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Ruling On Short Sandwiches May Cast A Long Shadow

By **J. Philip Calabrese** (January 18, 2018, 12:12 PM EST)

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As 2017 drew to a close and lawyers looked back on the significant cases in the area of product liability, commentators rightly focused on Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017) (holding that out-of-state residents may not pursue tort claims without a finding of specific jurisdiction), In re Motors Liquidation Co., 568 B.R. 217 (Bankr. S.D.N.Y. 2017) (finding that product liability claims may proceed against an entity that acquires assets out of bankruptcy so long as the claims are based solely on alleged post-acquisition conduct) and the status of various MDLs, particularly ones where individual cases have proceeded to trial.

Overlooked in the year-end articles is a ruling from the Seventh Circuit that will have an outsized effect on settling product liability cases in 2018 and beyond. In In re Subway Footlong Sandwich Marketing and Sales Practices Litigation, 869 F.3d 551 (7th Cir. 2017), the Seventh Circuit reversed approval of a class action settlement that provided “no meaningful relief” to class members. Pointedly, the court went so far as to note that such a settlement that results in fees to class counsel “is no better than a racket.”

The case started after a teenager posted a picture on social media in 2013 of his "footlong" sandwich next to a tape measure showing it as 11 inches. The picture went viral, prompting litigation. Early discovery showed that Subway standardizes both its raw dough and the meat and cheese in each sandwich. After mediation, the parties agreed to a settlement in which franchisees agreed to use a tool for measuring sandwich rolls and Subway would post a notice on its website explaining that natural variation in the baking process may result in some sandwiches being shorter than advertised. Additionally, the defendant agreed to pay $520,000 in attorneys’ fees for class counsel. The district court overruled an objection and approved the settlement as fair and reasonable.

On appeal, the Seventh Circuit upheld the objection and reversed. Comparing the state of affairs before and after the settlement, the court viewed each as having the same small chance that a consumer would purchase a sandwich measuring less than twelve inches, but having the same amount of dough, meat and cheese — plus all the toppings the customer requests.

The remedy to which the parties agreed did not change things, and the court emphasized that the parties conceded that ensuring uniformity is impossible given variability inherent in the bread-making process. For these reasons, the court saw the settlement as little more than an effort to pay off class counsel.

But the court went further. It roundly denounced the settlement as cynical and "utterly worthless" to consumers. The Seventh Circuit opined that a settlement that provides fees to class counsel, but no benefit to the class, "is no better than a racket."

Because class actions subject defendants to tremendous pressure to settle, settlements like the one the Seventh Circuit considered are not uncommon. Indeed, the Seventh Circuit itself famously observed that the stakes often prompt defendants to enter such settlements:

> [J]ust as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.

Blair v. Equifax Check Servs., 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.).

In Blair, the Seventh Circuit went on to note some plaintiffs and even some district courts force settlements on defendants. In such circumstances, the pressures on defendants to settle make a resolution like the one at issue in In re Subway Footlong Sandwich Marketing and Sales Practices Litigation understandable from a business standpoint.

The Seventh Circuit's ruling, however, signals that greater scrutiny lies ahead and that class action defendants will have to materially change their position or provide real benefits to class members as part of any settlement. Because of the leading voice the Seventh Circuit has had on many issues relating to settlement in modern class action practice, its ruling in In re Subway Footlong Sandwich Marketing and Sales Practices Litigation will likely carry considerable sway in 2018 and beyond.

Moreover, the Seventh Circuit's view aligns with the emphasis on settlement in the proposed changes to Rule 23 that are working their way toward taking effect on Dec. 1, 2018. These proposed revisions, the first to Rule 23 since 2003, expressly provide for the standards governing settlement, providing in the rule what has largely been understood from court decisions and prevailing practice.

One of the key considerations for court approval is the benefit for members of the class. By making this consideration an express part of the rule, the proposed revisions to Rule 23 will focus courts on benefits to class members, and the Seventh Circuit's decision is likely to take on greater significance in its reasoning requiring that defendants change their positions in a settlement and do more than merely buy peace with plaintiffs' counsel.

Finally, although this ruling arises in the class action context, its impact is likely to reach more broadly. According to the case statistics published by the Administrative Office of the U.S. Courts, over 40 percent of all class actions filed in the federal courts in 2017 are classified as product liability claims of one kind or another. Therefore, a significant amount of high-stakes class litigation, where the Seventh Circuit's ruling will directly carry great weight, relates to product liability.

Beyond that, perhaps plaintiffs' lawyers settling individual product liability claims will be content to resolve cases for, essentially, nuisance value cash payments. However, when the high-exposure claims that set the market and drive litigation take on a different character by requiring more than just payment of ransom, that dynamic will likely affect other claims as well, even if those changes take time to work their way through case filings and settlements.

In short, under the Seventh Circuit's approach, defendants will have to be prepared to do more to settle product liability claims than simply write a check to make a claimed problem go away. Often, that course is the easiest solution to a business problem, and one that courts and counsel have an interest in facilitating — at least until now.

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