Comment: Equifax settlement set for further US court scrutiny

15 Apr 2021 | 20:12 GMT | **Comment**
By Dave Perera

Six objectors will get their day in US court to contest a settlement ending litigation against credit reporting agency Equifax. They disagree on legal issues. They disagree on strategy. Not all of them are attorneys. Among them is Ted Frank, a class action gadfly who by his count has participated in objections to eight dozen class action settlements and who accuses the district court judge of being a rubberstamp for class counsel. Still, he wants the world to know: He's not a serial objector despite the judge's criticisms.

Numerous US class action settlements have gained notoriety, but none more so recently than one involving Equifax, which for a brief moment seemed poised to pay $125 to each of the 147 million American adults who had their personally identifying information stolen from the Atlanta-based firm.

“Everyone: go get your check from Equifax!” tweeted Representative Alexandria Ocasio-Cortez, a New York Democrat with a large online following, shortly after a federal judge in July 2019 gave preliminary approval.

It didn’t work out that way, of course: there was no $125 — despite court-approved settlement language that seemed to authorize it.

Now, six objectors to the Equifax settlement have a shared 30 minutes on Tuesday to make their case before an appeals court panel for why the settlement should be tossed out.

The day could be a messy one. The objectors disagree on legal issues. They disagree on strategy. Not all of them are attorneys. One of them, a Topeka, Kansas, man named Shiyang Huang, wants the appellate panel to dismiss the entire lawsuit on the grounds the plaintiffs lacked standing.

Also among the objectors is Ted Frank, a class action gadfly who, by his count, has participated in objections to eight dozen class action settlements since founding in 2009 the Center for Class Action Fairness, now known as the Hamilton Lincoln Law Institute.

“I’m not going to comment on my co-objectors or my co-appellants,” Frank told MLex. “I do not have any control over them.”

More than 18 months of negotiations went into the settlement. Frank wants it torn up, the class certification reversed, the settlement vacated and the case remanded back to district court with a new judge. If the US Court of Appeals for the Eleventh Circuit doesn’t agree, he’s prepared to take his arguments to the Supreme Court, he said.

Frank said his primary motivation for objecting isn’t the illusory $125, although he acknowledged that had the checks gone out, his other quarrels with the outcome might have taken a back seat. Certainly the fact that so many Americans chose cash over credit monitoring — despite the latter’s settlement calculated retail value of $1,920 over 10 years — reveals how little value the settlement holds for class members, Frank argued in a court filing.

— Equifax settlement makes waves —

Public excitement over the Equifax settlement soured after settlement parties drew attention to the fine print. Cash compensation was “up to” $125, from a fund capped at $31 million, and earmarked for people who could prove they already had credit monitoring. The main consumer benefit was meant to be four years of free three-bureau credit monitoring plus another six years of free Equifax-only monitoring.

“Okay everyone UPDATE on Equifax: for most people the better deal is 10 years of free credit monitoring. There’s apparently a run on settlements so there’s anxiety people are going to get 16 cent checks. But if you choose 10 years of credit monitoring, Equifax *must* cover it,” Ocasio-Cortez tweeted six hours after her initial exhortation to make a run for the money.

The settlement also approved reimbursements for losses traceable to the data breach, compensation of up to $500 for time spent, and identity restoration services offered by Equifax competitor Experian. Plaintiff attorneys will get $77.5

million.

The January 2020 written order from US District Judge Thomas Thrash of the Northern District of Georgia finalizing the settlement made waves, too, albeit on a far smaller scale, after Thrash took time to criticize serial objectors, naming seven objectors he considered to have a history of challenging class action settlements against the best interests of the class. Frank was among them (see here).

Frank “is in the business of objecting to class settlements,” Thrash wrote disapprovingly.

Although he’s famous, at least among the subset of America that follows class action litigation, for filing objections, Frank doesn’t like being called a serial objector. He’s a "public interest objector," he tells courts. A voice in class action settlements for consumers getting a raw deal.

Courts define serial objectors as extortionists who hope their meritless, last minute objections to negotiated settlements result in a payoff, Frank said. “That’s clearly not us. We’ve never extorted anybody.”

Thrash’s designation clearly rankles Frank. How he got on Thrash’s written list of serial objectors is an issue Frank says he wants to take up with the appellate judges. To hear Frank tell it, class counsel may have effectively written Thrash’s 122-page opinion for him after the judge directed it to prepare a written order summarizing his oral ruling.

Class counsel didn’t file its draft opinion on the docket — Northern District of Georgia rules don’t require placing on the docket proposed orders prepared at the judge’s direction, class counsel stated in a subsequent court filing. During the final fairness oral hearing, class counsel, but not Thrash, fingered Frank as a serial objector, although Thrash did say that “for the reasons” stated by class counsel, “it's my judgment that most of the objections that were voiced here today did not take into consideration the best interest of the class itself.”

“We can draw the natural inference that what the court submitted was basically a rubber stamp, more or less, of the draft opinion submitted ex parte,” Frank said.

Thrash in May ordered class counsel’s draft filed to the docket, but reversed himself a week later after the Eleventh Circuit denied Frank’s similar motion. In a motion filed shortly after the circuit court judges ruled, class counsel accused Frank of seeking “a sideshow that would needlessly complicate, delay, and interfere with the final resolution of the appeal.”

One reason cited by Thrash’s opinion for Frank’s inclusion in the list of serial objectors is Frank’s principle legal argument against the settlement — namely, that it treats residents of all states equally: Inhabitants of states that permit statutory damage claims ought to have been treated as subclasses within the larger class, Frank contends. A single, nationwide settlement class deprived those with more valuable claims from representation.

The difficulty for Frank is that he's used the identical argument before in other courts, where it's been shot down. Frank’s Center for Class Action Fairness represented an objector to retailer Target’s data-breach class action settlement, putting forward the same assertion of intraclass conflict between residents of states with differing statutory damages statutes.

“Class actions nearly always involve class members with non-identical damages,” wrote the District of Minnesota judge in his order to renew class certification (see here). On appeal, the Eighth Circuit said the objector lacked standing because he hailed from Texas, a state with no statutory cause of action.

In the Equifax opinion, Thrash was as dismissive as his Minnesota counterpart, writing that “variations in state law will not predominate over the common questions” and that “taken as a whole, the settlement represents a result that is at the high end of the range of what could be achieved through continued litigation.”

“Well, the Target data breach litigation district court judge got it wrong and applied the wrong legal standards, and so did the district court here,” Frank said.

Standing won’t be a problem this time, he vowed — the objectors are from Utah and Washington, DC — jurisdictions that permit statutory damages. They are, respectively, David Watkins, the brother of Hamilton Lincoln Law Institute’s former general counsel, and Frank himself.

The appeal is set for oral argument on April 20.

Please email editors@mlex.com to contact the editorial staff regarding this story, or to submit the names of lawyers and

advisers.

Related Portfolio(s):
Data Privacy & Security - Equifax - Litigation over 2017 data breach (US)

Areas of Interest: Data Privacy & Security

Industries: Communication Services, Consumer Finance, Diversified Financials, Financials, Information Technology

Geographies: North America, United States