

Sanchez, et al. v. California Public Employees' Retirement System

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date of Hearing: TBD
Department: 308
Case No.: BC517444

TENTATIVE:

- (1) The settlement appears to be in the range of reasonableness of a settlement that could ultimately be granted final approval by the Court;
- (2) Appoint Michael Bidart of Shernoff Bidart Echeverria, LLP, Gregory Bentley of Bentley & More, LLP, Stuart Talley of Kershaw, Cook & Talley, PC, and Gretchen Nelson of Nelson & Fraenkel LLP as Class Counsel;
- (3) Appoint Holly Wedding, Richard Lodyga and Eileen Lodyga as Class Representatives;
- (4) Approve the notice;
- (5) Set the scheduled matters as indicated below; and
- (6) Plaintiffs' counsel is file a proposed order consistent with this ruling by _____, 2017.

PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

As a "fiduciary" of the absent class members, the trial court's duty is to have before it sufficient information to determine if the settlement is fair, adequate, and reasonable. (7-Eleven Owners for Fair Franchising v. The Southland Corp. (2000) 85 Cal.App.4th 1135, 1151, citing Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801, 1802 ("Dunk").)

California Rules of Court, rule 3.769 governs settlements of class actions. Any party to a settlement agreement may submit a written notice for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion. California Rules of Court, rule 3.769(c).

In determining whether to approve a class settlement, the court's responsibility is to "prevent fraud, collusion or unfairness to the class" through settlement and dismissal of the class action because the rights of the class members, and even named plaintiffs, "may not have been given due regard by the negotiating parties." (Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America (2006) 141 Cal.App.4th 46, 60.)

FAIRNESS OF THE SETTLEMENT AGREEMENT

In an effort to aid the Court in the determination of the fairness of the settlement, *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244-245 ("*Wershba*"), discusses factors that the Court should consider when testing the reasonableness of the settlement.

A presumption of fairness exists where: 1) the settlement is reached through arm's length bargaining; 2) investigation and discovery are sufficient to allow counsel and the Court to

act intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of objectors is small. (*Wershba* at 245, citing *Dunk* at 1802.) The test is not the maximum amount plaintiff might have obtained at trial on the complaint but, rather, whether the settlement is reasonable under all of the circumstances. (*Wershba* at 250.)

In making this determination, the Court considers all relevant factors including “the strength of [the] plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 (“*Kullar*”), citing *Dunk* at 1801.)

“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” (*City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448, 455; see also *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.”)

TERMS OF SETTLEMENT AGREEMENT

The class is defined as, “all California citizens who purchased long-term care policies from CalPERS between 1995 and 2004, who were subject to the 85% premium increase announced to policyholders in or around February 2013, and implemented beginning in 2015; policyholders who went into claim status and whose premium payments were suspended prior to the increase, and who have remained in claim since that time, are not part of the certified class.” (¶B)

Following certification of the Class, the claims administrator sent notice to all policyholders identified by CalPERS as being within the Class, and each was provided and opportunity to opt out of the Class. In response to the Class notice, approximately 170 persons opted out of the Class leaving approximately 123,000 policyholders in the class. (¶B)

-The class notice shall not provide for the right to opt out since the Class has previously been provided such notice and the opt-out period has expired. Those individuals who have previously opted out of the Class are not entitled to participate in this Settlement. (Motion for Preliminary Approval, pg. 9.)

The Settlement Amount is \$9,750,000. (¶1)

The Settlement Amount will be utilized to reimburse Class Counsel for costs incurred in the litigation, which are currently \$597,879.77 (“Incurred Costs”), plus notice and settlement administration expenses which are currently estimated to be \$200,000 (“Settlement Administration Costs”). An additional \$1 million (“Future Cost Fund”) will be deposited into an interest-bearing QSF for the payment of future costs (the “Future Costs Fund QSF”). Interest earned on the Future Costs Fund QSF shall remain a part of the Future Costs Fund QSF and, if

necessary, may be used for any future costs. The balance of the Settlement Amount after payment of Incurred Costs, Settlement Administration Costs, and Future Cost Fund shall be deposited into an interest bearing QSF (the "Distribution QSF") and distributed following final approval of the settlement pro-rata to all Class Members without the need of a claim. (¶12, Second Amendment to Joint Stipulation for Class Action Settlement as to Towers Watson Defendants.)

In determining the pro-rata amount to be distributed to Class Members, the claims administrator shall divide the amount in the Distribution QSF (Including any accrued interest) by the total number of class members. (Ibid.)

-According to the class notice (paragraph 10), settlement funds will be distributed to the class upon final approval of the settlement.

At the conclusion of the litigation, any funds remaining in the Distribution QSF and Future Costs Fund QSF shall be added to any amounts recovered from any of the non-settling defendants and distributed pursuant to a future plan of allocation for distribution to the Class, administrative costs, attorneys' fees, and any incentive awards to the class representatives, as approved by the Court. (¶12, Second Amendment to Joint Stipulation for Class Action Settlement as to Towers Watson Defendants.)

If no further amount is recovered from the non-settling defendants and the net amount available in the Distribution QSF and the Future Fund QSF (together the "Remaining Funds") would result in a distribution to the Class of \$5.00 or more to each class member (after administrative costs), then the Remaining Funds will be distributed proportionately to the class members. If the Remaining Funds would result in a distribution that is less than \$5.00 per Class Member, the Remaining Funds shall be distributed *cy pres* in accordance with CCP Section 384, pursuant to Court Order. (Ibid.)

-No *cy-pres* has been selected at this time. At the conclusion of the litigation, any amount that is economically insufficient to distribute to the Class shall be distributed *cy pres* in accordance with CCP Section 384, pursuant to Court Order. Plaintiff will propose an appropriate *cy pres* recipient at the conclusion of the litigation. (Supplemental Memorandum ISO Amended Renewed Motion for Preliminary Approval, pg. 7.)

There will be no request for incentive payments to be made from the Towers Watson settlement fund for the Class Representatives. Any request for incentive payments to the Class Representatives will be made from any settlement or judgment with CalPERS. (Supplemental Memorandum ISO Amended Renewed Motion for Preliminary Approval, pg. 4.)

Class members will have 45 days from the mailing of the class notice to object. (¶15.b, as amended)

Settlement checks will remain valid for 6 months after issuance. (Supplemental Memorandum ISO Amended Renewed Motion for Preliminary Approval, pg. 8; Note: This clause regarding class members having 6 months to cash their checks was left out of the Second Amended Joint Stipulation.) Any funds from uncashed or undeliverable settlement checks (for class members

who the claims administrator cannot locate) shall remain in the Distribution QSF for distribution at the conclusion of the litigation as described in ¶12 of the Second Amended Joint Stipulation.

The settlement administrator is Heffler Claims Group. (Amended Proposed Order)

Note: The fully executed copy of the Second Amended Joint Stipulation and copies of the long form and short form notice are attached to the Amended Proposed Order.

Participating class members will release certain claims, as discussed below.

ANALYSIS OF SETTLEMENT AGREEMENT

A. Does a Presumption of Fairness Exist?

1. Was the Settlement reached through arm's-length bargaining? Yes. On March 1, 2017, Class Counsel, Towers Watson's Counsel and representative of Tower Watson mediated the matter before Nancy Lesser of Pax ADR. At the mediation, the Parties reached the Settlement based on the mediator's proposal. (Amended Declaration of Gretchen Nelson, ¶¶15-16; Motion for Preliminary Approval, pg. 5.)

2. Were investigation and discovery sufficient to allow counsel and the Court to act intelligently? Yes. Class Counsel conducted investigation and discovery in this case including at least the following: (a) Plaintiffs propounded extensive written discovery and Towers responded to: Three Separate Sets of Request for Production of Documents; Two Separate Sets of Special Interrogatories; and One Separate Set of Judicial Council Form Interrogatories. (b) Towers Watson propounded written discovery on Plaintiffs, including document requests, and interrogatories and requests for admission and Plaintiffs responded. (c) Plaintiffs and Towers Watson produced documents on various occasions resulting in nearly 20,000 pages of documents being produced. Additional document productions from CalPERS and third parties have resulted in more than 50,000 pages of additional documents that have been produced and reviewed in this litigation. (d) We have undertaken a detailed review and analysis of the discovery. (e) Plaintiffs were deposed at length with Plaintiffs Eileen Lodyga and Holly Wedding being deposed on two full days. Plaintiffs took the depositions of four (4) representatives of Towers Watson, including three former actuarial consultants who worked with CalPERS on the LTC Program. And, Plaintiffs took the depositions of multiple representatives of CalPERS as well as the Long Term Care Group which is the administrator of the LTC policies. (f) Plaintiffs researched and analyzed the applicable law as to Plaintiffs' claims including damage issues as well as the potential defenses asserted by Towers Watson. (g) The Parties analyzed the insurance available to cover the claims against Towers Watson, including the limits of that insurance. (Amended Nelson Declaration, ¶122.)

3. Is counsel experienced in similar litigation? Yes. Class Counsel has represented plaintiffs in class actions in insurance, securities, antitrust, telecommunications, employment, and consumer claims for decades. (Id. at ¶123.)

4. What percentage of class has objected? This cannot be determined until the fairness hearing. See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 14:139.18 ("Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing.")

B. Is the settlement fair, adequate and reasonable?

1. Strength of Plaintiffs' case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar* at 130.)

Plaintiffs' sole claim against Towers Watson is for alleged professional negligence relating to its actuarial services to CalPERS early in the LTC program. That claim is subject to defenses unique to Towers Watson which, if accepted by trier of fact, could result in Plaintiffs recovering nothing from Towers Watson. Among other things, Plaintiffs' claim against Towers Watson is dependent on a finding that the 85% increase implemented in 2015 was caused by actuarial work that Towers Watson provided to CalPERS during the period from approximately 1995 to 2003. (Supplemental Memorandum ISO Amended Renewed Motion for Preliminary Approval, pgs. 1-4.)

Towers Watson filed a motion for summary judgment in which it argued (1) that the claim against it is time-barred and (2) that it owed no legal duty to the Class. The summary judgment motion was fully briefed, and the hearing was then continued pending the mediation between Plaintiffs and Towers Watson that resulted in this settlement being presented for preliminary approval. The hearing on Towers Watson's summary judgment motion has since been continued to January 2018. (*Ibid.*)

Based on the information Plaintiffs have been able to obtain in discovery to date, Plaintiffs estimate that the Class as a whole may have suffered a financial impact of approximately \$700,000,000, as a result of the 85% rate increase. However, no party has engaged in expert disclosures or expert discovery to date and Plaintiffs are currently obtaining additional information that will be utilized by its experts in assessing the damages in this case. Thus, the foregoing is an estimate based on currently available data and expert discovery may impact or alter the estimate. (*Ibid.*)

Plaintiffs currently estimate that if they were to pursue their claim against Towers Watson (assuming it survived the pending summary judgment motion), they might recover \$70,000,000 (10% of \$700,000,000) or an amount in the range of \$50 million to \$100 million. (*Ibid.*)

2. Risk, expense, complexity and likely duration of further litigation. Further litigation carried the possibility of non-certification and unfavorable rulings on the merits on the above legal issues.

3. Risk of maintaining class action status through trial. It would have been Plaintiffs' burden to maintain the class action through trial.

4. Amount offered in settlement. Plaintiffs estimate that the net amount available for distribution to the Class will be approximately \$8,000,000. (Supplemental Memorandum ISO Amended Renewed Motion for Preliminary Approval, pg. 5.) As it relates to the distribution of the Towers Watson settlement funds, the total amount available for distribution to the Class will be divided by the number of Class Members, and each Class Member will receive a check for his/her share of the total. (*Id.* at pg. 6.) Plaintiffs estimate that each Class Member will receive approximately \$65.00 which is based on the following calculation and assuming approximately \$8 million for distribution: $\$8,000,000 / 122,800$ [Number of Class Members] = \$65.14. (*Ibid.*)

5. Extent of discovery completed and the stage of the proceedings. As stated above, it appears that Class Counsel has completed sufficient discovery in order to make an informed decision.

6. Experience and views of counsel. As indicated above, Class Counsel is experienced in class actions, including cases involving wage and hour violations.

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement. The class members' reactions will not be known until they receive notice and are afforded an opportunity to object or opt-out. This factor becomes relevant during the fairness hearing.

SCOPE OF RELEASE

As of the Effective Date, each Class Member fully releases the Released Parties from, "any and all actual or potential claims, counterclaims, actions, causes of action, costs, fees, attorneys' fees, or penalties of any kind alleged in the Action or that reasonably arise out of the facts alleged in the FAC or the SAC, including but not limited to claims asserted under contract, statute or tort, whether arising at law or in equity, and whether known or unknown, suspected or unsuspected, discovered or undiscovered, and which arise in whole or in part from services Towers Watson provided at any time relating to CalPERS's LTC Program." (§11.a)

The release in no way shall effect the rights, remedies or claims against CalPERS. (§11.c)

CONDITIONAL CLASS CERTIFICATION

Class already certified.

NOTICE TO CLASS

A. Standard

California Rules of Court, rule 3.769(e) provides: "If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing." Additionally, rule 3.769(f) states: "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement."

B. Form of Notice

The proposed long form notice is attached to the Amended Proposed Order as Exhibit C. The proposed short form notice is attached to the Amended Proposed Order as Exhibit D. The information provided in the proposed notice is acceptable. It includes a summary of the litigation, the nature and terms of the settlement, the procedures for participating in (do nothing) or objecting to the settlement, and the time, date, and location of the final approval hearing.

C. Method of Notice

Within 15 days of preliminary approval of the settlement, Plaintiffs, through the Settlement Administrator, will mail the Class Notice with the content and in the form approved by the Court to all Class Members and advise Class Members of their rights to object to the

settlement and the specific release language that will be included in the final judgment that will be binding on them if the settlement is approved. (¶15.a)

Within 15 days of preliminary approval of the settlement, the Settlement Administrator shall post on the established website the Settlement Agreement, the identity of counsel for the Settlement Class, the Long Form Notice, and the Preliminary Approval Order and such other documents regarding the Settlement as the Parties agree are necessary. The website shall be maintained until the Final Approval Order is issued. (Motion for Preliminary Approval, pgs. 8-9)

In the event that any class notice mailed to a class member is returned as undeliverable, the claims administrator shall attempt to confirm an updated address for the Class Member, shall re-send by U.S. Mail a class notice and shall inform the class member that he or she will have an additional 15 days to object to the settlement. (¶15.b)

D. Cost of Notice

The cost of settlement administration is estimated to be \$200,000. This amount appears reasonable. However, prior to the time of the final fairness hearing, the settlement administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

ATTORNEY FEES AND COSTS

Class Counsel will not seek an award of attorneys' fees from the Settlement. However, in any future application for attorneys' fees in this litigation as to any resolution with the non-settling defendants, the amount achieved by this Settlement may be used by Class Counsel as a basis for the Court's consideration in awarding attorneys' fees. (¶12, Second Amendment to Joint Stipulation for Class Action Settlement as to Towers Watson Defendants.)

Counsel should be prepared to justify any costs sought by detailing how such costs were incurred.

PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

The following schedule is proposed by the Court:

- Preliminary Approval Hearing – TBD *Today 10/25/17*
- Deadline for Serving Notices to Class Members – (within 15 days of preliminary approval) *Nov. 13, 2017*
- Deadline for Objections – (45 days from the mailing of the class notice) *Jan 3, 2018*
- Deadline for Class Counsel to File Motion for Final Approval of Settlement and Motion for Attorney Fees and Response to any Objections - *Jan. 10, 2018*
- Final Fairness Hearing and Final Approval – *Jan 26, 2018 at 11:00 am*