ARTICLES

Courts Take Notice of Class Action Settlement Processes

By Robert DeWitte

As if settling class action litigation wasn't already complex enough, common methods of providing notice to class members and settlement claims processes have recently come under the microscope, with far-reaching consequences for the future of settling class litigation.

It is perhaps no surprise that lower courts would begin to apply similar scrutiny to class action settlements in the wake of the U.S. Supreme Court's recent refinements to class certification law in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 277 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Indeed, even the Supreme Court itself has expressed its willingness to delve into the area if given an appropriate opportunity. *See Marek v. Lane*, 134 S. Ct. 8 (2013) (statement of Roberts, C.J., commenting on a class action settlement without granting certiorari).

Federal district and appellate courts have started setting new, more stringent standards for settlement of class action litigation, in particular in the areas of notice and settlement administration. This new scrutiny, which will have ramifications on both sides of the bar, is evident in the rise of reliance on the Federal Judicial Center's notice and claims process guidance, the Seventh Circuit's recent focus on settlement issues, and the Northern District of California's promulgation of new guidance governing class action settlements.

The Rise of the Federal Judicial Center's Checklist

The increased focus on notice and settlement administration issues can be traced in part back to the rise of the Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010). A guidebook of sorts to help judges navigate class action notice and settlement administration issues, the checklist has been cited and relied on with increasing frequency by courts across the country, in some instances as a basis for rejecting a proposed settlement and, in others, as a benchmark against which a settlement is measured. Objectors have based later-sustained objections on noncompliance with the checklist.

While the checklist is referenced most commonly in district court decisions, it was recently cited in a Ninth Circuit decision, *Laguna v. Coverall North America, Inc.*, 753 F.3d 918 (9th Cir. 2014), for its guidance on the appropriate circumstances for use of a claims process. The reference to the checklist by such a prominent class action court speaks to its rising prominence, even if it came in a dissenting opinion from a decision that was later vacated in its entirety after a settlement was reached. *See Laguna v. Coverall N. Am., Inc.*, 772 F.3d 608 (9th Cir. 2014).

The appropriateness of claims processes is just one of the issues the checklist addresses, and courts have cited it for a wide array of other issues. Some courts have taken to advising parties upon class certification that any notice plan must address the checklist's guidance on both

notices and notice plans. *See, e.g.*, *Underwood v. Carpenters Pension Trust Fund—Detroit & Vicinity*, No. 13-cv-14464, 2014 WL 4602974, at *11 (E.D. Mich. Sept. 14, 2014). On this front, the checklist is comprehensive, offering courts guidance and pros and cons on various forms of notice.

In terms of notice plans, one of the more common reasons courts cite the checklist is to validate whether a proposed plan will reach a sufficient percentage of class members, which the checklist suggests is between 70 percent and 95 percent. *See, e.g.*, *Swift v. DirectBuy, Inc.*, No. 11-cv-401, 2013 WL 5770633 (N.D. Ind. Oct. 24, 2013); *Spillman v. RPM Pizza, LLC*, No. 10-cv-349, 2013 WL 2286076 (M.D. La. May 23, 2013). It also contains guidance on the use of print and electronic media where necessary, cautioning against the use of Internet banners alone for purposes of notice. Courts have taken heed of this admonition. *See, e.g.*, *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840, 2013 WL 139732 (D. Kan. Jan. 10, 2013) (rejecting notice plan relying exclusively on Internet banner ads for some segments of the class).

Counsel would also be wise to follow the checklist's standards with respect to notice content, as courts routinely use the checklist to ensure that all required content is included in a proposed notice and that it is written in plain language. *See, e.g.*, *Vargas v. Capital One Fin. Advisors*, No. 12-cv-5728, 2013 WL 4407094 (S.D.N.Y. Aug. 15, 2013) (comparing notice content to the checklist's recommendation to evaluate notice adequacy; approving in light of compliance); *Sanchez v. Creekstone Farms Premium Beef, LLC*, No. 11-cv-4037, 2012 WL 380279 (D. Kan. Feb. 6, 2012) (approving the content and form of proposed notice "given that it is based on the FJC's example").

The Seventh Circuit's 2014 Trio

Aside from the growing influence of the checklist, the Seventh Circuit has also recently updated its class action settlement jurisprudence, touching on notice and settlement administration issues in a trio of 2014 opinions written by Judge Posner.

In the first case, *Eubank v. Pella Corp.*, 753 F.3d 718, 728 (7th Cir. 2014), the Seventh Circuit took issue with the notice, criticizing its content for an absence of detail concerning the substitution of class representatives, their views of the settlement, their relationship with class counsel, the financial condition of class counsel, and the level of detail provided in the description of the awards available to claimants, ultimately deeming the notice a non-neutral communication that failed to provide a truthful basis on which class members could rely to decide whether to opt out. This aspect of *Eubank* is potentially far-reaching for both counsel and notice administrators. How much information must now be included? Must a notice expert investigate the issues raised by Judge Posner and how much?

Aside from notice, *Eubank* also signaled the Seventh Circuit's view that consideration of the number of claims made by class members is critical to calculating the value of a settlement. *Id.* at 723. The court expanded on this theme in *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir.

2014), analyzing the claims filed by class members in relation to the value of the settlement and, correspondingly, to class counsel's fee petition. After taking issue with the fees approved by the *Redman* district court as bearing an inappropriate relation to the benefit realized by class members, the Seventh Circuit proposed two solutions: reallocation of a portion of attorney fees to the class award and expending more funds on notice in an attempt to boost the class recovery in order to justify a fee request. *Id.* at 632. Despite acknowledging the connection between notice and claims filed, the Seventh Circuit also indicated that class counsel should economize on notice and administrative expenses, regardless of whether those expenses come out of the total settlement fund or are paid separately by the defendant. *Id.* at 630. The Seventh Circuit thus left the unmistakable impression that parties negotiating settlements after *Redman* must thread the needle between ensuring that robust notice is carried out so as to justify approval of the settlement and economizing on cost.

While the Seventh Circuit provided plenty of new material for class action litigators to digest in *Eubank* and *Redman*, it issued another decision on the topic in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), in which it delved into, inter alia, the claims process, criticizing the complexity of the claim form and claim validation process, the settlement website, and the requirement that claiming class members sign their claim form under penalty of perjury. *Id.* at 782–84.

These decisions have already spread into other jurisdictions and will surely continue to do so. *See, e.g.*, *Myles v. AlliedBarton Sec. Servs., LLC*, No. 12-cv-05761, 2014 WL 6065622, at *5 (N.D. Cal. Nov. 12, 2014) (citing *Redman* for its discussion of settlement valuation); *Hall v. Bank of Am.*, No. 12-cv-22700, 2014 WL 7184039, at *3 (S.D. Fla. Dec. 17, 2014) (approving settlement and noting lack of any of the issues raised in *Eubank* as proof of lack of collusion); *Hess v. Volkswagen of Am., Inc.*, No. 111978, 2014 WL 7148919, at *9 (Okla. Dec. 16, 2014) (Taylor, J. concurring) (citing *Pearson*'s approach to evaluating fee requests in light of benefit to the class).

Northern District of California Guidance

The Seventh Circuit isn't the only jurisdiction taking a specific interest in class action settlement issues—the Northern District of California, itself a popular venue for class action litigation, recently released its own *Procedural Guidance for Class Action Settlements*. That court's guidance warns at the outset that failure to comply with its guidance may prompt delay or denial of settlement approval. The guidance covers a wide range of settlement issues, including the content, form, and method of communication of notice. Other areas of note are the emphasis on including anticipated administrative costs in preliminary approval papers, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs. The guidance also addresses notice content, suggesting including instructions on how to access the case docket via PACER or in person at any court locations, and it instructs that the notice should include a website address (implying that every settlement needs its own website) and that mailed notice

should be "supplemented" by email notice if feasible. These will increase the costs of settling class actions in instances where the parties may not have otherwise implemented them.

The Path Forward

The question becomes how best to navigate these emerging trends to ensure settlement approval. While cost will always be important, as a general matter, certain best practices can be taken.

In terms of notice, consult with a notice administration firm before finalizing a settlement; such firms advise on these issues on a daily basis and should be able to help identify pitfalls. Also, whenever possible, follow the Federal Judicial Center's checklist, which has proven to be a safe harbor of sorts, and view skeptically any suggestion that the checklist should be ignored. Above all, plan for *and* allow for sufficient notice commensurate with your case. Following this guidance will help ensure painless settlement approval.

In terms of claims processes, the clear trend favors simplification. *Pearson* shows that the Seventh Circuit has taken the position that the point of the settlement process is not to force potential claimants to prove they actually want to participate; instead, it is to efficiently provide relief to class members. Indeed, in addition to calling into question the requirement that claiming class members submit elaborate documentation and sign their claim forms under penalty of perjury, the Seventh Circuit noted that checks could have been simply sent to known class members, rather than requiring a claims process. 772 F.3d at 783–84. Similarly, the Third Circuit has recently cautioned against complex claims processes. *See* *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 (3d Cir. 2013). Following the philosophy of simplification, to the extent possible, parties would do well to minimize restrictions on a class member's ability to make use of a settlement award. *Redman*, 768 F.3d at 631 (citing *Eubank*).

Finally, while being mindful of cost, parties should distribute as much of the available relief available to class members to the extent possible. More and more settlements are being designed with not only a floor setting the minimum amount that must be distributed to claiming class members but also with a backup mechanism that permits a second round of distribution if necessary. Both the Seventh and Third Circuits agree on this point. *See, e.g.*, *In re Baby Prods.*, 708 F.3d at 174 (observing that a district court could make settlement approval contingent on the inclusion of a mechanism for additional payouts to claimants in a settlement if the payout due to those claimants would not deplete a significant portion of the total available settlement fund).

Conclusion

Class settlement issues have risen in prominence of late, and the development of the law in that area will doubtless continue apace. With that in mind, a smart litigant will pay attention the decisions thus far and, wherever possible, approach notice and claims process issues very carefully. Both plaintiffs' counsel and defense counsel will need to think carefully about how to increase the direct benefit to the class, perhaps by using additional or more effective notice methods, and how to create a simple claims process that also protects against fraudulent claims.

While there is unlikely to be a silver bullet solution to be applied uniformly in all cases, careful consideration of the facts and circumstances will be critical to avoid running afoul of these recent developments. Surely, these issues will be elaborated on further in the near future.

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