5 Takeaways From DOJ Objection To Cookie Class Settlement

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A recent objection by the U.S. Department of Justice to a proposed class action settlement in Cowen v. Lenny & Larry's Inc.[1] may be an indication that the DOJ will be scrutinizing future settlements for the benefits to the class members. The DOJ argued in its objection that the bulk of the benefit from the settlement will go to the general public (in the form of free cookies) and to class counsel (in the form of cash) rather than the class members, rendering the settlement "fatally lopsided."

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The DOJ's objection to this particular settlement could provide insights into how class settlements could trigger unfavorable DOJ attention moving forward.

The Proposed Class Settlement

The DOJ objection was filed on Feb. 15, 2019, in a class case alleging that cookie-maker Lenny & Larry's falsely labeled its product. Pursuant to the terms of a proposed class settlement, Lenny & Larry's agreed to a settlement that the parties claimed had a value of $5 million, broken down as follows:

- $1.1 million in attorneys' fees and costs;
- $350,000 in notice and administration costs;
- $7,500 in incentive awards to the named plaintiffs;
- $350,000 in cash to class members distributed on a pro rata basis to the claimants;
- $113,000 in free cookies to class members; and
- $3.15 million in cookies distributed to retailers nationwide to give away for free.

Under the proposed terms, a class member submitting a claim could elect a cash payment (up to $50 depending on proof of purchase) or free cookies. Approximately 90,000 class members submitted claims, and 90 percent of them elected the cash payment.

Class Action Fairness Act

The Class Action Fairness Act requires a class action defendant to notify the attorney general of the United States and state officials of a proposed class settlement in federal court. Although this requirement has been in effect since the passage of CAFA in 2005, intervention in class settlement proceedings by government officials has been rare and generally confined to "coupon" settlements.

However, the DOJ suggested last year that it might ramp up its efforts in reviewing class settlements. In February 2018, then-Associate Attorney General Rachel Brand announced in a speech to the D.C. chapter of the Federalist Society that the DOJ would be streamlining its process for reviewing class settlements to allow it to object to more settlements it determined were not fair and reasonable. Although the DOJ's objection in the Lenny & Larry's case is only the third objection filed by the DOJ since then, that is three more than in the decade preceding Brand's announcement.

In this case, the DOJ argued the purpose of the CAFA notification requirement was to "provide a check against inequitable settlements" and "deter collusion between class counsel and defendants to craft settlements that do not benefit injured parties." With this purpose in mind, the DOJ took umbrage with the class settlement on a number of grounds centering around the benefit of the class relative to the request for attorneys' fees.

The Problems According to the DOJ

1. Benefit to Non-Class Members at the Expense of Class Members

The DOJ claimed the settlement was not fair, reasonable or adequate because most of the settlement's value flows to non-class members. The settlement provides for over $3 million in cookies to be given away in stores.

The "random shoppers" obtaining these free cookies need not be part of the class.

Accordingly, this provides no benefit to the class. As such, the DOJ argued only about 13 percent ($463,000 — $350,000 in cash and $113,000 in cookies) of the $3.5 million settlement value would go directly to the class members.

2. Attorneys' Fees in Relation to the Benefit to the Class

Given its view that the benefit to the class was $463,000, it is no surprise the DOJ balked at the $1.1 million in attorneys' fees requested by class counsel. The DOJ argued the fee award should be tied to the class benefit, not the overall settlement value. By the DOJ's calculations, "class counsel's fee request is, in reality, an outlandish 70 percent of the net settlement." A more appropriate fee award would be "somewhere between $228,000 and $463,000" based on a benefit to the class of $463,000.

3. The Cookie Giveaway is Simply Marketing for Lenny & Larry's

The DOJ called out the cookie giveaway as a "marketing campaign" for Lenny & Larry's to draw in customers with free samples. This promotional opportunity intended to boost business "does nothing for the class, but it does advance Lenny & Larry's 'goodwill' and business interests."

Instead of giving cookies to the general public, the DOJ argued this benefit should flow to the class members. With over 90,000 class members submitting claims, there existed a built-in identification and delivery mechanism for the class members. Therefore, the additional $3 million in cookies, or more appropriately, cash, should be delivered to those class members.

The Procedural Status

It is unclear whether the court will agree with the DOJ and reject the settlement. What seems clear, though, is that the DOJ's submission caught the attention of the parties. Shortly following the submission, the parties sought a continuance of the final fairness hearing. Although they did not cite the DOJ's statement of interest as the reason, they did indicate they are renegotiating some of the terms of the settlement, including the benefit to the class members.

Key Takeaways

It is too early to tell if the DOJ's submission in this case is a sign of things to come and whether the DOJ will be more aggressive in scrutinizing class settlements, although it is important to note that the action here was foreshadowed by the DOJ. However, class action defendants negotiating settlements can take five key lessons from the DOJ's statement of interest regarding what may draw the attention of the DOJ:

1. The DOJ is Focused on the Benefit Obtained Directly by the Class Members

In negotiating a large giveaway to the public, defendants should be mindful that the DOJ may not consider this as bestowing any value to the class members. Instead, the DOJ argued this should be more appropriately classified as a cy pres award, which should not factor into the measure of the benefit to the class. This argument formed the basis of the DOJ's other objections to the class.

The DOJ is not the only one taking a closer look at cy pres awards, as the U.S. Supreme Court is currently considering the reasonableness of a class settlement in Frank v. Gaos that proposes to distribute all of the relief to cy pres funds and attorneys' fees, with no direct benefit to class members. At oral argument, the justices expressed great skepticism that a cy pres award constitutes a benefit to the class such that it could support an attorneys' fee award.

2. A Giveaway to the Public Reduces the Benefit to Class Members

A large "face value" settlement may not satisfy the DOJ if it believes the benefits of the settlement will not flow to the class members. Here, although the defendant agreed to fund a $5 million settlement, the large giveaway to the class reduced the actual benefit to the class.

3. The DOJ May Evaluate the Reasonableness of Attorneys' Fees in Relation to the Class Benefit

In arguing against the requested attorneys' fees, the DOJ argued the appropriate yardstick for measuring attorneys' fees should be the benefit obtained directly by the class, rather

than the overall value of the settlement. The DOJ further suggested that the appropriate ratio would be between one-third and a half of the benefit to the class members.

4. Giveaways Should Not Be Used as Marketing Campaigns

If defendants seek to include a product giveaway in a class settlement, it should be structured in such a way that does not suggest it is merely a marketing campaign. Here, the cookies were to be given away at the same locations that sold Lenny & Larry's cookies, which the DOJ argued amounted to nothing more than an attempt to draw in consumers with free samples. If possible, expanding the giveaway beyond the normal retailers could help it seem less like a "free sample" promotion.

5. Class Members Should Have First Opportunity to Claim Product Giveaway

Likewise, if the class members have an opportunity to obtain the free product before the general public, it could reduce concerns that it operates only as a promotional opportunity. Here, although the class members had a limited opportunity to claim some free product, that opportunity was capped and the amount of the giveaway to the public was predetermined.

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[1] Cowen v. Lenny & Larry's Inc., No. 1:17-cv-01530 (N.D.Ill.)