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2010 JAN 11 PM 3:57
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

PAUL LONARDO, *et al.*, *Plaintiffs*, v. THE TRAVELERS INDEMNITY COMPANY and THE STANDARD FIRE INSURANCE COMPANY, *Defendants*. DANIEL GREENBERG, *Objector*.	Case No. 06 CV 0962 Judge Kathleen O'Malley OBJECTION OF DANIEL GREENBERG

INTRODUCTION

Class member Daniel Greenberg of Arkansas objects to the proposed settlement, and gives notice that he intends to appear at the Fairness Hearing through his counsel, Theodore H. Frank.

"Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

This case provides a stark example of the potential conflict between class counsel and class members. Defendants have an incentive to settle the case as cheaply as possible; class counsel's incentive is to extract the maximum attorneys' fee. In such a world, for any given amount that the defendants are willing to pay, every dollar that is projected to go to the class—the class counsel's putative clients—is a dollar that is not going to the class counsel. "[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal." *Johnson v. Comerica*, 83 F.3d 241 (8th Cir. 1996). If the parties agree to a settlement that creates the illusion of fair recovery, but creates unnecessary obstacles to class members' recovery, then the class counsel and the defendants can effectively tacitly collude to benefit themselves at the expense of the class, even when the negotiations are at arm's length and in "good faith."

The proposed settlement creates just such obstacles. Rather than simply providing a refund, there is a claims form process. Moreover, the parties failed to use best practices by failing to permit the submission of claim forms over the Internet and instead requiring claim forms to be mailed. Given that Internet processing of claims would be far more inexpensive than paying a settlement administrator to handle mailings, the only conceivable grounds for creating these hoops is to artificially reduce the number of claims made.

The Court should reject the settlement as unfair. In the alternative, the Court should align the incentives of the class counsel with the incentives of the class by explicitly tying any attorney-fee award to the amount actually received by the class. *Cf.* Notes of Advisory Committee on 2003 Amendments to Rule 23(h), *citing* 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class") (Private Securities Litigation Reform Act).

I. Background: The Objector And His Attorney.

Daniel Greenberg is a member of the class. He is an Arkansas resident and member of the Arkansas House of Representatives. Mr. Greenberg received notice of the settlement in December 2009, and has standing to object under Fed. R. Civ. Proc. 23(e)(5) and the Court's Order of November 18, 2009 (Docket No. 170).

Mr. Greenberg has retained The Center for Class Action Fairness to represent him. The Center, founded by legal academic and attorney Theodore H. Frank in 2009, is a non-profit public-interest law firm that represents consumers *pro bono* as part of the 501(c)(3), DonorsTrust. A number of "professional objectors" are for-profit attorneys that attempt to or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees; thus, some courts presume that the objector's legal arguments are not made in good faith. But this is not the business model of The Center for Class Action Fairness. While the Center focuses on bringing objections to unfair class action settlements, it makes no effort to engage in *quid pro quo* settlements to extort attorneys, and has never settled an objection. The Center analyzes complaints from consumers aggrieved by class action settlement notices to determine whether a settlement is objectionable under the law because it favors attorneys over

class members. The Center's litigation on behalf of consumers has been covered by *Forbes* and the *National Law Journal*, among others.

The Center's president, Theodore H. Frank, is a graduate of the University of Chicago Law School, which he attended on a Public Service Scholarship. Mr. Frank is an elected member of the American Law Institute, and has written and spoken across the country about class action law and the principal-agent problems in class action settlements, including being quoted in the *New York Times*, *Wall Street Journal*, *Chicago Tribune*, and a number of legal journals on the subject.

II. Notice Was Insufficient Under Rule 23.

Class members are entitled to the "best notice practicable under the circumstances." Fed. R. Civ. Proc. 23(c)(2)(B). The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *cf. Eisen v. Carlisle& Jacquelin*, 417 U.S. 156, 174-175, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

Though class counsel are requesting $6.6 million in fees,[1] class members are given no information on what basis class counsel are making this claim. For example, if the parties expect that class members will receive $60 million in benefits, then the resulting 10% contingency fee is eminently fair; Mr. Greenberg would unilaterally withdraw his objection upon learning that this many claims were made. But if the parties anticipate that the redemption rate will be low, and

[1] Technically, the notice states that class counsel will request "up to" $6.6 million in fees. Notice ¶ 16. Given that the settlement provides clear sailing without objection from the defendants for any such request, § II.F.2, in practice, this means that class counsel will request $6.6 million in fees.

less than $1 million in claims will be paid, then the settlement structure was clearly designed to benefit the attorneys at the expense of the class. But for the conflict of interest between class counsel and their clients, the defendants could could have agreed to a better settlement for the class by offering higher claims payments or less a less onerous claims process, which would have encouraged more class members to make claims. Defendants could pay the same total amount for a superior settlement if class counsel had agreed to a reduction in their attorneys fees.

Nothing in the notice—or even in the docket—provides any sense of what the expected benefits to the entire class are to be, though this amount surely figured into the defendants' calculations in agreeing this particular settlement. But this information was not provided to the class or to the Court, in violation of Rule 23(c)(2)(B). If "class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class." *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000). But the class has been kept in the dark whether this has happened—though one can certainly draw an inference that the parties are embarrassed by the number by their failure to trumpet it to the Court in support of the settlement, much less disclose it at all.

Fed. R. Civ. Proc. 23(h)(1), added as part of the 2003 amendments to the Federal Rules, directly addresses this issue. Notice of a motion for attorneys' fees must be "directed to class members in a reasonable manner." "For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). . . . In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to

enable potential objectors to examine the motion." Notes of Advisory Committee on 2003 Amendments to Rule 23(h)(1). But the objections are due January 11, 2010, and no such full fee motion has been made. New notice is needed that (1) provides the full grounds of the basis of the fee request, and (2) the parties' best estimate of the value to the class of the settlement.

III. Class Recovery Is Exaggerated And Unfairly Limited By Artificial Barriers To Recovery.

Plaintiffs make much of the monetary relief to the class, but aggrandize it by omitting the artificial means by which recovery will be limited. The parties do not use the best practices to ensure class relief, and instead create hoops and obstacles to class recovery that only increase the expense of settlement administration. The only reason to do this is if the class counsel and defendants agree to reduce class recovery to benefit themselves. This can be done at arm's length without any explicit collusion, so long as class counsel looks the other way when defendants insist upon conditions on class recovery.

First, there is no reason to require class-member recovery to be through an opt-in process. Defendants have records of every class member's payments, and could simply cut a check or provide a discount to existing customers. *See, for example*, *Dupler v. Costco Wholesale Corp.*, No. 06-CV-3141 (E.D.N.Y.), available at http://www.costco.com/images/content/misc/pdf/renewalsettlement.pdf. Instead, the parties add the intermediate steps of a claim form plus processing of the claim forms—but one can submit a claim form without providing any additional information that the defendants do not already have. Though the American class action is formulated as an opt-out procedural device, the parties have agreed to needlessly turn the class recovery process into an opt-in procedure. The sole effect is to

reduce class recovery, and the sole reason to do this is to maximize the perception of class benefit while actually benefiting the class counsel and the defendants.

Second, even if a claim form is absolutely necessary, there is no reason to forbid filing claims over the Internet. Settlements with far more complex variables, and far more opportunity for fraudulent claims, than the straightforward compensation formula at issue in this case, are able to provide an Internet claims process. For example, in MDL No. 1897, *In re Mattel, Inc., Toy Lead Paint Prod. Liab. Litig.* (C.D. Cal.), available at http://www.mattelsettlement.com, there are over a hundred separate products at issue, and six different subcategories of recovery depending on class members' actions with and documentation of purchase of the product, but class members can submit their claims electronically under penalty of perjury. Here, every class member's claim will be treated identically, at a pro-rated $8.69/year of coverage. There is no reason for this class action settlement, where the class consists entirely of individuals with pre-existing contractual relationships with the defendants, to insist upon the more expensive manual processing of mailings, unless the class counsel and defendants are trying to limit class recovery for their own benefit.

This is not a hypothetical concern. The history of American class action law is littered with examples of parties agreeing to settlements where the claims process resulted in the class recovering a small fraction of what the attorneys collected. *See, e.g., Ford Explorer Cases*, J.C.C.P. Nos 4266 & 4270, (Cal. Sup. Ct., Sacramento County 2008) available at http://www.explorerclaims.com/Documents.aspx (approximately $37,500 class recovery versus $20 million in attorneys' fees); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008) ($26,000 class recovery versus $1 million fee request) (class decertified on

other grounds); *Moody v. Sears, Roebuck & Co.*, 2007 NCBC 13 (Cook County settlement resulted in $2,402 benefit to class and $1 million in attorneys' fees).

The artificial and baseless restrictions on class recovery are unfair, and provide independent grounds for striking down the settlemen unless the parties can present evidence of expected class recovery proportionate to the fee request.

IV. Class Counsel Have Breached Their Fiduciary Duty To The Class.

Defendants have agreed to pay up to $6.6 million in attorneys' fees, indicating that this was money that they were willing to pay to settle the case—but if the Court reduces the fee request in any way, the money reverts to the defendants, rather than to the class. While this can be used as a rhetorical argument against denying the fee request (and was used as a rhetorical argument in the notice to the class, see ¶ 16), it runs afoul of the fiduciary duty of class counsel to the entire class, under Rule 23(g)(4) to "fairly and adequately represent the interests of the class." "Severable" attorneys' fees should be treated as bargained recovery from the defendants that parties have earmarked exclusively for the benefit of plaintiffs' counsel.

Therefore the agreed attorneys' fees must be scrutinized when evaluating whether the settlement is fair, reasonable, and adequate. "There is no exception in Rule 23(e) for fee provisions contained in proposed class action settlement agreements. Thus, to avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). Provisions for attorneys' fees are contained in the settlement agreement, so this Court has a responsibility to review them rather than "sever" these disproportionate fees from consideration. There is good reason for this:

"If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Id.* at 964.

"That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need carefully to scrutinize the fee award." *Id.* A "defendant is interested only in disposing of the total claim asserted against it." *Id.* "The rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source." *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 820-21 (3rd Cir. 1995). "[P]rivate agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *Id.* at 821.

"[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal." *Johnson v. Comerica*, 83 F.3d 241 (8th Cir. 1996).

Because the class counsel, by failing to negotiate for reversion to the class of any denied fee request, have put their own interests ahead of the class's, the settlement cannot be deemed adequate.

V. Attorneys' Fees Should Be Based Upon Benefits To The Class.

If the Court approves the settlement, it can act to prevent conflicts of interest and align class counsel's interests with those of the class by basing any award of attorneys' fees upon

benefits to the class. *Cf.* Notes of Advisory Committee on 2003 Amendments to Rule 23(h), *citing* 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class") (Private Securities Litigation Reform Act). Any other result will encourage future class counsel to do what was done in this case, and agree to onerous restrictions on class recovery to increase the chances of settlement. But if class counsel fees are structured so that they are directly related to the *actual* benefit received by the class, class counsel will have the proper incentive to maximize class recovery, rather than to surreptitiously maximize attorneys' fees. In no event should the court award attorneys' fees before there is a firm answer on the amount of class recovery.

CONCLUSION

Class counsel have breached their fiduciary obligations to the class by releasing a deficient notice, by failing to disclose the scope of class recovery, by agreeing to terms that unfairly limit class recovery, and by agreeing to a reversion of a denied fee request to the defendants instead of a common fund. The Court should reject the settlement.

Dated: January 8, 2010

Respectfully submitted,

/s/Theodore H. Frank
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Attorney for Objector
Daniel Greenberg

PROOF OF SERVICE

I declare that:

I am employed in the state of Illinois. I am over the age of 18 years and not party to the within action; my office address is 312 N. May Street, Suite 100, Chicago, Illinois 60607.

On January 8, 2010, I served the attached:

OBJECTION TO PROPOSED SETTLEMENT

_X_ By First-Class Mail in that I caused such envelope(s) to be delivered via First-Class Mail to the addressee(s) designated.

Don Barrett BARRETT LAW OFFICE, P.A. 404 Court Square North P.O. Box 987 Lexington, MS 39095	Donna J. Vobornick SONNENSCHEIN NATH & ROSENTHAL LLP 233 South Wacker Drive Suite 7800 Chicago, IL 60606
Lonardo Settlement Administrator P.O. Box 4079 Portland, OR 97208-4079	

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 8, 2010.

/s/ M. Frank Bednarz
M.Frank Bednarz