

MINUTE ENTRY
FALLON, J.
August 23, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

	:	MDL NO. 1355
IN RE: PROPULSID	:	
PRODUCTS LIABILITY LITIGATION	:	SECTION "L"
	:	
	:	JUDGE FALLON
.....	:	

THIS DOCUMENT RELATES TO ALL CASES:

Following the pretrial status conference on August 3, 2001, the Court heard argument from counsel on Defendants' Motion to Enter Scheduling Order for Motion and Hearing on Class Certification. The reasons orally assigned for the Court's ruling at the conference are attached to this minute entry.

1 with respect to the number of plaintiffs that we think would
2 be a fair number to depose. I have made a proposal to Mr.
3 Herman. He's going to talk with his committee, and if we
4 cannot work it out, we will write a letter to Your Honor in
5 short order and ask Your Honor to decide.

6 THE COURT: Okay. The issue before the Court is a
7 question the role of Daubert in class actions.

8 Class actions, as we know, are an exception to the
9 usual rule that litigation is to be conducted by and on
10 behalf of the litigants involved in the proceedings. The
11 class action device is designed for cases in which factual
12 issues are common to the class as a whole, and which turn on
13 questions of law applicable in the same manner to each member
14 of the class.

15 In federal courts, for a class to be certified, the
16 requirements of Rule 23 of the Federal Rules of Civil
17 Procedure must be met. The rule in general requires
18 numerosity, commonality, typicality, adequacy in
19 representation, predominance on common issues, and
20 superiority of other available means.

21 The party, of course, who brings the class action
22 has the burden of establishing the prerequisites of Rule 23.

23 The cases are clear that the Court can certify
24 classes only if the Court is satisfied after an analysis that
25 the requisites of Rule 23 have, indeed, been met.

1 In the early days of class actions, it was usual
2 or certainly not unusual for the determination of
3 certification to be made solely on the pleadings.

4 Indeed, that was the way, the accepted way of
5 dealing with certification. But, as class actions grew in
6 numbers and complexity and the courts became more experienced
7 in handling them, the procedure changed. Now the typical
8 analytical method of resolving certification is to go beyond
9 the pleadings and convene a contradictory hearing, including
10 presentation of either or both testimony and documents.

11 The defendants proposed that a hearing should take
12 place and that the Court should entertain Daubert issues in
13 connection with the class certification hearing.

14 The plaintiffs object to the introduction of
15 Daubert issues at this stage arguing, in essence, that this
16 will result in a mini trial on the merits, which is
17 inappropriate and premature at this point in the litigation.

18 The latest expression of the Fifth Circuit, to me,
19 seems to favor a hearing on the class certification issue.
20 It seems to recognize that in some instances a class
21 certification can be made solely on the pleadings. But in
22 most instances, something other than the pleadings should be
23 considered.

24 The Fifth Circuit in the Costano case states "Going
25 beyond the pleadings is necessary as a court must understand

1 the claims, defenses, relevant facts and applicable
2 substantive law in order to make a meaningful determination
3 on the certification issues." See 84 F.3d at 744.

4 But, when this is done, that is to say, when a
5 hearing is conducted, the hearing on class certification may
6 not become an inquiry into the merits of the case.

7 The Eisen versus Carlisle case, 417, U.S. 156,
8 makes that clear. In fact, in Miller versus Mackey, the
9 Fifth Circuit held that a district court could not deny
10 certification based on its belief that the plaintiff could
11 not prevail on the merits of the case. See 452 F.2d at 427.

12 Notwithstanding these impediments, courts have held
13 that there is a role for a Daubert hearing at the class
14 certification phase: In Re: Visa Check case, 192 FRD 68..

15 Also, there is an article dealing with this issue
16 at 15, Number 4, Federal Litigator, page 86, April 2000
17 issue. But, although there is a role for a Daubert at the
18 cert stage, it's a very limited role.

19 The issue at the cert stage is not whether the
20 plaintiffs have stated a cause of action or will prevail on
21 the merits of the cause of action, but, rather, whether the
22 requirements of Rule 23 are met: namely whether there is
23 numerosity, commonality, typicality, adequacy in
24 representation, predominance of common issues, superiority
25 over other available methods. Let me turn to these

1 requisites.

2 You shouldn't waste a lot of time on numerosity in
3 this case. That appears to be present.

4 Commonality may be of interest.

5 Typicality may be of interest.

6 Adequacy in representation, don't waste time on
7 that. That's present.

8 The big issues with regard to the role of Daubert
9 at the certification state are: predominance of a common
10 issue and superiority over other available methods.

11 The Visa check case captures it this way. "A court
12 considering a class classification motion must look somewhere
13 between the pleadings and the fruit of discovery. Enough
14 must be laid bare to let the judge survey the factual scene
15 on a kind of sketchy relief map, leaving for later view the
16 myriad of details that cover the terrain." Visa at 79.

17 With regard to the focus on predominance and
18 superiority, it seems to me that the key issue is whether or
19 not the issues of the injury, in fact, proximate cause,
20 reliance, affirmative defenses, compensatory damages are so
21 overwhelmingly replete with individual circumstances that
22 they outweigh predominance or superiority.

23 Further in this regard, particularly with regard to
24 superiority, it seems to me attention or thought should be
25 given by all sides to whether or not there are any problems

1 in presenting the trial on the merits of any class action.
2 Also, whether or not it is feasible to try class actions by
3 state or by region or issue.

4 So, I will allow Daubert issues to be presented at
5 a certification hearing, but in a limited way.

6 I give you these comments in the hope that it will
7 give you some guidance in your future pursuit in this matter.

8 Do we have any other issues at this point?

9 MR. IRWIN: Your Honor, with respect to the motion
10 for the entry of the class certification order, we did have
11 an issue with respect to a fixed hearing date as opposed to
12 a --

13 THE COURT: Yes, I have had an opportunity to meet
14 with counsel for both sides, both liaison counsel earlier
15 today, and it's my feeling which I expressed to them that we
16 ought to have a fixed date, but having said that, I'm not
17 keyed into the February date.

18 I suggest to counsel that they get together on it
19 and see whether a date can be set. If not, then I will set
20 dates either before or after February.

21 But, when I set a certification date, I expect each
22 side to be ready. That means that both sides must cooperate
23 in the discovery process so we can expeditiously complete
24 this aspect of the case.

25 So, while a date certain will be set, I expect that

1 the discovery will be forthcoming in sufficient time to allow
2 for presentation by each side.

3 I want the defendants to have the discovery that
4 they need, and I want the plaintiffs to have the discovery
5 that they need in advance of the hearing date.

6 MR. HERMAN: May it please the Court, on behalf of
7 the plaintiffs' legal committee, I just want to reiterate for
8 the record what we have indicated previously. The defendants
9 tell us that they will not have the overseas discovery
10 available for us until next year. After the depositions were
11 taken in Belgium, we're certain that's where the mother lode
12 of the information is.

13 We still are awaiting electronic discovery. We
14 have just received substantial documents from American
15 discovery. I'm well aware that you don't have to have every
16 document and every scrap of paper and everything reviewed,
17 but the critical documents in the case, we haven't seen yet,
18 and we are willing to sit down and discuss a cert date that's
19 reasonable, but we see way we can meet a February date. I
20 just state that for the record.

21 THE COURT: All right. This is something that I
22 look to you all for input on, at least from the standpoint of
23 the first try. Both of you can pick a better date than I can
24 pick because you know your case, you know your requirements,
25 you know your needs, you know what you're able to do.