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One Minute Memo®

Ninth Circuit Issues Helpful Decision On Class Settlements, Grants Rehearing *En Banc* in *Kilgore*

The Ninth Circuit made two important class action rulings this week, one affirming final approval of a novel class settlement and the other granting rehearing *en banc* in a key case on class arbitration.

The *Lane* Case

On September 20, 2012, the Ninth Circuit issued a useful decision in *Lane v. Facebook, Inc.*, ___ F.3d ___, Case No. 10-16380, 2012 WL 4125857 (Sept. 20, 2012), making it easier for parties to settle cases on a *cy pres* basis and confirming that trial courts are *not* required to quantify the value of pending claims in order to decide whether a class settlement is fair.

Lane involved the settlement of a privacy class action against Facebook in which the settlement money was paid to charity because the ratio of dollars to class members made direct payments impracticable. Rather than agree on which existing charities would receive the money, the parties agreed to create a new charity that would focus on online privacy issues. The new organization would have a three-person board of directors, one of whom was to be a Facebook privacy officer. In addition, counsel for the class and Facebook were to oversee grants to ensure that they were consistent with the requirements of the settlement agreement.

Affirming the district court in a 2-1 decision, the Ninth Circuit reaffirmed that *cy pres* distributions are appropriate in similar circumstances. Perhaps more importantly, however, it approved of the novel creation of a new charity with defendant board representation, noting that new organizations are "not subject to a more stringent fairness standard" than existing ones. Particularly in cases where the parties have difficulty agreeing on *cy pres* recipients, or where there are no existing organizations with a nexus to the claims being settled, the decision gives litigants an additional option for structuring class settlements.

Lane also is helpful because it directly rejected the frequently-raised objection that a court cannot approve a class settlement without quantifying the value of the alleged class claims after extensive formal discovery has been completed. As the court explained:

> While a district court must of course assess the plaintiffs' claims in determining the strength of their case relative to the risks of continued litigation, it need not include in its approval order a specific finding of fact as to the potential recovery for each of the plaintiffs' causes of action. Not only would such a requirement be onerous, it would often be impossible -- statutory or liquidated damages aside, the amount of damages a given plaintiff (or class of plaintiffs) has suffered is a question of fact that must be proved at trial. Even as to statutory damages, questions of fact pertaining to which class members have claims under the various causes of action would affect the amount of recovery at trial, thus making any prediction about that recovery speculative and contingent.

(citation omitted).

The *Kilgore* Rehearing Order

After two strong decisions seemingly acquiescing in the pro-arbitration holding of *AT&T Mobility v. Concepcion*, the Ninth Circuit may be reversing course. On September 21, 2012, the court granted rehearing *en banc* in *Kilgore v. KeyBank, National*

Association, No. 09-16703 (slip op. Sept. 21, 2012). In doing so, it rendered non-citable its prior decision (at 673 F.3d 947) holding that the Federal Arbitration Act preempts California's *Broughton-Cruz* rule prohibiting arbitration of injunctive relief claims.

More importantly, however, the Ninth Circuit granted rehearing *en banc* in response to a petition making all of the same "vindication of statutory rights" arguments the Second Circuit used to evade the holding of *AT&T Mobility* in *In re American Express Merchants Litigation*, 667 F.3d 204 (2d Cir. 2012). The plaintiffs' class action bar undoubtedly is hoping that the full court will be more receptive to those arguments than was the *Kilgore* panel.

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