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EMPLOYMENT

Claims Procedure in Employment Settlement

Deatrick v. Securitas Security Servs. USA, Inc., No. 13-cv-05016, 2016 WL 729622 (N.D. Cal. Feb. 24, 2016) (Tigar, J.)

Plaintiff brought suit against his former employer under the Fair Labor Standards Act (FLSA), alleging failure to pay overtime compensation by misinterpreting the effect of vacation pay in overtime calculations, and similar wage and hour claims under California law. After Plaintiff sought and received conditional class certification, the parties reached a class settlement and Plaintiff sought the Court's preliminary approval, as well as conditional certification to include employees with similar claims arising during the litigation.

The Court granted conditional certification, but denied the motion for preliminary approval of the settlement. In support of its decision, the Court first evaluated the class certification request under Rule 23, beginning with numerosity and ascertainability, where the Court found a class of at least 11,000 people who were employees of Defendant during a particular time sufficient. In terms of commonality, the Court found it satisfied by virtue of the fact that all members share a single common question concerning the calculation of overtime pay. The Court found both typicality and adequacy satisfied, and also found that common questions would predominate over individual ones, thereby satisfying Rule 23(b)(3).

Turning then to the question of preliminary approval under Rule 23(e)(2) to determine whether the agreement was fair, reasonable, and adequate, the Court found that (1) the award amounts were within the range of possible approval, as were attorney fee awards; but (2) the incentive award was disproportionate, proposed as it was at 270 times the size of the average class award. The Court postponed further review of these amounts until the final approval hearing.

In evaluating the settlement, the Court also addressed the notice and claims procedure, and identified deficiencies in both. In terms of notice, while the Court acknowledged that the parties stated that "reasonable steps" would be taken for notices returned as undeliverable, that assurance was not sufficiently specific. The Court then considered the claims procedure, finding it not "fair, reasonable, or adequate" in that Plaintiff required a claim form for the opt-out class but not for the opt-in class, without any apparent rationale. The Court also expressed concern that requiring the form for the opt-out class would bind absent class members without any compensation in return, reasoning that, in light of precedent showing low response rates for claims procedures, the majority of the opt-out class may not submit a claim, and it would be unjust deny them their award. Noting that Defendant was in possession of all of its former employees' addresses and other information, the Court determined that requiring a claims process was an "unnecessary impediment" to class relief, and expressed its hope that future proposed settlement procedures would take that determination into account.

FALSE ADVERTISING

Consumer Product

Steigerwald v. BHH, LLC, No. 15-cv-741, 2016 WL 695424 (N.D. Ohio Feb. 22, 2016) (Gaughan, J.)

A consumer brought suit against a manufacturer and its agents, alleging that Defendants' pest control products do not actually repel pests. After certain claims were dismissed, leaving claims for fraud and breach of express warranty, Plaintiff sought class certification of a class of all purchasers of said products, as well as a class of Ohio purchasers.

The Court granted the request. In support of its decision, the Court first considered the question of ascertainability. While Defendants argued that individualized assessments would be required in order to ascertain the class, and that most consumers would fail to demonstrate proof of having purchased the items within the class period and class members could self-identify as members without having actually suffered harm, the Court nonetheless found the class ascertainable, noting past similar cases where affidavits, internal data, purchase records, and other evidence could be used to identify class members. The Court also noted that Defendants could challenge any problematic claims.

Turning to other elements of Rule 23, the Court found numerosity satisfied on grounds of 107,782 units having been sold during the class period. In terms of commonality, the Court found four common questions involving common proof were sufficient, reasoning as a general matter that despite Defendants' contention that the inquiry was not whether the individual devices met the user's expectations, or whether the devices actually worked, but rather whether the issues of efficacy and misrepresentation could be determined on a class-wide basis, commonality was satisfied.

In terms of typicality, the Court rejected Defendants' contentions that (1) since Plaintiff's fraud claim was barred under Ohio law treating express warranty as a contract claim and not a tort, typicality was not satisfied, finding that whether the claim was barred was a legal issue of all claimants, and thus typical; and (2) since the breach of express warranty claim was barred by failure to provide pre-suit notice of the defect, Plaintiff was atypical, finding that this was in fact a class-wide issue capable of class-wide resolution. The Court also found that although Defendants argued Plaintiff relied more on hope than on the packaging, the key issue centers on whether the devices did what the packing represents or not—which was typical to the class.

Turning then to Rule 23(b)(3) predominance, the Court rejected Defendants' contention that state law differences would lead to individual claims and proofs, finding that Plaintiff's argument was whether the product worked at all according to the representations made, and that this would fall under well-settled common law claims for fraud and reliance in 48 states. Similarly for the breach of warranty claim, the Court found similarity between the legal theories in all the states in which certification was sought. Defendants also argued that different states had different statutes of limitation, which the Court also rejected.

INSURANCE

Long Term Care / Assisted Living

Estate of Gardner v. Continental Casualty Co., No. 13-cv-1918, 2016 WL 806823 (D. Conn. Mar. 1, 2016) (Arterton, J.)

Multiple estate Plaintiffs brought suit against insurer alleging violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), and claims for unjust enrichment, bad faith, and breach of contract for denial of insurance claims. Plaintiffs sought class certification of (1) a main class of purchasers of long term care insurance policies; and (2) a 23(b)(2) subclass of members eligible for coverage of assisted-living facilities but denied on the grounds that the facility lacked a license or could not provide continuous care.

The Court granted both requests. First analyzing the question of ascertainability, the Court found the main class was not too overbroad after Plaintiff had revised it to limit the class to current policyholders who were Connecticut residents. For the subclass, the Court reviewed Defendant's objection that "assisted-living facility" was not a defined term in the law, and as a result, redefined the class to name these facilities consistent with a term of art used in the applicable statute.

In terms of Rule 23, the Court first found a class of 741 sufficient for numerosity, and after rejecting Defendant's argument that the subclass (of 26) was not sufficiently numerous on grounds that joinder would be impractical, citing as its basis the nature of the individuals in the proposed subclass, found numerosity satisfied for the subclass as well.

In terms of commonality and typicality, the Court rejected Defendant's argument that the class members had individual issues (such as the nature of the unique policies, unique facilities in question, unique causation issues in each case, and various other fact-intensive issues), finding that the heart of the claims is a dispute over identically-worded policy terms. The Court also found that any individualized issues could be handled at the claims administration stage.

In terms of adequacy, the Court considered Defendant's contentions that (1) the proposed class representatives were subject to individual defenses; (2) as a general matter, decedents cannot represent living plaintiffs for injunctive relief; and (3) neither of the living plaintiffs have standing to represent an injunctive class. Noting that no evidence had been presented on these individualized defenses, the Court nonetheless found (2) to be meritorious, but noted with respect to (3) that Plaintiffs' assertion that they suffered ongoing injury from Defendant's denial of coverage was sufficient to assert imminent injury for the purposes of injunctive relief. Ultimately the two living plaintiffs were found adequate.

Turning then to Rule 23(b)(3) predominance, the Court echoed its previous findings on typicality, commonality, and adequacy to reject Defendant's arguments that individualized issues would predominate, finding that the overriding question was found to be common and capable of class-wide resolution, so as to predominate.

MOOTNESS

Post-Gomez

Bais Yaakov of Spring Valley v. Varitronics, LLC, No. 14-cv-5008, 2016 WL 806703 (D. Minn. Mar. 1, 2016) (Noel, J.)

Defendant facing a class action moved to deposit money into the Court's registry under Rule 67, and Plaintiff opposed.

The Court denied the motion. In support of its decision, the Court discussed the United States Supreme Court's recent decision in *Campbell-Ewald v. Gomez*, which held that a plaintiff seeking a class action must have the opportunity to show that certification is warranted, and that a Rule 68 offer of judgment does not moot the case.

The Court then compared two similar New York cases dealing with the issue, *Brady v. Basic Research* and *Bais Yaakov v. Graduation Source, LLC*, finding that the difference between the cases was that in *Brady*, the certification motion had not yet been decided, and the request to deposit was denied, whereas in *Graduation Source, LLC*, the motion was decided and the deposit was permitted.

The Court found this case to be more analogous to *Brady*, as the Plaintiff had not yet had a fair opportunity to show that certification was warranted, and the Defendant had no real purpose to make its deposit other than to attempt to moot the case.

SETTLEMENT

Approval Based on Calculation of Class Member Award

Gallego v. Northland Group, Inc., No. 15-1666, 2016 WL 697383 (2nd Cir. Feb. 22, 2016) (Lynch, J.) Plaintiff debtor brought a putative class action against Defendant debt collector under the Fair Debt Collection Practices Act (“FDCPA”) for sending improper debt collection letters, and after reaching a settlement, sought certification of a settlement class. Relevant to this discussion, the United States District Court for the Southern District of New York denied Plaintiff’s motion for certification of a settlement class on grounds of superiority, and Plaintiff appealed.

The Second Circuit ruled that the district court acted within its discretion to deny certification. In support of its decision, the Court reviewed the district court’s ruling, which found that superiority was not met because (1) the amount each putative class member could receive if *all* class members filed a claim on the settlement fund (approximately 16.5 cents per class member) was “meaningless”; (2) providing the best notice practicable under the circumstances would be disproportionate to the benefit obtained by class members; and (3) even if most class members did not file claims, and the participation rate was 5%, the relief provided, while more than 16.5 cents, would still be low. The Court found denial of certification based on this reasoning to be within the range of permissible decisions.

Inadequate Notice / Claims Rate

Kaufman v. American Express Travel Related Servs. Co., No. 07-cv-1707, 2016 WL 806546 (N.D. Ill. Mar. 2, 2016) (Gottschall, J.)

After a class action settlement had been reached in litigation between consumers and Defendant concerning gift card transactions, and the Court initially denied final approval in part because of inadequate notice and a low claims rate, and later denied it a second time, then requiring corrective notice to issue due to inadequate notice content, the parties thereafter issued that corrective class notice and additional steps, ultimately received more claims than the initial round of notice, and again sought final approval.

This time the Court granted final approval, granted in part and denied in part (lowering one award) the petitions for fees, confirmed its prior approval of an incentive award of \$1000 for each representative plaintiff, and also denied Defendant’s request for reimbursement for costs for the first round of notice.

In support of its decision, the Court analyzed the fairness of the settlement, looking to the five factors used in the Seventh Circuit’s *Synfuel Techs., Inc. v. DHL Express (USA), Inc.* decision. Here, the Court found the first factor (the strength of the merits compared to the settlement) satisfied on grounds that the range of recovery was reasonable, and the class could conceivably receive nothing if the litigation were advanced further. The Court also found the second factor (the complexity and expense of litigation) was likely to be extremely costly due to discovery difficulties, which weighed in favor of approval. In terms of the third factor (opposition to the settlement), the Court found that the fact that only 100 members opted out, while over 81,000 filed claims, and the objections received were insufficient to justify denial of settlement approval. In terms of the fourth factor, the experience and views of counsel, the Court found a record of good faith and an absence of collusion, which supported settlement approval. Likewise for the fifth factor, the stage of proceedings and amount of discovery, which the Court found sufficient for settlement approval.

Turning then to attorney’s fees, the Court looked to the comparison of the requested fees to the benefit to the class, and reduced the requested award, ultimately awarding fees of \$1,000,000, 34% of the value of the benefit to the class. The Court then approved cost and incentive awards, as well as the *cy pres* recipient, Consumer Reports/Consumers Union.

The Court then addressed Defendant's request for reimbursement of the costs of the first round of notice, finding that round of notice to have been so inadequate that it did not merit recovery of those costs.

TELEPHONE CONSUMER PROTECTION ACT

Reversion Settlement

Landsman & Funk P.C. v. Skinder-Strauss Assocs., No. 15-2485, 2016 WL 611441 (3rd Cir. Feb. 16, 2016) (Cowen, J.)

An objector to a class action settlement of a lawsuit brought under the Telephone Consumer Protection Act for unsolicited fax advertisements appealed a magistrate judge's order granting final approval.

The Court affirmed the magistrate judge's order, finding no abuse of discretion. In support of its decision, the Court reviewed the settlement's terms, which called for an award of \$58,325 to the class, \$10,000 to Plaintiff, and approximately 3.5 times the amount in attorney's fees, with a reversion of \$348,333 of the settlement fund to Defendant. Looking to the magistrate judge's reasoning in approving the settlement, the Third Circuit noted that the United States District Court for the District of New Jersey had found that among thousands of potential class members, only one objection was made against the decision to settle after years of vigorous litigation. The trial court had also found that by applying the lodestar method, counsel had sought \$208,333 in fees as a percentage of the total fund; the Objectors had argued that the fees should be based on the amount claimed rather than the entire fund.

Ultimately the Third Circuit found that the district court did not abuse its discretion, citing Third Circuit precedent in *Gunter v. Ridgewood Energy Corp.*, which set forth factors to determine whether the distribution reflects a failure to serve the interests of the class. The Court found that the district court appropriately determined the settlement fair and reasonable because there was no "indicia of self-dealing by counsel" and that the award to the class was appropriate as a direct benefit, and this was sufficiently within its discretion.

With experience administering over 6,000 settlements, KCC's team knows first-hand the intricacies of class action settlement administration. At the onset of each engagement, we develop a plan to efficiently and cost-effectively implement the terms of the settlement. Our domestic infrastructure, the largest in the industry, includes a 900-seat call center and document production capabilities that handle hundreds of millions of documents annually. In addition, last year, our disbursement services team distributed \$500 billion to payees.

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