Section of Litigation Class Actions & Derivative Suits

Settlement Allows Claim Review Instead of Monetary Relief

By Michael Walker – November 11, 2011

In a series of recent opinions, the Eleventh Circuit upheld the settlement of a nationwide class action against a home warranty company in *Faught v. American Home Shield Corp*. *Faught* addresses various class-settlement issues, including the permissibility of non-monetary relief that provides for a re-review of denied claims by the defendant, the availability of multiple forms of attorney fees to class counsel, and injunctions against competing suits by opt-out class members.

Several months prior to the filing *Faught*, different counsel filed *Edleson v. American Home Shield of California, Inc.*, No. 37-2007-071725-CU-BTCTL, in the Superior Court of California, County of San Diego. In both cases, a putative nationwide class asserted claims against American Home Shield Corp. (AHS) or its subsidiary. AHS offers homeowners home warranty contracts that cover the repair or replacement of various home systems or appliances specified under the contracts. While the putative class in *Edleson* was more broadly defined, both putative classes challenged several of AHS's business practices, focusing primarily on the allegedly routine wrongful denial of claims.

The *Edleson* class was preliminarily approved in 2008. That proposed settlement gave the class members a right to submit or resubmit their claims to a "review desk" at AHS, but did not provide for any guaranteed payment to the class. An attorney fee to class counsel in the amount of $2.75 million was also preliminarily approved. Objections to the settlement were filed, including by class members who would later also object to the *Faught* settlement.

When the *Edleson* settlement received preliminary approval, the parties in *Faught* were negotiating a potential settlement, but the *Faught* court stayed that action while *Edleson* went through the approval process. In 2009, however, the California court declined to grant final approval to the *Edleson* settlement. The court's primary concern was that the class members would "get nothing more than a

right to submit or resubmit claims to a defendant that has allegedly not acted in good faith on prior occasions. . . . The entire settlement essentially asks plaintiffs to give up many viable and realistic rights in return for the hope that defendant will act in good faith."

After the rejection of the *Edleson* settlement, the parties in *Faught* reached a settlement that was preliminarily approved by the U.S. District Court for Northern District of Alabama in October of 2009. That settlement received final approval in April 2010. The terms of the *Faught* settlement, while similar in principle to the rejected *Edleson* settlement, included additional concessions to the class members. For example, a number of "litigation kickers" that incentivized AHS to err on the side of paying claims were included in the *Faught* settlement that were absent from *Edleson*, such as a provision that allowed for enhanced attorney fees for class members who rejected offers from AHS and then recovered more than the offered amount through litigation. The *Faught* class counsel's fee was $1.5 million, rather than $2.75 million as in *Edleson*; notably, however, the *Faught* class counsel would also receive 25 percent of the amounts recovered by the class members from the review desk. There were other additional requirements in the *Faught* settlement that sought to ensure the timeliness and quality of the review desk process.

Various objectors filed briefs opposing the *Faught* settlement, both after preliminary approval and on appeal to the Eleventh Circuit. Their primary objections were that the settlement was improper for the same reason that the *Edleson* settlement was rejected—the review desk did not provide sufficient relief—and that the *Faught* class counsel's fee was excessive. In addition, some objectors' counsel sought fees based on an argument that they had benefitted the class by defeating the less favorable *Edleson* settlement and obtaining the extra relief provided in *Faught*.

The district court rejected all of these arguments, and the Eleventh Circuit upheld the approval of the settlement, largely deferring to the district court's discretionary authority over class settlements. The appeals court found that the review desk procedure was acceptable, noting that the litigation kickers gave AHS incentive to fairly consider all claims submitted to the review desk and, along with other aspects of the settlement, rendered it substantially more favorable to the class than the *Edleson* settlement. While similar claim-review procedures have been upheld in other class-action settlements, the *Faught* settlement is notable in that it did not provide for independent and contemporaneous oversight of the review process, and the oversight "mechanism" will largely be in small claims court.

Both the district and the appeals court rejected the objectors' counsel's argument that they should be entitled to fees. The primary basis for that argument was that the objectors were largely responsible for the better result for the class in *Faught* due to their objections to *Edleson*, thus entitling them to a fee for benefitting the class. The district court found, *inter alia*, that the objections in *Edleson* post-dated the critical terms of the *Faught* settlement and concluded that no basis existed to find that the class received any benefit from the objectors; the appeals court affirmed these findings.

One set of objectors, which included the Edlesons, was represented by the former class counsel in *Edleson*, who opposed the settlement in part on the grounds that the *Faught* class counsel's fee was excessive. They argued that the *Faught* counsel's $1.5 million fee was earned through "little more than copying the terms of the *Edleson* settlement," the uncertainty over the value of the settlement created by the provision entitling class counsel to 25 percent of the review desk awards, and the combination of the $1.5 million fixed fee and the 25 percent provision exceeded the 25-percent-of-value benchmark amount that the Eleventh Circuit has held to be presumptively reasonable.

The district and circuit courts also rejected these arguments. The Eleventh Circuit acknowledged that the *Faught* settlement may have been aided by the work done by the Edelsons' counsel, but found that fact did not render the *Faught* class counsel's fee unreasonable. It also approved the uncertainties created by the rarely seen hybrid fee award by noting that arguments against it "ignore the district court's finding that the $1.5 million payment is designed to compensate the class counsel for the non-monetary benefits they achieved for the class—like company-wide policy changes and appliance and system replacements

and repairs, to which the 25% fee is not applied." Finally, the court cursorily approved of the district court's consideration of the additional factors implicated when the fee is greater than 25 percent of the measurable benefit to the class.

The Eleventh Circuit addressed one final noteworthy aspect in a separate opinion. The district court's preliminary approval of the settlement temporarily enjoined the class members from prosecuting "any Claim" addressed in the agreement. The Edlesons opted out and continued pursuing their complaint in California, and on AHS's motion, Judge Proctor specifically enjoined them from doing so while he considered the *Faught* settlement. The final judgment approving the settlement enjoined class members from continuing or otherwise proceeding with claims against AHS on the released claim. Thereafter, the Edlesons filed in California an amended complaint that, *inter alia*, sought injunctive relief against AHS, alleging that its actions presented a continuing threat to both them and the general public.

AHS then moved for and obtained a permanent injunction against the Edlesons' California lawsuit as pled. On appeal, however, the Eleventh Circuit found that the district court had abused its authority in issuing the injunction because it was superfluous—it held that the injunction against continuing claims by class members in the final judgment approving the settlement applied to the Edlesons. Because the Edlesons had opted out of the settlement, this opinion appears to hold that an injunction against competing suits runs against class members who have opted out, which in turn raises the issue of what rights are retained by those who opt out, and what types of claims they are entitled to pursue.

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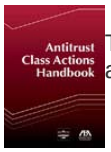

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