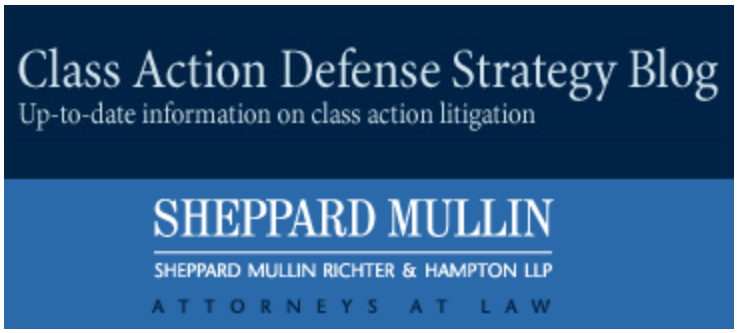

Class Action Defense Strategy Blog

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Ninth Circuit Holds that District Courts May Reject, But May Not Select, Lead Plaintiffs' Counsel in Class Actions Brought Under the Private Securities Litigation Reform Act

By *John Stigi* and *Christina Costley*

In *In re Cohen*, No. 09-70378, 2009 WL 3681701 (9th Cir. Nov. 5, 2009), the United States Court of Appeals for the Ninth Circuit reversed an order by the United States District Court for the Northern District of California that rejected co-lead plaintiff's selection of counsel and instead appointed a firm selected by the district court. Calling the district court's selection of counsel "clearly erroneous," the Ninth Circuit took the unusual step of issuing a writ of mandamus vacating the district court's appointment of counsel and holding that, under the plain language of the Private Securities Litigation Reform Act of 1995 ("Reform Act"), the district court has the power to reject, but not to select, lead counsel in a securities fraud class action.

Cohen arose out of allegations by a putative class of investors that the defendant, NVIDIA Corporation, fraudulently concealed the use of flawed materials and processes in producing certain products. Several investors filed suits based upon these alleged omissions and the district court consolidated the complaints into a single putative securities fraud class action. The district court then appointed two of the investors as co-lead plaintiffs. One of these investors, Robert Cohen, already had selected Kahn Gauthier Swick, LLP ("KGS") to represent him in the litigation. The district court declined to appoint KGS as co-lead counsel for the class and instead appointed as co-lead counsel Girard Gibbs LLP, a firm initially selected by another investor who also had filed suit but who was not appointed as co-lead plaintiff. Cohen requested leave to file a motion for reconsideration of the court's order appointing lead plaintiff's counsel or, in the alternative, an application for an order certifying interlocutory appeal. The district court denied Cohen's motions. Cohen then filed a petition for writ of mandamus with the Ninth Circuit.

The Ninth Circuit granted Cohen's petition and issued a writ of mandamus vacating the lower court's decision. The Court cautioned that "the remedy of mandamus is a drastic one and only

exceptional circumstances amounting to a judicial usurpation of power will justify invocation of this extraordinary remedy" (internal citations omitted). The Ninth Circuit then set forth a five-factor test used to determine whether mandamus is appropriate, though it noted that the primary question for the appellate court to resolve is whether the district court's opinion constituted "clear error." In this instance, the Court found, it did. The Ninth Circuit noted that the Reform Act specifically refers to lead plaintiff as the actor that "selects and retains class counsel" (internal citations omitted). Based upon this, the Ninth Circuit concluded, the power to select class counsel "plainly belongs to the lead plaintiff." In so holding, the Ninth Circuit declined to give an expansive reading of the authority granted to the district court by the Reform Act to *approve* lead counsel. While the Ninth Circuit recognized the district court's discretion to approve lead counsel, and consistent with it, remanded the case to the district court to approve KGS as lead counsel for the putative class in that case, it nonetheless emphasized that this discretion "in no way suggests that a district court shares in the lead plaintiff's authority to select lead counsel or that disapproval of a lead plaintiff's choice divests the lead plaintiff of this authority." The Court further specified that a district court's authority to reject counsel for the class should be used carefully, only in case's where counsel selected by the lead plaintiff plainly is inadequate. The Ninth Circuit's decision follows that of the Third Circuit in *In re Cendant Corp. Securities Litigation*, 264 F.3d 201 (3d Cir. 2001), which holds that the Reform Act provides "the power to 'select and retain' lead counsel belongs . . . to the lead plaintiff."

The Ninth Circuit further observed, in a footnote, that the practice of appointing "co-lead plaintiffs" to represent a putative class of investors bringing suit under the Reform Act also may constitute error. While the Court did not reach this issue in *Cohen* because the parties did not raise it, the Court explained that the plain language of the Reform Act, which refers to "lead plaintiff" in the singular, suggests that "the district court should appoint only one lead plaintiff, whether an individual or a group."

The Court's opinion in *Cohen* serves as a reminder that, when bringing suit for securities fraud, the Ninth Circuit will strictly enforce the plain language of the Reform Act and will not tolerate deviation from, or expansion of, the Act's plain language.