

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA
JCCP 004032**

Date: Wednesday, August 19, 1999 HONORABLE DANIEL SOLIS PRATT Judge Y. KRANTZ Deputy Sheriff	 	DEPT. SE D S. WORTHEN Deputy Clerk NONE Court Reporter
4:00 am	JCCP004032 IN RE: DIET DRUG CASES	Plaintiff Counsel Defendant Counsel

NATURE OF PROCEEDINGS: ORDER RE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

CLASS CERTIFICATION: ORDER

Class certification is **DENIED**. CCP ' 382.

INTRODUCTION

Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. @ Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 469, quoting Eisen v. Carlisle & Jacquelin (2d Cir. 1968) 391 F.2d 555, 560.

CALIFORNIA FACTORS TEST, CCP ' 382

The party seeking certification as a class representative must establish the existence of an ascertainable class and a well defined community of interest among the class members. [Citation.] The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (See Civ. Code, ' 1781, subds. (b)(2)-(4).)" Richmond, supra, at p. 470.

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Issues predominate when they are the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance. @ Vasquez v. Superior Court (1971) 4 Cal.3d 800, 810.

Note: The requirement that common issues predominate parallels Fed. R. Civ. P. 23(b)(3). Contrast Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) applies to equitable actions. It requires only that a common issue exists, not that common issues predominate. Though courts look to Rule 23 and federal decisions applying it for guidance in class action matters (see, e.g., Vasquez, supra, at p. 821), the court has discovered no example where a California court has certified a class under an analog of Rule 23(b)(2). In California, legal and equitable causes of action are treated equally with respect to certification. See Weaver v. Pasadena Tournament of Roses (1948) 32 Cal.2d 833, 837.

In considering class certification, the court must refrain from inquiring into the merits. See Eisen v. Carlisle & Jacquelin (1973) 417 U.S. 156, 177-178. However, at the same time the court must go beyond the pleadings and "understand the claims, defenses, relevant facts, and applicable substantive law" and must analyze how issues will play out at trial. Castano v. American Tobacco Co. (5th Cir. 1996) 84 F.3d 734, 744, 745; see General Telephone Co. of the Southwest v. Falcon (1982) 457 U.S. 147, 160.

PRESENT CASE

Plaintiffs bring causes of action for products liability, negligence, fraud, and violations of B&P ' ' 17200 and 17500.

The issues at trial will include, but not be limited to: Whether fenfluramine and dexfenfluramine are hazardous (which will require an inquiry into length of treatment and dosages); what defendant knew about any hazard and when it knew it; what warnings defendant gave and when;

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whether the warnings were adequate; whether defendant concealed any hazards; whether defendant has any affirmative defenses; and the extent of plaintiffs' damages.

COMMON ISSUES

These issues range from common to unique. Whether fenfluramine and dexfenfluramine are hazardous and whether some form of medical monitoring is required may be issues common either to all plaintiffs or to discrete subgroups. Semi-common issues include what did defendant know (or what should it have known) about the hazards of fenfluramine and dexfenfluramine at specified times and what warnings did it give.

DISPARATE ISSUES

Thereafter, commonality wanes and disparity waxes. The amount of the diet drugs each plaintiff took, whether a drug was taken alone or in combination with other drugs, the length of time they were taken, and factors unique to each plaintiff (such as age, weight, medical history, etc.) present increasingly disparate issues relating to risk and damages. (The court understands

plaintiff's argument that these issues could require common proof in that plaintiffs could seek to establish some sort of grid of factors by which the extent of defendant's liability may be established. Each member of the class would then be placed on the grid according to the results of a questionnaire each would complete before receiving treatment. If the court disregards defendant's right to challenge a member's answers, these issues may, arguably, become common issues.)

However, the knowledge and intent of each prescribing physician and the knowledge and actions of each plaintiff (which are relevant to defendant's affirmative defenses) are issues of fact ineluctably unique to each plaintiff. See Georgine v. Amchem Products, Inc. (3d Cir. 1996) 83 F.3d 610, 627, *affd. sub nom. Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591

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[ADifferences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.]; Barnes v. American Tobacco Co. (3d Cir. 1998) 161 F.3d 127, 146-149 [defenses raise individual issues precluding certification].

Plaintiffs argue Alearned intermediary@ and Aassumption of the risk@ defenses are barred where the drug manufacturer concealed the risks of the medication from physicians, the FDA, and consumers. This argument is supported neither by the cases plaintiffs cite nor by any law the court has found. Contra, Plenger v. Alza Corp. (1992) 11 Cal.App.4th 349, 362 [manufacturer not required to warn of a risk readily known and apparent to the physician]; Barnes, *supra*, 146-149.

Plaintiffs also argue seven other states have considered and rejected Athe very same arguments AHP reiterates here.@ Reply. p. 1. On the contrary, though Judge Corodemus in Vadino v. American Home Products Corp. (1999) Middlesex Co. Case No. MID-L-425-98 Aidentified fourteen questions of fact and law in the litigation before it that are common to the class@(p. 14), the court nevertheless concluded Acommon issues of law and fact do not predominate over individual issues concerning causation and defendants' affirmative defenses@ (P. 29.) The Supreme Court in Arkansas similarly found common issues do not predominate. Baker v. Wyeth-Ayerst Laboratories (1999) 992 S.W.2d 797; 338 Ark 242, 249.

The New Jersey, West Virginia and Washington courts certified their respective actions under local statutes that parallel Fed. R. Civ. P. 23(b)(2) by requiring only that common issues exist, not that they predominate. Respectively, Vadino, *supra*, at p. 25; Burch v. American Home Products Corp. (1998) Brooke C. Cir. Ct., Case No. 97-C-204, p. 25; Fred St. John, et al. v. American Home Products Corp., et al. (1998) No. 97-2-06368-4, Wash. Super., Spokane Co., p. 9, 12, 14. As California law requires predominance, these decisions are not on point. Though the West Virginia court also certified under a statute paralleling Rule 23(b)(3), it did so only with

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respect to the common issues, ruling Athe individual causation and damages issues can be determined in subsequent mini-trials should there be a dispute.@ Burch, at p. 43.

The court will not follow this example by bifurcating this case into certified and non-certified proceedings because few common issues can be resolved in a certified stage. See Baker, supra, 338 Ark. at p. 250. A[E]ach member must not be required to individually litigate numerous and substantial questions to determine his right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and the litigants.@ City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 460.

Though the Pennsylvania court found common issues predominate, it ignored, without explanation, issues regarding causation and affirmative defenses, merely quoting, sans analysis, from a contract interpretation case that A'Common questions will generally exist if the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent.'@ In re Pennsylvania Diet Drugs Litig. (PA 1999) Master Docket No. 9709-3162, p. 20, quoting Janicik v. Prudential Insurance Co. (1982) 451 A.2d 451, 457 (internal quote in Janicik omitted). The rationale adopted by the Pennsylvania court is not persuasive here.

(The court does not have before it the reasoning behind the Texas, Illinois and Kentucky decisions, and thus cannot determine whether or how those courts found common issues predominate.)

The court finds common issues do not predominate.

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SUPERIOR METHOD OF ADJUDICATION FOR THE B&P CLAIMS

Plaintiffs argue at least their unfair competition claims should be certified because they do not require consideration of issues relating to reliance, comparative fault or damages, but instead focus solely on defendant's misconduct.

To justify certification, not only must common issues predominate, but ~~A~~the representative plaintiff must show substantial benefit will result both to the litigants and to the court~~@~~ if the claim is treated as a class action. Blue Chip Stamps v. Superior Court (1978) 18 Cal.3d 381, 385. This ~~A~~substantial benefit~~@~~ requirement embodies the federal requirement that a class action be ~~A~~superior to other available methods for the fair and efficient adjudication of the controversy.~~@~~ Fed. R. Civ. P. 23(b)(3); Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal.App.3d 758, 773.

An action for unfair competition may be brought by ~~A~~any person acting for the interests of itself, its members or the [absent] general public.~~@~~ B&P ' 17204. Therefore, it enjoys quasi-class benefits without requiring certification.

~~A~~The court in such a suit is empowered to grant equitable relief, including restitution in favor of absent persons, without certifying a class action. [Citations.] In contrast to the streamlined procedure expressly provided by the Legislature, the management of a class action is a difficult legal and administrative task.~~@~~

Dean Witter, supra, at p. 773, internal citations and quotation omitted.

Thus, even if there were no disparate issues ~~A~~there is no basis for a finding that the class certification presents a superior method for adjudicating the unfair competition claims.~~@~~ *Ibid.*

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Though in a ' 17204 suit absent persons will not be bound by any individual judgment, and may thus come to re-litigate issues, this possibility poses a threat only to defendant. Here, however, Adefendant opposes class certification and will presumably not be heard to complain later if it suffers adverse consequences as a result.@ *Id.* at p. 773-774.

The court finds class certification would not present a superior method for adjudication of plaintiffs' unfair competition claims. (Of course, the court makes no determination regarding the propriety of bringing a ' 17204 action, but simply finds any such action would not be superior to a class action.)

Plaintiffs argue that without class certification it is likely many diet drug users will find it difficult or impossible to pay for necessary medical examinations. Motion, p. 5. The court is sensitive to this concern. However, Afairness to the plaintiffs alone cannot compensate for the lack of predominance.@ Baker, *supra*, 338 Ark. at p. 251.

Because common issues do not predominate and plaintiffs' unfair competition actions are not suitable for class treatment, the court does not decide whether plaintiffs 1) present claims typical of the class or 2) can adequately represent the class. Richmond, *supra*, at p. 470.

Pursuant to the above reasoning, plaintiff's motion for class certification is denied.

A copy of this order is sent electronically and by fax to counsel for moving party and to all liaison counsel.

