

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**Before the Honorable Steven C. Yarbrough  
United States Magistrate Judge**

**Clerk's Minutes**

*Belanger v. Allstate Fore & Casualty Insurance Co.*  
19cv317 WJ/SCY

Tuesday, March 26, 2024 at 9:30 a.m.

**PLAINTIFF'S ATTORNEYS PRESENT:**

Corbin Hilderbrandt  
Geoffrey Romero  
Kedar Bhasker  
Yvonne Belanger (client)  
Michelle Lacount (Epiq Representative)

**DEFENDANT'S ATTORNEYS PRESENT:**

Eric Burris  
Peter Valeta  
Aaron Cook (Allstate Representative)

**TYPE OF PROCEEDING:** Final Approval Hearing  
Total Time – 1 hour, 50 minutes

**RECORDING INFORMATION:** ABQ-Zoom

**COURT'S NOTES/RULINGS:**

9:35 a.m. The Court is here today on the final approval hearing. The Court is on the record. Counsel enter their appearances. The Court notes that the hearing is being live-streamed. The Court did not receive notice that anyone wants to be heard today. Plaintiff's counsel confirms that they are unaware of any objectors and no one has expressed an interest in being heard today. Ms. Lacount and defense counsel confirm the same. Plaintiff's counsel confirms there are no undeclared objectors and no side agreements. The defense is also not aware of any.

9:38 a.m. The Court discusses Tenth Circuit precedent regarding kicker and clear sailing agreements and the Court's obligation to review the proposed settlement and attorney's fees.

9:42 a.m. The Court first addresses notice issues. The Court sees no due process issue as the notice covers the requirements in Rule 23(c)(2)(B). One of the notices has the wrong date for the hearing (a January date); one has the original February date (2/15/24); and one lists the hearing date as March XX. Were class members advised of the wrong hearing date? This creates a question as to whether the lack of information about the final approval hearing date, or incorrect information about that date, deprived anyone of being heard. The Court does note that no class

member reached out to the Clerk's Office ahead of a January or February date in order to be heard. Mr. Romero does not believe that this issue is fatal given that the parties requested to move the hearing and Chief Judge Johnson said that no further notice was required. Mr. Valeta explains that the claims administrator has established a website, the website is in the notice, and the website is up to date with the correct hearing date. The Court confirms that the website does have the correct hearing date. The Court agrees that this is likely not a fatal issue.

9:50 a.m. The Court raises a concern about the opt-outs. At the last status conference, the Court was concerned that the opt-out process is more onerous than filing a claim and that opt-outs have less time to complete their filing. The Court was unable to review the process for opt-outs on the website because the updated website simply indicates that the opt-out deadline has now passed. Ms. Lacount explains that online opt-outs are very rare and the vast majority of cases use mail in opt-outs. She is unsure in this case whether there was an online opt-out. She will check with her team and update the Court. She confirms that Epiq did add an online opt-out feature. Mr. Valeta explains why the parties prefer mail-in opt-outs as opposed to online opt-outs. The Court notes that Chief Judge Johnson, as the presiding judge, did approve the opt-out process with the preliminary approval.

9:58 a.m. The Court asks about how notices were sent. Ms. Lacount responds that notice was sent by email first and then mail second. Mr. Romero responds that successful deliveries were 91%. This is significant given the scope of the class, going back to 2004. The Court asks for clarification regarding the 91% success rate and how much that rate takes into account an email going into a spam folder. Mr. Romero responds that if the email hits a spam folder, there is a soft-spam bounce back. A successful delivery therefore means the notice went to someone's actual inbox or was sent by mail. Ms. Lacount confirms that if the email was bounced as spam, it would come back to Epiq. Once the email is taken in by the receiving server, Epiq gets notice that the email was received, but it has no other information such as whether the email was opened. This the same level of confidence with US mail- notice was sent and it was not returned back. Ms. Lacount clarifies that if the notice email hits as a spam, Epiq will get a bounce back. The Court agrees that the system of notifying people was more than adequate.

10:11 a.m. The Court notes that at the last hearing there was a Spanish place holder in the notice. Looking at the actual notices, there was no Spanish and the Court did not see any Spanish on the website. Ms. Lacount responds that the IVR (interactive voice recording) gives an option for a Spanish recording. Also, the website contains both the long form and short form notice in Spanish. Mr. Romero also points out that Attachment D notice provides direction in Spanish to see the website or call the phone number to receive notice in Spanish. The Court observes that the email notices do not appear to have the same Spanish advisement as the notices sent by first class mail.

10:16 a.m. The Court asks about CAFA, Section 1715, notice to the government regulators. Mr. Valeta confirms that the defense worked with Epiq to provide notice as required by the statute.

10:18 a.m. The Court asks about the amount of the actual payout. There are different groups; first, the 2.2 million will be paid out no matter how many claimants. Mr. Romero explains that

there are 966 claimants who made both option 1 and option 2 claims and Epiq is reviewing the claims to provide the maximum refund. At a minimum, the amount for option 1 claims is valued at \$1.9 million. Mr. Valeta explains that 64 claims make up the \$1.9 million. The remaining option 1 claims require more information from the claimant to know what the value is. The Court asks about the option 1 claims- what is Allstate's process to evaluate those claims? Mr. Valeta explains that Allstate is readjusting claims according to their regular procedure. Claimants will be given notice of that determination and have the opportunity to appeal. The Court asks how long it will take to know the actual payout to the class since that information is relevant to the attorney's fee issue and provides information about the benefit of the settlement to the class. Mr. Valeta responds that mailings have gone out to a substantial portion of the original claimants, and the time is extended for the supplemental claimants. The Court asks that, of these roughly 1,000 claims, what is the estimate for the actual payout? Mr. Valeta responds that without more information, he has no further projection. The Court discusses the wrongful death claims. Mr. Valeta confirms there are roughly 40 wrongful death claims.

10:30 a.m. The Court asks whether treating wrongful death claims differently than claims with severe injuries is appropriate. Mr. Valeta responds that under the standard adjustment process, Allstate must examine the injury cases while the value is apparent in the wrongful death cases. The Court asks about the 55% claimants. Mr. Romero explains that there are a group of claimants from 2004-2010 who may receive a lesser amount given statute of limitation defenses.

10:31 a.m. The Court notes that, at this point, the payout is at least 4.1 million, plus \$200,000 in administration fees paid by the defense. The parties agree. The Court discusses the value to the class compared to the amount of fees requested. Mr. Romero explains that the attorneys do not take any money from the pool available to the class. The Court is looking at this case as a fee-shifting case, as opposed to a common fund, which is usually a percentage calculation. Caselaw indicates that a fee-shifting often uses a lodestar and, even when a percentage of the fund calculation is used, that calculation is usually cross-checked with the lodestar. Mr. Romero explains that there have been common efforts in these related cases. He argues that this case is closer to a common-fund case. Mr. Romero also discusses the complexity of the case. Mr. Valeta states that attorney's fees were negotiated separately, after the class claims were settled. The Court states that the fact that the fees were negotiated separately assuages concerns regarding the kicker or clear-sailing agreement. But, if the fees are negotiated separately, then it is hard for the Court to characterize the fees as common fund. The Court views this case as a fee-shifting case and can still use a percentage calculation, but precedent generally seems to require a cross-reference with the lodestar calculation.

10:49 a.m. The Court finds that the settlement was honestly and fairly negotiated. The Court finds the relief is adequate, especially given the uncertain outcome of the related case before the New Mexico Supreme Court that will address whether *Crutcher* applies retroactively. The Court finds that the attorney's fees issues does not need to hold up approval of the fees—the Court can approve the settlement while waiting on more information regarding the fees, if necessary. Mr. Romero responds that the Plaintiff's attorneys will continue to represent the class even after final approval.

10:54 a.m. One aspect that Chief Judge Johnson asks to be considered in this hearing is other actions, if any, to be enjoined or dismissed. This makes the Court think of the request for injunctive relief in the Complaint. Mr. Romero responds that the Superintendent of Insurance has ordered all insurers to incorporate *Crutcher*.

10:55 a.m. The Court reviews the issues raised by Chief Judge Johnson in the preliminary approval order. The settlement is fair, reasonable, and adequate. The Court has no issue with the Rule 23(a) factors as to whether to finally certify the class. Some of the Rule 23(b)(3) factors could create a certification issue, particularly issues related to the variance of proof related to damages in the non-death Option 1 claims. Those concerns are much less when the class is certified for settlement purposes only. The Court sees no fatal issue with notice. There are no objections. The Court see no reason to hold up the settlement approval while it addresses attorney's fees. It finds that all potential class members were adequately advised. The Court is inclined to recommend that Chief Judge Johnson enter a final order. The Court will also recommend that Epiq be appointed as the settlement class administrator. As to injunction of other actions, Mr. Romero explains that individuals with other claims were given the option to join the class or continue their lawsuit. Mr. Bhasker discusses the *In re Samsung* case and the *Home Depo* case, which both involved objectors. The Court points out that objections do not have much incentive in this case to object to attorney's fees.

11:05 a.m. The Court discusses the award to the class representative. It notes that the award is modest and that Ms. Belanger attended the all-day mediation and is present today. Mr. Romero explains that Ms. Belanger undertook this endeavor from an automobile accident in that happened in 2014. She has put her interest second to that of the class.

11:08 a.m. The Court discusses whether to require Plaintiff's counsel to provide their hours in order to cross-check the fee. Mr. Romero explains that extracting billing for just this case would be difficult. Mr. Bhasker explains work that Plaintiff's counsel has completed in this case and the novelty of the case.

11:20 a.m. The Court will begin drafting a PFRD for Chief Judge Johnson and asks the parties for a supplement by April 30, 2024 as to claims paid out. The Court will take the issue of whether to order Plaintiff's counsel to provide an accounting of hours they worked on this case under advisement. Nothing further from the parties.

11:23 a.m. The Court conclude the conference.