SANDBERG PHOENIX

CLASS ACTION BLOG

Neither Constitutional Nor *Aqua Dots* Objections Derail MDL Class Action Settlements – 10th Circuit Rules

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Summary: The 10th Circuit addressed appeals by multiple objectors to multiple class action settlements in a Kansas based MDL which is of importance during the hot summer months. The 10th Circuit ruled, its ruling was published, and then that ruling was withdrawn in response to the petition for panel rehearing while the petition for rehearing *en banc* remained pending. (In other words, potential additional 10th Circuit rulings are possible.) Nevertheless, the rulings thus far should be interesting to the class action bar as a whole. The multiple class actions in the MDL deal with the effects of temperature changes on the quantity of gas purchased using the gas pumps to which we are accustomed. Judge Moritz described the controversy as follows: because "gas expands as it heats up… the number of molecules—and, accordingly the amount of energy—in a gallon of gas will vary based on the temperature at which it's dispensed… so consumers who purchase gas dispensed at higher temperatures may be getting less energy than they expect. *Id.* at 1101.

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Several of the class action lawsuits transferred to the District of Kansas resulted in class settlements the district court approved. Although more than one issue was raised on appeal, this blog post concentrates on a grouping of nine settlement agreements with several of the retail defendants. Those settlement agreements can be lumped into conversion settlements (the retailers agreed to convert the existing gas pumps into automatic temperature control (ATC) pumps) and fund settlements (the retailers agreed to contribute certain amounts ranging from $61,000 to $5,000,000 into a common fund to reimburse fuel retailers for ATC conversions and to defray costs incurred by state agencies which agree to permit or require ATC at resale). Importantly, "[n]either the conversion settlements nor the fund settlements provide any money to class members." *Id.* at 1104.

Further complicating the picture, there were two groups of objectors identified as the Alkon group and the Speedway group. The Speedway group consisted of non-settling defendants. The 10th Circuit ruled that the district court correctly concluded those objectors had no Article III standing to challenge any of those settlements. The general rule is that non-settling defendants have no standing to complain about a settlement because "they lack 'a legally protected interest in the settlement' and therefore can't satisfy Article III's injury in fact requirement." The court rejected the Speedway objector's argument that they fell within a limited exception to the general rule if they can demonstrate they are "prejudiced" by the settlement. We will save that important standing argument and how the 10th Circuit resolved that issue for another day. Here, we note that both Speedway and Alkon argued that the approval of the settlement agreements (1) violated the First Amendment; and (2) violated separation of powers principles. Alkon further objected regarding unequal treatment for class members and hugely preferential treatment to class counsel.

Although Speedway lacked standing to object to any of the settlement agreements, Alkon had standing to challenge 10 settlements. *Id.* at 1109. The court ruled that the Alkon objectors were members of the 10 settlement classes, a fact which the plaintiffs did not dispute. Because Alkon failed to contend it had standing to challenge the remaining 19 settlement agreements, the court found that argument was waived. *Id.* at 1113.

The 10th Circuit then addressed the Alkon objectors' contention that the fund settlements violated the First Amendment because they "set aside money for state regulators to defray costs associated with enacting and implementing new regulatory programs for conversion to ATC. Alkon argues this aspect of the agreements requires absent class members to subsidize the plaintiffs' lobbying efforts aimed at obtaining regulatory approval for ATC," constituting "the 'compelled funding of speech' in violation of the First Amendment." *Id*.

The 10th Circuit's rejection of this argument was not lengthy, but it was important. Relying on earlier 10th Circuit precedent, the court noted that "the First Amendment only limits state—as opposed to private—action." The court agreed with the plaintiff's argument that "neither the district court's approval nor its potential enforcement of these private settlement agreements constitutes state action for purposes of the First Amendment." *Id.*

Alkon relied on *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948) to support its contrary position. In *Shelley* the Supreme Court "held that a state court's enforcement of private covenants designed to prevent people of color from purchasing real estate constituted state action for purposes of the Equal Protection Clause." *Id.* Alkon argued by analogy to *Shelley* that the "judicial imprimatur of the approval orders… demonstrate[s] 'that the settlement agreements at issue here' are more than merely private contracts." *Id.* The 10th Circuit rejected that contention noting that the 7th, 9th and 11th Circuits "have uniformly declined to extend *Shelley* beyond cases involving discrimination." *Id.*

Shelley was an Equal Protection Clause case. Because Alkon did not argue that "the settlement agreements implicate the Equal Protection Clause," or cite case law "extending *Shelley* outside of that context or present a reasonable argument why we should do so here," the 10th Circuit ruled that the "district court's approval of the settlement agreements doesn't constitute state action" which could violate the First Amendment. *Id.* at 1113-14.

Similarly, the 10th Circuit rejected Alkon's arguments that the settlement agreements violated Article III and separation of powers principles. Alkon raised those objections based on several arguments, several of which Alkon had failed to properly brief or otherwise preserve for appellate consideration. For example, the court refused to consider Alkon's "Article III re-dressability requirement" because Alkon had not adequately explained how that requirement "operates in the context of a settlement agreement" and had failed to cite any authority supporting the argument. The court also declined to consider the argument that "the conversion settlement agreements constitute advisory opinions and therefore run afoul of Article III;" Alkon failed to cite authority "suggesting that a district court's approval of a private settlement agreement containing a future-conduct release constitutes an advisory opinion." *Id.* at 1115.

The 10th Circuit also rejected Alkon's multi-pronged argument which boils down to an argument that the district court's approval of the settlement was an abuse of discretion because it essentially usurped legislative and executive branch functions by approving this funding and conversion settlement agreement which resolved hotly contested policy arguments those branches of government had thus far refused or otherwise failed to adopt. The 10th Circuit rejected those related arguments by first stating that the "district court didn't order states to require or even allow, conversion to ATC;" rather, "policy decisions about whether to allow or require ATC remain with state policymakers." *Id.* at 1116.

The court also rejected the argument that "the district court violated the Rules Enabling Act" by approving the settlement. Alkon relied upon *Authors Guild v. Google, Inc.*, 770 F.Supp.2d 666 (S.D. N.Y. 2011) which held that the settlement agreement there before the court violated the Rules Enabling Act because it "attempt[ed] to use the class action mechanism to implement forward-looking business arrangements that [went] far beyond the dispute before the [court in that particular] litigation." Rather than following *Authors Guild*, the 10th Circuit pointed out that both the 8th and 3rd Circuits had ruled that district court approval of settlement agreements were not "substantive adjudication[s] of the underlying causes of action" and that "approving a voluntarily-entered settlement agreement" does not "abridge, enlarge or modify any substantive right." *Id.* Accordingly, there was no violation of the Rules Enabling Act notwithstanding *Authors Guild*. *Id.*

The court devoted far more reasoning to its conclusion that the attorneys' fees award the district court approved was not an abuse of discretion. In so ruling the court acknowledged that the settlement agreements contemplated attorneys' fee awards of millions of dollars to class counsel. The court also agreed "with Alkon that class action settlements pose obvious conflict-of-interest problems" because class counsel may be tempted 'to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement approving a meager recovery for the class but generous compensation for the lawyers.'" (Quoting *Eubank v. Pella Corp.*, 745 F.3d 718, 720 (7th Cir. 2014).) *Id.* at 1117. When ruling that the district court had not abused its discretion in approving the settlements, the 10th Circuit rejected Alkon's request that it follow *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013). Rather, it chose to agree with another 6th Circuit ruling which stated "[c]onsumer class actions… have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources." *Id.* at 1121. In addition, consumer class actions encourage "positive societal effects [which require] class counsel [to] be adequately compensated—even when significant compensation to class members is out of reach." In support of its position that the district court did not abuse its discretion when certifying the class, the 10th Circuit distinguished *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011). The 10th Circuit stated that Alkon's suggestion "that a district court necessarily abuses its discretion by certifying a class when a class action 'can provide no compensatory value to class members'" was not supported by *Aqua* Dots. In further support of its ruling the 10th Circuit stated that the district court acted within its discretion in ruling that "in light of the limited size of any potential financial recovery for any particular class member and the possibility of inconsistent results, a class action [was] a far superior method of resolving the claims compared to individual suits." Although the 10th Circuit "might disagree with the district court on this point, Alkon fails to establish that the district court's decision is so unreasonable as to constitute an abuse of discretion." *Id.* at 1122.

Expect additional developments out of the 10th Circuit as a result of the In re Motor Fuel Temperature Sales Practices Litigation. The court made clear that it was going to strictly follow appellate rules regarding preservation of issues and arguments on appeal and supporting those arguments on appeal. It further made clear that the court was unwilling to reverse district court class certification decisions absent substantial proof that the district court had abused its discretion. Finally, the 10th Circuit did not seem to believe that the constitutional attacks that were raised held much merit. As stated above, we can expect to see more appeals of interest to the class action bar out of the In re Motor Fuel Temperature Sales Practices Litigation MDL.