Class Action Monitor

Weil

Q1 2022

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Class Action Honors

Ninth Circuit Applies Heightened Scrutiny to Post-Certification Class Settlement

By Greg Silbert, Pravin Patel, and Corey Brady

In *Briseño v. Henderson*, the Ninth Circuit held that the new settlement approval factors in revised Rule 23(e)(2) apply to settlements proposed after class certification, and that those factors require careful scrutiny of attorney's fee awards. This decision provides an important set of "red flags" of which to be aware when structuring a class settlement.

Amendment of Rule 23(e)(2)

Federal Rule of Civil Procedure 23(e)(2), which governs the analysis of whether a proposed class settlement is fair, reasonable, and adequate, was amended in December 2018. Previously, the Rule had offered this standard without elaboration, leaving federal courts to fill the gaps using a variety of judicially created factors. As the Advisory Committee noted, each circuit "developed its own vocabulary" for assessing settlement fairness, with long lists of factors "potentially distracting attention from the central concerns." *See* Fed. R. Civ. P. 23 advisory committee's note (2018 amendment). Rule 23(e)(2) was therefore revised to focus courts and parties on a shorter list of core concerns, including, as relevant here, the terms of any fee award.

In June 2021, the Ninth Circuit took up an issue of first impression related to revised Rule 23(e)(2): Do the new settlement approval criteria apply to settlements occurring *after* class certification, and in particular, should attorney's fee awards be subject to heightened scrutiny at this stage?

It answered "yes," overturning a class settlement that raised "a squadron of red flags." *See Briseño v. Henderson*, 998 F.3d 1014, 1019 (9th Cir. 2021).

The *Briseño* Settlement

The consumer class members in *Briseño* alleged that ConAgra misleadingly labeled Wesson vegetable oil "100% Natural" even though the oil contained genetically modified ingredients. After losing their first class certification motion, the plaintiffs put up two experts who testified that Wesson's labeling caused a 2.28% price premium. The district court ultimately granted class certification, and after that determination was upheld on appeal, the parties began settlement negotiations.

They reached a deal in which ConAgra would pay consumers, on a claims-made basis, 15 cents per bottle of oil purchased, with a maximum of 30 bottles (or $4.50) applying to any household that lacked proof of purchase. ConAgra would provide $585,000 in other settlement funds. In addition, ConAgra would be enjoined from marketing Wesson oil as "natural"—though at that point ConAgra had changed the label and sold the Wesson brand. On the other hand, the proposed settlement would provide $6.85 million in attorney's fees. While the parties initially asserted that this settlement offered $95 million in value to the class ($67.5 million for the direct payout, and $27 million for the injunctive relief), relative to less than $7 million in attorney's fees, ConAgra in fact paid out only $1 million to the class due to a low claims rate.

One class member opted out: M. Todd Henderson, a professor at The University of Chicago Law School. Prof. Henderson objected to the settlement, which he argued was too rich for the plaintiffs' attorneys and raised the specter of collusion. The district court disagreed and approved the settlement, finding that while there is an apparent trend toward class action settlements disproportionately benefitting plaintiffs' attorneys, the fee award here did not render the entire settlement unfair.

The Ninth Circuit Closely Scrutinizes Fee Provisions

The Ninth Circuit reversed, holding that the court had erroneously failed to apply revised Rule 23(e)(2)(C)(iii), which specifically requires scrutiny of proposed attorney's fee awards. While noting that no other circuits had addressed exactly what Rule 23(e)(2)(C)(iii) requires or whether it applies after class certification, the *Briseño* panel reasoned that the Rule's text is not limited to a pre-certification stance. "And for good reason, too: The specter of collusion still casts a long shadow over post-class certification settlements when they involve divvying up funds between class members and class counsel." Accordingly, "the new Rule 23(e) makes clear that courts must balance the 'proposed award of attorney's fees' vis-à-vis the 'relief provided for the class.'"

The court recognized the argument for applying Rule 23(e) only in the pre-class certification context—that class counsel may collude with the defendant to strike a quick settlement *before* devoting meaningful resources to the case—but noted that "class certification does not cleanse all sins." That is because there will still be an incentive for plaintiffs' counsel to strike a settlement that shortchanges class members, and the defendant will rationally be focused on the total payout rather than how it is divided. In other words, the post-class certification stance "does not [] address the inherent incentives that tempt class counsel to elevate his or her own interest over those of the class members." Thus, courts must scrutinize post-certification proposed settlements for collusion or unfairness to the class.

Applying this scrutiny to the *Briseño* settlement, the court found that the parties had included "a bevy of questionable provisions." The first red flag was that class counsel received a disproportionate amount of the settlement—almost $7 million compared to an actual cash distribution to class members of less than $1 million (due to a low claims rate). Second, the settlement contained a "clear sailing arrangement" whereby ConAgra agreed not to challenge the attorney's fees. Finally, it contained a "kicker" or "reverter" clause whereby ConAgra, not the class members, would

receive the funds if the court reduced the attorney's fees. The Ninth Circuit panel noted that the combined effect of the clear sailing and kicker clauses was to preclude a Rule 23(h) excessiveness challenge to the fee award.

The panel also rejected the district court's valuation of the injunctive relief. In addition to Prof. Henderson's objection, thirteen state attorneys general filed an *amicus* brief, which observed that "empty injunctive relief has become one of the more concerning parts of the class action settlement landscape." *See* Brief of Thirteen Attorneys General as *Amici Curiae* in Support of Objector-Appellant and Reversal, Case No. 19-56297, 2020 WL 2061109 (filed Apr. 10, 2020). The AGs contended that because ConAgra had already changed the Wesson label and sold the brand, the injunctive relief was effectively worthless. The Ninth Circuit agreed, concluding that the injunction would not obligate ConAgra to do anything it was not already doing and could only apply if ConAgra reacquired the Wesson brand. For all these reasons, the Ninth Circuit struck down the settlement.

Key Takeaways

Briseño sets a precedent for scrutinizing fee awards in post-class certification settlements under the revised Rule 23(e)(2). The Ninth Circuit's reasoning on this issue could be adopted by other circuits, because, as it pointed out, (i) the Rule is not explicitly limited to pre-certification settlements, and (ii) there could, in some instances, still be incentives for class counsel to structure an excessive fee award after certification. Parties negotiating a settlement at this stage of a class action case may want to consider *Briseño*'s standard for assessing attorney's fees.

In particular, parties should be aware of the red flags from the *Briseño* settlement. While the court was clear that none of these red flags was necessarily an independent basis for invalidating a settlement—and each could be an element of a fair deal—their confluence was a sign of collusion.

For example, the court seemed especially troubled by the combined effect of the clear sailing and kicker provisions. Particularly in the Ninth Circuit, parties should consider whether to structure a class settlement to include both of these provisions, and how such a structure could affect the acceptable ratio of class counsel's fees to class member's compensation (though we note that, while *Briseño* has been cited a number of times within the Ninth Circuit, thus far it has only been cited by one federal court elsewhere. *See Smith v. Costa Del Mar, Inc.*, 2021 WL 4295282, at *3 n.7 (M.D. Fla. Sept. 21, 2021)). Also, the *Briseño* court repeatedly emphasized the disproportionate amount of attorney's fees relative to the *actual* cash payout to class members. Even though the actual cash payout was diminished by a low claims rate, the court observed that claims rates in consumer class actions are "notoriously low, especially when it involves small-ticket items." In structuring a fee award, parties should therefore consider the full range of potential payouts.

Briseño also instructs settling defendants to remain mindful of not just the total payout in a settlement, but the division between class counsel and class members. As the decision noted, it is rational for a defendant to focus on the former. Yet, adopting such a narrow focus could lead to disapproval of the settlement if class counsel tries to divide that payout unfairly.

Finally, parties should carefully evaluate any proposed injunctive relief to avoid the pitfall observed in *Briseño* and, according to the state AGs, other cases too. This would include not only a searching review of the injunctive relief, but also a comparison of its projected value to the monetary compensation to class members—if most of the settlement's value derives from the injunctive relief, as in *Briseño*, then it is all the more critical to get that valuation right.

Weil's leading class action practice will continue to monitor the evolution of case law on this issue for developments that may be relevant to our clients.

Ruhlen and Recent Trends in Favor of Remand

By Edward Soto, Pravin Patel, Mark Pinkert, and Katie Black

The Class Action Fairness Act of 2005 (CAFA) expanded federal jurisdiction over certain categories of class actions. 28 U.S.C. § 1332(d)(1)-(2); *see also Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 84-85 (2014). CAFA is triggered when a class "has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million." *Id.*; § 1332(d)(2), (5)(B). Congress described its legislative intent for CAFA as "restor[ing] the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. 109–2, § 2, 119 Stat. 4, 5 (2005). To that end, CAFA also included a removal provision, which permits the removal of a "class action" from state to federal court "by any defendant without the consent of all defendants" and "without regard to whether any defendant is a citizen of the State in which the action is brought." § 1453(b). In *Dart*, Justice Ginsburg explained that, whether there is an presumption against removal in "mine-run diversity cases[,] no antiremoval presumption attends cases invoking CAFA, which Congress enacted to *facilitate* adjudication of certain class actions in federal court." 574 U.S. at 89 (emphasis added).

CAFA's expansion of federal jurisdiction left the door open to extensive amounts of class action litigation being filed in or removed to federal courts. That expansion—along with the increasing filing and removal of litigation under consumer-oriented statutes like the Telephone Consumer Protection Act (TCPA), Fair Debt Collection Practices Act (FDCPA), and Fair Credit Report Act (FCRA)—has caused docket and administrative pressure in several federal district courts. It is common for firms that follow a volume-filing business model to specialize in these types of cases, because many of the relevant statutes impose relatively low statutory damages. In the Southern District of Florida, for example, it is not uncommon for a few repeat players to have tens and sometimes even hundreds of consumer cases pending in the District. Many of those cases originated in state courts but were removed under federal question jurisdiction and, in class action cases, under CAFA.

Whether or not there is a direct correlation, the growing burden on federal district court dockets has been followed by substantive doctrines that have contracted federal jurisdiction and made remand to state court easier. This trend can be seen in recent cases like *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1751 (2019), which held that the CAFA removal provision does not permit removal by a third-party counterclaim defendant, and *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2205 (2021), where the Supreme Court held that for Article III standing to sue in federal court, a plaintiff needs to have been concretely harmed by the alleged violation giving rise to the suit, and that "an injury in law is not an injury in fact." Since *Spokeo*, it has been common for district courts to remand consumer-oriented federal lawsuits under the TCPA, FDCPA, and FCRA. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339-42, 353-54 (2016) (holding that Article III standing requires a concrete injury, not a mere procedural violation, and remanding for the court of appeals to consider whether a FCRA violation caused a concrete injury). But *TransUnion* settled some of the open issues with *Spokeo* and will certainly accelerate the trend of remands. *See, e.g.*, Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211, 1236 (2021) (discussing how "*Spokeo's* progeny" have seen a trend towards both dismissal and remand in federal courts in cases where FACTA claims "rel[ied] on pure procedural injury"). As Justice Thomas noted in dissent in *TransUnion*, the narrowing of Article III standing will filter many federal lawsuits into state courts. *TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting) ("The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts . . . as the sole forum for such cases, with defendants unable to seek removal to federal court." (internal quotation omitted)).

The Eleventh Circuit recently continued this remand-friendly trend in *Ruhlen v. Holiday Haven Homeowners, Inc*., where the court held that it lacked subject-matter jurisdiction to review the district court's *sua sponte* remand of a case to state court. *See Ruhlen v. Holiday Haven Homeowners, Inc*., No. 21-90022 (11th Cir. 2022). In *Ruhlen*, mobile homeowners and their respective homeowner's association filed in Florida state court, claiming violations of the Americans with Disabilities Act (ADA) and the Florida Antitrust Act. *Id*. at 1. Defendants removed the suit to federal court under CAFA. *Id.* While in the district court, plaintiffs filed an amended complaint that dropped the federal ADA claims and, instead, substituted additional state law claims. *Id*. at 2. In finding that there was no longer federal-question jurisdiction, the district court concluded that the suit was no longer covered under CAFA, and subsequently remanded the suit back to state court. *Id*. at 2. But it did so *sua sponte*—without any request from the plaintiff. *Id.*

Generally, a court of appeals lacks jurisdiction to review an order remanding a removed case to state court based on the district court's determination that it lacks subject-matter jurisdiction. *See* 28 U.S.C. § 1447(d); *Hunter v. City of Montgomery*, 859 F.3d 1329, 1333 (11th Cir. 2017) (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976)). There is, however, a statutory exception to the general rule under CAFA that applies where the appeal is "from an order of a district court granting or denying *a motion* to remand a class action to the State court from which it was removed." 28 U.S.C. § 1453(c)(1) (emphasis added).

The question in *Ruhlen*, then, was whether the CAFA exception applied to *sua sponte* remands for lack of subject-matter jurisdiction (given that they're not technically issued on a motion by the parties) or whether such an order is one that is deemed to have "den[ied] a motion to remand." In assessing this question, the Eleventh Circuit looked to dictionary and legal definitions of the term "motion" and concluded that it required party initiation. *Ruhlen*, at 4 ("Numerous sources corroborate our conclusion that, in ordinary legal parlance, a "motion" is a request or an application made by a party."). Because the district court acted *sua sponte* in remanding *Ruhlen* back to state court, the Eleventh Circuit found no statutory basis for appellate review.

Judge Rosenbaum dissented, arguing that the majority engaged in a "hypertechnical reading of CAFA" that was "refuted by the broader view of the common understanding of the statutory language [and] the clear intention of the statute as revealed by its context." *Id.* at 9. In response to the majority's conclusion that "party initiation" is necessary, the dissent argued that other Eleventh Circuit cases had defined a *sua sponte* action as being, effectively, a court's own "motion." *Id.* at 11 (citing *Velchez v. Carnival Corp.*, 331 F.3d 1207, 1210 (11th Cir. 2003)). The dissent pointed to cases in other circuits that "have all concluded that an order remanding a case removed based on CAFA jurisdiction does not become unreviewable simply because it was remanded sua sponte." *Id.* (citing, e.g., *Watkins v. Vital Pharms, Inc.*, 720 F.3d 1179, 1181 (9th Cir. 2013)). The dissent concluded by criticizing the majority opinion as cutting against the legislative intent of CAFA. *Id.*

Under *Ruhlen*, district courts now have another tool for remanding class actions, particularly those involving consumer statutes like the TCPA or FDCPA, which do not involve traditional pocketbook harms to the plaintiffs, but instead involve statutory damages attractive to plaintiffs' attorneys filing in high volume. As a matter of course, many district courts issue orders to show cause when the basis for federal jurisdiction is not apparent from the notice of removal or is otherwise questionable. It is possible, and perhaps likely, that district courts will instead *sua sponte* remand CAFA-based removals if there is a close question about jurisdiction. The lack of reviewability may make *sua sponte* remand an attractive option for a district court with a busy docket.

Although at its inception CAFA intended to direct certain class actions to federal courts, cases like *TransUnion* and *Ruhlen* are perhaps a bellwether of a growing inclination to make remand easier, or even prevent the initial removal of, class action cases in state courts. From the defense perspective, to avoid close cases in which the district court may be include to rule *sua sponte*, it will be important to shore up notices of removal.

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Whether our clients face a nationwide class action in one court or statewide class actions in courts across the country, we develop tailored litigation strategies based on our clients' near- and long-term business objectives, and guided by our ability to exert leverage at all phases of the case – especially at trial. Our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters—their businesses.

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Class Action Honors (cont.)

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Class Action Monitor is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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