

## CLASSLESS ACTION?

Attorney Linda Dardarian was surprised to find her class action against Countrywide Home Loans undercut by another plaintiff firm's bargain-basement settlement attempt.

SHELLEY EADES



# REVERSE AUCTIONS

## HAVE NO CLASS

*Lawyers square off with firms trying to undercut settlements*

**By Justin Scheck**

RECORDER STAFF WRITER

Linda Dardarian expected an aggressive fight in her class action against Countrywide Home Loans — but she didn't think it would be against another plaintiff lawyer trying to settle her case for half its worth.

That was the battle she faced last year, when the law firm led by prominent attorney David Boies tried to settle a Los Angeles employment suit against Countrywide out from under her.

"I was furious," said Dardarian, a partner at Goldstein, Demchak, Baller, Borgen & Dardarian in Oakland. "My feeling was that they had used the other case as a way to stop the court in Los Angeles and interfere with my

ability to represent my clients."

Dardarian experienced a rarity in employment cases, but it's common enough in the class action bar that there's a name for it: the reverse auction. In big cases, defendants facing multiple suits can pit plaintiff firms against each other in hopes of getting the cheapest — and most comprehensive — settlement.

"When there are overlapping claims, the defendant can go and shop the deal for the lowest price," said Samuel Issacharoff, a Columbia Law School professor who helped Dardarian fend off the Boies firm.

One defense attorney said there's an advantage to having multiple settlements on the table. "You obviously are trying to get the broadest relief possible for the cheapest amount," said Dominic Surprenant, a partner with

Daniel Girard, a partner with Girard Gibbs & DeBartolomeo in San Francisco, knows all about that. He's spent the past two years in a game of legal whack-a-mole, flying to courts in Florida, Illinois and Texas to beat back the settlement offers that tend to pop up when he has an expensive case headed to trial.

"It's just amazing because of the brazenness of it," he said.

Stopping a reverse auction generally requires convincing a judge to rule that a proposed settlement is unfair. But this doesn't always work, and plaintiff lawyers are often forced to take other measures — in and out of court — to prevent another firm from settling their claims.

Ethical gray areas in class action law have allowed reverse auctions to become a trend, said Joseph McMonigle, an ethics expert and partner at Long & Levit in San Francisco.

He said that competing filings can allow defendants to pick the plaintiff with the weakest case. With weaker opposition, he said, defense lawyers have more leverage to reach a cheap settlement.

There is the danger that a lawyer in that position might be tempted to cut a worse deal for his clients just to make sure he gets paid. Since there are few clear rules on the duty a plaintiff lawyer has to a prospective class that hasn't been certified, there's some ethical wiggle room. "It certainly isn't something that makes the legal profession shine," McMonigle said.

As bad a break as reverse auctions can be for the lawyers being undercut, the settlements tend to be a disaster for class members — the deals can result in undervalued payouts, inflated attorneys fees, no injunctive relief and blanket immunity for a defendant from follow-up claims.

Dardarian said she doesn't see the Boies firm as a clear predator in her Countrywide case — Boies had been litigating other cases against the lender before Dardarian filed hers. But she said Boies' proposed settlement was a raw deal for her class.

It would have settled overtime claims for plaintiffs spanning several states — including Dardarian's California class — for \$16 million.

After a nasty epistolary spat with Caryl Boies — David Boies' partner and daughter — Dardarian persuaded a Texas judge to overrule that deal last year. Dardarian final-

ly settled her suit in April — coming away with \$30 million for California plaintiffs.

Caryl Boies said she didn't engage in a reverse auction, and said she didn't know whether Countrywide tried to enter the cheaper settlement with her to avoid Dardarian's more valuable claims.

"I don't want to speculate on what they're thinking. Their goal was to settle all of the claims, and they could not do that in California," Boies said.

Reverse auctions are a new concern for Dardarian. Her firm — where partners come from places like the NAACP and tend to retire early to write hiking books or start a nonprofit — specializes in employment law, an island of civility in the harshly competitive class action bar.

But the successes of firms like Goldstein, Demchak may be changing that, as other lawyers seeking big payouts get into the field.

Take the example of Mary Anne Sedey. In another case of an employment reverse auction, the St. Louis plaintiff lawyer had to hire more than 20 outside attorneys to defeat another firm's attempt to undercut her discrimination suit against Rent-A-Center.

Four months after Sedey filed her case, another firm took a discrimination suit it had already filed on behalf of two clients and refiled it as a class action.

Sedey got rid of the competing firm's \$12 million settlement deal by lobbying scores of class members to file objections. She eventually came away with \$47 million for the class in 2002.

While Sedey and Dardarian fended off their competitors, the large awards they came away with create an incentive for other firms to get in on the employment suits.

Yet Dardarian and Sedey are optimistic that employment class actions will remain an oasis of good manners.

"I'm hoping this is not a trend," Sedey said. Girard gave up that hope years ago.

#### **WHACK-A-MOLE**

Reverse auctions have become a routine concern for consumer lawyers like Girard and Mark Chavez, of the Mill Valley firm Chavez & Gertler. And for good reason.

The two have repeatedly had other firms try to settle suits out from under them. Earlier this year, Girard fought back a deal that would have ended his suit over America Online's billing practices.

He says the case could produce damages

exceeding \$500 million, but an Illinois firm tried to settle the claims for \$25 million in an Illinois state court.

The lawyers there added new charges to their complaint as part of the settlement agreement to jettison Girard's federal claims in California, he said.

In May, a judge in U.S. District Court for the Central District of California placed an injunction on the Illinois deal.

Girard is also trying to strike down a settlement of a class action against American Express, alleging that defense lawyers pitted various firms against one another in a reverse auction.

And in 2003, he defeated a Texas settlement over Hyundai horsepower claims before reaching his own more valuable deal.

In that case, Girard had filed a complaint in Orange County Superior Court in late 2002; three weeks later, another firm filed a suit making the same allegations in Beaumont, Texas.

Girard said the carmaker balked when he made a key discovery request: a sealed document from an unrelated court case in which a Hyundai employee said the company knew about its horsepower problems for years.

"We were trying to get that affidavit unsealed when they went to the Beaumont plaintiffs," Girard said. He said Hyundai wanted to settle with the Texas lawyers — who had conducted no discovery — to avoid the bigger liability that the discovery material would have created in California.

In early 2003, Hyundai reached a settlement with the Texas lawyers that would have provided free lube jobs to class members. After protests by Girard, a Texas judge refused to approve that settlement — and didn't hide his disapproval of the competing lawyers' proposed deal.

"With the exception of [the competing] attorneys, who negotiated the settlement and stand to receive \$2 million if it is approved, none of the other class members or counsel with pending actions against Hyundai supports the proposed settlement," wrote Jefferson County Judge Gary Sanderson.

Chavez has had two similar experiences in recent years. In 2002, he was unable to stop another firm from settling a case he says he originated against a lending company. And he is currently trying to defeat another lawyer's effort to settle a suit he has

against Craftmatic beds.

Girard said the problem is on the rise.

"It's been in the air for some time now," he said. "It's in the last few years that the atmosphere seems to have evolved into a sort of 'anything goes' mentality."

#### **CUTTING THEIR LOSSES**

While some reverse auctions are the result of malicious intent, Issacharoff said, it's not always a case of unscrupulous lawyers jumping a high-stakes claim. Most come about when plaintiff lawyers inadvertently find themselves with competing claims. When one such firm realizes its case is weak, it may enter a cheap settlement, rather than walk away with a defeat — and little or no recovery.

He said Caryl Boies's situation in Countrywide may be a prime example.

Boies, he said, was put in a tough spot when a Texas judge sent her case to arbitration — which eliminated the class-action aspect of the case.

"In essence," Boies said, "we were a lawsuit without a house, because Country-

wide's arbitration provision also prohibits collective actions."

In supporting Dardarian, Issacharoff said Boies had been left with no leverage to force a settlement — unless she offered a deal that would also settle out Dardarian's expensive California claims. (Boies disagrees, saying she had leverage in the form of threatened future suits.)

"There are bottom feeders that go around shopping for cheap class actions," Issacharoff said. "But I don't think the Boies firm is one of them."

The all-or-nothing nature of plaintiff litigation can make it tempting for a lawyer to sell out the class, said Columbia law professor John Coffee — who coined the term reverse auction.

Coffee said the result of negotiations by lawyers with little leverage is often a settlement that benefits the defendant and plaintiff lawyer at the expense of the class. It essentially makes the plaintiff and defense lawyers partners against the class members, he said.

"Once you realize you're losing, the only way to win is through collusion," he said.

#### **GRIM FORECAST**

Despite the recent experiences of Dardarian and Sedey, employment lawyers say they're not bracing for an onslaught of low-ball settlements.

"It is more collegial in the plaintiff employment bar," said James Finberg, a partner at Lief Cabraser Heimann & Bernstein.

And Barry Goldstein, of counsel with Goldstein Demchak, agrees. He said employment lawyers are more aware of reverse auctions since Dardarian presented a paper at an April American Bar Association conference about the problem.

But, Coffee warns, "the field of labor class actions is expanding." And this generates concern.

"As it expands, you're importing problems that may exist in other parts of the profession," Goldstein said.

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