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TOP HEALTH CARE LAWYERS

Non-monetary class action settlements: 7 things you should consider

By Elliot K. Gordon

A key objective of some class action lawsuits is not only to obtain monetary relief for class members, but to secure changes to the ways that companies do business. That is especially so for cases brought against the health care sector. In recent years, health care companies have agreed to modify existing or implement new medical policies, appeals procedures, disclosures, compliance programs, out-of-network reimbursement practices and cybersecurity measures as part of class action settlements. Business process changes can have significant operational and revenue effects on companies and therefore require a comprehensive process for both negotiating and implementing them. The following are seven issues that parties should consider when negotiating non-monetary relief as part of class action settlements.

1. Definitions of Key Terms

The parties should ensure that the terms used in provisions for non-monetary relief are mutually understood and well defined. Key terms should not be hastily defined at the last minute; rather, agreement on their meanings should be achieved early in the process. There is significant risk of a settlement agreement falling apart (as well as post-settlement disputes) if the parties have different understandings of relevant terms. Where possible, parties should consider using commonly accepted healthcare industry terminology (such as Current Procedural Terminology or Health Care Common Procedure Coding System codes) in order to eliminate any misunderstandings.

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2. Duration of Commitments

In order to secure the best possible benefits for class members (and future consumers), plaintiffs are likely to either seek irrevocable commitments or obligate the defendant to keep the non-monetary relief provisions in effect for a substantial period of time. Given the rapid pace of change in the health care industry and in order to ensure competitiveness, defendants are likely to seek the shortest possible time period for commitments to non-monetary relief. Defendants may be more willing to make longer commitments to the extent that there are “escape valves” from their obligations under certain circumstances.

3. Changed Circumstances

Companies agreeing to non-monetary relief may be concerned that the commitments they are making may make them less competitive or nimble. Defendants may be more willing to both provide non-monetary relief as part of a class settlement and agree to keep business practice changes in effect longer if there is some mechanism by which they can modify or terminate their obligations upon the existence of specific circumstances or meeting certain criteria. This is a particularly important issue in the healthcare sector, which is highly regulated, as companies will want to ensure that their commitments do not conflict with statutory, regulatory, technological or medical practice changes. Plaintiffs willing to consider such provisions in exchange for securing non-monetary relief or ensuring that such relief will be required for an extended duration will want to define those circumstances or criteria as narrowly as possible, such as where the company will incur a demonstrable and substantial impact on its business or where compliance becomes impractical or of no further benefit to class members. There is plenty of room for creativity in this area, but courts likely will scrutinize any escape valves to ensure that companies cannot invoke such provisions to avoid their obligations.

4. Implementation Schedule

Just as settlement agreements must address the duration of non-monetary relief, they must also dictate when companies must commence compliance with their obligations. Where companies commit themselves to make multiple changes to business practices and/or products, it may be appropriate to develop a schedule that contains varying implementation dates for different provisions. This may also be necessary where companies must deal with multiple legacy systems or different operating subsidiaries, or must obtain regulatory approval to implement some changes. Insofar as plaintiffs will want non-monetary relief provisions to be implemented promptly, as part of the negotiation process, companies should be prepared to furnish plaintiffs' counsel with information sufficient to understand why the proposed implementation schedule is necessary to make the required changes. In addition, the parties may need to agree on whether there will be any relief for those affected by challenged practices after settlement but prior to implementation of business practice changes.

5. Compliance Monitoring

Plaintiffs will want to ensure that defendants are doing what they agreed to do. Depending on the nature of the business practice change, noncompliance may be evident to consumers. However, some changes may be system or process changes where noncompliance would not be readily apparent (such as cybersecurity practices). Therefore, agreements may require measures for monitoring compliance with obligations. These measures include specifying a self-reporting mechanism or having a third party conduct examinations or audits to ensure compliance. In any case, companies should conduct internal audits to ensure their ongoing compliance with non-monetary relief provisions.

6. Dispute Resolution Method

In addition to trial courts reserving jurisdiction over disputes arising under a settlement agreement, or breach of contract actions, parties may wish to consider alternative approaches to dispute resolution, including mandatory mediation and/or binding arbitration. Parties can mutually select one neutral responsible for resolving any and all future disputes. The agreement should also address which party or parties will bear the cost of alternative dispute resolution.

7. Valuation of Relief

Plaintiffs' counsel will want to include the value of any non-monetary relief in petitioning for an award of attorneys' fees. Accordingly, parties should seek to reach agreement on that valuation. While plaintiffs might rely on certain external data or information obtained in discovery, it may become necessary for the company to furnish certain information as part of the negotiation process, such as the costs associated with implementing particular business practices. In this era of increasing judicial scrutiny of class settlements and attorneys' fees awards, the proponents of a settlement should be prepared to make a persuasive case to the court as to how they developed the valuation of the non-monetary relief component. This valuation can be derived from, among other things, the costs of implementing changes or the benefits to be provided to class members in the future (such as lower costs, increased value, greater time savings). Declarations from independent experts as to the valuation of non-monetary relief may also be helpful in obtaining judicial approval. Plaintiffs' counsel may also want to use the value of non-monetary relief to seek a percentage of a common fund that exceeds the applicable benchmark in the relevant jurisdiction.

Class action lawsuits will continue to push companies in the health care sector to implement business practice changes. Careful consideration of the above issues will allow parties to negotiate sustainable and meaningful settlements that meet the needs and interests of healthcare consumers and companies alike. ■

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