In a scathing opinion authored by Judge Posner, the Seventh Circuit recently overturned the district court's approval of a class action settlement in *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. June 2, 2014). The *Eubank* settlement, Posner said, "flunked the 'fairness' standard by the one-sidedness of its terms and its fatal conflict of interest," which involved a class represented by the lead plaintiff's son-in-law. *Id.* at 728. According to Judge Posner, the class settlement at issue presented "almost every danger sign" that district courts are warned to avoid. *Id.* The Seventh Circuit's opinion is a useful roadmap of what ***not*** to do when settling a consumer class action in federal court. Particularly, *Eubank* teaches that litigants should (1) thoroughly screen for conflicts of interest when selecting class counsel and named plaintiffs; (2) ensure that attorneys' fees to class counsel are not disproportionately high; (3) avoid using complex and/or confusing claim forms; and (4) pay attention to subclasses when drafting class settlement agreements.

Eubank is a consumer class action lawsuit filed in 2006 against Pella Corporation, the well-known window manufacturer. *Id.* at 721. The named plaintiff alleged that certain of Pella's "Proline Series" windows had a design defect that caused damage to the windows as well as to the houses in which they were installed. The district judge certified two separate classes consisting of roughly 225,000 members: one class for Pella customers who had already replaced or repaired their defective windows, and the other class for those who had not yet repaired them. Class counsel negotiated a settlement with Pella in 2011, and the district judge approved the settlement in 2013. *Id.* In June 2014, however, the Seventh Circuit overturned the settlement based on a number of "red flags" surrounding the agreement. *Id.* at 729. Below is a summary of the takeaways from Judge Posner's opinion.

1. Screen Class Counsel and Named Plaintiffs to Avoid Conflicts of Interest.

The *Eubank* settlement was doomed to fail due to conflicts of interest stemming from (i) an improper relationship between class counsel and the named plaintiff, and (ii) class counsel's unusual financial and ethical crises, which Posner suggests affected the

settlement's terms. These circumstances, Posner wrote, rendered the named plaintiff and class counsel unfit to represent the class. *Id.* at 721.

Initially, there was only one named plaintiff in *Eubank*—a dentist named Leonard Saltzman. *Id.* at 721. Saltzman was the father-in-law of the lead counsel for the class, Paul Weiss. Weiss's wife—Saltzman's daughter—was also a lawyer and partner at Weiss's firm. *Id.* This relationship, Judge Posner noted, created an inherent conflict of interest between Saltzman and the class: "the larger the fee award to class counsel, the better off Saltzman's daughter and son-in-law would be financially." *Id.* at 724.

In addition to conflicts involving the named plaintiff, Weiss was embroiled in financial and ethical troubles during the settlement's negotiation, which Posner said "should have disqualified [Weiss] from serving as class counsel even if his father-in-law hadn't been in the picture." *Id*. At the time of the settlement's negotiation, both Weiss and his wife were defendants in a lawsuit charging them with misappropriation of the assets of their former law firm. *Id.* at 722. Moreover, Weiss was the subject of a second lawsuit brought by the Illinois Attorney Registration and Disciplinary Commission, which recommended that he be suspended from practicing law for 30 months. *Id.* This, the Court noted, should have been enough for the district judge to remove Weiss as class counsel because "[i]t was very much in his personal interest, as opposed to the interest of the class members to get the settlement signed and approved before the disciplinary proceeding culminated in a sanction that might abrogate his right to share in the attorney's fee." *Id.* at 724.

2. Attorneys' Fees Should Be Reasonable in Relation to the Value Received by Class Members.

Notwithstanding the conflicts of interest, Judge Posner found the terms of the settlement agreement independently objectionable. The settlement agreement was problematic for several reasons, including that it granted a disproportionately large amount of attorneys' fees to class counsel.

The final settlement directed Pella to pay $11 million in attorneys' fees to class counsel. The basis for this figure was the plaintiffs' claim that the settlement was worth $90 million to the class. However, the settlement did not specify an amount of money to be received by the members of the class, as distinct from class counsel. Instead, it simply laid out a procedure by which class members could claim damages. *Id.* In fact, the Court noted,

the only evidence supporting the $90 million valuation was an affidavit of an accountant, hired and paid for by Weiss's law firm. *Id.* at 727.

Pella, on the other hand, only estimated that the class would recover around $22.5 million. *Id.* at 724. After performing his own analysis, which accounted for such variables as damages caps in the settlement agreement and the length and complexity of the claim forms, Judge Posner estimated the total value to the class members was a mere $8.5 million. *Id.* at *9. Based on the disparity between the attorney award and class benefit, Posner concluded, "[c]lass counsel sold out the class." *Id.* at 726.

3. Avoid Confusing Claim Forms.

Judge Posner also criticized the complex, confusing claim forms class members had to complete to receive their benefits under the settlement. *Id.* at 725-26. The forms' length was one problem: "12 pages for [a] 'simple' claim with [a] $750 ceiling . . . ." *Id.* at 725. The Court further commented on the confusing nature of the forms:

> [they] require a claimant to submit a slew of arcane data, including the 'Purchase Order Number,' 'Glass Etch Information,' 'Product Identity Stamp,' and 'Unit ID Label' of each affected window. The claim forms are so complicated that Pella could reject many of them on the ground that the claimant had not filled out the form completely and correctly.

Id. at 725-26. Indeed, although 225,000 notices and claim forms were sent to class members, less than 1,300 were completed, which the Court attributed to the complexity of the forms. *Id.* at 726.

4. Do Not Ignore Subgroups When Drafting the Settlement Agreement.

As a final matter, the Seventh Circuit noted that the *Eubank* settlement ignored the district court's previous certification of two separate classes and purported to bind a single nationwide class consisting of all owners of Pella Proline windows. *Id.* at 721. This omission, Posner said, was "[a] red flag[] that the judge failed to see" and contrary to the longstanding rule that "members of each subgroup cannot be bound to a settlement except by consents given by those who understand their role is to represent solely the members of their respective subgroups." *Id.*

For more information about how this decision may impact your business, please contact the authors below.

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