8/8/19 Alison Frankel's On The Case 22:57:18

Alison Frankel's On The Case


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# UChicago law prof, repped by Ted Frank, objects to Conagra's Wesson Oil settlement

(Reuters) - A couple of summers ago, a class action alleging that Conagra mislabeled some Wesson Oil products as "all natural" was the subject of furious briefing at the U.S. Supreme Court. Conagra, backed by class action critics, was urging the justices to use its case to clarify a standard for ascertainability – the shorthand term for a means of identifying class members. The federal circuits were hashing out – in contradictory opinions that seemed to be coming down on a weekly basis – what class counsel needed to do to assure courts that they could figure out who belonged in their classes. If the Supreme Court had been in the mood for a blockbuster class action issue, the Conagra case was a ripe target.

The justices opted not to take the case, which eventually returned to the trial court in Los Angeles. In March 2019, after nearly eight years of litigation, plaintiffs' lawyers moved for preliminary approval of a settlement of 11 certified statewide classes. Conagra, which had just sold the Wesson brand, agreed that it would not label Wesson products as all-natural if it were to reacquire the brand. It also agreed to pay class members 15 cents for every bottle of Wesson oil they'd bought, with a $4.50 cap on claims if buyers couldn't provide proof of purchase. Purchasers in New York and Oregon, where consumer laws include statutory damages, would share in an additional fund of $575,000.

Class counsel from Tadler Law, DiCello Levitt Gutzler and Milberg Phillips Grossman asked for $6.85 million in fees. Their costs and lodestar billings in the case, they told U.S. District Judge Cormac Carney of Los Angeles, totaled nearly twice that amount. And their fee request, they said, represented a reasonable percentage of the value of the settlement, including that injunction, to class members. An expert for class counsel valued the injunction – which, remember, barred Conagra from labeling Wesson products as all-natural in the event that the company ever reacquired the Wesson brand it no longer owned – at $27 million.

Judge Carney granted preliminary approval to the settlement and the fee request, which he called reasonable, in April.

Guess who doesn't think it's reasonable at all?

That's right: Ted Frank of the Center for Class Action Fairness and the Hamilton Lincoln Law Institute. This week, Frank filed an objection to the Wesson oil settlement. His client is a securities law professor from University of Chicago, M. Todd Henderson. Frank, who had been tweeting about the settlement's alleged shortcomings before he got involved in the case, told me that Henderson, a friend who has previously been a CCAF client and expert witness, heard about Frank's concerns and shared them. "He's excited about doing this," Frank said.

The objection contends that the Conagra injunction offers no value to class members because Conagra doesn't own the Wesson brand anymore. Only 70,745 class members have filed claims, totalling about $290,600, so the true value of the deal – including the additional $575,000 for New York and Oregon purchasers – is about $866,000. If class counsel are awarded $6.78 million, according to the objection, plaintiffs' lawyers will get many multiples of the class recovery.

And that's just one of the signs of "impermissible self-dealing" in this settlement, according to the objections. The 9th U.S. Circuit Court of Appeals identified three red flags in 2011's In re Bluetooth Headsets Products Liability Litigation (654 F.3d 935): disproportionate fees for plaintiffs' lawyers; a "clear sailing" agreement that defendants will not protest class counsel's

fee request; and a kicker insuring that any reduction in fees will revert to the defendant rather than to the class. "This settlement features all three indicia," the objection said.

Frank said most trial judges in California federal court don't take the time to police proposed class settlements to make sure they comply with the Bluetooth test. "Courts are happy to get cases off the docket," he said. Plaintiffs' lawyers, he added, have a strong incentive not to police themselves. In this case, Frank said, plaintiffs' lawyers justified a $5 million boost to their fee request by claiming a worthless injunction should be valued at $27 million. (Conagra, represented by Alston & Bird, argued that it did not change labeling in response to the lawsuit but also did not oppose class counsel's fee request.)

Class counsel from Tadler Law and DiCello Levitt sent me a joint email statement responding to Frank's objection, which is the only filing opposing final approval of the proposed settlement. "Plaintiffs have litigated this case for 8 years, including all the way up to the United States Supreme Court on an important issue of class action jurisprudence," the statement said. "The Supreme Court declined to consider the issue, leaving in place the 9th Circuit's ruling dispelling the notion of ascertainability as a prerequisite for class certification under Federal Civil Rule 23 … Plaintiffs achieved a fair, reasonable and adequate settlement."

Frank's most recent protest of a fee award based on an injunction he considered worthless did not succeed. With Frank as an objecting class member, his shop opposed a nearly $1 million fee request in Kumar v. Salov North America, a nationwide class action alleging that Berio olive oil was falsely labeled as being imported from Italy. U.S. District Judge Yvonne Gonzalez Rogers of Oakland approved the settlement despite Frank's objection. The 9th Circuit affirmed her ruling in an unpublished 2017 decision (737 Fed.Appx. 341).

(Reporting by Alison Frankel)

**---- Index References ----**

Company: CONAGRA BRANDS INC

News Subject: (Business Lawsuits & Settlements (1BU19); Class Actions (1CL03); Consumer Protection (1CO43); Government (1GO80); Government Institutions (1GO90); Judicial Cases & Rulings (1JU36); Legal (1LE33); Liability (1LI55); National Judiciaries (1NA65); U.S. Supreme Court (1US13))

Region: (Americas (1AM92); California (1CA98); New York (1NE72); North America (1NO39); Oregon (1OR01); U.S. Mid-Atlantic Region (1MI18); U.S. West Region (1WE46); USA (1US73))

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