

ACI's 21st National Conference on Consumer Finance Class Actions & Litigation

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A Focus on Class Action Settlements

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Potential Red Flags

- Claims made
- Onerous claims process
- Questionable value (coupon, small payments, injunction)
- Clear Sailing Clause
- Reverter to defendant (settlement fund, attorney fee award)
- Excessive attorney's fees

A Valid Defense?

Factors in determining fairness include:

“(1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed.”

***Wong v. Accretive Health, Inc.*, 2014 WL 6888166,
at *3 (7th Cir. Dec. 9, 2014)**

The Seventh Circuit

- *Redman v. Radioshack Corp.*, 768 F.3d 622 – decided Sept. 19, 2014
- *Pearson v. NBTY, Inc.*, 772 F.3d 778 – decided Nov. 19, 2014
- *Wong v. Accretive Health, Inc.*, 2014 WL 6888166 – decided Dec. 9, 2014

Redman

District Court Abused Discretion In Approving Class Settlement

- Coupon settlement
- ½ of 1%-1.5% of class made claims
- Ratio of attorney fee to class value potentially 67%
- Clear sailing clause
- Other concerns
- The Court commented that RadioShack likely willfully violated FACTA

Pearson

District Court Abused Discretion In Approving Class Settlement

- Onerous claims process
- Ratio of attorney fee to class value was 69%
- Clear sailing clause
- Reverter to defendant
- Injunctive relief with no value
- *Cy pres* concerns
- The Court discusses the lack of medical basis for the representations made regarding the product

Wong

District Court Did Not Abuse Its Discretion In Approving Class Settlement

- Defendant raised potentially valid defenses
- Motion to dismiss pending when parties mediated before experienced mediator
- Litigation would involve lengthy discovery and expert testimony
- Insurance proceeds were limited
- Value to class in light of litigation risks appeared fair
- Attorney's fees were 30% of settlement value to class

The Ninth Circuit

***In re Ferrero Litigation (Hohenberg v. Ferrero USA, Inc.)*, 583 Fed. Appx. 665 – decided July 16, 2014**

- Lodestar method approved
- Settlement agreement contained clear sailing clause and reverter to defendant
- Objectors opposed motion for attorney fees
- Injunctive relief meaningful
- Monetary relief also provided
- Settlement reached after certification through process involving judicial officers
- Factors from *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) met

The Third Circuit

***In re Nutella Marketing and Sales Practices Litigation*,
2014 WL 4801262 – decided Sept. 29, 2014**

- Attorneys paid 25% of fund plus additional amounts from defendant for injunctive relief
- Clear sailing clause
- Reverter to defendant (fee for injunctive relief)
- Objector had standing to challenge portion of fee award paid by defendant
- Injunctive relief provided some value to class

Complexities in Implementing Class Relief

- Payments
- Account waivers
- Account credits
- Loan modifications
- Promises not to collect
- Delayed relief on an account

***Foley v. Wells Fargo Bank, N.A., 772 F.3d 63
(1st Cir. Nov. 14, 2014)***

CAFA Class Settlement As Bar To Enforcement Action

Where State had notice of CAFA settlement, it could be enjoined from seeking duplicative recovery through an enforcement action.

California v. Intelligender, LLC, 771 F.3d 1169 (9th Cir. Nov. 7, 2014)

Considerations

As a general rule, a CAFA class action settlement does not act as *res judicata* against the State in acting its sovereign capacity.

- Vindication of broader governmental interests versus recoupment of individual's loss
- Concerns over double recovery
- Scope of class definition
- CAFA notice

Objectors and Appeal Bonds

Rule 7 bond appropriate to cover settlement administration costs for one year

In re Nutella Marketing and Sales Practices Litigation, 2014 WL 4801262 (3rd Cir. Sept. 29, 2014)

District Court erred in imposing Rule 7 bond to cover additional notice and administrative costs

Tennille v. Western Union Co., 2014 WL 7240693 (10th Cir. Dec. 22, 2014)

Cy Pres Distributions Impact on Defendants

- *In re BankAmerica Corp. Securities Litigation (Oetting v. Green)*, 2015 WL 110334 (8th Cir. Jan. 8, 2015)
- *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. Nov. 19, 2014)

Incentive Awards- Red Flags

- Significant disparity between incentive awards and payments to remaining class members
- Conditional incentive awards

***Radcliffe v. Experian Information Services Inc., et al.*, 715 F.3d 1157 (9th Cir. May 2, 2013)**

***In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Circuit Aug. 2, 2013)**