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Class & Collective Action Group Newsletter

Federal Appellate Courts

Decision in *Mussat v. IQVIA, Inc.* (Seventh Circuit)

Key Issue

Whether the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*[1] extends to Rule 23 class actions, such that a federal court may not exercise personal jurisdiction over a defendant in relation to any individual claims of putative class members, including unnamed members, that cannot independently satisfy due process concerns.

Background

Plaintiff Florence Mussat, an Illinois physician, filed a putative class action suit against IQVIA, a corporation headquartered in Pennsylvania, in the Northern District of Illinois. Mussat argued that two unsolicited faxes from IQVIA that Mussat received did not contain a requisite opt-out notice in violation of the Telephone Consumer Protection Act ("TCPA"). Mussat sought to certify a class of all persons in the United States who had received similar faxes from IQVIA in the four years prior to the action.

At the district court level, IQVIA moved to strike the class definition from the complaint, arguing that the court lacked personal jurisdiction over IQVIA for claims by non-Illinois members of the proposed nationwide class who did not receive the alleged faxes in Illinois. Specifically, IQVIA argued that the court could not exercise either general or specific personal jurisdiction with respect to the claims of nonresident class members under due process, given that IQVIA was not "at home" in Illinois and the nonresident class members' claims did not relate to IQVIA's contacts with Illinois.

The district court granted the motion, reasoning that the Supreme Court's recent decision in *Bristol-Myers* required that the unnamed members of the proposed class—rather than just named plaintiffs—show sufficient minimum contacts between a defendant and the forum state for the court to exercise personal jurisdiction in relation to the unnamed members' claims. The court found that, in this case, plaintiffs had failed to show that the court could exercise personal jurisdiction with respect to the claims of members allegedly harmed outside of Illinois.

The district court granted permission for plaintiff's interlocutory appeal, under Federal Rule of Civil Procedure 23(f), of the court's decision to strike the class definition to the Seventh Circuit.

[1] 137 S. Ct. 1773 (2017).

Decision

On March 11, 2020, the Seventh Circuit held that it had jurisdiction to hear the interlocutory appeal.[2] It then reversed the district court's decision to strike the nationwide class allegations and remanded the case.[3]

The Seventh Circuit discussed *Bristol-Myers* in depth. In *Bristol-Myers*, plaintiffs, most of whom were not California residents, filed a coordinated mass action (a device available under California law) in state court against the defendant corporation claiming injuries arising out of a blood-thinning drug.[4] The Supreme Court held that California's state courts did not exercise personal jurisdiction with respect to the claims of nonresident plaintiffs, as there were inadequate links between the nonresidents' claims and California to support jurisdiction.[5]

In *Mussat*, the Seventh Circuit declined to extend *Bristol-Myers* to nationwide class actions filed in federal court under a federal statute, and it instead held that the personal jurisdiction inquiry should only focus on the claims of named plaintiffs.[6]

The Seventh Circuit first noted that before *Bristol-Myers*, there had been a "general consensus" that personal jurisdiction over a defendant in a class action was assessed only in relation to the claims of named plaintiffs, not all class members.[7] The Seventh Circuit then distinguished *Bristol-Myers* from the case at hand by noting, among others, that *Bristol-Myers* was a type of mass action authorized by California law that permits the consolidation of individual cases, rather than a class action.[8] Therefore, the court reasoned, each plaintiff in *Bristol-Myers* was a named party to the case, whereas lead plaintiffs in a Rule 23 class action represent the interests of unnamed class members, who are not full parties to the case for certain purposes such as determining diversity jurisdiction or venue.[9]

The Seventh Circuit also rejected defendant's argument that allowing nonresident, unnamed class members to proceed would be inconsistent with Federal Rule of Civil Procedure 4(k), which governs service of process.[10] The panel noted that the argument conflated service with personal jurisdiction, and that other provisions of the Federal Rules of Civil Procedure did not support defendant's argument.[11]

Finally, the Seventh Court noted that the Supreme Court itself reserved decision on the question of whether its holding extended to federal courts at all.[12]

Thoughts & Takeaways

The Supreme Court's decision in *Bristol-Myers* spawned considerable uncertainty as to whether and how it would limit the scope and size of class actions, including in federal court. For example, taken to its logical conclusions, *Bristol-Myers* could arguably be applied to limit nationwide federal class actions to forums in which the defendant is subject to general jurisdiction, *i.e.* the only forums in which unnamed,

[2] *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020).

[3] *Id.* at 443.

[4] 137 S. Ct. at 1777.

[5] *Id.* at 1782; *see also Id.* at 1783–84 (leaving open the question of the exercise of personal jurisdiction by federal courts in similar situations).

[6] *Mussat*, 953 F.3d at 448–49.

[7] *Id.* at 445 (noting the Supreme Court has "regularly entertained" such cases without questioning personal jurisdiction over defendants).

[8] *Id.* at 445–47.

[9] *Id.* at 447 ("We see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue . . . .").

[10] *Id.* at 447–48.

[11] *Id.* (discussing Fed. R. Civ. P. 82, 17(a)(1), and 23(b)(3)).

[12] *Id.* at 448 (citing *Bristol-Myers*, 137 S. Ct. at 1784).

nonresident class members can still demonstrate the court's personal jurisdiction over defendant for their claims.

By declining to expand *Bristol-Myers* to such situations, however, the Seventh Circuit's decision in *Mussat* has, for now, limited the impact of *Bristol-Myers* on class actions in favor of the established norm of how class actions may proceed in federal courts. The Seventh Circuit's decision reaffirmed the established principle that federal class actions may proceed based on personal jurisdiction arguments with respect to the claims of named plaintiffs, rather than of *all* the members of a class. As a result, the more stringent requirements of establishing personal jurisdiction articulated in *Bristol-Myers* may be cabined to a smaller subset of collective actions in which each plaintiff is a named party.

Nonetheless, as demonstrated in part by the D.C. Circuit in *Molock v. Whole Foods* (discussed below), confusion and uncertainty over the scope and effect of *Bristol-Myers* still persists. For example, it remains to be seen how courts will interpret *Bristol-Myers* in the context of class actions in state court, as opposed to federal courts. And of course, other circuits may reach a different conclusion from the Seventh Circuit. The lingering uncertainty in the wake of *Bristol-Myers*, as well as the significance it holds for the landscape of collective action litigation across the country, suggests that the Supreme Court may have occasion to revisit these issues in the future.

Read the decision here.

Decision in *Molock v. Whole Foods Market Group, Inc.* (D.C. Circuit)

Key Issue

Whether, under the Supreme Court's decision in *Bristol-Myers*,[13] a federal district court may exercise personal jurisdiction over the defendant in relation to all class members in a nationwide class action on the basis of a defendant's interactions with named plaintiffs.[14]

Background

Plaintiffs in this case are a group of current and former Whole Foods employees who sought to represent a putative nationwide class of past and present employees of defendant Whole Foods. Plaintiffs alleged that Whole Foods had manipulated its incentive-based bonus program, thus depriving employees of their due wages. Plaintiffs brought several state law claims for damages in a diversity action in the District of Columbia.[15]

In response, Whole Foods moved to dismiss the complaint on several grounds, including that the district court lacked personal jurisdiction to entertain the claims of the putative class members who were not D.C. residents. The district court denied Whole Foods's motion. Whole Foods then filed a petition for leave to appeal the decision solely on the personal jurisdiction issue, which the D.C. Circuit granted.[16]

In arguing the personal jurisdiction question on appeal, Whole Foods relied on the Supreme Court's 2017 decision in *Bristol-Myers*. In that case, the Supreme Court held that nationwide plaintiffs—most of whom were not California residents—in a mass tort action could not proceed in California

[13] 137 S. Ct. 1773.

[14] *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293 (D.C. Cir. 2020).

[15] *Id.* at 295.

[16] *Id.*

state court against the defendant, which was not domiciled in California. Specifically, the Supreme Court concluded that the California court lacked personal jurisdiction to hear the claims of nonresidents of California because those plaintiffs could not show enough minimum contacts between their claims against defendant and California, the forum state, to satisfy due process. The Supreme Court expressly left open the issue of whether this rule applied under the Fifth Amendment to personal jurisdiction in federal district courts.[17]

Whole Foods similarly argued that the district court lacked personal jurisdiction over the non-D.C. residents because: (1) Whole Foods was not domiciled in the District of Columbia, and therefore the court could not exercise general personal jurisdiction over Whole Foods; and (2) the claims of the nonresidents did not arise out of or relate to Whole Foods's contacts with the District of Columbia for the purposes of specific personal jurisdiction. In response, plaintiffs argued that under Federal Rule of Civil Procedure 23, a federal court sitting in diversity could exercise personal jurisdiction over unnamed, nonresident class members, even if a state court could not. Alternatively, plaintiffs argued that the district court should have denied Whole Foods's motion to dismiss because it was premature to argue personal jurisdiction before class certification, given that the putative class members were not yet parties to the action.[18]

Decision

Instead of ruling directly on the jurisdictional question, the D.C. Circuit agreed with plaintiffs' second argument and concluded that prior to class certification, the putative class members were not parties before the court and Whole Foods's motion to dismiss those class members on personal jurisdiction grounds was premature.[19] The D.C. Circuit found that the Supreme Court had made it clear in *Smith v. Bayer Corp.*[20] that putative class members are always treated as nonparties and that they only become parties to an action after class certification.[21] Because the putative class members were not parties, the panel concluded, "[a]ny decision purporting to dismiss putative class members . . . would be purely advisory."[22]

The circuit court similarly rejected Whole Foods's other arguments, including its arguments that: (1) even if putative class members were absent pre-certification, their claims were not; (2) personal jurisdiction should be addressed "as soon as possible," even before class certification; and (3) failing to address personal jurisdiction would add to the burden of class discovery.[23]

Judge Silberman dissented, taking the position that Whole Foods's motion was not premature because it did not seek to dismiss nonresident putative class members. Silberman found that defendant's motion "did not ask for dismissal of any person, let alone the putative class members. Nor did the motion specify that the 'claims' it challenged for lack of personal jurisdiction were those of the putative class members as opposed to those of the named plaintiffs."[24] Instead, Judge Silberman noted, defendant sought to dismiss the claims in the named plaintiffs' complaint that alleged injuries occurring outside the District of Columbia. Such dismissal is proper before class certification, he argued, and as

[17] *Bristol-Myers*, 137 S. Ct. at 1775–76, 1781–82, 1784.

[18] *Molock*, 952 F.3d at 296.

[19] *Id.* at 295.

[20] 564 U.S. 299 (2011).

[21] *Molock*, 952 F.3d at 297–98.

[22] *Id.* at 298.

[23] *Id.* at 298–300.

[24] *Id.* at 302 (Silberman, J., dissenting).

such, the majority should have reached the *Bristol-Myers* question.[25]

Judge Silberman also noted that he would have found that *Bristol-Myers* does extend to class actions had the court reached the issue.[26] He argued that the mass action in *Bristol-Myers* and class actions are both just "species of joinder" and thus can be treated similarly, and that the personal jurisdiction requirements must be satisfied independently for each specific claim in a case.[27] He disagreed with plaintiffs that absent class members should not be treated as "parties" for personal jurisdiction purposes, finding no sufficient authority explaining why party status should make a difference in this context.[28] Judge Silberman also disagreed that the particular rules for Rule 23 class actions provide an adequate substitute for the normal due process protections of personal jurisdiction limits. He found that Rule 23 offered no protection against the "abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[29] Finally, Judge Silberman disagreed that the federal courts have broader power to exercise personal jurisdiction than state courts over nationwide cases. While he agreed that this could be so if Congress authorized it, he noted that there is currently no statute or rule that authorizes such an expansive approach to personal jurisdiction.[30]

Thoughts & Takeaways

Molock and *Mussat* are the first two U.S. Courts of Appeals decisions interpreting the Supreme Court's *Bristol-Myers* decision in the federal context. As noted in our analysis of *Mussat*, the Supreme Court decision raised the specter of a new limitation on nationwide class actions, potentially restricting the forums in which a plaintiff seeking to represent a putative class can bring its case, and has created confusion in the district courts. While the *Molock* decision does not provide clear guidance from the D.C. Circuit on this question, the question may be raised again in this case after Whole Foods completes the class certification process. Judge Silberman's dissent may also provide some insight into how the D.C. Circuit may consider a similar case in the future.

Read the decision here.

[25] *Id.* at 301.

[26] *Id.* at 304, 306.

[27] *Id.* at 306.

[28] *Id.* at 306–07.

[29] *Id.* at 307–08 (internal quotation marks and citation omitted).

[30] *Id.* at 308–09.

Federal District Courts

Decision in *In re EpiPen Marketing, Sales Practices, and Antitrust Litig.* (D. Kansas)

Key Issues

1. Whether common questions predominate over individual questions, such that a class may be certified under Rule 23(b)(3), when common evidence will not establish that every class member has been injured.

2. Whether a defendant has a due process right to challenge its liability to individual class members, where plaintiffs present a classwide model that plausibly claims to reduce aggregate damages to account for the inclusion of uninjured class members.

Background

Plaintiffs paid or reimbursed others for the purchase price of branded or authorized generic EpiPens, portable epinephrine auto-injector ("EAI") devices. Plaintiffs brought a consolidated class action complaint alleging that Mylan, N.V., Pfizer, Inc., and a number of affiliated companies illegally maintained a monopoly over the EAI market in violation of various federal and state laws.

The EpiPen is manufactured by the Pfizer defendants and distributed by the Mylan defendants. Plaintiffs alleged that from 2009 to 2016, Mylan had a market share of over 90%, and since 2007 raised the price of the EpiPen from $100 to more than $600. Mylan allegedly maintained its monopoly by illegally offering discounts to pharmacy benefit managers to make the EpiPen the exclusive or preferred branded EAI device for insurance plans. Mylan also allegedly forced buyers to purchase EpiPens in a two-pack instead of selling the device individually. For its part, Pfizer allegedly entered anticompetitive "pay-for-delay" settlements with potential market entrants; plaintiffs claimed that after filing patent infringement lawsuits against generic EpiPen rivals, Pfizer paid the rivals to settle the lawsuits in exchange for delaying market entry for several years.

Plaintiffs moved for certification of an injunctive class and several damages classes. In support of their motion, plaintiffs submitted an aggregate damages model which showed, among other things, that more than 95% of the individual class members and more than 99.999% of third-party payor class members were likely to have been injured by defendants' conduct (for example, a class member might have been injured had she preferred to purchase another branded EAI device rather than an EpiPen; an uninjured class member may have preferred the EpiPen even if an alternative had been available). Although plaintiffs' damages model could not identify *which* class members had been injured, they argued that it accounted for the existence of uninjured plaintiffs through a proportional reduction in the total damages award sought by the class.

Defendants argued, among other things, that certifying the damages class would be inappropriate under both Rule 23(b)(3) and the due process clause because plaintiffs' classwide model could not establish injury-in-fact—an element of plaintiffs' case in chief under the antitrust laws—on a classwide basis. Arguing that plaintiffs' model acknowledged the inclusion of uninjured class members and could not itself establish classwide injury, defendants argued that they had both the right and the intention to challenge each class member's proof of injury-in-fact on an individual basis. Those individual challenges would be individual questions which would predominate over any question common to the class.

Defendants relied heavily on *In re Asacol Antitrust Litigation*,[31] in which the First Circuit reversed a district court's certification of a consumer drug purchaser class on due process and predominance grounds. In *Asacol*, the First Circuit reversed the district court's certification of a class on the ground that the procedures necessary to protect defendants' due process right to challenge liability for individual class members would necessarily result in individual questions predominating over questions common to the class. The *Asacol* district court found that a percentage of the putative class (which alleged that a generic drug had been prevented from entering the market in violation of the antitrust laws) would have been uninjured by defendants' alleged conduct, and that an individual inquiry would be necessary to determine whether any particular class member had been injured. The district court further concluded that those individual determinations could be made by a claims administrator (presumably after a classwide liability determination), who would identify and deny the claims of uninjured class members.

The court of appeals disagreed that a claims administrator would adequately protect defendants' Seventh Amendment and due process rights, because defendants would be unable to contest any class member's evidence of injury-in-fact—an element of plaintiffs' liability case. The court concluded that injury-in-fact must be proved at or before trial, just like the other elements of plaintiffs' case. The court also concluded that injury-in-fact could not be proved using classwide evidence, such that injury-in-fact would be an individual issue (requiring the testimony of potentially thousands of people to establish liability). Unsurprisingly, the *Asacol* court concluded that individual questions would predominate over common ones, and reversed the district court's certification of the class.

Defendants in *EpiPen* largely mirrored the *Asacol* arguments, and asked the court not to certify the damages classes.

Decision

In a lengthy opinion, the district court certified two of plaintiffs' proposed damages classes.

Noting that defendants had relied heavily on *Asacol*, the court reviewed the facts of the case, and then summarily rejected its application to *EpiPen*.[32] The *EpiPen* court concluded that plaintiffs were not required to show, at least at the class certification stage, that they would be able to prove injury-in-fact for every class member with a classwide model. Relying on in-district and Seventh Circuit case law, the court held instead that individual issues related to uninjured class members would not predominate unless defendants were able to show that there are "a great many" such class members.[33]

Acknowledging defendants' argument that there could be at least one hundred thousand uninjured class members, the court found that those individuals would make up "less than 5% for individual consumers and less than .001% for third-party payors."[34] The court therefore concluded that there were therefore not "a great many" uninjured plaintiffs such that a class could not be certified.

The *EpiPen* court also took a narrower view of defendants' due process rights than the court in *Asacol*. As described above, the *Asacol* court held that plaintiffs were required to prove injury-in-fact

[31] 907 F.3d 42 (1st Cir. 2018).

[32] *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2020 WL 1180550, at *28–29, *32 & n.36 (D. Kan. Mar. 10, 2020).

[33] *Id.* at *32; *see In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013); *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2016 WL 5371856, at *4 (D. Kan. Sept. 26, 2016); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009).

[34] *EpiPen*, 2020 WL 1180550, at *34 n.41, *35.

as part of their liability case, and that if it could not be proved using classwide evidence (because defendants had individual defenses they intended to assert), injury-in-fact would need to be proved on an individual basis. The *EpiPen* court disagreed, holding that defendants do not have a due process right to assert individual defenses as long as plaintiffs plausibly show that their damages model can proportionately reduce aggregate liability to account, on average, for the presence of uninjured class members. In the court's view, it is not a basis for complaint by defendants whether uninjured class members recover for injuries they did not suffer, as long as defendants are not liable for more damages than they would have been had the uninjured members been removed from the class.

Having concluded, among other things, that there were not "a great many" uninjured plaintiffs and that defendants' due process rights would be sufficiently protected, the court proceeded to certify two of the damages classes.

Thoughts & Takeaways

Predominance. How many uninjured class members is "a great many?" The case law does not provide a clear answer. "There is no precise measure . . . . Such determinations are a matter of degree, and will turn on the facts as they appear from case to case."[35] The *EpiPen* court certified classes with potentially 5% of class members having suffered no injury. The court's focus on the percentage of uninjured plaintiffs is worth noting, however, because it suggests that the court's concern was less about predominance than about a practical consideration regarding bargaining power.

As described above, the *EpiPen* court acknowledged that the uninjured 5% of the class could amount to as many as 100,000 people.[36] Although the court analyzed uninjured class members under the heading of "predominance," there is some reason to doubt whether the balance of individual and common questions was really the court's focus. *EpiPen*'s reliance on the *percentage* of uninjured class members is consistent with the logic of *Kohen*, the case in which the Seventh Circuit introduced the concept of "a great many" uninjured plaintiffs—a case in which predominance is not discussed at all. Instead, the *Kohen* court focused on the "*in terrorem* character of a class action,"[37]—that is, the propensity for a class action which seeks a massive damages award to induce settlement, regardless of the case's likelihood of success on the merits. On this view, the percentage of uninjured class members, rather than their absolute number, seems likely to be the better measure of the degree to which a class's claims (and therefore its bargaining power during settlement discussions) are overinflated. It may also serve as a focusing technique for the court when considering class definition; if the class seems likely to contain a large number of uninjured class members, it may be that the class is defined too broadly.

The *Asacol* court was attempting to solve a different problem (which may better fit the "predominance" label). In that case, the court came face-to-face with practical difficulties that follow from attempting to adjudicate individual claims and defenses in the context of a large class. Notably, these difficulties will primarily be a function of the *absolute number* of class members whose claims will require some degree of individual proof, rather than the *percentage* of class members whose claims will eventually fail on the merits (*i.e.*, those who are in fact uninjured). For any putative class of significant size, the latter metric is almost entirely irrelevant to the predominance inquiry. If one hundred thousand class members must present individualized evidence

[35] *Messner*, 669 F.3d at 825; *see Kohen*, 571 F.3d at 678 ("We do not know how many of these [uninjured class members] the class may contain, but probably not many."); *Urethane*, 2013 WL 2097346, at *2 ("a very small percentage of class members suffer[ing] no damages . . . . does not compel decertification").

[36] *EpiPen*, 2020 WL 1180550, at *34 n.41.

[37] *Kohen*, 571 F.3d at 678.

of injury-in-fact at trial, it will be nearly impossible for common questions to predominate, whether those hundred thousand individuals constitute 5% or 50% of the class.

EpiPen and *Asacol* together demonstrate that both the percentage and absolute number of uninjured class members may be relevant, depending on the concerns motivating a court.

Due process. As described above, the *EpiPen* court also took a more limited view of defendants' due process rights than did the *Asacol* court, holding that defendants could not present individual challenges to liability when the effect of those defenses could plausibly be incorporated in plaintiffs' aggregate model. Notably, the *EpiPen* court did not engage with a distinction, relied on in *Asacol*, between two types of aggregate damages. In the first type of case—where a defendant's total damages are an aggregation of individual damages claims, each claim independent from the others (as in a typical consumer class action)—the *Asacol* court held the defendant has a right to present the same individual defenses to liability it would have been able to present in an individual action. In the second type of case—in which there is no relationship between the total damages for which a defendant is liable and the number or identity of potential claimants (the classic example being a defendant's theft of a defined sum from a pension fund owned by a plaintiff class)—the *Asacol* court noted in *dicta* that the defendant may not have a due process right to present *individual* defenses to liability, since any such defenses arguably would be irrelevant to plaintiffs' proof of aggregate damages.[38]

The *EpiPen* court implicitly assumed that the underlying theory of aggregate damages is irrelevant to a defendant's right to due process; in either case, that right is sufficiently protected if a plaintiffs' model plausibly uses probabilistic evidence to estimate the aggregate damages the class members would have been able to prove if the defendant had been allowed to assert individual defenses to each class member. *Asacol* reached the opposite conclusion; if a defendant has plausible individual defenses which would affect the total amount of damages for which it could be liable (in other words, when aggregate damages will be the sum of independent claims), the defendant has the right to assert those defenses on an individual basis, even if plaintiffs submit plausible evidence of the likelihood of success of those defenses in the aggregate.

Conclusion. Ultimately, the *EpiPen* court rejected *Asacol* less for any supposed theoretical shortcoming than for a practical one; *Asacol* simply sets too high a bar for class certification. In a footnote, the court favorably cited a description of *Asacol* as a "death knell" for pharmaceutical antitrust class actions brought by indirect purchasers: "Given the myriad ways in which consumers could theoretically be uninjured, once a defendant asserts an intent to challenge each claim to have been affected by their conduct it becomes nearly impossible for indirect purchasers to show that common issues will predominate . . . ."[39]

Read the decision here.

[38] The *Asacol* court also acknowledged, but had no reason to decide, the question of whether Article III allows federal court to knowingly award damages to uninjured claimants. *Asacol*, 907 F.3d at 55 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring)).

[39] *EpiPen*, 2020 WL 1180550, at *32 n.36 (citing *In re Intuniv Antitrust Litig.*, No. 1:16-cv-12396-ADB, 2019 WL 3947262, at *7 n.8 (D. Mass. Aug. 21, 2019)).

Fee Order in *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.* (D. Mass.)

Key Issue

Whether an earlier granted fee award was appropriate given revelations about plaintiff counsels' misrepresentations regarding their fees and about the methods used to secure the lead plaintiff as a client of lead counsel.[40]

Background

Plaintiff Arkansas Teacher Retirement System ("ATRS") was the lead plaintiff and class representative for a class of customers suing defendant State Street Bank and Trust Company for alleged fraud in billing foreign exchange transaction. ATRS was represented by several counsels, including Labaton Sucharow LLP as lead counsel, Thornton Law Firm, and Lieff Cabraser Heimann & Bernstein LLP. In 2016, the parties moved for class certification for the purposes of settlement and approval of a $300 million settlement of the case, with a fee award for plaintiffs' counsels amounting to 25% of the common fund, or roughly $75 million.[41]

In granting counsels' requested fee order, the court expressly stated that it was relying heavily on various representations from plaintiffs' counsels. However, shortly after the court ordered the fee award, attorneys from Labaton informed the court that they had double-counted the hours of staff attorneys on the case, an error that had increased the lodestar by over 9,300 hours and over $4 million. Several media reports then came out revealing that Labaton and Thornton had made various other misrepresentations to the court in their fee request. The Boston Globe reported that Labaton staff attorneys were typically paid $25 to $40 an hour, as opposed to the $335 to $500 represented by Labaton. Additionally, the work of several attorneys had been double-counted by the three firms representing ATRS, with different hourly rates attributed to the same attorneys. Finally, an attorney named Michael Bradley, the brother of Thornton's managing partner, had been represented to be an employee of Thornton who was paid at a rate of $500 an hour, when he was actually a sole practitioner who usually made $53 an hour.[42]

A second Globe article shed light on how Labaton and Thornton collected clients in Massachusetts, focusing on how the managing partner of Thornton had leveraged his previous political connections as a member of the state House of Representatives to get business. Labaton and Thornton also had histories of making campaign contributions to elected officials who chaired public pension funds, who then retained the firms to monitor their funds' investments and to represent them in class actions. Moreover, the claims settlements negotiated for these funds provided for highly disparate recoveries between plaintiffs and their counsel. For all its cases for one pension fund, Thornton and Labaton shared in total awards of over $41 million, while the fund itself recovered only $40,000.[43]

In light of these revelations, the court appointed a Special Master to investigate the matter of attorneys' fees and publish a report and recommendation. The court then vacated the $75 million fee award. In the course of this investigation, in addition to making discoveries confirming the Boston Globe reports, the Special Master discovered that Labaton had agreed to pay a third attorney, Damon Chargois, $4.1 million as a finder's fee out of the fee award

[40] *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, Nos. 1:11 Civ. 10230-MLW, 11-12049-MLW, 12-11698-MLW, 2020 WL 949885 (D. Mass. Feb. 27, 2020).

[41] *Id.* at *3, *11.

[42] *Id.* at *3.

[43] *Id.* at *4, *18.

for persuading ATRS to hire Labaton and doing no other work on the case. Chargois' efforts had included "considerable favors, political activity, money spent and time dedicated in Arkansas."[44] The Special Master filed his report under seal on in May 2018. The report recommended that the court re-award the $75 million, but to reduce the recovery for Labaton by about $6 million (to about $26 million); for Thornton by about $3 million (to about $17 million); and for Lieff by about $3 million (to about $13 million). The remainder would be disgorged to the class or reallocated to counsel for another case that had been consolidated with ATRS's. The Master also recommended imposing sanctions of up to $1 million on Thornton.[45]

All three counsel involved filed objections to the report. The district court accordingly ruled on their objections to the Master's findings, and modified his report and final fee award.[46]

Decision

The court modified the final attorneys' fee award to $60 million, which would constitute 20% of the $300 million common fund. The court awarded roughly $22 million to Labaton, $13 million to Thornton, and $15 million to Lieff. The court also reduced the service award to ATRS from $25,000 to $15,000, reinstated a $10,000 service award to another plaintiff whose case had been consolidated with ATRS's, and then allocated over $14 million to the class.[47] In total, such awards reduced the fees from $75 million to $60 million (which includes roughly $10 million to counsel from a case consolidated with ATRS's).

In reaching this decision, the court found that when exercising its equitable authority to award fees, the court could not reward inequitable conduct and thus it was appropriate to take misconduct into account. When a class seeks a fee award, the adversarial process is not operating and an attorney's duty of candor takes on particular importance.[48] In fact the interests of class counsel are in tension with the interests of the class, as the two compete for shares of the common fund.[49] Labaton, Thornton and Lieff had made many materially false and misleading statements in submissions supporting their request for a $75 million award.[50] Labaton's agreement with Chargois violated professional conduct rules that required a client's informed consent to fee divisions between lawyers at different firms and that prohibit the exchange of value for recommending a lawyer's services. The fact that Labaton concealed the Chargois arrangement from the class, other counsel and the court was also a violation of professional responsibility rules and its duties as class counsel.[51]

The court also raised concerns about monitoring agreements generally, in which counsel monitor the portfolios of institutional investors for opportunities to bring class action lawsuits. The court found that such agreements created a risk that firms would engage in questionable conduct to obtain the agreements, and once engaged, could incentivize firms to recommend class actions that would benefit counsel the most.[52]

Finally, the court noted that these revelations raised questions about whether ATRS was an adequate class representative. While the court did not make a decision as to ATRS's adequacy, the court flagged

[44] *Id.* at *22–23.

[45] *Id.* at *4–5, *22–24.

[46] *Id.* at *5.

[47] *Id.* *5–6.

[48] *Id.* at *13, *31.

[49] *Id.* at *14–15, *31.

[50] *Id.* at *6–9, *16–17, *32–40, *45–46.

[51] *Id.* at *24–25, *39–45.

[52] *Id.* at *19 n.10.

that ATRS's relationship with Labaton, which had been created through the political connections forged by Chargois, raised conflict of interest or atypicality questions that could affect its ability to protect the interests of the class.[53]

Thoughts & Takeaways

Although raised in the context of a fee order, this decision highlights several important issues related to class certification and the practices of class counsel. The court put a spotlight on compensation and client recruitment practices that may not be very visible for class members and opposing counsel, but which raise fundamental issues about a counsel's ability to serve effectively under the requirements of Rule 23 and the PSLRA. This court is not the first to raise questions about the practice of implementing monitoring agreements between law firms and the institutional investors who often end up serving as their clients and as class representatives.[54] Importantly, these practices also implicate a class representative's ability to adequately represent a class under Rule 23(b).

Read the decision here.

[53] *Id.* at *25–26.

[54] *Id.* at *19 n.10.

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