

LITIGATION FILES

'Divided Loyalty' Causes Neutral to Deny Class Action

By Eron Ben-Yehuda

A recent arbitrator's decision denied certification in a proposed class action because the representative plaintiff was the father of a partner in the Santa Monica firm that filed the suit.

The May 12 award issued by Mary S. Jones of the American Arbitration Association broke legal ground, according to Los Angeles defense attorney C. Robert Boldt.

Although there are well-known cases that have disqualified class representatives because they have too close a relationship with class counsel, this decision goes one step further, Boldt of Kirkland & Ellis says.

Boldt says what's unusual is that Jones found the relationship improper even though the son, Mark Milstein of Verboon, Milstein & Peter, played no active role in the case.

Adding to the ruling's significance, this is the first class certification opinion issued by the American Arbitration Association, Boldt says.

By coming out on the side of the defense, the decision may sway more in-house lawyers to designate the American Arbitration Association in arbitration agreements with consumers, he says.

"I've gotten a ton of calls on this," Boldt says.

Boldt worked on the case with firm associate Ariane E. Decker, representing Protection One Alarm Services Inc.

The proposed class action claimed Protection One violated the state's unfair competition law and breached its contract with customers by allegedly requiring them to pay for alarm services at locations they no longer owned or resided in because the one-year term of the agreement had yet to expire.

The proposed class was limited largely to Californians who had entered into a service agreement revised in 1994 or later.

Lead plaintiffs' counsel Wayne S. Kreger calls Jones' decision a "bad development." But it won't stop his firm from pursuing litigation based on other Protection One consumer contracts, he says.

"We intend to continue to prosecute a number of plaintiffs' claims against Protection One," Kreger says. "We're trying to figure out the best way to protect the universe of people defrauded."

Kreger says he's also speaking on behalf of his law partner Mark Milstein, whose father Joseph Milstein represented the class.



Photo by Robert Levins

Kirkland & Ellis attorneys Ariane E. Decker, left, and Robert Boldt were successful in defeating class certification on behalf of their client, Protection One Alarm Services Inc.

In denying certification, Jones found that neither Joseph Milstein nor the Verboon firm could adequately represent the interests of the proposed class.

"Clearly, the fact that a class representative is the father of a named partner in the firm seeking to serve as class counsel creates an appearance of divided loyalty," Jones wrote.

Boldt argued that Joseph Milstein let his son's firm prosecute the class action with "unfettered discretion." As a result, the law office became the "de facto" class representative, he contended.

Jones concluded that the evidence shows that Joseph Milstein, other than reviewing the complaint and talking briefly with his son, had done "virtually nothing" in the case.

Jones also faulted Kreger and his firm associate and co-counsel Bevin E. Allen for not showing due regard for the interests of the other class members.

Kreger and Allen refused to acknowledge the importance of the relationship between class representative and class counsel, Jones wrote. After the suit commenced, they allegedly waited

nearly two years to communicate with Joseph Milstein. Not until the day he was deposed did he speak to them, Jones concluded.

Kreger disputes those findings. He says Joseph Milstein retained the firm as counsel, reviewed documents, consulted on discovery responses and appeared for a deposition.

"He did everything in his power and ability as an 80-year-old man to protect the class," Kreger says.

Besides, Kreger adds, "This is not a complicated case. The facts are clear."

So the firm did not need to have meetings or strategy sessions with the class representative, he says.

Boldt says this case adds to the public perception that class actions mostly benefit the plaintiffs' attorneys, who end up with a large portion in fees.

But Kreger calls that comment "gamesmanship."

"I'm sure he didn't work for free," Kreger says. "I'm sure he was handsomely compensated."