IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE ANTITRUST LITIGATION,	)	Master Docket No. 1:05-cv-00979-SEB-JMS
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	

PLAINTIFFS' OPPOSITION TO NON-SETTLING DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDERS GRANTING PRELIMINARY APPROVAL TO SETTLEMENT AGREEMENTS AND CERTIFYING SETTLEMENT CLASSES AS TO AMERICAN CONCRETE AND SHELBY GRAVEL

Introduction

The Court should deny the Motions for Reconsideration of Orders Certifying Settlement Classes for American Concrete and Shelby Gravel filed by the Prairie, Beaver, Builders and IMI Defendants,[1] because the Defendants: (i) have demonstrated no legal prejudice from the Preliminary Approval Orders and lack standing to challenge the American and Shelby Settlements, (ii) have not challenged the fairness or adequacy of the proposed settlements, and (iii) have not identified any issue on which "full adversarial briefing" or "full argument in opposition" by the Defendants would be relevant or even helpful. Indeed, in their Motions for Reconsideration the Defendants have alleged no error whatsoever in the Court's certification of the American and Shelby settlement classes.

In lieu of error, the Defendants apparently are suggesting that the Court should de-certify the American and Shelby settlement classes so that they (the non-settling Defendants) can then

[1] The First Motion to Reconsider was filed by Defendants Prairie Materials Sales, Inc., MA-RI-AL Corp., Beaver Materials Corp., Rick Beaver, Chris Beaver and Gary Matney (Docket No. 455) (hereafter the "Prairie/Beaver Motion"). The second Motion to Reconsider was filed by Defendants Builders Concrete & Supply Co., Inc., Gus B. ("Butch") Nuckols, III, and John Blatzheim ("Builders") and Irving Materials, Inc., Fred R. Irving, Price C. Irving, Daniel C. Butler and John Huggins ("IMI") (Docket No. 456) (hereafter "Builders/IMI Motion"). The non-settling defendants are at times referred to herein collectively as "Defendants."

"help" the Court decide whether to certify the settlement classes with a full record opposing certification of a *litigation* class. This suggestion is not only misplaced, since it comes from parties with no standing to oppose the settlements, but the arguments purporting to support the suggestion are specious.

For example, the IMI and Builders Defendants simply assert that additional briefing and expert analysis related to the manageability of a litigation class action would somehow assist the Court, while conceding that "the manageability requirements of Federal Rule of Civil Procedure 23 need not be met in certifying settlement classes." Builders/IMI Motion, ¶ 4. Similarly, while failing to raise a single actual concern with the Court's settlement certifications, the Prairie and Beaver Defendants claim that vacating the Preliminary Approval Orders and deferring settlement certification would "*resolve any concerns* regarding whether the current orders certifying settlement classes as to the Settling Defendants comply with the strict requirements of Rule 23." Prairie/Beaver Motion, ¶ 4 (emphasis added).

It is plain that the unspecified "concerns" on which the Defendants seek reconsideration of the Court's Orders have nothing to do with the propriety of certifying the American and Shelby settlement classes and are, at most, strategic. But even the "strategic" concerns of the Defendants are implausible, given that the Preliminary Approval Orders have no preclusive effect on the issue of class certification for purposes of litigation. Under these circumstances, the Motions for Reconsideration should be denied.

Certification of the American and Shelby Settlement Classes

On November 8, 2007, the Court entered two Orders Preliminarily Approving Settlement, Certifying Settlement Class, And Directing Notice ("Preliminary Approval Orders"). (Docket Nos. 451 & 452.) The Preliminary Approval Orders preliminarily approved the Plaintiffs'

settlements with American Concrete Company, Inc. ("American") and Shelby Gravel, Inc. d/b/a Shelby Materials, Richard Haehl, and Philip Haehl ("Shelby") as within the range of fair, reasonable and adequate settlements. Preliminary Approval Orders, ¶ 7. The Preliminary Approval Orders also certified settlement classes, but only "as to American" under the American Settlement Agreement, and only "as to Shelby" under the Shelby Settlement Agreement. The Court based its decision to certify the settlement classes on findings that "for purposes of settlement" the prerequisites to class certification under Rule 23 (a) and (b)(3) were met. Preliminary Approval Orders, ¶¶ 4 and 5.[2]

These limited certifications are proper, as the Defendants concede, because "[a] class may be certified for the limited purpose of settlement." Builders/IMI Motion, ¶ 4, citing *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979), and *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997). The Preliminary Approval Orders are specifically limited to the terms of the respective settlements and the settling parties, and grant relief far different from the relief sought by the Plaintiffs in their pending Motion for Class Certification (Docket No. 397). The certification of settlement classes was not for purposes of litigation, as requested in the Motion for Class Certification, but only "for settlement purposes." And, the certification of settlement classes was only "as to American" and "as to Shelby," and not as to the defendants generally, as requested in the Motion for Class Certification.

It is therefore not particularly significant that the settlement classes certified by the Court are defined in the same manner as the litigation class requested by the Plaintiffs in their Motion for Class Certification. *See* Builders/IMI Motion, ¶ 5; Prairie/Beaver Motion, ¶ 2. The

[2] Since the Court's entry of the Preliminary Approval Orders, an escrow account has been established by Settlement Class Counsel for the management of the Settlement Fund. Under the terms of the Settlements, $368,000 has now been paid into the Settlement Fund by American, and $4,700,000 has now been paid into the Settlement Fund by Shelby. The $5,068,000 will be held in the Settlement Fund until Court-approved distribution for the benefit of settlement class members.

settlement classes were not certified for litigation purposes and, more importantly, were not certified "as to" the remaining Defendants who now seek reconsideration. As discussed below, it follows that the certification of the settlement classes does not affect the substantive rights of the Defendants.

The Defendants Lack Standing to Oppose the Preliminary Approval Orders

Although this Court exercised its discretion in *In re Bromine Antitrust Litigation,* 203 F.R.D. 403 (S.D. Ind. 2001), to defer preliminary approval of a partial settlement, including settlement class certification, until the hearing on litigation class certification, it also emphasized that the non-settling defendant did not have standing to oppose the settlement or settlement class certification:

> We note that while Great Lakes's arguments are helpful, Great Lakes lacks formal standing to object to the proposed settlement and to class certification for settlement purposes (as opposed to class certification for litigation purposes, to which it clearly can object). In *Quad Graphics, Inc. v. Fass,* 724 F.2d 1230, 1233 (7th Cir.1983), the Seventh Circuit ruled that "a non-settling party must demonstrate plain legal prejudice in order to have standing to challenge a partial settlement." The Seventh Circuit later applied this ruling to class actions. *Agretti v. ANR Freight System, Inc.*, 982 F.2d 242, 247 (7th Cir.1992) ("The doctrine of plain legal prejudice does not depend upon whether the settlement involves a class action or simply ordinary litigation."). Circumstances of plain legal prejudice include interfering with a party's contract rights or ability to seek contribution or indemnification or stripping a party of a legal claim or the right to present relevant evidence at trial. *Id.* (citations omitted). Great Lakes makes no argument that the proposed partial settlement would affect it in one of these ways, and perusal of the proposed partial settlement raises no concern that it would cause Great Lakes to suffer plain legal prejudice.

Bromine, 203 F.R.D. at 406, fn. 6. The Defendants cite this Court's *Bromine* decision to support their Motion, but do not mention the Court's conclusion that the non-settling defendant lacked standing to oppose settlement class certification. In fact, despite the plain language of *Bromine*

and the Seventh Circuit precedent cited therein, the Defendants make no effort whatsoever to demonstrate the "plain legal prejudice" necessary to establish standing.[3]

The Builders and IMI Defendants' reliance– in this context – on *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002), is unfortunately misleading. The Defendants contend that *West* supports their request that the Court vacate the Preliminary Approval Orders, and that it somehow supports their proposed procedure of deferring certification of the settlement class until the litigation class certification motion is fully briefed. Builders/IMI Motion, ¶ 8, fn. 2. But the *West* opinion addresses neither issue.

Instead, in *West* the Seventh Circuit granted interlocutory review of a district court's certification of a litigation class in a securities case. *West*, 282 F.3d at 937. The issue in *West* was whether a court, when faced with a theory of recovery that had never before been asserted, and which flew in the face of accepted market theory analysis, was required to delve into the theory at the class certification stage. Not surprisingly, the Court of Appeals said that the district court should do so under those peculiar circumstances. Unlike the Defendants here, the appealing defendant in *West* was the subject of the certified class and obviously had standing to challenge certification. There was no settlement in *West*, and therefore no certification of a settlement class, and no discussion of preliminary approval.

However, there is no question that the rule on standing from *Agretti* – as applied by this Court in *Bromine* – does apply, and remains the law in this Circuit:

> We reject any suggestion by ANR that standing to object to a settlement in a class action situation by a non-settling party requires a different standard than plain legal prejudice. The doctrine of plain legal prejudice does not depend upon whether the settlement involves a class action or simply ordinary litigation. ...

[3] The Builders and IMI Defendants further fail to acknowledge their plain lack of standing when threatening to appeal the Court's preliminary certification of the American and Shelby settlement classes under Rule 23(f). Builders/IMI Motion, ¶ 10. See *Agretti*, 982 F.3d at 246 ("[w]e agree with the district court that ANR does not have standing to object to the settlement, either in district court or on appellate review of the settlement").

> Mere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice.

Agretti, 982 F3d at 247. This rule is widely accepted. See, e.g., *In re Integra Realty Resources, Inc.,* 262 F.3d 1089, 1102-03 (10th Cir. 2001) (citing *Agretti* and denying non-settling defendants' standing to oppose partial settlement); *In re School Asbestos Litig.*, 921 F.2d 1330, 1332-33 (3d Cir. 1990); *Alumax Mill Prods, Inc. v. Congress Financial Corporation*, 912 F.2d 996, 1002 (8th Cir. 1990); *Waller v. Financial Corp. of America*, 828 F.2d 579, 582-83 (9th Cir. 1987); *Bass v. Phoenix Seadrill/78, Ltd.,* 982 F.2d 1154, 1164-65 (C.A. Tex 1985).

Recently, the District Court for the Northern District of Georgia rejected the very request made by the Defendants here. In *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, 2007 WL 2119022 (N.D. Ga. July 20, 2007), a non-settling defendant attempted to defer the district court's consideration of a motion for preliminary approval until the plaintiffs' motion for certification of a litigation class could be heard. The district court's discussion, which rejected that maneuver, is equally applicable here:

> Defendant Masco argues that the Court should defer preliminary approval of the settlement class until it has reached a decision concerning plaintiffs' motion to certify the litigation class. At the outset, the Court notes that, Masco, a non-settling defendant, does not have standing to object to a class settlement with the settling defendants, unless Masco can show "plain legal prejudice." *In re Beef Ind. Antitrust Litig.,* 607 F.2d 167, 172 (5th Cir.) (as a non-settling defendant, defendant is not prejudiced and has no standing to object); *Smith v. Arthur Andersen LLP,* 421 F.3d 989, 998 (9th Cir.2005) (general exception to the rule that non-settling defendant may not object to settlement where defendant can demonstrate that it will sustain formal legal prejudice as result of the settlement); *Mayfield v. Barr,* 985 F.2d 1090, 1092-93 (D.C.Cir.1993) (same); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C.Cir.2000) (same); *Wainright v. Kraftco Corp.,* 53 F.R.D. 78, 81 (N.D.Ga.1971) (non-settling defendants have no standing to object to a proposed settlement) (internal citation omitted).
>
> Here, Masco contends that any decision by the Court on plaintiffs' motion for preliminary approval of the settlement class will impact the Court's decision regarding the amended litigation class definition. Thus, Masco's concerns appear to be mainly strategic. While understanding Masco's concern, the Court concludes

> that preliminary approval of the settlement class will not affect its decision regarding the redefined litigation class. In approving the settlement class, the Court is not endorsing any evidence or arguments that the parties will submit in connection with plaintiffs' redefined litigation class. Rather, the Court's decision regarding the settlement class rests solely on the uncontested evidence presented by plaintiffs and the settling defendants. In short, certification of the settlement class will not have preclusive effect on defendant Masco in contesting the litigation class.

Columbus Drywall, 2007 WL 2119022,*7 (footnote omitted).

The Defendants here have not even tried to make a showing of "plain legal prejudice," as they quite plainly cannot. At most, the Defendants have articulated vague *strategic* concerns, which fall well short of their burden. For the reasons adopted by the Seventh Circuit and other Circuits, and discussed by the court in *Columbus Drywall*, the Court should therefore reject the Defendants' Motions.

The Defendants Have Asserted No Errors in the Preliminary Approval Orders

The Prairie and Beaver Defendants, for example, suggest that reconsideration would allow the Court to "resolve any concerns" regarding the Preliminary Approval Orders, but not that they (Prairie and Beaver) have been or could be harmed by the Orders, or that any "concerns" exist in any event. Prairie/Beaver Motion, ¶ 4. Seemingly Prairie and Builders see a strategic advantage to reconsideration, but do not share it with the Court. More importantly, they do not even suggest what "concerns" may exist, or how additional briefing by parties without standing could help resolve such concerns if they existed.

The Builders and IMI Defendants are slightly more forthcoming, admitting they are concerned that the Plaintiffs will argue that certification of the settlement classes has "the effect of precluding the non-settling Defendants from challenging class certification." Builders/IMI Motion, ¶ 7. This concern is groundless, and the Defendants could have learned as much by conferring with Plaintiffs before filing their Motions. The Court's certification of settlement

classes under the American and Shelby settlements has no preclusive effect, as a matter of law, and Plaintiffs will not argue that the Court's Preliminary Approval Orders prevents the non-settling Defendants from challenging the certification of a litigation class. See *Columbus Drywall*, 2007 WL 2119022,*7.

Oddly, the principal objection that the Builders and IMI Defendants suggest they will raise to the certification of a litigation class is that "individualized proof will render any class treatment unmanageable under Rule 23(b)(3)." Builders/IMI Motion, ¶ 6. Yet, the Builders and IMI Defendants themselves agree that "the manageability requirements of Federal Rule of Civil Procedure 23 need not be met in certifying a settlement class." Builders/IMI Motion, ¶ 4, citing *Amchem*, 521 U.S. at 620. In other words, the issue on which the Builders and IMI Defendants intend to challenge the certification of a litigation class, with additional briefing and expert analysis, is not even an issue that is relevant to the certification of settlement class. Obviously additional argument on this issue – from Defendants who lack standing to oppose the American and Shelby settlements or settlement class certification – will not assist the Court in conducting a more thorough consideration of the Motions for Preliminary Approval of the American and Shelby settlements.

Because they assert no error by the Court in entering the Preliminary Approval Orders, and offer no real suggestion of how they could assist the Court in considering preliminary approval even if they did have standing to do so, the Defendants offer no real reason to grant reconsideration. The Motions should therefore be denied.

The Preliminary Approval Orders Were Properly Entered And Do Not Require an Evidentiary Hearing

The Defendants do not identify any procedural error in the Court's entry of the Preliminary Approval Orders, and none exists. As this Court observed in the *Bromine* case, all

that is required for preliminary approval is that the settlement be "within the range of possible approval." *Bromine*, 203 F.R.D. at 416, citing *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979). As discussed below, a hearing is not required for this determination. In fact, a hearing is not even required to consider a motion for class certification for litigation purposes, and the ordinary approach in this District is to limit class certification hearings to oral argument on previously submitted evidence.

The management of a class action rests largely within the district court's discretion. *Mars Steel Corp. v. Continental Illinois Nat. Bank & Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987). It is therefore within this Court's discretion whether, and to what extent, it should conduct an evidentiary hearing prior to preliminary approval. *Id.* at 684. As the court in *Mars Steel* held, such a hearing plainly is not required. *Id*. at 684-85 (no error in omission of an evidentiary hearing prior to preliminary approval). See also, *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976) (no error in district court's failure to hold evidentiary hearing either before preliminary approval or final approval); *Williams v. General Electric Capital Auto Lease*, 1995 WL 765266, *8 (N.D.Ill.) (it is within court's discretion to forego evidentiary hearing before giving preliminary approval to settlement); *In re General Motors*, 594 F.2d at 1133 (same).

Despite their lack of standing, and despite their failure to identify even a single possible error with respect to the Preliminary Approval Orders, the Defendants now ask the Court to vacate those Orders and defer its consideration until after a full adversarial hearing in which presumably all Defendants can oppose the certification of American and Shelby settlement classes. If, as Defendants argue, the certification of settlement classes should have no bearing on the certification of a litigation class, it is difficult to imagine why deferring preliminary approval

is in anyone's interests. It is clear, however, that such a delay could only be detrimental to the interests of the American and Shelby settlement class members.

As this Court has recognized, the "bar is low" when considering a settlement for preliminary approval. *Bromine,* 203 F.R.D. at 416. The Court properly found that the American and Shelby Settlements were "within the range of possible approval," that the settlement classes should be notified of the proposed settlements, and the fairness hearing should be scheduled at which they and all interested parties may have an opportunity to be heard. *Gautreaux v. Pierce,* 690 F.2d 616, 621 n.3 (7th Cir. 1982) (citations omitted). The Defendants have made no argument to the contrary, and their Motions for Reconsideration should be denied.

Conclusion

For the foregoing reasons, the Motions for Reconsideration of Orders Certifying Settlement Classes for American Concrete and Shelby Gravel filed by the Prairie, Beaver, Builders and IMI Defendants should be denied.

Dated: December 10, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I hereby certify that on December 10, 2007, a copy of the foregoing was mailed, by first-class U.S. Mail, postage prepaid and properly addressed to the following:

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