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CLASS ACTION BLOG

Things Can Really Get Hot. Objector Abuse Exposed? What About Exorbitant Fee Awards?

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The Appellate Court of Illinois recently addressed objector abuses with the specially concurring justice stressing the need to carefully review truly high attorney fee awards. It did so in the *Clark v. Gannet* case. In the lengthy majority opinion, Justice Hyman began by writing:

The relationship between class counsel and objector's counsel can be a tense and combative one. And when objector's counsel happens to be professional objectors, who impose objections for personal financial gain without little or no regard for the interests of the class member, open hostility often ensues. Objector's counsel here, Christopher A. Bandas, of Corpus Christi, Texas, and C. Jeffrey Thut, of Chicago, have provoked more than the ire of class counsel, earning condemnation for their antics from courts around the country. Yet, their obstructionism continues.

By beginning with those words, there is little surprise that the court left in place the trial court's contempt order which, in part, struck the objections. The court of appeals found that it "lack[ed] jurisdiction" to review the contempt finding, also finding that because of that ruling, the contempt "order [which] struck [the] objections" allowed the court to "avoid addressing [the] objections."

But the court then found the exclusion of evidence of "objector's counsel's pattern of conduct in representing objectors in class action lawsuits" was improper, reversed that ruling, and remanded for another hearing. But the court was not done, it concluded its summary overview by "direct[ing] the clerk of our court to forward a copy of this order to [Illinois's attorney disciplinary commission] (ARDC) to determine whether disciplinary action should be taken against [objector's counsel]."

The majority opinion pointed out that this appeal was really a battle between class counsel and the objector's counsel. Justice Hyman stated that class counsel filed the motion for sanctions against the objector and his attorneys "to expose what they regarded as a farce." He also wrote that the sole objector's "participation was solicited by a disbarred California attorney" who in turn referred the objector to "Texas attorney Bandas." In turn, Bandas contacted Chicago attorney Thut to act as his local counsel. On the last possible day for filing objections, Bandas prepared the objections which Thut signed and filed. The objection stated, in part, "objector is also represented by Christopher Bandas, as his general counsel in objecting to the settlement. Mr. Bandas does not presently intend on making an appearance for himself or his firm." Indeed Bandas never officially appeared.

The objection filed contended that "class counsel's attorneys' fees were excessive and class members had received insufficient information in the class notice regarding the settlement terms." Later they added an objection to the amount of the settlement. Class counsel referred to the objection as a "'cut and paste job' filed by a professional objector." At the final fairness hearing the judge overruled the objection, found the class notice was proper, and found that the settlement agreement was "fair, reasonable, and adequate." Regarding the attorney fees issue, she also found no need to require a lodestar cross-check or "to supervise the allocation of fees" while approving the award of attorneys' fees and expenses of $5,382,000, a fee of 39% of the settlement amount, which the trial judge found "within the range of reasonable fees."

Regarding the sanctions, motion class counsel testified that Bandas, the Texas attorney who never formally appeared, threatened to delay and hold up the settlement unless he was paid nearly half a million dollars. Although that did not happen, "[we] ultimately agreed to pay him $225,000 so he wouldn't appeal this objection." Class counsel further contended that Bandas's approach in all cases was to prepare all of the documents on behalf of the objectors and then to get other attorneys to sign the objections and other supporting documents which Bandas had prepared. They also took the position that attorney Thut "was responsible for Bandas's actions because he 'signed everything without reviewing it.'"

The trial judge scheduled an evidentiary hearing on the sanctions motion. Class counsel served a notice requiring the objector to appear at that hearing and the judge overruled the motion to quash that notice. Nevertheless, the objector failed to appear.

At the evidentiary hearing, there was testimony confirming "an agreement between class counsel and Bandas for the $225,000." When Bandas was told that class counsel intended to seek the statutorily required court approval of that payment, "Bandas responded that disclosure of [that] agreement could not be made to anyone, 'including the court.'" After listening to the evidence, the "trial court found … that the objection was not filed for an improper purpose." The court also made oral findings which were then incorporated into a written order which did not accurately reflect the court's oral rulings. The mistakes were corrected in a later order in which the court expressly withdrew the earlier, mistaken, order. Justice Hyman wrote that the objector's "insurmountable problem is that [the trial judge] withdrew the July 20 order and issued a different order on July 24, superseding the order specified in his notice of appeal." Accordingly, Justice Hyman held that the appellate court did not have "jurisdiction to consider [the objector's] appeal."

However, the appellate court took up class counsel's cross appeal which contended that the trial court improperly kept out relevant evidence at the sanctions hearing. Justice Hyman referred to that ruling as preventing class counsel "from presenting evidence of the relationships between serial objector Stewart and Texas attorney Bandas, who has a history with courts across the country of acting frivolous, vexatious, and in bad faith." With that description, it is hardly surprising that the exclusion of evidence ruling was reversed.

Justice Hyman noted that objectors get paid either by legitimately increasing the value of the class action settlement or by intervening and causing "expensive delay in the hope of getting paid to go away. The former purpose for intervening would be entirely proper, while the latter would not." (Quoting *Vollmer v. Selden*, 350 F.3d. 656, 660 (7th Cir. 2003)). The court also noted that the relationship between class counsel and objector's non-appearing attorney was so bad that class counsel had filed a federal lawsuit accusing the objectors and his attorneys "of various racketeering and conspiracy violations of federal statutes," a lawsuit of which the court took juridical notice. The court also took judicial notice of the federal judge's findings that "courts nationwide have denounced Defendants' behavior" and had cited the case before the appellate court "as one of 15 lawsuits since 2009 in which Bandas, Thut and Stewart have repeated this same basic pattern- frivolously object, appeal its denial, settle out of court, and withdraw."

The court's deferential abuse of discretion standard of review did not "prevent this court from independently reviewing the record to determine whether the facts warrant an abuse of discretion finding." Finding an abuse of discretion, the court vacated "the order denying the motion for Rule 137 sanctions and remand[ed] this matter to the trial court. We direct the trial court to conduct a new hearing with admission of evidence of similar conduct in other cases to determine whether the objection was indeed filed for an improper purpose."

Despite that reversal, the court was not yet done. The court went on to address what it described as the unauthorized practice of law by Bandas. Just because Bandas had failed to specifically sign a pleading and had not entered his appearance, he had practiced law in Illinois without having an Illinois license. Nor did the court spare his co-counsel who had appeared. The majority noted that helping "another in the unauthorized practice of law is also the unauthorized practice of law." In support of that position, the court cited the Illinois Rules of Professional Conduct, ABA Model Rules and numerous cases across the country. The Court quoted the annotated comments to the ABA's Model Rules: "Lawyers who work with out-of-state lawyers risk being deemed to have assisted them in the unauthorized practice of law."

After citing those authorities the court found that *"[both] attorneys have engaged in a fraud on the court."* (Emphasis added.) The court concluded by directing the appellate court clerk to "forward a copy of this order to the [Illinois attorney disciplinary commission] to determine whether disciplinary action should be taken against Bandas and Thut."

The specially concurring justice, Presiding Justice Mason, concurred in the result and agreed that the court had no jurisdiction over the objector's appeal. But he wrote further to provide *"future guidance for trial judges, to comment on the exorbitant fees awarded to class counsel and the lack of any meaningful examination by the trial court of the justification for those fees."* (Emphasis added.) Although class counsel said they engaged in "extensive discovery," he noted that "none of that activity is reflected on the court's docket." In short, the presiding justice was not buying class counsel's explanations trying to support what he concluded was an attorney fee award well above what was justified by the work class counsel actually did. In addition, the appellate court had "no way of knowing what, if any, inquiries the trial judge made regarding the 'package deal' presented to her as the parties did not bother to bring a court reporter to the hearing." He also noted that relatively few members of the class ("less than 2% of the estimated 2.6 million class members") bothered to respond to the class notice and that only 50,000 filed claims to recover roughly $150 each. Furthermore, "even if we had jurisdiction, we would have no record to speak of that would enable us to determine whether the more than $5 million in fees Class Counsel expect to receive are reasonable or appropriate." Even though it was within the trial judge's discretion to "dispense with a lodestar calculation under appropriate circumstances," it was not appropriate in this case.

The court abdicates its role as the guardian of the interests of absent class members when it simply accepts counsel's word for it. Every dollar that goes to class counsel depletes the funds available to compensate class members. As the settlement fund is non-reversionary, Gannett had no interest in opposing [class counsel's] request for fees and given our conclusion that [the objection] was motivated solely by his lawyers' desire to extract a payment from class counsel and not to improve the terms of the settlement for the class, without the trial judge's oversight, absent class members had no one looking out for their interests... and as far as the record shows, the trial court simply accepted class counsel's representation that a 39% fee was appropriate. I sincerely doubt that a lodestar calculation would have yielded a number that, enhanced by a reasonable multiplier, would remotely approach $5.38 million.

He then described several class action settlements where "median fees [were] between 17.7 and 33.3% of the settlement" and cited specific cases where the awards were 23.75%, 13.5%, and one in which the federal judge reduced the fee award "from one-third of the settlement fund to 15%." Clearly the presiding justice was not pleased with the amount of the award, the trial court's handling of the review of the award, or class counsel's attempted justification of the award.

The presiding Justice concluded his special concurrence stating:

The trial court's uncritical acceptance of an award of 39% of the settlement fund to class counsel in a case in which the court had no prior involvement encourages the skepticism, cynicism, and distrust of our judicial system so prevalent in society today. I strongly encourage trial judges in future cases to fulfill their critical role as the guardians of the interests of absent class members, to carefully analyze unopposed fee requests that diminish funds available to compensate class members, and to insist that a reviewable record be made of any hearing, including the court's reasons for granting counsel's fee request.

The *Clark* case is important to Illinois class action litigators because of the way it treated the objector's appeal as well as the way it treated the motion for sanctions. More importantly perhaps, this case demonstrates for class action litigators everywhere that judges are increasingly willing to look at the conduct of objectors and their attorneys as well as class counsel and their attorneys' fee petitions seeking awards of millions of dollars. Abuses once overlooked are now going to be critically scrutinized by at least some appellate courts.