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7th Circ. OKs \$1.6M In Atty Fees In Southwest Coupon Suit

By **Jody Godoy**

Law360, New York (August 24, 2015, 9:43 PM ET) -- The Seventh Circuit has largely upheld \$1.6 million in attorneys fees in a class settlement for Southwest Airlines fliers holding expired drink vouchers, splitting from the Ninth Circuit's interpretation of the Class Action Fairness Act.

Objectors Jeffrey Markow and Alison Paul asked the court to review the 2012 settlement with the airline in the suit over drink tickets the airline stopped honoring in 2010. The objectors argued the deal didn't justify \$1.7 million in attorneys fees and smacked of collusion. On Aug. 20 a three-judge appellate panel disagreed, saying recovery for the class was "exceptional" and that the CAFA allows lodestar calculations of attorneys' fees in coupon settlements, putting it at odds with the Ninth Circuit.

A sentence in the CAFA invoked by the objectors "does not expressly prohibit use of the lodestar method," the panel said. "What the sentence does, unambiguously, is reject the most abusive method for calculating a fee in a coupon settlement: calculating the fee as a percentage of the face value of all the coupons issued."

The underlying suit alleges Southwest breached a contract with customers in August 2010 when it said that it would no longer accept drink vouchers without a printed expiration date, retroactively voided all previously issued vouchers and accepted vouchers issued with a Business Select ticket only on the date of travel.

Under the December 2012 settlement, each class member was allowed one drink voucher to replace any received before August 2010 that was not redeemed. The class plaintiffs said there were at least 5.8 million vouchers and possibly up to twice that many, each valued at \$5, that were never redeemed, meaning the settlement was worth between \$29 million and \$58 million.

On appeal, the **objectors argued** that class counsel was only entitled to a portion of the coupons actually redeemed. Class counsel countered that they deserved not the \$1.6 million the court had calculated using the lodestar method but the full \$3 million Southwest had agreed not to contest.

The Seventh Circuit rejected both arguments, saying that although the Ninth Circuit **adopted a standard** along the lines of what the plaintiffs asked for, that standard invalidates provisions in the CAFA meant to give courts multiple options on how to calculate fees.

Instead, the panel found that the law allows for lodestar fees as an alternative, and that the law's restriction limiting attorneys' fees to a percentage of coupons redeemed applies

when the settlement proposes attorneys' fees as a percentage of the recovery.

H. Thomas Wells Jr. of Maynard Cooper & Gale PC, who represents Southwest, told Law360 the airline had taken the position that the lodestar calculation was the correct one from the start, and held that position through four months of negotiations with the plaintiffs over fees.

Plaintiffs' counsel had initially sought \$7 million, or around 20 percent, of the potential settlement amount of \$29 million, according to the appeals court.

Wells said that the final number of coupons claimed by settlement members was around 504,000, each redeemable for a drink that would cost around \$5 on a Southwest flight, making the final amount of recovery worth around \$2.5 million to the class.

Joseph Siprut of Siprut PC, an attorney for the class, told Law360 plaintiffs and counsel are "pleased the court upheld the settlement and reaffirmed the trial court's finding that the settlement represents an 'exceptional' result for the class."

Melissa A. Holyoak of the Center for Class Action Fairness, who represents the objectors, told Law360 the center intends to file a petition for en banc review, saying the ruling is "inconsistent with the Seventh Circuit's recent decisions that require district courts to consider the actual recovery to class members."

"Here, the district court failed to do so because the settling parties refused to disclose the number of claims," Holyoak said.

In its ruling, the appellate court also chided Siprut and Adam J. Levitt, one of the class representatives who is also a director at Grant & Eisenhofer PA. The pair should have disclosed their relationship as co-counsel on another case, the court said, and it stripped Levitt's \$15,000 class representative award and gave Siprut's fees a \$15,000 haircut.

Circuit Judges David F. Hamilton, Ann Claire Williams and Joel M. Flaum sat on the panel.

The objectors are represented by Theodore H. Frank and Melissa A. Holyoak of the Center for Class Action Fairness.

The class is represented by Joseph Siprut, Gregg Barbakoff and Gregory Jones of Siprut PC.

Southwest is represented by Michael Drumke of Swanson Martin & Bell LLP and Huey Wells Jr. of Maynard Cooper & Gale PC.

The case is In Re: Southwest Airlines Voucher Litigation, case number 13-3264, in the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by Lance Duroi. Editing by Brian Baresch.

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