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CLASS ACTION BLOG

Objecting Class Member Had No Right to Opt Out of the Trump University Class at the Settlement Stage

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Summary: Three class actions were filed against Donald J. Trump and Trump University, one in state court in New York and two in the Southern District of California. The cases were settled for $25 million shortly after Mr. Trump was elected President of the United States. Sherri Simpson was the lone objector who sought to opt out of the class at the settlement stage after failing to opt out when the class was originally certified. She did not "dispute that she received, at the class certification stage, a court approved notice of her right to exclude herself from the class and chose not to do so by the deadline. She argues, however, that the class notice promised her a second opportunity to opt out of the settlement stage, or alternatively, that due process requires this second chance." The 9th Circuit rejected both arguments.

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Trump University was sued in multiple class action suits which were thereafter settled. The suits alleged misrepresentations made by Trump University and/or those working on its behalf. The district court certified the cases as class actions and the Court approved class certification notice to the class members. That notice plan gave prospective class members the choice of remaining in the class or opting out of the class by November 16, 2015. Ten people opted out of the class by that deadline, but Simpson did not. In fact, she "was frequently in contact with class counsel" before and after that date.

Part of the settlement required class members wanting settlement monies to submit a claim form, something Simpson did. A month later, then represented by counsel, she filed an objection to the settlement "arguing that she had a due process right to opt out of the settlement and alternatively requesting that the district court allow her to opt out pursuant to its discretionary authority under Rule 23(e)(4)." Even later, "in a supplemental declaration in response to class counsel's opposition to her objection, Simpson argued for the first time that the long form class action notice gave her the impression that she would have a second opportunity to opt out of the class if the case settled."

After finding that Simpson had standing to object and to pursue her appeal, the 9th Circuit held that the language of the initial long form class notice did not "promise her a second opt out right at the settlement stage." The Court reasoned in part that such a right could have been given as part of the settlement negotiations, but that did not happen. The long form notice had language which, if read in isolation, could have been confusing and could have been understood to provide a second opt out opportunity. However, when read in totality, it was clear that opt out notices had to be submitted by November 16, 2015, which it expressly stated in multiple places. The 9th Circuit said that the "most reasonable reading of the notice suggests that class members had a single opt out opportunity that expired if not exercised by the deadline." Furthermore, the Court pointed to language which made it clear that the decision was "whether to stay in the Classes or ask to be excluded before the trial," and that class members "ha[d] to decide this [before the stated deadline]." The 9th Circuit declared that the correct inquiry "is what an average class member would have understood the notice to guarantee, and the actions of the class members in this case bolster our conclusion that a reasonable reading of the notice precludes Simpson's interpretation. Among over 8,000 class members, Simpson was the only one advancing this understanding of the notice. Indeed, Simpson did not even raise this argument until the final settlement approval hearing." Although the notice could have been clearer, the 9th Circuit held "that the class notice language did not provide a second, settlement-stage opportunity to opt out of the class."

The 9th Circuit also rejected Simpson's argument that due process required the district court to give her a second opt out right at the settlement stage. Relying on its 1982 ruling in *Officers for Justice v. Civil Service Commission of San Francisco*, 688 F.2d 615 (9th Cir. 1982), the Court noted that it had previously rejected the argument "that due process guaranteed… a second opt out opportunity at the settlement stage" to allow the class member to litigate separately. In addition, the 9th Circuit rejected Simpson's argument that the United States Supreme Court had overruled that holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Rather, both *Shutts* and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) ruled that due process requires a class member to be given "a single opportunity to opt out," not a second opportunity to opt out at the settlement stage. Having remained in the class at the class certification stage, Simpson had no second opportunity required either by due process or granted by a fair reading of the long form class notice. Accordingly, the district court's ruling was affirmed.