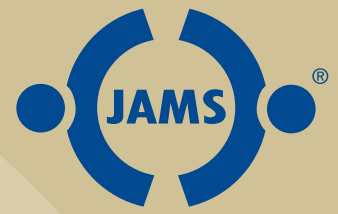


Class Action Settlement Checklist



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As most attorneys are aware, the settlement of a class action can be quite complicated. Unlike “one vs. one” cases, class actions involve terms that go beyond simple dollars and cents issues. This is particularly true since trial courts are known to carefully scrutinize proposed settlements at the preliminary approval stage.

The purpose of the following Checklist is to provide the class action practitioner with a list of settlement related topics to be considered during the mediation negotiation process. While it is certainly likely that not all of these items will come into play in every class action, and this list is not meant to be all-inclusive, it is hoped that the list will serve as a tool that will help counsel avoid unnecessary pitfalls. It is also hoped that attorneys will consider addressing some or all of these matters in a Memorandum of Understanding (MOU) to be executed at the conclusion of the mediation.

- What is the agreed-upon definition of the class?
- Are there going to be sub-classes? If so, what is their definition?
- What is the size of the class?
- What is the amount of the settlement? Does the amount of the settlement change if the class proves to be larger or smaller than anticipated?
- What other factors could result in a change in the amount of the settlement?
- What is the agreed-upon starting date for the “class period”?
- What is the agreed-upon “ending date” concerning when the settlement will apply?
- Is there a “blow up” provision that will void the settlement if a defined percentage of class members choose to opt out? If so, what is the percentage?
- Will class members have to make a claim to share in the settlement (a “claims-made” settlement)?
- If this is a claims-made settlement, what will be the nature of the claim form? Will it be simple (i.e., name, address, social security number and a simple declaration under oath), or more complex. NOTE: the more complex a claim form is, the more likely it will be rejected by the court.
- Who will write the first draft of the claim form?
- If no claim form is required, will each class member be given an individualized estimate of their share of the net settlement at the time the notice of settlement is disseminated?
- Whether or not a claim form is required, how will class members challenge the determination of their share of the settlement fund?
- Will the claims administrator have the authority to resolve disputes with class members? Will your judge approve this methodology?
- Do the parties agree that any of the unclaimed funds (in a claims-made settlement) will revert to the defendant(s)? If so, how will that be determined? NOTE: many courts are now routinely rejecting settlements that contain reversion clauses. Some will permit them as long as there is a “floor” that will be paid out, no matter what.
- Is there a minimum amount each class member will receive?
- Will notice to the class be required? In all but the rarest of “injunctive relief-only” class actions, the answer is yes.
- Which party will draft the notice, subject to approval by the other side?

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Class Action Settlement Checklist *continued*

- ❑ Does your judge have a particular type of form of notice she/he requires or prefers? If so, a great deal of lost time can be avoided by crafting the proposed notice to meet the judge's requirements.
- ❑ How will the terms of the settlement be described in the notice?
- ❑ Will the notice clearly indicate the manner in which the settlement proceeds will be shared among the class members?
- ❑ The notice will no doubt require the plaintiffs' counsel to set forth the contingent fee they are seeking. Will the defendant object to that fee request?
- ❑ How will the notice and accompanying documents be disseminated to the class members?
- ❑ Will any electronic methods, such as email, be used to disseminate the notice? If so, how will you establish the viability of this method to satisfy the trial court?
- ❑ What costs will be deducted from the gross settlement fund (i.e., costs of administration, attorney fees, etc.)?
- ❑ In wage and hour litigation, will the employer pay the employer side payroll taxes?
- ❑ Exactly what is the scope of the release that will result from each class members' participation in the settlement? NOTE: It is absolutely critical that the parties agree upon the extent of the release (i.e., what claims are being released by the class members), and its specific language, prior to or at the mediation.
- ❑ As is most common, is this an "opt out" class?
- ❑ How much time will each class member have to opt-out after mailing of the class settlement notice? NOTE: I do not know of any judge approving an opt out period of less than 30 days. Most require 45 to 60 days.
- ❑ What will a class member have to do to opt out of the settlement? Will an opt-out form be included with the class settlement notice, or will the class member have to take other action to opt out?
- ❑ How much time will class members have to object to the settlement?
- ❑ What will a class member have to do to object to the settlement terms?
- ❑ Who will write the first draft of the formal settlement agreement?
- ❑ Is there a time limit on completion of the first draft of the settlement agreement, the notice and the claim form?
- ❑ Will the settlement begin to draw interest after a specific date if the parties are waiting for preliminary or final approval?
- ❑ Will the motion for preliminary approval be a joint motion, or a motion by the plaintiffs only?
- ❑ If a joint motion, who will write the first draft, and what is the deadline for completing the same?
- ❑ Who will select the administrator? Will there be input from the other side?
- ❑ Will the party selecting the administrator obtain bids from more than one possible administrator?
- ❑ Will the existence of the settlement remain confidential until the court grants preliminary approval?
- ❑ When will settlement funds be deposited with the administrator?
- ❑ Will deposited funds draw interest?
- ❑ Will the motion for final approval be a joint motion? If so, who will prepare the first draft?
- ❑ How much time will pass after final approval before distribution of the settlement funds? Any variation based on objectors?