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Price Fixing

Late Attempt at Intervention Fails To Save Nurses' Conspiracy Class Action

After both named plaintiffs in a class action alleging a conspiracy to depress nurses' wages by Memphis-area hospitals were found inadequate, a late attempt to intervene by a putative class member was properly denied by the district court as untimely, according to an unpublished decision by the U.S. Court of Appeals for the Sixth Circuit (*Clarke v. Baptist Memorial Healthcare Corp.*, 6th Cir., No. 10-5164, 6/29/11).

Challenged Conduct

Registered nurses Suzanne Clarke and Conise Dillard filed a class action against Baptist Memorial Healthcare Corp. and Methodist Healthcare of Memphis, Tenn. They alleged that the healthcare organizations conspired in violation of Sherman Act § 1 to depress the wages paid to registered nurses.

From the beginning, there was an issue with the adequacy of Clarke's representation of the class because she had worked for the Nurse Alliance, an advocacy group associated with the Service Employees International Union (SEIU). During her deposition, she testified that "she would resist any monetary settlement ... if it did not also reduce the nurse-to-patient ratio in Memphis-area hospitals, which was a primary goal of the Nurse Alliance and the SEIU."

While Dillard was initially a viable representative, shortly after the action was filed, she filed for bankruptcy, thereby raising issues about her adequacy, as well.

Even though the deadline to add parties was Aug. 28, 2007, the plaintiffs waited until Jan. 4, 2008 to file a motion seeking to add Anna Bachelder, a member of the putative class, as a party. The magistrate judge, denying the motion as untimely, opined that the plaintiffs did not act with due diligence in filing the motion.

The plaintiffs continued to litigate the motion for class certification with Clarke and Dillard as the named representatives. The district court, however, denied the motion on the grounds that neither was an adequate class representative. In response, Bachelder filed a motion to intervene, which the district court denied as untimely.

Analysis

Judge Richard Allen Griffin, writing for the Sixth Circuit, initially addresses Bachelder's claim that the district court applied the wrong legal standard under one of five "timeliness factors" set forth in *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984), because it found that she failed to intervene once she was "aware of significant and potentially fatal obstacles to the adequacy of Clarke and Dillard" rather than after it became "clear ... that her interest [we]re not being protected adequately by the named plaintiff."

In support of her claim, Bachelder cited *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). The court of appeals determines that such reliance is misplaced because the Supreme Court in that case "was not setting an 'it must be clear that an intervenor's interests are not being adequately protected' standard; it was applying the 'reasonably should have known of one's interest in the case' standard to the facts of the case." See also *Triax*, 724 F.2d at 1229.

Under that standard, the court need not have already concluded that Clarke and Dillard were not adequate representatives prior to Bachelder having intervened; "[r]ather, as the district court correctly stated, Bachelder should have intervened when she knew or reasonably should have known

of her interest." See *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981).

Bachelder's second argument—namely, that the district court relied on clearly erroneous findings of fact—also fails to sway Judge Griffin, as one of the "facts" upon which her argument was based "was not a *fact* relied on by the district court in making its determination that the motion to intervene was untimely; it was part of the district court's *legal conclusion* regarding Dillard's adequacy as a class representative." Upon a review of the record, the only facts the district court relied upon were either undisputed or taken directly from Clarke's testimony and thus it did not abuse its discretion in relying upon them.

Finally, the Sixth Circuit rejects Bachelder's assertion that the district court abused its discretion by finding that the timeliness factors weighed against intervention because it did not consider "the purpose for which intervention was sought" and improperly analyzed "the point to which the suit has progressed" and "the prejudice to the original parties."

While the court agrees that the district court should have addressed the "purpose of intervention," it "reasonably analyzed" the other two factors. "Given the totality of the circumstances," it determines,

including the facts that Bachelder employed the same counsel as Clarke and Dillard, failed to gain admission as a party through amendment of the scheduling order because of a lack of diligence, and waited many months until after the close of class-certification discovery and a decision on the merits of certification before seeking to intervene, [it] hold[s] that the district court did not abuse its discretion in ruling that Bachelder's motion to intervene was untimely.

As such, Judge Griffin concludes that the district court's order denying the motion to intervene should be affirmed.

Counsel for intervenor-appellant: David P. Dean and Emilie Susan Kraft, James & Hoffman, PC, Washington, D.C.; counsel for defendant-appellee Baptist Memorial: James D. Wilson, Shesky & Froelich, Ltd., Chicago, Ill.; Michael R. Shumaker and Stephen J. Squeri, Jones Day, Washington, D.C.; Brian J. Murray, Jones Day, Chicago, Ill.; counsel for defendant-appellee Methodist Healthcare: David Palmer Jaqua and Amy Marie Pepke, Butler Snow, Memphis, Tenn.; Benjamin Holt, Catherine Emily Stetson, and Corey William Roush, Hogan Lovells, Washington, D.C .

By Tiffany Friesen Milone

Text of the court's decision is at <http://op.bna.com/atr.nsf/r?Open=srin-8jbm5z> — at BNA's website.

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Text of the court's decision is at <http://op.bna.com/atr.nsf/r?Open=srin-8jbm5z> — at BNA's website.

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

ISSN 1526-520X

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