New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.law.com/ny
VOLUME 228—NO. 65 THURSDAY, OCTOBER 3, 2002

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Class Certification Withheld: Failure to Show 'Typicality, Adequacy'

Among the decisions handed down in July and August in the United States District Court for the Southern District of New York was an opinion by Judge Shira A. Scheindlin denying class certification based on the class representatives' failure to demonstrate typicality and adequacy.

Judge Whitman Knapp found that a lawyer functioning "of counsel" to a law firm was sufficiently independent of the firm to avoid disqualification despite the firm's conflict of interest. In other cases, Judge Robert P. Patterson Jr. invoked the court's inherent powers to order a defendant to pay its opponent's expert witness fees as a sanction for vexatious litigation conduct, and Judge Robert W. Sweet struck an affirmative defense because it was not sufficiently linked to changes in the amended complaint in response to which it was asserted. Finally, Judge Charles S. Haight Jr. found that a motion to dismiss based on a forum selection clause should be considered under Rule 12(b)(3), which permits consideration of materials outside the pleadings.

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Class Actions

In a decision filed in In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation,[1] Judge Scheindlin took the unusual step of denying class certification because the claims of the named plaintiffs were not typical of those of the plaintiff class and because the named plaintiffs could not adequately represent the interests of absent class members.

The putative class in this "hybrid environmental/products liability" case consisted of residential well owners located in four states, seeking injunctive relief against 20 oil companies for alleged contamination of their well water from the gasoline additive MTBE. MTBE is a possible carcinogen and even low levels can give water an unpleasant odor and taste. Plaintiffs claimed that the defendant oil companies engaged in a joint effort to use and market MTBE despite their knowledge of its threat to groundwater, because it is less expensive than safer alternatives. Plaintiffs sought an order that the defendants provide clean water to members of the class.

Rule 23a(3) requires that plaintiffs seeking class certification establish that their claims are "typical" of the class as a whole. Courts generally look to whether the claims of all class members arise from the same course of events and whether each class member relies on similar legal arguments to prove the defendants' liability. Judge Scheindlin held that although this test is not demanding, plaintiffs had failed to meet it in this case because each of the named plaintiffs' wells was contaminated through factually unique circumstances such as leaking underground storage tanks or a burst pipeline. She observed that because most of the class representatives were able to identify the specific source of contamination for their own wells, they would "face an uphill battle" in relying on the market-share liability theory, under which liability is apportioned among manufacturers of a fungible product where plaintiffs are unable to identify the specific manufacturer that caused their injury. By contrast, she noted that other members of the plaintiff class, who were not able to identify the manufacturers of the source of the contaminating MTBE, would be able to proceed under the market share theory. She concluded that "in this critical respect," the named plaintiffs' claims were not typical of the class.

Judge Scheindlin went on to find that the named plaintiffs, who were seeking only injunctive relief, could not adequately represent the absent class members many of whom were likely to have personal injury or property claims as well. She expressed concern that subsequent courts might find that later-asserted claims for damages were barred by res judicata. She cited Feinstein v. Firestone Tire

and Rubber Co., 535 F. Supp. 595 (S.D.N.Y. 1982) (Haight, J.) and Small v. Lorillard Tobacco Co., 679 N.Y.S. 2d 593 (App. Div. 1998), aff'd, 698 N.Y.S. 2d 615 (1999) as instances where courts had found that class representatives who did not assert available claims were inadequate. Judge Scheindlin also questioned whether the named plaintiffs, whose primary complaint was bad smelling and tasting water, could be counted on to prosecute vigorously the action on behalf of those class members who had suffered personal injury. She concluded that "[w]hen viewed against the risk that subsequent courts would preclude absent class members from bringing personal injury claims, the named plaintiffs' relatively weak incentive to prosecute this case leads to the inescapable conclusion that the class representatives are inadequate."

Relying on much the same reasoning, Judge Scheindlin also found that the action was not "maintainable" as a class action as required by Rule 23(b). She reasoned that the individualized issues among the members of the putative class relating to the degree and cause of the contamination and the steps need for its remediation would require the court either to craft a specific remedy tailored to each member of the class — a result that is not permissible under Rule 23(b)(2) — or to issue an order that was so broad that it would fall short of Rule 65(d)'s specificity requirements. Similarly, she rejected the named plaintiffs' arguments that the proposed class was maintainable under Rule 23(b)(3), which applies where questions of law or fact common to the class predominate over questions affecting individual members. Judge Scheindlin held that the fact that the contamination came from different sources and varied in degree among the proposed class members, precluded her from finding the requisite predominance of issues for a 23(b)(3) class.

Disqualification

Judge Knapp's opinion in Regal Marketing Inc. v. Sonny & Son Produce Corp. et ano.,[2] addresses when an attorney in an "of counsel" relationship to a law firm should be disqualified based on a conflict of interest between a client and the firm. In signing the complaint and other pleadings in that matter, the plaintiff's attorney had indicated that he was affiliated with a law firm that had previously represented the defendants in connection with certain regulatory matters. The defendants sought his disqualification, arguing that the law firm was disqualified under DR 5-108 of the New York Code of Professional Responsibility and that by virtue of plaintiff's "of counsel" relationship to the firm, the firm's conflict should be imputed to plaintiff's attorney pursuant to Kasis v. Teacher's Ins. and Annuity Ass'n, 93 NY2d 611 (1999).

Judge Knapp denied the motion to disqualify. Citing Cardinale v. Golinello, 43 NY2d 288 (1977) among other sources, he acknowledged that in some instances, courts have treated attorneys acting "of counsel" as members of the firm, requiring their disqualification where the firm was disqualified. But he cautioned that labels alone should not control the court's decision, noting that in other instances, courts had refused disqualification on the basis of an "of counsel" relationship. See, e.g., Rosman v. Shapiro, 653 F. Supp. 1441 (S.D.N.Y.1987) (Sprizzo, J.); Bison Plumbing City, Inc. v. Benderson, 722 N.Y.S. 2d 660 (App. Div. 2001). He stressed that it is the level of the attorney's involvement with the firm that should control the question of disqualification and, where the relationship is attenuated, disqualification is not required.

Judge Knapp held that the plaintiff's attorney's relationship with the defendants' former law firm fell short of the type of affiliation that would justify attributing the firm's conflicts to the plaintiff's attorney. Specifically, he noted that the attorney was not a member or associate of the firm; did not appear on its letterhead; and was not covered by the firm's liability insurance. He further emphasized that the attorney had his own law firm, which maintained separate phone and billing systems and separate insurance. The two law firms leased office space on the same floor and, on occasion, as was the case in this instance, the plaintiff's attorney agreed to work on a matter for the neighboring law firm on an of counsel basis. Judge Knapp concluded that plaintiff's counsel's relationship with the defendants' former law firm was thus akin to that of an independent contractor and that this "de minimus" relationship did not warrant his disqualification.

Sanctions

After finding that the defendant in Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc. et al.[3] had fraudulently obtained the patents at issue in that litigation, Judge Patterson entered an order awarding the plaintiff almost $27 million in attorney's fees pursuant to 35 USC §285, which permits the court in "exceptional cases" to award attorney's fees to the prevailing party in a patent case. Invoking the court's inherent authority and, in reliance on Amsted Indus., Inc. v. Buckeye Steel Castings Co., 23 F. 3d 374 (Fed. Cir. 1994), he also awarded the plaintiff $2.5 million in expert witness fees, holding that the defendant had "defiled the temple of justice" during the course of the litigation.

Judge Patterson found that the defendant had abused the judicial process in a variety of ways in order to obstruct the plaintiff's discovery of evidence relating to the defendant's fraud before the patent office. Specifically, he found that the defendant had violated Rule 30(d)(1) by improperly instructing a key deposition witness not to answer certain questions relating to the importance of a document it had withheld from the patent office. He also noted that the defendant had asserted unfounded claims of attorney-client privilege on a number of occasions in order to avoid producing critical documents. Among the instances he pointed to were the defendant's efforts to shield the files of its French patent agent claiming that they revealed confidential communications with an American attorney, when in fact the agent had not sought legal advice from the attorney, but had merely instructed him to file a patent application that had been translated from French to English. (His ruling on

this matter is discussed in greater detail in our October 1998 column in The New York Law Journal). Judge Patterson also found that the defendant had improperly relied on French secrecy law to avoid producing key documents. Other vexatious conduct upon which Judge Patterson relied in awarding the plaintiff its expert witness fees included the defendant's delays in producing certain documents, critical redactions made to others, and assertions (deemed suspicious by Judge Patterson) that certain important documents had been lost or misplaced . Finally, Judge Patterson held that the defendant had unnecessarily increased the costs of discovery by demanding broad discovery along unpromising avenues, and by retaining 49 separate medical experts, forcing plaintiff to take dozens of expert depositions and to retain its own battery of experts to counter the defendant's proffered expert testimony.

Pleading

Judge Sweet's decision striking an affirmative defense asserted in Pereira v. Cogan, et al.,[4] considers whether amendments in an answer filed as of right under Rule 15(a) in response to an amended complaint, should be limited by the scope of the specific amendments to the complaint. After the close of discovery, the defendants consented to the plaintiff's filing of an amended complaint which added an alternative theory for relief concerning a previously pleaded issue. One of the defendants subsequently filed an amended answer, asserting for the first time an affirmative defense claiming a damages offset, and which presented no issue regarding liability. The plaintiff sought to have that affirmative defense stricken, arguing that although the defendant was entitled to amend his answer under Rule 15(a), such amendments must be responsive to changes in the amended complaint.

Judge Sweet observed that the case law on this question "is all over the map." Within the Second Circuit, he cited cases, including Wechsler v. Hunt Health Sys. Ltd., 186 F. Supp 2d 402 (S.D.N.Y. 2002) (Leisure, J.), holding that a defendant could not amend his answer to assert a defense that went "above and beyond" responding to the amended complaint and others, such as American Home Products Corp. v. Johnson & Johnson, 111 F.R.D. 448 (S.D.N.Y. 1986) (Conner, J.) in which the court found no limitation on the scope of an amended answer under Rule 15(a). He noted that courts from other districts have charted a middle ground, permitting the defendant to plead anew when a plaintiff expands the theory or scope of a case in an amended complaint, but requiring leave of court to assert new defenses when an amended complaint does not change the scope of the case. See, e.g., Tralon Corp. v. Cedarapids, Inc., 966 F. Supp. 812 (N.D. Iowa 1997), aff'd, 205 F. 3d 1347 (8th Cir. 2000).

Judge Sweet found that Rule 15(a)'s requirement that "[a] party shall plead in response to an amended pleading" within 10 days supports the view that some limitation on a responsive pleading filed under that rule is appropriate. He reasoned that "[a] defendant who is responding to an amended complaint cannot amend his answer as of right without any regard to the amendments taken by his adversary." He acknowledged that where "the plaintiff expands its case by adding new theories or claims, it cannot complain if the defendant seeks to do the same by averring new counterclaims." In this case, however, despite the fact that the plaintiff had added a new theory of liability, Judge Sweet concluded that the affirmative defense was improper because the defendant had been aware of it for a long period of time and should not be permitted to "ambush [the] plaintiff with an unexpected defense." Moreover, Judge Sweet found that the defendant's amendment was not responsive to the change in the complaint and ordered the affirmative defense stricken.

"Defendant unnecessarily increased the costs of discovery by demanding broad discovery along unpromising avenues."

Forum Selection

Judge Haight dismissed the complaint in Jockey International, Inc. v. M/V "Leverkusen Express," et al.,[5] finding that a forum selection clause in the applicable bill of lading required that the plaintiff litigate its claim for damaged goods in Germany. He noted at the outset that it is an open question in the Second Circuit as to which Rule of Civil Procedure should govern a dismissal based on a forum selection clause, quoting the Second Circuit's observation in New Moon Shipping Co. v. Man B & W Diesel AG,121 F3d 24 (2d Cir.1997) that "there is no existing mechanism with which forum selection enforcement is a perfect fit."

Judge Haight found that courts within this circuit have variously considered such motions under Rules 12(b)(1), 12(b)(3) and 12(b)(6) and that other circuits have split on this question, with the Ninth Circuit treating motions to enforce forum selection clauses under Rule 12(b)(3) and the First Circuit holding that such motions fall within Rule 12(b)(6). He pointed out that as a practical matter, Rule 12(b)(3) permits the court to consider materials outside the pleadings, while Rule 12(b)(6) does not. Because the parties in this case had submitted materials outside the pleadings, he opted to proceed under 12(b)(3) and, finding that the forum selection clause was mandatory, valid and enforceable, dismissed the complaint for lack of proper venue.

(1) No. 00 Civ. 1898, MDL No. 1358, 2002 WL 1560358 (July 16, 2002).

(2) No. 01 Civ. 1911, 2002 WL 1788026 (Aug. 1, 2002).

(3) No. 95 Civ. 8833, 2002 WL 1733681 (July 26, 2002).

(4) No. 00 Civ. 619, 2002 WL 1822928 (Aug. 7, 2002). The authors' firm is counsel to one of the other defendants in this case.

(5) No. 01 Civ. 9165, 2002 WL 1940308 (Aug. 22, 2002).