did the nature of the claims themselves. The Court found Plaintiff had failed to define the class based on the class members' medical conditions and the types of wilderness therapy sought, or to show commonality in the written language or interpretation of each class members' benefits plan. As such, the Court found commonality unsatisfied.

As a result, the Court found further that the issues affecting commonality also created insurmountable problems regarding the need to demonstrate that the class was similarly situated under Rule 23(b)(1)(A), or would suffer a risk of dispositive adjudication on absent members under Rule 23(b)(1)(B).

In terms of Rule 23(b)(2), the Court found that the mere allegation of a uniform policy was not sufficient to show a common question, but that Plaintiffs sought individualized relief in the form of monetary damages, and that any declaratory or injunctive relief sought would require evaluating individual claims for monetary benefits for further determinations of liability and damages. Accordingly, Rule 23(b)(2) was not satisfied.

Finally, in terms of Rule 23(b)(3) predominance, the Court found that the lack of commonality was sufficient to hold that predominance could not be satisfied, reasoning that the same problems already identified would lead individualized issues to predominate over common ones.

ENVIRONMENTAL

Clark-Floyd Landfill v. Gonzalez, No. 19A-CT-2680, 2020 WL 3282508 (Ind. Ct. App. June 18, 2020) (Najam, J.)

Plaintiff homeowners brought class action against landfill operator, alleging a failure to prevent the physical invasion of pollutants and noxious odors upon their properties. After class certification was granted, Defendant sought interlocutory appeal.

The Court of Appeals of Indiana affirmed, reasoning in support of its decision first that contrary to Defendant's contention, the trial court did not apply an incorrect legal standard. Here, the Court emphasized that the relevant order cited the applicable law and referred to evidence sufficient to satisfy its requirements.

Next, the Court looked at definiteness of the class, concluding that while the lower court had not specifically addressed definiteness, the proposed class definition was sufficiently defined.

The Court then turned to commonality, where Defendant argued that Plaintiffs had failed to designate evidence showing the odors could be traced to a common defendant. The Court found this assertion not credible, and listed the substantial evidence supporting the trial court's judgment.

In terms of predominance, the Court credited the lower court's finding that the mutual interest in resolving common questions regarding the landfill odors would predominate over any individual interests or damages measurements. The Court found no error in this and ruled that addressing any difference in damages was nonetheless rooted in resolving the common question.

Finally, the Court considered the trial court's decision not to strike numerous exhibits. While Defendant argued that the trial court did not apply proper standards for determining inadmissibility, the Court found it was not necessary to apply a more stringent standard at certification, and ruled that the trial court did not abuse its discretion in admitting the evidence at the certification stage.

OIL & GAS

Cooper Clark Foundation v. Oxyusa Inc., Nos. 120,371, 2020 WL 3481429 (Kan. Ct. App. June 26, 2020) (Leben, J.)

Plaintiff brought a landowner class action against a company with lease rights to extract natural gas, alleging years of improper accounting in subtracting expenses from their payments owed. After class certification was granted, Defendant appealed, raising four issues.

The Kansas Court of Appeals affirmed. In terms of the four issues, the Court first considered whether the lower court misapplied the marketable-condition rule as applied in *Fawcett v. Oil Producers, Inc. of Kansas*. In that regard, the Court found that Defendant's argument ignored the class definition in the instant case, and that Defendant had misread *Fawcett*, finding no error in the lower court's decision.

Second, the Court looked at whether the lower court erred in finding commonality. While Defendant argued that numerous individual issues were presented that should preclude commonality, the Court found the presence of several common questions sufficient.

Third, the Court looked at whether the lower court erred in finding predominance. Here, while Defendant had argued that its statute of limitations defense presented individual questions likely to predominate, the Court found this defense could be litigated class-wide, and that the district court had not erred in finding predominance.

Fourth, the Court looked at whether the lower court failed to rigorously analyze the statutory requirements for certification, for failing to rule on Defendant's motion to strike expert testimony. The Court found that nothing in the motion would have precluded certification, and that the Court had implicitly rejected the substance of the motion in its detailed findings anyway. Accordingly, the Court found no error.

SETTLEMENT ISSUES

Objectors

Herrera v. Charlotte School of Law, LLC, Nos. 19-1148 and 19-1161, 2020 WL 3118494 (4th Cir. June 11, 2020) (Alston, J.)

Plaintiff students brought fraudulent misrepresentation suits in multiple federal and state courts against a law school. The law school had allegedly failed to comply with American Bar Association accreditation standards by continuing to operate without making required public disclosures, before it then lost its license to operate in the following year. The suits were consolidated at both the federal and state level, and a single mediation led to a limited-fund, non-opt-out settlement agreement. In the federal consolidated case, the United States District Court for the Western District of North Carolina approved the settlement and certain Objectors appealed separately on various grounds.

The United States Court of Appeals for the Fourth Circuit affirmed in full. Reasoning in support of its decision, the Court considered the three main claims of error. First, Objectors argued that the district court erred in approving a limited fund settlement under Rule 23(b)(1) and the United States Supreme Court's 1999 decision in *Ortiz v. Fibreboard Corp.* The Court considered whether a limited fund settlement was appropriate and found that district court's findings established that the limited fund was at the maximum Defendants could contribute to the fund, and thus approving a limited fund settlement was appropriate. The Court also looked at whether Defendants fared better under the settlement agreement in being able to continue their businesses, but did not find error in the district court's recognition that Defendants' assets were outweighed by their liabilities, and that additional litigation would deplete any funds for the class. The Court then considered whether the class was either underinclusive or overinclusive in assigning a relative value to each claim and found that the appropriateness of the class definition had been established by lengthy negotiations and findings of reasonableness. As such, the Court found no abuse of discretion.

In terms of the second argument, while Objectors argued that the district court erred in approving the settlement as fair, reasonable, and adequate under Rule 23(e), the Court found that the district court's finding of fairness had properly accounted for the length and quality of negotiation by qualified representatives. For the district court's finding of adequacy, the Court found the approval accounted sufficiently for the limited recovery available, the financial state of the Defendants, and the low percentage of objections by the class members. As such, the Court found no abuse of discretion.

In terms of the third argument, while Objectors asserted error on the part of the district court for its denial of a prior motion for discovery, the district court had denied the motion for discovery pertaining to the limited fund settlement on the basis that the terms of discovery had been negotiated vigorously, and that Defendants had complied so as to produce an extensive document discovery. As such, the Court found no abuse of discretion.

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