

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUL 28 2000

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

IN RE:)
)
 VITAMINS ANTITRUST LITIGATION)
)
) Misc. No. 99-197 (TFH)
)
 THIS DOCUMENT RELATES TO:)
)
)
 ALL ACTIONS.)

MEMORANDUM OPINION

Pending before the Court is defendants Akzo Nobel, Inc., ConAgra, Inc., DCV, Inc., DuCoa, L.P., and E.I. du Pont de Nemours and Company's ("Moving Defendants") Motion for Reconsideration and Clarification of the Court's May 9, 2000 Order and Memorandum Opinion on Motions to Dismiss and/or Sever. Upon careful consideration of the briefs and the entire record herein, the Court will deny Defendants' Motions for Reconsideration and Certification for Interlocutory Appeal and will grant in part and defer ruling in part on their Motion for Clarification.

I. DISCUSSION

A. Motion for Reconsideration

The Moving defendants argue that this Court should reconsider its ruling that at this stage in the litigation, based on the allegations in their complaints, the Court would allow the direct action opt-out plaintiffs to proceed on a single conspiracy theory despite the Court's conditional certification of two separate settlement classes in the class proceedings. See Def. Mem. at 1-13. After considering the standards for reconsideration and the facts of this case, the Court will deny the instant Motion for Reconsideration for the following reasons.

(2)

and

While this Court has discretion to reconsider interlocutory orders, the Supreme Court has admonished that “courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.” Davis v. Lehane, 89 F. Supp. 2d 142, 147 (D. Mass. 2000) (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988)). Thus, in light of the need for finality in judicial decision-making, “a court should grant a motion for reconsideration of an interlocutory order only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order. Id. In this case, the Moving Defendants have failed to meet their burden of demonstrating that reconsideration is warranted under these principles.

The Moving Defendants do not contend that there has been an intervening change in the law or that new, previously unavailable evidence has been discovered. Instead, relying on the Supreme Court’s decision in Amchem Products, Inc. v. George Windsor, 521 U.S. 591 (1997), a case discussed at considerable length in their original motions to dismiss and/or sever, the Moving Defendants argue that under the principles of stare decisis and/or collateral estoppel, this Court should have dismissed plaintiffs’ allegations of a single overarching conspiracy, or at least should have severed the choline chloride defendants, in light of the Court’s earlier certification of two separate settlement classes in the class action suit.¹ This argument was fully presented to this Court in the Moving Defendants’ motions to dismiss and/or sever and during oral argument

¹ Specifically, the Court held that while it might be proper to sever aspects of the direct action opt-out plaintiffs’ case at a more advanced stage when discovery is completed and all relevant facts have been disclosed, “it would be improper to prejudge the scope of the conspiracy that plaintiffs allege.” See May 9, 2000 Mem. Op. at 33, citing SEC v. National Student Marketing Corp., 360 F. Supp. 284, 296 (D.D.C. 1973).

on these motions. See Memorandum of Points and Authorities in Support of Defendant E.I. DuPont de Nemours and Company, Akzo Nobel, Inc., and Conagra, Inc.'s Motion to Dismiss and Motion to Sever at 3 (arguing that single conspiracy theory is contrary to Court's conditional certification of two separate classes); Tr. 4/19/00 at 18-21, 30, 34, 54-55 (various arguments by both sides on issue of whether Amchem and Court's approval of two settlement classes prevents opt-out plaintiffs from alleging one conspiracy). Thus, since this Court has already considered and rejected the identical arguments made by the Moving Defendants in this Motion, the Motion for Reconsideration must be denied unless the Court finds that its prior ruling was clearly erroneous. See Davis, 89 F. Supp. 2d at 149 (A "motion for reconsideration is not an opportunity for a party to improve upon his arguments or try out new arguments; nor is it properly a forum for a party to vent his dissatisfaction with the Court's ruling. Rather . . . there must be a reason why the court should reconsider a prior decision and the movant must set forth facts or law of a strongly convincing nature to induce the court to reverse the prior decision.")

Upon reflection, this Court finds no clear error or inconsistency in its certification of two settlement classes of purchasers in the class action suit and its conclusion that, based on the allegations in their complaints, the direct action opt-out plaintiffs can proceed at this stage on their theory of the case as a single world-wide conspiracy. The Moving Defendants rely almost exclusively on Amchem, 521 U.S. at 591, to support their argument that this Court is bound by its certification of the two settlement classes and cannot now allow the opt-out plaintiffs to proceed on a single-conspiracy theory. However, there is no language in Amchem that compels this conclusion. In Amchem, the Supreme Court decertified a class comprised of countless numbers of people, each of whom allegedly had been, or someday might be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies, attributable

to a defendant, or whose spouse or family member had been so exposed. Id. at 597. Although the District Court's certification was based on the commonality of the proposed class, i.e., that "[t]he members of the class have all been exposed to asbestos products supplied by the defendant," the Supreme Court found that "given the greater number of questions peculiar to several categories of class members, and to the individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos cannot satisfy the Rule 23(b)(3) requirement." Id. at 623-24. This holding is not at all inconsistent with the notion that separate certified classes may retain a common "overarching dispute" despite other differences. There is simply no language in Amchem or any other case cited by Moving Defendants that compels the conclusion that certification of separate settlement classes alone constitutes a finding that injuries to each class resulted from different sets of facts. Indeed, in Amchem, the plaintiffs' and potential plaintiffs' claims all arose from the same set of facts – their exposure to asbestos and asbestos products manufactured by defendants in that case and the health consequences of such exposure.

Furthermore, there is no language in Amchem to suggest that a court may not divide a group of plaintiffs with injuries arising from the same set of facts into separate classes for purposes of settlement, while at the same time allowing those plaintiffs who opted out of the settlement and thus chose not to be members of any of these classes to pursue their litigation in the way they see fit, so long as that vision of the case is adequately alleged in their pleadings. The Court finds no support for Moving Defendants' suggestion that this Court's certification of two settlement classes constitutes a finding of fact that two separate conspiracies existed. In fact, when certifying these settlement classes, the Court made no such finding. Instead, the Court found, as required by Fed. R. Civ. P. 23(b)(3) that questions of law or fact common to the

members of the class predominated over any questions affecting individual members and that the class action was superior to other methods for the fair and efficient adjudication of the controversy. See Fed. R. Civ. P. 23(b). It is conceivable that the Court could have certified one settlement class; however, the fact that it ultimately chose to follow class plaintiffs' wishes and certify two separate classes does not reflect any view of this Court as to the ultimate scope of the alleged conspiracy or conspiracies. The Court's certification decision merely reflected its conclusion that the settlement classes would adequately achieve the goals of Rule 23(b)(3), that is it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." See Fed. R. Civ. P. 23 Advisory Committee's Note. The Court never concluded that one settlement class could not have achieved the same result or that by certifying two classes it was making a factual finding that multiple conspiracies existed in this case.

As explained in the May 9, 2000 Memorandum Opinion, this Court believes that there are multiple methods of viewing the same set of facts and there is no caselaw compelling this Court to bind the opt-out plaintiffs to the settling classes' view of the case. In fact, settlements often reflect different strategic considerations than cases that are actually litigated. The Supreme Court even noted this unique aspect of settlements in Amchem when it found that "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems. . . ." Id. at 620. Significantly, the Court discussed what it perceived to be a crucial difference between certifying settlement-only classes and allowing opt-out plaintiffs to proceed at this early stage in the litigation on the basis of their adequately pled theory of the case, the difference being that "a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class,

informed by the proceedings as they unfold.” Id. In this case, the Court has left open the possibility that it may later decide to sever these cases for trial but that at this early stage in the litigation, where plaintiffs have adequately pled the existence of a world-wide conspiracy, the Court finds severance unwarranted. Since Moving Defendants have cited no controlling authority which would require this Court to hold that its certification of two settlement classes constituted a finding of fact that two separate conspiracies exist in this case, the Court finds stare decisis inapplicable here.

Moreover, the Court finds that the principle of collateral estoppel is equally inapplicable in this case. Collateral estoppel applies only to an issue that was: (1) actually litigated and (2) determined by a valid, final judgment on the merits (3) after a full and fair opportunity for litigation by the parties or their privies (4) under circumstances where the determination was essential to the judgment, and not merely dictum. Patton v. Klein, 746 A.2d 866, 871 (D.C. 1999). Under these principles, collateral estoppel does not dictate an outcome in this case on the scope or number of vitamins-related conspiracies by virtue of this Court’s approval of the class certifications and class settlements. As discussed above, the fact that the Court scrutinized the factual basis for the proposed settlement classes in accordance with Amchem does not constitute a finding on the scope or number of conspiracies. Moreover, this issue was not “actually litigated” since it was not “contested by the parties and submitted for determination by the court.” Otherson v. Dept. of Justice, 711 F.2d 267, 273 (D.C. Cir. 1983). In fact, class counsel has stated on the record in open court that class plaintiffs “did not take a position one way or another” as to whether there was sufficient evidence to constitute an “overarching conspiracy” and that the settlement was structured with separate multi-vitamins and choline chloride classes simply “for case management purposes” as part of a negotiated compromise.” Tr. 4/19/00 at 39.

Therefore, the issue of separate and distinct conspiracies was never addressed, let alone resolved, by this Court in connection with the class certifications or class settlements.

Furthermore, the Court agrees with the direct action opt-out plaintiffs that they have not had a full and fair opportunity to litigate the issue of whether there were one or multiple conspiracies. Nowhere in the course of presenting the settlement for Court approval was it ever suggested that the Court's certification of two separate settlement classes bound the opt-out plaintiffs on the issue of the scope and number of conspiracies. Therefore, the opt-out plaintiffs were not on notice that they could be bound by the Court's certification of the settlement classes. Moreover, even if they had been on notice, they had no real opportunity to contest the Court's certification of these two classes, because the Court denied their motions to intervene and held that they lacked standing to challenge the settlement agreement once they had opted-out of the class.² There is simply no authority for the Moving Defendants' proposition that the opt-out plaintiffs should be bound by the Court's certification of the two settlement classes in the class action. In fact, the Seventh Circuit has found that "[u]nder the scheme of the revised Rule 23, a member of the class must cast his lot at the beginning of the suit and all parties are bound, for good or ill, by the results. Someone who opted out could take his chances separately, but the separate suit would proceed as if the class action had never been filed." Premier Electrical Constr. Co. v. Natl. Electrical Contractors Assoc., 814 F.2d 358, 362 (7th Cir. 1987) (emphasis added). This language suggests quite clearly that Moving Defendants are incorrect in their assertion that opt-out plaintiffs should be bound by all decisions made by the Court in connection

² This decision was subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit. See In Re: Vitamins Antitrust Class Actions, et. al., 2000 WL 669840 (D.C. Cir. June 9, 2000).

with the class action settlements. The fatal error in the Moving Defendants' reasoning is their failure to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost. Accordingly, this Court cannot find that the direct action opt-out plaintiffs had a full and fair opportunity to litigate the issue of whether there was a single or multiple conspiracies in this case. Therefore, the doctrine of collateral estoppel is inapplicable here.

Since neither the principle of stare decisis nor the doctrine of collateral estoppel are applicable in this situation and since this Court finds no clear error in its denial of the motions to sever at this stage in the litigation, the Court will deny the Moving Defendants' Motion for Reconsideration.

B. Motion for Certification for Interlocutory Appeal

The Moving Defendants also request that if this Court denies their Motion for Reconsideration, the Court certify this issue for interlocutory appeal.³ Under 28 U.S.C. § 1292(b), a district court may certify an issue for interlocutory appeal if it finds that the non-final order "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the

³ The precise wording of the Moving Defendants' certification request is as follows: "Whether, given the Supreme Court's holding in Amchem Products, Inc. v. George Windsor, 521 U.S. 591, 620 (1997) that a district court may not certify a settlement class unless it meets the requirements of Fed. R. Civ. P. 23(a) and (b), the doctrine of stare decisis and/or collateral estoppel require a district court that has approved class action settlements based on a factual finding of at least two separate and distinct classes and conspiracies affecting the vitamin industry (multivitamin and choline chloride) to thereafter apply its finding on the scope of the conspiracies to related actions pending in the same MDL proceedings, based on the same facts, by plaintiffs seeking to combine the distinct classes and conspiracies previously found by the court and pursue an overbroad, single all-vitamins conspiracy claim?"

ultimate termination of the litigation.” Foster v. United States, 926 F. Supp. 199, 202 (D.D.C. 1996), citing Trout v. Garrett, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989). Accordingly, in order to establish a basis for interlocutory appeal, the moving party must demonstrate three things: (1) that the issue involves a controlling question of law; (2) that substantial contrary authority or other grounds for a difference of opinion exist; and (3) that immediate appeal would materially advance the ultimate termination of the litigation. Id. Although the decision of whether to certify an issue for interlocutory appeal is addressed to the Court’s discretion, id., “interlocutory appeals under 28 U.S.C. § 1292(b) are rarely allowed” and the burden is on movants to show that “exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1116 (D.D.C. 1996).

This Court finds an interlocutory appeal unwarranted in this case. First, piecemeal appellate review of this lawsuit will not materially advance the termination of this action. Instead, this case will undoubtedly be delayed if the Court certifies the Moving Defendants’ question for appellate review. The parties’ discovery plan would be the first victim of this delay and this would frustrate the MDL procedures that contemplate “that the interests of justice c[an] best be served by conducting consolidated and coordinated discovery. . . .” See 5/9/00 Mem. Ord. at 36 n. 20. Second, the Moving Defendants have offered no caselaw or any other authority demonstrating a substantial ground for difference of opinion on this issue. In fact, other than their own personal disagreement with the Court’s decision, the Court has no reason to believe that such a difference of opinion even exists. See First American Corp., 948 F. Supp. at 1116 (“Mere disagreement, even if vehement, with a court’s ruling on a motion to dismiss does not establish a ‘substantial ground for difference of opinion’ sufficient to satisfy the statutory

requirements for an interlocutory appeal.”) Finally, the Court finds that the rights of these parties will not be irretrievably lost in the absence of an immediate appeal. In fact, an appeal may ultimately prove unwarranted since this Court has reserved the right to later sever these actions if, after the close of discovery, the facts suggest that multiple conspiracies do in fact exist. Defendants’ argument that they will suffer prejudice if denied an interlocutory appeal because they will be forced to submit to more extensive discovery certainly does not rise to the level of an irretrievable loss of a fundamental right. Therefore, since the Moving Defendants have not met their burden of justifying an interlocutory appeal in this case, the Court will deny their request for certification.

C. Motion for Clarification

The Moving Defendants request two clarifications of the Court’s May 9, 2000 Memorandum Opinion. First, they ask that the Court clarify the sentence on page 11 of that Opinion which states that “the Court is satisfied that plaintiffs have exercised due diligence and that the alleged conspiracy could not have been discovered earlier due to defendants’ acts of concealment.” The defendants are concerned that, although the Opinion makes clear that the Court’s analysis of the fraudulent concealment claims is made only in the context of the sufficiency of plaintiffs’ pleadings, the sentence on page 11 could be interpreted to suggest that the Court has made a factual finding concerning the plaintiffs’ alleged exercise of due diligence. Although the Court agrees with plaintiffs that this statement was “clearly made in the context of examining the adequacy of plaintiffs’ allegations for the purposes of ruling on a motion to dismiss,” the Court will grant defendants’ request for clarification since this sentence, if read out of context, could be misleading. Therefore, this Court will clarify the sentence on page 11 so that all parties are clear that the Court, in discussing the sufficiency of plaintiffs’ fraudulent

concealment allegations, was only ruling on the adequacy of these allegations at the pleading stage and did not make any findings of fact on the issue since no evidence has yet been presented.

Second, the Moving Defendants request that the limited relief granted to Degussa-Huls Corp., DuCoa L.P. and DCV, Inc. in the Court's May 9, 2000 Memorandum Opinion and Order with regard to the Donnelly Act and the Florida Deceptive and Unfair Trade Practice Act ("FDUPTA") claims be extended to all defendants sued by the NBTY, et al. plaintiffs and the Tyson, et al. plaintiff Publix. However, the Court will defer clarification on these issues, because they are the subject of pending motions for reconsideration.⁴ For purposes of efficiency and clarity, the Court will defer any clarification on the scope of its Donnelly Act and FDUPTA holdings until it considers and rules on the pending motions for reconsideration; at that point, the Court will clarify which defendants are affected by its ruling.

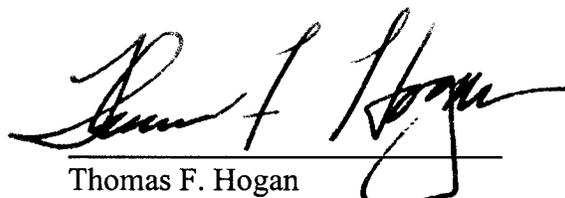
II. CONCLUSION

For the foregoing reasons, the Court will deny the Moving Defendants' Motion to Reconsider the Court's May 9, 2000 Memorandum Opinion and Order and their alternative request that the Court certify the issue for immediate interlocutory appeal. In addition, the Court will grant the Moving Defendants' request for clarification of the sentence on page 11 of its May 9, 2000 Memorandum Opinion to confirm that this Court has only ruled on the sufficiency of plaintiffs' fraudulent concealment pleadings and has not made any evidentiary findings of fact on

⁴ Plaintiff Bristol-Myers, joined by the NBTY, et al. plaintiffs, has moved for reconsideration of the Court's ruling on the Donnelly Act indirect claim regarding vitamin purchases before December 23, 1998, and Plaintiff Publix has moved for reconsideration of the application of its FDUPTA claim to vitamin purchases before June 30, 1993. The Court has previously stated its intention to defer ruling on these motions until briefing is complete. See 6/6/00 Order.

that issue. Finally, the Court will defer clarification of the May 9, 2000 Memorandum Opinion and Order with respect to extending the relief granted to Degussa-Huls Corp., DuCoa L.P., and DCV, Inc. to other defendants until the Court has ruled on the applicable pending motions for reconsideration. An order will accompany this Opinion.

July 21, 2000


Thomas F. Hogan
United States District Judge