UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:97-CV-394-H

KENTUCKY LABORERS DISTRICT
COUNCIL HEALTH AND WELFARE
TRUST FUND, et al. PLAINTIFFS

V.

HILL & KNOWLTON, INC, et al. DEFENDANTS

MEMORANDUM OPINION

On September 30, 1998, this Court entered a Memorandum Opinion and Order, dismissing many of Plaintiff's claims. The Court left standing, at least for the time being, Plaintiffs's RICO and common law fraud claims. Those claims involve complex factual allegations and potentially ground-breaking legal issues. The dispositive motions were hard fought by superb advocates on both sides. Defendants have now moved to certify the following two issues to the Sixth Circuit Court of Appeals for interlocutory review pursuant to 28 U.S.C. § 1292(b):

> 1. Whether, under the circumstances alleged in Plaintiffs' complaint, economic injuries incurred by a union health care trust fund are purely derivative of the physical injuries which its participants suffered, and are therefore too remote to permit recovery as a matter of law.
>
> 2. Whether Plaintiffs' RICO claims, which are predicated upon their participants' and beneficiaries' physical injuries, allege an injury to "business or property."

Def. Brief in Supp. of §1292 Cert. at 3. For reasons discussed below, the Court believes that certification for interlocutory appeal is neither appropriate nor very likely to advance this case to resolution.

Section 1292(b) of Title 28 of the United States Code provides for interlocutory orders certifying appeals in the rare circumstances when such appeals may be appropriate prior to final judgment. The movant must convince the trial court that an order not otherwise appealable "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Even when the trial court is of the opinion that the case meets each of these elements, the appeals court must also agree to take up the matter.

Several factors weigh in determining the propriety of certification. Among these are the likelihood of prompt reversal, the complexity and length of proceedings avoided by reversal, "and the substantiality of the burdens imposed on the parties by a wrong ruling." 16 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3930 (1996). The Court must also consider "the probabilities that lengthy appellate consideration will be required, that the order will be affirmed, that continued district court proceedings without appeal might moot the issue, that reversal would not substantially alter the course of district court proceedings, or that the parties will not be relieved of any significant burden by reversal." *Id.* Given the highly subjective nature of these criteria, it is understandable that the Court's discretion is broad, subject always to the view of the appellate court.

Some but not all of these factors would support Defendants' motion. This Court might avoid lengthy and complex proceedings if reversed. While it is true that reversal on the issues raised by Defendants could end this litigation or substantially alter its course, proceeding to the summary judgment stage or to trial could do the same. The Court raised this possibility in its

Memorandum Opinion, which expressed serious doubts about Plaintiffs' ability to prove their case. In the interest of fairness and the policy considerations behind Rule 12, the Court has provided Plaintiffs an opportunity to find evidence supporting their claims.

The Court concedes that perhaps superficially, the issues raised by Defendants appear to be controlling issues of law, about which there may be substantial ground for difference of opinion. After all, as Defendants correctly point out, the disposing of a 12(b)(6) motion to dismiss is a question of law. It is not one in the Court's view, however, that merits certification. If that were the case, every partial denial of a 12(b)(6) motion would be fodder for an interlocutory appeal because all such decisions involve a controlling issue of law.

It is also true that reversal would materially advance the litigation. But reversal is not guaranteed. Given the split among the various district court decisions on the remoteness question, the chances of reversal are not at all clear and certainly not overwhelming.[1] The prospect of affirmation by the Sixth Circuit counsels against certification in a case already

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[1]The Defendants suggest that a number of decisions around the country dismissing similar claims by the same Plaintiffs are evidence that a substantial chance of reversal awaits them at the Sixth Circuit. *See* Def. Brief in Support at 7 (citing *Texas Carpenters Health Benefit Fund v. Philip Morris Inc.,* No. 1:97CV6525(TH) (E.D. Tex. Aug 31, 1998); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.* 1998 WL 544305(D. Ore. Aug. 3, 1998); *Seafarers Welfare Plan v. Philip Morris Inc.*, No. JSG-97-2127 (D.Md. July 13, 1998); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris Inc.*, 1998 WL 212846 (E.D. Pa. April 22, 1998); *Southeast Florida Laborers Dist. Health and Welfare Trust Fund v. Philip Morris Inc.*, 1998 WL 186878 (S.D. Fla. April 13, 1998)); Def. Supp. Authority*, International Bhd. of Teamsters Local 734 Health and Welfare Fund v. Philip Morris, Inc.*, No. 97-C-8113, 8114 (N.D. Ill. Dec. 1, 1998). However, an equal or greater number of courts have reached different conclusions. Courts on both sides have expressed uncertainty and even confusion. That many other courts have reached different conclusions suggests that the chances of reversal are not at all overwhelming or even necessarily likely. *See Iron Workers Local Union No. 17 Insurance Fund and Its Trustees v. Philip Morris, Inc.*, No. 1:97-CV-1422 (N.D. Ohio Dec. 2, 1998) at 18-19 (citing the following, where dismissal has been denied at least in part: *National Asbestos Workers Med. Fund v. Philip Morris, Inc.*, No. 98CV1492, 1998 WL 732911 (E.D.N.Y. Oct. 19, 1999); *Kentucky Laborers Dist. Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc.*, No. Civ. A. 3:97-CV-394, 1998 WL 695299 (W.D. Ky. Sept. 30, 1998); *New Jersey Carpenters Health Fund v. Philip Morris, Inc.,* 17 F. Supp. 2d 324 (D.N.J. 1998); *Stationary Engs. Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc.* No. C-97-01519, 1998 WL 476265 (N.D. Cal. Apr. 30, 1998); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.* 7 F. Supp. 2d 277 (S.D.N.Y. 1998), *appeal granted* (2d Cir. July 14, 1998) (No. 9807944); *West Virginia Laborers' Pension Trust Fund v. Philip Morris, Inc.*, No. 3:97-0708 (S.D.W.Va. Aug.12, 1998)).

destined to be long and convoluted. Furthermore, as the Second Circuit observed in *Gottesman v. General Motors Corp.*, "[i]t would seem axiomatic that appeals challenging pre-trial rulings upholding pleadings against demurrer could not be effective in bringing nearer the termination of litigation; on the contrary, they only stimulate the parties to more and greater pre-trial sparring apart from the merits." 268 F.2d 194, 196 (2d Cir. 1959). The proceedings that remain before this Court will give Defendants ample opportunity to make the case that the evidence produced by Plaintiffs does not support the claims sufficiently pled. Later proceedings and discovery may well vindicate Defendants' beliefs that Plaintiffs' injuries are indeed too remote.

Most striking about Defendants' argument is their failure to challenge the standards that the Court applied to the issues of remoteness and "business or property" injury. Instead, they challenge the Court's application of the legal standard to the facts alleged in Plaintiffs' complaint. In essence, Defendants merely raise again the sufficiency of the Plaintiffs' pleadings. However, as the legislative history of Section 1292(b) indicates, "'[I]t is not thought that . . . the mere question as to the correctness of the ruling would prompt the granting of the certificate.'" *Kraus v. Board of County Rd. Comm'rs for County of Kent*, 364 F.2d 919, 921 (6th Cir. 1966) (quoting 1958 U.S. Code Cong. & Admin. News, 5260-61). *See also Novacor Chemicals, Inc. v. GAF Corp.*, 164 F.R.D. 640, 648 (E.D. Tenn. 1996) (denying certification where dispute is not about applicable law but whether court properly applied the law to the facts).

The recent case cited by Defendants, *Mackey v. Milam*, No. 97-3859, 1998 WL 574350 (6th Cir. Sept. 10, 1998) actually demonstrates how Defendants' arguments fall short. In *Mackey*, the district court certified for appeal the question of whether the United States should be substituted as the defendant in a sexual harassment case brought by a member of the Air Force

against her supervisors. The question turned on whether the supervisors were acting within the scope of their employment; if so, the United States could be substituted as a defendant. State law governed the scope-of-employment question. In accepting the appeal, the Sixth Circuit determined that the district court erroneously applied Ohio case law. *See Mackey*, 1998 WL 574350, *3. Specifically, the district court in *Mackey* incorrectly used a scope-of- employment test in *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991), a case involving sexual misconduct of a church pastor with a congregation member. The Sixth Circuit stated that a subsequent Ohio case, *Kerans v. Porter Paint Co.*, 575 N.E.2d 428 (Ohio 1991) made clear that the analysis in *Byrd* did not apply to employee-supervisor cases involving *respondeat superior* questions, as was the case in *Mackey*. *Id.*

If the controlling question here, as in *Mackey*, regarded the legal standard this Court pulled from questionable or improper precedent, or if this court created some new cause of action out of thin air, the need for certification would be apparent. Neither is the case. Rather, this court applied well-established law on remoteness to rather complicated and far-reaching factual allegations. This Court and other federal district courts in similar cases considering Defendants' 12(b)(6) motions consistently have discussed general remoteness and proximate cause tests as well as the more specific discussions in *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311 (1992). Moreover, the question of business and property injury raised by the Defendants is merely a rehashing of the derivativeness argument which this Court carefully-- though possibly incorrectly-- addressed in its Memorandum Opinion. That other district courts have reached different conclusions is not surprising given the evolving nature of the evidence available to Plaintiffs and nuances between the standards for reviewing 12(b)(6) motions in the various districts.

Defendants' understandable dissatisfaction with this Court's analysis of the Rule 12 motions is simply not enough to support certification. While Defendants seem to have placed considerable effort in making this motion attractive, the Court does not see the need for a more lengthy analysis and discussion. The Court sees no different more plausible, controlling legal standard regarding either of the questions they seek to certify. For this reason and the others stated here, the Court concludes that the issues which Defendants raise are not suited for interlocutory review.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

The Court having considered Defendants' Motion for Certification pursuant to 28 U.S.C. § 1292(b) and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion for certification is DENIED.

This _____ day of December, 1998.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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