Law Seminars International Presents: The 15th Annual Conference on Litigating Class Actions

Settlement Strategies

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I. GETTING YOUR SETTLEMENT APPROVED: HOT BUTTON ISSUES

A. Know the Standard

1. In the Ninth Circuit, trial courts are directed to consider the following factors in determining whether to approve a settlement:

   [T]he strength of 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; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

   Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1242 (9th Cir. 1998)

B. Rule 23 Amendments – Approval Factors

1. Court may approve a settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Rule 23(e)(2).

2. Factors courts should consider in making that determination:
   a. The adequacy of representation by class representatives and class counsel;
   b. Whether the settlement was negotiated fairly;
   c. The adequacy of the relief provided to the class; and
   d. Whether class members were treated equitably relative to each other.

C. The Releases

1. The scope of the release should equal the scope of relief.

D. Class definition

1. Complaint definition vs. settlement definition
2. Do *not* release uncertifiable claims (like personal injury claims)
3. Precise and objective class definition, including beginning and ending dates

E. Types of Relief

1. Beware coupons

2. Common fund, claims made without fund limits, and claims made subject to cap
   a. Are claims necessary or can the class be paid outright? *See* Federal Judicial Center "Guidelines for Motions for Preliminary and Final Approval of Class Settlement"

b. The role of robust notice, especially in claims-made settlements
c. How complicated is the claim form?
    i. *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014) (12 to 13 page claim form)

3. Class relief compared with attorney fees and service awards
    a. *Eubank v. Pella Corp.* ($11 million in fees, $5,000 to $10,000 in service awards, uncertain damages to some class members who complied with the claim filing protocols and coupons for the rest)

4. Reversion
    a. Is defendant incentivized to make eligibility for relief difficult and notice less effective?
    b. Class counsel may be awarded fees based on relief available rather than actual payout
        i. Who is fighting for the class members after the settlement is done?

F. Standing

1. Ensure that there is some finding that the named plaintiff has standing. *See Schumacher v. SC Data Center, Inc.*, 912 F.3d 1104 (8th Cir. 2019)

G. Notice

1. Rule 23 Amendments – Notice

2. Parties must "provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Rule 23(e)(1).
    a. Show that court will be able to approve the proposed settlement, and
    b. Show that, if the class has not been certified, the court will be able to certify for judgment on the proposal

3. Though class certification orders are immediately appealable, orders under 23(e)(1) are not. *See* Rule 23(f).

4. Notice Methods
    a. For classes certified under 23(b)(3)—or for which notice of a proposed 23(b)(3) settlement is ordered under 23(e)(1)—notice must be "**the best notice that is practicable under the circumstances**, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, **electronic means**, or other appropriate means."

II. CY PRES

A. Forum

1. Differences between state and federal practice as well as different circuits

B. Targeting *cy pres* recipients

1. *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012)
    a. Interests and activities of *cy pres* recipients must align with particular interests and claims of class members
    b. Other options

C. The future of *cy pres*

1. *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), *cert denied Marek v. Lane*, 134 S. Ct. 8 (2013)
    a. Justice Roberts' cert denial stated "In a suitable case, this Court may need to clarify the limits on the use of such remedies."
    b. Rule 23 subcomittee has decided *not* to address *cy pres*
2. *Frank v. Gaos*, 586 U.S. __ (2019)
    a. Rather than answer the *cy pres* question, the Court vacated the judgment and remanded the case to the Ninth Circuit on the basis that "substantial questions" remained about whether any of the named plaintiffs has standing to sue under *Spokeo, Inc. v. Robins*, 578 U.S. __ (2016).
    b. Justice Thomas Dissent
        i. "In short, because the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, I would hold that the class action should not have been certified, and the settlement should not have been approved." *Frank v. Gaos*, 586 U.S. __ (2019) (Thomas, J., dissenting).

III. SERVICE AWARDS TO CLASS REPRESENTATIVES

A. Is a service award justified?

1. Case review, consultation, and settlement participation
2. Discovery and document production
3. Deposition
4. Living with the problem
5. Risks to the class rep
6. Benefits to class rep as a class member

B. Proportionality of class representative service award compared to individual class member's recovery

1. Conflict between class representative maximizing her return compared to adequacy of settlement for class members at large

a. *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003) (class representative to receive sixteen times recovery ordinary class member's award)

C. Service fees in retainer agreements

1. *Rodriguez v. West Publishing*, 563 F.3d 343 (9th Cir. 2009)
    a. "Selling the lawsuit to attorneys who are the highest bidders"

D. Service fees, but only if class representative supports settlement

1. *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157 (9th Cir. 2013)
    a. Service fee much higher than individual class members would receive in settlement
    b. Arrangement also rendered class counsel inadequate

IV. ATTORNEYS' FEES

A. Preparing for negotiations/ethical issues

1. Negotiating fee and class relief
    a. *Cf. Evans v. Jeff D.*, 475 U.S. 717, 735 (1986) (simultaneous negotiation of main settlement and attorneys' fees is acceptable because more conducive to settlement if parties know their complete liability); and
    b. Ethical Guidelines for Settlement Negotiations. 2002 ABA Litig. Sec. 41 § 4.2.2 (when an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in a fee)

B. Disproportionate attorney fees

1. Whose interests are paramount?
    a. *Figueroa v. Sharper Image*, 517 F.2d 1292 (S.D. Fl. 2007)
        i. Alleged false advertising regarding $350 air purifier—case settled for a $19 coupon for any product sold by Sharper Image, which was threatening bankruptcy, and $4 million in attorney's fees
    b. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (2011)
        i. Injunctive relief; cy pres award of $100,000; $12,000 service award; and $800,000 in attorney's fees
        ii. On remand, counsel awarded $232,729.05 in fees and $50,000 in costs
    c. *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014)
        i. $5,000 to $10,000 to class reps, unidentified damages to some class members and coupons to others, $11 million in fees, $2 million to be paid before final settlement

C. Clear sailing provisions "disfavored" because they deprive the court of advantages of adversarial process. *In re Bluetooth*, 654 F.3d at 946.

D. Kicker arrangements (revert unpaid fees to defendant rather than class)

> "[A] kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger of collusion already suggested by a clear sailing provision. If the defendant is willing to pay a certain sum in attorneys' fees as part of the settlement package, but the full fee award would be unreasonable, there is no apparent reason the class should not benefit from the excess allotted for fees. The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *In re Bluetooth*, 654 F.3d at 949.

E. Quick pay

1. Useful in dealing with objectors
2. What happens if settlement is overturned on appeal?

F. Agreeing to retention or consulting agreements in connection with settlement forbidden

V. OBJECTORS

A. "Good" objectors

1. Fulfill due process
2. Provide critique of settlement
3. Improve settlement by raising unforeseen issues

B. Shake down or professional objectors

1. They expect to lose because they create leverage by appealing, not by prevailing on objection
   a. Fiduciary duty of class counsel to obtain benefits timely for the class versus appellate delay

2. John Yanchunis suggests considering requiring information about objector in class notice.
   a. "Any class member who retains an attorney to prepare the class member's written objection and/or who intends to appear at the Fairness Hearing through counsel must, in addition to the requirements stated above, do the following in the written objection: a) Set forth the attorney's experience with class actions, including the capacity in which the attorney participated in each class action (e.g. plaintiffs', defendants' or objectors' counsel), and the outcome of each case; b) If the attorney has previously represented objectors in a class action, then the attorney must detail the disposition or effect that any objection had on each class action case and how much the attorney was paid for the representation of each objector in each class action case; and c) Even if the class member employs an attorney to prepare the written objection, the class member must sign the written objection

personally as an attestation that the class member discussed the objection with his or her attorney and has fully reviewed the written objection."

C. Rule 23 Amendments – Objectors
    a. Objectors must state whether the objection "applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." Rule 23(e)(5)
    b. Payments to the objectors must be disclosed to and approved by the court

D. "Public interest" objectors (Frank)

    1. Guardian of the class?

E. Plaintiffs' lawyers who were frozen out

F. Common grounds for objections/appeals

    1. Settlement amount
    2. Structure
    3. Notice
    4. Fees

G. Seek an appellate bond from objector

    1. Federal Rule of Appellate Procedure 7 permits a "court to order an appellant to file a bond or provide other security to ensure payment of costs on appeal"

    2. Typically, costs include only the limited items provided in Rule 39
        a. Photocopying and binding of appellate briefs and appendices
        b. Expense of obtaining portions of the court reporters' transcript

    3. *Hershey v. Exxon Mobil Corp.*, 550 F. App'x 566 (10th Cir. 2013) (unpublished)

        a. "Because any appeal by an objecting Class Member would delay the payment under the Settlement, each Class Member that appeals agrees to put up a cash bond to be set by the district court sufficient to reimburse Class Counsel's appellate fees, Class Counsel's expenses, and the lost interest to the Class caused by the delay."
        b. The Tenth Circuit held that FRAP 7 was not exclusive, and so the parties could decide on additional requirements. (The objectors, as class members, would be bound by the agreement unless they opted out, at which point they would lose standing as objectors.)

    4. Courts generally use two grounds for appellate bonds greater than FRAP 7.2
        a. An appeal is frivolous and the court is likely to assess attorney's fees as a sanction

i. *See, e.g.*, *Compact Disk Minimum*, 2003 WL 22417252, at *1 (including attorneys' fees on appeal in Rule 7 bond because a "Rule 7 bond can cover damages assessed under Fed. R. App. P. 38"); *Vaughn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738, 751 (E.D. Tex. Sept. 28, 2007) (including attorneys' fees because "amount of bond should reflect the significant possibility that any objector's appeal will be subject to Fed. R. App. P. 38"), *rev'd by* 507 F.3d 295 (5th Cir. 2007); *cf. In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817 (6th Cir. 2004) (affirming Rule 7 bond that included $50,000 in attorneys' fees because the state law on which the suit was based required plaintiffs to pay "damages" to defendants for filing frivolous litigation)

b. Because the statute on which the class suit was originally granted shifted attorneys' fees to the prevailing party
    i. *See, e.g.*, *In re Heritage Bond Litig.*, MDL 02-ML-1475 DT, 2005 WL 2401111, at *5 n.8 (C.D. Cal. Sept. 12, 2005) (including attorneys' fees on appeal in Rule 7 bond because the Private Securities Litigation Reform Act "permits attorneys' fees to a prevailing plaintiff"), *vacated* 2007 WL 1340633 (9th Cir. May 8, 2007)
    ii. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 124, 128 (S.D.N.Y. 1999) (including $50,000 in attorneys' fees on appeal in Rule 7 bond because the Clayton Act permits plaintiffs to recover the "cost of suit, including a reasonable attorney's fee").

5. AAJ Class Action Objector Database
    a. Good source of information about serial objectors and their counsel

VI. CONCLUSION

A. Know the rules and the process

B. Negotiate wisely and ethically

C. Negotiate a fair deal

D. Ensure robust notice

E. Avoid attorneys' fees pitfalls

F. Ensure an easy claims process