

**Order Denying Motion For Reconsideration But Granting
Leave To File Renewed Motion For Class Certification**

09/26/2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA)
PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407
ORDER DENYING MOTION FOR
RECONSIDERATION BUT
GRANTING LEAVE TO FILE
RENEWED MOTION FOR CLASS
CERTIFICATION

This document relates to:

Bowen v. Schering-Plough Corp.,
No. C01-303R

Kamla v. GlaxoSmithKline Corp.,
et al., No. C01-304R,

Wurz, et al. v. American Home
Products Corp., No. C01-306R

Anderson, et al. v. Bayer Corp.,
No. C01-307R

French, et al. v. Bristol-Myers
Squibb Co., No. C01-308R

Turner, et al. v. Novartis
Corp., et al., No. C01-309R

I. INTRODUCTION

Plaintiffs filed a Motion for Reconsideration Pursuant to Local Rule 7(h)(1) and Fed. R. Civ. P. 59(e) or in the Alternative for Renewal of Motion for Class Certification Pursuant to Rule 23(b)(3) for Economic Injury Claims ("Plaintiffs' Motion"). Having reviewed this motion, along with the remainder of the record, and, being fully advised, the court finds and concludes as follows:

II. BACKGROUND

Plaintiffs sought class certification in six different cases, each

pending against a different defendant. In each case, plaintiffs originally pursued certification of two different classes, the first under two causes of action, and the second under four causes of action. During oral argument, however, plaintiffs essentially limited their class claims to only one class - "Class II" - pursuing only two causes of action - implied warranty and unjust enrichment. They proposed subclasses based on the two causes of action, and one sub-subclass to account for a material variation in state law. The court thereafter issued an Order Denying Motion for Class Certification Pursuant to Rule 23(b)(3) for Economic Injury Claims ("Order"), based on plaintiffs' failure to adequately demonstrate the predominance of common issues of law or to provide the court with a suitable trial plan.

Plaintiffs now request reconsideration of the court's order denying class certification. They argue that the court committed manifest error in failing to certify the class, contending that the differences in state law pointed out by defendants were not material to this case. Although the court mentioned in dicta that the parties had reached different conclusions as to the state laws containing privity requirements, see Order at 9 n.7 and 15 n.13, plaintiffs misconstrue this point as a basis upon which class certification was denied. Plaintiffs also argue that the court wrongly asserted their failure to identify subclass representatives or to offer a suitable trial plan. Essentially, plaintiffs make the arguments in their motion for reconsideration, concerning the lack of materiality of the alleged variations, that they failed to make in their reply briefing. See Order at 14.22 Similarly, only in their motion for reconsideration did plaintiffs supply sample jury instructions and verdict forms. See Order at 15 and Plaintiffs' Motion at 4.

III. DISCUSSION

A. Motion for Reconsideration:

Local Rule 7(h) provides:

Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

Although plaintiffs belatedly provide, in their motion for

reconsideration, some of the arguments and information identified by the court as missing from their class certification briefing, the court does not find that they have identified either a manifest error in the court's ruling or a showing of new legal facts or authority which they could not have earlier brought to the court's attention. As such, the court declines to reconsider its order denying class certification.

B. Renewed Motion for Class Certification:

As an alternative to reconsideration, plaintiffs request a renewal of their motion for class certification. The court possesses wide latitude to address the propriety of class certification. See Fed. R. Civ. P. 23(c)(1) (allowing for the altering or amending of an order regarding certification at any time before a decision on the merits); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 & n.11 (1978) ("a district court's order denying or granting class status is inherently tentative."); Armstrong v. Davis, 275 F.3d 849, 871 & n.28 (9th Cir. 2001) ("[Rule 23] provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court.")

The class that plaintiffs were proposing at the time of the court's order denying certification was dramatically different from that originally proposed by plaintiffs. The court finds that briefing tailored to the narrowed class would be both appropriate and helpful to the court in rendering a class certification decision. As such, although denying plaintiffs' motion for reconsideration, the court grants plaintiffs leave to file a renewed motion for class certification.

In renewing their motion for class certification, plaintiffs should direct their attention to the discrete class and claims at issue: Class II claims under theories of unjust enrichment and implied warranty.³³ To the extent the Wurz plaintiffs intend to continue their pursuit of an express warranty claim against defendant American Home Products, this claim should also be addressed in the briefing. Moreover, as identified in the court's order denying class certification, see Order at 16, plaintiffs should demonstrate in their briefing that each subclass, and if appropriate any sub-subclass,⁴⁴ Plaintiffs maintain the prematurity of a finding as to the need for a privity sub-subclass. See Plaintiffs' Motion at 3. However, because, in the court's opinion, the creation of such a sub-subclass appears likely, any possible preparation on this issue

would be helpful. satisfies all of the requirements of Rule 23. See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190, amended by 273 F.3d 1266 (9th Cir. 2001); In re Teletronics Pacing Sys., Inc., 172 F.R.D. 271, 278 (S.D. Ohio 1997). Plaintiffs should also incorporate into their renewed motion for class certification the new arguments and information submitted in their motion for reconsideration.

Additionally, the court finds that a renewed motion for class certification would serve the purpose of addressing issues raised in the June 28, 2002 status conference, but not briefed extensively, if at all, in the original round of certification briefing. As such, the court requests that the renewed motion for class certification briefing also take the specific issues delineated below into consideration.

1. Cy Pres or Fluid Recovery:

As the parties are aware, the court addressed plaintiffs' proposal for the adoption of a cy pres procedure, or fluid recovery, at length in the June status conference. See generally Transcript of Proceedings ("Transcript") (June 28, 2002). Given the court's continuing concern as to whether the adoption of such a procedure would be appropriate and/or permissible in this case, the parties should again address this issue in their renewed class certification briefing.

However, the briefing should also anticipate the possibility that the court may reject a fluid recovery procedure. See Order at 16 n.15 (citing Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990) as holding that Rule 23 does not permit "dispensing with individual proof of damages.")⁵⁵ Plaintiffs indicated their continued interest in pursuing class relief in the event the court denied their request for fluid recovery. See Transcript at 41. Although the court does not here reach a decision on this issue, it notes that a number of the named plaintiffs do not appear to possess any proof of possession of a PPA product as of November 6, 2000,⁶⁶ See Schering-Plough's Memorandum in Opposition to Plaintiffs' Motion for Class Certification at 8 (named plaintiff Douglas Bowen admitted to discarding all medications containing PPA following FDA advisory); Bristol-Myers Squibb Memorandum in Opposition to Plaintiffs' Motion for Class Certification at 3-4 (packaging produced by Nancy French in deposition indicated that the product did not contain PPA, and named plaintiff Terry Asbert conceded throwing away any PPA

products she found after the FDA advisory); GlaxoSmithKline's Memorandum in Opposition to Plaintiffs' Motion for Class Certification at 3-4 (named plaintiff Deborah Kamla lacks any proof that she possessed a PPA product as of November 6, 2000); Wyeth's Opposition to Plaintiffs' Motion for Class Certification at 3, 8 (the only product possessed by one of the two named plaintiffs in Wurz consists of a bottle which had expired in 1999). and, as a result, would not qualify as class representatives, or class members, without the adoption of a cy pres procedure.

2. Superiority:

The court also expressed concern relating to the Rule 23 superiority requirement. See Transcript at 64-73. Although the court does not here express an opinion as to whether the superiority-related issues discussed below would or could constitute legitimate bases for denial of class certification, it finds that briefing on the subject would be helpful.

a. Existing Remedy:

Defendants in these cases have PPA refund and product replacement programs available to individuals possessing proof of purchase. Should the court limit class membership to individuals possessing adequate proof of purchase, the question arises as to the superiority of litigating these class actions in light of the existing remedies. See, e.g., Webster v. Whitehall-Robins, et al., No. JCCP-4166, slip op. at 3-6 (Cal. Super. Ct. L.A. County August 23, 2002) (finding existence of PPA refund programs rendered class unsuitable for class certification).

b. Minimal Recovery Versus Costs and Burdens of Litigation:

In the June status conference, the court questioned the parties as to the superiority of class treatment given the possibility that costs in this case, including class notification and attorneys' fees, would far exceed the amount of individual recovery. See Transcript at 64-73. As such, the briefing should also address the issue of superiority in relation to the possibility of minimal recovery in the face of high costs and extensive burdens on the court.

C. Briefing Schedule:

The court requests that the parties meet and confer as to an appropriate briefing schedule for plaintiffs' renewed motion for class certification, and submit such schedule to the court for consideration within seven (7) days of this order. If the parties

are unable to reach an agreement on this issue, they shall present their alternative suggestions to the court.

IV. CONCLUSION

For the reasons stated above, the court hereby DENIES plaintiffs' motion for reconsideration, but GRANTS plaintiffs leave to file a renewed motion for class certification. In briefing the renewed motion, the parties shall address all of the issues discussed in this order. The parties are directed to submit either an agreed upon briefing schedule or their alternative suggestions for the schedule within seven (7) days of this order.

DATED at Seattle, Washington this 25th day of September, 2002.

/s/

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE