

When Plaintiffs' Class Counsel Face The Music

March 17, 2019

Last week, in *Cline v. Touchtunes Music Corp.*, No. 18-1756, the Second Circuit Court of Appeals upheld a Manhattan district judge's decision to approve a low-cost class action settlement in what the judge termed a "nuisance" case, while basically zeroing out the \$100,000 fee requested by the plaintiffs' class counsel.

Defendants who have faced silly but not entirely motionable class actions can momentarily enjoy the *schadenfreude* of watching a plaintiff's law firm come away with nothing for its efforts. The problem with decisions like *Cline*, however, is that they may make plaintiffs' counsel more hesitant to settle a cheap case on cheap terms. For the class action defense bar, raising potential settlement costs is nothing to celebrate.

The facts of *Cline* are almost too silly to merit repeating. The defendant provided a digital jukebox application to (for example) bars and restaurants. Patrons could pay money to play songs, and the app's terms told the patrons clearly that their songs weren't guaranteed to play and that no refunds would be provided under any circumstances. What the terms didn't disclose, however, is that the restaurant manager had the ability to manually skip songs. The plaintiff, ostensibly on behalf of a class of people whose songs were skipped, sued for the lost value—about 40 cents each—of not hearing the songs be played.

The defendant, after two tries, couldn't quite get the whole suit dismissed. A highly experienced district judge left alive a false advertising claim for the non-disclosure. At that point, early last year, the parties agreed to a settlement. About 166,000 patrons whose songs weren't played, and for whom the defendant had contact information, received a code by email good for one free song play on any of the defendant's jukeboxes. Other people could file claims for codes, and 2,200 people did so.

The plaintiff's counsel sought a \$100,000 fee for themselves and a \$2,000 incentive fee for the plaintiff. The judge approved the settlement but not these fees. He rejected the incentive award and, in place of the \$100,000 fee, which plaintiffs' counsel contended was their "lodestar" of hours worked, the judge instead granted a fee of 20 cents per song code that class members actually redeem within the one-year expiration period. That fee is likely to be less than \$1,000. The plaintiffs' counsel appealed that reduction, but the Second Circuit upheld it in a summary order, finding that the district judge acted within his discretion, especially in a "coupon"-type settlement.

What should not be lost in any analysis of *Cline* is this key statement in the Second Circuit's opinion: "[C]lass counsel's lodestar fee application was not supported by contemporaneous billing records, and...no substantial explanation had been provided for a \$10,000 'consulting fee' for which reimbursement was sought." The Second Circuit thus reinforced that plaintiffs' counsel absolutely can still seek lodestar-based fees even when settling for coupons or in-kind goods, *provided that* they support those fees with appropriate billing detail.

If plaintiffs' counsel try to tell you that they don't want to enter into a coupon or in-kind settlement because *Cline* makes them fearful of receiving no fee in the case, therefore, remind them that the problem in *Cline* wasn't the settlement structure; it was the law firm's failure to document its fees. Don't make that mistake, and *Cline* shouldn't be an issue. Low-value cases like *Cline* still should be able to settle on low-value terms.