[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 23-11319 & 23-11541

In Re: JOHNSON & JOHNSON AEROSOL SUNSCREEN MARKETING,
SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION.

KATHERINE BRENNAN,
MICHELLE MANG,
MEREDITH SEROTA,
Individually and on Behalf of All Others Similarly Situated,
JACOB SOMERS,
LAUREN HARPER, et al.,

Plaintiffs-Appellee-Cross Appellant,

THEODORE H. FRANK,

Interested Party-Appellant Cross-Appellee,

versus

JOHNSON & JOHNSON CONSUMER, INC.,
NEUTROGENA CORPORATION,
JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,
AVEENO,
JOHNSON & JOHNSON, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:21-md-03015-AHS

Before WILSON, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

Objector Theodore Frank appeals the district court's approval of a class-action settlement providing relief to a class of purchasers of Johnson & Johnson sunscreen products, sold under its Neutrogena and Aveeno brands, that were alleged to contain benzene, a known carcinogen. After appellate briefing concluded, a different panel of this Court held that the provisions of the Class Action Fairness Act governing coupon settlements, 28 U.S.C. § 1712, apply to settlements offering relief to class members in the form of vouchers that are redeemable for up to a certain dollar amount usable against any of a company's products or services. *See*

Drazen v. Pinto, 101 F.4th 1223, 1267–74 (11th Cir. 2024). Part of the relief offered to the class here—specifically, to purchasers of affected non-aerosol sunscreen products—came in the form of such vouchers.[1] Both parties to the appeal agree that the district court's order approving the settlement and attorney's fee should be vacated and remanded for that court to apply *Drazen* in the first instance.

On remand, the district court should also consider whether any named plaintiff established standing to pursue prospective injunctive relief on behalf of the class in light of *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243 (11th Cir. 2023), which was also issued after the district court's approval of the settlement. In *Williams*, this Court vacated a class-action settlement providing for

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[1] Frank also argues on appeal that the class may have lacked standing to challenge the non-aerosol products in the first place because no named plaintiff purchased any non-aerosol products. The class responds by arguing that the alleged injuries suffered by aerosol and non-aerosol sunscreen purchasers are identical. Our review of the class complaints, however, reveals that at least one named plaintiff likely alleged that she purchased one of the affected non-aerosol products. *See* First Amended Class Action Complaint at 4, *Brennan v. Johnson & Johnson Consumer, Inc.*, No. 21-cv-04869 (N.D. Cal. June 24, 2021), ECF No. 1-1 at 48; *see also* Declaration of Michelle Mang in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ¶ 2, *In re Johnson & Johnson Sunscreen Litig.*, 21-md-03015 (S.D. Fla. June 24, 2022), ECF No. 82-4 at 8. Consistent with the obligation of all courts to ensure their own subject-matter jurisdiction at all stages in the litigation, the district court remains free on remand to reconsider whether "at least one named plaintiff has suffered the injury that gives rise to" each class claim. *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) (quotation omitted).

injunctive relief because no named plaintiff had established "a threat of 'real and immediate,' as opposed to 'conjectural or hypothetical,' future injury." *Id.* at 1253 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). The plaintiffs there alleged that they "would like to purchase Defendants' products if they truly improved brain performance," but that the currently available products were "worthless" and that they were "unable to rely on Defendants' representations regarding the effectiveness of Defendants' products in deciding whether to purchase Defendants' products in the future." *Id.* at 1254–55. We concluded that these statements were "plainly insufficient to establish a threat of imminent or actual harm" because they demonstrated, at most, a "conditional" desire to purchase other products that did "not yet exist, and may never exist." *Id.* at 1254–56.

Here, part of the settlement relief granted to purchasers of aerosol sunscreen came in the form of prospective injunctive relief directing Johnson & Johnson to purge any existing inventory of the isobutane aerosol propellant found to be the source of the benzene and to establish new testing protocols for the presence of benzene in its supply chain and finished sunscreen products. On remand, the district court should conduct an inquiry into the named plaintiffs' standing to pursue this relief. *See id.* at 1254.

The district court's order is **VACATED** and the case is **REMANDED** for proceedings consistent with this opinion.[2]

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[2] Because the district court's order approving the settlement agreement is vacated, we do not reach the remainder of the issues raised by either Frank's

appeal or the class's cross-appeal; nothing in this opinion should be construed as addressing these isssues.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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June 20, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-11319-DD
Case Style: In re: Johnson & Johnson Aerosol Sunscreen
District Court Docket No: 0:21-md-03015-AHS

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. **A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard.** See 11th Cir. R. 35-5(k) and 40-1.

Costs
Each party to bear its own costs.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or

cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

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OPIN-1 Ntc of Issuance of Opinion