



IN RE: ZETIA (EZETIMIBE) ANTITRUST LITIGATION

No. 20-2184, Decided July 6, 2021

U.S. Court of Appeals for the Fourth Circuit

Introduction:

Opinion Topic: Class-Action Numerosity Requirement

The plaintiffs, a group of pharmaceutical-product purchasers, filed suit under the Sherman Act alleging a patent-settlement agreement between branded and generic drug manufacturers constituted an anticompetitive “reverse payment.” The federal district court certified a class of 32 members, all of which were sophisticated companies with large claims. The Fourth Circuit granted the defendants’ appeal and analyzed the lower court’s application of Federal Rule of Civil Procedure 23(a). The three-judge panel held that the district court “rested its numerosity analysis”—under Rule 23(a)(1), which requires a class must be “so numerous that joinder of all members is impracticable”—on “faulty logic.” The district court incorrectly based its numerosity reasoning on the impracticability of individual suits rather than joinder.

In his concurrence, Judge Niemeyer wrote separately to “identify some factors that might be considered in determining ‘numerosity.’” He notes that the Fourth Circuit has not articulated a definitive test for when the class size renders joinder impractical, and offers lower courts and litigants valuable guidance on the “nonexclusive factors” that could tip the balance in a Rule 23(a)(1) analysis.

Opinion Digest:

NIEMEYER, Circuit Judge, concurring

I am pleased to join the court’s opinion. I write separately only to identify some factors that might be considered in determining “numerosity” under Federal Rule of Civil Procedure 23(a)(1). *See Anderson v. Weinert Enters., Inc.*, 986 F.3d 773, 775 (7th Cir. 2021) (“Ample ink has been spilled discussing class action litigation and Federal Rule of Civil Procedure 23. Rare are the cases analyzing the Rule’s numerosity requirement”).

While a district court’s nuanced discretion is especially important in determining whether a proposed class is “so numerous that joinder of all members is *impracticable*,” Fed. R. Civ. P. 23(a)(1) (emphasis added), we have recognized that a definitive test has not been articulated to assist in the exercise of that discretion, *see Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978) (per curiam) (noting that “[t]here is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied”). Nonetheless, I believe we can point to a few nonexclusive factors that a district court might consider.

The **Honorable Paul V. Niemeyer** serves as a Circuit Judge on the U.S. Court of Appeals for the Fourth Circuit. *Judge Niemeyer had no role in WLF’s selecting or editing this opinion for our CIRCULATING OPINION feature.*

First and perhaps most important is simply the number of members defined to be in the class. Generally, courts have presumed that a class with more than 40 members is sufficiently numerous while a class that numbers 20 or fewer is presumably too small to certify. See 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.22[1][b] (3d ed. 2020); 1 William B. Rubenstein, *Newberg on Class Actions* § 3.12 (5th ed. 2021); see also *Kennedy v. Va. Polytechnic Inst. & State Univ.*, No. 7-08-CV-00579, 2010 WL 3743642, at *3 (W.D. Va. Sept. 23, 2010) (“A nationwide survey of federal court decisions signals that it is exceedingly rare to certify classes with less than 25 members. ... [C]ourts seem much more willing to certify a class if it has more than 40 members” (citations omitted)). For me, a class fewer than even 30 members should be exceptional.

But other factors must be considered to give flesh to the numbers inquiry. Leading treatises have typically summarized the relevant factors as (1) judicial economy resulting from avoidance of joined or independent actions, (2) geographic dispersion of putative class members, and (3) the ability and motivation of class members to bring suit absent class certification. See Moore's, *supra*, § 23.22[1][a]; Rubenstein, *supra*, §§ 3.11, 3.12; cf. *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016). The weight to be given any relevant factor, however, will be influenced by the particular facts of the case. For example, geographic dispersion, or the lack thereof, may have extra importance when a putative class's members are either especially scattered or notably concentrated. See, e.g., *Anderson*, 986 F.3d at 777 (noting that geographic dispersion cut against certification where “[a]ll but two of the class members lived within a 50-mile radius of the courthouse”). And class members' motivation gains importance where there is reason to believe that those members would otherwise refrain from a joint suit out of “fear of possible reprisals” by the defendant or for other reasons cutting both for and against certification. *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (en banc) (certifying a small class of Black physicians in an employment discrimination suit).

Judicial economy as a broad category appears to be the factor on which courts have relied most heavily. See *Modafinil*, 837 F.3d at 253–54 (stating that “both judicial economy and the ability to litigate as joined parties are of primary importance”); see also *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 427 (1st Cir. 2007) (“Among the primary rationales behind the class action mechanism are judicial economy and efficiency”). One aspect of judicial economy is docket management. See *Modafinil*, 837 F.3d at 257 (“[Judicial economy] primarily involves considerations of docket control, taking into account practicalities as simple as that of every attorney making an appearance on the record”). All members of a putative class suing on their own — even if joined under Rule 20 — will naturally place a greater strain on a district court than having just two or three class members represent the whole. See *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993); see also Rubenstein, *supra*, § 3.11 (“Where many individuals have similar claims, there may be a flood of litigation. With so many litigants proceeding individually, the courts would be overrun with claims. Yet the vast quantity of individual litigants makes joinder impracticable”).

Another facet of judicial economy is courtroom space and correlated staffing. For example, more parties joined to an action means, in most cases, more attorneys, each of which must be present in court for hearings and conferences. In this case, there may be a substantial gap between the number of attorneys currently needed to represent the 3 named class representatives and the number that would be needed to represent 35 joined parties, if that many were to consent, even if one assumes that each joined party has only 2 or 3 attorneys present. A court could reasonably recognize the demands on physical space and staffing necessary to accommodate so many individuals. See *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 41 (S.D.N.Y. 1990) (“[T]he impracticability of joinder is best seen by noting the difficulties involved in having thirty-five intervenors, all with their respective attorneys, attempt to go through the formal motions required for entrance into and participation in the suit” (cleaned up)).

As a further aspect of judicial economy, a district court may consider the differential in costs of discovery between a class action and an action with many joined parties. The court could consider whether, in the action of joined parties, “discovery would be repetitive and unduly expensive.” *Ballard v. Blue Shield of S.W. Va., Inc.*, 543 F.2d 1075, 1080 (4th Cir. 1976). But while a district court may give weight to this consideration as to *future discovery*, it should not succumb to the sunk-cost fallacy and certify a class merely because a great deal of effort has *already been expended* in discovery. Noteworthy about discovery is the fact that it represents civil litigation’s largest cost. See generally John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 Minn. L. Rev. 505 (2000); Nicholas M. Pace & Laura Zakaras, RAND Inst. for Civ. Just., *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (2012).

And an aspect of broader practicality, and also, perhaps, judicial economy, might relate to the ability to identify class members. See *Baltimore v. Laborers’ Int’l Union of N. Am.*, 67 F.3d 293, 1995 WL 578084 at *1 (4th Cir. 1995) (unpublished table decision); *Ballard*, 543 F.2d at 1080 (noting that “the number of [class members] and knowledge of their identity ... should be considered”). It has been observed that if a “majority of the members of the proposed class were identified” by the court, and especially if those members “reside within an established jurisdictional boundary,” joinder may be more practicable. *Baltimore*, 67 F.3d 293, 1995 WL 578084 at *1. On the other hand, when absent class members “are not specifically identifiable,” joinder might become more impracticable. *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975).

These factors are, to be sure, not exhaustive. But they exemplify the nature of what should be considered in determining the numerosity requirement of Rule 23(a)(1). At bottom, “*all the circumstances* of the case should be taken into consideration” in a district court’s numerosity analysis. *Ballard*, 543 F.2d at 1080 (emphasis added). Moreover, an appellate court’s review of a certification order should remain mindful that certification is ultimately determined by the district court — not the appellate court — and that it is the district court which will be saddled with the burdens that flow from a decision. Cf. *Brown v. Nucor*, 785 F.3d 895, 922 (4th Cir. 2015) (Agee, J., dissenting) (noting that this court “typically tread[s] lightly when reviewing a class certification decision”).