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Staton v. Boeing: An Exercise in the Abuse of Discretion Standard of Review

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STATON V. BOEING:[1] AN EXERCISE IN THE ABUSE OF DISCRETION STANDARD OF REVIEW

I. INTRODUCTION

In the recent decision of *Staton v. Boeing Co.*,[2] the United States Court of Appeals for the Ninth Circuit effectively opened the appellate court as an alternative forum for *de novo* review of factual questions. The Ninth Circuit was charged with reviewing a district court's[3] decision to certify a class and approve a proposed consent decree. The class consisted of approximately 15,000 African-American employees of Boeing who alleged systematic, company-wide race discrimination.[4] After two fairness hearings,[5] the district court approved a consent decree outlining $7.3 million in monetary relief as well as injunctive relief valued at approximately $3.65 million.[6] The decree also awarded class counsel approximately $4 million in fees and costs.[7]

The Ninth Circuit upheld the district court's decision to certify the class, but reversed and remanded the approval of the consent decree because of concerns related to the attorneys' fee award and the structure of the monetary payments to class members.[8] The dissent argued that the settlement agreement should have been upheld, and that the Ninth Circuit failed to apply the abuse of

1. 327 F.3d 938 (9th Cir. 2003).
2. *Id.*
3. The case was heard before the United States District Court for the Western District of Washington.
4. *Staton*, 327 F.3d at 944, 946.
5. *Id.* at 945, 951–52.
6. *Id.* at 944, 948–49.
7. *Id.* at 944–45.
8. *Id.* at 945.

discretion standard of review,[9] despite its claims that it did apply such a standard.[10]

This Comment reviews the analysis of both the district court and the Ninth Circuit court, and it argues that the district court acted within its discretion in deciding that the class was appropriate and that the award distribution to class members was fair, adequate, and reasonable.[11] This Comment further argues that the Ninth Circuit erred by applying a "*quasi de novo*" standard of review[12] to questions of class award distribution, and thus erred in reversing on this ground.[13]

Part II reviews the facts of *Staton*. Part III focuses on the abuse of discretion standard and what the standard really means. Part IV tackles the analysis of *Staton* with regard to fund distribution. Finally, Part V concludes that appellate courts should exercise care when reviewing decisions to avoid creating a *quasi de novo* system of review for questions of fact before the appellate court.

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9. See *infra* Part III for a discussion of the abuse of discretion standard of review.

10. *Staton*, 327 F.3d at 986 (Trott, J., dissenting).

11. These three requirements are discussed in Part IV.B.1.

12. The author has chosen to use the term *quasi de novo* to express how the Ninth Circuit reviewed this decision. By stating that it was applying an abuse of discretion standard, yet, as discussed below, delving too deeply into the facts, the Ninth Circuit in effect used a 'middle ground' standard of review. As a result, the opinion looks more like it used *de novo* review, despite the court's claim to have used abuse of discretion.

13. This Comment does not address the Ninth Circuit's ground of reversal based on the line item attorneys' fee award. While there are arguments for and against that portion of the decision (for a brief discussion see *supra* note 56), the question of whether the Ninth Circuit properly reviewed the district court's decision as to the distribution of funds is a separate question that deserves discussion in and of itself. Nor does this Comment argue that the case should not have been remanded since the problem of attorneys' fees cannot be separated from the remainder of the consent decree. However, by reversing on the ground that the distribution was unfair, the Ninth Circuit erroneously provided an additional ground for its decision.

II. FACTS OF *STATON*

A. The Proposed Class

Staton's proposed class consisted of approximately 15,000 African-American employees of Boeing Company,[14] some of whom had initiated individual suits against Boeing.[15] The class representatives, who alleged company-wide racial discrimination,[16] were supervisors as well as rank-and-file workers.[17] Class members included union and non-union members, salaried and hourly employees, and employees from numerous Boeing facilities.[18]

B. The Consent Decree

Settlement discussions began in November 1998, and by January 1999 class counsel and Boeing had reached an agreement.[19] The consent decree submitted to the district court outlined $7.3 million in monetary damages, various forms of injunctive relief, and approximately $4 million in attorneys' fees and costs.[20] The decree allowed class members to opt out of monetary relief, but not

14. *Staton*, 327 F.3d at 944.

15. *Id.* at 946. In March 1998 forty-three employees filed individual suits in Seattle alleging individual claims of race discrimination. *Id.* Twelve of these plaintiffs joined four others to file the class action that triggered the consent decree in question. *Id.* Plaintiffs from a second class action initiated in Philadelphia consolidated their case with the Seattle class action in October 1998. *Id.* In an amended complaint dated November 4, 1998, thirty-two named plaintiffs sought to represent all African-American Boeing employees. *Id.* These named plaintiffs, as well as over two hundred others, signed retainer agreements with class counsel. *Id.*

16. *Id.* at 954.

17. *Id.* at 958.

18. *Id.* at 954.

19. *Id.* at 946–47.

20. *Id.* at 944–45. The $4 million figure is divided as follows: Boeing agreed to pay $3 million in attorneys' fees and costs incurred to date, as well as up to $100,000 to explain the consent decree to class members, $200,000 to objectors' counsel, and $750,000 for monitoring, administering, implementing, and defending the decree. *Id.* at 948–49.

equitable relief.[21] Class members who did not opt out agreed to a broad release provision.[22]

The monetary award was allocated such that $3.77 million was divided among 264 specific individuals—the named plaintiffs and those who actively participated in the litigation.[23] Most of these individuals were also identified by plaintiffs' counsel as those with the strongest claims or those that were willing to take the risk of coming forward and pursuing the case.[24] The remaining $3.53 million were available for all other class members to submit claims.[25]

The injunctive relief covered many grounds. The primary provisions included: a statement similar to the statutory prohibition on discrimination; a requirement that Boeing meet with an advisory committee of class members to discuss concerns; Boeing's hiring a consultant to assist in meeting the objectives of injunctive relief; implementation of systems to inform employees of promotion procedures, opportunities and recipients; and implementation of programs to provide feedback and training to applicants who do not receive promotions.[26] There was some dispute as to whether the injunctive relief required Boeing to provide outside counsel to African-American employees to assist them in promotions and to mitigate potential disputes.[27]

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21. *Id.* at 947–48. This is consistent with Federal Rule of Civil Procedure 23(b).

22. *Staton*, 327 F.3d at 947. The consent decree released Boeing from all liability to African-American employees for race discrimination, as well as from any liability for "'negligent misrepresentation, fraud, detrimental reliance, promissory estoppel, or breach of contract.'" *Id.* (quoting the consent decree).

23. *Id.* at 948.

24. *Id.* at 975–76.

25. *Id.* at 948.

26. *Id.* at 949–51.

27. The injunctive provisions required that class counsel monitor Boeing's feedback and training systems for unsuccessful promotion candidates, and that Boeing meet and confer with class counsel regarding company policies about internal complaints as well as their informal systems for notifying candidates about promotional opportunities. *Id.* at 950. However, these provisions do not require Boeing to take the suggestions of class counsel. *Id.* Although the experts the district court relied upon submitted their statements based on the belief that counsel would provide free legal assistance in the above situations for three years, Boeing and the Ninth Circuit indicated a belief that free individualized legal assistance was not actually required of class counsel. *Id.* at 961–62. The Ninth Circuit further expressed skepticism that the $750,000

III. THE ABUSE OF DISCRETION STANDARD

The majority and dissenting opinions in *Staton* agreed that the appropriate standard of review for both class certification and the settlement agreement was the abuse of discretion standard.[28] The Ninth Circuit has previously held that "[t]he district court's 'decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof.'"[29] The problem addressed by this Comment is how the Ninth Circuit applied this standard in reviewing the district court's decision to approve the Boeing settlement agreement.

What does it mean for an appellate court to review for abuse of discretion? It is not enough for a court to merely say it has applied this standard. Rather, the court must determine what level of discretion is acceptable, and what constitutes an abuse. Various courts will define abuse in different ways—such is the nature of something so abstract as a "standard of review." However, the Ninth Circuit has held that it "will affirm if the district court judge applies the proper legal standard and his findings of fact are not clearly erroneous."[30]

Thus, an appellate court should focus on whether the district court applied the correct law, as well as the procedural mechanisms used by a district court to review and analyze the facts, rather than focusing on the facts alone. It is a district court's duty to discover and interpret the facts, to decide which facts are credible, and to determine if the facts fulfill the requirements of the law. It is an appellate court's duty to review the district court's findings, to determine if the facts could mean what the district court says they

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provided to class counsel in the consent decree would cover both the costs of implementing the consent decree *and* providing any legal services that were actually required. *Id.* at 962.

28. *Id.* at 953; *id.* at 986 (Trott, J., dissenting).

29. *In re* Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998)).

30. *Id.* Other circuits ask similar questions. For example, the Tenth Circuit states there must be "a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1187 (10th Cir. 2002) (quoting Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995)).

mean, and, if so, to decide if the facts as laid out by the district court could support the district court's decision.

In an appellate court's analysis, the substance of the case is an indicator of abuse of discretion, and it is necessary to understand the facts to properly understand a district court's decision. However, an appellate court should not give new meaning to the facts in making an ultimate decision regarding abuse of discretion because the entirety of the evidence is not before the appellate court.[31] Instead, the facts as established by the trial court should guide an appellate court in its review.[32] In sum, an appellate court is charged with determining whether the district court's interpretation was clearly erroneous or unsupported.

For example, in *Mego* the Ninth Circuit affirmed the district court's decision to uphold a $1.725 million settlement in a securities class action.[33] The *Mego* court laid out the appellant's arguments,[34] discussed the appropriate legal standard for each discrete issue,[35] evaluated the district court's review and application of the facts to the standard,[36] and determined that the district court could reasonably have concluded as it did and thus did not abuse its discretion.[37] In *Mego* the court did not *substantively* review the facts to make its own conclusion; instead it *procedurally* reviewed the district court's analysis and interpretation of the facts.

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31. *See, e.g.*, *Hanlon*, 150 F.3d at 1026 ("the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is 'exposed to the litigants, and their strategies, positions and proof.'") (quoting Officers for Justice v. Civil Serv. Comm'n of San Francisco, 688 F.2d 615, 626 (9th Cir. 1982); *see also* FED. R. CIV. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

32. Of course the appellate court must determine if the trial court was clearly erroneous in establishing the facts, and thus must independently review the facts to some extent. However, this factual review is limited to a determination of whether or not the trial court was clearly erroneous in its interpretation of the evidence before it. To this end, it is useful for a district court to set forth a clear record of the evidence reviewed and the conclusions drawn from the evidence.

33. In re *Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 456.

34. *Id.*

35. *Id.* at 458, 460, 462.

36. *Id.* at 458–63.

37. *Id.* at 463.

Based on the above concepts, this Comment sets forth the following analysis. When reviewing any district court decision, the Ninth Circuit should ask: (1) based on the general facts, what issues are before the court; (2) what is the proper legal standard to apply to those issues; (3) did the district court apply this legal standard; (4) did the district court fully analyze the facts, without leaving out key details, and with respect to the proper legal standard;[38] and (5) could the district court have concluded, without such gross error as to make its decision untenable, that the facts support a particular decision?

IV. ANALYSIS OF *STATON*

A. Class Certification

The Ninth Circuit first reviewed the district court's determination that class certification was appropriate.[39] Using the general format outlined above, the Ninth Circuit correctly affirmed the district court's decision.[40] It determined that the district court fully evaluated the facts, applied the correct law, and thus did not abuse its discretion.[41]

The district court evaluated the facts before it to determine whether the four prerequisites of class certification were met: "(1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation."[42] It reviewed documentation from an array of employee interviews,[43] listened to the narratives of proponents and objectors regarding institutional discrimination,[44] evaluated the similarity of claims and defenses of the potential sub-groups,[45] and reviewed the work performed to date by class counsel.[46]

38. Obviously the record provided by the district court is key to this analysis. Thus, it is incumbent upon district courts to issue opinions that fully describe what was reviewed and how the facts entwined with the law during proceedings.

39. *Staton*, 327 F.3d at 953.

40. *Id.* at 953.

41. *Id.* at 953, 956.

42. *Id.* at 953; FED. R. CIV. P. 23(a).

43. *Staton*, 327 F.3d at 954.

44. *Id.*

45. *Id.* at 957.

46. *Id.* at 957–58.

Of the above four Federal Rule of Civil Procedure 23 requirements, the Ninth Circuit devoted the most attention to a review of the district court's decision as to commonality.[47] Because the class contained an array of workers that performed in different positions and were from many locations, the majority questioned whether a class action could actually be maintained during litigation.[48] The majority recognized that the district court applied the correct Rule 23 law.[49] It then found that the district court acted within its discretion because the district court carefully reviewed the facts applicable to commonality—including early evidence that showed company-wide race discrimination[50]—and the district court did not interpret the facts before it in a clearly erroneous manner.[51] Moreover, the objectors did not raise the need for subclasses, which boosted the district court's decision.[52] The Ninth Circuit stressed that the district court could have decided that the proposed class was too diverse (and thus denied class certification) and still have been within its discretion because the district court thoroughly examined the evidence before it.[53] The majority's decision and review as to class certification is a useful example of the proper application of the abuse of discretion standard.

B. The Consent Decree

The Ninth Circuit next reviewed the district court's evaluation and approval of the proposed consent decree.[54] It indicated that it was "somewhat uneasy, reading the settlement as a whole"[55] and then concluded that the district court abused its discretion in approving the consent decree. The Ninth Circuit's reasons were twofold. First, "the district court erred in approving the proposed attorneys' fees award."[56] Second, the "district court abused its

47. *Id.* at 953–59.
48. *Id.* at 953–54.
49. *Id.* at 956.
50. *Id.* at 954.
51. *Id.*
52. *Id.* at 956.
53. *Id.*
54. *Id.* at 959.
55. *Id.* at 961.
56. *Id.* at 974; *see supra* note 13. As mentioned previously, this ground of reversal is not addressed by this Comment because it merits separate

discretion in finding the settlement agreement to be fair, adequate and reasonable."[57] Thus, the Ninth Circuit remanded the case for determination of these issues.[58] As discussed below, the Ninth Circuit improperly reversed the district court's approval of the distribution of funds to class members by applying in effect a *quasi de novo* standard of review rather than an abuse of discretion standard.

1. The appropriate legal standard

The Ninth Circuit correctly stated that a proposed settlement, as a whole, must be "'fundamentally fair, adequate and reasonable.'"[59] The Ninth Circuit typically reviews the *Hanlon* factors to determine if a settlement complies with these requirements.[60] These factors include:

> [T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; . . . and the reaction of the class members to the proposed settlement.[61]

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consideration. However, it is worth mentioning that the Ninth Circuit may have erred in reversing the fee provision. On the one hand, the procedure used by the district court does not comport with the typical procedures used in class action cases, and thus the Ninth Circuit may have been correct in reversing. On the other hand, the *typical* procedures are not *required* procedures. Federal Rule of Civil Procedure 52 provides the basic framework for fee allocation. Rule 23 was recently amended to reflect the typical procedures and incorporates Rule 52. However, both rules leave open the possibility that other methods may be acceptable if the substance of the fee allocation is within acceptable limits. When this is the case, reversing due to form over substance seems to defeat the general goal of reaching a mutually agreeable settlement.

57. *Staton*, 327 F.3d at 978.

58. *Id.*

59. *See id.* at 959 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998)).

60. *See, e.g.*, *In re* Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000); *see also* Molski v. Gleich, 318 F.3d 937, 953 (9th Cir. 2003).

61. *Hanlon*, 150 F.3d at 1026.

The Ninth Circuit has stated that "[t]he district court must show that it has explored these factors comprehensively to survive appellate review."[62]

2. The release and injunctive provisions

The consent decree approved by the district court in *Staton* included a broad release provision[63] as well as many forms of injunctive relief.[64] The Ninth Circuit objected to these portions of the decree but correctly affirmed the district court's holding as there was no clear abuse of discretion. As the Ninth Circuit noted, the district court correctly concluded that the injunctive provisions did not favor recovery by one member over another, and although the release provisions were broad, members had a clear opportunity to opt out.[65] This case is not like *Molski*, where broad release provisions left many class members without any recovery and violated their due process rights.[66] However, because the *Staton* provisions were suspect, the Ninth Circuit was "somewhat uneasy, reading the settlement as a whole,"[67] and turned to an in-depth review of the allocation of funds to class members and the attorneys' fees provision.[68]

3. The value and distribution of funds to class members

As stated previously, the proposed consent decree provided for a monetary award of $7.3 million, as well as injunctive relief valued

62. In re *Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 458.

63. *Staton*, 327 F.3d at 947.

64. *Id.* at 949; *see supra* text accompanying note 26.

65. *Staton*, 327 F.3d at 947, 962–63; *see supra* note 22 and accompanying text.

66. *Molski*, 318 F.3d at 942. In *Molski*, the Ninth Circuit reversed and remanded the district court's decision to approve a consent decree that provided almost exclusively for injunctive relief to the mobility-impaired class. *Id.* at 941–44. The Ninth Circuit reviewed the decision for abuse of discretion and found that the consent decree contained broad release provisions that left too many class members without recovery and that class members' due process rights were violated. *Id.* at 942, 955–56. These flaws made the terms of the decree "inadequate and fundamentally unfair," which led the Ninth Circuit to conclude that the district court judge had abused her discretion. *Id.* at 942.

67. *Staton*, 327 F.3d at 961.

68. *Id.* at 963.

by class counsel at approximately $3.65 million.[69] Class members were given an opportunity to opt out of the monetary relief, but were not given a similar opportunity to opt out of the injunctive relief.[70] The injunctive relief applied across the board to all class members affected by each provision.[71]

Of the $7.3 million, $3.77 million was divided between the 264 named plaintiffs and class members that actively participated in the litigation.[72] The active participants received awards ranging from $5000 to $50,000, with an average award of $16,500.[73] The remaining $3.53 million was to be distributed among the remainder of the 15,000-member class.[74] At the cut-off date, 3400 of the nearly 15,000 class members had applied for an award, which would therefore average around $1000 each.[75]

The district court correctly looked to the *Hanlon* factors in determining that the award was appropriate. For example, in one passage the district court assessed three of the *Hanlon* factors: "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; and (3) the risk of maintaining class action status throughout the trial."[76] The district court stated:

> The strengths of the plaintiffs' claims and the risks of future litigation are clearly related questions. Boeing has faced a series of individual race discrimination law suits in recent years and has won every one. Although the number of named plaintiffs in this case and the descriptions of their experiences lend credence to their allegations, discrimination cases are notoriously difficult to prove . . . There is also some risk that the class certified by the Court

69. *Id.* at 948–49. The $3.65 million figure covers implementation, notice, and injunctive relief. *Id.* at 949.

70. *Id.* at 947–48. This is consistent with class relief under Federal Rule of Civil Procedure 23(b).

71. *Staton*, 327 F.3d at 949–51; *see supra* note 27.

72. *Staton*, 327 F.3d at 948. Plaintiffs' counsel identified these 264 members as either having the strongest claims, or as those willing to take the risk and expend the time and money necessary to pursue the litigation. *Id.* at 975–76.

73. *Id.* at 948.

74. *Id.*

75. *Id.*

76. *Id.* at 980 (Trott, J., dissenting); *see supra* text accompanying note 61.

> would not survive a challenge by Boeing . . . [because] the class claims are too individual to meet the commonality and typicality requirements. Finally, there is no doubt that continued litigation would be enormously burdensome and expensive for the plaintiffs as well as for Boeing.[77]

Similar passages are quoted throughout both the majority and dissenting opinions.[78] In addition, the district court carefully evaluated the award differential between class members to determine if the fact that active participants received larger awards than the remainder of the class was evidence of collusion.[79]

The Ninth Circuit properly asked whether the district court could have interpreted the facts as it did, and whether the facts as announced by the district court could support the district court's decision. However, the Ninth Circuit then erred by examining the facts too closely and making independent determinations as to what the facts meant, rather than using the facts in the record to review the propriety of the district court's decision. The problem with this sort of *quasi de novo* review of the facts is the lack of evidence and witnesses in front of the appellate court. When the trial court sets forth a record supporting its conclusions, which are in turn drawn from the interaction of the facts of the case and the law, its decision should be given due deference.[80]

An appropriate factual analysis by a Ninth Circuit appellate panel is illustrated in *Valentino v. Carter-Wallace, Inc.*,[81] where the district court failed to give any reason or evidence to support its decision to uphold a class certification order.[82] In *Valentino*, the Ninth Circuit vacated a products liability class certification order because the district court failed to show that the class met the

77. *Staton*, 327 F.3d at 980 (Trott, J., dissenting) (quoting the district court).

78. For example, the majority discussed the district court's findings in regards to the objector's contentions. *Id.* at 951–52. The majority also agreed with the district court that there was no evidence of outright collusion. *Id.* at 958. The dissent presented additional passages from the district court. *Id.* at 979–86 (Trott, J., dissenting).

79. *Id.* at 975.

80. *See* FED. R. CIV. P. 52(a).

81. 97 F.3d 1227 (9th Cir. 1996).

82. *Id.* at 1234.

requirements of Rule 23.[83] Because the order was "brief and conclusory," the *Valentino* court was unable to determine if the lower court evaluated the facts or the law.[84] Likewise, in *Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*,[85] the deference typically due a trial court was disregarded because the district court made no findings about the application of the Rule 23 provisions to the facts of the case before the court.[86]

Thus, merely stating that a review was made will generally meet neither the evidentiary nor record requirement necessary for the appellate court to afford deference to the trial court.[87] However, where the trial court supports its statement of the law with sufficient evidence to justify its decision, even if the appellate court thinks a different decision was more appropriate, the appellate court should not reverse unless there is clear error.[88]

In contrast to the above cases, the district court in *Staton* set forth adequate evidence that it evaluated both the facts and law presented in the case.[89] Thus, its decision deserved due deference from the appellate court. The Ninth Circuit should have asked only whether the facts as set forth by the district court were clearly erroneous, and if they were not clearly erroneous, if the facts could have supported the district court's decision. However, the Ninth Circuit instead applied a *quasi de novo* standard of review.

An example of the Ninth Circuit's *quasi de novo* review is seen in its treatment of the question of collusion. The district court recognized the award differential and stated that "excessive payments to named class members can be an indication that the agreement was reached through fraud or collusion."[90] However, it found there was no collusion, especially considering the fact that collusion would have required the participation of 264 class

83. *Id.* at 1230.
84. *Id.* at 1234. In fact, the only thing that was clear to the *Valentino* court was the district judge's desire to encourage settlement. *Id.*
85. 244 F.3d 1152 (9th Cir. 2001).
86. *Id.* at 1161.
87. *See id.*
88. *See id.*
89. *See, e.g.*, *supra* notes 77–79 and accompanying text.
90. *Staton*, 327 F.3d at 975 (quoting the district court).

members, which is quite a large group to get behind a scam.[91] Additionally, the district court explained that those receiving higher awards were identified as having the strongest claims and would thus be the most likely recipients of the largest awards.[92]

The Ninth Circuit rejected these conclusions, but not because the district court applied the wrong law or was clearly erroneous in its findings of fact. Instead, the Ninth Circuit rejected these conclusions because it felt "somewhat uneasy, reading the settlement as a whole."[93] Because of its discomfort, the Ninth Circuit drew its own bare conclusions despite the clear availability of findings by the district court.

For example, the Ninth Circuit rejected the district court's conclusion that those receiving higher awards had the strongest claims.[94] The Ninth Circuit stated that direct evidence of a link between the amount of the award and the strength of the claim was necessary, especially due to the fact that those receiving higher awards retained counsel prior to settlement.[95] However, class counsel agreed to pay back any amounts received under the original retainer agreements.[96] Thus, there was no additional incentive to ensure a higher award. Moreover, this case had not progressed through litigation so the court did not know whether the members' claims would prevail at trial.[97] It is for this very reason that the trial court was in the best position, with witnesses and evidence before it,[98] to make a decision as to the likelihood that the claims would survive and as to what relative value the claims should be assigned.

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91. *Id.* at 981 (Trott, J., dissenting).
92. *Id.* at 975–76.
93. *Id.* at 961.
94. *Id.* at 975.
95. *Id.* at 976; *see also id.* at 946; *supra* note 15.
96. *Staton*, 327 F.3d at 977 n.26.
97. *Id.* at 962 n.14. This Comment would arrive at an entirely different conclusion if the Ninth Circuit had determined that the facts actually showed that the active participant claims were not as strong as other claims, and thus the district court's conclusions were clearly erroneous. Similarly, had the district court not supported its conclusions with any evidence, the Ninth Circuit would have been justified in its conclusions.
98. Evidence included statements by plaintiffs' counsel regarding the strength of claims as well as the general participation of those involved. *Id.* at 976.

Furthermore, in deciding facts for itself, the majority determined that an average differential of approximately sixteen times existed between active and non-active class members, and concluded that the record did not support such a difference.[99] However, the Ninth Circuit erred by looking merely at the average award differential, which skews the numbers. Many of the awards were closer to $5000, thus creating a differential of five times. Such a differential has been acceptable in past cases,[100] and it was accepted by the district court.

The majority attempted to distinguish its previous acceptance of incentive awards from the facts of *Staton*, relying primarily on the fact that unnamed plaintiffs received large awards in *Staton*.[101] However, in so doing, the majority failed to recognize the additional commitment of these other active participants, as well as the district court's finding that most of the active class members had stronger claims. The majority glossed over this problem by stating that "class members can certainly be repaid for any cost allotment."[102] However, the time and risk associated with participating in litigation cannot be quantified solely by cost allotment. The majority erred by ignoring the district court's findings that supported a larger award to active participants.

On a final note, the majority also ignored the fact that an opt-out provision was available, which reduced the risk of the differential since class members could preserve individual claims. It is important to note that only 500 out of 15,000 class members—three percent—opted out.[103] The district court implicitly recognized that this was a small percentage of the class, which indicated a large majority had not taken issue with the provisions and made it less likely collusion existed.

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99. *Id.* at 975.

100. The majority discussed its past approval of various large awards, including two $5000 incentive awards in In re *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000). *See Staton*, 327 F.3d at 976. In *Mego*, the class consisted of 5400 potential members and the settlement was valued at $1.725 million. *Id.* Each class member would have received approximately $320.

101. *Staton*, 327 F.3d at 977.

102. *Id.*

103. *Id.* at 948. Note that these numbers are approximations as discussed in the Ninth Circuit opinion.

It is clear, as the dissent pointed out, that the district court considered the strength of individual claims and the risk to active class members as well as the expense, complexity, and duration of further litigation.[104] By analyzing the facts under the *Hanlon* factors and setting forth a record that indicated evaluation of these factors, the district court presented enough evidence to support its decision. By reviewing the facts in a *quasi de novo* manner, rather than scrutinizing whether the district court clearly erred in its factual determinations, the Ninth Circuit failed to afford the district court due deference and trampled the court's findings without justification.

V. CONCLUSION

The abuse of discretion standard of review has been expanded to an unacceptable point. Appellate courts are not adequately equipped to review factually based decisions anew because the appellate court only receives a record of the district court's evaluation of the facts and law, and it does not see the evidence or the witnesses before it. *De novo* review is only appropriate where a matter can be decided on the basis of law. This is why the Ninth Circuit has stated that to overturn a district court's approval of a settlement agreement, the judge must have applied the wrong legal standard or have acted in a clearly erroneous manner[105]—actions that do not require a full and complete review of the facts. By so expanding appellate review, the Ninth Circuit has opened the door for a docket nightmare. Litigants may now expect their facts to be reviewed with a quasi *de novo* standard of review and will be more apt to appeal. Additionally, the appeal process will take longer if the court has to reevaluate all of the facts. For these reasons, the Ninth Circuit would do well to draw the abuse of discretion standard back in, and to restore appellate review to its appropriate level.

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104. *Id.* at 980 (Trott, J., dissenting).

105. *In re* Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000).

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