

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS : MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE, :
DEXFENFLURAMINE) PRODUCTS :
LIABILITY LITIGATION :
: :
THIS DOCUMENT RELATES TO: :
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SHEILA BROWN, et al. :
: :
v. :
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AMERICAN HOME PRODUCTS :
CORPORATION : CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO. _____

Bechtle, J. October , 2000

Presently before the court is Agnes Spoonhunter Logan's ("Logan") Motion to Intervene and for Rehearing on Pretrial Order No. 1415; defendant American Home Products Corporation's ("AHP") Opposition thereto and Logan's Reply to AHP's Opposition. For the reasons set forth below, the court will deny the motion.

I. BACKGROUND

Logan is the widow and personal representative of the estate of Raymond L. Logan, Jr., who died in 1998 from bacterial endocarditis allegedly resulting from the ingestion of the diet drugs at issue in this case. (Mot. to Intervene and for Reh'g on Pretrial Order No. 1415 ("Mot. to Intervene") at 1.) She is a Native American and a member of the Arapahoe Wind River Tribe in Wyoming. Id.

In Pretrial Order No. 1415, this court certified a

Settlement Class and approved the Nationwide Class Action Settlement Agreement between the parties in this action on August 28, 2000. Subject matter jurisdiction was based on diversity of citizenship.¹ (Mem. and Pretrial Order No. 1415 at 76.) Personal jurisdiction was based on extensive notice of the Settlement sent through various channels. Id. at 89-90. Pretrial Order No. 1415 was the culmination of the Settlement approval process, which began in November 1999 when the court ordered all Class Members and other interested parties to submit comments in opposition to the proposed Settlement before March 30, 2000. (Pretrial Order No. 997 ¶ 18.) Persons wishing to opt-out of the class were required to do so by that date. Id. ¶ 19. Also part of the approval process was a fairness hearing held in May 2000 at which anyone who had submitted objections pursuant to Pretrial Order No. 997 was given the opportunity to offer evidence concerning the proposed Settlement. See Mem. and Pretrial Order No. 1415 at 14 (discussing Fairness Hearing). Logan apparently did not opt-out of the Settlement or file an objection.

The class certified by the court in this action included, inter alia:

All persons in the United States, its possessions and territories who ingested Pondimin (R) and/or Redux (R) ("Diet Drug Recipients"), or their estates, administrators or other legal representatives, heirs or beneficiaries

¹ See 28 U.S.C. § 1332 (granting subject matter jurisdiction to the federal courts in suits between citizens of different states).

("Representative Claimants"), and any other person asserting the right to sue AHP or any Released Party . . . by reason of their personal relationship with the Diet Drug Recipient, including . . . spouses, . . . dependents, other relatives or 'significant others' ("Derivative Claimants").

(Pretrial Order No. 1415 ¶ 3.) Pretrial Order No. 1415 also enjoins all class members who have not timely opted out of the Settlement from "asserting, and/or continuing to prosecute against AHP or any other Released Party any and all Settled Claims which the class member had, has or may have in the future in any federal, state or territorial court." Pretrial Order No. 1415 ¶ 7.

On September 25, 2000, approximately one month after the entry of final judgement in Pretrial Order No. 1415, Logan filed a probate estate in the Shoshone and Arapahoe Tribal Court for the purpose of pursuing a wrongful death claim against AHP under the tribal code. (Reply to AHP's Opp'n to Mot. to Intervene and for Reh'g on Pretrial Order No. 1415 ("Reply to AHP's Opp'n") Ex. A, ¶ 5.)

Pursuant to Rules 23(d) and 59(e) of the Federal Rules of Civil Procedure, Logan seeks 1) an order permitting her to intervene in order to challenge her inclusion in the Settlement Class and 2) an order for a rehearing to request amendment of Pretrial Order No. 1415 or its alteration to reflect that she is not in the class.

II. LEGAL STANDARD

Whether to grant a Rule 59(e) motion is within the

discretion of the trial court.² Kiewit E. Co. v. L & R Constr. Co., Inc., 44 F.3d 1194, 1204 (3d Cir. 1995). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." Continental Casualty Co. v. Diversified Indus., Inc., 884 F.Supp. 937, 943 (E.D. Pa. 1995). Courts will reconsider an issue only "when there has been an intervening change in the controlling law, when new evidence has become available, or when there is a need to correct a clear error or prevent manifest injustice." NL Industries, Inc. v. Commercial Union Ins. Co., 65 F.3d 314, 324 n. 8 (3d Cir. 1995). Mere dissatisfaction with the Court's ruling is not a proper basis for reconsideration. Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993)

A motion to intervene must be timely.³ Pennsylvania v. Rizzo, 530 F.2d 501, 504 (3d Cir. 1976); see Fed. R. Civ. P. 24 (requiring "timely" application to intervene). Factors to consider in determining timeliness are how far the action has

² Logan's motion was filed within ten days after entry of final judgement in Pretrial Order No. 1415 and thus is timely for the purpose of a motion to alter or amend judgement. See Fed. R. Civ. P. 59(e) (requiring that motion to alter or amend judgement be filed within 10 days after entry of final judgement).

³ The court will presume that Logan moves to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure, even though she does not specifically state that in her motion.

progressed, any prejudice that delay may cause to other parties, and the justification for the delay. In re Fine Paper Antitrust Litig., 695 F.2d 494, 500 (3d Cir. 1982) (citing Rizzo, 530 F.2d at 506). Furthermore, "a motion to intervene after entry of a decree should be denied except in extraordinary circumstances." Id.

Rule 23(d) gives the court power to determine procedures that ensure the fair and efficient conduct of a class action. Fed. R. Civ. P. 23(d).

III. DISCUSSION

Logan asserts that as a Native American, the court is without personal jurisdiction over her due to sovereign immunity and that the action must be abated until the tribal court determines whether it has jurisdiction. AHP contends that Logan lacks standing to bring a Rule 59(e) motion because she is not a party and that her motion is defective both procedurally and on its merits. The court will address these arguments in turn.

A. Standing

Claims of unnamed class members may be barred absent timely intervention in a class action suit. See generally Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 680 (8th Cir. 1992) (requiring intervention as condition of appeal by unnamed class member); In re Fine Paper Antitrust Litig., 695 F.2d at 499 (holding that unnamed class members lacked standing to seek alteration of certification order because they failed to timely

intervene). If determined to be a class member within this court's jurisdiction, Logan will be precluded from bringing a suit against AHP in tribal court based upon claims stemming from her husband's death. Her interests are directly affected by this court's interpretation of Pretrial Order No. 1415. Because her challenges to jurisdiction and inclusion in the Settlement Class may be barred absent intervention, Logan has standing to move to intervene.

B. Rule 59(e) Requirements

Three circumstances warrant the grant of a Rule 59(e) motion: (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to prevent clear error of law or manifest injustice. North River Ins. Co. v. Cigna Reins. Co., 52 F.3d 1194, 1218 (3d Cir. 1995).

Logan does not specifically assert any of the aforementioned grounds for her motion, and there is no reference to a change in controlling law or new evidence supporting her motion. As discussed below, the court appropriately exercised jurisdiction over Logan by including her in the Settlement Class, so there is no clear error or injustice.

C. Intervention

Logan's motion is untimely for Rule 24 purposes. Final judgment has been entered in this matter. (Pretrial Order No. 1415.) Substantial notice was sent through various media in

order to inform class members of the Settlement.⁴ (Mem. and Pretrial Order No. 1415 at 81-89.) Permitting intervention might prejudice class members by delaying administration of medical and other benefits. Furthermore, Logan offers no justification for her failure to opt out or voice her objections before the March 30, 2000 deadline. Her husband died in December 1998 and Logan waited until September 2000, after entry of final judgment in this matter, to challenge the Settlement and to open probate proceedings in tribal court. (Reply to AHP's Opp'n Ex. A, ¶¶ 4 & 5.) Thus, because Logan had ample time and opportunity to raise her objections to certification, the court will not permit intervention.

D. Sovereign Immunity

As quasi-sovereign nations, Indian tribes are immune from suit in state or federal court in the absence of congressional abrogation or tribal consent. United States v. United States Fid. Co., 309 U.S. 506, 512-13 (1940) (describing immunity). However, an individual tribe member does not have sovereign immunity from suit in federal court unless he or she is a tribal official acting in an official capacity. Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 173 (1977); Northern States Power

⁴ Logan does not assert that notice was insufficient or that she was somehow prevented from receiving notice of the Settlement. Also, her attorney indicated that she has been a secretary at the Arapahoe School District for many years. (Tr. 10/25/00 at 10-11.) Given her apparently educated background, the court is free to infer that Logan received and understood notice of the Settlement.

Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 462 (8th Cir. 1993); United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992); In re Stringer, Civ. No. 98-10166, 2000 WL 912115, at *1 (Bankr. W.D. Pa. June 26, 2000).

Furthermore, members of an Indian tribe are citizens of the state in which they reside for purposes of diversity jurisdiction. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 n.10 (1987). Individual tribe members are subject to the diversity jurisdiction of a federal court. Romanella v. Hayward, 933 F. Supp. 163, 166 (D.Conn. 1996).

As the caselaw demonstrates, Logan's argument that the sovereign immunity of the tribal entity extends to her in an individual capacity is without merit.⁵ The fact that the sovereign immunity of the Arapahoe tribe has not been abrogated or waived is irrelevant to the issue of whether this court has jurisdiction over her as an individual. See Puyallup Tribe, 433 U.S. at 173 (noting that tribal immunity does not prevent exercise of jurisdiction over individual tribe member); In re Stringer, 2000 WL 912115, at *1 (same). Thus, Logan is subject to this court's diversity jurisdiction.

Because she is the personal representative of her husband's estate as well as his widow, Logan is both a Representative

⁵ By Logan's rationale, a Pennsylvania resident would be immune from suit in every federal court as well as every state and territorial court with the exception of Pennsylvania, absent congressional abrogation or Pennsylvania's waiver of sovereign immunity.

Claimant and a Derivative Claimant subject to Pretrial Order No. 1415. (Pretrial Order No. 1415 ¶ 3.) This court has already ruled that the notice plan implemented in this action was sufficient to assert personal jurisdiction over class members. (Mem. and Pretrial Order No. 1415 at 88.) Accordingly, this court properly exercised jurisdiction when it included Logan in the Settlement Class.

E. Abatement

Where concurrent jurisdiction over a suit may exist, a federal district court should not exercise its diversity jurisdiction before the relevant tribal court has first had an opportunity to determine its own jurisdiction. Iowa Mut., 480 U.S. at 16 (discussing abatement doctrine). This rule applies even in the absence of an action pending in tribal court. United States v. Tsosie, 92 F.3d 1037, 1041 (10th Cir. 1996) (“[T]he exhaustion rule does not require that an action be pending in tribal court.”); Crawford v. Genuine Parts Co., Inc., 947 F.2d 1405, 1407 (9th Cir. 1991) (holding that absence of pending tribal court proceedings is irrelevant to requirement to dismiss or abstain from deciding case in concurrent jurisdiction of tribal court). However, the tribal exhaustion requirement is a rule of comity, not a prerequisite to jurisdiction in federal court. Iowa Mut., 480 U.S. at 15-16.

Logan indicates in her reply that she is a plaintiff in an action in tribal court. (Reply to AHP’s Opp’n at 11.) Logan is in violation of Pretrial Order No. 1415, which enjoined class

members from pursuing settled claims against AHP in any court. (Pretrial Order No. 1415 ¶ 7.) That order was entered on August 28, 2000. Logan opened proceedings in tribal court on September 25, 2000. (Reply to AHP's Opp'n Ex. A, ¶ 5.)

Logan asserts that where it is unclear whether an action is within a tribal court's jurisdiction, it should be abated pending resolution of the jurisdictional issue by the tribal court.

(Mot. to Intervene at 5.) Logan does not cite any case supporting the proposition that abatement is proper in a class action in which the claimant is an unnamed member of the class, or where the claimant has filed suit in tribal court after the entry of final judgment in a court with concurrent jurisdiction.⁶

There was probably concurrent jurisdiction between the tribal court and this court over Logan's claims. See L. & Order Code of the Shoshone & Arapahoe Tribes of the Wind River Indian Reservation, Wyoming §§ 1-2-3 (providing tribal courts with jurisdiction over civil actions arising from tortious or business conduct on reservation), 1-2-6 (providing for concurrent jurisdiction over such claims with state and federal courts), 14-

⁶ When asked to cite support for his argument that abatement would be appropriate even after the entry of final judgment, Logan's attorney, Mr. Saunders, stated that "one of the cases cited [in Logan's motion] . . . involved a default judgment." (Tr. 10/25/00 at 12.) However, the case Mr. Saunders apparently referred to involved a default judgment entered by the tribal court which was later challenged in district court. See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, et al., 471 U.S. 845, 856-57 (1985) (holding that tribal remedies must be exhausted before claim for injunctive relief could be entertained by district court).

10-1 & 14-10-2 (providing for wrongful death actions by personal representative).

However, although it is possible that comity considerations may have warranted abstention before entry of final judgment,⁷ the abstention rule does not change the fact that judgment was entered in this case by a court with both personal and subject matter jurisdiction over Logan and her claims. Thus her claim is barred by application of the doctrine of res judicata. If Logan wished to have her claims adjudicated in a tribal court, she could easily have opted out of the Settlement before the March 30, 2000 deadline.⁸ Because Logan's claim has already been adjudicated, there is nothing for this court to abate from in favor of the tribal court. Comity does not require this court to vacate its judgment as to Logan. Accordingly, abatement is inappropriate.

IV. CONCLUSION

For the reasons set forth above, Logan's motion will be denied. An appropriate order follows.

⁷ The court will not decide that question in this order.

⁸ "[S]ilence on the part of those receiving notice is construed as tacit consent to the court's jurisdiction." In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 306 (3d Cir. 1998) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) and Carlough v. Amchem Prods., Inc., 10 F.3d 189, 199 (3d Cir. 1993)), cert. denied sub nom., Krell v. Prudential Ins. Co. of Am. Litig., 525 U.S. 1114 (1999).

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AND NOW, TO WIT, this day of October, 2000, upon
consideration of Agnes Spoonhunter Logan's Motion to Intervene
and for Rehearing on Pretrial Order No. 1415; defendant American
Home Products Corporation's Opposition thereto and Agnes
Spoonhunter Logan's Reply to American Home Product's Opposition,
IT IS ORDERED that said motion is denied.

LOUIS C. BECHTLE, J.