

# Illinois Appellate Court Vacates Refiled and Repackaged FACTA Class Settlement.

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Henry Lee filed a class action lawsuit against the Defendant doing business as The Body Shop for alleged “willful violations of the federal Fair and Accurate Credit Transactions Act of 2003.” He originally filed suit in federal court in New York, but after objections were raised to the federal court settlement and the federal judge directed the plaintiff to “show cause why the Federal Court Action should not be dismissed for lack of standing,” Lee voluntarily dismissed. The next day Lee refiled in state court in St. Clair County, Illinois. The day after that, Plaintiff filed “Plaintiff’s Unopposed Motion For Preliminary Approval of Class Action Settlement Agreement” under the Illinois Class Action statute. However, no new notice was sent to anyone except for the federal court objectors. Preliminary approval was granted shortly thereafter, but a lengthy objection was filed. At the final approval hearing, the trial court judge listened to statements from plaintiff, counsel for defendant, and counsel for the objector before granting final approval. The objector then pursued an appeal.

The opinion is long, but the import of the ruling is fairly straightforward. Even though class counsel had litigated the matter in federal court for many months and had previously sought federal court approval, class counsel failed to provide most of that record to the Illinois trial court. Although the Illinois class period was longer than the federal court class period, no notice was given to those additional class members. In addition, the appellate court found that it was impossible to determine from the record whether the plaintiff could adequately represent the settlement class as well as a subclass. Further, the appellate court was troubled by whether class counsel had a conflict representing both the primary settlement class and the subclass. The court was also concerned by the amount of the incentive award and the clear sailing provision. The court was not concerned about the standing issue raised, but the appellate court was greatly concerned with the absence of an adequate record before either the trial court or the appellate court.

In its conclusion, the appellate court found that class counsel failed to offer the court a notice plan that protected the due process rights of the Illinois class. Under the circumstances here, due process required notice instructing the settlement class members that the Federal Court Action had been dismissed and a new action had been filed in state court. Accordingly, the circuit court did not acquire personal jurisdiction over the settlement class members, including those within the Illinois Class Period.

For that reason alone, the final approval order was vacated and the matter remanded with very specific instructions from the appellate court directing “the parties and the circuit court [to] begin anew.”

The appellate court seemed to be concerned that the parties had decided they could avoid the federal court’s strict standards and dash to a state court to get their class settlement approved. The appellate court made it clear that the trial court was obligated to protect the interests of the absent class members no matter what class counsel and defense counsel represented to the trial court. Although settlements are favored, they will not be approved at the expense of absent class members who may be unwittingly giving up their rights. Although the FACTA class settlement in the *Lee* case may have been completely fair and reasonable, that was impossible to determine from the record presented to the appellate court which required much more.

Case Citation: Henry Lee V. Buth-Na-Bodhaige, Inc., 2019 IL App (5th) 180033