Expert Q&A on Class Action Settlements and Developments in Class Action Practice: A Plaintiff-Side Perspective

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An expert Q&A with David J. Goldsmith of Labaton Sucharow LLP, discussing important considerations and best practices for plaintiffs' counsel seeking to settle a class action and obtain attorneys' fees, and highlighting issues on the horizon affecting class actions generally that plaintiffs' counsel should monitor.

GIVEN THAT THE MAJORITY OF CLASS ACTIONS ULTIMATELY SETTLE BEFORE GOING TO TRIAL, WHAT ARE THE KEY CONSIDERATIONS FOR CLASS COUNSEL INVOLVED IN SETTLEMENT NEGOTIATIONS?

Careful preparation of the case for settlement negotiations, the nature and scope of which will depend on the stage of the litigation, is key. Class counsel should:

- **Select a respected, experienced mediator.** Counsel should seek a mediator who is fair, experienced with the type of class case at issue (such as securities fraud, mass torts, or consumer class actions), and, ideally, known to the court. A mediator's credibility depends on his ability to get the parties to reach an accord, and that means any good mediator will extract concessions from both sides.
- **Estimate the recoverable damages under various scenarios, generally with the assistance of a qualified consulting expert.** For example, counsel may assess possible damages figures based on an assumption that a jury will find for the plaintiffs on all of their claims (a "pie-in-the-sky" figure) or an assumption that there will be an adverse ruling on certain claims or factual or legal issues. If the damages methodology itself is at issue, counsel may calculate alternative damages figures based on various assumptions and inputs. Which damages figures class counsel discloses to the mediator and to the defendants is an important strategic decision. In some cases, counsel will submit their pie-in-the-sky figure to both the mediator and the defendants, but will disclose alternative calculations only to the mediator on a confidential basis.
- **Consider the available sources of recovery.** In addition to researching the defendants' general ability to pay a settlement or judgment, class counsel should learn as much as possible about the defendants' applicable insurance coverage. The insurance policies carried by the defendant make up what is known as the insurance "tower." Counsel should understand the layers of coverage in the tower, as well as how much money has been drawn down in defense costs. In federal cases, obtaining this information is relatively straightforward because defendants must produce insurance policies as part of their initial disclosures (Federal Rule of Civil Procedure (FRCP) 26(a)(1)(A)(iv)).
- **Learn as much as possible about the case.** If formal discovery has not yet begun, class counsel should meet and confer with defense counsel for the production of specified and perhaps targeted categories of nonpublic documents for mediation purposes.

For a sample agreement settling the claims of a plaintiff class, see Standard Document, Class Action Settlement Agreement (6-608-2586).

WHAT STRATEGIES SHOULD CLASS COUNSEL CONSIDER WHEN SEEKING COURT APPROVAL OF A CLASS ACTION SETTLEMENT?

Class counsel entering the settlement approval process should know their "hook," meaning a headline-level explanation of why a proposed settlement is fair. The hook should focus on two or three essential reasons, specific to the facts and circumstances of the case, why the settlement is fair, reasonable, and adequate in light of the risks, costs, and duration of continued litigation. For example:

- The settlement amount is a robust percentage of the maximum recoverable damages as compared to cases of similar magnitude.
- The settlement amount compares favorably to a settlement recently approved in a factually similar case.
- The parties settled on the eve of trial.
- The defendants could not likely fund a substantially larger settlement.

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- An experienced mediator recommended that the parties settle at that level after informed, arm's-length negotiations.

Class counsel should try to avoid generic reasons like "class action litigation is complex and unpredictable." Having a clear, persuasive hook will be invaluable when preparing written submissions in support of the settlement, responding to any objections, and arguing why the settlement should be approved.

For information on each stage of the settlement approval process, see Practice Note, Settling Class Actions: Process and Procedure (3-541-8765).

WHAT STRATEGIES SHOULD CLASS COUNSEL CONSIDER WHEN SEEKING AN AWARD OF ATTORNEYS' FEES?

In addition to researching the law governing fee awards in the relevant jurisdiction (generally, federal circuit or state appellate district law), class counsel should research the fee award decisions of the particular judge in previous class actions. Because fee awards are committed to the court's discretion, many judges have their own consistently and sincerely held views on fee awards, and will be skeptical of class counsel who seek fees that are higher than those the judge has previously awarded. If counsel have legitimate reasons to seek a materially greater fee, they should be prepared to explain why:

- The settlement, and the work to achieve it, is different in this case.
- The requested fee is reasonable and appropriate in this case.

The fee petition should not solely or even principally rely on the fees historically awarded by the particular judge, however. Rather, the submissions should show, to the extent possible, that the requested fee falls within the range of fees awarded in similar cases by other courts, both:

- **Within the relevant jurisdiction.** For example, a visually appealing chart showing how the requested fee compares with fees awarded by the judges in the same courthouse or jurisdiction can be persuasive.
- **Outside the relevant jurisdiction.** Counsel should look to reliable academic studies on class action attorneys' fees rather than cite a string of unrelated (and often unhelpful) fee orders. One particularly useful 2010 study has been cited favorably by many courts in evaluating fee awards (Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010)).

A small number of class counsel have espoused a strategy of seeking fees at the outer limits of reasonableness, on the theory that the court will never award more and can always award less. This "you don't ask, you don't get" approach tends to draw objections and backfire with the court, and reflects badly on class counsel generally. Reasonableness is the watchword not only for courts in determining an appropriate fee award, but also for class counsel in preparing an appropriate fee petition.

For a comparison of recent court-approved fee awards, go to the What's Market Class Action Settlement Agreements database available on Practical Law.

For more information on seeking attorneys' fees in class actions, see Practice Note, Attorneys' Fees in Class Action Settlements (w-001-4099).

For information on the factors and calculation methods that federal appellate courts use to determine the reasonableness of requested attorneys' fees in class action settlements, see Practice Note, Calculation Method for Attorneys' Fees in Class Action Settlements by Circuit (w-001-4540).

WHAT FACTORS SHOULD CLASS COUNSEL CONSIDER WHEN CHOOSING APPROPRIATE *CY PRES* DISTRIBUTEES?

Cy pres is an equitable doctrine named from the Norman French expression *cy pres comme possible*, or "as near as possible." The doctrine originated in trusts and estates law as a way to carry out a testator's intent in making charitable gifts. In class action settlements, the *cy pres* doctrine permits the court to distribute unclaimed or non-distributable portions of a class settlement fund to the "next best" set of beneficiaries for the indirect benefit of the class (see *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 741 (9th Cir. 2017), *vacated on other grounds sub nom. Frank v. Gaos*, 139 S. Ct. 1041 (2019) (per curiam)).

Cy pres awards generally must satisfy a "nexus" requirement, showing that the award serves the objectives of the underlying statute, that is, the claims or rights vindicated by the settlement, and the interests of the absent class members. Class counsel should select charitable, not-for-profit distributees whose missions and programs are aligned with the objectives of the statute invoked by the litigation and which further the interests of the class members. While a prior relationship or affiliation between any party or its counsel and a distributee is not automatically disqualifying, class counsel can expect courts to inquire into the circumstances of the relationship or affiliation to ensure that the distributee was selected on the merits.

The Supreme Court has expressed some doubt as to whether class action settlements that distribute money to cy *pres* distributees and set aside fees to class counsel but distribute no money to class members are fair, reasonable, and adequate, and support class certification under FRCP 23. In *Frank v. Gaos*, the Court took up this question but ultimately remanded for the Ninth Circuit to consider whether the plaintiffs had standing in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). See 139 S. Ct. 1041, 1045-46 (2019) (per curiam). Additionally, Justice Thomas stated that he would have rejected the proposed class and settlement. *Id.* at 1046-48 (Thomas, J., dissenting); see also *Marek v. Lane*, 134 S. Ct. 8, 8-9 (2013) (statement of Roberts, C.J., respecting denial of certiorari). Such "*cy pres*-only" settlements, though rare, are best avoided.

For more information on the use of *cy pres* awards, see Practice Note, Settling Class Actions: Process and Procedure (3-541-8765).

WHAT IMPACT DO YOU EXPECT THE RECENT AMENDMENTS TO FRCP 23 WILL HAVE ON CLASS ACTION PRACTICE FOR PLAINTIFFS?

The latest amendments to FRCP 23 became effective on December 1, 2018.

The amendments mainly address settlement issues. FRCP 23(c)(2)(B), as amended, simply endorses the longstanding practice of sending a combined notice of class certification for settlement purposes and a proposed settlement. Significantly, this provision also expressly recognizes alternative methods of communicating with class

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members by clarifying that instead of or in addition to US mail, the best practicable notice may be provided by "electronic means, or other appropriate means." In certain cases, these alternative methods may be more reliable, faster, and less costly than mail.

FRCP 23(e)(1)(B), as amended, codifies a standard for courts to follow in deciding whether to grant preliminary approval of a settlement and direct that notice be given to the class. The parties must show that the court will "likely be able to" approve the settlement and certify the class for settlement purposes. This standard does not appear materially different than whether the settlement falls within the "range of reasonableness," which is the standard that generally has been applied at the preliminary approval stage. Class counsel should note that a settlement class is subject to the same class certification prerequisites as a litigation class, with the exception of manageability of the proceedings (see *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

FRCP 23(e)(2), as amended, lists a focused set of factors for courts to consider in assessing whether a proposed settlement is fair, reasonable, and adequate. These factors, which are intended to replace the varying lists of factors articulated by the courts of appeals, are familiar except that the following now appear relevant to the adequacy of the settlement relief:

- The effectiveness of any proposed method of distributing relief to the class.
- The amount and timing of payment of requested attorneys' fees.
- Whether the settlement treats class members equitably relative to each other.

Courts have consistently analyzed distribution methods, attorneys' fees, and allocation issues separately from the fairness, adequacy, and reasonableness of the settlement itself. If a proposed settlement is fair but the court is dissatisfied with the method of distributing relief, the amount of the requested attorneys' fees, or the plan of allocation, the court can readily approve the settlement but award a lesser fee, approve an amended plan of allocation, or issue directives regarding distribution. This longstanding, accepted practice allows courts to avoid throwing out fair, valuable settlements and returning the parties to litigation over ancillary concerns, and class action settlement agreements overwhelmingly reflect this practice. Class counsel should argue that amended FRCP 23(e)(2) be interpreted accordingly. Having the approval of class action settlements rise and fall on any of these three additional factors puts approval of settlements at risk and benefits no one.

Finally, amended FRCP 23(e)(5) concerns objections by class members to proposed settlements. The amendment removes the requirement for court approval of any withdrawal of an objection. Therefore, if class counsel convinces an objector that the objection is without merit or is otherwise improper and should be withdrawn, no court approval is needed for withdrawal. Further, the amendment provides that unless approved by the court after a hearing, no payment or other consideration may be provided in connection with forgoing or withdrawing either an objection or an appeal from a judgment approving a settlement. These measures will have a positive impact on class action practice by addressing the problem of bad-faith, opportunistic objectors who seek to extract payments from class counsel rather than legitimately assist the court in evaluating a settlement.

APART FROM SETTLEMENT-RELATED CONCERNS, A BROADER ISSUE CURRENTLY FACING CLASS COUNSEL IS THE FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2017 (FCALA). WHAT IMPACT DO YOU EXPECT FCALA, IF ENACTED, TO HAVE ON CLASS ACTION PRACTICE FOR PLAINTIFFS?

FCALA would significantly curtail plaintiffs' ability to bring and maintain class actions. Among its litany of changes, the bill would:

- Subject class actions to a stay of discovery while a motion to dismiss, motion to transfer, or motion to strike or dispose of class allegations is pending, with narrow exceptions.
- Bar courts from issuing an order certifying any nonsecurities class action "in which any proposed class representative or named plaintiff is a relative or employee of class counsel."
- Prohibit courts from certifying any class action seeking monetary relief for personal injury or economic loss unless the proponent "affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives." The court would be required to conduct a "rigorous analysis of the evidence presented" on this question.
- Remove courts of appeals' discretion to deny petitions for review of class certification orders, so that interlocutory class certification appeals will be as of right.

Therefore, FCALA would make it harder for plaintiffs to obtain class certification by imposing restrictions on who can represent the class (a provision that could be subject to constitutional challenge), codifying a new typicality requirement associated with damages, and encouraging defendants to routinely appeal class certification orders. The bill would also enable defendants to delay proceedings by filing motions to stay discovery for extended periods even after a complaint has been found to state a claim.

Additionally, FCALA would regulate aspects of attorneys' fee awards, including placing limits on the amount of attorneys' fees and prohibiting the determination or payment of attorneys' fees until the distribution of any monetary recovery to class members has been completed.

Moreover, FCALA would expressly apply to all class actions that are pending as of the date of enactment. The bill's retroactive effect raises a number of troubling questions, such as whether a district court would be obligated to revisit class certification or other matters, or whether a court of appeals would have to entertain a class certification appeal that it had previously declined to hear.

WHAT OTHER KEY ISSUES ARE ON THE HORIZON FOR CLASS COUNSEL?

One key issue is the impact of the Supreme Court's recent decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.* (*ANZ*), which held that the three-year time bar for claims brought under Section 11 of the Securities Act of 1933 (15 U.S.C. § 77k) is a statute of repose, not a statute of limitations (137 S. Ct. 2042, 2029-52 (2017)). Accordingly, the three-year period is not subject to the tolling rule that had generally been applied in class actions under the Supreme Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

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Following *ANZ*, class members that may wish to opt out and bring an individual Section 11 claim must file their claim within three years of the securities offering at issue, irrespective of the timing of class certification or a settlement. Although *ANZ* concerned Securities Act claims, class counsel should assume that the five-year time bar for claims brought under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78(j)(b)) also will not be subject to *American Pipe* tolling. See *North South Capital LLC v. Merck & Co.*, 702 F. App'x 75, 80-81 (1st Cir. 2017) (plaintiffs acknowledged that after *ANZ*, equitable tolling under *American Pipe* does not apply to statute of repose for Exchange Act claims).

Additionally, after *ANZ*, plaintiffs' filing of protective complaints to preserve their ability to opt out could impact the settlement value of class actions. Where these complaints are filed before the parties discuss settlement, defendants can be expected to contend that those plaintiffs have effectively opted out of the class and must be excluded from any damage calculations.

ANZ also suggests a tension between:

- The proper time for seeking class certification and notifying class members of the pendency of the action and their right to opt out.
- The desirability of notifying class members of the expiration of the repose period and the consequences of failing to file a protective claim.

Class counsel may wish to seek certification early enough to assure that the latter disclosures can be included in the notice. If that is not practicable, a standalone notice informing class members of the expiration of the repose period may be needed. To save costs, courts should consider streamlined methods of providing this notice, as contemplated by amended FRCP 23(c)(2)(B). Courts should also consider directing defendants to share those costs, perhaps in view of whether pre-class certification proceedings have been unreasonably delayed.

For more information on the *ANZ* decision and its implications for class members and potential opt-out claimants, see Article, Expert Q&A on Tolling of Securities Claims After CalPERS (w-009-4133).

Apart from settlement-related issues, *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), presented the interesting question of whether state courts lack jurisdiction over class action claims brought under the Securities Act.

For decades, the Securities Act provided unambiguously that federal district courts have jurisdiction "concurrent with" state courts to hear private enforcement claims (15 U.S.C. § 77v(a)). In 1998, however, Congress enacted the Securities Litigation Uniform Standards Act (SLUSA), which forbids most securities class action claims brought under state law and permits removal of certain securities class actions to federal court (15 U.S.C. § 77p(b)-(c)). Since SLUSA, plaintiffs have continued to file Securities Act complaints in state courts, and most federal district courts have granted motions to remand.

The question in *Cyan* was whether the jurisdictional provisions of SLUSA were intended to strip state courts of concurrent jurisdiction over lawsuits that assert only Securities Act claims.

In a unanimous opinion by Justice Kagan, the Court held that SLUSA did not strip state courts of jurisdiction over class actions alleging violations of only the Securities Act. The Court further held that SLUSA does not permit defendants to remove such Securities Act-only cases to federal court. (138 S. Ct. at 1075, 1078.) Cyan accordingly validated the decision of class counsel to file Securities Act complaints in state courts, and unsurprisingly has led to an increasing number of these types of filings.

For more information on SLUSA, *Cyan*, and the question of concurrent jurisdiction, see Practice Note, Securities Litigation: Class Actions Arising from IPOs (w-007-2000).

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