

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 08-2784, 08-2785, 08-2798, 08-2799, 08-2818, 08-2819, 08-2831, and 08-2881

SHAWN SULLIVAN; ARRIGOTTI FINE
JEWELRY; JAMES WALNUM, on behalf of
themselves and all others similarly situated,

v.

DB INVESTMENTS, INC; DE BEERS S.A.;
DE BEERS CONSOLIDATED MINES, LTD;
DE BEERS A.G.; DIAMOND TRADING COMPANY;
CSO VALUATIONS A.G.; CENTRAL SELLING
ORGANIZATION; DE BEERS CENTENARY A.G.

On Appeal from the United States District Court
for the New Jersey
(D.C. No. 04-cv-2819)

ORDER

PRESENT: SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, and VANASKIE, Circuit Judges

Rehearing En Banc is schedule in the above entitled appeals for Wednesday,
February 23, 2011. The Court has determined that supplemental briefing is required:

(1) The parties are directed to address the following assertions:

(a) the predominance inquiry requires that each potential class member
share at least one identical claim;

(b) predominance is satisfied if class members have different claims as long
as each contains elements requiring resolution of common issues of fact;

(c) predominance is satisfied if class members have related, but different,
claims that all arise out of the same course of conduct on the part of the
defendant;

(d) predominance does not examine the 'claims,' as such, of all potential
plaintiffs, but focuses on the 'predominance' of common, versus
individualized, issues of fact or law that will be presented by a certain class
action, as framed in the complaint, and as anticipated to be tried.

(2) Assuming, *arguendo*, that certain indirect purchaser plaintiffs do not have a cause of action, is this set of facts properly analyzed under Rule 23(a)(2)'s prerequisite that there be "questions of law or fact common to the class," Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members," both, or neither?

(3)(a) Does including class members in a settlement-only class who do not have a common valid claim under the applicable substantive law preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?

(3)(b) Does including class members in a settlement-only class who do not have either a shared valid claim under the applicable substantive law, or a shared issue of fact relevant to different valid claims, preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?

(3)(c) If class members do not have a shared claim, does the existence of related, but different claims, all arising out of the defendants' course of conduct preclude a finding that common issues of fact or law predominate under Federal Rule of Civil Procedure 23(b)(3)?

(4) Where some states provide a right to relief, while others do not, does there exist, as we wrote in *In re Warfarin*, a "situation[] where variations in state laws are so significant as to defeat commonality and predominance?" If not, what kind of variation would defeat commonality and predominance?

(5) In a settlement class, is the District Court required to assure itself that each class member has a valid claim under the applicable substantive law? If so, what standard should the District Court apply? If a "facially apparent" standard applies, how should a district court determine whether it is facially apparent that some class members have no valid claim?

(6) Does the nationwide settlement class of indirect purchasers certified by the District Court contain class members who do not have a right to relief under any of the three state-law causes of action pled in the complaint?

(7) Did the District Court run afoul of the Rules Enabling Act because its order effectively granted relief to individuals to whom De Beers had no antitrust liability?

(8) Did the District Court's order effectively grant relief under claims from states that had foreclosed such relief? If so, did the District Court run afoul of principles of federalism?

(9) Is De Beers's decision to voluntarily enter into a settlement relevant to any issue regarding the Rules Enabling Act or the requirements of commonality or predominance under Federal Rule of Civil Procedure 23?

Appellants and any supporting amici shall file their supplemental brief on or before December 10, 2010;

Appellees and any supporting amici shall file their supplemental brief on or before January 11, 2011;

Appellants' reply brief, and the reply brief by any supporting amici, shall be filed and served on or before January 21, 2011.

The parties shall file the briefs electronically through the Court's ECF system and provide the Clerk with 20 hard copies of each brief.

By the Court,
/s/ Anthony J. Scirica
Circuit Judge

Dated: November 10, 2010
MB/cc: All Counsel of Record