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Southwest Airlines In-Flight Alcohol Suit Causes Circuit Split

On August 20, 2015, the Seventh Circuit held that the “coupon settlement” provision of the Class Action Fairness Act (CAFA), 28 USC § 1712, allowed the district court to award class counsel an attorney fee based on the lodestar method. *In re Southwest Airlines Voucher Litigation*, Nos. 13-3264, 13-3462, 14-2591, 14-2602, 14-2495, 2015 WL 4939676 (7th Cir. Aug. 20, 2015). The Seventh Circuit’s decision represents a split from the Ninth Circuit’s decision in *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013).

The underlying suit involved certain in-flight drink vouchers that Southwest Airlines stopped honoring. The parties reached a settlement to provide replacement drink vouchers to all class members, as well as certain injunctive relief. The Seventh Circuit repeatedly stated that unlike many “coupon settlements,” the settlement here was extremely favorable to the class members, in that it provided them with nearly all the relief that they could hope for if the case were to proceed through a successful trial. Objectors, however, appealed approval of the settlement, arguing that the district court erred in using the lodestar method to calculate attorney fees. Specifically, the objectors argued that the proper basis for a fee award under CAFA would be based on a percentage of the value of coupons actually redeemed by class members. This is the view that a divided panel of the Ninth Circuit previously adopted in *HP Inkjet*. The Seventh Circuit, however, found that CAFA does not prohibit the use of the lodestar method to calculate attorney fees in coupon settlements, though it does prohibit the calculation of fees based on the face value of all coupons available to the class.

The objectors also complained that the settlement included a “clear-sailing” clause in that Southwest agreed not to contest a fee request exceeding \$3 million and a “kicker” clause in that any reduction from the requested fee benefitted the defendant rather than the class. The Seventh Circuit stated that these clauses weigh against fairness and call for intense scrutiny in evaluating a proposed class settlement, but also stated that they are not *per se* bars to approval. Observing that the settlement was quite favorable to the class, the court stated that counsel should be compensated accordingly.

The Seventh’s Circuit decision, representing a split from the Ninth Circuit’s decision in *HP Inkjet*, allows for the use of the lodestar method in certain coupon settlements in courts within that circuit. The Seventh Circuit warned, however, that counsel should be cautious and consider the value of the settlement to class members when entering into such agreements.

—*Erin Wilson*, Lane Powell, Seattle, WA. Any opinions expressed herein are hers, and not necessarily those of Lane Powell PC or any one or more of its clients.