KCC Class Action Services

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INTERLOCUTORY APPEAL OF CLASS CERTIFICATION

Summit Medical Group, Inc. D/B/A St. Elizabeth Physicians v. Coleman, 2022 WL 1697800 (Ky. Ct. App. May 27, 2022)(Jones, J.)

A state court interlocutory appeal of an order certifying a class action for alleged double billing by defendant. Upon review, the Kentucky Appellate Court held the circuit court abused its discretion when concluding plaintiff was adequate to serve as named representative of the class.

Defendant argued the circuit court abused its discretion in finding plaintiff to be an adequate representative as evinced by: (1) her lack of a written fee agreement with any attorney or law firm; (2) her lack of knowledge regarding the legal basis of her claims; (3) her uncertainty regarding who was representing her at various points in the litigation; and (4) her lack of overall involvement in the litigation to date, including allowing the case to languish for several years.

The court disagreed that the lack of a fee agreement was a basis for finding her to be an inadequate representative, stating that even if a fee agreement did exist, it would not govern plaintiff's relationship with class counsel nor bind the absent class members. Once a court certifies a class and appoints class representatives and class counsel, those parties have an attorney-client relationship with one another. After certification, the relationship and class counsel's fees are largely governed by Rule 23, and not any individual fee agreement the named representative may have previously had.

The court also did not agree that plaintiff's lack of knowledge regarding the exact legal theory behind her claims was indicative of the fact that she was not an adequate class representative. It stated that courts are mostly concerned that the class representative has an adequate factual understanding of the case; the class representative does not need to understand the legal theories of the case and is entitled to rely on counsel's expertise and advice.

The court was not concerned with plaintiff's inability to identify the various lawyers who have represented her, however her general passivity related to the litigation and the fact that she allowed it to languish for several years prior to any decision on certification was problematic.

The court could not excuse the fact that between May of 2013 and August of 2018, nothing was accomplished in the case. Additionally, nothing suggested to the court that plaintiff had the willingness or ability to prevent future similar delays.

The court concluded that allowing the case to proceed with plaintiff as the named class representative would risk the rights of the unnamed class members she would represent. It was for this reason that the court held that the circuit court abused its discretion.

WAGE AND HOUR

Almanzar v. Home Depot U.S.A., Inc., 2022 WL 2817435 (E.D. Cal., July 19, 2022)(Newman, J.)

In this wage and hour case, plaintiff filed an unopposed motion for preliminary certification of a settlement class, and preliminary approval of a class action and PAGA (California Labor Code's Private Attorneys General Act) settlement. The court granted certification of the settlement class and denied preliminary approval of the settlement as to the Rule 23 claims as well as the PAGA claims, without prejudice.

The court noted that although the action largely consisted of class claims, it also included the PAGA claim which is not a class claim. Because PAGA is not a class claim, a plaintiff need not satisfy the Rule 23 class certification requirements.

However, settlements of PAGA claims must be approved by the court under Cal. Lab. Code § 2699(l)(2). The court applied "a Rule 23-like standard" asking whether the settlement of the PAGA claims is "fundamentally fair, reasonable, and adequate".

The court found motions to preliminarily approve class action settlements that contain PAGA claims were best approached in three parts. First, the court examines whether the class claims (the non-PAGA causes of action) satisfy the requirements for certification under Rule 23. Then, in evaluating whether to preliminarily approve the overall settlement, the court considers the adequacy of the agreement as to the class claims under Rule 23(e). Third, the court focuses on the adequacy of the agreement as to the PAGA claims.

The court questioned plaintiff's calculation of defendant's maximum liability. The court could not determine whether the proposed settlement amount (8% of Home Depot's maximum liability) was likely reasonable; therefore, the court denied preliminary approval of the settlement. The court required any renewed motion for preliminary approval of the settlement should: (1) include the true maximum liability estimated for each class claim; (2) calculate the percentage of settlement recovery on the class (non-PAGA) claims based on the maximum liability for all class (non-PAGA) claims; and (3) clarify the reason for omitting the value of derivative wage statements and waiting time penalties claims, if they are indeed being omitted.

The court also found defects or potential issues in other aspects of the settlement such as differential treatment between current and former employees.

Finally, the court found the settlement of the PAGA claims did not adequately explain the reasonableness of the PAGA settlement or account for the distinct nature and effect of those claims versus the class claims. In essence, the settlement failed to correctly state that opting out of the class settlement still entitled those who opted out to bring their own PAGA claim and receive a share of the PAGA penalties.

TELEPHONE CONSUMER PROTECTION ACT

Drazen v. Pinto, 2022 WL 2963470 (11th Cir. July 27, 2022)(Tjoflat, J.)

This class action alleged that GoDaddy violated the Telephone Consumer Protection Act when it allegedly called and texted plaintiffs solely to market its services and products through a prohibited automatic telephone dialing system. Due to an Article III standing problem with the class, the Eleventh Circuit vacated the district court's approval of the settlement and conditional class certification and remanded with the opportunity to revise the class definition.

The court found at the outset the settlement must be reviewed to ensure every class member (as opposed to just the named plaintiffs) has Article III standing at every stage of the litigation, citing *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021). The district court certified the following class definition:

> All persons within the United States to whom, from November 4, 2014 through December 31, 2016, Defendant placed a voice or text message call to their cellular telephone pursuant to an outbound campaign facilitated by the web-based software application used by 3Seventy, Inc., or the software programs and platforms that comprise the Cisco Unified Communications Manager.

The universe of plaintiffs under the class definition included any individual who received a text message or phone call on their cellphone from GoDaddy in the specified period.

The Eleventh Circuit held, under *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), a single unwanted text message is not sufficient to meet the concrete injury requirement for standing. Thus, the class definition could not stand as it would allow individuals without standing to receive what is effectively damages in violation of *TransUnion*.

Additionally, the Court addressed the more difficult question as to whether individuals who received a single call had standing. While the Eleventh Circuit previously held in *Glasser v. Hilton Grand Vacations Company, LLC*, 948 F.3d 1301,1306 (11th Cir. 202) that receipt of more than one unwanted telemarketing call was sufficient to meet the "concrete injury" requirement for Article III standing, the Court wanted briefing on whether a single cellphone call was sufficient to meet Article III standing. *TransUnion* clarified that courts must look to history to find a common-law analogue for statutory harm; therefore, the Court vacated class certification and settlement and remanded in order to give the parties a chance to redefine the class with the benefit of *TransUnion* and its common-law analogue analysis.

VIOLATION OF LANHAM ACT

Co-Craft, LLC v. Grubhub, Inc., 2022 WL 2981831 (D. Colo. July 28, 2022)(Rodriguez, J.)

Two similar class actions alleging violations of the Lanham Act were filed against Grubhub for false advertising. The first was filed by Co-Craft in the District of Colorado. The second was filed by Lynn Scott LLC and the Farmer's Wife LLC (the "Lynn-Scott" case) four months later in the District of Illinois. Both cases sought, inter alia, equitable relief in the form of disgorgement of profits. When Co-Craft filed its amended complaint, it filed a motion to stay the *Lynn-Scott* case. Co-Craft also filed a stipulation and proposed order regarding settlement. The *Lynn-Scott* plaintiffs filed a motion to intervene and opposed Co-Craft's motion for preliminary approval.

The Court denied preliminary approval of the settlement without prejudice and permitted intervention. The proposed settlement raised questions as to whether the settlement was fair, reasonable and equitable and may impair or impede the intervenors' ability to protect their interests.

The court held that although the proposed settlement did not release the *Lynn-Scott* claims for monetary relief, it released the request for equitable relief, which included a claim for disgorgement of profits under the Lanham Act. Releasing the equitable relief sought in both cases would likely preclude the proposed intervenors and class from pursuing equitable relief under the Lanham Act. The court found that there appeared to be a deficiency in the parties understanding of the terms of the settlement which provided at least one reason not to notify the class members of the settlement and to proceed to a fairness hearing. For that reason, the proposed settlement did not warrant preliminary approval until the parties addressed this issue.

The Court found the motion to intervene as of right was appropriate and timely. The motion was filed approximately one and a half months after the filing of the amended complaint. Furthermore, the amended complaint encompassed the *Lynn-Scott* claims, showing that they had an interest in the matters at issue, that disposing of the action without intervention may impair their ability to protect their interests and that representation of the proposed intervenors may be inadequate.

The Court also found that permissive intervention was appropriate. The parties admitted that the claims were similar and thus the proposed intervenors had a claim or defense that shared with the main action a common question of law or fact. Finally, the court found that timely intervention would not unduly delay or prejudice the adjudication of the original parties' rights.

ATTORNEYS' FEES AND EXPENSES

Grottano v. City of New York, 2022 WL 2763815 (S.D.N.Y. July 15, 2022)(Berman, J.)

The settlement agreement in this class action provided that class counsel would seek approval of attorneys' fees of up to $5.4 million which were to be paid for by defendants independently of the $12.5 million settlement fund. Plaintiffs filed a motion for attorneys' fees and expenses seeking $4.5 million in fees. Defendants filed a cross motion for reimbursement from class counsel's attorneys' fees for the amount paid to the claims

administrator in excess of $500,000. Defendants also contended that the $4.5 million fee was unreasonable.

The court reviewed the fee award in accordance with the prevailing standard in the Second Circuit, *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000).

The court held that under the *Goldberger* factors, legal fees should be reduced to $2.6 million primarily due to the need to correct a flawed initial claims notice process and to devise a workable supplemental notice and claim form. It also found the litigation was not overly complex and the quality of representation was not optimal due to troublesome management which delayed and reduced payments to class members, weaknesses in billing records and the flawed notice process.

Defendant's cross motion for reimbursement of administrative costs was granted in part. The settlement agreement contemplated a maximum of $500,000 in administrative costs, which limit was exceeded as a result of flawed initial claims notice and attendant proceedings. Claims administration costs in fact exceeded $1 million. The initial notice misled class members into thinking they would receive $4,000 per claimant where the actual recovery would be much less.

The court found both sides shared responsibility for the notice problems and the resulting cost overruns and thus the fairest and most equitable solution was for class counsel and defendants to equally share the claims administration costs exceeding $500,000. Class Counsel was ordered to reimburse (from the $2.6 million attorneys' fee award) defendants for half the total amount of fees paid and to be paid to the claims administrator in excess of $500,000.

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