CLIENT UPDATE

THIRD CIRCUIT REJECTS BABY PRODUCTS ANTITRUST CLASS ACTION SETTLEMENT

NEW YORK
Jeffrey S. Jacobson
jsjacobson@debevoise.com

Gary W. Kubek
gwkubek@debevoise.com

Maura K. Monaghan
mkmonaghan@debevoise.com

Yesterday the Third Circuit Court of Appeals reversed a district judge's approval of a $35 million antitrust settlement because the district judge did not ask, and the parties did not volunteer, how little of the common fund class members had managed to claim and how much therefore would be distributed to charitable *cy pres* recipients. *In re Baby Products Antitrust Litigation*, 2013 WL 599662.

The plaintiffs in *Baby Products* alleged in 2006 that manufacturers and large retailers of car seats and other expensive baby products had conspired to set a price floor for those products, inflating prices by an asserted 18%. In late 2010, the defendants agreed to settle with a putative nationwide class for $35.5 million. Class members who provided suitable proof of purchase could obtain refunds of up to 60% of their purchase price, but class members who lacked proof of purchase could receive only $5.00. Although the parties represented to the district judge that the proof of purchase requirements were not onerous, most class members who filed claims lacked proof and thus only were able to claim the $5.00 benefit.

At the fairness hearing, the parties knew that only about $3 million of the common fund would be distributed to the class. The district judge awarded the plaintiffs' counsel a $14 million fee, representing one third of the common fund plus $2.2 million in litigation expenses. The remaining funds, roughly $18 million, would have been distributed to *cy pres* recipients that had not been specifically identified in the class notice.

In rejecting the settlement, the Third Circuit held that district judges must consider "the degree of direct benefit provided to the class," and that "[b]arring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." If the parties have not volunteered this information, "the court should affirmatively seek [it] out" and "withhold final approval . . . until the actual distribution of settlement funds can be estimated with reasonable accuracy."

If the district judge had learned that the proof of purchase requirements had proved too onerous, the Third Circuit believed, the judge would and should have ordered those requirements relaxed, rather than allowing nearly half the settlement fund to be diverted away from direct compensation to class members.

The Third Circuit also said that district judges may, but are not required to, award a smaller fee to plaintiffs' counsel for monies paid out *cy pres*, rather than to class members, in order to incentivize plaintiffs' counsel to cause more money to make it directly into class members' hands.

Although *Baby Products* concerned distribution of a non-reversionary common fund, objectors in future settlements could seek to apply the decision to claims-made settlements or common fund settlements where unclaimed funds revert to the defendants. The logic of *Baby Products* also could require judges to consider in other types of cases how much is actually being paid out to class members when considering the appropriate fee award. The decision therefore may impact how future plaintiffs' counsel negotiate class action settlements.

* * *

Please do not hesitate to contact us with any questions.

February 20, 2013