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Close Counts In Horse Sho Chronic Halitosis, but Not Says Fifth Circuit

Posted in Class Action Decisions, Class Action Trends, Federal Court Decisions, tagged Baker Hostetler, class action settlement, cy pres, elf, fifth circuit, klier, settlement agreement, unclaimed settlement on November 8, 2011 | Leave a Comment »

The Baker Hostetler class action practice team issued a new Executive Alert today authored by Columbus Partner Mark Johnson entitled Fifth Circuit Restricts *Cy Pres* Doctrine in Class Action Settlements. The alert discusses the Fifth Circuit's recent decision in *Klier v. Elf Atochem North America, Inc.*, restricting the use of the *cy pres* doctrine to distribute unclaimed class action settlement funds in the absence of express terms in the settlement agreement.

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Roundup of Recent Federal Decisions on Class Action

Posted in Class Action Decisions, Class Action Fairness Act, Federal Court Decisions, tagged amount in controversy, CAFA, chimei, circuit court of appeals, cy pres, easterbrook, federal court of appeals, fifth circuit, fourth circuit, keeling, klier, ninth circuit, parens patriae, punitive damages, remand, removal, seventh circuit on October 4, 2011 | Leave a Comment »

Having been focused on several other speaking and writing projects recently (in addition to my day job), it's taken longer than I had hoped to comment on several recent class-action-related decisions by the federal circuit courts of appeals. Here's a brief summary of three recent decisions of note:

Washington State v. Chimei Innolux Corp., No. 11-16862 (9th Cir. Oct. 3, 2011) – joining the Fourth Circuit in holding that a *parens patriae* action brought by state attorneys general or other state officials for the benefit of the state's citizens is not a "class action" for the purposes of removal under the Class Action Fairness Act (CAFA).

Klier v. Elf Atochem N. Am., Inc., No. 10-20305 (5th Cir., Sept 27, 2011) – holding in the absence of an express provision in the settlement agreement to the contrary that unclaimed funds should be distributed pro rata to class members who participated in the settlement as opposed to being given to charity as a *cy pres* distribution. Take note of the concurrence by Judge Edith H. Jones, which makes a strong argument that in the absence of any agreement to the contrary or express waiver of the right to recover unclaimed funds, the equities favor returning those funds to the *defendant* rather than paying them to the class or distributing them to charity.

Esurance Ins. Co. v. Keeling, No. 11-8018 (7th Cir., Sept. 26, 2011) – holding that when punitive damages are at issue, the correct standard is whether it would be "legally impossible" for the plaintiff to recover an amount of punitive damages that, when combined with the amount of compensatory damages sought, would exceed the $5 million amount in controversy threshold under CAFA, but concluding that it was not legally impossible under Illinois law, even though it was unlikely, that $4.4 million in punitive damages could be awarded

in a case where the compensatory damages were slightly more than $600,000.

A great resource for more timely commentary and analysis on recent class action decision in the federal courts of appeals is Alison Frankel's blog *On the Case*.

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Public Interest Objectors

Posted in Articles, Class Action Settlements, Practice Tips, tagged appropriate government official, class action notice, class action settlement, coupon settlement, cy pres, nonprofit objector, organized objector, professional objector, public interest objector, reversion on April 21, 2011 | 1 Comment »

Recently, I have commented on two types of objectors in class action settlements. This March 31 entry discusses the problem of so-called "professional" objectors. And this April 12 entry addresses objections raised by government officials. There is at least one other type of organized objectors to class action settlements: public interest organizations. (I use the term "organized objectors" to distinguish these types of objections from objections that may be sent in by individual class members who are not represented by separate counsel). Mechanically, objections by public interest organizations may be accomplished in a manner similar to that used by professional objectors: through the representation of one or more settlement class members by lawyers employed by or cooperating with the organization. However, unlike with professional objectors lawyers, the representation is usually *pro bono*. Alternatively. as with objections by government officials, public interest objections to a settlement may be accomplished through *amicus* briefs to the court.

There are a variety of public interest organizations that file objections to proposed class action settlements. These organizations have widely differing purposes and political agendas. For example, the *Center for Class Action Fairness* (*CCAF*) was founded by attorney and leading tort and class action reform advocate (and contributor to the popular law blog, *Overlawyered*), Ted Frank. *CCAF* is a nonprofit organization formed for the stated purpose of providing "*pro bono* representation to consumers and shareholders aggrieved by class action attorneys who negotiate settlements that benefit themselves at the expense of their putative clients." In this April 18, 2011 press release, Frank summarizes various cases in which his organization successfully objected to class action settlements that "will result in class members receiving over $5 million more than what their class attorneys were willing to negotiate."

At the other end of the political spectrum (at least from the perspective of tort reform) from *CCAF*, is *Public Justice*, an organization founded by leading trial lawyers that describes itself as "America's public interest law firm." A stated objective of *Public Justice* is to fight interests aimed at "closing the courthouse doors so victims can't hold the powerful accountable," including fighting "class action bans and abuses." Like *CCAF*, *Public Justice* has successfully objected to or intervened in a variety of class action settlements. Some of its work in this area is summarized in the article "Fighting Class Action Abuse," which is available on its website.

A third organization, *Public Citizen*, is a consumer advocacy group that has the stated goal of preserving the right of consumers to seek relief through class actions. However, according to its website, "[a]t the same time, we recognize that on occasion class action settlements may not be in the interest of all class members, and in such cases we have often represented class members in objecting to and seeking to improve the terms of such settlements."

Although the political motivations of these organizations might be different, there are several key similarities between these groups. First, their interest in objecting to a settlement is based on a sincerely held belief that their involvement is necessary to protect the public interest. This means that they are not motivated by profit, but rather by a conviction that the settlement (or the system itself) is unfair. Like government objectors, their goal is to gain disapproval of or modification to the settlement, not to extort a portion of the fee.

Second, regardless of the ultimate motivating philosophy, even public interest groups with drastically different political agendas can find the same kinds of settlements or settlement terms objectionable. Not surprisingly, many of their objections are the same as those that a government official might make.

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Target data breach class settlement - Overlawyered on Breaking Down the Target Payment Card Breach Settlement – It's Not as Groundbreaking as You've Been Led to Believe

Coupon settlements are a natural target. A conservative group formed to combat class action abuse might object to a coupon settlement because the fact that a coupon settlement was the best the plaintiffs' could do for the putative class reflects that he case was a frivolous, lawyer-driven case that had no societal value in the first place. A consumer advocacy group might object to the same settlement because of a perception that it is unfair for a defendant to profit from its own wrongdoing. Where both groups might agree is that the court should not approve a settlement that includes little or no benefit to class members and a large payout to the plaintiffs' lawyers.

One area in which right-leaning and left-leaning public interest groups may diverge is in their view of *cy pres* provisions in class action settlements, that is, distribution of any unclaimed funds to a charity. Class action reform advocates object to *cy pres* distributions because they don't benefit the members of the class, and are sometimes simply a tool used by trial lawyers to raise funds for their own pet causes. Trial lawyers in turn, argue that *cy pres* is the best way to deal with unclaimed funds, because the alternative would be to let the money revert back to the defendant, which would allow the defendant to profit from its wrongdoing. (Although I want to stay neutral, as a defense lawyer, I am compelled to point out that the fallacy in this reasoning is the class action *settlement* context, the defendant hasn't been found to have done anything wrong. Rather it has voluntarily agreed to provide some compensation in exchange for peace from further litigation).

As with objections by government actors, objections to class action settlements by public interest groups are rare, but they present a significant risk to approval of a settlement if they do occur. There are a variety of steps that counsel can make to avoid these types of objections, including:

- Ensure that the settlement notice is in plain English, understandable, and contains all information required by Rule 23(c)(2)(B). The Federal Judicial Center guidelines for plain English notice provide an excellent template, but the template obviously must be tailored to each case in order to provide effective notice. Hiring a qualified notice expert (not simply a settlement administrator) to help draft the notice and testify about the fairness of the notice plan can protect against possible objections to the fairness of the notice.
- Make sure that the notice is delivered in a way that makes it truly the best notice practicable. Intentionally using a method of notice that is unlikely to be read and appreciated by class members, in the hopes of reducing the response rate, is folly. If you don't do everything reasonable possible to give class members adequate notice of a settlement, you risk having the entire settlement disapproved after you have incurred the significant notice costs. In many cases, direct mail is still considered the best way of distributing notice. Technology has made direct mail possible even in cases where the last known addresses of class members are a few years old. Old addresses can be updated through the post office change of address system, as well as through various private databases. Again, having a qualified notice expert can help. If it is truly impossible to reach a sufficient number of class members through direct mail, then a published notice can be used as a supplement, but it is better to think of published notice as a last resort.
- Avoid settlement terms or arguments that exaggerate the true value of a benefit to be given to the class. A settlement does not have to give class members 100% of the claimed damages in order to be fair. It is, after all, the result of a compromise. However, exaggerating the value of benefits, especially non-monetary benefits, is one of the surest ways to draw objections and skepticism from the Court.
- Avoid unnecessary publicity. Unnecessary publicity (by either the plaintiffs or the defendant) raises the risk that public interest groups will scrutinize it. This is another reason to use direct mail when possible.
- If the settlement does include a *cy pres* component, try to find an organization that is likely to benefit some or all of the class members directly. Distribution to any organization in which one of the lawyers has a personal affiliation or stake will raise a red flag. Donations to a victim's assistance fund, for example, are less likely to receive scrutiny than a donation to a lawyer's law school.
- In any settlement that may include unclaimed funds (whether those funds revert to the defendant, are distributed pro rata to other class members, or are distributed to a charity), above all else, do whatever you can to ensure that class members have a fair *opportunity* to participate in the settlement. You often can't force class members to

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claim benefits, but you do have the power to make sure that there are no artificial barriers to participation.

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Long Live the Reversionar Settlement

Posted in Class Action Settlements, Commentary, tagged claims made settlement, class action reform, class action settlement, cy pres, reversion, reversionary settlement on February 23, 2010 | Leave a Comment »

The other day, a colleague tipped me off to a December 2009 blog posting by Oakland, California employment and civil rights attorney Bryan Schwartz entitled Death to the Reversionary, "Claims-Made" Settlement, a thoughtful, well-written article with which I completely disagree and to which I felt compelled to respond. Schwartz is critical of what he alternatively calls "reversionary" or "claims-made" settlements and proposes that plaintiffs' firms adopt strict policy of refusing to enter into them. His critique may be best summarized in the following excerpt, although I would encourage reading the entire article:

> The idea of a reversionary, claims-made settlement is that the defendants will actually be paying "up to" the amount indicated, depending on the number and value of the claims that are submitted. So, if only 50% of eligible claims are submitted, then defendants may wind up paying only half of the agreed-upon amount, with the rest reverting to defendants, though the plaintiffs' attorneys still collect fees on the full settlement amount. Though many courts no longer permit this practice, defendants still frequently try to offer claims-made (aka reversionary) settlements (which can be easy to sell to the corporate client – "I know X sounds bad, but you're really only paying Y, so don't worry!"). Some plaintiffs' counsel may still agree to claims-made/reversionary settlements, too – but I urge you not to do so!

Schwartz's critique has surface appeal, and is no doubt shared by many plaintiffs' lawyers and even judges. However, I would respectfully urge lawyers and judges alike not be too quick to dismiss the possible benefits of these settlement structures for all parties and the courts. If done properly, claims-made settlements provide a unique mechanism for resolving disputes that is both fair to all parties and reduces unnecessary burdens on the court system.

I wrote an article for *ProductLiabilityLaw360* in 2008 in which I summarized different possible class action settlement structures and discussed the benefits of claims-made settlements over various alternatives (See full article here). In that article, I drew a distinction between a true "claims-made" settlement and a settlement that involves a pre-determined capped fund with a reversion to the defendant. The quoted section from Schwartz's article above appears to refer to the latter structure. By contrast, what I would consider a true "claims-made" settlement would be a settlement in which each class member is given the right to make a claim in a predetermined amount or based on a predetermined formula, but the total amount of the potential payments are not capped, and attorney's fees and costs are paid separately and not taken out of any fund used to pay claims. Unlike the structure described by Schwartz, the Defendant in this type of claims-made settlement takes on the risk, at least theoretically, that it will have to pay 100% of all claims submitted, *plus* fees and costs. Typically, if the settlement involves a set fund with a reversion, fees and costs are taken out of the fund first, and benefits to class members are reduced pro-rata if there is not enough money left in the fund to pay 100% to all claimants. Any unclaimed amounts revert to the defendant if, after paying all fees and costs and 100% of money claimed by class members, there is still money left over. Despite these technical differences, however, both structures are subject to many of the same criticisms as outlined in Schwartz's article, and I will not dwell on the differences in the discussion that follows but will rather refer to them both as "claims-made" settlements.

One of the main ideas in my 2008 article was that claims-made settlements can be beneficial to all of the true stakeholders. By true stakeholders, I mean the named plaintiffs, their counsel, the defendant, the courts, and all class members who can be reached and who care to participate. The main factor in making a claims-made settlement fair is in doing everything possible to ensure the best

notice practicable, so that all class members have a fair opportunity to *participate* in the settlement. In my view, this should be the primary goal, not forcing class members to benefit from a settlement or forcing a defendant to pay whether or not class members benefit. Class members who receive notice may choose not to participate in claiming settlement benefits for any number of completely legitimate reasons, including that they don't want to be bothered, they disagree with class actions generally, or they don't feel strongly that the defendant did anything wrong. In some cases, it is impossible to reach a portion of the class, so there is no way to benefit class members directly even assuming that they would have wanted to participate.

With these principles in mind, I have outlined below a few of the key criticisms leveled at claims-made settlements, with a brief response to each. Whether my responses carry the day will obviously be left to the individual reader, but I would hope that anyone predisposed to think that claims-made settlements are generally a sham to benefit corporate America at the expense of the public will at least read them with an open mind.

Criticism 1: Claims-made settlements allow the defendant to get away with its misconduct. The defense attorney's easy retort to this argument is that class actions generally allow greedy plaintiffs' lawyers to extort money out of innocent companies by filing frivolous lawsuits. In most class actions, however, the defendant's conduct was not clearly improper, nor was the lawsuit clearly frivolous. That is one reason why most class actions are resolved by settlement in the first place. The point is that a settlement is a compromise resolution of a dispute, not punishment for a corporate wrongdoer. It is no more fair to call a defendant in a class action settlement a wrongdoer than it is to call the case frivolous.

Criticism 2: Leftover money should be given to charity, not returned to greedy corporate executives. Aside from the previous observation that a defendant hasn't been found to have done anything wrong in a class action settlement, this criticism also often rests on another flawed premise; that is, that any money saved by a corporation in settling a lawsuit goes to a select few corporate executives who use the money to buy a new private jet or vacation home. This is a misconception of how large companies operate. Every dollar paid out by a corporate defendant impacts a variety of groups of people who had nothing to do with whatever the alleged misconduct was. When a company pays a settlement or a judgment in a class action, it is not required to specify where the money is going to come from. So, every dollar paid in settlement negatively impacts the company's shareholders, most of whom (at least in the case of a public company) clearly had nothing to do with whatever malfeasance the company is accused of. Paying a settlement may require the company to increase the cost of its goods or services, which negatively impacts consumers. In the case of an insurance company, the cost of settling a lawsuit is also borne by the company's policyholders in the form of higher premiums. The cost of settling a lawsuit may also impact the job security of the company's employees. When these other stakeholders are taken into account, it becomes far less clear that it is more just to have any unclaimed funds be paid to a charity, which had nothing at all to do with the subject of the dispute, rather than returned to the company, where the funds might benefit certain executives but will also benefit innocent shareholders, consumers, policyholders, and employees. There are a variety of other criticisms of *cy pres* awards in class action settlements. (See CAB entries dated October 11, 2009, October 28, 2009, and December 17, 2009 discussing *cy pres* awards).

Criticism 3: Claims-made settlements create perverse incentives for defendants. In many cases, claims-made structures provide the only possible way to bridge the gap between what the Defendant is willing to pay, short of going to trial, and what the plaintiffs' *attorneys* are willing to accept in fees, short of going to trial (In my experience, the named plaintiff does not play much of a role in this process, but then again, I've never been in the room when settlement was discussed with a named plaintiff). The defendant doesn't think it did anything wrong, and certainly doesn't think that whatever it might have done wrong impacted everyone in the class (or would-be class), and it isn't willing to pay 100% of what the plaintiff is claiming on behalf of the class. In order to settle the suit, it will only agree to pay far less than what would take to make the entire class whole. On the other side, the plaintiffs' attorneys fee expectation, which is based on an assumed 1/3 share of a recovery on behalf of the class as a whole, becomes a key obstacle for resolution of the dispute, whether or not the actual class members would ever hope to benefit from the relief that the attorney is seeking. So, it can be argued that claims-made settlements create perverse incentives for both defendants and plaintiffs' class action lawyers.

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But incentives don't necessarily have to translate into abuses. There are checks in place to prevent abuses on both sides. The perverse incentive for a defendant is to create artificial roadblocks to participation, such as making the claim form confusing or burdensome to complete. This can be avoided by following strict plain notice guidelines and hiring a competent settlement administrator and notice expert. The perverse incentive for a plaintiff is to trade class benefits for higher fees. However, the potential for this abuse is limited by the requirement that the court approve any fee award.

Perhaps abolishing claims-made settlements would cause more consumers, shareholders, or employees to reap higher returns in class action lawsuits, but it would just as likely reduce the fee expectations created within the plaintiffs' bar for settling suits for what they are actually worth both in terms of litigation risk and public benefit. These are public policy matters that in my view are best left to the state legislatures and Congress to correct if they need to be corrected. Removing claims-made settlement as an option, stated simply, means less class action settlements. From the perspective of critics of the class action device generally, this may sound like a positive reform, but I can't imagine that it would ultimately be a positive development for the plaintiffs' bar. Fewer class action settlements means a greater burden on the court system and lower fee expectations for plaintiffs' lawyers generally, resulting in less people willing to pursue class actions, and less opportunity for the victims of alleged wrongdoing to recover any benefits.

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Yet More on Cy Pres

Posted in Articles, class action reform, Class Action Settlements, tagged class action settlement, cy pres, reversion on December 17, 2009 | 1 Comment »

Cy pres awards continue to be a hot topic both in the news and in academia. The latest contribution comes from Columbia law student Sam Yospe, whose article entitled Cy Pres Distributions in Class Action Settlements (Columbia Business Law Review, forthcoming) examines judicial discretion in choosing cy pres awards and makes practical suggestions for reform. Yospe's article is an excellent secondary research source for anyone looking at issues relating to cy pres awards in class action settlements.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492105

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More on Cy Pres

Posted in class action reform, Class Action Settlements, Class Action Trends, Commentary, tagged class action settlement, common fund, cy pres, payment to charity, reversion, settlement distribution on October 28, 2009 | 1 Comment »

Over the past week, I have received two separate requests for comment on cy pres awards to charity in class action settlements. Evidently it's on readers' minds, so I thought I'd give some thoughts on the subject here.

Cy pres distributions to charity are one of several ways of dealing with a common problem in class action settlements: unclaimed proceeds from a common fund. Class settlement proceeds may go unclaimed for any number of reasons, but for the sake of simplicity, I'll limit the discussion to funds that cannot be claimed because not all class members can be located or given notice of the availability of the settlement amount. Amount the other possible ways to distribute these unclaimed amounts are 1) allow the funds to revert back to the defendant; 2) pay the unclaimed amounts pro rata to the plaintiffs who did participate in the settlement; or 3) allow the funds to escheat to the state.

An argument commonly made in favor or a cy pres distribution over the other possible methods is that it provides a social benefit that arguably counteracts the wrong alleged to have been done by the defendant and prevents the defendant from reaping the benefits of its misconduct. The fallacy in this reasoning is that in the settlement context, the defendant hasn't been found liable for anything. It is simply agreeing to resolve the case by paying money rather than face the uncertainty, cost, and risk of litigation and trial. As long as plaintiffs are given a full and fair opportunity to participate (a topic for another

day), there is no reason that cy pres distributions are a superior way of dealing with unclaimed funds to allowing the defendant to retain the funds for the benefit of its shareholders, employees, policyholders, creditors, or other stakeholders.

On the other hand, because a defendant agrees to a settlement willingly, it really can't be argued that cy pres provisions are unfair to defendants. So, from a purely practical point of view, there is little to criticize in the use of cy pres in class action settlements. Cy pres provides one of several options for settlement structures that may be available to resolve a dispute without having to resort to a trial. Plaintiffs lawyers like cy pres provisions because they may justify a higher attorney's fee percentage and because they can make the plaintiff's lawyer look like Robin Hood. A defendant may agree to the distribution because it wants the certainty of fund that limits its settlement exposure and because it may be able to take advantage of the PR benefits of having donated money to charity in resolving a lawsuit.

From a societal or public policy point of view, however, cy pres is open to serious criticism. The civil justice system is intended to provide a forum for remedying private wrongs. If those injured by an unfair or unlawful practice cannot be located to provide them a remedy, then why should the money be forfeited to others who have not suffered injury at all? Given the high cost of litigation, cy pres is not a particularly efficient way of redistributing wealth. Policing and punishing misconduct and consumer protection are functions that are probably more appropriately handled by regulatory and criminal authorities. While cy pres distributions may provide a societal benefit, it might be more beneficial, and less costly to businesses, just to impose a tax on all large companies rather than allowing plaintiffs' attorneys to pursue these benefits in the civil courts.

For the time being, however, cy pres has become an accepted procedure for dealing with unclaimed class action funds. As long as it is allowed, class action lawyers and litigants should continue to consider it as one option among many in resolving class actions.

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In Case You Care, ClassAc the Video "Class Action"

Posted in Class Action News, Class Action Trends, Commentary, tagged beacon, beacon settlement, blockbuster, cy pres, facebook, facebook settlement, privacy class action, privacy law on October 26, 2009 | Leave a Comment »

Venkat Balasubramani over at *Spam Notes* has been covering developments in an interesting group of class actions against Blockbuster Video and Facebook. The cases arise out of Facebook's Beacon feature, which causes news feed stories to be automatically generated about users' purchases and other actions with online partners like Blockbuster. the plaintiffs in each of the cases allege violations of various privacy laws arising out of the use of the Beacon program.

The first of the three actions was filed against Blockbuster in federal court in Texas. A separate filing against Facebook and various of its online partners, including Blockbuster, followed in federal court in California. The Texas plaintiffs later filed a similar case against Facebook in Texas.

The parties in the California case recently reached a settlement. The settlement calls for Facebook to terminate the Beacon program and pay $9.5 million to a fund to be used to establish a "privacy foundation," along with payment of administrative costs, incentive payments to the named plaintiffs, and attorneys' fees. If finally approved, the settlement would include a release of claims by users against both Facebook and its affiliates, thus ostensibly resolving the claims in both Texas cases even though Facebook is the only named defendant in the California case.

As Balasubramani reports, the court in the California case has preliminarily approved the settlement and denied attempts by the Texas plaintiffs to intervene. The cases involve an interesting case study in the struggle between competing plaintiff groups. The settlement also raises interesting questions about the use of *cy pres* awards to charity in lieu of direct payments to class members and the preclusive effect of a class settlement as to claims against defendants who do not contribute to the settlement consideration.

Check out *Spam Notes* for the latest developments as well as links to key filings and settlement documents.

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