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SEVENTH CIRCUIT COURT OF APPEALS REJECTS "WORTHLESS" SUBWAY CLASS ACTION SETTLEMENT

On August 25, 2017, the Seventh Circuit Court of Appeals rejected a settlement of a class action lawsuit that alleged Subway's "footlong" sandwiches failed to measure up. *In re Subway Footlong Sandwich Marketing and Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017). The settlement offered "zero benefits for the class" and only served to enrich class counsel, according to the Court of Appeals. Thus, the class action settlement was rejected and the case was remanded to the district court.

The Subway footlong litigation was ill-advised from the start. It was filed after Subway customers posted pictures on social media allegedly showing that some "footlong" sandwiches measured closer to 11 inches. Several class action law firms jumped on board and quickly filed lawsuits alleging violations of state consumer-protection statutes. But the facts didn't support the claims. Subway used the same size "raw dough sticks" at all its stores, and that raw dough always weighed exactly the same. Although baking variations caused some of the raw dough sticks to bake up a bit short of 12 inches, those customers who bought slightly smaller sandwiches received no less bread, by volume, than any other. And, the quantity of meat and cheese was the same on each sandwich. Customers also could add a wide range of other toppings to their sandwiches. So, in the end, there was no evidence that any customer was short-changed any food.

The settlement of the Subway lawsuit, which was approved by the district court, required Subway to take certain steps over a period of four years to reduce the likelihood that there would be "short" footlong sandwiches in the future. Although the district court and the parties found value in Subway taking these additional steps, the Seventh Circuit Court of Appeals disagreed. Specifically, the Court of Appeals focused on language in the parties' settlement agreement stating that, even after these steps were taken, it was still possible that Subway's footlong sandwiches would be slightly shorter than 12 inches because of baking variations. In the Court of Appeals' view, the settlement accomplished nothing that would benefit the consumers who made up the class.

Upon concluding that the Subway class action settlement offered "zero benefits" to the class, the Court of Appeals vacated the district court's order approving the settlement. The case

was recently remanded to the district court, where it currently awaits further action.

For more information about the benefits and drawbacks of class action litigation generally, you may contact Doug Dehler at 414-276-5000 or doug.dehler@wilaw.com.