No. 20-6097

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IN RE: SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

JERRY WELLS, ET AL.,
Plaintiffs-Appellees,
v.
JOHN DOUGLAS MORGAN,
Objector-Appellant,
v.
SAMSUNG ELECTRONICS AMERICA, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Oklahoma, No. 5:17-ml-02792

BRIEF OF SEVEN ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF OBJECTOR-APPELLANT

Mark Brnovich
Attorney General
Kate B. Sawyer
Assistant Solicitor General
Counsel of Record
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
kate.sawyer@azag.gov

September 17, 2020

Counsel for Amicus Arizona Attorney General's Office
(Additional counsel listed after signature block)

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INTEREST OF AMICI CURIAE

The Attorneys General of Arizona, Alabama, Idaho, Indiana, Missouri, North Dakota, and Oklahoma are their respective States' chief law enforcement or legal officers. Their interest here arises from two responsibilities: (1) an overarching responsibility to protect their States' consumers, and (2) a responsibility to protect consumer class members under CAFA, which envisions a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 5 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens"); *id.* at 35 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties."). This brief furthers each of these interests.

This brief is a continuation of ongoing efforts by State Attorneys General to protect consumers from class action settlement abuse. These efforts are focused on ensuring that settlement money ends up in the hands of consumers, and they have produced meaningful settlement improvements for class members. *See, e.g.*, *Cowen v. Lenny & Larry's, Inc.*, No. 17-cv-01530, Dkts. 94, 110, 117 (N.D. Ill.)

(involvement of government officials, including State Attorneys General, produced revised settlement that increased class's cash recovery from $350,000 to ~$900,000); *Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261 (S.D. Cal.) (after a coalition of State Attorneys General filed amicus and district court rejected initial settlement, revised deal was reached, increasing class's cash recovery from $0 to ~$700,000); *Unknown Plaintiff Identified as Jane V., et al., v. Motel 6 Operating LP*, No. 18-cv-0242, Dkts. 50, 52, 58 (D. Ariz.) (after Arizona Attorney General raised concerns regarding distribution of settlement funds to class members, parties amended settlement agreement to increase minimum class member recovery from $50 to $75 and to remove class-wide caps).[1]

[1] The Attorneys General certify that no parties' counsel authored this brief, and no person or party other than named *amici* or their offices made a monetary contribution to the brief's preparation or submission. The Attorneys General submit this brief as *amici curiae* only, taking no position on the merits of the underlying claims, and without prejudice to any State's ability to enforce or otherwise investigate claims related to this dispute. Counsel for all parties have consented to the procedural filing of this brief.

SUMMARY OF ARGUMENT

In class action settlements where a defendant has already agreed to a maximum, uncontested fee amount (as here), fee reversion arrangements divert settlement proceeds away from class members and elevate the interests of class counsel and defendants over the interests of the class. In this way, these fee reversion arrangements, often called "kicker" clauses (*see* note 3 below), reflect the ever-present conflicts and disadvantages consumers face in the class action settlement process. It is therefore important for the Court, which has never spoken on this issue, to step in and protect consumers by limiting the enforceability of these types of arrangements.

BACKGROUND

This class action is based on Plaintiffs' allegations that certain Samsung top-load washing machines experienced detachment of tops and/or drain-pump failure. To resolve the litigation, the parties reached a settlement that would bind each of the 2.8 million class members unless they actively opted out of the settlement.

As part of the agreement, class counsel and the Defendants negotiated that Samsung would not object to a request of attorneys' costs and fees of up to $6.55 million, subject to district court approval.[2] Importantly, any portion of the $6.55 million that the district court did not award to class counsel would be returned to

[2] When "the defendant agrees not to oppose a fee award up to a certain amount," the settlement is often said to contain a "clear-sailing" provision. *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 705 (7th Cir. 2015).

Samsung and would not be available to increase the benefit to class members.[3] Class counsel ultimately requested ~$6.2 million in attorneys' fees and expenses.

Objectors came forward to contest the settlement, including the arrangement that would send any reduced fee award to Samsung instead of to the class. The district court nonetheless approved the settlement and awarded class counsel a lesser-than-requested ~$4 million. As class counsel and Samsung had negotiated, the ~$2.5 million of the negotiated fee that the district court rejected is set to revert to Samsung instead of going to the class members.

ARGUMENT

State Attorneys General are engaged in an ongoing effort to ensure that the proceeds of class action settlements actually reach and benefit the consumer class members who are releasing their claims. It is in that spirit that the undersigned speak now to highlight the dangers and consumer harms that arise from the type of fee reversion arrangement presented here, where any money that is culled by the trial court from the fee request would return to Samsung (and not the class), even though Samsung agreed beforehand to not contest a ~$6.55 million fee request in an effort to put a sum certain on its liability in this case.

[3] The arrangement here is essentially a fee reversion clause, which is also known as a "kicker clause"—"[a] 'kicker' clause provides that if a court reduces the attorney fee sought in a class action, the reduction benefits the defendant rather than the class." *Sw. Airlines*, 799 F.3d at 705.

I. Where A Defendant Has Already Agreed To An Uncontested Fee Amount In A Class Action Settlement, Fee Reversion Arrangements Divert Settlement Proceeds Away From Class Members

By ensuring that otherwise-uncontested fee money can only ever reach class counsel or the defendant, fee reversion arrangements in class action settlements with agreed-upon fee awards violate what should be the core tenet of the class action settlement approval process: ensuring that class members receive the fruits of the settlement that a defendant has committed to providing in order to resolve the case. Since class members extinguish their claims in exchange for settlement funds, those "settlement funds are the property of the class[.]" *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2018) ("funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members").[4] Yet by agreeing to a fee reversion, class counsel and defendant agree to divide the uncontested fee only between themselves—diverting the funds from the class members whose claims generated the settlement in the first place.

[4] This key aspect of Rule 23 settlements—release of class member claims in exchange for settlement funds—is in contrast to statutorily based State Attorney General actions for the benefit of consumers, which are almost always brought and resolved without directly representing consumers or releasing consumer claims.

Where the fees are completely uncontested by the defendant, defendant has essentially offered up an uncontested pot of money in resolution of plaintiffs' claims. That pot, including both the class's recovery and the fee money, is properly considered property of the class (or should be assumed to be part of the class's compensation in the case, as the class is ultimately responsible for compensation of the class counsel).[5] But when class counsel and defendants have made an agreement to return any fee money not awarded by the court to the defendant, that agreement functions to "deprive[ ] the class of [the] full potential benefit" of the total negotiated sum. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011).

Viewed as such, where class counsel has agreed to send any of the culled fee award back to defendant rather than having that money fall to the class, it strongly suggests that class counsel have failed to serve the interests of their clients; it is difficult to find an explanation for this type of fee reversion arrangement other than class counsel and a defendant putting their combined interests ahead of the interests of the class. *See*, *e.g.*, *Sw. Airlines*, 799 F.3d at 712.

[5] This is entirely different than when the fees are contested by a defendant—i.e., where the class counsel and defendants have not included a "clear-sailing" provision. *See, e.g.*, *Chambers v. Whirlpool*, No. 16-56666, Dkt. 94 (9th Cir.) (Defendant appealing a contested fee award). When that occurs, there is no agreement by class counsel and a defendant to place each of their interests above those of the class.

II. As Courts Have Recognized, These Types Of Fee Reversion Arrangements Are A Product Of The Inherent Conflicts And Disadvantages Consumers Face Throughout The Class Action Settlement Process

Fee reversion arrangements in settlements where there is an otherwise-uncontested fee request are a particularly salient example of the overarching problems consumers face in the class action settlement process. In dividing settlement funds, class counsel has an incentive to obtain a large fee, causing potential conflicts with the class.[6] Indeed, there is a danger "'that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.'" *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013); *see also* Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 TUL. L. REV. 1809, 1840 (2000) ("More for the class usually means less for the attorney and vice versa."). And defendants rarely help. When a defendant agrees to a sum total for settlement and fees, with the certainty that comes with that, the defendant has no interest in how the money is divided between the class and class counsel. "A defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class*

[6] *See, e.g., In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("interests of class members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'").

Action Settlements, 77 TUL. L. REV. 813, 820 (2003).[7] A defendant is "'interested only in the bottom line: how much the settlement will cost him.'" *Sw. Airlines,* 799 F.3d at 712; *see also* Silver, at 1840 ("moneys paid as fees and moneys paid as damages … are simply amounts the defendant must pay and will agree to pay if they sum to less than the defendant expects to lose at trial").[8]

Courts have repeatedly recognized that these fee reversion arrangements reflect inherent conflicts in the class action settlement approval process and on that basis have roundly criticized the use of these arrangements, calling them one of the hallmarks of a conflicted settlement. As the Ninth Circuit explained in *In re Bluetooth Headset Products Liability Litigation*, reversion clauses are a clear sign of potential collusion in the settlement process; when a defendant has committed a certain sum for fees, "there is no apparent reason the class should not benefit from the excess allotted for fees" in the event a fee is reduced. 654 F.3d at 949. And the Seventh Circuit has repeatedly weighed in on the issue, "expressing deep

[7] *See also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) ("[A]llocation ... is of little or no interest to the defense."); *Dry Max Pampers*, 724 F.3d at 717 ("'the economic reality [is] that a settling defendant is concerned only with its total liability'").

[8] Beyond these conflicts, consumers also face procedural hurdles, including being only indirectly represented by class counsel, having to make interest-based determinations with limited notice documentation, and facing burdens in raising concerns with the court. *See, e.g., Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163−64 (9th Cir. 2013) (incentive awards undermine adequacy of class representatives); *Dry Max Pampers*, 724 F.3d at 722 (discussing class representatives' failure to protect absent class members' interests); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir. 2010) (notice failed to provide "interested parties with knowledge critical to an informed decision as to whether to object[.]").

skepticism about such clauses, which seem to benefit only class counsel and can be signs of a sell-out." *Sw. Airlines*, 799 F.3d at 712; *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 786–87 (7th Cir. 2014) ("Neither can we think of a justification for a kicker clause"). The Seventh Circuit has even expressed that "at the very least there should be a strong presumption of [ ] invalidity" when considering such a provision. *Pearson*, 772 F.3d at 787.

* * *

Given the inherently conflicted nature of these fee reversion arrangements, the disservice they do to class members, and the way they reflect the broader disadvantages consumers face in the class action settlement process, it is time for the Court, which has never spoken on these arrangements, to take a hard line with respect to the use of fee reversion arrangements in class action settlements with agreed-upon fee amounts. As repeat players in the class action settlement process, the undersigned see first-hand how fee reversion arrangements in these types of settlements produce deleterious results for class members. Speaking from that perspective, the undersigned urge the Court to step in, serve its role as a protector of the interests of the class in the settlement approval process, and take action limiting the enforcement of these arrangements, which reflect some of the worst conflicts and disadvantages that fall upon consumers in the class action settlement approval process.

CONCLUSION

For the foregoing reasons, this Court should take strong action limiting the enforcement of fee reversion arrangements in class action settlements where there is an agreement to not contest fees up to a certain level.

September 17, 2020

Respectfully submitted.

/s/ Kate B. Sawyer
Mark Brnovich
Attorney General
Kate B. Sawyer
Assistant Solicitor General
Counsel of Record
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
kate.sawyer@azag.gov

Counsel for Amicus Arizona Attorney General's Office
(Additional counsel listed after signature block)

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

LAWRENCE G. WASDEN
Attorney General
State of Idaho

CURTIS T. HILL, JR.
Attorney General
State of Indiana

ERIC SCHMITT
Attorney General
State of Missouri

WAYNE STENEHJEM
Attorney General
State of North Dakota

MIKE HUNTER
Attorney General
State of Oklahoma

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 2,379 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32(a)(5) and (6).

/s/ Kate B. Sawyer
Kate B. Sawyer
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025

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/s/ Kate B. Sawyer
Kate B. Sawyer
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025

CERTIFICATE OF SERVICE

I hereby certify that on this September 17, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Kate B. Sawyer
Kate B. Sawyer
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025