

Litigation Alert

February 22, 2018

Key Points

- The DOJ has streamlined its process for reviewing CAFA settlement notices.
- The DOJ will likely become more aggressive in reviewing class action settlements for fairness, reasonableness and conformity with DOJ policy positions.
- Parties in class actions should bear in mind that DOJ officials will scrutinize class action settlement agreements more closely.



U.S. Department of Justice Will Likely Become More Active in Reviewing Proposed Class Action Settlements

One week after it became known that Associate Attorney General Rachel Brand will be stepping down from her position at the U.S. Department of Justice (DOJ), she made comments suggesting that the DOJ plans on taking a more aggressive approach toward reviewing—and potentially interfering with—proposed class action settlements.

Under the Class Action Fairness Act of 2005 (CAFA), defendants in federal class actions are required to provide notice of any proposed classwide settlement to the appropriate state and federal officials prior to final court approval. This notification requirement is designed to ensure that regulators are in a position to react or intervene if a settlement appears unfair to class members or inconsistent with regulatory policies. In many cases, the official to be notified is the U.S. Attorney General (currently Jeff Sessions), who heads the DOJ.

Since CAFA was passed, formal participation by federal and state officials in settlements has been infrequent, and officials have objected to settlements as *amicus curiae* in only a few reported cases. However, Brand said on Thursday that the DOJ will soon become more aggressive in reviewing class action settlements under CAFA. She explained that layers of federal bureaucracy have often prevented DOJ attorneys from reviewing CAFA notices before critical junctures in the settlement approval process, but she hinted that the DOJ has taken steps to streamline the review procedure to ensure that DOJ officials can become involved in proposed settlements when necessary. In the same interview, Brand also questioned the legality of nationwide injunctions. She argued that “[t]here are real questions about whether nationwide injunctions are consistent with Article III of the Constitution, since they grant relief to parties not before the court.” These comments signal that the DOJ may become more likely to file

statements of interest with regard to settlements that it views as unfair or unreasonable, or as inconsistent with regulatory policies.

While examples of state and federal attorneys general objecting to class action settlements under CAFA are rare, they foreshadow how a more active DOJ may approach such settlements upon receiving CAFA notices.

For example, in *Ault v. Walt Disney World Co.*, 2009 WL 854045 (M.D.Fla.), the DOJ objected as *amicus curiae* to a proposed settlement between Disney and a class of plaintiffs who alleged that Disney violated Title III of the Americans With Disability Act by failing to modify its policy banning Segways for persons with disabilities. The DOJ argued that the proposed settlement provided virtually no benefit to absent class members, the class definition and release provisions were overbroad, and the agreement lacked adequate enforcement or monitoring provisions. The court ultimately overruled the DOJ's objections and approved the settlement.

Groups of state attorneys general have also objected to proposed class action settlements under CAFA. For example, in *Figueroa v. Sharper Image Corp.* 517 F. Supp. 2d 1292 (S.D. Fla. 2007), 35 state attorneys general filed amicus briefs objecting to a "coupon" settlement between plaintiffs and Sharper Image on the grounds that the settlement did not provide meaningful compensation to class members, did not force disgorgement of ill-gotten gains and forced class members to do business with the defendant in order to receive compensation. Emphasizing that this group of attorneys general was "representing hundreds of thousands, if not millions of eligible class members," the court rejected the proposed settlement, agreeing that it was unfair to class members.

Similarly, in *Wilson v. DirectBuy, Inc.* 2011 U.S. Dist. LEXIS 51874 (D. Conn. May 16, 2011), another coupon settlement case, a group of 39 state attorneys general objected to the proposed settlement on the grounds that it provided little real value to class members, the minimal value of the settlement stood in stark contrast to the attorney's fees to be paid to class counsel, and the settlement provided no injunctive relief preventing the defendant from continuing the same practices alleged to have harmed consumers. Relying on many of the arguments made by the attorneys general, the court denied settlement approval.

Conclusion

Brand's comments suggest that the DOJ will likely become more active in reviewing CAFA notices and may take more aggressive positions on proposed settlements that it views as inconsistent with its policy priorities. The limited examples of state and federal attorney general objections to classwide settlements suggest that the DOJ will likely focus on the value to be provided to class members, the mechanism for obtaining settlement relief, attorney's fees, the scope of the class definition and releases, and the provisions for monitoring and enforcement. Courts may be particularly persuaded by DOJ arguments focusing on fairness to the large numbers of class members that the DOJ represents. Parties in class actions should bear in mind the possibility of such DOJ scrutiny in formulating classwide settlement agreements, especially settlements impacting regulatory policies important to the DOJ or providing for nationwide injunctions.

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