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PERSPECTIVE

DOJ objecting to class settlements more frequently

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It is no secret that class action settlements are receiving increased scrutiny in federal courts these days. Courts are rejecting proposed class settlements at a higher rate, with settling litigants facing increased odds of being sent back to the drawing board to either rewrite the terms of their settlement or otherwise scrap it altogether. Based on recent developments, including those described in this article, it appears this trend will continue at a greater rate.

The Class Action Fairness Act of 2005 requires litigants to provide notice of class settlements to the U.S. Department of Justice within a short period of time after the parties enter the settlement agreement. DOJ interprets this requirement to enable it to file statements of interest (otherwise known as objections) against proposed settlements to prevent consumer harm, increase oversight of unfair settlements, and deter collusion between class counsel and defendants who propose settlements that do not benefit unnamed class members.

DOJ's Silence Comes to an End

Historically, DOJ rarely intervened to object to federal class action settlement proposals. In the first 12 years after CAFA's enactment, it happened only twice — both times within the first few years of CAFA's existence. But this decade-long silence has come to an end. In February 2018, a recently departed associate attorney general, Rachel Brand, announced that DOJ had modified its screening process for CAFA notices, and that it would increasingly object to unfair settlements in the future. The next day, DOJ filed its first CAFA objection in more than a decade. S*ee Cannon et al. v. Ashburn Corp. et al.*, No. 1:16-cv-01452, No. 58 (D.N.J. Feb. 16, 2018).

DOJ's Recent Increased Scrutiny of Class Settlements

Within the past year, DOJ has objected to proposed class settlements in three consumer cases. These objections demonstrate heightened focus on the perceived value and equity of the settlement and the actual payout to the unnamed class members. For example, in Cannon, a case involving alleged false advertising of pricing and discounts for wine, DOJ objected to a proposed class settlement because, in its view, the settlement would pay too much to class counsel and too little to the class in the form of "limited-value" coupons.

Similarly, in *Cowen et al. v. Lenny & Larry's, Inc.*, a case involving alleged inaccurate labeling of cookies, DOJ objected that most of the settlement's value would flow to nonclass members in the form of free cookies (which also happened to serve as a promotional opportunity for the defendant), while class counsel would receive fees that were disproportionate to the overall benefit to the class. No. 1:17-cv-01530, No. 103 (N.D. Ill. Feb. 15, 2019).

And in *Chapman et al. v. Tristar Products, Inc.*, a case involving product liability claims related to exploding pressure cookers, DOJ objected to a proposed settlement because named plaintiffs would receive disproportionately preferential treatment compared to the class and class counsel would receive attorneys' fees disproportionate to the value to the class. No. 1:16-cv-01114, No. 134 (N.D. Ohio June 6, 2018).

What Litigants Can Learn from Recent Trends

Although it remains uncertain when and why DOJ will intervene to object to class settlements, the *Cannon, Cowen* and *Chapman* cases indicate that DOJ may object to certain terms, including:

Terms that provide a "nominal benefit" to unnamed class members: DOJ takes issue with the breadth of the unnamed class members' release of claims in comparison to the direct benefit received — often in the form of a coupon for a free product. DOJ's objections suggest that it perceives these proposed settlements as illusory benefits to unnamed class members.

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Settlements that include high award of attorney fees to class counsel: DOJ takes issue with disproportionately high awards of attorney fees to class counsel, particularly where the harm to the class was alleged to be de minimis but the benefit to class counsel is significant. If the proposed settlement notes such minimal harm to the class, DOJ sees significant attorney fees as unwarranted. Or, if the harm is more significant, then a greater benefit should be awarded to the class.

Terms that provide high incentive awards to named plaintiffs: DOJ takes issue where generous relief is given to the named plaintiffs in comparison to modest or nominal benefit given to the class.

Options in Responding to DOJ Objections

If DOJ objects, parties may choose to return to the drawing board and revise settlement terms to allay the government's concerns. In *Cowen*, the parties recently submitted to the court an amended proposed settlement that proposes providing more than double the amount of money initially contemplated to class members who make claims. The parties cited an unexpectedly large number of claimants to justify modifying the settlement to direct more money to class members. With this change, the parties contend that DOJ's concerns — even as to attorney fees — are now moot.

Alternatively, the parties may respond to the government's objection. In *Chapman*, the parties responded to DOJ's objections by order of the court. The defendant represented to the court that it would not pay a higher settlement to the class even if the attorney fee application had been lower. Despite DOJ's objections focused on attorneys' fees, the court approved the proposed settlement. The matter is on appeal. Likewise, in *Cannon*, the court ordered the parties respond to DOJ's objections. The parties responded and amended the proposed settlement, seeking final approval. But the proposed amendment fell short. The court denied the requests for final approval resulting in the defendant terminating the settlement agreement and plaintiffs dismissing the case with prejudice.

While there is neither a one-size-fits-all approach to responding to DOJ's objections, nor a guarantee that the parties will be able to overcome such objections, the best approach is to address DOJ's concerns by establishing that the proposed settlement does not pose any material risk to the unnamed class members and/or amending the proposed settlement to allay those concerns.

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