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Implications Of DTD Enterprises Inc. V. Wells

Law360, New York (October 26, 2009) -- In *DTD Enterprises Inc. v. Wells*, No. 08-1407, the U.S. Supreme Court recently declined to review a New Jersey trial court's order that, without considering the merits of the underlying claims, directed a class action defendant to pay the entire cost of notice to a class simply because the defendant could afford to pay while the plaintiff could not.

In seeking certiorari, the defendant argued that imposing such costs on it violated the Constitution's Due Process Clause. Justice Kennedy authored a separate statement — joined by Chief Justice Roberts and Justice Sotomayor — observing that “the petition for certiorari ... implicate[s] issues of constitutional significance.”

Although this statement lacks precedential value, it suggests that at least three justices are sympathetic to a class action defendant's due process objection to having to bear the costs of the class notice.

Background

DTD Enterprises Inc. (DTD), a commercial dating-referral service, filed a debt-collection action against a customer in New Jersey state court; the customer responded by filing class action counterclaims against DTD.

The state court certified a class and ordered DTD to bear the entire cost of notice to the class. The state court's sole consideration in imposing this cost on DTD seems to have been the relative wealth of the parties — DTD could afford to pay and the customer could not.

DTD objected, arguing, among other things, that it violated the Due Process Clause for the court to force it to pay for class notice without examining the merits of the underlying litigation, given the risk that, if DTD ultimately prevailed, it would never be able to recover those costs from the plaintiff.

The trial court rejected DTD's objections and New Jersey's intermediate appellate court and supreme court each denied DTD leave to appeal.

DTD then petitioned the U.S. Supreme Court for certiorari, raising its federal constitutional due process claims. Although the court denied the petition without dissent, Justice Kennedy issued a rare statement concerning the denial of certiorari, joined by Chief Justice Roberts and Justice Sotomayor.

In that statement, the three justices recognized that DTD's petition involved a significant due process question.

As Justice Kennedy pointed out, when a plaintiff lacks the ability to pay costs relating to class certification, a defendant who has to cover the costs up front "has little hope of recovering its expenditures later if the suit proves meritless" — notwithstanding the usual rule that the prevailing party is entitled to recover its costs — and thus is effectively deprived of a property interest protected by the Due Process Clause.

Accordingly, the statement suggests that, before a state court may impose such costs, "[t]he Due Process Clause requires a 'hearing appropriate to the nature of the case.'"

Justice Kennedy added that "there is considerable force to the argument that a hearing in which the trial court does not consider the underlying merits of the class action suit is not consistent with due process because it is not sufficient, or appropriate, to protect the property interest at stake."

The three justices nevertheless agreed that, given the particular procedural posture of the case as it was presented to the court, it was "best to deny the petition."

Analysis

Despite the fact that the court denied review in DTD Enterprises, Justice Kennedy's statement is significant because it suggests that at least three justices (including the court's newest member, Justice Sotomayor) are sympathetic to the argument that it would violate due process to require a defendant in a class action lawsuit to pay all class notice costs simply because the defendant is the wealthier party.

As DTD pointed out in its petition, New Jersey is not the only state that vests trial judges with the discretion to impose the costs of notice on defendants without considering the underlying merits.

Justice Kennedy's statement strongly suggests that, in the context of an appropriate vehicle, this issue will garner the necessary four votes for a grant of certiorari.

In the meantime, defendants in class action lawsuits should strongly consider making the argument that it violates their federal constitutional right to due process for a state

court to impose all — or perhaps even most — of the costs of class notice on them without an inquiry into the relative merits of the claims at issue.

Given the apparent interest of at least three justices, it makes sense to raise this federal constitutional issue in class certification proceedings before trial courts in order to preserve the issue for appeal and possible U.S. Supreme Court review.

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