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Eleventh Circuit Provides New Guidance on Class Action Settlements

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Suppose that the central issue in a putative class action is a legal issue pending before the Supreme Court. Depending on how the Supreme Court rules, the plaintiffs will recover either nothing or up to $600 million. But rather than rolling the dice and waiting for that decision, the parties agree to a class action settlement that can only work if it's approved before the decision is issued. Conceptually that seems like something parties should be able to do. Settlements often happen because the defendant doesn't want to risk being held liable for a huge exposure, and plaintiffs don't want to risk being left empty handed. But litigation takes time, and if there are objections to the settlement and an appeal, that will all occur after the merits issue is decided. At that point, the deal will look much better or worse for one side. A recent decision from the Eleventh Circuit provides several lessons for lawyers negotiating class settlements and presenting them to a district court for its approval.

In *Drazen v. Pinto*, No. 21-10199, 2024 WL 2122466 (11th Cir. May 13, 2024), the plaintiffs alleged that the defendant violated the Telephone Consumer Protection Act (TCPA) by using an autodialer to make telephone calls and send text messages. The parties agreed to a claims-made settlement of up to $35 million in cash and vouchers for those class members who made claims, with up to $10.5 million for attorney's fees. The district court granted preliminary approval. Shortly after notice was emailed to the class, the Supreme Court granted certiorari to decide whether a device must have certain capabilities to constitute an autodialer under the TCPA. If the Supreme Court ruled for the defendant, the *Drazen* case would be worthless, and if it ruled for the plaintiff, the claims would be worth potentially up to $600 million. Several months after final approval of the settlement, the Supreme Court decided the issue in favor of the defendant.

Judge Tjoflat's opinion vacating the approval of the settlement is lengthy. Here is what I found most significant for purposes of parties seeking approval of future settlements:

1. **Sufficient Notice to Class Members of Attorney's Fees Motion**: The schedule proposed by the parties and adopted by the district court provided class members with only 7 days to review the attorney's fees motion before the objection deadline, and the notice did not specify when that motion would be filed. The opinion strongly criticized this timing.
2. **Notice of "the Class Claims, Issues or Defenses":** The court held that this requirement is conjunctive and required notice to the class members of not merely the claims asserted but also the issue pending before the Supreme Court and how its decision would impact the case.

The Eleventh Circuit opinion suggested that a supplemental notice should have been issued regarding this development.

3. **Opt-Out Requests:** The court of appeals took issue with the parties requiring that class members seeking to opt out submit a detailed letter under penalty of perjury.
4. **Release:** The opinion takes issue with what it refers to as an "overbroad release," pointing to language that released the defendant's "past and present parents, predecessors, successors, affiliates, holding companies, subsidiaries, employees, agents, attorneys, board members, assigns, partners, contractors, joint venturers or third-party agents with which it has or had contracts, and/or their affiliates." This type of language in large part is fairly standard. It's hard to imagine a defendant settling a class action while leaving open potential claims against its affiliated entities, officers, and employees. The district court interpreted the release as limited to claims that were made or could have been made in the lawsuit, although Judge Tjoflat's opinion indicated that the district court improperly "amended" the settlement agreement in reaching that conclusion.
5. **CAFA's Coupon Settlement Provisions:** The settlement provided class members with an option of either $35 in cash or a $150 voucher redeemable for any of the defendant's products and services and freely transferable. The Eleventh Circuit held that this was a "coupon settlement" subject to stricter requirements for approval under the Class Action Fairness Act (CAFA), ruling in essence that any credit or discount on the defendant's goods or services is a "coupon." If you want to avoid this, the best approach would be an all-cash settlement.
6. **Attorney's Fees:** In a "coupon settlement" under CAFA, attorney's fees for class counsel may be based on the value of the coupons that were redeemed, the lodestar method, or both. Only 1.9% of class members made claims, valued at approximately $2.3 million. The district court awarded a $7 million fee (20% of the $35 million potentially available if all class members made claims), where the lodestar amount was approximately $2.8 million. In vacating the settlement, the court of appeals explained that in "many cases" the district court should wait until after the coupons' expiration date to decide on attorney's fees, although a district court may estimate a redemption rate and receive expert testimony for that purpose. Here, the district court erred by basing the attorney's fees on a percentage of the total amount potentially available to class members rather than the much smaller amount of relief obtained.

Ultimately, this case goes back to the district court, and it is unclear what will happen. The district court might only reduce the attorney's fees or disapprove the settlement. Given the outcome on the merits issue in the Supreme Court, the defendant would obviously be pleased if the settlement is disapproved because it will prevail on the merits. But the deal was structured so that the parties could hedge their bets on the merits. In any event, the parties likely could have avoided some or all of the issues identified above in preparing the settlement documents and seeking approval of the settlement.

It is worth noting that two of the three judges on the panel filed a concurring opinion stating that they would have addressed only the coupon settlement and attorney's fees issues. So, the remainder of the opinion, which appears to be the opinion of only Judge Tjoflat, may not carry the typical weight of a regular full panel opinion.

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