KULLAR v FOOT LOCKER RETAIL, INC.
A NEW STANDARD FOR CLASS ACTION SETTLEMENT APPROVAL?

by Scott Edward Cole

So, you have made it to mediation against a financially-strapped company, curious to see if your wage and hour class action can be resolved before the tumultuous economy catches up with the defendant and dashes any hope of recovery. The catch, however, is that the defendant wants none of its sensitive financial information in the public record should you settle and be required to submit the deal for judicial approval. Given the mediation privilege, you know that you cannot unilaterally open up such information to public scrutiny. And you also know that asking the trial judge to simply trust that you saw enough detail to support the reasonableness of the deal is not likely to work, given the trial court's duty to independently assess the settlement. For practitioners considering the issue of how much evidence is enough to support court approval of a class action settlement, the First District's decision in *Kullar v Foot Locker Retail, Inc.* (2008) 168 CA4th 116, [summarized in **CELA Bulletin**, Nov 08, p.6], is a must-read.

The opportunity of an early mediation in *Kullar* presented questions all too familiar to class action practitioners: Was the evidentiary record sufficient to value the class claims intelligently? If mediation were to be delayed, would the company still be financially capable of funding the settlement? Could the defendant be persuaded to reveal the sensitive information that might secure settlement approval, but that would expose the defendant if approval were to be denied? Despite these uncertainties, the reality is that most practitioners are open to early mediation because, in the end, getting the client compensated is usually the paramount goal.

The claims in *Kullar* were not unusual: on behalf of a class of Foot Locker non-exempt workers, the plaintiff claimed that the company violated state wage and hour laws by failing to reimburse them for the cost of uniforms, and by denying them meal and rest breaks. The case was filed in August 2005, and the parties thereafter engaged in standard discovery and law and motion work. When the parties agreed in August 2006 to attend mediation, formal discovery was stayed, but an informal informational exchange continued, including an exchange of various data points. It was these data points that the defendant considered highly proprietary and subject to the mediation privilege. (Cal Evid Code § 1119).

After a full day mediation in October 2006, before a highly respected mediator, the parties reached an accord and signed a document setting forth the basic settlement terms. Three months later, a formal settlement agreement was finalized, executed, and submitted to the court for preliminary approval. In response to modifications to the agreement and related notices, as well as the filing of objections by three class members, (all represented by one law firm), the preliminary approval process continued for several more months. At the end of the process, and following a successful notice program, the objections were rejected by the trial judge and the settlement was granted final approval.

The *Kullar* appeal by the three objectors followed, arguing that the mediation privilege should not apply when a settlement is submitted for trial court approval, and that the evidentiary record was insufficient for the trial judge to adequately assess the reasonableness of the agreement. In an opinion filed in October 2008, the First District Court of Appeal, Division Three, while expressly stating that the settlement may ultimately be found entirely reasonable, reversed the trial court's order granting final settlement approval. In its short opinion, it remanded with instructions that the trial judge make further inquiry into the factual underpinnings so that a more informed decision could be made. Specifically, the appellate panel held: (1) the public record must reflect information about the "nature and magnitude" of the claims; (2) the mediation privilege did not trump the court's duty to receive sufficient information to make an informed decision about the fairness and reasonableness of the proposed settlement; and (3) if the record is sufficient to explain the manner in which the factual and legal issues have been evaluated, very little in the way of additional discovery may be justified.

Equally important as these holdings is what the Court of Appeal did *not* say. The *Kullar* opinion does not say that early settlements are disfavored. It also does not limit the parties regarding either the volume or kind of information needed for class settlement approval. Finally, in this writer's opinion, *Kullar* did not forge a new standard for judicial approval: how to interpret the admonition that the trial court must obtain information about the "nature and magnitude of the claims being settled" is still up for vigorous debate. It's an open question whether the admonition means that counsel must forecast specific class claim values far in advance of trial, (or even far in advance of a class certification ruling), or must merely provide the kind of data points that were withheld in *Kullar*.

If any one piece of practical advice can be gleaned from this decision, it is that defendants should be as forthcoming as possible with information supporting the particular "discount" involved in a settlement, (e.g., a bleak financial outlook), and make a place for that kind of information in the settlement record. Given increased judicial scrutiny of class action settlements, getting as much of this information before the trial judge as possible increases the chances of resolving matters already ripe for settlement.

Scott Cole & Associates *(Oakland) represented plaintiff Jatinda Kullar and the plaintiff class in the litigation that was the subject of the First District's decision in* Kullar v Foot Locker Retail, Inc*. The firm is dedicated to furthering workers' rights in employment class action litigation, particularly cases involving claims for overtime pay, meal and rest breaks, and expense reimbursement. Scott, a CELA member, can be reached at: scole@scalaw.com, or (510) 891-9800.*