

"Clear Sailing" Agreement Is Approved By Court In Consolidated Consumer Class Action Case

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In [Consolidated Consumer Privacy Cases, California Court of Appeal – 1st District, 2009 DJDAR 9765](#) (June 30, 2009), the First Appellate District approved what is sometimes referred to as the “clear sailing” doctrine concerning an attorney fee award. The award was sought under the common fund doctrine and under the “private attorney general” provisions of [CCP § 1021.5](#).

The [Utility Consumers’ Action Network](#) (“Utility Consumers”) sued [Bank of America](#) N.A. (hereinafter the “Bank”) and related entities for unfair competition, false advertising, invasion of privacy and related claims. Thereafter, the case was coordinated with similar actions filed against the Bank. In April of 2003, a consolidated class action complaint was filed against the Bank pursuant to court order. That complaint alleged that the Bank disclosed confidential information to unauthorized third parties for a fee. The parties reached a comprehensive settlement agreement in 2007, which provided that class counsel would seek court approval for payment of not more than \$4 million in attorney fees from the Bank.

The Bank agreed not to oppose such an application by class counsel, so long as the fee award was capped at \$4 million or below. The Bank did reserve the right to seek to withdraw from the agreement if the court awarded a higher amount. The arrangement not to oppose a set sum amount of attorney fees is often referred to as a “clear sailing” agreement. After approving the settlement, the trial court awarded almost \$3 million to class counsel plus expenses. Numerous parties then filed an appeal, arguing that the trial court erred in approving the amount of fees to class counsel and specifically the procedural vehicle referred to as the “clear sailing” agreement.

The court of appeal affirmed. The court noted, that under the record before it, there were no terms contained in the agreement that were inappropriate. The court specifically noted that it could find no federal or California authority which condemned an agreement by the defendant to pay reasonable attorney fees as awarded by the court, up to a certain amount. The court noted that the objectors’ claims that such a payment scheme constituted a breach of fiduciary responsibility by affording class counsel on incentive to prioritize their fee claim, over the class’s recovery was not meritorious. The court even recognized that the [Federal Manual for Complex Litigation](#) acknowledged and implicitly approved of such an arrangement.

Clear sailing agreements are a useful tool in resolving complex cases and take some of the uncertainty out of the amount and ultimate resolution of fee awards.