



Jessica Smith

Partner
303.295.8374
Denver
jjsmith@hollandhart.com



Stephen Masciocchi

Partner
303.295.8451
Denver
smasciocchi@hollandhart.com

The Tenth Circuit Weighs In on 'Kicker' and 'Clear-Sailing' Provisions in Class Action Settlements

Insight — June 22, 2021

Law.com

The circuit court held that district courts must apply “heightened scrutiny” to settlement agreements containing these provisions, because “the “presence of both agreements in a settlement agreement also suggests the class members may not be receiving all reasonable benefits.”

In a matter of first impression, the U.S. Court of Appeals for the Tenth Circuit clarified the role of district courts in ruling on class action settlement agreements that contain “kicker” and “clear-sailing” agreements. *In re Samsung Top-Load Washing Machine Marketing, Sales Practices and Products Liability Litigation*, — F.3d. —, 2021 WL 1825685 (10th Cir. May 7, 2021). The circuit court held that district courts must apply “heightened scrutiny” to settlement agreements containing these provisions, because “the “presence of both agreements in a settlement agreement also suggests the class members may not be receiving all reasonable benefits.” *Id.* at *7.

Underlying Class Action Litigation

In 2015, some Samsung top-load washing machines experienced weakness in their door mechanisms, which allowed “water to spew out of the machine.” *Id.* at *2. Samsung, together with the Consumer Product Safety Commission, announced a voluntary recall program, which (1) provided free repair and one-year warranty, (2) gave consumers a rebate toward the purchase of a new washer, or (3) offered certain consumers a full refund. *Id.* This voluntary recall program failed to appease consumers, who filed putative class actions around the country against Samsung and many retailers who sold the machines. The Judicial Panel on Multidistrict Litigation (JPML) combined the various lawsuits into a single action that proceeded in the Western District of Oklahoma.

After consolidation, the parties began settlement negotiations with a mediator. “Over the span of several months, the parties spent nine days negotiating a settlement, focusing the first eight days of mediation on the issue of compensation and not turning to the issue of attorneys’ fees and costs until the final day of mediation.” *Id.* The mediator, in a signed declaration, “described the negotiations as ‘hard-fought,’ ‘lengthy,’

'exhausting,' 'at times frustrating' and 'quite adversarial.'" Id. He concluded that the terms of the settlement agreement were "the product of arm's length negotiations by highly skilled, well-informed lawyers." Id.

Settlement Agreement

The settlement agreement provided both relief to the class members and attorneys' fees for class counsel. Class members were given four options: (1) enhanced rebates; (2) enhanced recall repair, which included a technician to the class member's home, plus a rebate; (3) full refund, plus up to \$400 in expenses; or (4) recall repair with a warranty extension. Id. at *3.

As for attorney fees, "the parties agreed Samsung would 'pay attorneys' costs and fees in the total, all-inclusive amount of \$6,550,000.00, subject to approval of the Court.'" Id. "In accord with this language, Samsung agreed not to contest any requested award of fees and costs up to \$6.55 million." Id. "And because the Settlement Agreement did not require Samsung to place any money to cover the attorneys' fees and costs in an escrow-type account prior to the district court's determination of the appropriate amount of the award, the Settlement Agreement permitted Samsung to retain the difference between the maximum permissible award of \$6.55 million and the amount ultimately awarded by the district court." Id.

Side Agreement With Potential Objector

One of the class members, John Morgan, expressed his intent to object to the settlement agreement based, in part, on the attorneys' fee arrangement. He "contended settlement negotiations between class counsel and Samsung culminated in a Settlement Agreement allowing class counsel to self-deal at the expense of class compensation." Id.

To avoid his objections, Samsung and Morgan negotiated toward a side agreement. They "reached an agreement in principle and drafted a term sheet." Id. In particular, the side agreement allowed Morgan's lawyers (who were not class counsel) to get their attorney fees paid in exchange for Morgan dropping his objections. Id. at *4.

Class counsel objected to the side agreement, arguing that Morgan's lawyers and Samsung had engaged in misconduct, including that Morgan's lawyers had "found a mechanism to get paid, even though class members may not receive even one dollar more than they would have many months ago." Id. at *4. Essentially, Morgan's lawyers and Samsung had found a way to transfer attorney fees away from class counsel. But Morgan and Samsung never produced a copy of their side agreement for the record, and Morgan walked away from the negotiations.

District Court Approves the Settlement Agreement

After abandoning his side agreement, Morgan objected to the class settlement. He argued that class counsel had breached its duties to the class by opposing the side agreement between Morgan and Samsung. Id.

at *4. The district court denied Morgan's objections, certified the class, and proceeded toward attorney fee compensation. *Id.*

The district court found that the settlement was fair and adequate to the class. In support, the court made a variety of findings, including that: (1) the agreement was negotiated at arm's length and vigorously litigated; (2) based on expert evidence, the settlement's value to the class was between \$6.44 and \$11.31 million; and (3) the rebates were not the primary source of compensation. Based on these findings, the court granted final class certification and approved the settlement agreement. *Id.* at *5.

The district court then issued its ruling on attorney fees and costs. Although class counsel sought nearly \$6 million in fees and \$250,000 in costs, the district court awarded "a base fee amount of \$2,951,067.50" as "reasonable and supported by the record." *Id.* The court also applied a loadstar multiplier of 1.3, which resulted in a final attorney fees and costs award of \$3,836,387.75. *Id.*

Appeal to the Tenth Circuit

In the Tenth Circuit, Morgan argued that the district court should have disqualified class counsel for opposing his attorney's side agreement. In particular, he pointed to the "kicker" and "clear-sailing" agreements as improper because "Samsung could retain unallocated attorneys' fees rather than distributing them to the class in exchange for Samsung's agreement not to challenge class counsel's fees and costs request." *Id.* at *6.

The circuit court articulated the usual standards for reviewing a class action settlement. "The district court's approval of a class action settlement is reviewed for an abuse of discretion." *Id.* (quotations omitted). "In reviewing a court's determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." *Id.* (quotations omitted). Under Rule 23, "a district court, before approving a settlement agreement, must find that the settlement is 'fair, reasonable, and adequate.'" *Id.*

Court Requires 'Heightened Scrutiny' for Settlements Involving 'Kicker' and 'Clear-Sailing' Agreements

But this case presented "an issue of first impression regarding the degree of scrutiny a district court must apply to a settlement agreement in a class action where the terms governing the award of attorneys' fees and costs contain a "kicker" and a "clear-sailing" agreement." *Id.* at *7. "A true 'kicker' agreement allows 'all fees not awarded [to class counsel to] revert to defendants rather than be added to the cy pres fund or otherwise benefit the class.'" *Id.* at *8. "A 'clear sailing' agreement is one where the defendant 'agree[s] not to object to an award of attorneys' fees' specified in a settlement agreement." *Id.*

Although no court has expressly prohibited "kicker" or "clear-sailing" agreements, they differ on their scrutiny of these provisions. In establishing

Tenth Circuit law on this issue, the court analyzed the value these provisions have in class settlement negotiations. “Kicker” agreements “can valuably further negotiations by allowing defendants to establish their maximum liability with the expectation that their actual liability will ultimately be less once the district court scrutinizes class counsel’s fees and costs request.” *Id.* at *8. And because reversions to defendants are not necessarily improper, there is “no reason why we should adopt a rule strictly precluding parties from providing for the same result as part of a settlement.” *Id.*

And “clear-sailing” agreements do not always “demonstrate collusion.” *Id.* at *9. In fact, the Tenth Circuit had previously approved of such a provision, albeit without analysis. *Id.* (citing *In re Motor Fuel Temp. Sales Pracs. Lit.*, 872 F.3d 1094 (10th Cir. 2017)).

The circuit court acknowledged that the combination of both a “kicker” and a “clear-sailing” provision can indicate possible collusion. To address that risk, the court adopted a “heightened scrutiny approach[.]” *Id.* at *10. “As part of this evaluation, the district court shall take special care to assure the class members receive fair and reasonable compensation based on record evidence of their actual damages and the likelihood of success at trial.” And “[a] court should also consider the fees and costs award provided for by the settlement in comparison to the value of the settlement to the class,” along with the negotiations that got the parties to the settlement. *Id.*

“In considering the structure of negotiations, a district court should seek independent verification of any claims by the parties that attorneys’ fees and costs were negotiated subsequent to and apart from class compensation.” *Id.* “Additionally, a court may consider whether the parties relied upon a neutral mediator to aid settlement negotiations,” which is helpful but not dispositive of the question. *Id.* Finally, the district court must “consider the litigation and settlement agreement as a whole, searching for other indicia of self-dealing by class counsel through negotiations with the defendant.” *Id.*

Based on these considerations, the Tenth Circuit held that the district court conducted the proper analysis. In the circuit court’s view, “the record supports the conclusion that class counsel fought hard for the interests of the class members and obtained more than equitable compensation for the class” and that the district court “acted well within its discretion to grant final approval of the Settlement Agreement.”

Stephen Masciocchi and Jessica Smith are attorneys at Holland & Hart, specializing in complex commercial litigation. Steve assists clients with federal and state appeals and class actions in high-stakes trial and appellate litigation. Jessica has substantial appellate experience and leads the firm’s religious institutions and First Amendment practice.

Reprinted with permission from the June 22, 2021 online edition of Law.com © 2021 ALM Media Properties, LLC. All rights reserved. Further

duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.