

SETTLING CLASS ACTIONS: MAKE SURE TO PROVIDE SUFFICIENT INFORMATION TO SUPPORT THE REASONABLENESS OF CLASS SETTLEMENT

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Substantial time and expense can be incurred in settling a class action lawsuit and shepherding a settlement through the approval process. Accordingly, special attention should be paid to ensure that it can withstand class member objections, which will inevitably be brought.

The facts and holding in Kullar v. Foot Locker Retail, Inc., 168 Cal. App. 4th 116 (2008) provide guidance. (The California Supreme Court recently denied a request to depublish this case and, therefore, is citable as law going forward.)

In Kullar, employees initially brought a class action against Foot Locker on the ground that it required employees to purchase certain types of shoes, without reimbursement, in violation of various provisions of California law. Thereafter, the plaintiffs filed an amended complaint for alleged denial of statutorily mandated meal and rest periods. While plaintiffs conducted formal discovery on issues raised by the original complaint, no formal discovery was conducted regarding the meal claims.

Thereafter, the parties successfully mediated the case, which resulted in a stipulated settlement in which Foot Locker agreed to pay up to a maximum of \$ 2 million, inclusive of all costs, attorney fees and settlement expenses. The class was comprised of approximately 16,900 persons.

A class member, who filed another class action (in which she alleged that Foot Locker failed to compensate its hourly employees without meal breaks and wages due to terminated employees) objected to the settlement on the ground that there had been insufficient discovery/investigation underlying the settlement and, specifically, the claims relating to unpaid meal period claims. The trial court overruled the objection and approved the settlement. The objector timely filed an appeal

The court of appeal reversed and remanded. In reviewing the settlement, the court of appeal noted that “well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement” include:

- “the strength of plaintiffs’ case,
- the risk,

- expense,
- complexity and likely duration of further litigation,
- the risk of maintaining class action status through trial,
- the amount offered in settlement,
- the extent of discovery completed and state of the proceedings,
- the experience and views of counsel,
- the presence of a governmental participant, and
- the reaction of the class members to the proposed settlement.”

See id. at 128.

Citing an earlier version of Newberg on Class Actions, the Court of Appeal also noted that a “presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” See id. at 128.

Here, the court of appeal held that the second factor was lacking. “The record fails to establish in any meaningful way what investigation counsel conducted or what information they reviewed on which they based their assessment of the strength of the class member’s claims, much less does the record contain information sufficient for the court to intelligently evaluate the adequacy of the settlement.” Id. at 129.

On this ground, the court of appeal remanded the case and permitted parties to supplement their showing supporting the settlement. Further, the objectors were to be permitted some discovery to explore the reasonableness of settlement. Importantly, the amount of such discovery would be in the discretion of the trial court and considered in light of the information provided in support of the settlement. It noted that, “[t]he objecting parties should not be permitted to frustrate the mutual interest of the class members and the defendant to resolve the litigation promptly by conducting extended or unnecessary discovery.” Id.

Thereafter, the trial court is ordered to assess the reasonableness of the settlement. “But the court must also receive and consider enough information about the nature and magnitude of the claims being settled, as well as the

impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed.” Id. at 133.

The lesson here is to make sure that sufficient information and/or data is provided to demonstrate the reasonableness of the settlement. As demonstrated in Kullar, that also requires information demonstrating that the parties, as well as the court, considered information regarding all claims settled by the settlement, as well as the difficulties faced by plaintiffs in successfully litigating the case.

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