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Class(ic) Settlement Problems

Curtis E.A. Karnow

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By Curtis E.A. Karnow[1]

Last year I participated on a panel of state and federal judges discussing class actions. Not one of us had approved a class action settlement on the first effort. This suggests that it might be helpful to provide a list of issues which often seem to pose problems when counsel file motions for preliminary approval of such settlements. (I assume here that the class has not been certified as of the time of settlement.)

Generally, counsel should review the papers with great attention to detail. Problems often slip in because old forms are used, or conflicts are created as among various papers filed, such as variations in the definition of the class.

What follows is not a checklist of the important areas to cover in a motion for approval. Some potentially useful checklists are cited at the end of this note.

Finally, I must note that each case is unique. Problems listed below may or may not in a given case inhibit preliminary approval; many are matters of degree; and many judges will view things very differently than suggested here.

Generally

Counsel often use different language in different documents, such as in the notice, settlement agreement, claim forms, proposed orders, and so on, on the same issue. For example, I have seen conflicting measurements of time and deadlines. The papers might tell potential members that their claims or objections must be submitted by a certain date but that is described variously as "postmarked by" "mailed by" "served by" "sent in by" or "received by" the date. Sometimes there are conflicting requirements concerning the same issue, such as what must be done with claims or objections; e.g., mailed to all counsel (or the claims administrator), or filed, or *also* filed; or mailed to the court, or filed with the court, etc. Frequently there are differences, and sometimes major differences (such as the class period), among the class definitions in the proposed order, the proposed settlement, and the notice.

Settlement

Settlement agreements on occasion fail to cover potentially important issues. For example, if it provides for equitable relief (such as an injunction), how is this valued and how was that value arrived at? Are the parties merely endowing great value on just a promise to obey the law in the future? The agreement (or other explanation) should usually note how many "cents on the dollar" the settlement represents. This usually involves a description of the sums plaintiffs might obtain with an outright victory, and the fraction represented by the settlement. The court needs to know the size of the class and average or likely recovery for a class member; and the estimated range of high and low amounts.

Does the settlement create a true common fund? Or will defendant only agree to make a certain amount available, pay up to that amount, and have the rest revert back to the defendant? Although this would be unusual and perhaps a red flag, the papers should note if the employer share of taxes comes out of the settlement fund. The court will need to know how uncashed checks are handled. These might escheat to the state, or provide an additional payment to identified class members, or be treated otherwise.

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[1] Judge of The Superior Court of California (San Francisco). This article has been submitted for publication both in defense and plaintiffs' publications for the benefit of both bars seeking to resolve class action cases through settlement.

Class notice & claims

Commonly, the class notice is not comprehensible to a lay person. It contains legalese such as "consideration," and Latin phrases such as "pro rata." Drafters should assume the notice will be read quickly, sometimes suspiciously (does it look like a bill or invoice?), by readers with an 8th grade education[2] (unless the class definition suggests otherwise). Lawyers often use undefined, difficult and vague terms such as 'proof of purchase' or 'proof of membership in the class' or 'Net Settlement Distribution.'

Readers may not be able to tell from the notice if they are included in the class, or the range of a possible distribution, how to send in claims, or exactly what information they must provide. Sometimes the notice fails to report the range of attorney's fees which might be awarded, or fails to note a potential impact on other class actions and on recipients' rights in those other cases (dueling class actions).

Some notices have bizarre and unnecessary obstacles to filing objections or making claims, such as asking for unnecessary information and then deeming any incomplete objection or claim as 'not filed.' Counsel should consider whether a claims procedure is needed at all: administrative costs may be lower and more class members may receive sums without it; so the papers should note for example why the administrator cannot simply mail out checks.

Often proposed procedures provide too little time to make a claim, or objection, or to opt out, or before money goes to *cy pres* recipient. (Generally 30 days is not enough.) The parties should discuss the various proposed methods of notice, making a record why publications or other fora are best suited to reach class members, and not others. Judges want to reach as many members as possible.

Memoranda

The papers must include a good presentation of the basis for the court to make the merits evaluation required by *Kullar v. Foot Locker Retail, Inc.,* 168 Cal.App.4th 116, 129 (2008). Frequently counsel state that *they* have carefully considered this, and I am sure that's true, but the trial judge *herself* is obligated to do so on the basis of the discovery and other investigations made by the parties. The discussions should show the strength and weakness of cases, such as an explanation of the parties' damages model or damages estimates under optimistic and pessimist views of evidence or law, discussing evidence on both liability and damages.

Release

Trial judges carefully scrutinize the release language. This may be too broad, using language that covers all claims in any way related to the subject matter of the suit or the relationship of the parties. Usually, releases should just be within the scope of the claims at issue in the case, i.e., within the scope of what res judicata would implicate were judgment for one of the parties to be entered. Sometimes releases are too broad or vague when they describe claims which "relate to" or "arose in connection with" or "that could have been brought" in the case. Problems may arise when the release can be read to extend to claims entirely unrelated to the lawsuit. Consider whether it is sufficient to have a release covering "claims stated in the complaint and those based on the facts alleged in the complaint." In short, releases should generally be tethered to the complaint's alleged facts.

In this connection judges look at the language waiving CC § 1542, if present. Often, at least read in isolation, the scope of that release is far broader than the parties actually intend or that a judge would usually adopt. Sometimes, the interplay of language from various sections has the (sometimes unintended) consequences of limiting or greatly expanding the scope of a release. For example, one might

[2] http://en.wikipedia.org/wiki/Literacy_in_the_United_States.

find the definition of "Released Claims" in ¶ X; then in ¶ Y we might read that class members "will release any claims related to the Released Claims…." This last "related to" clause may greatly, but to some unascertainable extent, broaden the scope of the release.

The PAGA (Private Attorney General Act) is a sometime difficult and emerging area of the law, and parties may have legitimate concerns on whether such claims are subject to release. A red flag may be raised when the complaint does not plead PAGA but the defense wants a PAGA release.

Payment to class representatives

The fact that a class representative might personally provide broader release than the rest of the class can't usually be a basis to justify any additional payments *out of the class fund.* At least prior to final approval, non-hearsay declarations will be needed on the hours spent, or other contribution made by class representatives, in order to justify a separate payment. Regardless of these contributions, a judge may pause when there are vast differences between the sums to be distributed to absent class members and the payments to the class representatives.

Objections

Counsel may suggest objectors file their objections directly with the court. At least in San Francisco's complex departments, this usually does not work: there is confusion as to what filing fees might have to be paid, and it is difficult for unrepresented class members to know what to do. Objections are usually handled by plaintiffs' counsel, who bundles them up and files them as a group in advance of the final fairness hearing. Perhaps the administrator might handle the task.

Class definition

Some definitions are so complex no one can figure them out; in particular, putative class members might never understand it. Sometimes the class period is badly defined: is it (i) through entry of judgment rather than (ii) tied to date no later than date of notice with opt-out opportunity? Care should be exercised in ensuring that the time period in the class definition is such that claims not extant as of the time of the preliminary approval (and thus not then known) will be released. If the geographic scope of the class extends beyond this state, the papers should explain how the court has jurisdiction.

Administrator

The court usually approves the administrator to accomplish a variety of work on behalf of the court. Is there a declaration explaining why the proposed administrator is competent, suitable and trustworthy?

Fees

While details need not be presented at the preliminary hearing, it is very useful to have an estimate of the approximate lodestar, and of course the court (and notice recipients) usually need to know the upper limit on the fees to be sought, including as a percentage of the settlement fund created.

Proposed Order re: Preliminary Approval

The suggested finding should be that the settlement amount appears to be within the "ballpark" of reasonableness. *Kullar,* 168 Cal.App.4th at 133. But ideally, the showing at this preliminary stage should be good enough for ***final*** approval (absent e.g., a valid objection), so as to minimize the risk of wasted time and money on new notices. The proposed order should set forth a procedure to calendar a

hearing to enable the court's ultimate approval of (i) the sums to be paid for claims administration, (ii) the identity of a cy pres recipient, and (iii) a report on the final distribution.

Judges may balk at secrecy provisions, e.g., that the settlement and related papers are deemed confidential if the final approval is not obtained. Such provisions may conflict with California Rules of Court on sealing (CRC 2.550). It is inappropriate to include proposed orders that a settlement be deemed in "good faith" under CCP § 877.6, without any showing required for such a finding. Some judges use a form that enjoins absent putative class members from filing additional actions--even though at that point they may not be subject to the court's authority. It is not clear this is useful.

Cy pres

The briefs should note all relationships between (i) the *cy pres* recipient and (ii) any class representative or counsel or others involved in the case; and why *cy pres* must be an option. The profit or nonprofit status of the recipient should be noted, and unless it is obvious from the description of the recipient how the money will be used, the use of the money should be stated. The parties should explain the congruence between (i) interests of recipient and (ii) the reasons for the suit and interests of the class. (In employment class actions, *cy pres* may be unnecessary as employees can usually be identified.)

Resources/checklists

- http://www.fjc.gov/public/home.nsf/autoframe?openform&url_r=pages/376
- http://www.lasuperiorcourt.org/civil/UI/ToolsForLitigators2.aspx
- http://www.lasuperiorcourt.org/civil/UI/pdf/ChecklistPreliminaryApprovalofClassActionSettlement7.31.12.pdf
- http://www.17200blog.com/orders/Judge_Brick_Guidelines_for_Counsel_re_Class_Settlement_Applications_2-18-2009.pdf