

Mortgages

\$1.7 Million Award to Class Counsel Upheld In Bank Fee Settlement Despite Objections

Cassese v. Wash. Mut. Inc., 2d Cir., No.11-4333-cv(L), 11/20/12

Key Development:In a nonprecedential order, Second Circuit upholds \$1.7 million attorneys' fee award in class action settlement over allegedly illegal mortgage charges, finding no abuse of discretion and no violation of due process rights of objectors.

Takeaway:Requiring class members to file objections to class counsel's fee motion before the fee motion is actually filed may violate due process, even though there was no due process violation on the facts of this case.

By [Yoel Tobin](#)

An award of \$1.7 million in attorneys' fees in a class action settlement over allegedly illegal mortgage charges was within the discretion of the district judge, the U.S. Court of Appeals for the Second Circuit held Nov. 20 in a nonprecedential order (*Cassese v. Wash. Mut. Inc.*, 2d Cir., No.11-4333-cv(L), 11/20/12).

In affirming the district court, Judges Barrington D. Parker, Reena Raggi, and Gerard E. Lynch acknowledged that class members objecting to the award were raising a due process argument that had been accepted by the U.S. Court of Appeals for the Ninth Circuit.

The Second Circuit nevertheless concluded that, under the circumstances presented here, the district court did not violate the due process rights of objectors.

The court also rejected challenges to the amount of the fee award from objectors, who thought it was too high, and from class counsel, who thought it was too low. The court emphasized the deferential nature of its review and the broad discretion enjoyed by the district court.

Settlement Reached and Notice Sent.

The plaintiffs filed a class action against Washington Mutual Inc. in 2005, alleging that Washington Mutual illegally charged prepayment fees in relation to mortgage and home equity loans. After nearly six years of what the district court described as “vicious” litigation, the plaintiffs reached a \$13 million settlement with Washington Mutual.

A notice of proposed settlement was sent in June 2011. The notice informed the class of the amount of the settlement. The notice also said that class counsel would apply for attorneys' fees not to exceed \$3,900,000, and for reimbursement of expenses not to exceed \$50,000. The deadline for objections was Aug. 31, 2011.

Request for Attorneys' Fees.

On Sept. 1, 2011, class counsel filed a request for \$3.9 million in attorneys' fees and \$50,000 in expenses. A hearing was held on Sept. 15, 2011.

The judge approved the settlement, and awarded class counsel \$1.7 million in attorneys' fees and \$50,000 in

expenses, to be paid out of the settlement fund.

Several objectors appealed the award, as did class counsel.

Due Process.

The objectors asserted that the district court violated their due process rights as well as Fed. R. Civ. P. 23(h) by telling them to file objections to class counsel's request for attorneys' fees before class counsel actually made the request.

The panel recognized that the Ninth Circuit had accepted the due process argument advanced by the objectors in *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010), where the Ninth Circuit said that requiring the filing of objections before the fee motion is itself filed “denies the class the full and fair opportunity to examine and oppose the motion that Rule 23(h) contemplates.” However, the panel held that the objectors' due process rights were not violated.

The court noted that class counsel's request for fees and expenses tracked the amounts specified in the earlier settlement notice.

Also, the objectors had two weeks after class counsel filed his request to crystallize their objections and ask for additional information before the hearing. Under these circumstances, there was no due process violation, the panel concluded.

The panel also held that the district court had acted within its discretion when it denied the objectors' request for discovery of class counsel's billing records, which had been filed under seal with the district court.

Amount of Award.

Finally, the court turned back challenges from all directions to the amount of the fee.

In response to the objectors who thought the fee was too high, the court noted the lower court's findings on the length of the litigation, the “difficult” work involved, and the “outstanding” performance of class counsel.

In response to class counsel, who thought the fee was too low, the panel noted that class counsel was receiving more than the “presumptively reasonable” lodestar, and that the district court could properly limit the fee to leave more funds for the class. Further, the court noted its “exceedingly deferential review” and the “wide discretion” afforded to the district court.

Class counsel were Joseph S. Tusa of Tusa PC in Lake Success, N.Y., and the firm of Lowey Dannenberg Cohen & Hart PC in White Plains, N.Y.

The attorneys for the objectors included Irwin B. Schwartz of BLA Schwartz PC in New York; Steve A. Miller of Steve A. Miller PC in Denver; and John J. Pentz of the Class Action Fairness Group in Maynard, Mass.

The attorneys for the defendant Washington Mutual Inc. included John P. Mastando III, Gregory Silbert, and Vanessa W. Chandis of Weil Gotshal & Manges LLP in New York.

Full text at <http://op.bna.com/class.nsf/r?Open=yton-929mfn>.

