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ANTITRUST

Williams v. The Estates LLC, No. 19-cv-1076, 2021 WL 1581239 (M.D.N.C. Apr. 22, 2021) (Eagles, J.) Plaintiffs brought suit against real estate companies, alleging a bid-rigging conspiracy that led to lower prices in foreclosure sales on their homes. Plaintiffs moved for certification of a nationwide Sherman Act class and a North Carolina subclass. Plaintiffs also sought leave to file a declaration from an expert economist.

The Court denied the motions, reasoning in support of its decision that predominance had not been satisfied. Specifically, the Court found that Plaintiffs would need to show proof of antitrust injury or “impact” for purposes of liability, rather than only for recovering damages. Since this would require individualized inquiry of “injury-in-fact” suffered from the alleged antitrust violation, the Court found it would need to analyze each individual class member’s foreclosure sale and circumstances. Additionally, the Court found Plaintiffs had not addressed this issue in sufficient detail so to show common proof would suffice.

In response to a request for supplemental briefing, Plaintiffs also submitted a motion to submit an expert’s declaration without prior notice to Defendants of any need for expert discovery, and without any opportunity for deposition or to produce rebuttal evidence. The Court therefore denied the motion for leave to file the declaration as untimely and prejudicial. As a result, the Court likewise denied the motion for certification due to the lack of evidence on proving antitrust impact by common evidence.

DATA BREACH

In re Brinker Data Incident Litigation, No. 18-cv-686, 2021 WL 1405508 (M.D. Fla. Apr. 14, 2021) (*per curiam*) Plaintiffs brought class action against restaurant management group after their payment information was stolen by hackers. Plaintiffs moved for certification and Defendant moved to exclude expert opinions and testimony.

The Court denied the motion to exclude, and ultimately granted certification in part, deferring certification on the breach of implied contract claim. Reasoning in support of its decision, the Court first looked at the motion to exclude Plaintiff’s expert testimony as to a common method of damages calculation. While Defendant argued that the expert lacked expertise due to lack of experience on data breach cases involving individual cardholder plaintiffs, and that the expert was unreliable (by virtue of usage of internet articles and misapplication of principles and methods), the Court found that the expert’s experience was sufficient, and that his methodology relied on other reputable sources and properly applied reliable principles and methods.

After addressing standing, the Court turned to class certification under Rule 23. First, the Court considered ascertainability and the class definition. While the Court found the class was ascertainable due to identification from transaction records and dark web files downloaded, the Court agreed that the class should be narrowed to exclude class members who did not incur expenses or time spent in mitigation of the consequences of the data breach. The Court found this would avoid later predominance issues regarding standing mentioned above. The Court also looked at whether Plaintiffs were all part of the class, and found the records indicated sufficient proximity to the class period but noted that facts could arise that would lead to reevaluation.

Turning to numerosity, the Court found the number of compromised cards was likely to be millions, and that this was sufficient. For commonality, the Court found several common questions at issue and that Plaintiffs’ claims were typical of the class, with the only difference being the amount of damages. The Court also found adequacy was met by a lack of conflicts and by qualified counsel.

In terms of Rule 23(b)(3) predominance, the Court looked at standing again and found the narrowing of the class definition was sufficient to eliminate concerns in using the proposed common method. The Court also

reviewed choice of law concerns and found it would be necessary to analyze whether each state law variation would be materially distinguishable on the breach of implied contract claim. The Court found Plaintiffs had not submitted an extensive analysis on this point, and deferred certification on this claim. However, the Court found negligence claims could proceed, and that further concerns on causation and damages could be determined in the damages phase. The Court also found superiority was met by the need for efficiency in adjudicating small individual claims in one action, and because the class action was sufficiently manageable.

The Court also looked at the alternative of a Rule 23(c)(4) class, but found this was unnecessary when a Rule 23(b)(3) class could be certified.

HEALTHCARE

Rave v. SVA Health Care Services, LLC, No. 2019AP2236, 2021 WL 1621411 (Wis. Ct. App., Apr. 27, 2021) (*per curiam*)

Plaintiff brought suit against a medical billing records holder, alleging improper charging of fees in retrieving his records to pursue a personal injury claim after a car crash. Plaintiff sought to certify and the circuit court granted his motion, which Defendant appealed.

The Court affirmed the certification order. Reasoning in support of its decision, the Court looked at the certification order for abuse of discretion. While Defendant argued that typicality and adequacy were not met due to a failure to consider unique defenses and a statute of limitations bar, the Court found the circuit court did consider these issues and simply had rejected Defendant's arguments. The Court also disagreed that unique defenses were likely to become a major focus in the litigation, as they could be dealt with in a single motion. The Court found this was consistent with Wisconsin statutory and case law.

Looking next to predominance and superiority, Defendant argued that the circuit failed to address the issues it raised on these elements. Rather, the Court found the circuit court applied the correct law to the facts on these elements that it had explicitly considered Defendant's arguments as a whole without addressing particular points, and that it had simply found these arguments unpersuasive.

RACKETEERING

Castillo v. Johnson, No. 20-15814, 2021 WL 1592350 (9th Cir. Apr. 23, 2021)

Plaintiffs brought suit against wastewater services company, alleging they were improperly overcharged in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and Arizona law. After Plaintiff's motion for certification was granted, Defendants appealed on predominance.

The Court affirmed the certification order, reasoning in support of its decision that the damages model proposed was administrable despite a need for some individualized findings. The Court found further that the damages model was consistent with the theory of liability. While Defendants argued that this model did not sufficiently deal with the "filed rate" doctrine on claims involving rates approved by a public agency, the Court found this was a question for a summary judgment motion, and was not necessary for determining predominance on certification. The Court also found this issue had been raised in a motion to dismiss, which was denied by the trial court and not appealed. The Court determined a Rule 23(f) petition was not the correct mechanism to appeal the denial of a motion to dismiss.

TELEPHONE CONSUMER PROTECTION ACT

Scoma Chiropractic, P.A. v. Dental Equities LLC, No. 16-cv-41, 2021 WL 1566668 (M.D. Fla. Apr. 21, 2021) (Badalamenti, J.)

Plaintiffs brought suit for violation of the Telephone Consumer Protection Act (“TCPA”) against Defendants, alleging that defendant sent unsolicited faxes. The case had been stayed pending an FCC ruling in another case, in which online fax services were found not to meet the statutory definition of a fax machine under the TCPA. Plaintiffs now re-filed a motion for certification of two subclasses to account for this distinction. The matter was heard by a magistrate judge who recommended certification be denied on ascertainability grounds, specifically as “administratively infeasible”, but four days later the Court of Appeals for the Eleventh Circuit held in *Cherry v. Dometic Corp.* that this was not a basis for deciding certification under Rule 23. Plaintiff moved to object to the report and sought an extension of time and a renewal of the stay to await a “final order” concerning the FCC ruling.

The Court denied the motion without prejudice, vacated the magistrate judge’s report as moot, and denied further motions for time and for a renewed stay. Reasoning in support of its decision, the Court looked at the validity of the report in light of *Cherry*, and found that the relevance to the magistrate judge’s decision and the parties arguments underlying that decision required a fresh briefing on the certification motion. The Court also found that the stay was no longer needed, as the online fax server issue was a merits question, and not a question for deciding on certification. The Court found that to the extent that any final FCC ruling would affect the grounds for commonality down the road, a motion to decertify would be proper at that time.

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