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Trends

More Judges Eying Class Claims Data? If So, Then What?

BY PERRY COOPER

A judge in the Northern District of California recently asked for data on claims rates before she would approve a class settlement over defective brakes in Nissan vehicles. She might be on to something big.

After seeing how few class members actually made claims to receive a portion of the settlement's proceeds, and how much money class counsel requested in comparison, the judge rejected the deal.

This isn't a common practice among judges in class actions, but maybe it should be, Brian T. Fitzpatrick, a professor at Vanderbilt Law School in Nashville, Tenn., told Bloomberg BNA.

The case is an anomaly, but ''it's the wave of the future,'' he said. Fitzpatrick does empirical research on class settlements and advocates for greater access to class action data.

But attorneys on both sides of the class action bar say the move for transparency could have unexpected consequences.

Plaintiffs' attorney Daniel R. Karon of Karon LLC in Cleveland told Bloomberg BNA recently that making claims data public could provide ammunition to class objectors who want to scuttle settlements that, regardless of claims rates, have real benefits for class members, or serve an important deterrence function.

Objectors are those who formally challenge the fairness of class settlements in court.

Defense attorney Andrew J. Pincus, of Mayer Brown LLP in Washington, said claims data could provide useful insight into the class action policy debate over whether such suits provide any real value at all. He said the debate is largely ''a battle of anecdotes'' due to the lack of class-related data points.

But he warned that claims data doesn't always show the full picture—it doesn't help separate legitimate claims from those brought just to extort a settlement from defendants.

Nissan Deal Skids. In the California case, Nissan reached a $4.27 million settlement with car owners to resolve a certified class suit over Nissan brakes (*Banks v. Nissan N. Am. Inc.*, 2015 BL 392688, N.D. Cal., No. 11-cv-2022, 11/30/15) (16 CLASS 1344, 12/11/15).

Judge Phyllis J. Hamilton asked the settlement administrator to file a report at the final approval hearing detailing the claims filed and the payouts to class members.

Hamilton didn't like what she saw.

The settlement, which covered 264,000 vehicles, only garnered the filing of 1,540 valid claims, the court found. The average claimant would receive $180.56, but more than one-fifth would get $20, and more than one-third would receive $60 or less. Class counsel requested a total of $3.43 million in fees.

''Where 6.5% of the payout goes to the class members, and 80.2% goes to the attorneys purporting to represent those class members, the tail is clearly wagging the dog,'' Hamilton said.

Becoming More Common? Overall, judges are scrutinizing settlements much more closely than they were five or 10 years ago, Fitzpatrick said. And claims data gives judges another tool to work with.

''To be honest, I think that's probably good,'' he said. ''We should make sure there's testing of these deals before we let the defendant off the hook and extinguish all the plaintiffs' rights.''

''There was a lot of rubber stamping for a long time by judges and I think it's good that people are starting to pay attention and kick the tires on these things before they put them into the books,'' he said.

Karon agreed that judges aren't regularly asking for claims data.

''In my experience, I've not had a judge request claims-take data,'' he said. Karon has filed many consumer and antitrust class suits including those over Bausch & Lomb contact lenses and LDC flat screen TVs.

''Instead, judges focus on—and their proper textual concern is—ensuring that the parties' notice-and-claims process comports with due process, which is required by the Rules and is in all parties' best interest,'' Karon said.

He referred to Fed. R. Civ. P. 23, the federal rule that governs class actions.

Pincus also hadn't heard of judges asking for claims data before approving deals. He said it could blow up the way the settlement system is currently conducted—including significant delays in resolving suits—if judges condition final settlement approval on claims filing.

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Class members are told during the claims process how much they might receive if they file a claim. The judge could later express displeasure with the claims rates and say, ''It turns out we're not going to give anybody anything because not enough people filed so we're going to go back to the drawing board,'' he said.

But ''that just seems like an odd process that could be quite costly,'' Pincus said.

Little Available Data. Even though courts have to sign off on the fairness of class settlements, the data on the number of claims made is available in very few cases. Nicholas M. Pace and William Rubenstein called it ''an informational black hole'' in a 2008 RAND working paper.

But a recent federal agency report shows Judge Hamilton may not be alone in her late-in-game scrutiny of claims rates. The Consumer Financial Protection Bureau compiled one of the few extensive studies of class settlement data as part of its March 2015 arbitration study.

The study included interviews with claims administrators who noted increased attention to claims rates. ''Final approvals have come later in a settlement process, sometimes after the end of the claims period,'' the study said.

The study calculated an estimated claims rate for 105 class settlements involving consumer financial products. The weighted average claims rate for those settlements was 4 percent, with the caveat that the claims numbers used to calculate the rates may not be final for many of the settlements.

Steven Weisbrot, executive vice president at claims administration firm Angeion Group in Philadelphia, told Bloomberg BNA that claims administrators have the claims rate data on every deal they handle. But it's not just as simple as asking them to release it.

''The claims administrators' hands are tied in terms of being able to provide case-specific data without the specific consent of the parties,'' he said, which rarely happens.

Pincus said the lack of data makes it hard to study the class action system. He headed a 2013 small-scale empirical study for Mayer Brown that found ''minuscule'' claims rates of between .000006 and 12 percent in five consumer and employment-related class settlements.

''One of the problems has been that it isn't public and so people have no idea what's really going on in these cases,'' he said.

He said he often hears a class settlement referred to as a ''$100 million deal,'' but that's really the amount that could be paid, not how much went to class members.

He said it's hard to predict what the availability of claims data would do to class practice in the real world. ''I would hope that people wouldn't bring class actions of the type that real people don't care about, or that aren't going to generate enough of a settlement fund,'' he said.

Ammo for Objectors. But Karon, the plaintiffs' attorney, stressed that the data could be misused, especially by objectors.

''Permitting objectors to mischaracterize claims-take data could hurt the class-action practice and the societal benefits that class actions—and class-action settlements—promote,'' he said.

''Defendants tend to prefer claims rates to be as low as possible,'' he said. ''But plaintiffs want claims rates to be as high as possible, and plaintiffs do their best to encourage that result.''

''So empowering objectors to dismantle good settlements is bad for victims who have waited years for their recoveries, as well as for defendants who have waited just as long for peace of mind,'' Karon said.

''Providing more weapons to objectors for this purpose is bad for class actions, which are an important societal mechanism for ensuring marketplace fairness,'' he said.

But one frequent class action objector defended the disclosure of such data and rejected the argument that it should be withheld because it somehow may be misused by objectors.

''The idea that these numbers shouldn't be disclosed because then judges might realize the settlement is fundamentally unfair pretty much is the best argument why the numbers should be required to be disclosed, and why plaintiffs' counsel fight tooth and nail to keep the public from learning how bad these settlements are,'' Theodore H. Frank, director of Competitive Enterprise Institute's Center for Class Action Fairness in Washington, told Bloomberg BNA.

Deterrence Not Accounted For. Fitzpatrick agreed that too much emphasis on the take rate overlooks other benefits class actions provide, like discouraging wrongful conduct.

As long as the money laid out for a settlement isn't going back to the defendant, ''it's going to a charity or some other third party, then the deterrence purpose of the class action is being served,'' he said.

''Really in a lot of small stakes consumer class actions, that's really the most important thing,'' he said. ''We shouldn't punish the lawyers for getting good deterrence.''

But Pincus said the class action system doesn't deter wrongful conduct because it doesn't make a distinction

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between punishing wrongful conduct over legitimate conduct.

''The problem with the class action system is that it doesn't target wrongful conduct, so it can't have a real deterrent effect,'' Pincus said. ''It's a tax.''

Pincus said that claims data could give people the impression that a low payout means the settlement was bad. ''But maybe it's just that it was a bad case and it was settled for nuisance value because the alternative for a defendant is to pay to litigate it,'' he said.

Improved Ability to Get Money to Class. Technology may improve claims rates, Fitzpatrick said.

''I do think we're entering an era where we shouldn't be as pessimistic about the ability to get money into people's hands,'' he said.

He suggested that PayPal could help streamline the process. As long as the claims administrator has e-mail addresses for class members, money could be distributed right to them automatically.

Claims administrator Weisbrot agreed about the importance of technology.

''The increase of availability of digital technology provides an unprecedented and important opportunity to increase claims rates and to do so at a price point that is much more palatable than relying solely on the older, more traditional methods,'' he said.

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STEVEN WEISBROT, ANGEION GROUP

He said the electronic notice isn't only cheaper, it's also allows the administration companies to quantify how well it works.

Online ads and social media posts allow claims administrators to monitor clicks in real time, and adjust if it's not working, Weisbrot said. ''Digital is simply more capable of measurement and thus, more customizable towards a given goal.''

''In general the legal industry are very slow adopters of new technology,'' he said. ''For a long time, the idea of having a dedicated case website or even effectuating notice via e-mail were thought of as absolutely radical ideas in our industry. Now virtually every meaningful case has a website and e-mail is used routinely.''

Rule Change Coming? Claims data may become more available if a Rule 23 change on the table is pursued.

The Fed. R. Civ. P. 23 Subcommittee of the Judicial Conference Advisory Committee on Civil Rules has been mulling possible changes to the class action rule for the past year (16 CLASS 516, 5/8/15).

The rulemakers want to set up the settlement approval process so that a judge has as much information as possible—including claims rates—before final approval so he or she can make an intelligent decision, Fitzpatrick said. They call this ''front-loading.''

The subcommittee isn't proposing that the claims report be mandatory, but they want to encourage judges to ask for it, he said.

But a group of professors, including Fitzpatrick, suggested to the subcommittee that parties be required to submit to the court a report breaking down all the claims rates at the end of the claims process. ''If that goes into effect then we'll have tons of data to look at to see how things are going,'' Fitzpatrick said.

The subcommittee cautions, however, that any changes it proposes wouldn't take effect until the end of 2018 at the earliest.

Pincus said that instead of requiring parties to file a claims report, ''a better change would be to change the incentives to make sure claims are legitimate up front.''

Prolonging the settlement process without changes at the front end ''doesn't seem to benefit anybody except lawyers—defense lawyers will obviously make more, plaintiffs lawyers will potentially make more,'' he said. ''But I don't see how that benefits anybody else.''

To contact the reporter on this story: Perry Cooper in Washington at pcooper@bna.com

To contact the editor responsible for this story: Steven Patrick at spatrick@bna.com