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Class Actions: The Ninth Circuit Rejects Conditional Incentive Awards For Class Representatives And Closely Scrutinizes Attorney Fee Awards For Coupon Settlements

Addressing what appear to be issues of first impression in the Ninth Circuit, the court of appeals recently reversed two district court orders approving class action settlements.

In *Radcliffe v. Experian Information Solutions, Inc*., No. 11-56376 (as amended May 2, 2013), the court held that "conditional" incentive awards to class representatives invalidated the settlement by creating a conflict of interest between the class representatives and the rest of the class members. In the case before it, the class representatives were to receive US$5,000 incentive awards, but only if they accepted the settlement agreement. They risked receiving as little as US$26 as class members if they objected. The court found that this "removed a critical check on the fairness of the class-action settlement, which rests on the unbiased judgment of class representatives similarly situated to absent class members." Thus, the class representatives could no longer "fairly and adequately protect the interests of the class" under Federal Rule 23.

In *In re HP Inkjet Printer Litigation*, No. 11-16097 (May 15, 2013), the court interpreted the Class Action Fairness Act provisions that govern the calculation of attorney fee awards when a settlement involves coupons. The trial court had estimated the "ultimate value" of the settlement, including coupons and injunctive relief, to be US$1.5 million, and awarded a lodestar fee of US$1.5 million. The court of appeals found that the fee award was improper because Section 1712(c) required the trial court to calculate fees attributable to the coupon relief separately from the fees attributable to the injunctive relief. While a lodestar fee award is appropriate for injunctive relief obtained, any fees attributable to the coupon relief must be based on the actual redemption value of the coupons. The court explained that such an approach helped to address "the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class."

Judgments: The Inter-American Convention On Letters Rogatory Cannot Be Used To Aid In Efforts To Enforce A Money Judgment

A California court of appeal recently agreed with federal district courts that the Inter-American Convention On Letters Rogatory "does not authorize the issuance of a letter rogatory that has as its purpose the enforcement of a money judgment." *Landstar Global Logistics, Inc. v. Robinson & Robinson, Inc.*, No. D060829, (May 16, 2013). The Convention authorizes letters rogatory to aid in "[t]he performance of procedural tasks of a merely formal nature, such as service of process, summonses or subpoenas abroad," but not "acts involving measures of compulsion." The court found that efforts to enforce a judgment involve "measures of compulsion" because they seek "to alter the judgment debtor's substantive rights by depriving it of money or other property sufficient to satisfy the judgment." Thus, the trial court should not have issued a letter rogatory to request that the

Mexican authorities register judgment liens Landstar had obtained against Robinson and Robinson, with the purpose of ensuring that Landstar would receive the proceeds of the sale of certain real property located in Mexico.

Discovery: Third Parties Required To Produce Production Search Terms And Custodian List For Cost-Effective Discovery

A Northern District of California magistrate judge held that third parties subject to a subpoena must participate in transparent and collaborative discovery. In the patent infringement case, *Apple Inc. v. Samsung Electronics Co. Ltd*, No. 12-cv-0630, Apple moved to compel third-party Google Inc. to produce a list of the search terms and custodians that Google had used in responding to Apple's subpoenaed requests for production. Google withdrew its initial objection based on waiver of the work-product immunity doctrine; the court speculated that this was because there was no legal support for its position. Google then objected because, as a third party, such transparency about its discovery methods would be "extraordinary"; it would be unduly burdensome as it could lead to further production requests.

The court cited the reasoning in *DeGeer v. Gillis*, 755 F. Supp. 2d 909 (N.D. Ill. 2010) to reject Google's argument. Faced with a similar set of circumstances, the court in DeGeer ordered the third party to produce the search terms and custodians because it was necessary to have an open, transparent discovery process, but also noted that the requesting party must cooperate and collaborate in selecting search terms and custodians. Following this rationale, the court in *Apple* also ordered Google to produce the search terms and custodians and ordered Google and Apple to meet and confer to discuss the lists and resolve any remaining disputes regarding Google's production.

Circuit Split: Sixth Circuit Lowers Bar For Pleading Certain Securities Claims

The Sixth Circuit in *Indiana State District Council of Laborers v. Omnicare*, No 12-5287 (6th Cir. May 23, 2013), has created a circuit split regarding the standards for pleading claims under Section 11 of the Securities Act of 1933. Section 11 gives plaintiffs a private cause of action against a publicly traded entity, as well as its officers, directors, and other high-level individuals, whenever false statements are contained in the offering documents of the entity's securities.

Both the Second Circuit and Ninth Circuit previously held that a properly pleaded claim arising under Section 11 must plead both that the statements were false and that the defendant knew that the statements were false. The Sixth Circuit rejected this standard, holding that Section 11 was intended to create strict liability for false statements. Accordingly, the Sixth Circuit held that the defendant's knowledge was not relevant for purposes of a Section 11 claim and that, because liability could attach without consideration of *mens rea*, it was not necessary to plead the defendant's state of mind. While all three circuits considered the issue of scienter in the context of dismissal for failure to plead a claim, the Sixth Circuit's ruling suggests that successful pursuit of Section 11 claims in the Sixth Circuit may become easier in other ways as well.

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