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Writ likely unnecessary to review order rejecting ‘no poach’ deal

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A federal district judge’s recent ruling rejecting a proposed class action settlement involving several well-known technology companies has garnered a good deal of media attention. Much of that attention has concerned how a judge could conclude that a settlement totaling almost a third of a billion dollars could be unreasonable. The defendant companies have petitioned for a writ of mandamus challenging the ruling, and the 9th U.S. Circuit Court of Appeals has now called for a response. The high-profile nature of this dispute is intriguing. But what has caught our attention is a fundamental point of writ procedure - the defendants’ assertion that the order rejecting the settlement will never be reviewable on appeal.

The plaintiffs in *In re Adobe Systems Inc.*, 11-2509 (N.D. Cal.), are technical workers who sued their employers, prominent Silicon Valley companies, for entering into illegal agreements not to “cold call” each other’s employees. After U.S. District Judge Lucy Koh

certified a class, defendants Lucasfilm, Pixar and Intuit entered into court-approved settlements.

Following lengthy negotiations, the plaintiffs later executed a separate settlement agreement with the remaining defendants - Adobe, Apple, Google and Intel - for a payment of $324.5 million to class members. Koh rejected that proposed settlement as unreasonable, finding that class members would receive proportionally less than they received in the previous settlement with co-defendants. She concluded the remaining defendants would need to pay an additional $55.5 million - a total of $380 million - for the settlement to be reasonable. The defendants have petitioned the 9th Circuit for a writ of mandamus, seeking to overturn the order and obtain settlement approval.

Federal appellate courts may issue writs of mandamus to review lower court rulings under the All Writs Act, 28 U.S.C. Section 1651. A writ is not supposed to be a substitute for an appeal - a writ "is an 'extraordinary' remedy limited to 'extraordinary' causes." *Burlington N. & Santa Fe Ry. v. U.S. Dist. Court*, 408 F.3d 1142, 1146 (9th Cir. 2005). The 9th Circuit "will only issue the writ for usurpation of judicial power or a clear abuse of discretion." *Cordoza v. Pac. States Steel Corp.*, 320 F.3d 989, 998 (9th Cir. 2003).

The defendants' petition argues that the district court erred "by creating an unprecedented and rigid test for preliminary settlement approval in class actions." Pet. for Writ of Mandamus at 1, *Adobe Sys. Inc. v. U.S. Dist. Ct.*, 14-72745 (9th Cir. Sept. 4, 2014). They ask for the extraordinary remedy of mandamus review because, they claim, there will never be an opportunity to review the district court's order denying preliminary approval of a settlement. *Id.* at 8.

The defendants make this claim because the unavailability of later appellate review is essentially a prerequisite to mandamus review. The 9th Circuit generally will not consider granting relief when a petitioner has "other adequate means, such as a direct appeal, to attain the relief he or she desires." *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011). While they correctly point out that Koh's order refusing to approve the settlement is not itself appealable, e.g., *Utah by and through Dep't of Health v. Kennecott Corp.*, 14 F.3d 1489, 1492-96 (10th Cir. 1994), that is not the end of the analysis. Most interlocutory orders are not appealable, yet they are unsuited to writ review because they can be reviewed on appeal from a final judgment. Mandamus is reserved for petitioners who can show they "will be damaged or prejudiced in a way not correctable on appeal." *Van Dusen*, 654 F.3d at 841.

The defendants' argument that the order rejecting the proposed settlement is unreviewable on appeal bears close scrutiny. Nothing in the order precludes the parties from continuing their litigation, and doing so would eventually culminate in a dispositive motion or jury verdict. A final judgment would then be entered, and an appeal could be taken from that judgment. An appeal from the judgment would open the door to review of any and all interlocutory orders entered during the litigation - including the order rejecting the proposed settlement. Whichever party fared worse under the judgment than in the proposed settlement would have ample incentive to appeal seeking to reverse the order that is now the subject of the writ petition.

There are no authorities, it seems, limiting courts' power to reinstate a proposed settlement, and such limitations would not be sensible. If courts are authorized to approve a settlement now, they ought to have comparable authority to approve it later. (Whether later approval is a good idea, or a proper exercise of discretion, is of course a different matter.) For these reasons, the order should be reviewable on appeal from any final judgment. The 9th Circuit apparently has not confronted this procedural issue before, but Adobe's petition provides a unique opportunity to do so. Indeed, while it is impossible to know why the 9th Circuit called for a response to the writ petition, it is possible that the court intends to clarify whether Koh's order is reviewable in a later appeal.

A decision from the 11th Circuit, *In re Smith*, 926 F.2d 1027 (11th Cir. 1991), provides a useful contrast showing when mandamus is available because later appellate review is not. *Smith* granted writ relief to petitioners challenging a district court's order refusing to approve a settlement - the same relief sought by Adobe and its cohorts. But the 11th Circuit concluded there was "no alternative but mandamus to remedy the trial court's error" because "[t]he trial judge has effectively frozen the litigation and thwarted the possibility of an appealable final order." *Id.* at 1030. The 11th Circuit relied on authorities like *In re Temple*, 851 F.2d 1269, 1271 (11th Cir. 1988) where a district court had imposed a sweeping stay of litigation, and *In re Sharon Steel Corp.*, 918 F.2d 434, 436-37 (3d Cir. 1990), where a procedural rule barred appellate review until the district court ruled on a particular motion, and writ relief was granted to compel a ruling on that motion. Situations of this type demonstrate that mandamus may be appropriate to review orders rejecting proposed settlements when those orders are coupled with rulings (or judicial inaction) that prevent the litigation from continuing and culminating in a final judgment.

In the *Adobe* case, unlike *Smith*, Koh has not stayed the action or imposed other barriers to completing the litigation and entering an appealable final judgment. It should therefore be presumed that the *Adobe* litigation can proceed toward final judgment and appeal, at which point the order disapproving the settlement would be reviewable. And for that reason, the assertion in the defendants' writ petition that there can never be appellate review of an order rejecting a proposed settlement is questionable. Hopefully the 9th Circuit merits panel takes up this interesting issue and addresses it.

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