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Court of Appeal Affirms Multi-Million Dollar Settlement Despite Vigorous Objections

By Paul Seeley

UPDATE: On July 28, 2010, the Court of Appeal, First District, modified and published the opinion in Cellphone Fee Termination Cases . The court retained its holdings regarding the adequacy of the class notice and the appropriate "incentive" payments to the class representatives. However, the court did not publish the portion of its opinion that analyzed the "fairness" of the class settlement, including the court's recognition that the pending cross-complaint filed by Verizon against the class that could have reduced the class's overall damage award. The rest of the opinion remains the same and can now be relied upon as authority supporting similar class-notice and incentive payment settlement plans.

On June 28, 2010, in the unpublished opinion Cellphone Fee Termination Cases, A124038 (June 28, 2010), the Court of Appeal, First District, affirmed the trial court's approval of a nationwide class action settlement over the objections of several class members. Although it is not published, the Cellphone Fee case provides guidance for litigants seeking to secure approval of class-wide settlements. It also suggests effective litigation strategy that will help class action parties "win" the settlement against asserted objections.

The Cellphone Fee case focused on early termination fees ("ETFs") assessed by Verizon Wireless to its customers. For the relevant time period, the ETFs were $175 and were not prorated during the duration of the contract. Cellphone Fee at 2. The plaintiffs claimed that the ETFs violated consumer protection statutes and were unauthorized penalties under Civil Code section 1671. After the plaintiffs rested their case during trial, a settlement was reached that applied to a nationwide class of all Verizon customers.

The terms of the settlement created two subclasses: The "Assessed Class," composed of customers who were actually assessed the ETFs, and the "Subscriber Class," who had contracts containing an ETF provision but were never charged an ETF. Verizon created a common fund of $21 million for all monetary payments. Members of the Assessed Class could recover up to $175 for each ETF they had proof that they paid, while members assessed an ETF but did not pay it, could recover up to $25. These figures would be adjusted, *pro rata*, based on the number of claims submitted. The Subscriber Class received no financial compensation. Verizon,

meanwhile, was enjoined from assessing a flat-fee ETF for two years.

The Settlement Notice was mailed to millions of customers. Advertisements were placed in 17 newspapers, and websites and a toll-free telephone line was established. As a result of these notices, over 150,000 customers submitted claims. The high number of claims meant that each claimant would receive approximately $87.50, or 50% of the ETF. Eight objections were filed, and the trial court approved the settlement over their objections. This appeal followed.

In reviewing the trial court's approval of the settlement, the Court of Appeal applied an abuse of discretion standard, deferring to the trial judge who had reviewed the evidence over five years of litigation. The objectors first claimed that the settlement notice was "inadequate" because the notice did not discuss the size of the class and explain that the enormous size of the class could reduce the amount of money a claimant could recover. Id. at 13. Relying on authority from federal district courts, the court held that there is no requirement to disclose, in the class notice, the size of the potential claimant class even though it affected each claimant's pro-rata recovery.

The objectors then attacked the "fairness" of the settlement and objectors claimed that the settlement fund was inadequate based on the size of the potential claimant pool. The court rejected this argument, stating that the trial court adequately apprehended the size of the class and then discounted the potential risks of non-recovery. The objectors also claimed that the "Subscriber Class" should not have been denied monetary recovery. Id. at 17. The court rejected this view because these class members, who had never paid an ETF, had no damages and their claims were tenuous at best. Id.

The objectors also claimed that the trial court failed to properly evaluate the risks of the class members' claims. Id. at 18. Again, the court rejected this view because the statutory basis for the claims was not certain and, more importantly, Verizon filed a cross-complaint against the class. Id. at 18, n. 24. Through this cross-complaint, had the case gone to verdict, Verizon was entitled to introduce into evidence the total amount of assessed but unpaid ETFs as an offset for the class's total recovery. Id. at 3, n. 6. The trial court recognized that, in another trial on ETFs, the class recovery was actually *zero* due to the same setoff procedure. Id. at 19. Given the potential of recovering nothing, receiving 50% of the ETF was fair.

Next, the objectors attacked the fact that those assessed ETFs, but who had not paid them, were only going to receive approximately $13 (50% of $25.00) even though Verizon was entitled to pursue the full amount of the set off. Id. at 19. Again, the court rejected this argument because the objectors failed to show how "those how have paid nothing would be able to establish, particularly on a class basis, that they would be entitled to restitution…" Id. at 20.

Finally, the objectors claimed that the individual payments of $10,000 to each of the named class members were excessive and showed that the class members were "bought off" to "induce them to sell out the Subscriber Class." Id. at 20. After noting the lack of California authority on this point, the court looked to federal authority that suggested court's should evaluate these "individual" rewards by looking at five factors: (1) the risk to the class representatives, (2) the personal difficulties encountered by the class representatives, (3) the amount of time and effort spent working as a class representative, (4) the duration of the litigation, and (5) the personal

benefit (or lack thereof) enjoyed by the class representative. Id. at 22, *citing* Van Vranken v. Atlantic Richfield Co. 901 F.Supp. 294, 299 (N.D.Cal. 1995). In this case, the named plaintiffs were active in the litigation, had to attend numerous depositions, travelled across country, and helped respond to discovery. Id. at 22. Given those facts, it was not an abuse of discretion to award the named plaintiffs $10,000 to compensate them for the prosecution of the case. Id. at 23.

This case provides litigators a roadmap to successfully settle a class action case. First, by applying pressure on the potential monetary recovery through the cross-complaint, Verizon was able to substantially increase the "risk" and thereby reduce the amount of the "reasonable" settlement. Second, the extreme amount of notice, which went so far as to set up bi-lingual telephone messages for "frequently asked questions" was important to the court's determination that the settlement procedures were fair. Finally, the case, though unpublished, provides some authority for individual settlement awards for the named plaintiffs so that those most in control of the settlement will be enticed to settle their claims for far above what a class member would actually receive. In the end, the Court of Appeal's deferential standard of review ensured that the trial court's determinations prevailed and the settlement was approved.