
District Court Rejects Direct Purchaser Class for Failure to Satisfy Numerosity Requirement

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On August 28, 2017, in *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al.*, the Eastern District of Pennsylvania denied class certification for direct purchasers asserting Hatch-Waxman reverse-payment antitrust claims because the 24-25 putative class members did not satisfy the numerosity requirement. Separately, for the same reasons, the court rejected a settlement agreement between the direct purchasers and another defendant.¹ The decisions followed a Third Circuit opinion vacating the district court's initial grant of class certification in *In Re Modafinil Antitrust Litigation*, 837 F.3d 238 (3d Cir. 2016). On remand, Judge Goldberg identified judicial economy and that the prospective class members had the ability and motivation to litigate through joinder as principal factors for finding that joinder would be practicable and that certification of a direct purchaser class, for either litigation or settlement purposes, was therefore inappropriate. This appears to be the first decision to reject a pharmaceutical direct purchaser class, or a proposed settlement with direct purchasers, on numerosity grounds. The case could be an important precedent for future litigation and settlements in direct purchaser antitrust litigation, particularly in the Hatch-Waxman context where the number of plaintiff drug wholesalers is relatively small.

Background

Direct purchaser class plaintiffs brought an antitrust suit against the manufacturer of Provigil and four generic pharmaceutical companies based on four Hatch-Waxman reverse-payment settlements between 2005 and 2006. Plaintiffs claim that the settlements delayed the market entry of generic Provigil and therefore caused inflated market prices. The prospective class includes drug wholesalers that purchased that brand-name drug between June 24, 2006, and August 31, 2012.

On July 27, 2015, Judge Goldberg granted direct purchasers' initial motion for class certification. Defendants obtained appellate review of that decision under Federal Rule of Civil Procedure 23(f). On September 13, 2016, the Third Circuit vacated Judge Goldberg's class certification ruling and remanded for further consideration of the numerosity requirement under Federal Rule of Civil Procedure 23(a)(1). The Third Circuit concluded that Judge Goldberg abused his discretion by (1)

“improperly emphasizing the late stage of the proceeding” and (2) neglecting to consider the “ability of individual class members to pursue their cases through the use of joinder” as opposed to individual cases. *In re Modafinil Antitrust Litig.*, 837 F.3d at 249.

Decisions

A party seeking class certification must show, among other things, that joinder of absent class members would be impracticable. Federal Rule of Civil Procedure 23(a)(1). The district court examined the issue of impracticability using the guidance provided by the Third Circuit and denied the direct purchasers' supplemental motion for class certification. The Third Circuit had observed that because the prospective class was “relatively small,” the “inquiry in impracticability should be particularly rigorous when the putative class consists of fewer than forty members.” *Id.* at 250.

The Third Circuit identified “judicial economy” and “ability and motivation of the prospective class members to litigate as joint plaintiffs” as the most important issues in the numerosity analysis. Judicial economy is the impact on the court docket and litigation if the class is not certified and the case proceeds with multiple plaintiffs. The ability and motivation of the prospective class members to litigate as joint plaintiffs is the assessment of the likelihood of joinder under the particular circumstances of the prospective class. This guided the district court's analysis on remand.

Judicial Economy. The district court concluded that judicial economy concerns weighed against certifying the direct purchaser class because of (i) the relatively small size of the putative class and (ii) the likelihood that plaintiffs could use cost and resource sharing mechanisms to eliminate or attenuate the administrative burden of joinder. That nine opt-out retailer plaintiffs in the same case had successfully used cost and resource sharing strategies—including filing joint motions and sharing experts—convinced the court that joinder would not result in unwieldy or burdensome litigation. Although the district court had previously concluded that the late stage of the proceedings and sunk litigation costs weighed in favor of certification, the Third Circuit “constrained” it to exclude consideration of “sunk costs” or the potential for further trial delay from its analysis.

Ability and Motivation to Litigate as Joint Plaintiffs. The district court first acknowledged that “the Third Circuit has spoken very clearly and directly about the ability and motivation of the proposed class members, stating that the class members appear likely to have the ability and incentive to bring suit as joined parties.” The district court rejected direct purchasers' argument that class members with trebled damages below \$5 million had “negative value claims” because the costs of joining the lawsuit would exceed their potential recovery. It found: (i) direct purchasers presented no evidence that the putative class members would actually spend the amount they estimated through trial and (ii) the “reality of contingent representation” eroded the negative value argument as to attorneys' fees. That the class members would likely share some, “if not the majority,” of litigation costs further suggested that the directed purchasers had the ability and motivation to litigate through joinder.²

Separately, the District Court rejected a settlement agreement between the direct purchasers and another defendant, for the same reasons. The court held that because under Supreme Court authority “there is no lower standard for the certification of a settlement class than there is for

litigation classes,” and the definitions of the proposed settlement class and the litigation class were “identical in all material respects,” the settlement class also failed to satisfy the numerosity requirement.³

Implications

King Drug has important potential implications. It appears to be the first Hatch-Waxman reverse-payment decision to reject a direct purchaser class or a settlement with such a class on numerosity grounds. Until now, courts had routinely certified (and approved settlements based on) direct purchases classes. Most wholesale drug purchases in the United States are made by three large firms, and there are typically a limited number of smaller wholesalers that comprise the rest of the putative class. Indeed, the Third Circuit observed that “the majority [has] never seen a class action where three class members, each with billions of dollars at stake and close to 100% of the total value of class claims between them, have been allowed to sit on the sidelines as unnamed class members.” *Modafinil*, 837 F. 3d at 259. The Third Circuit’s opinion, and the district court’s decision on remand, give future defendants powerful authority to contest class certification on numerosity grounds.

¹ *King Drug Company of Florence Inc., et al. v. Cephalon, Inc., et al.*, No. 2:06-cv-1797, Order, August 28, 2017, ECF No. 1074.

² The district court addressed and dismissed the remaining factors—the financial resources of class members, their geographic dispersion, and the ability to identify future claimants—as not determinative.

³ *King Drug Company of Florence Inc., et al. v. Cephalon, Inc., et al.*, No. 2:06-cv-1797, Order, August 28, 2017, ECF No. 1074.

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