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Class & Collective Action Group Newsletter

Federal Appellate Courts

Decision in *In re Logitech Inc.*

Key Issue

Whether a district court judge's standing order prohibiting parties in a putative class action from discussing a class-wide settlement until after a class has been certified should be withdrawn as unconstitutional and in conflict with Rule 23 of the Federal Rules of Civil Procedure.[1]

Background

As reported in our August 12, 2019 newsletter, a putative class action was filed against Logitech in the Northern District of California in May 2018, asserting common law fraud and other state law claims based on allegations that Logitech made false advertisements about its speaker system.

Judge William H. Alsup entered a standing order that prohibited the parties from discussing settlement of class claims until after a class had been certified. The order noted that some putative class actions may be appropriate for earlier resolution in which instance the parties must make a motion for appointment of interim class counsel. The parties in *Logitech* then made that motion. Judge Alsup denied the motion after expressing concerns about potential collusive settlements and entered a scheduling order that contemplated class discovery, expert disclosure and briefing on class certification.

In January 2019, Logitech filed a petition for a writ of mandamus (a procedure that allows a party to seek an order from an appellate court that is directed at a lower court judge) directing the district court to withdraw its standing order. Logitech argued that Judge Alsup's standing order improperly restricted the parties' First Amendment rights (free speech and petition) and conflicted with Rule 23.

The Ninth Circuit heard oral argument on the petition on July 18, 2019.

Decision

In an unpublished opinion on September 12, 2019, the Ninth Circuit affirmed Judge Alsup's standing order and denied Logitech's petition for a writ of mandamus, holding that the district court's decision was not clear error as a matter of law.[2] In so holding, the Ninth Circuit rejected Logitech's argument that the standing order violated Rule 23 and the parties' First Amendment rights to petition and to free speech.

First, the Ninth Circuit held that the order's prohibition on class negotiations before certification was not clear error given Rule 23's lack of mandatory

[1] *In re Logitech, Inc.*,—F. App'x—, No. 19-70248, 2019 WL 4319012 (9th Cir. Sept. 12, 2019).

[2] The Ninth Circuit thus analyzed only the third factor in the five-factor test used to determine whether to grant a writ of mandamus. 2019 WL 4319012, at *1 (citing *In Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011)).

class settlement language and the discretion it affords to district courts. The court stated that Rule 23 contemplated the simultaneous certification of a class and settlement with permissive, not mandatory language. It also noted that Rule 23 provided district courts with wide discretion, including over the appointment of counsel. In addition, when parties seek settlement and certification at the same time, the Ninth Circuit has instructed courts to pay "heightened" attention to class certification requirements, including whether there are subtle signs of collusion or of class counsel pursuing their own self-interest.

Nevertheless, the Ninth Circuit critiqued the district court for failing to make an on-the-record finding of its specific concerns about collusion regarding the settlement in this case. It pointed to the Supreme Court's decision in *Gulf Oil*, 452 U.S. 89 (1981), which stated that although district courts have the duty and authority to exercise control over class actions, they cannot exceed the bounds of the Federal Rules of Civil Procedure. As a result, *Gulf Oil* held that an order inconsistent with Rule 23, such as one restricting communications from parties or their counsel to potential or actual class members, must contain a "specific record showing…the particular abuses…threatened" and the district court must "giv[e] explicit consideration to the narrowest possible relief which would protect the respective parties."[3] Here, the district court did not make a specific finding nor did it consider a narrow means of protecting the parties, such as by choosing to reject the settlement after it had been negotiated, rather than preventing negotiations in the first place. Although the Ninth Circuit held that the order's failure to have a specific record or to be drawn as narrowly as possible did not amount to clear error justifying the extreme remedy of mandamus, it made it clear that it is not a favored practice.

Second, the Ninth Circuit held the order was also not clear error under the First Amendment. The court said it was uncertain whether settlement negotiations constituted protected speech because a defendant does not have a right to negotiate with absent potential class members before class or interim class counsel has been appointed.

Thoughts & Takeaways

Although an unpublished opinion, the Ninth Circuit's decision potentially gives the green light to district courts to bar precertification settlement negotiations in class actions through a standing order. However, the Ninth Circuit's criticism of the use of such orders is likely to deter their use in future cases.

Read the decision here.

Decision in *In re Rail Freight Fuel Surcharge Antitrust Litig.* — MDL No. 1869

Key Issue

Whether a damages model under which 12.7% of class members did not suffer any injury, thereby requiring individualized inquiries for these class members, could satisfy the predominance requirement of Rule 23(b)(3).[4]

Background

Plaintiffs allege that the four largest freight railroads in the United States conspired to fix rate-based fuel surcharges, which are additional charges above the base shipping price and calculated as a percentage of that price. Plaintiffs are both direct and indirect purchasers who brought claims under the Sherman Act, Clayton Act, and state law.

In 2012, the named direct purchaser plaintiffs moved to certify a class under Rule 23(b)(3), relying on two regression models prepared by their expert.

[3] 2019 WL 4319012, at *1 (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981)).

[4] *In re Rail Freight Fuel Surcharge Antitrust Litig.* — MDL No. 1869, 934 F.3d 619 (D.C. Cir. 2019).

Defendants criticized these models on several grounds, including that the damages model included shipments made under legacy contracts set before the alleged conspiracy began, which resulted in false positive damages determinations.

The district court initially certified the class, finding the damages model to be plausible and workable, but it did not address defendants' argument about the legacy contracts. The D.C. Circuit vacated and remanded in light of both *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) and the district court's failure to address the propensity of plaintiffs' damages model towards false positives.

On remand, the district court permitted supplemental discovery and expert reports, but thereafter denied class certification. The court concluded that although the regression models were reliable, the damages model had three problems, any one of which was enough to defeat the predominance requirement under Rule 23(b)(3): (i) it measured highly inflated damages for intermodal traffic, (ii) it still resulted in false positives for legacy contracts, and (iii) it resulted in negative damages and therefore no injury for over 2,000 members of the proposed class. Plaintiffs appealed under Rule 23(f).

Decision

On August 16, 2019, the D.C. Circuit affirmed, holding that the damages model indicated that common issues did not predominate because it showed that out of the 16,065 members in the putative class, 2,037 members, or 12.7%, suffered "only negative overcharges" and thus were not injured, despite plaintiffs' theory that all members were injured.

First, the parties disputed whether predominance turns on the reliability of common evidence. The district court had held that although the damages model was reliable for admissibility purposes, reliability was a higher standard under Rule 23 than under *Daubert*. As a result, plaintiffs had not met predominance because of concerns that undermined the reliability of the analysis. The D.C. Circuit did not resolve this question about the standard for reliability, because it held that even if the damages model was reliable, it did not prove class-wide injury. As a result, plaintiffs did not have common proof of the elements of liability for that 12.7% of the class, which would have required individualized inquiries.

Second, plaintiffs argued that predominance did not require common evidence extending to all class members. The D.C. Circuit disagreed, but said that even if that were true, the "*de minimis* exception" the district court recognized did not cover the 12.7% of class members as to whom the model failed to show any damages. The district court had noted that the few reported decisions involving uninjured class members suggested that 5-6% constituted the outer limit of this exception, so that the 12.7% and its raw value of 2,037 uninjured class members would not be considered *de minimis* and would require individualized adjudication of causation and injury. The D.C. Circuit agreed with the district court's assessment that plaintiffs had not proposed a "winnowing mechanism" to reduce the 12.7% figure other than requiring "full-blown, individual" trials to determine injury for each of those class members. Additionally, the D.C. Circuit rejected plaintiffs' alternative theory that the 12.7% was due to normal prediction error, because prediction error could not account for all of those class members and likely suggested a problem with the model. The D.C. Circuit also rejected plaintiffs' documentary evidence of widespread fuel surcharges and expert testimony because plaintiffs failed to prove that the 2,037 members were injured by the alleged conspiracy and did not compel a finding of predominance.

Thoughts & Takeaways

Plaintiffs' damages model ultimately doomed their theory that all the class members were injured by the alleged price-fixing conspiracy. Yet if the model had shown that under 5-6% of class members were injured, it is uncertain whether the D.C. Circuit would have changed its opinion. Unlike the district court which believed there could be a *de minimis*

exception, the D.C. Circuit took a stricter view that the common evidence must show injury to all class members. After *Comcast*, the D.C. Circuit may be demanding a more rigorous showing of antitrust impact to meet predominance under Rule 23(b)(3).

The D.C. Circuit declined to address the question of whether the reliability of evidence to prove predominance is a different standard for class certification than it is for admissibility purposes. Defendants argued that reliability under Rule 23 was a higher standard, as evidenced by the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Comcast* that rejected class certification based on concerns about the reliability of the common evidence. Plaintiffs responded that predominance turned only on whether the evidence is common or individualized, and they read the Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) as holding that reliability may be assessed only for purposes of admissibility or summary judgment. The eventual answer to this question will affect how future plaintiffs both choose experts and present their damages models for class certification.

Read the decision here.

Decision in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*

Key Issue

Whether a cy pres-only settlement of a Rule 23(b)(2) class action satisfies the fairness requirements under Rule 23(e).[5]

Background

Defendant Google, Inc. designed Doubleclick.net, a web browser that uses "cookies" to track user data on Safari and Internet Explorer web browsers despite the fact that certain users had enabled privacy settings to prevent such data tracking. When it was discovered in 2012 that Doubleclick.net cookies were bypassing these selected privacy settings, plaintiffs filed a putative class action against Google alleging violations of federal privacy and fraud statutes and of California state law.[6] Following briefing and mediation, the parties agreed to settle the action and simultaneously moved for class certification pursuant to Rule 23(b)(2) and approval of a class settlement under Rule 23(e). The terms of the settlement included assurance from Google that it would cease the complained-of data tracking practices and a payment by Google of $5.5 million to be distributed among the class representatives, their counsel and a selected group of cy pres recipients. In exchange, plaintiffs agreed to a class-wide release of all claims, including for damages that did or could relate to the subject of the litigation.

Following preliminary certification, a notice period and the filing of a sole objection by objector Theodore H. Frank, the District Court for the District of Delaware held a settlement hearing and subsequently issued an order approving class certification and the proposed settlement. Frank timely appealed the decision. The appeal was held in abeyance pending the Supreme Court's decision in *Frank v. Gaos*.[7]

Decision

On August 6, 2019, a Third Circuit panel vacated the district court's decision. Although finding that cy pres-only settlements are not *per se* improper, the panel held that the district court had failed to sufficiently evaluate the fairness and adequacy of this settlement, particularly with respect to the breadth of the class-wide release and the selection of the six recipients of cy pres awards.

[5] *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316 (3d Cir. 2019).

[6] The Federal Trade Commission and several state attorneys general also brought suit against Google, resulting in a settlement that included a fine of $39.5 million against the company.

[7] 139 S. Ct. 1041 (2019). In *Frank v. Gaos*, the Supreme Court did not evaluate the class action settlement, but rather vacated and remanded on a question of Article III standing.

The Third Circuit held that it was unable to determine the fairness of the settlement based on the district court's cursory analysis, which had failed to fully examine or even address certain factors under Third Circuit precedent. Specifically, the panel found that the release of all current and future monetary damages claims raised a "red flag." Because the parties sought to certify an injunction class under Rule 23(b)(2), they had avoided the more stringent certification and notice requirements that apply to damages classes under Rule 23(b)(3). Yet despite bypassing these more rigorous review and safeguards, the settlement nevertheless had provided for a broad class-wide waiver of damages claims and compensated class counsel on a fund basis.

Separately, the panel found that because Google was otherwise donating to four of the six non-profits, and that at least one of them had a prior relationship with class counsel, the question of the fairness of the selection process for cy pres recipients warranted greater scrutiny than that provided by the district court.

Thoughts & Takeaways

Perhaps lost in its criticism of this particular settlement, as a matter of first impression, the Third Circuit held that a class action settlement consisting solely of cy pres consideration could be proper in an appropriate case. The court made it clear however, that such settlements will be subject to extreme scrutiny both in terms of whether individual class members are being treated fairly and whether there is a fair selection process for the cy pres recipients.

Read the decision here.

Federal District Courts

Decision in *Amerio v. Gray*

Key Issue

Whether a class can be certified in a securities fraud class action when plaintiffs failed to show predominance for some, but not most of their claims.[8]

Background

Plaintiffs Andrew Goldberg and Steven Amerio sought to certify a class of investors who allege they were duped by defendants into investing in Everloop, Inc. Defendants allegedly did so by several means, including (1) false representations about the development of products and initiatives; (2) a false representation that Everloop had obtained $27 million in grants; (3) false statements regarding possible investment in Everloop by other investors, as well as false statements about the general financial condition of the company; and (4) a failure to inform investors of one defendant's significant disciplinary history and a false statement that his licenses were in good standing in a private placement memorandum.

Plaintiffs sought to certify class of investors under Rule 23(b)(3) for claims including federal securities fraud, RICO, common law fraud, negligent misrepresentation, and breach of fiduciary duty. Plaintiffs argued that they had demonstrated reliance on a class-wide basis, relying on the rebuttable presumption of reliance from *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), in which the Supreme Court held that reliance may be presumed where plaintiffs allege fraud based on omission of material facts which defendants had a duty to disclose.

Decision

On September 3, 2019, the court denied class certification. It held that the *Affiliated Ute* presumption did not apply because plaintiffs' claims were primarily focused on affirmative misstatements and the "only claim that seems to present an omission is the failure…to inform plaintiffs that [defendant] Gray had lost his license due to disciplinary issues." The court stated that the Second Circuit had clarified in *Waggoner v. Barclays PLC*, 875 F.3d 79, 96 (2d Cir. 2017) that the *Affiliated Ute* presumption does not apply "where plaintiffs' claims hinge more on affirmative misrepresentations and are not 'primarily' based on omissions" and that it does not apply "to misstatements whose only omission is the truth that the statement misrepresents."

Plaintiffs argued that defendant's omissions about his disciplinary history and licenses did not fall into this latter category, but the court disagreed, stating that "of course defendants, in claiming Gray's credentials were still in good standing, failed to inform their potential investors that they were not. But that is true of any falsehood: a liar always omits the truth that he is lying." Because plaintiffs could not take advantage of the class-wide presumption of reliance under *Affiliated Ute*, the court held that common issues did not predominate over individualized inquiries for plaintiffs' securities fraud claims, as well as for their other claims containing the element of reliance. Although the court found that common issues predominated for a few of plaintiffs' claims, such as breach of fiduciary duty, it ultimately held that it would "achieve no economy of time, effort or expense to proceed with a litany of lesser issues in a class setting, ignoring the reliance issue as it broods overhead."

[8] *Amerio v. Gray*, No. 15-cv-538, 2019 WL 4170160 (N.D.N.Y. Sept. 3, 2019).

Following the court's decision, plaintiffs moved for reconsideration arguing, among other things, that reliance was not a bar to certification because the court found predominance was satisfied for at least of eight of their twelve claims. Alternatively, plaintiffs argued the court could certify a class under Rule 23(c)(4)(A) as to issues concerning the existence of a fiduciary relationship and defendants' misconduct. This motion is still pending.

Thoughts & Takeaways

The decision serves as a reminder to consider the impact of class certification requirements across claims, as the district court declined to certify the entire action based on the court's assessment that the "absolute core" of the complaint was allegedly fraudulent representation mandating individualized determination of reliance.

State Courts

Decision in *Noel v. Thrifty Payless Inc.*

Key Issue

Whether California state courts recognize an ascertainability requirement for class certification.[9]

Background

Plaintiff James Noel sued Rite Aid (operated by defendant Thrifty Payless, Inc.) over his purchase of an inflatable pool, which was allegedly marketed through misleading packaging that misrepresented its true size. Plaintiff sought to certify a class of all purchasers of the same inflatable pool over a defined period of time. Rite Aid resisted, arguing that in order to satisfy the ascertainability requirement, plaintiff had to introduce evidence that would show how class members could be identified (so that they could be provided with notice of the pending action). Plaintiff had not done so, nor established that Rite Aid possessed records that would allow the identification of individual purchasers of the pool (though Rite Aid did know how many such pools had been sold in the aggregate).

The trial court denied the motion for class certification, agreeing with Rite Aid that without evidence showing what method could be used to identify class members, plaintiff had failed to establish that the class was ascertainable. The Court of Appeal agreed, emphasizing that while plaintiff did not need to actually separately identify all class members at the class certification stage, he did need to come up with a means by which they could be identified.

Decision

On July 29, 2019, the Supreme Court of California reversed, and clarified that under California law, the ascertainability requirement does not impose an evidentiary burden on a class, but merely means that the class must be defined in terms of "objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." If the class definition provides "a basis for class members to self-identify," the requirement is satisfied.

In so holding, the court discussed California precedent that addressed the ascertainability requirement, which it admitted had been less than entirely clear. Its discussion emphasized due process concerns, specifically including the need to provide notice to absent class members. In choosing between two different approaches to the problem that had emerged, the court preferred the approach that focused on the class definition over an alternative—and more demanding approach—that looked more closely at the "mechanics" of identifying class members. The court was concerned that the second approach imposed a burden on plaintiffs by requiring successful discovery efforts preceding the certification stage, and by introducing potentially hypothetical rather than actual concerns about future administrative complexities. In analyzing the different approaches, the court discussed how federal courts have addressed the same issue, noting that the Third Circuit stands out for its "stringent" approach, which the court contrasted with the more generous approach taken by the Seventh Circuit.

Thoughts & Takeaways

As more class actions are filed in state courts, problems that have been playing out in the federal courts will increasingly be reexamined there, as this case illustrates. There is a circuit split on how federal courts approach ascertainability, and California state courts have now taken one side of that divide.

Read the decision here.

[9] *Noel v. Thrifty Payless, Inc.*, 445 P.3d 626 (Cal. 2019).

Other Adjudications

Decision by the National Labor Relations Board in *Cordúa Restaurants, Inc.*

Key Issue

Whether a mandatory arbitration agreement preventing employees from opting into class or collective proceedings or threats of termination for any refusal to sign such an agreement violates the National Labor Relations Act ("NLRA").[10]

Background

Cordúa Restaurants, Inc. ("Cordúa") required its employees to sign a mandatory arbitration agreement that waived their "right to file, participate or proceed in class or collective actions" in both civil and arbitral proceedings. In January 2015, several employees of Cordúa filed a collective action alleging violations of the Fair Labor Standards Act and the Texas Minimum Wage Act. Additional employees opted in to the action and in response, Cordúa circulated a revised arbitration agreement prohibiting employees from filing or opting into a collective action without the company's approval. Upon distribution of the revised agreement, employees expressed hesitancy about signing and were told by a manager that refusal to sign would result in their termination. The employees brought suit about the revised agreement, and in April 2018, the National Labor Relations Board (the "Board") found that Cordúa violated Section 8(a)(1) of the NLRA. Cordúa appealed for review by the Fifth Circuit. While the petition was pending, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which held that waivers requiring employees to resolve claims by way of individual, rather than collective, arbitration do not violate the NLRA. The Board vacated its prior decision in light of the Supreme Court's ruling and issued a new opinion.

Decision

On August 14, 2019, a majority of a four-member Board held that Cordúa's actions in revising the mandatory arbitration agreement in the face of pending litigation and its threats of termination for failure to sign the revised agreement did not violate the NLRA. Relying on *Epic Systems*' proclamation that an agreement requiring individual arbitration for employment-related claims does not violate the NLRA and should be enforced according to its terms under the Federal Arbitration Act, the majority held that "[b]ecause opting in to a collective action is merely a procedural step required in order to participate" in such an action, an arbitration agreement that precludes an employee from opting in to a collective action similarly did not violate the NLRA. The majority found that the revised agreement was substantially identical to its predecessor agreement and had merely made a previously implicit requirement explicit, the effect of which was to require employees to individually arbitrate their claims, an outcome blessed by the Supreme Court in *Epic Systems*.

Additionally, because conditioning employment on acceptance of an arbitration agreement with a class and collective action waiver is permissible under *Epic Systems*, the majority held that threatening termination for failure to sign the agreement "amounted to an explanation of the lawful consequences" of such action.

In dissent, a single board member concluded that the revised agreement and threat of termination violated Section 8(a)(1) of the NLRA because the agreement was an effort to suppress protected activity, *i.e.*, the employees' decision to join the ongoing litigation. Although the dissent agreed the revised agreement itself was valid under *Epic Systems*, the fact that the agreement was adopted

[10] Board Decision, *Cordúa Restaurants, Inc.*, 368 NLRB No. 43 (2019).

specifically in response to protected activity and not legitimate business concerns—such as to compel arbitration—was sufficient to violate the NRLA. Under the dissent's logic, because the revised agreement was unlawful, the threat of removal for refusal to sign was also unlawful. Moreover, the dissent claimed even if termination was lawful under the agreement, the threat in response to the employees' right under the NRLA to protest a condition of employment itself violated Section 7 of the NLRA.

Thoughts & Takeaways

The opinion is the Board's first mandatory arbitration case following the Supreme Court's decision in *Epic Systems* and represents two issues of first impression following *Epic Systems*: whether the NRLA prohibits employers from revising mandatory arbitration agreements to require waiver of the right to opt-in or participate during an ongoing class or collective action, and whether the NRLA permits an employer to terminate employees for refusing to do so. Plaintiffs still have the opportunity to file a petition for review to the Fifth Circuit.

Read the decision here.

Other Noteworthy Developments

District Court Approves "Negotiation Class" in Opioid Multidistrict Litigation

On September 11, 2019, Judge Dan Aaron Polster of the Northern District of Ohio certified the first ever "negotiation class" under Rule 23(b)(3).[11] The multidistrict litigation ("MDL") consists of over 2,000 individual actions brought by cities, counties, and municipalities against opioid distributors and manufacturers, and alleges that they failed to properly monitor suspicious orders of prescription opiate medications or they misrepresented the risks of their long-term use, all of which contributed to the opioid epidemic.

The "negotiation class" works, first, by having class members develop a plan for allocating a lump sum settlement among class members and for voting on the reasonableness of that settlement. The parties developed this plan and proposed it to the court in the same motion for class certification. Under the allocation plan, plaintiffs would distribute 75% of a lump sum settlement to counties, with each share calculated according to three equally-weighted public health factors. The remainder is allocated to a private attorneys' fee fund (from which private attorneys could seek fees in lieu of enforcement of private contingency fee contracts) and to a class members' special needs fund to cover class member expenses not addressed by the class-wide allocation formula. If a settlement is reached with a particular defendant, class members are entitled to vote on whether the proposed settlement amount is sufficient, and the settlement will be approved only if there is approval by 75% of voting entities by number, by population, and by allocation.

This structure is different from a class action settlement because here, class members must decide whether to opt out before knowing the actual size of the settlement; they only know the voting and allocation plans. Judge Polster rejected the argument that this structure was a due process violation because, in a regular class certification, the decision to opt-out occurs at the beginning of a class action and Rule 23(e)(4) offers, but does not require, a second opt-out opportunity at settlement. He also rejected defendants' argument that a negotiation class violates Article III because it is unrelated to a "judicial function." Judge Polster responded that the negotiation class served an "even more important judicial function at an even more important juncture in the litigation" because (i) it ensures that class certification requirements are met, (ii) absent class members' interests "are protected by those who purport to represent them, prior to those agents negotiating a settlement for the absent class members," and (iii) assisting parties in creating a settlement is a meaningful judicial function.

The idea behind the negotiation class comes from defendants' insistence that any settlement be "global," such that it resolves most, if not all, lawsuits arising out of the opioid claims. However, over 2,000 suits have already been brought by cities, counties, and municipalities, and there was concern that many of those plaintiffs would opt out to pursue individual settlement. For example, Purdue Pharma LP recently reached a tentative $3 billion deal to settle plaintiffs' claims, and Endo Pharmaceuticals and Allegan similarly reached settlements of $10 million and $5 million, respectively.[12]

[11] *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804, 2019 WL 4307851 (N.D. Ohio Sept. 11, 2019).

[12] None of these settlements extinguished claims brought by state attorneys general.

Judge Polster certified the Rule 23(b)(3) class and approved the voting and allocation plans under Rule 23(e), acknowledging that although no settlement had yet been reached, it would be "perverse" and "an enormous waste of judicial and social resources—to launch into this whole negotiation class only to later hold that the allocation scheme, identified at the outset, was inequitable *ab initio*." The result of his order is that the negotiation class is authorized to negotiate settlements with any of the 13 defendants or can make a formal motion to amend the class certification order to include other defendants. However, the negotiation class is not authorized to negotiate against state governments in their disputes for the same settlement funds.

The court noted opposition to the negotiation class, primarily from state attorneys general who are separately pursuing litigation against many of the defendants in state court. In a letter to the court, several state attorneys general argued that the negotiation class impinged on state sovereignty because the district court could not approve a settlement that would allocate settlement money among local governments without the states' approval. The court responded that the negotiation class merely provided an option to plaintiffs in the MDL, which would not interfere with any settlement reached between defendants and the state attorneys general in the state litigation. Yet this response has not appeared to alleviate the concern by state attorneys generals that, if such a global settlement is reached in the MDL with local governments, defendants may be less willing to reach similarly large settlements in each of the state actions.

Plaintiffs will have 60 days in which to opt out from the negotiation class. The bellwether trial is scheduled for October 21, 2019.

Thoughts & Takeaways

It remains to be seen whether the concept of a negotiation class is a unique development for the challenges presented in the opioid MDL or if it will be a device used in future cases by defendants seeking global peace.

Read the decision here.

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