

## Avoiding class settlement nightmares

By Hon. Nancy Wieben Stock (Ret.)  
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Attorneys who practice in the civil arena are accustomed to controlling all aspects of their settlement. Specifically, the timing, the terms, the scope of the release and the dismissal are almost always well within the control of defense and plaintiffs' counsel. The reverse is true when it comes to class action settlements. The attorneys control virtually nothing and the usual practice of waltzing into a judge's courtroom with a dismissal in hand leads to nowhere.

However, attorneys who routinely handle these types of cases are keenly aware of this problem, yet remain bewildered when preliminary and final approvals are denied. Class settlements have quickly become the most scrutinized area of a judge's calendar. There are two reasons for this. First, the scrutiny placed on the judge is passed on to the attorneys. Second, case law has now developed to the point that judges face a more rigorous regime when making their findings as to fairness.

With respect to the judicial scrutiny component, attorneys need to understand the judicial perspective. What are the judge's responsibilities and how can the judge go about accomplishing these obligations?

Judges expect a healthy adversarial process when it comes to verifying the validity of the terms proffered in a class settlement. Since class settlements must be accompanied by a judicial finding of fairness, reasonableness and adequacy, the question becomes how those findings can be made when all adversarial checks and balances are absent. This is the first time, in what is usually a contentious battle, where class counsel and defense counsel join forces and remain silent in order to achieve their respective goals.

Defense counsel's interests are to make sure the settlement is approved so the preclusive effects of a release can forever bar further exposure to their client. Class counsel's interests are to safeguard the benefit for the class and make sure that all of their years of waiting result in fees that the judge will approve without hesitation.

The respective interests may not satisfactorily address the questions the trial judge has to pursue and leaves the judge to make the determination of fairness, adequacy and reasonableness with no real challenger. Accordingly, the normal advocacy pathway used to achieve the

correct result is completely lacking. At this juncture, class counsel and defense counsel are in unison and may say and do anything to achieve what each believes is in their client's best interest. Unfortunately, this does not necessarily equate with the information needed to assist the judge in making the findings required by case law. In that regard, the trial judge must scrutinize the settlement and, unlike any other area of civil law, the trial judge must certify and guarantee the benefits to the class and likewise determine the proper parameters of any release and fees awarded.

So what are the red flag areas attorneys need to be mindful of?

**What's it worth?** The court must make a finding that the settlement is fair, adequate and reasonable. Often the motion fails to provide an analysis of the value of the settlement to the class. *Kullar v. Footlocker Retail Inc.*, 168 Cal. App. 4th 116 (2008). In a wage and hour case, how many work weeks are encompassed in the claims rate, what is the average class recovery, and how does this relate to wages earned in an average week? Given the economic circumstances we live in, it is possible that approval will be given to a lower gross settlement amount if an adequate showing is made of defendant's severe financial distress and the court is willing to actively supervise the ongoing financial reporting and payments.

**Common fund conundrum.** Often settlement approval and attorney fees requests are based upon an inflated view of the benefit to the class, as measured by the amount of money in the so-called "common fund." When attorney fees, employer taxes and reversions to the defendant are included in the gross settlement amount, this hardly makes up a common fund.

**Payment of no money.** Nonmonetary benefits are acceptable, but must be justified. In a case involving corporate policy change benefiting consumers, what is the overall value to the consumers? Consider the inclusion of expert declarations and those of class members to explain. Although not always favored by courts, coupon settlements can be fair and adequate if they do not force the consumer into an unwanted relationship with the defendant. California law may also restrict the expiration date if the coupons are considered gift certificates. California Civil Code Section 1749.5(a)(1).

**Cy pres.** Much confusion abounds

in this area. Suffice it to say that when payments cannot reasonably be made to identified class members, a settlement may include the payment of a relatively large percentage of funds to a third party. Federal cases strike a different chord, but in California the requirements are set forth in Code of Civil Procedure Section 384(a). Recipients who are hand-picked by counsel, who have a personal interest in the charity, or who are 501(c)(3) foundations of the corporate defendant will likely be rejected. In the claims-made wage and hour context, it is best to consider an escheat of claimed but uncollected funds to the State Controller's Office where there is a chance that the employee will someday be reunited with the lost wages.

**Collusion and the service fee.** The court must trust that absent class members, whose claims will be forever extinguished in settlement, are fairly represented by a conflict-free representative plaintiff. This is why courts are skeptical about out-of-proportion cash payments to representatives as service fees or enhancements. Often a general release with a waiver by the representative will be included in settlement. While the defendant is entitled to seek whatever protections it desires, the extra releases and waivers will not be a factor in the granting of a larger enhancement, due to the appearance of collusion. Also, if the enhancement is based upon risks taken and sacrifices made by the representative, supply evidence of this. Conclusory will be looked upon with skepticism.

**Don't hide the ball.** Class notice is a key feature of fairness. Advocacy should be eliminated from the message. A link to a website enhances the ability to expand the message. For consumer matters, use the method most likely to reach the target audience. Consider point-of-purchase notification, the back of the cash register receipt, signage and second-language publications. Most importantly, keep the notice simple and readable. See Federal Rule of Civil Procedure 23(c)(2)(b).

**Name it and claim it.** Be careful with claims procedures. They should be simple and intuitive. Have a layperson proof-read the draft. A high claims rate benefits all concerned. (Think, attorney fees determination).

**The release.** This is the end goal for most settling defendants. Class counsel are required to be vigilant in protecting against releases that "give away the

farm" by releasing claims not brought. Beware the phrase, "all claims that could have been brought," or "which relate to." These are red flags for enhanced judicial scrutiny.

**Attorney fees.** Class counsel are entitled to be compensated for the reasonable value of their efforts in obtaining a benefit to the class. *Lealoa v. Beneficial California Inc.*, 82 Cal. App. 4th 19 (2000). In California, courts are not bound by the federal practice of awarding counsel a percentage of the gross settlement amount. The California practice involves judicial review of detailed billing statements to ascertain the lodestar, from which the court will consider applying a multiplier (positive or, sometimes, negative). *Chavez v. Netflix Inc.*, 162 Cal. App. 4th 43 (2008). Judges will often cross-check this approach with a percentage of value to the class approach to arrive at a final award. Whereas the lodestar approach may appear to penalize diligent class counsel for early settlement, the balancing features described herein mitigate against that result.

**Dismissal is not an option.** Under California law, the court may not dismiss a class action after settlement. The California Rule of Court requires that a judgment be entered.

Hopefully counsel who practice in this area find these points useful in preparing their fairness motions.

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