Counsel's Advisory

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TEXAS COURT DENIES ATTORNEYS' FEES IN NON-CASH CLASS ACTION SETTLEMENT

by
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A Texas Court of Appeals recently extended the "coupon" rule typically applied in class action litigation to settlements in merger litigation where non-cash benefits are awarded to the class. The Dallas Court of Appeals decision in *Rocker v. Centex Corp.*, -- S.W.3d -- , 2012 WL 3264023 (Tex. App.—Dallas Aug. 10, 2012, no pet. h.) represents a commendable commitment to tort reform legislation in the Lone Star State and a significant shift away from fee-driven settlements in corporate class actions.

In 2003, the Texas Legislature promulgated mandatory guidelines for reforming class action litigation in response to concerns of class action abuse, objectionable settlements, and system-wide inconsistency. The guidelines require that courts calculate attorneys' fees with the lodestar method and, most importantly, that attorneys' fees be awarded in the same proportion of cash and noncash amounts (e.g., coupons and noncash common benefits) as those awarded to the class. In implementing the guidelines in Texas Rule of Civil Procedure 42(i)(2), the Texas Supreme Court Advisory Committee acknowledged that the rules may lead to harsh results but nonetheless implemented the legislature's directives verbatim. Thus, it should come as no surprise that courts have been left with little room to deviate from the statutory language.

At first blush, the *Centex* case follows the typical class action merger litigation model. After a merger announcement between Centex and Pulte Homes, Inc., shareholders sued claiming that the value received and disclosures made were insufficient. Centex and Pulte Homes Inc. reached a settlement agreement with the shareholders wherein they were awarded supplemental disclosures in exchange for a release of all claims—a non-monetary settlement. Following a hearing, the court approved the settlement and awarded class counsel an agreed upon fee of $1.1 million. Mr. Rocker, the only objecting shareholder, was overruled at the district court level despite his assertions that the settlement was unfair because the plaintiffs' lawyers "settled for a judgment that provides no benefits whatsoever for class members, but a hefty fee for the lawyers."

The Dallas Court of Appeals reversed, holding in a matter of first impression that the attorneys could not receive a cash award where the class only received non-cash benefits, in this case supplemental disclosures. The court thus rejected plaintiff's arguments that Rule 42(i)(2) only applies to "coupon settlements" where there is also a monetary recovery. Instead, the court applied basic rules of statutory interpretation and found that where "noncash" modified "benefits" in the statutory language, the legislature intended the section to apply even where there is no monetary recovery, as well as in cases other than those where coupons are awarded. The court also rejected any argument that plaintiffs' attorneys may recover fees under the "common fund doctrine," noting that in Texas the doctrine has been limited to cases where there is an identifiable pecuniary benefit to the class. Here, where there was no pecuniary benefit, the court "may not apply an equitable doctrine to achieve a result prohibited by the statute." Additionally, Justice Richter held that constitutional considerations required affording shareholders the right to opt out of the class. The case was ultimately remanded to be decided in the interest of justice.

One clear implication of the ruling is the diminished incentive for frivolous class-action litigation in Texas state courts—the desired policy effect of the tort reform legislation. As a result, shareholders will likely bring their suits in federal court or in another state if possible. The *Centex* decision marks a continued trend in courts nationwide evidencing a dwindling tolerance for disproportionate attorneys' fee requests, as

Centex follows the rejection of large attorneys' fees awards in at least two other class action suits involving large corporations and non-monetary settlements: *Fraley v. Facebook*, 830 F.Supp.2d 785 (N.D. Cal. Dec. 2011) and *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012). Be it by state legislation or judicial decision-making, the commitment to curbing frivolous class action litigation appears to be catching on, and cases such as *Centex* can, and should, serve as useful model arguments for expanding the effects of such rulings.

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