



STANDARDS AND GUIDELINES  
FOR LITIGATING AND SETTLING  
CONSUMER CLASS ACTIONS  
(FOURTH EDITION)

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**Introduction**  
**by**  
**Executive Director Ira Rheingold**

It has been more than 25 years since the National Association of Consumer Advocates (NACA) produced and adopted the first version of our “Standards and Guidelines for Litigating and Settling Consumer Class Actions.” At the time, much controversy – real and imagined - surrounded the practice of class action law. In response to the confusion created by the public debate about the efficacy of collective redress, NACA gathered together some of our nation’s leading class action practitioners and set about – through a rigorous drafting and comment process – to create a guide for the proper and ethical practice of class action law.

Through the years, these guidelines have proven to be helpful to lawyers and courts alike. They have formed the basis of expert testimony, both in support of class action settlements and in support of objections to bad settlements. Most importantly, they have achieved their primary goal of setting the standard for litigating and settling consumer class actions. Many of the original Guidelines have been embraced and adopted by courts and their principles were clearly reflected in both the 2004 and 2018 changes to the Federal Rule of Civil Procedure 23.

Because of the initial 2004 revisions to Rule 23 and the ever-changing political and legal landscape of class action litigation, NACA issued a revised Second edition of these Guidelines in 2006. This edition addressed new and developing issues, including specific problems with the use of the class action device in predatory home lending litigation, the exponential growth of forced arbitration in consumer “contracts,” and the use of offers of judgment, under Federal Rule 68 and state counterparts, to forestall class actions.

In 2014, the Guidelines were thoroughly updated again, including eliminating the previously published section on arbitration, which had been made irrelevant thanks to a series of unfortunate decisions by the U.S. Supreme Court.

Now in 2023, with the practice of class action law continuing to evolve and the 2018 Rule 23 revisions having been fully implemented and incorporated by practitioners and the courts, NACA is publishing the Fourth Edition to reflect these most recent changes. This edition, while not making significant substantive changes to previous versions, was drafted to make them more accessible and easier to use by formatting the Guidelines to read more like the Federal Rules - a statement of the Guideline, followed by an explanatory discussion of that Guideline.

The Fourth Edition of our “Standards and Guidelines for Litigating and Settling Consumer Class Actions,” was drafted by a committee of our nation’s most principled and experienced class action lawyers, led by Steve Gardner and including Rob Bramson, Seth Lesser, Leah Nicholls, Mike Quirk, Stuart Rossman, Beth Terrell, Brian Wolfman, and Allison Zieve. We hope and believe that they continue to help lawyers and courts alike and remain the standard that encourages only the most ethical and thoughtful practice of consumer class action litigation.

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## Guideline 1

### Communications with Class Members

1. Class counsel should be alert to defense efforts to communicate with class members that seek to entice them to abandon or settle their claims individually. These efforts undermine the court's authority to protect class members and should not be allowed. Limiting communication between the defense and class members ensures that the judicial system's integrity is not impugned.
2. If class counsel learns of a defendant's effort to communicate with class members, counsel should consider going to the court to obtain an order preventing that communication, as well as sanctions, if warranted.

#### Discussion

This Guideline addresses improper communications from defendants to class members.<sup>1</sup> The issue has arisen most often when a defendant tries to undermine the class by picking off class members.<sup>2</sup> Common ways defendants attempt to do so include trying to convince class or putative class members to: (1) opt out, (2) release their claims, (3) enter into out-of-court settlements, or (4) compromise their factual situations in some way.<sup>3</sup> In one case, a defendant attempted to convince class members to opt out of a class action, despite the court's instructions not to communicate with class member, which resulted in sanctions.<sup>4</sup>

The parameters of appropriate communication differ before and after class certification. Model Rules of Professional Conduct 4.2 and 7.3 do not generally prohibit counsel for either party from communicating with persons who may in the future become members of the class. However, misleading or coercive communications with putative class members by defense counsel or the defendant may frustrate the fair balance of interests essential to justice and violate disciplinary rules.<sup>5</sup> The American Bar Association (ABA) Standing Committee on Ethics and

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<sup>1</sup> See also Guideline 10 on effective class notices. Unlike defense counsel, class counsel has a legitimate interest in sufficient contact with putative class members to ascertain uniformity, typicality, and other issues pertinent to class certification.

<sup>2</sup> The issue discussed in this Guidelines relates to absent class members and is distinct from issues discussed in Guideline 3, which addresses defendants' attempts to "buy off" putative class representatives.

<sup>3</sup> See, e.g., *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) (affirming sanctions and discussing courts' powers to control communications with class members, after the defendant attempted to convince class members to opt out of a class action, despite the court's instructions not to communicate with class members); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 254 (S.D.N.Y. 2005) (holding that lender's attempt to impose arbitration clause barring class claims by mailing "change in terms" notice after putative class action was filed is prohibited by Rule 23 as an unauthorized communication interfering with the rights of litigants); *Loatman v. Summit Bank*, 174 F.R.D. 592 (D.N.J. 1997) (sanctions imposed where defendant tried to obtain allegiance of named class representative and "drive a wedge" between class representative and class counsel after defendant had been instructed not to contact the plaintiff).

<sup>5</sup> See, e.g., *In re Air Commc'n & Satellite Inc.*, 38 P.3d 1246 (Colo. 2002) (ordering corrective notice after

Professional Responsibilities formal opinion on the issue of contact by counsel with putative members of a class prior to class certification requires that both plaintiff's and defense counsel comply with Model Rule 4.3, "Dealing with Unrepresented Person," under such circumstances.<sup>6</sup>

After the class has been certified, State rules of professional responsibility, based on the ABA's Rule of Professional Conduct 4.2 mandate that class members be treated as parties represented by a lawyer and prohibit communication from defendants.<sup>7</sup> Therefore, after certification, class counsel represents all class members, and the defendant's attorneys may not communicate directly with class members.

Communicating with class members does not pit First Amendment rights against the court's duty to protect the class from false and misleading information. Courts have repeatedly rejected the assertion that restraints on communications from defendants to class members violate defendants' First Amendment rights, in light of courts' obligation to protect the class and the judicial process.<sup>8</sup>

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communication from defendant); *In re McKesson HBOC, Inc., Sec. Litig.*, 126 F. Supp. 2d 1239 (N.D. Cal. 2000); *Ran-kin v. Board of Educ.*, 174 F.R.D. 695 (D. Kan. 1997); *In re Friedman*, 23 P.3d 620, 628 (Alaska 2001) (dictum, citing *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986)); *Richmond v. Dart Indus., Inc.*, 629 P.2d 23 (Cal. 1981) (stating that any contact must not discourage class membership through miscommunication); *Nagy v. Jostens, Inc.*, 91 F.R.D. 431 (D. Minn. 1981) (enjoining defendants from further inappropriate contacts with class members and requiring corrective action).

<sup>6</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445 (Apr. 11, 2007). Model Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

<sup>7</sup> See *Fulco v. Continental Cablevision, Inc.*, 789 F. Supp. 45, 46-47 (D. Mass. 1992) (after certification, defendant's counsel must treat the unnamed class members as represented by counsel); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032 (E.D. Wash. 1985); *Resnick v. A.D.A.*, 95 F.R.D. 372, 376-77 (N.D. Ill. 1982) (Rule 4.2); MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.24 (1995).

<sup>8</sup> *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1206 (11th Cir. 1985) (emphasis added); see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984) (discussing variety of ways First Amendment rights may be "subordinated" during litigation).

## Guideline 2

### Confidentiality

Class counsel should generally oppose confidentiality agreements in connection with class action litigation and class settlements.

1. Agreeing to confidentiality may be appropriate only when the high threshold for confidentiality of corporate information is met or when agreeing to confidentiality is otherwise in the interest of the class.
2. Class counsel should evaluate whether a protective order providing for confidentiality of information obtained in discovery is necessary on a case-by-case basis and should ensure that any protective order limits the bases for confidentiality and places the burden of justifying confidentiality on the party seeking it. When defendant's designations of confidentiality are unjustified, class counsel should challenge them.
3. Class counsel should agree to file documents in court under seal only when the high bar for sealing court records has been met. A defendant's choice to designate a document as confidential during discovery is not sufficient.
4. Under no circumstances may the amount of the settlement, the amount of attorney fees sought or awarded, or the scope of the release of claims of either the class representatives or the class members be kept confidential after a proposed class action settlement has been submitted to the court.
5. Any assertion by a defendant that confidentiality should extend to any aspect of a settlement should be viewed with skepticism by class counsel. Confidentiality of any aspect of the settlement should be strictly limited to go no further than necessary to effectuate the settlement.

#### Discussion

Although the law varies among jurisdictions, generally the public has a First Amendment and common law right of access to court records. The default rule is that documents filed in court are not confidential. Only if the party seeking confidentiality can meet the high bar for sealing court records is confidentiality appropriate.

In class actions, transparency is particularly important because absent class members cannot fairly be bound by proceedings that are kept secret from them. Decisions regarding whether to opt out of the case, participate in a proposed settlement, seek to intervene, or file a separate individual action all depend on availability of basic information about the class action. Because consumer class actions address widespread practices by a defendant, the details about those practices are likely to be of interest to other consumers who are considering filing (or have already filed) individual cases. Widespread wrongful practices are also likely to be of public interest—particularly when they involve dangerous products.<sup>9</sup>

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<sup>9</sup> *In re Cendant Corp.*, 260 F.3d 183, 193 (3d Cir. 2001) (presumption of public access has particular force in class

For these reasons, class counsel should generally seek to oppose or limit confidentiality throughout the litigation, including when conducting discovery, filing documents in court, and settling the class action. There may be legitimate bases for confidentiality in some circumstances, such as maintaining confidentiality of individuals' private personal information or trade secrets.

At the beginning of discovery in a class action, parties are often pressured to agree to a stipulated blanket protective order permitting parties to designate documents exchanged in discovery as "confidential." Defendants often abuse blanket protective orders by over-designating documents as confidential. Class counsel should view defendants' requests for blanket protective orders with skepticism and evaluate whether a blanket protective order is necessary. Regardless of the agreement of the parties, blanket protective orders are proper only for good cause. Broad allegations of potential harm are insufficient to meet this standard. Good cause may be shown by a description of the categories of information the parties anticipate may legitimately merit protection from disclosure.<sup>10</sup>

If class counsel determine that it is in the class's best interests to agree to a protective order, class counsel should try to reduce the opportunities for abuse of confidentiality. Class counsel should propose an order that (1) defines "confidential" narrowly, encompassing only the type of information that meets the "good cause" standard; (2) prohibits mass, routine, and bad-faith designations; (3) provides that in a challenge to confidentiality designations the burden remains on the party seeking confidentiality; (4) provides for sanctions for non-compliance with the order; and (5) includes a provision permitting class counsel to share confidential documents with counsel in other cases litigating similar issues or with class members who agree to maintain confidentiality.<sup>11</sup>

When feasible, class counsel should challenge suspect confidentiality designations. If class counsel cannot feasibly oppose inappropriate assertions of confidentiality, they should consider alerting a third party who may be better positioned to do so.<sup>12</sup>

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action setting)

<sup>10</sup> *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); see also *In re National Prescription Opiate Litig.*, 927 F.3d 919, 935-38 (6th Cir. 2019) (detailing the inadequate vague assertions that failed to support a blanket protective order shielding certain information concerning the opiate epidemic from public view); *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999) (holding that a district judge cannot approve a blanket protective order without finding good cause); *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986).

<sup>11</sup> See *United Nuclear Corp. v. Cranford*, 905 F.2d 1424, 1428 (10th Cir. 1990) (finding that modification of a protective order was necessary to avoid burdening collateral litigants with duplicate discovery); see also *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981); *Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66, 76 (S.D.N.Y. 2010); see also *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982); *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004).

<sup>12</sup> Members of the public are generally permitted to enforce the public right of access to court records by intervening (or serving as amici, in some jurisdictions) to unseal records filed under seal. See, e.g., *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000); *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998); *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979). Jurisdictions vary as to the extent to which third parties can seek discovery



The bar for filing documents in court under seal is very high, and class counsel should generally oppose sealing unless the high bar for doing so is met. That a document has been designated confidential in discovery is not a sufficient basis for sealing.<sup>13</sup> Under the First Amendment, sealing is warranted only when there are “compelling reasons” to do so that outweigh the public interest in disclosure.

Once settlement is on the table, the bar against confidentiality is even higher, because class action settlements must be public.<sup>14</sup> Absent class members have a direct interest in access to settlement terms concerning their claims.<sup>15</sup> Rule 23 requires dissemination of the “best notice that is practicable under the circumstances,”<sup>16</sup> and giving absent class members the opportunity to review any proposed settlement terms before deciding whether to object or, if applicable, opt out of the case. Thus, class action settlements cannot be made confidential, although at least one discrete term is sometimes kept confidential when confidentiality is determined to be in the best interests of the class.<sup>17</sup> Defendants often contend that corporate financial or proprietary information merit secrecy. Indeed, their agreement to settle could be contingent on the non-sharing of non-public financial or proprietary information that otherwise could be kept confidential under a protective order. To obtain settlement, class counsel might feel compelled to agree to keep such information, or at least its specific details, confidential.<sup>18</sup> Aside from

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materials. *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

<sup>13</sup> *See, e.g., Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 420-21 (5th Cir. 2021) (admonishing courts for conflating the standard for protective orders and the standard for sealing); *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 307 (6th Cir. 2016) (holding the district court abused its discretion when it “conflated the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view”).

<sup>14</sup> In contrast to class action settlements, some courts have shown more openness to confidentiality of settlement agreements in cases under the Fair Labor Standards Act. Rhonda Wasserman, *ARTICLE: Secret Class Action Settlements*, 31 REV. LITIG. 889, 908-09 (2012) (“courts are disinclined to seal settlements in Rule 23 class actions, while they occasionally do so in collective actions filed under the FLSA”); *but see Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015) (terms of FLSA settlements are to be public).

<sup>15</sup> *Willis v. United States*, No. CV 117-015, 2019 U.S. Dist. LEXIS 221109, at \*4 (S.D. Ga. Dec. 26, 2019) (“It is immaterial whether the sealing of the record is an integral part of a negotiated settlement agreement between the parties... Once a matter is brought before a court for resolution, it is no longer solely the parties’ case, but also the public’s case[.]”) (citing *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992)).

<sup>16</sup> Fed. R. Civ. P. 23(c)(2)(B).

<sup>17</sup> *E.g.*, a provision permitting a defendant to withdraw from a settlement agreement if a particular number of class members opt out. Courts routinely permit the thresholds for such provisions to remain secret. *E.g., Cent. States Grp. v. AIG Glob. Inv. Corp.*, 334 F. App’x 248, 250 n.4, 255 (11th Cir. 2009) (“The threshold number of opt outs required to trigger the blow provision is typically not disclosed and is kept confidential to encourage settlement and discourage third parties from soliciting class members to opt out.”).

<sup>18</sup> For instance, it might be necessary to inform the court that a settlement was reached, at least in part, as a result of the defendants’ financial condition – which itself could be a reason why the settlement might be fair, adequate, and reasonable and reached at a particular juncture – but class counsel might have to explain to the court that the defendant insisted that the details of its financial condition be kept confidential. Class counsel should, at a minimum, offer to provide that information to the court for *in camera* review.

these rare instances, however, confidentiality agreements in class action settlements should not be permitted.

Defendants often try to impose gag provisions on plaintiffs' counsel in settlement agreements, such as requiring counsel to agree not to publicize the settlement. Ethics opinions view attempts to impose confidentiality on counsel as running afoul of Model Rule of Professional Responsibility 5.6(b), which bars settlement agreements that restrict a lawyer's right to practice, including representation of future clients.<sup>19</sup> Class counsel can point to these ethics opinions to push back against defense counsel's attempts to impose a gag provision on counsel in the settlement.<sup>20</sup>

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<sup>19</sup> See D.C. Bar Ass'n, Ethics Op. 335 (2006) ("A settlement agreement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case . . . . Such conditions have the purpose and effect of preventing counsel from informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases."; "[t]he line we draw is that the confidentiality of otherwise public information cannot be part of a settlement agreement even if the lawyer's client agrees that such provisions be included."); see also Chicago Bar Ass'n, Informal Ethics Opinion 2012-10 at 2-3; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 730 (2000).

<sup>20</sup> See generally *Tradewinds Airlines, Inc. v. Soros*, No. 08 Civ. 5901, 2009 U.S. Dist. LEXIS 40689, 2009 WL 1321695, at \*9 & n.5 (S.D.N.Y. May 12, 2009) (refusing to interpret confidentiality provisions to limit counsel's ability to represent others, as it would violate ethical rules).

## Guideline 3

### Named Plaintiff Buyoffs, Including Offers of Judgment under Rule 68

Class counsel must bear in mind the critical importance of impressing on their named-plaintiff clients that individuals who accept the role of class representative have more at stake than their own claims. The representative takes on a fiduciary responsibility to the class.

1. Class counsel should advise prospective class representatives that (a) they have fiduciary responsibilities to the class they seek to represent and (b) a defendant may try to undermine the class litigation by trying to buy off their individual claims either through an individual settlement offer or a formal offer of judgment.
2. A named plaintiff retains the right to accept a pre-certification settlement offer or offer of judgment, but named plaintiffs willing to refuse such offers play an important role in preserving the class action for the benefit of all members of the class.
3. Class counsel should be aware of the current legal standards governing the effect of individual settlement offers to prospective class representatives on the proposed class so they can offer informed advice to their clients about how to respond.
4. Class counsel should be aware that a mootness doctrine in state courts may be more flexible than in federal court with regard to whether an accepted pre-certification offer of judgment to a named plaintiff moots a class action.

### Discussion

Defendants sometimes make settlement offers or offers of judgment under Federal Rule of Civil Procedure 68 to a named plaintiff in an effort to defeat a putative class action. Under Rule 68, a plaintiff who rejects an offer of judgment on specified terms (or allows the offer to lapse after 14 days), proceeds to trial, and ultimately obtains a final judgment that is not more favorable than the offer must pay the costs the defendant incurred after the offer was made.<sup>21</sup> However, because a rejected or lapsed offer has no legal effect on the plaintiff's claim, the offer does not moot the claim, even if it would have granted complete relief on that claim, and it therefore does not bar the plaintiff from seeking to certify a class.<sup>22</sup>

Offers of judgment and settlement offers to named plaintiffs pose a particular threat in consumer class actions, where individual damages are often small but the defendant's wrongdoing can only be redressed through class litigation.<sup>23</sup> By making offers of judgment or settlement offers

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<sup>21</sup> Fed. R. Civ. P. 68(a), (d).

<sup>22</sup> *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016).

<sup>23</sup> See, e.g., *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 48-49 (1st Cir. 2015) ("In recent years, this stratagem has become a popular way to try to thwart class actions.... This stratagem is most readily employed in precisely those cases where Congress has chosen to empower citizens as private attorneys general to pursue claims for well-defined statutory damages, because it is in such cases that defendants can most easily offer an individual plaintiff relief on her personal claim in an amount that indisputably equals the highest amount that the individual

to named plaintiffs, defendants facing potentially significant class liability seek to resolve the claims of the named plaintiffs and thus terminate the class action by eliminating its named plaintiff. In general though, if a class representative's individual claim is resolved after the court has ruled on class certification, the class action remains justiciable if the named plaintiff retains a sufficient interest to adequately represent the class.<sup>24</sup> In some cases, counsel may seek to substitute a new named plaintiff as class representative.<sup>25</sup> When a court denies a motion for class certification, a named plaintiff who settles her individual claim may appeal on behalf of the class if she retains a stake in the litigation.<sup>26</sup>

Courts are divided on when and whether an individual settlement of the named plaintiff's claim prior to certification requires dismissal of the class action.<sup>27</sup> Some courts hold that, prior to certification, an accepted offer of judgment moots the named plaintiff's claims and requires dismissal of the class action.<sup>28</sup> Other courts have held that when a named plaintiff accepts a settlement offer or Rule 68 offer of judgment before certification, the class claims must be dismissed<sup>29</sup> *unless*

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plaintiff could recover on her own claim.”).

<sup>24</sup> See *Sosna v. Iowa*, 419 U.S. 393, 399-401 (1975) (holding that mootness of named plaintiff's claim after class certification did not moot the class action); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (“[A] defendant may moot a class action through an offer of settlement only if he satisfies the demands of the class; an offer to one cannot moot the action because it is not an offer to all.”); see also William B. Rubenstein, 1 Newberg on Class Actions § 2.10 (5th ed.) (discussing courts' attempts to avoid mootness after the court has ruled on class certification).

<sup>25</sup> See, e.g., *Payne v. Tri-State Careflight, LLC*, No. CIV 14-1044 JB/KBM, 2019 WL 1242672, at \*30 (D.N.M. March 16, 2019) (discussing impact of an offer of judgment accepted by named plaintiffs in the context of a motion for relief from judgment by unnamed pre-certification class members following entry of final judgment).

<sup>26</sup> See *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 at 336 (1980) (holding that a named plaintiff whose individual claim has arguably been mooted has standing to appeal an adverse order on class certification when he still has a stake in the pendency of the litigation); *Brady v. AutoZone Stores, Inc.*, No. 19-35122, 2020 WL 2893709 (9th Cir. June 3, 2020) (holding that the individual class representative who voluntarily settles individual claims may appeal on behalf of the class if the settlement preserves the individual's financial stake in the unresolved class claims); see also *Muro v. Target Corp.*, 580 F.3d 485, 490-91 (7th Cir. 2009) (“A *voluntary* settlement by the prospective class representative often means that, as a practical matter, the settling individual has elected to divorce himself from the litigation and no longer retains a community of interests with the prospective class. Only if issues personal to the prospective class representative remain alive in the litigation can a court be assured that there remains sufficient concrete adverseness to ensure that the class certification issue is presented in a truly adversarial manner and, consequently, will be litigated comprehensively and clearly. An abstract interest in a matter never has been considered a sufficient basis for the maintenance of—or the continuation of—litigation in the federal courts.”); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1021-22 (9th Cir. 2012) (examining language of Rule 68 offer of judgment to determine whether plaintiff retained a right to appeal adverse class certification order or released all her individual claims upon acceptance of the offer and applying general principles of contract law to the extent the offer was ambiguous).

<sup>27</sup> See 1 Newberg § 2.16.

<sup>28</sup> See, e.g., *Gustafson v. Travel Group, Inc.*, No. 20-2272-KHV, 2021 WL 1694029 at \*2 (D. Kan. Apr. 29, 2021) (“Where plaintiffs have had ample time to file the class certification motion, district courts adhere to the general rule that the mootness of named plaintiffs' claims prior to class certification moots the entire case.”).

<sup>29</sup> See, e.g., *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009) (noting that, in general, a suit brought as a class action must be dismissed for mootness when the personal claims of the class representative are

the court allows the substitution or intervention of new plaintiffs with active claims to seek certification going forward.”<sup>30</sup> If multiple named plaintiffs seek to represent a class and only some settle their individual claims, the class action may proceed.<sup>31</sup>

Courts are divided on the effect of an offer of judgment accepted before a court’s ruling on a pending motion for class certification. Some courts have held that a named plaintiff’s acceptance of an offer of judgment does not moot the claims on behalf of a proposed class when a motion for class certification is pending or can still be timely filed.<sup>32</sup> Some courts allow named plaintiffs whose individual claims have become moot to continue to represent the proposed class so long as they have not unduly delayed in moving for class certification and the class members still have live claims; these courts allow the certification motion to relate back to the date the complaint was filed or have adopted exceptions to mootness to keep the class action alive.<sup>33</sup> Likewise, the Third Circuit has held that class claims must be dismissed only if the named plaintiffs’ claims become moot *before* they have moved for class certification.<sup>34</sup> These cases collectively

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satisfied before a class has been certified); *Rodriguez v. Premier Bankcard, LLC*, No. 3:16-CV-2541-JGC, 2019 WL 2567722, at \*3 (N.D. Ohio June 21, 2019) (holding that the named plaintiffs’ acceptance of an offer of judgment providing full relief on their claims, when no class had been certified and no motion for certification was pending, mooted the class action); *DeCastro v. City of New York*, No. 16-CV-3850 (RA), 2020 WL 4932778, at \*8 (S.D.N.Y. Aug. 24, 2020) (recognizing that “[d]istrict courts in this circuit have also suggested that, where a Rule 68 offer of judgment is made to and accepted by a named plaintiff prior to the filing of a motion for class certification, both the individual and the potential class claims of the named plaintiff become moot,” and collecting cases in the Second Circuit). *But see Family Med. Pharmacy, LLC v. Perfumania Holdings, Inc.*, Civ. Action 15-0563-WS-C, 2016 WL 3676601, at \*7 (S.D. Ala. July 5, 2016) citing *Stein v. Buccaneers Ltd. P’ship.*, 772 F.3d 698, 704 (11th Cir. 2014) (holding that “even if a defendant successfully ‘picks off’ a named plaintiff’s individual claims via Rule 68 offer of judgment before adjudication of class certification issues, there remains a live controversy and, hence, no Article III jurisdictional problem.”

<sup>30</sup> See *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006) (“Substitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons is a common and normally an unexceptionable (‘routine’) feature of class action litigation both in the federal courts and in the Illinois courts.... Strictly speaking, if no motion to certify has been filed (perhaps if it has been filed but not acted on), the case is not yet a class action and so a dismissal of the named plaintiff’s claims should end the case.... If the case is later restarted with a new plaintiff, it is a new commencement, a new suit. But the courts, both federal and Illinois, are not so strict. Unless jurisdiction never attached ... or the attempt to substitute comes long after the claims of the named plaintiffs were dismissed ... substitution for the named plaintiffs is allowed.” (internal citations omitted)); see also 1 Newberg § 2.17.

<sup>31</sup> See, e.g., *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1140, 1144 (9th Cir. 2016).

<sup>32</sup> See *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 48-49 (1st Cir. 2015) (holding that a settlement offer to a named plaintiff made before it could move to certify a class could not moot the class action); *McClain v. Hanna*, No. 2:19-cv-10700, 2019 WL 2325678, at \*6 (E.D. Mich. May 31, 2019) (collecting cases and discussing the impact of Rule 68 offers of judgment and “picking off” of class representatives).

<sup>33</sup> See, e.g., *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 at 1091 (9th Cir.2011).; see also, *Chen v. Allstate Ins. Co.*, 819 F.3d 1136 at 1138 (9th Cir. 2016) (holding that *Pitts* is good law and that, if the district court had entered judgment giving the named plaintiff complete relief on his claims for damages and injunctive relief and thereby mooted his individual claims, he would still be able to seek class certification).

<sup>34</sup> See *Richardson v. Bledsoe*, 829 F.3d 273, 279-83 (3d Cir. 2016) (discussing the Third Circuit’s mootness jurisprudence in light of *Campbell-Ewald* and concluding that its “picking off” exception to mootness prior to an order on

create an incentive for defendants to make offers of judgment before a certification motion has been filed.<sup>35</sup>

Prior to 2016, some courts held that an offer of judgment for the full value of a named plaintiff's claim prior to certification required dismissal of class claims regardless of whether the offer was accepted or rejected.<sup>36</sup> The issue was further complicated when the Supreme Court held in *Genesis Healthcare v. Symczyk*<sup>37</sup> that an FLSA collective action must be dismissed if the named plaintiff's individual claims were mooted by a Rule 68 offer of judgment. There, the majority assumed for purposes of argument that the named plaintiff's claims were moot because she rejected a Rule 68 offer of judgment.<sup>38</sup> The dissent, written by Justice Kagan, challenged this assumption, and argued that an unaccepted offer of judgment or settlement offer could not moot the claims of the named plaintiff because, as a matter of contract law, an offer without acceptance lacks binding effect.<sup>39</sup>

The Supreme Court squarely addressed the issue in *Campbell-Ewald Co. v. Gomez*,<sup>40</sup> where the named plaintiff alleged that he and the proposed class received unsolicited recruitment text messages sent by a subcontractor for the U.S. Navy in violation of the Telephone Consumer Protection Act.<sup>41</sup> Before the deadline to move for class certification, the defendant proposed to settle the named plaintiff's individual claim and filed a Rule 68 offer of judgment.<sup>42</sup> The defendant offered to pay the named plaintiff his costs (but not attorneys' fees) plus \$1,503 per message he received in satisfaction of his claims for statutory and treble damages, and proposed a stipulated injunction barring it from sending text messages in violation of the TCPA.<sup>43</sup> The plaintiff did not accept the offer and allowed it to lapse.<sup>44</sup> Before the plaintiff moved for class certification, the defendant moved to dismiss the case for lack of subject-matter jurisdiction, arguing that its offer mooted the named plaintiff's individual claims and, because the class had not been

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class certification was remained still good law, citing *Weiss v. Regal Collections*, 385 F.3d 337, 347-48 (3d Cir. 2004)).

<sup>35</sup> See *Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015) ("Settlement proposals designed to decapitate the class upset the incentive structure of the litigation by separating the representative's interests from those of other class members. So it may be that, in class actions, the conclusion 'not moot' implies that the case should be allowed to continue ....").

<sup>36</sup> See *Diaz v. First Am. Home Buyers Protection Corp.*, 732 F.3d 948, 952-53 (9th Cir. 2013) (discussing pre-2016 circuit split); *Tanasi v. New Alliance Bank*, 786 F.3d 195, 199 (2d Cir. 2015) (same).

<sup>37</sup> *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 73 (2013) (assuming, without deciding, that a refused offer of judgment in a Fair Labor Standards Act collective action mooted the named plaintiff's individual claims and the collective action).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 81 (Kagan, J., dissenting).

<sup>40</sup> *Campbell--Ewald Co. v. Gomez*, 577 U.S. 153 (2016).

<sup>41</sup> *Id.* at 157.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 158.

<sup>44</sup> *Id.*

certified, the case should be dismissed.<sup>45</sup> The district court denied the motion, finding that the named plaintiff should be given an opportunity to move for class certification, had not been dilatory in not moving sooner, and that the class claims would relate back to the date the complaint was filed.<sup>46</sup> The Ninth Circuit agreed that an unaccepted Rule 68 offer of judgment does not moot a named plaintiff's claims.<sup>47</sup>

The Supreme Court adopted the dissent's position in *Genesis Healthcare*, holding that an unaccepted Rule 68 offer of judgment does not moot the plaintiff's claims and thus does not divest the court of jurisdiction over the class action. Justice Ginsburg, writing for the Court, focused on the basics of contract law and the language of Rule 68 and emphasized that a Rule 68 offer, as well as a general settlement offer, "once rejected, had no continuing efficacy."<sup>48</sup> The Court recognized that "with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset."<sup>49</sup> Finally, the Court explained that, even if a rejected settlement offer or offer of judgment were relevant to the mootness calculations, the named plaintiff's individual claim was not moot because he "remained emptyhanded" and "a would-be class representative with a live claim of [his] own must be accorded a fair opportunity to show that certification is warranted."<sup>50</sup>

*Campbell-Ewald* left an opening for unaccepted settlement offers to moot a named plaintiff's claims. The Court hypothesized that a named plaintiff's individual claims could become moot if, in conjunction with a Rule 68 offer, a defendant deposited the full amount of the plaintiff's claimed damages in an account payable to the plaintiff and the court then entered judgment in that amount.<sup>51</sup> Most courts presented with the situation raised by the Supreme Court's hypothetical have not found the plaintiff's claims to be moot, although in some cases the funds were not actually received by the plaintiff,<sup>52</sup> in some the plaintiff asserted unfulfilled claims for injunctive or declaratory relief,<sup>53</sup> and in some the court declined to enter judgment and closed the case without having both parties' consent.<sup>54</sup> Many courts rejecting similar mootness arguments

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<sup>45</sup> *Id.* at 158-59.

<sup>46</sup> *Id.* at 159.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 163 (citing *Genesis Healthcare*, 569 U.S. at 81 (Kagan, J., dissenting)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 165.

<sup>51</sup> *Id.* at 165-66.

<sup>52</sup> See *Chen*, 819 F.3d at 1145-56 (noting that the defendant had not deposited the settlement funds with the court or otherwise unconditionally relinquished its interest in the funds to the named plaintiff and holding that the named plaintiff's "individual claims are not now moot, because he has not actually received all of the relief to which he is entitled on those claims").

<sup>53</sup> *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 909 F.3d 534, 543 (2d Cir. 2018) (holding that defendant's Rule 67 deposit itself did not moot the plaintiff's individual claims and directing the district court to resolve the pending class certification motion).

<sup>54</sup> *Tanasi*, 786 F.3d at 197, 200 ("If the parties agree that a judgment should be entered against the defendant, then the district court should enter such a judgment.").

have reasoned that although a class lacks independent status before certification, a proposed class representative with live claims “must be accorded a fair opportunity to show that certification is warranted.”<sup>55</sup> Thus, after *Campbell-Ewald*, an unaccepted offer of judgment, absent more, does not moot a named plaintiff’s claims and do not require dismissal of the proposed class’s claims.

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<sup>55</sup> *Campbell-Ewald*, 577 U.S. at 165.



## Guideline 4

### Litigation When Similar Class Actions Are Pending

Competing class actions seldom result in benefits to class members as a whole. Before filing suit, class counsel should attempt to learn of any existing cases and communicate with counsel in the other cases. Class counsel should encourage joint litigation of related lawsuits, both in discovery and in settlement:

1. Class counsel in related class actions should cooperate to the maximum extent feasible in the pretrial stage, including by agreeing to conduct joint discovery, using joint experts, and coordinating document production. At a minimum, counsel in related class actions should share discovery. When possible, counsel should share responsibility for researching and drafting important pleadings and coordinate scheduling of important motions, including motions on the pleadings, for summary judgment, and for class certification.
2. Class counsel should resist confidentiality agreements and protective orders that restrict their ability to share discovery with lawyers in related cases.
3. As soon as possible, class counsel should serve the defendant with discovery requests asking the defendant to identify other potentially related lawsuits so that class counsel may coordinate litigation.
4. Early in the lawsuit, class counsel should ask the court to order the defendant to notify the court and class counsel before agreeing to a settlement in another case that could affect class members in the pending case.
5. Class counsel should resist preliminary orders that stay individual litigation of related claims or other actions by absent class members. If stay orders are nonetheless entered, class counsel should seek to provide class members with pending individual lawsuits an immediate right to opt out so that they can avoid being bound by the stay.<sup>56</sup>
6. Class counsel should be alert to the possibility that a defendant in multiple cases may seek to conduct a “reverse auction.”
7. When a settlement has been reached, counsel should notify class counsel and the court in other cases involving the same defendant and the same or similar issues. This notice should occur well before the fairness hearing, allowing those counsel adequate time to object and appear at the hearing.
8. Class counsel should notify other people and groups who have an interest in the case that a tentative settlement has been reached and that a preliminary hearing will be

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<sup>56</sup> See Guideline 15 on class actions involving homes.

scheduled to consider the fairness and adequacy of the settlement.<sup>57</sup>

9. Class counsel should notify groups with specific interest and expertise in the areas of the law involved in the case
10. Class counsel should not agree to expand the class definition at the settlement stage unless the expanded definition results in significant relief to the newly added members of the class and does not have the effect of diminishing the relief to the original class members.
11. Class counsel should not agree to broad releases that unnecessarily wipe out claims in other pending individual or class cases.
12. Class counsel should be cautious about settling anything beyond the claims alleged in the complaint and mindful of preserving the opt-out rights of class members.<sup>58</sup> This caution is especially important in class actions involving homes, for the reasons discussed in detail in Guideline 15.<sup>59</sup>
13. Before agreeing to any release of claims in a settlement, class counsel should seek to identify pending cases with respect to which the defendant could or might take the position that the release would extinguish the claims. Preferably, class counsel should agree to release only those claims at issue in the settling case and no other claims.<sup>60</sup>

## Discussion

Determining best practices when there are overlapping or competing class actions presents difficult issues. When multiple class actions are pending, with different counsel, a settlement in one case may preclude continued prosecution of claims in another case. The potential for damage to class members' interests is significant.

Problems with competing class actions often arise when the defendant suggests expanding a settlement class beyond the class definition contained in the complaint or in an earlier order certifying a class, or expanding the scope of claims settled, but offers no increased benefit to cover the additional class members or to compensate additional claims. This concern can arise in any class action settlement negotiation but is particularly common when more than one class action is pending against the defendant.<sup>61</sup>

The Manual for Complex Litigation addresses this issue and proposes several procedural steps to facilitate coordination among overlapping cases, including (1) joint conference calls among all

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<sup>57</sup> Cf. 28 U.S.C. § 1715 (requiring a defendant to provide “the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement”).

<sup>58</sup> See Guideline 9 on class-member releases.

<sup>59</sup> See Guideline 15 on class actions involving homes.

<sup>60</sup> See *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (2004).

<sup>61</sup> Guideline 9 addresses releases generally, including the propriety of releasing claims beyond those alleged in the complaint, and instructs against releasing claims for which no compensation is given. Guideline 15 addresses release problems specific to class actions involving homes.

judges, (2) coordination of discovery, and (3) joint appointment of experts.<sup>62</sup>

Advocates for individual consumers may have concerns about a multi-state or national class action that seeks to hold the defendant to one standard, when some of the states whose citizens are class members may have laws that offer greater relief to consumers, such as minimum statutory damages or automatic enhancement of actual damages. This concern may be addressed in settlement by preserving defenses to actions by the defendant against class members—especially when rights in foreclosure, repossession, and other significant matters are concerned—unless state-law remedies have the potential to provide significantly greater relief. See Guideline 15 for discussion of problems inherent in class actions involving homes, where the continued significant relationship with the defendant warrants special attention.

It is possible, and often preferable, to avoid this problem by tailoring the class definition and claims to cover a limited number of states and, where state-law claims are alleged, to focus on the states that offer the greatest protection to consumers. This approach may require division of the class into subclasses based on state of residence or contract formation, but it will not make the class action unmanageable. Indeed, by setting up subclasses at the outset, it is possible to avoid (or at least blunt) a defendant's frequent complaint that the need to interpret several state laws for one class makes a case unmanageable and thus not certifiable.

Another area of concern is settlement through a "reverse auction" by which a defendant proposes a cheap settlement and shops around among plaintiffs' counsel until the defendant finds a lawyer willing to settle on lowball terms. Faced with the prospect (emphasized by the defendant) of receiving nothing for a case in which counsel may have sunk significant amounts of time and expenses, the temptation exists to agree to a sub-optimal deal for the class to salvage something from the case.<sup>63</sup>

Counsel in non-settling cases might seek to intervene in the settling case for purposes of requesting a portion of the available attorney fees if the work done in the non-settling case provided substantial contributions to the settlement ultimately reached.

Other considerations when litigating one of several class actions include secrecy, both during discovery and at the time of settlement. Courts presiding over class actions often enter protective orders, at the request of the defendant or both parties, restricting the sharing of documents and information obtained in discovery with lawyers litigating similar cases elsewhere. Such orders foster competition and conflict between class counsel in the various cases. Bearing in mind the need to comply with (or seek modification of) the language of the protective or confidentiality order in any given case, one way to avoid this problem is for all counsel to

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<sup>62</sup> Manual for Complex Litigation (Fourth) § 20.14 (2004).

<sup>63</sup> See, e.g., *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1323 (S.D. Fla. 2007) (finding that that "the settlement is not the product of informed, arms-length negotiations between effective Class Counsel and the Defendant. Sharper Image did play these Plaintiffs off against the California actions, even conditioning a settlement here to the entry of an injunction prohibiting the already-certified California actions from going forward, to structure a poor settlement with weak parties).

agree to cooperate in all cases, including by sharing discovery.

As discussed in Guideline 2, secrecy at the time of settlement creates many problems. The presence of competing class actions may exacerbate these problems by frustrating efforts by class members, class counsel in the competing cases, and potential objectors to learn the details of the settlement.

Cooperation among class counsel through various means—including sharing discovery, conducting joint discovery, using joint experts, coordinating document production, and coordinating scheduling of important motions such as motions for class certification—can expedite case handling and minimize costs to each counsel. Nationwide access to PACER and electronic case files, together with the ability to scour the Internet, Westlaw, Bloomberg, and Lexis, are simple and inexpensive ways to look for competing cases.

## Guideline 5

### Coupon Settlements

Coupon settlements should rarely be used.<sup>64</sup>

Coupons may be considered only when (1) the primary goal of the litigation is injunctive and the defendant agrees to an injunction with the coupons being ancillary; (2) the coupons add additional value to a cash settlement that might, if it were greater, exhaust the defendant's ability to pay; and (3) class members are offered a choice of cash or coupons of greater value. In the latter situation, the consumer should be required to affirmatively choose the coupon over the cash, with cash being the default.

For the rare cases falling within these limited exceptions:

1. Coupons should be redeemable for any of the defendant's goods or services, not just the goods or services at issue in the case.
2. Coupons should be able to be used multiple times until their value is exhausted.
3. Even if coupons provide for a percentage discount for a good or service, they should also have a minimum dollar cash redemption value.
4. Coupons should not be subject to any "blackout" periods during which they cannot be used and should have adequately long periods before expiration to enable class members reasonable time to use them.
5. The settlement should not require class members to expend additional money to use the coupon and should not be redeemable only for particular items that many class members would not need or want. However, these bars may be relaxed if the coupons are freely transferrable to anyone, including for cash. Claims administrators and marketing companies can facilitate the transfer of coupons to third parties. Notice of these arrangements can be provided to the class.
6. Coupons should be stackable -- multiple coupons may be added together and used by a class member or third party at the same time as a discount against the purchase price of any one product.
7. Class members or third parties should be able to use the coupons without having to

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<sup>64</sup> Settlements and the case law use the terms "coupon," "certificate," and "voucher" without distinguishing among the terms. These Guidelines use the term "coupon" throughout. This usage is not necessarily identical to the reference to "coupon" settlement in 28 U.S.C. § 1712. (There is no present consensus about the meaning of "coupon" in Section 1712 and whether it differs from, for example, vouchers.) Compare *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 951-52 (9th Cir. 2015); *Romero v. Perryman (In re Easysaver Rewards Litig.)*, 906 F.3d 747, 757-58 (9th Cir. 2018), and *Redman v. RadioShack Corp.*, 768 F.3d 622, 634-35, 637-38 (7th Cir. 2014), with *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53 (D. Mass. 2015); *Cantu-Guerrero v. Lumber Liquidators, Inc. (In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.)*, 952 F.3d 471, 490 (4th Cir. 2020).

identify themselves or demonstrate that they were entitled to the coupons.

If the defendant insists on a coupon settlement because of its financial condition, class counsel must investigate that claim before agreeing to a coupon settlement. Attorneys should demand to review non-public financial information or materials certified or provided by the company's independent accountants.

A settlement that provides for coupons should specify that at the conclusion of the redemption period or, if no expiration date, after a reasonable period of time, class counsel and defendants will file with the court detailed information about redemption rates and coupon transfers to make a public record of what works and what does not work in coupon cases.

## Discussion

The use of coupon class action settlements in which relief to class members is made in the form of coupons redeemable on future purchases from the defendant, sometimes to the exclusion of any cash to the class members, was a contentious issue in the 1990's into the 2000's. Their misuse, including in situations where plaintiffs' counsel claimed entitlement to a fee for a percentage of the coupons issued (not redeemed), was one of the concerns behind the 2005 passage of the Class Action Fairness Act which, in 28 U.S.C. § 1712, mandated that contingency fees in coupon settlements generally must be based on value of the coupons redeemed.<sup>65</sup> There remain some unaddressed issues as to how CAFA limits attorneys' fees in coupon settlements.<sup>66</sup>

Not every settlement that does not deliver dollars into the hands of the class is a coupon settlement. For example, credits to existing accounts are often good substitutes for mailing checks to each class member. This more efficient, low-cost method of distributing the funds to class members saves on the costs of administering the settlement, thereby allowing more of the settlement fund to be distributed to class members. Similarly, if the amounts available to each class member are so small as to make delivery by checks not economically viable or if the class members are impossible to determine with certainty, distribution of the class benefit through

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<sup>65</sup> Pub. L. No. 109-2, 119 Stat. 4 (Feb. 18, 2005) (stating that section 1712 was intended to address those class action settlements where "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value").

<sup>66</sup> One such issue is whether fees can be determined on a lodestar basis or solely on a percentage of the coupons redeemed basis. The Sixth, Seventh, and Eighth Circuits and the District of Massachusetts have held courts retain latitude to choose between applying contingency and lodestar calculations. See *Linneman v. Vita-Mix Corp.*, 970 F.3d 621, 626 (6th Cir. 2020), *Levitt v. Sw. Airlines Co. (In re Sw. Airlines Voucher Litig.)*, 799 F.3d 701, 709 (7th Cir. 2015), *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 975 (8th Cir. 2016), *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53, 65 (D. Mass. 2015). On the other hand, the Ninth Circuit has interpreted 28 U.S.C. § 1712 as commanding that coupon-only settlements follow a contingency-fee structure, *i.e.*, as a percentage of the coupons redeemed, *Feder v. Frank (In re HP Inkjet Printer Litig.)*, 716 F.3d 1173, 1184 (9th Cir. 2013), which also means that in mixed settlements including coupon and non-coupon relief, part of the total settlement value must arise from a contingent value based on probable coupon redemption. *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 664 (9th Cir. 2020). See also *Marino v. COACH, Inc.*, No. 1:16-cv-01122, 2021 U.S. Dist. LEXIS 40821, at \*9 n.3 (S.D.N.Y. Mar. 3, 2021) (holding that fees from coupons must be contingent on their value, but a settlement agreement can provide to pay for fees separate and in addition to the settlement fund).

*cy pres* awards could be advisable, as discussed in Guideline 6.

Aside from the effect of CAFA, unless a coupon settlement provides *increased* benefits to class members and possesses certain safeguards, it should be avoided for the following reasons:

1. Except in unusual circumstances, there is no principled reason why a cash settlement cannot be achieved.<sup>67</sup>
2. For many class members, redemption may not be an option, because they are unwilling or unable to make a future purchase from the defendant. Thus, the class members are not equally compensated—some get something; others get nothing.
3. Even where the coupon is freely transferable, the defendant may be able to use its specialized knowledge of the industry to recover the cost of the coupon in the marketing of the relevant product, undermining deterrence.
4. Policy considerations disfavor rewarding the wrongdoing defendant with new sales from the victims of its illegal practices.

Nonetheless, in rare instances, a coupon settlement may be reasonable. Coupon settlements may make sense where the individual cash recovery would be so small that it would be exceeded by the costs of the cash distribution, making a coupon distribution the most (if not the only) effective way to provide the class with benefits. In addition, where the defendant is in a financially precarious position, coupons may be all that it can provide. Coupons may also be used where the primary value of the settlement is injunctive relief, with the coupons offered as an added benefit.<sup>68</sup> Thus, although coupon settlements should be the exception, not the rule, the facts may justify them in specific cases.<sup>69</sup>

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<sup>67</sup> The defendant may be acting on principle occasionally, however. In one employment case where the issue was whether the defendant had acted as “employer” to the class, the defendant refused to countenance paying cash to the class members because that suggested some validity to the claim, but, after obtaining summary judgment in its favor, it did, however, provide each class member with three \$100 store coupons which met all criteria in these Guidelines for maximizing value. See *In re Jimmy John’s Overtime Litig.*, 14-civ-5509 (N.D. Ill.) (final approval obtained June 8, 2021, ECF No. 760).

<sup>68</sup> *Bayhulle v. Jiffy Lube Int’l, Inc.*, 146 P.3d 856, 860 (Okla. Civ. App. 2006) (stating that “the major benefit of the settlement was Jiffy Lube’s cessation of the practice of charging the fee, which [an expert] termed ‘a huge, huge benefit,’” and that “while the coupons are ‘a lagniappe, just an extra,’ they are also of beneficial value to a significant number of class members since they contain no requirement of filling out and mailing in a proof of claim providing that Jiffy Lube would stop charging an environmental fee challenged in the lawsuit and would give class members a coupon good for \$5 off an oil change”).

<sup>69</sup> See, e.g., *In re Sears Auto. Ctr. Consumer Litig.*, No. C-92-227-RHSFMS(JSB), 1997 WL 27112, at \*1 (N.D. Cal. Jan. 17, 1997) (providing for coupon that could be redeemed at any Sears store).

## Guideline 6

### *Cy pres Awards*

Counsel must adhere to the highest possible standards of advocacy and ethical conduct when proposing distribution of monetary damages through *cy pres* settlement provisions.

1. When it may not be possible to distribute all settlement funds to class members, class counsel should negotiate for *cy pres* distributions rather than a reversion to the defendant or escheat to the state.
2. *Cy pres* awards should provide an indirect benefit to absent class members and further the purposes of the underlying litigation.
3. In cases involving large *cy pres* distributions, class counsel should recommend mechanisms to provide for monitoring and, if appropriate, judicial oversight of the expenditures. Class counsel should be entitled to compensation for work necessary to monitor implementation of the *cy pres* remedy in those cases at standard rates, with no enhancement or multiplier.
4. Unusual circumstances might justify bypassing the direct distribution of money to class members before considering a *cy pres* award, such as instances where individual recoveries are unduly costly to distribute because, for example, where the amounts of individual distributions would be very small, particularly in light of the costs of processing checks.
5. *Cy pres* may also be appropriate when funds remain after reasonable efforts have been made to identify and distribute money to all class members. If economically feasible, the remaining funds should be distributed *pro rata* to the claimants who cashed their initial checks before being allocated as *cy pres* awards.
6. Class counsel should not propose any *cy pres* recipient in which any party or their counsel, or any objector to the proposed settlement, has a direct or indirect interest, financial or otherwise.
7. Counsel should disclose all known details of the *cy pres* plan, including the identity of any proposed *cy pres* recipients, when moving for preliminary approval.



## Discussion

Courts have widely adopted the use of *cy pres* in class actions as a means to distribute money belonging to the class, where distribution to individuals is not feasible.<sup>70</sup> Forcing the defendant to disgorge undeserved profits is an important goal of a consumer class action, and *cy pres*, appropriately used, advances that goal.

Although, state courts have approved *cy pres* remedies, some state statutes restrict the distribution of residual funds in class actions.<sup>71</sup> The extent to which these statutes apply in federal diversity cases is disputed.<sup>72</sup>

If a settlement involves individual distribution to class members but funds remain after distribution, the settlement should provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically feasible or participating class members have been fully compensated. *Cy pres* allows the funds to be used to indirectly benefit the class, thereby providing a far preferable alternative to returning the funds to the defendant, which “would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable.”<sup>73</sup>

When choosing an organization to receive *cy pres* funds, “[n]ot just any worthy recipient can qualify as an appropriate *cy pres* beneficiary.”<sup>74</sup> The objective of *cy pres* is to achieve the best approximation, after distributing funds to class members, of righting the wrongs to the members of the class that led to the underlying lawsuit.<sup>75</sup> Counsel should avoid proposing *cy pres* recipients who have significant prior affiliations with any party, their counsel, or the court.<sup>76</sup> If they do, “a number of factors, such as the nature of the relationship, the timing and recency of the relationship, the significance of dealings between the recipient and the party or counsel, the circumstances of the selection process, and the merits of the recipient play into the analysis” of whether the prior relationship is significant.<sup>77</sup>

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<sup>70</sup> For the first comprehensive discussion of applying the doctrine in the class action context, see Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy pres Remedy*, 39 U. Chi. L. Rev. 448 (1972); see also Arthur R. Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 510 (1972). The rationale for *cy pres* awards is further explained in James R. McCall et al., *Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 Hastings L.J. 797 (1995).

<sup>71</sup> E.g., Cal. Civ. Proc. Code § 384(b) (West); 735 Ill. Comp. Stat. 5/2-807; see 4 Newberg on Class Actions § 12:35 (5th ed. June 2021 Update) (collecting statutes and rules).

<sup>72</sup> 4 Newberg on Class Actions § 12:35 (5th ed. June 2021 Update).

<sup>73</sup> ALI Principles § 3.07 cmt. b. The ALI Principles also disfavor escheat to the government. *Id.*

<sup>74</sup> *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012).

<sup>75</sup> *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d. 1301, 1308 (9th Cir. 1990).

<sup>76</sup> *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 331 (3d Cir. 2019).

<sup>77</sup> *In re Google Referrer Header Priv. Litig.*, 869 F.3d 737, 744–46 (9th Cir. 2017), *vacated on other grounds*, *Frank v. Gaos*, 139 S. Ct. 1041 (2019).

In considering appropriate *cy pres* recipients, relevant considerations include the nature of the lawsuit,<sup>78</sup> the interests of the class members,<sup>79</sup> and the geographic scope of the case.<sup>80</sup>

The district court has broad discretion to decide whether or not to approve a proposed *cy pres* distribution and recipient.<sup>81</sup> Like all class action settlements, a settlement containing a *cy pres* remedy must be fair, adequate, and reasonable,<sup>82</sup> but any *cy pres* component to a settlement must *itself* be fair, accurate, and reasonable.<sup>83</sup> Courts therefore must carefully review the competence and records of organizations that are proposed as recipients. Class counsel should be prepared to show the court how the selected organization can work for the interests the underlying litigation sought to protect.

Until recently, a settlement could allow the designation of a *cy pres* recipient at a later date, subject to the court's approval, with little risk, but recent decisions caution against this method.<sup>84</sup> Because approval of a class action settlement may depend on the appropriateness of the *cy pres* recipient, identifying a recipient at a later date risks having objectors attempt to, and perhaps succeed at, upending an otherwise good settlement after it has been finally approved.

In cases where an organization receives a substantial *cy pres* distribution, class counsel should consider monitoring use of the *cy pres* funds to ensure use in accordance with the terms of the court's order. When possible, designating recipients with a proven record and competence in

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<sup>78</sup> In *In re American Tower Corp. Securities Litigation*, 648 F. Supp. 2d 223, 224–25 (D. Mass. 2009), the court affirmed that *cy pres* distributions are appropriate when distribution to the class is not feasible but held that *cy pres* awards have to relate to the alleged harm of the underlying suit.

<sup>79</sup> In *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*, Nos. 01–2118, 02–1018, 2007 WL 2007447, at \*2 (D.D.C. July 10, 2007), the court describes the *cy pres* doctrine as “the next best use of funds,” or a way to indirectly benefit the class when the class can't be compensated directly.

<sup>80</sup> In *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011), the court held that *cy pres* distributions must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity.

<sup>81</sup> Appellate review of a trial court's *cy pres* distribution is based upon an abuse of discretion standard. See *Allred v. Reconstrust Co., N.A.*, 787 Fed. App'x 994, 996 (10th Cir. 2019); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011).

<sup>82</sup> Fed. R. Civ. P. 23(e)(2).

<sup>83</sup> *Allred v. ReconTrust Co., N.A.*, 787 Fed. App'x 994, 996–997 (10th Cir. 2019) (citing *In re Baby Prods. Antitr. Litig.*, 708 F.3d 163, 169 (3d Cir. 2013)); *Lane v Facebook, Inc.*, 696 F.3d 811, 819–20 (9th Cir. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 33 (1st Cir. 2009).

<sup>84</sup> *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012). The court also noted that its concerns were “not placated by the settlement provision that the charities will be identified at a later date and approved by the court—a decision from which the Objectors might again appeal.” *Id.*; see also *In re BankAmerica Corp. Sec. Litigation*, 775 F.3d 1060, 1066 (8th Cir. 2015) (“[T]he district court should make a *cy pres* proposal publicly available and allow class members to object or suggest alternative recipients before the court selects a *cy pres* recipient” subject to the exception to this rule when “the amount of funds to be distributed *cy pres* is de minimis.”). *But see In re Baby Prods. Antitr. Litig.*, 708 F.3d 163, 181 (3d Cir. 2013) (approving settlement notice that disclosed the possibility of *cy pres* recipients to be selected at a later date).

the issues raised in the underlying litigation is preferable to using the funds to create a new organization, to ensure concrete benefit to the class.

## Guideline 7

### Reversion

Reversion of remaining settlement or judgment funds to a defendant is seldom appropriate.

1. Class counsel should very rarely agree to a class settlement that authorizes reversion and should oppose any post-settlement efforts by defendants or courts to allow it.
2. As discussed in Guideline 6 (*cy pres*), either additional payments to class members, if feasible and appropriate, or a *cy pres* distribution is preferable. Escheat to the state, which also generally should be avoided, is preferable to reversion to the defendant.

### Discussion

A defendant may seek a provision in a settlement agreement requiring reversion of leftover money. Reversion to the defendant is almost never appropriate because it undermines a key purposes of class actions—forcing disgorgement of income from a defendant’s unlawful practice.

It is critical at the outset of settlement discussions, and in subsequent negotiations as necessary, to make clear that any dollar amounts discussed in settlement will not revert to the defendant under any circumstances. Failure to drive this point home early in settlement discussions can be cause for the collapse of discussions that have extended over many days or weeks and that the parties believed were close to completion.

Reversion undermines the purposes of class actions—including those identified in Guideline 1. Unless class members have received complete relief—that is, unless they have received all that they have claimed in the lawsuit—reversion is inconsistent with the goal of compensating class members for their injuries. In addition, the possibility that funds will revert to the defendant undermines the defendant’s incentive to agree to the best possible means of notice and distribution of the funds to the class, because when fewer class members receive funds, more money will revert to the defendant. For example, defendants eligible to receive leftover funds may push for a claims-made distribution process rather than automatic distribution and seek to impose to make the claims process unnecessarily complicated.<sup>85</sup> On the flip side, a defendant who is not entitled to reversion of leftover funds has little reason to oppose effective notice and distribution. Notably, courts have observed that a settlement agreement providing for reversion may be a sign of collusion between class counsel and defendants.<sup>86</sup>

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<sup>85</sup> See Manual for Complex Litigation, Fourth § 21.61.

<sup>86</sup> See, e.g., *In re Volkswagen “Clean Diesel” Mktg., Sales Practices & Prods. Liability Litig.*, 895 F.3d 597, 611-12 (9th Cir. 2018) (explaining why an agreement for reversion raises the “specter of collusion” but then explaining why that was no concern under the circumstances, because defendant Volkswagen was incentivized to increase class participation under penalty of massive fines); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (agreement for reversion is a “warning sign.”). Some courts have viewed reversion, particularly in combination with other factors, such as clear-sailing provisions, as warranting particular scrutiny. See, e.g., *In re Sw. Airlines Voucher*

Reversion also undermines class action goals of deterrence and systemic change by mitigating the financial impact of class actions on wrongdoers.

For these reasons, reversion has long been disfavored by commentators<sup>87</sup> and courts.<sup>88</sup>

In highly unusual circumstances, reversion may be appropriate. For example, in rare cases, the settlement will have money remaining after all class members have received full relief for their claims—a situation that could occur in the rare circumstance where damages are liquidated and there is no possibility of unliquidated compensatory or punitive damages.<sup>89</sup>

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*Litig.*, 799 F.3d 701, 712-13 (7th Cir. 2015); *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 947 (9th Cir. 2011); *In re Samsung Top-Load Washing Machine Mktg., Sales Practices, and Prods. Liability Litig.*, 997 F.3d 1077, 1088-90 (10th Cir. 2021).

<sup>87</sup> See ALI Principles of the Law of Aggregate Litigation § 3.07 cmt. b. (reversion not appropriate because it “would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the wrong-doer simply because distribution to the class would not be viable”); see also 4 Newberg on Class Actions § 12:29 (5th ed.) (discussing reasons reversionary funds are disfavored); Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges*, 20 (3d ed. 2010) (urging judges to reject settlements providing for reversion and instead favoring follow-up distributions to class members).

<sup>88</sup> See also *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (“Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement.”); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32–33 (1st Cir. 2012) (reversion can “undermine the deterrence function of class actions ... by rewarding the alleged wrongdoer simply because distribution to the class [is not] viable” (quoting ALI Principles)); *Friar v. Vanguard Holding Corp.*, 125 A.D.2d 444, 445-46 (N.Y. App. Div. 1986) (rejecting reversion because it “would be equivalent to awarding [the defendant] the benefit of its own wrongdoing”).

<sup>89</sup> *E.g.*, *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989) (approving reversion where, following robust notification, including individual notification, every claimant had received complete backpay, which was the only available remedy under the claim alleged, and where reversion was not discussed until after the claims process had been completed).

## Guideline 8

### Service Awards for Class Representatives

Courts typically approve monetary service awards for class representatives to recognize their willingness to represent absent class members, actively participate in the litigation, and assume potential personal and financial risk for being associated with the litigation.

1. When negotiating the amount of a service award, class counsel should consider the following factors: (1) whether and the extent to which the class representative incurred expenses or spent time responding to written discovery, conferring with counsel about the case background or settlement issues, or performing other tasks associated with the prosecution of the litigation; (2) whether the class representative was deposed, the length of the deposition, the amount of travel required, and other schedule disruptions; (3) whether the class representative testified at trial or at any pre-trial hearing; (4) whether the class representative assumed any risk in undertaking representation of the class, including the risk of liability for costs or attorneys' fees, or the risk of a counterclaim or adverse extra-judicial action by the defendant; (5) whether the class representative rejected an individual settlement offer; (6) whether the amount of the service award is reasonable compared to the value of the settlement as a whole and to any payments to individual class members; (7) the stage of the proceeding, including whether the case settled or was tried to judgment; and (8) the case law in the relevant jurisdiction relating to service awards and the typical amount approved by courts in that jurisdiction for that type of claim.
2. Class counsel should avoid pre-settlement arrangements with class representatives about service awards, service awards conditioned on any settlement term or the class representative supporting the settlement, or percentage-of-recovery-based service awards.
3. To avoid the appearance of improper fee sharing, service awards should be paid out of the class's monetary relief (whether settlement or post-judgment) rather than from an attorney fee award.

### Discussion

Courts routinely approve service awards to compensate class representatives for their efforts on behalf of the class.<sup>90</sup> Class representatives contribute to the litigation in ways that unnamed class

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<sup>90</sup> See, e.g., *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015); *Melito v. Experian Marketing Sols.*, 923 F.3d 85 (2d Cir. 2019), cert. denied, 140 S. Ct. 677 (2019); *Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 F. App'x 880, 881 (3d Cir. 2016); *Berry v. Schulman*, 807 F.3d 600, 613-14 (4th Cir. 2015); *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 290 (5th Cir. 2017) (vacating settlement approving a \$12,500 service award on other grounds); *Pelzer v. Vassalle*, 655 F. App'x 352, 361 (6th Cir. 2016); *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014) (approving of service awards generally, but finding that service awards in this case created an impermissible conflict of interest between the class representatives and the class because the settlement agreement limited service awards to representatives who supported the settlement); *Tussey v. ABB, Inc.*, 850 F.3d 951, 962 (8th Cir. 2017); *Johnson v.*

members do not; for example, providing valuable facts during the initial case investigation, providing written discovery responses and producing documents, being deposed, allowing access to their homes or personal property, serving as witnesses at trial, and participating in settlement negotiations.<sup>91</sup> Service awards encourage individuals with small personal claims to take on the personal and financial burden of serving as class representatives, ensuring that cases are brought.<sup>92</sup> Service awards also recognize that class representatives sometimes reveal personal, financial, or other private information as part of the litigation and may risk reputational harm by participating in the litigation.<sup>93</sup> Service awards are typically negotiated by the parties and considered by courts as part of its decision whether to approve a class action settlement Rule 23(e), although the class members' recovery should not be contingent on the court's approval of the service awards.<sup>94</sup> Service awards may also be sought by motion after judgment has been entered.<sup>95</sup>

Although there is no universal set of factors for determining the appropriate amount of a service award, courts generally consider the time and effort the class representative devoted to work on behalf of the class, the degree to which the representative's actions benefitted the class, and any risk that the individual assumed by serving as class representative.<sup>96</sup> Courts also consider

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*MGM Holdings, Inc.*, 943 F.3d 1239, 1241 (9th Cir. 2019); *Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P.*, 888 F.3d 455, 468-69 (10th Cir. 2017).

<sup>91</sup> See, e.g., *Rose v. Travelers Home & Marine Ins. Co.*, No. 19-977, 2020 WL 4059613, at \*11 (E.D. Pa. July 20, 2020) (awarding \$10,000 joint service award to married class representatives who gathered information during the investigation of their potential claims, reviewed and produced documents, met with class counsel, attended mediations, and without whom "there would have been no case, and Settlement Class Members would have had to pursue their [claims] alone"); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 (W.D. Wash. 2009) (approving \$7,500 service awards to class representatives who, among other things, allowed investigators to inspect their homes and remove samples of their decks in product-defect case).

<sup>92</sup> See, e.g., *Hashw v. Dept. Stores Natl. Bank*, 182 F. Supp. 3d 935, 951-52 (D. Minn. 2016) (approving \$15,000 service award where, without the class representative's service, "there can be no class action" (quoting *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992)).

<sup>93</sup> See *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *Berry v. Schulman*, 807 F.3d 600 at 613 (4th Cir. 2015);

<sup>94</sup> *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (acknowledging that service awards are discretionary).

<sup>95</sup> See, e.g., *Strauch v. Computer Sciences Corp.*, No. 3:14-CV-956 (JBA), 2020 WL 4289955 (D. Conn. July 27, 2020). As noted in the text, NACA recommends payment of service awards from the class relief rather than from attorney fees to avoid the appearance of fee sharing, but a number of courts have approved payment of service awards from attorney fee awards without expressing any concern.

<sup>96</sup> See, e.g., *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947-48 (9th Cir. 2015) (discussing factors to consider in reviewing service awards, including number of class representatives receiving payments, the proportion of the payments relative to the total settlement amount, and the size of each payment); see also *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (directing courts to consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation"); *Low v. Trump University, LLC*, 246 F. Supp. 3d 1295, 1313-17 (S.D. Cal. 2017) (discussing considerations, including risk to the class representative in commencing suit, notoriety encountered by the class representative, amount of time and effort spent on the case, duration of the litigation,

whether the service award is reasonable compared to the class members' recoveries.<sup>97</sup> In determining whether a service award is reasonable, some courts rely on declarations from counsel or the class representatives that detail the class representative's efforts and how those efforts benefited the class.<sup>98</sup> Some courts require greater detail, such as time sheets—akin to attorney billing records—showing the time each class representative actually devoted to the case.<sup>99</sup>

Although service-award amounts vary greatly, they are generally in the \$1,000 to \$10,000 range.<sup>100</sup> In the Ninth Circuit, for example, courts have routinely found \$5,000 service awards to

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and personal benefit or lack thereof enjoyed by the class representative resulting from the litigation); *Humphrey v. United Way of Tex. Gulf Coast*, 802 F. Supp. 2d 847, 869 (S.D. Tex. 2011) (listing same factors).

<sup>97</sup> See *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (leaving open the question of whether extra payments are ever permissible but noting that they are more likely to be proper when they represent "a fraction of a class representative's likely damages"); *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1161 (9th Cir. 2013) (finding that "[service] awards significantly exceeded in amount what absent class members could expect upon settlement approval" and thus "created a patent divergence of interests between the named representatives and the class"); *Vassalle v. Midland Funding, L.L.C.*, 708 F.3d 747, 756 (6th Cir. 2013) (suggesting that \$2,000 payments to named plaintiffs were disproportionately greater than the relief for the absent class members, but rejecting settlement on other grounds); see also, e.g., *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 628 (E.D. Mich. 2020) (finding that the requested service award of \$10,000 was excessive because it was at least 100 times greater than amount individual unnamed class members would collect and would make named plaintiff "far more than 'whole'").

<sup>98</sup> See, e.g., *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at \*15 (S.D. Ill. Dec. 16, 2018) (approving service payments of \$25,000 on the basis of class representatives' declarations attesting to work performed for the class over 20 years); *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008) (class representative must justify a service award through "evidence demonstrating the quality of plaintiff's representative service," including "substantial efforts taken as class representative to justify the discrepancy between her award and those of the unnamed plaintiffs"); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (approving service payments of \$25,000 to three class representatives and \$10,000 to three class representatives on the basis of counsel's affidavits);

<sup>99</sup> See *Shane Group, Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 310-311 (6th Cir. 2016) (remanding to district court for further review of the settlement and service awards).

<sup>100</sup> See, e.g., *In re Cigna-American Specialty Health Admin. Fee Litig.*, No. 2:16-CV-03967-NIQA, 2019 WL 4082946, at \*16 (E.D. Pa. Aug. 29, 2019) (approving of \$10,000 service award to class representatives who assisted class counsel with discovery and mediation, finding that the requested awards were within the range of awards in similar cases, and citing cases); *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 204-05 (N.D. Ill. 2018) (noting that \$10,000 service awards are "generally handed out in TCPA cases"); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266-67 (N.D. Cal. 2015) (recognizing that "[i]ncentive awards typically range from \$2,000 to \$10,000" and collecting cases); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 131 (S.D.N.Y. 2009) (approving service awards of \$15,000, \$10,000, and \$5,000 based on the range of other approved incentive awards and the service of each class representative); see also William B. Rubenstein, 5 *Newberg on Class Actions* § 17:8 (5th ed. June 2021 update) (discussing empirical studies of service awards from 1993-2002 and 2006-2011, and noting that the median per representative service award in 2011 was \$5,250 and the average per representative service award was \$11,697); David F. Herr, *Ann. Manual for Complex Litig.* § 21.662 (4th ed. May 2021 update) (collecting cases approving of service awards ranging from \$1,000 to \$15,000).



be “presumptively reasonable,”<sup>101</sup> The standard varies from jurisdiction to jurisdiction.<sup>102</sup> Every court requires an inquiry into whether the requested service award is reasonable based on the facts of that case, so even if an award is “reasonable” by circuit standards, it may still be found to be unreasonable based on the class representative’s actual participation in the litigation.<sup>103</sup> Larger awards may be appropriate where the representative has served for a long time or has expended a significant effort for the class,<sup>104</sup> with smaller awards appropriate when the representative served for a relatively short time or only minimally participated in the case.<sup>105</sup> Larger awards may also be appropriate when a class representative rejected an earlier settlement offer and later secured a better settlement for the class, especially in cases involving statutory damages.<sup>106</sup> In addition, courts may reduce the service award to an amount that they find

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<sup>101</sup> See, e.g., *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 457, 463 (9th Cir. 2000); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 at 246 (N.D. Cal. 2015) (collecting cases approving service awards of \$5,000 as presumptively reasonable).

<sup>102</sup> See, e.g., *Kemp v. Unum Life Ins. Co. of America*, No. 14-0944, 2015 WL 8526689, at \*7-8 (E.D. La. Dec. 11, 2015) (finding that courts within the Fifth Circuit have generally approved of service awards of \$5,000, and collecting cases); Theodore Eisenberg and Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1333-34 (2006) (summarizing a study of reported class actions between 1993 and 2002 and reporting median and average service awards in various types of class actions, including consumer).

<sup>103</sup> See *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157 at 1164 (9th Cir. 2013) (courts must scrutinize service award requests to ensure they do not impact the adequacy of the class representative); *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) (courts must ensure that class representatives are not expecting a “bounty” for bringing suit).

<sup>104</sup> See, e.g., *Romero v. Securus Techs., Inc.*, No. 16-CV-1283-JM (MDD), 2020 WL 6799401, at \*9 (S.D. Cal. Nov. 19, 2020) (approving \$10,000 service awards because the class representatives waived their personal right to seek monetary and statutory damages, acted as private attorneys general in bringing the case, and would not have agreed to the settlement if the rest of the class had been required to release their claims); *Norfleet v. John Hancock Life Ins. Co.*, 658 F. Supp. 2d 350, 353-54 (D. Conn. 2009) (approving \$20,000 service award to class representative who served for five years, was deposed, responded to discovery, and worked with class counsel throughout motions practice and settlement negotiations).

<sup>105</sup> Compare *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP-TAB, 2012 WL 5878032, at \*1 (S.D. Ind. Nov. 20, 2012) (approving \$25,000 service awards to two class representatives based on extensive involvement over seven years of litigation, including participation in litigation decisions, travel to attend hearings, and reviewing settlement to ensure fair recovery for the class) with *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 259 (D.N.J. 2005) (awarding \$1,000 service award to class representative whose only involvement in the case was participation in the settlement).

<sup>106</sup> See, e.g., *Jordan v. Nationstar Mortg., LLC*, No. 2:14-CV-0175-TOR, 2019 WL 1966112, at \*9 (E.D. Wash. May 2, 2019) (approving \$20,000 service award to sole named plaintiff because during the five years of litigation she responded to discovery, was deposed by the defendant, prepared for two trials, and rejected a settlement offer that would have provided no relief to the class); *Markos v. Wells Fargo Bank, N.A.*, No. 1:15-CV-001156-LMM, 2017 WL 416425, at \*3 (N.D. Ga. Jan. 30, 2017) (approving \$20,000 service awards where class representatives rejected offers of judgment that would have compensated them more than the service award and therefore put the class interests above their own); *Sykes v. Harris*, No. 09 Civ. 8486 (DC), 2016 WL 3030156, at \*18 (S.D.N.Y. May 24, 2016) (noting that class representatives took on “significant risks” in rejecting offers of judgment under Rule 68 because they exposed themselves to liability for costs incurred after the offer if the ultimate judgment was less favorable than the offer).

supported by the representatives' work.<sup>107</sup> Similarly, the amounts of service awards vary based on differences in the class representatives' roles and efforts in the litigation. Thus, differing amounts are appropriate where, for example, one class representative undertook more work on behalf of the class, served as a representative longer, or was deposed or otherwise participated in discovery while other representatives did not.<sup>108</sup>

In some circumstances, service awards may jeopardize the adequacy of class representatives by creating conflicts between the representatives and the class.<sup>109</sup> For example, courts might be concerned that service awards significantly larger than any relief offered to unnamed class members—particularly in cases involving only “perfunctory” injunctive or coupon relief—may lead class representatives to compromise the interests of the class for their own personal gain.<sup>110</sup> This concern may be alleviated if the class representatives of an injunctive relief or coupon relief settlement, for example, waive their personal claims for damages,<sup>111</sup> or if the service award is paid separately by the defendants and not from funds used to provide the promised coupon or injunctive relief.<sup>112</sup>

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<sup>107</sup> See, e.g., *Adkins v. Facebook, Inc.*, No. C18-05982 WHA, 2021 WL 1817047, at \*7 (N.D. Cal. May 6, 2021) (reducing service award from \$5,000 to \$500 because class representative used vacation time from work to travel for proceedings, but also allowed his phone to be forensically examined during discovery); *Wolph*, 2013 WL 5718440, at \*6 (noting neither class representative suggested that “they undertook any great risk to either their finances or to their reputation in bringing this action” as a reason to reduce service award).

<sup>108</sup> See, e.g., *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, No. 10-CV-14360, 2019 WL 4746744, at \*9-10 (E.D. Mich. Sept. 30, 2019) (approving service awards ranging from \$5,000 for individual class representatives to \$35,000 and \$45,000 for organizational class representatives based on the greater efforts expended by and burden shouldered by the organizational class representatives); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 646-47 (S.D. Cal. 2011), *aff'd*, 473 F. App'x 716 (9th Cir. 2012) (approving an award of \$4,000 to one class representative and \$2,000 to another based on different levels of involvement in the litigation).

<sup>109</sup> *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157 at 1165 (9th Cir. 2013) (“district courts must be vigilant in scrutinizing all incentive awards” to ensure adequacy of representation and lack of conflicts of interest with class members).

<sup>110</sup> See *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (finding that, although the Sixth Circuit had neither approved nor disapproved service awards as a general practice, the requested service awards were disproportionate compared to the questionable value of the injunctive relief received by the class); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 602-03 (N.D. Cal. 2020) (rejecting service awards for class representatives who were not exposed to financial or reputational risk, were willing to sign off on a settlement that would have distributed the vast majority of the settlement fund to cy pres recipients, and class members would receive only \$4 per product). *But see In re Google LLC Street View Electronic Comms. Litig.*, 2020 WL 1288377, at \*9-10 (N.D. Cal. Mar. 18, 2020) (approving \$5,000 service awards to eighteen class representatives where the only monetary payments were cy pres and class received only injunctive relief).

<sup>111</sup> See e.g., *Campbell v. Facebook Inc.*, No. 13-CV-05996-PJH, 2017 WL 3581179, at \*8 (N.D. Cal. Aug. 18, 2017) (approving \$5,000 service awards in settlement for declaratory and injunctive relief where the awards were not conditioned on support of the settlement and the plaintiffs sat for daylong depositions, actively participated in litigation, produced their private Facebook messages in discovery, and, unlike the class, waived their personal claims for monetary damages).

<sup>112</sup> See, e.g., *Linneman v. Vita-Mix Corp.*, 394 F. Supp. 3d 771, 790-91 (S.D. Ohio 2019), *vacated and remanded on other grounds*, 970 F.3d 621 (6th Cir. 2020).

Service awards should not be tied to or conditioned on any other settlement term. In particular, class counsel should avoid “incentive agreements” with class representatives that tie service awards to the total value of a settlement because the ceiling on service awards could dissuade class representatives from holding out for greater relief for the class in settlement.<sup>113</sup> Service awards should always be for a specific dollar amount rather than a percentage of a common-fund settlement,<sup>114</sup> although courts may look to the total value of the settlement to determine whether the requested award is reasonable.<sup>115</sup>

Neither Congress<sup>116</sup> nor the Supreme Court<sup>117</sup> has said that service awards in consumer class actions are impermissible. The Eleventh Circuit, however, has held that service awards are *per se* unlawful.<sup>118</sup> Every other circuit court has approved service awards when the awards are fair in comparison to the overall settlement and the class members’ individual recoveries and reflect the work and risk undertaken by the class representative.<sup>119</sup> District courts have also largely rejected the Eleventh Circuit’s reasoning as unpersuasive and contrary to long-standing precedent within their respective circuits.<sup>120</sup>

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<sup>113</sup> See *Rodriguez*, 563 F.3d at 958–60; see also *Rodriguez v. Disner*, 688 F.3d 645, 653–58 (9th Cir. 2012) (holding that attorneys who represented conflicted class representatives committed an ethical violation, and affirming denial of attorneys’ fees to those attorneys).

<sup>114</sup> See *Chieftain Royalty Co.*, 888 F.3d at 468–69 (reversing district court’s approval of service award as a percentage of the settlement fund and finding that scaling service awards to the settlement fund does not accurately reflect the services performed and risks undertaken by the class representative and can lead the class representative to hold out for a higher recovery to the detriment of the class).

<sup>115</sup> See, e.g., *Jenkins v. Trustmark Nat’l Bank*, 300 F.R.D. 291, 305–06 (S.D. Miss. 2014) (noting that \$35,000 of service awards to be distributed to seven class representatives was a reasonable payment, in part because the awards represented less than one percent of the settlement fund).

<sup>116</sup> Compare Fed. R. Civ. P. 23 (no mention of service awards or additional payments to class representatives) with the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(2)(vi) (requiring that securities class complaints include a certification that a plaintiff “will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff’s pro rata share of any recovery,” except as otherwise approved by the court).

<sup>117</sup> See *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018) (“The class representative might receive a share of class recovery above and beyond her individual claim.”); *Frank v. Gaos*, 139 S. Ct. 1041, 1045 (2019) (noting service award).

<sup>118</sup> *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020).

<sup>119</sup> *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015); *Melito*, 923 F.3d at 96; *Rodriguez v. Nat’l City Bank*, 726 F.3d 372, 357 (3d Cir. 2013); *Berry*, 807 F.3d at 613–14; *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 290 (5th Cir. 2017) (vacating settlement on other grounds); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876–77 (7th Cir. 2012); *Tussey v. ABB, Inc.*, 850 F.3d 951, 962 (8th Cir. 2017); *In re Online DVD-Rental*, 779 F.3d at 943; *Chieftain Royalty Co.*, 888 F.3d at 468–70.

<sup>120</sup> *Grace v. Apple, Inc.*, No. 17-CV-00551-LHK, 2021 WL 1222193, at \*7 (N.D. Cal. Mar. 31, 2021); *Wickens v. Thyssenkrupp Crankshaft Co., LLC*, No. 1:19-CV-6100-RMD, 2021 WL 267852, at \*2 (N.D. Ill. Jan. 26, 2021); *Vogt v. State Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, 2021 WL 247958, at \*3–4 (W.D. Mo. Jan. 25, 2021); *Somogyi v. Freedom Mortgage Corp.*, 495 F. Supp. 3d 337, 353–54 (D.N.J. 2020).

## Guideline 9

### Class Member Releases

A class action settlement agreement's release-of-claims provision should:

1. Be negotiated by counsel who adequately represent class members as to each claim that will be released;
2. Encompass only claims for which class members have been or are provided a right to exclude themselves if the class was or will be certified pursuant to Rule 23(b)(3);
3. Be commensurate with the relief obtained for each class member; and
4. Be disclosed clearly and comprehensibly in the notice to class members.

#### Discussion

A class action settlement should generally release only class claims alleged in the complaint. Settlements that release non-certified or non-pleaded claims raise concerns about both procedural unfairness and substantive inadequacy. The procedural fairness concern is that class members may not have had notice of the added-on claims at the time they had the right to exclude themselves from the class (and declined to exercise that right). The substantive inadequacy concern is that the settlement relief for class members may be based primarily or entirely on the value of the certified or pleaded claims, and thus may not reflect the separate value of all the released claims.

Class counsel generally should not agree to a settlement that releases non-certified or non-pleaded claims. If they do, adequacy of representation must be separately demonstrated as to the added-on claims; the settlement must provide sufficient consideration for those claims, and class members must be given the opportunity to exclude themselves from the settlement at the time they receive notice that any non-certified or non-pleaded claim would be released.

To ensure that the difference between certified and non-certified claims receives appropriate attention, negotiation of certified claims should precede any negotiation of other claims. The District Court for the Northern District of California's *Procedural Guidance for Class Action Settlements* aids in this process by specifying that settling parties must explain to the court any difference between pleaded or previously certified claims and the claims to be released class action settlement approval process.<sup>121</sup>

Class counsel should proceed cautiously in discussing settlement of claims outside the scope of the pleadings or certified claims.

Because broad application of collateral estoppel may be harmful to class members,<sup>122</sup> class counsel must therefore take care to negotiate release terms that explicitly protect class members

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<sup>121</sup> See N.D. Cal. Guidance 1(c)-(d).

<sup>122</sup> See Guideline 15 for a discussion how collateral estoppel from an excessively broad release in class actions involving home ownership can be especially damaging to consumer class members.

against harmful application of collateral estoppel—such as when the release of an affirmative claim related to home ownership could result in release of the claim as a defense to foreclosure,<sup>123</sup> or where release of a claim related to a debt might amount to a confession of the debt’s validity or a waiver of class members’ rights to defend against collection actions or seek *vacatur* of judgments.

Class counsel also should approach with care provisions that release claims not only against a named defendant but also against an absent third party. Although third-party releases may sometimes be appropriate—for example, where the third party is under common ownership with the settling defendant, or where the settling defendant would be under a duty to indemnify the third party—they risk immunizing wrongdoers from accountability without providing additional compensation to the class. Counsel should be particularly wary of third-party releases that identify the releasees by description and not by name.

Class counsel should investigate and obtain discovery on the scope of cases pending against the defendant in determining the appropriate scope of a release. To protect against the possibility of releasing active claims that are unknown to class counsel, an explicit carve out from the release for claims in separately pending litigation may be appropriate.

Although a “general release” may be appropriate for the named class representatives, absent class members should not be required to release claims for which the settlement provides no remedy or to release damages claims without a damages remedy. For example, if the class settlement only provides injunctive relief and not restitution or other monetary payments to individual class members, the release should provide that individual damages claims are not released. Relatedly, a litigation or settlement class certified only under Rule 23(b)(2) should not release claims for damages covered by Rule 23(b)(3) unless class members receive notice, the right to opt out, and adequate consideration for all claims and relief covered by the release.<sup>124</sup>

Class counsel should not release procedural rights, such as the right to proceed as a class, for otherwise unreleased claims. For smaller-value claims, release of the right to proceed as a class can be tantamount to release of the claim itself.<sup>125</sup> Even for larger-value claims for which class certification may be less critical, a settlement’s imposition of a procedural restraint on a claim of high value is not justified under a settlement that otherwise does not, and perhaps could not,

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<sup>123</sup> See Guideline 15.

<sup>124</sup> Cf. *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 329-30 (3d Cir. 2019) (“We also question, and leave to the District Court on remand, whether a defendant can ever obtain a class-wide release of claims for money damages in a Rule 23(b)(2) settlement, and if so, whether a release of that kind requires a heightened form of notice under Rule 23(c)(2)(B) or due process tenets.”).

<sup>125</sup> See, e.g., *Koby v. ARS Nat’l Servs., Inc.*, 846 F.3d 1071, 1081 (9th Cir. 2017) (“It is enough to conclude that the waiver of the right to seek damages in future class actions has *some* value, and it plainly does. Very few class members would bother to file their own individual actions to recover minimal (or non-existent) damages and statutory damages capped at \$1,000. For small-dollar claims like these, even under a statute with a fee-shifting provision, a class action is often the only realistic means of obtaining any monetary recovery.”).

release the claim.<sup>126</sup>

There are serious, and probably fatal, objections to any settlement that purports to release potential future claims of persons who have not suffered injury at the time of settlement. Even if it were possible to notify such future-damaged class members, it is impossible to provide any meaningful notice and opportunity to opt out because they have not been injured and thus cannot assess what the proposed settlement means to them.<sup>127</sup> Including uninjured people in the class defeats the predominance requirement of Rule 23(a)(4), and the named class members (who were already injured) cannot represent the interests of the absent uninjured class members, as required by Rule 23(b)(4).<sup>128</sup>

If class counsel deems it necessary to require class members to submit a claim form to receive compensation, class counsel must evaluate whether class members who fail to submit a claim form should be bound by any release.<sup>129</sup> In a case where a class member who does not submit a claim form *would* be bound by a release of claims, the notice of settlement should make this fact clear.<sup>130</sup> Conversely, in cases where submission of a claim form triggers coverage by a release, class counsel should consider carefully—based on the type of case, the scope of the release, and the value of the compensation as compared to the value of the claims being released—whether to include additional notice on the claim form that class members will release all claims should they return the form.

Releases should never include agreements not to assist criminal investigations, civil-enforcement proceedings, or professional-disciplinary proceedings. Such an agreement would likely be void on public policy grounds.

In agreeing to settle a class action, a defendant understandably wishes to protect against later suits by class members for the same alleged wrongs that are being settled through the class action. Ordinary principles of *res judicata* and collateral estoppel apply in the class action context to bar claims from being litigated again later, so long as there was adequate representation of the class in the earlier case.<sup>131</sup> Nonetheless, just as in individual cases, defendants generally will insist upon including releases within a negotiated settlement document. There does not appear to be any benefit from releases that do not exceed the scope of the *res judicata* bar, apart from perhaps the greater certainty to defendants, but neither does there appear to be any harm.

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<sup>126</sup> *But see In re NCAA Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 605 (N.D. Ill. 2016) (denying approval, but advising settling parties to narrow the scope of, *not to eliminate*, a release of class action rights for preserved personal-injury claims).

<sup>127</sup> *See Amchem v. Windsor*, 521 U.S. 591 (1997).

<sup>128</sup> *Id.* at 624-27.

<sup>129</sup> For additional guidance on the appropriateness of using claim forms, see Guideline 11.

<sup>130</sup> For detailed guidance on notice, see Guideline 10.

<sup>131</sup> *See Matsushita Electric Co. v. Epstein*, 516 U.S. 367 (1996).

Before *Matsushita Electric Industrial Co. v. Epstein*,<sup>132</sup> there was some uncertainty whether class-wide releases that were broader than the scope of the pleadings or certified claims were binding upon individual class members in later litigation. As a noted commentator states: “A class action settlement agreement cannot release the claims of absent class members. Only absent class members can release their own claims.”<sup>133</sup> But Newberg later notes that an alternative to individual releases is to include “a constructive release clause in the settlement agreement,” advising that acceptance of settlement benefits releases whatever claims are described in the settlement agreement.<sup>134</sup>

The Supreme Court’s decision in *Matsushita* holds that *res judicata* bars re-litigating non-certified claims (and even non-pleaded claims) that are released on a class-wide basis, so long as there is adequate representation and an opportunity to opt out. Court approval of a proposed settlement seeking to include such a release therefore must include findings that plaintiffs and class counsel adequately represent the class on all of the settled issues.

In some cases, defendants may also seek individually executed releases from class members, either as part of the language contained in claim forms or as an endorsement on settlement distribution checks. The unanimous view of commenters has been that if the scope of the classwide release is limited to those claims certified by the court for class treatment, individually executed releases are unnecessary and unproductive.

While it is unusual for individual claims of a named representative to be asserted together with class claims in one complaint, in some cases instances this may be appropriate or even necessary. For example, cases involving more complex transactions may raise a wider range of claims, including those that are and are not amenable to class-wide resolution. Even though some of the claims are not suitable for class certification, the class representative may have plead all transaction-related claims, including individual claims, in a single complaint. One comment stressed that it is preferable to avoid including individual claims when possible.

The opportunity to opt out of a proposed settlement is particularly important if claims are being settled that have not been previously certified by the court. Although it is common practice to offer class members only one opportunity to opt out of a class action, a second opportunity may be advisable.<sup>135</sup> When there is a contested class certification motion, the opportunity to opt out usually comes immediately after certification. Although a post-certification settlement requires notice of the settlement terms and an opportunity to object, class members may not be given a second opportunity to opt out, although the court may require this pursuant to Rule 23(e)(4) as a condition of granting settlement approval. If claims are being settled that were not described in the initial class notice, failure to give a second opt-out opportunity raises serious fairness issues.

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<sup>132</sup> *Id.*

<sup>133</sup> NEWBERG at § 12.17, at 321 (4th ed. 2002).

<sup>134</sup> *Id.* at 321ff.

<sup>135</sup> See Fed. R. Civ. P. 23(e)(4).

Where a statute provides for a cap on damages recoverable in any one class action, over-broad class definitions mean that additional class members would release their individual claims without any marginal increase in the class recovery. Class counsel should strongly consider narrowing the class to maximize the value that class members receive for their release of claims.



## Guideline 10

### Notice of Settlement

Notice of a proposed class action settlement should use simple, plain language that describes the salient aspects of a class, including the settlement terms. Notice should be provided in both summary and full forms.<sup>136</sup>

1. A summary notice should be used as a means to facilitate wide dissemination, as appropriate given the nature of the case and the size and make-up of the class, and to make the key aspects of the settlement readily apparent to class members. The summary notice should provide enough information to be meaningful and should always provide an easy way to obtain a full notice (usually via a website address).
2. The summary notice should be sent with or appear at the beginning of the full notice if the full notice is sent by mail. Summary notices should be disseminated alone, without the full notice, where doing so can broaden the reach of the notice by permitting more widespread dissemination (for example, through publication in print media or posting at a defendant's point of sale). When disseminated separate from the full notice, the summary notice's text should be large enough in size to attract the class members' attention.
3. A summary notice should, at a minimum, provide the following information:
  - A clear statement explaining how to tell whether a consumer is a class member.
  - The total amount of relief to be granted the class, stated in dollars where the payment is in cash or credit to an account.
  - The nature, form, and range of the individual relief that each class member could obtain.
  - How further information can be obtained. More than one means (*e.g.*, phone, fax, email, websites, and mail) of obtaining information should be provided. A URL for a website created to provide information about the settlement should always be provided.
  - Key dates, such as the deadlines for class members to submit an objection or file a claim form, and the date of the fairness hearing.
  - Font size and formatting should be chosen with an eye to maximizing readability.
4. **Full notice:** In a full notice, the following information should be included:
  - A URL for the settlement website.

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<sup>136</sup> This Guideline does not consider state laws, which in some jurisdictions may require specific forms of notice.

- The total maximum attorney fees, in dollars, to be sought by class counsel, and how the fee was or will be calculated (hourly, hourly with a multiplier, percentage, or a combination), as well as the source from which payment will be sought (defendant or from the class recovery).
- The nature of the claims in the case and the defenses to those claims.
- Proposed distribution of any unclaimed funds, including whether they will revert to the defendant.
- Options available to class members, including at least opting out and objecting.
- What the class member releases by not opting out of the settlement.
- The amount of any service awards to the named plaintiffs.
- The identities of all proposed recipients of *cy pres* distributions, along with an explanation of the circumstances under which those organizations may receive distributions.<sup>137</sup>
- Key dates, such as the deadlines for class members to submit an objection or file a claim form, and the date of the fairness hearing.
- Font size and formatting should be chosen with an eye to maximizing readability.

**5. Settlement website:** The website should post:

- The summary notice,
- The full notice,
- The complaint,
- The settlement agreement,
- The claim form (if any),
- The settling parties' filings in support of the settlement,
- Any motion for attorney fees,
- How to access the docket for the case via PACER or in person at the court,
- Key dates, including the deadlines for class members to submit an objection or file a claim form, and the date of the fairness hearing, and
- Contact information for class counsel who can answer questions from class members.

**6. Form of notice:** The form(s) of notice (*e.g.*, email; postcard, posted sign) used should reflect that notice is not a formality and should be provided in ways likely to be noticed by class members. For instance, counsel should consider whether posting ads on

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<sup>137</sup> *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 181 (3d Cir. 2013).

particular websites would be helpful, or whether a summary notice at the place of sale (for example, in stores, whether brick-and-mortar or online) would be appropriate. For individual notice, whether notice by mail or by email (or both) is preferable will depend on the circumstances of the specific case. Supplemental forms of notice also may be used, particularly in circumstances where the initial form of notice is returned as undeliverable.

7. Notice should be disseminated in languages in addition to English when a substantial portion of the class may not be fluent in English, including through a non-English version of the settlement website.

## Discussion

For classes certified under Rule 23(b)(3), Rule 23(c)(2)(B) provides that the notice must be “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Instead of directing a specific means of notice, Rule 23(c)(2)(B) “relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court.”<sup>138</sup> It specifies: “The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.”

In the past, the form and content of notice to the class, particularly settlement notices, was a recurring problem. Over the years, a consensus developed that traditional “tombstone” and other forms of settlement notice were too often presented in such fine print and were sufficiently complicated and unclear that the class members did not understand the nature of the relief sought or obtained in their names. The notices therefore did not provide the information necessary for class members to make an informed decision whether to remain members of the class, opt out, or object to the settlement.

The view that notices were too complicated and confusing led to the 2003 amendment of Rule 23, which requires that a notice “must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class members under Rule 23(c)(3).”

The Federal Judicial Center has created “illustrative clear-notice forms” that can “provide a helpful starting point for [some] actions.”<sup>139</sup> But some practitioners believe that even these simplified forms are too complicated. For one, the products liability class action summary notice

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<sup>138</sup> Rule 23, advisory committee note to 2018 amendments.

<sup>139</sup> <https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0>

form fills a full page and contains—even if not in dense or legalistic language—a great deal of hard-to-digest information.

Today, for publication or posting on websites, practitioners generally use more simplified forms of “summary notice” that give, in plain terms and using easy-to-read graphic fonts and presentation, the nature of the case, who is in the class, what relief is sought, and, for settlement notices, the relief available, and the right to opt out or object. One advantage of this approach is that these bolder, more widely published, and possibly smaller notices permit a broader reach. Summary notices also usually provide telephone, website, and physical addresses from which full notices and other information—containing all the information required by Rule 23(c)(2)(B) as well as additional detail—can be obtained. For example, the exclusions from the class (*e.g.*, employees, officers, agents, subsidiaries of defendants) can generally be omitted from the summary notice and left to the full notice.

Defendants often push for generic names for a website URL (*e.g.*, “FCRASettlement”) that make it difficult for class members to find. Instead, class counsel should insist that the website URL have a meaning relevant to the lawsuit, such as the name of the defendant or the name of the case: “JonesvBadCompanySettlement.”

Full notices now often have a summary at the outset of the most salient points (*e.g.*, who is in the class, what relief is sought or being provided by settlement, how claims can be made, who counsel is or what fees they might be requesting, and how counsel can be contacted), with the full details of the settlement (including, for example, who is excluded, the verbatim terms of the release, etc.) set forth below.

Notice can be provided by direct mail, newspaper and magazine publication, email, Internet websites, Internet press-releases, on-site (*e.g.*, in-store) postings, toll-free phone numbers, social media, and, for some large class action settlements, radio and television advertisements. Importantly, “publication” of notice does not necessarily mean publication in a newspaper or magazine; it may refer to posting in a specific location.<sup>140</sup> Increasingly, courts approve email notice, postcard notice, web-banner notice, and other forms of new-media notice.<sup>141</sup> These means of notice are also often used in combination with mailed or other forms of notice. For example, banner ads on relevant websites or summary notices on websites that class members are likely to visit may be used to supplement a more traditional notice program.

In some cases, counsel may find it helpful to solicit the advice of readability experts (often found at local universities) to recommend simplified ways of expressing the relevant concepts. This advice may be particularly helpful if the parties have reached an impasse on the notice’s wording or if a defendant is insisting on legalistic or technical wording. At the very least, readability of the notice should be checked using a grade-level review tool available in word-

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<sup>140</sup> See, *e.g.*, *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (“The notice proposed by class counsel consists of sticker notices on [defendant’s] two ATMs and publication of a notice in the principal Indianapolis newspaper and on a website. That is adequate in the circumstances.”); *Orvis v. Spokane County*, 281 F.R.D. 469, 476 (E.D. Wash. 2012) (ordering that notice be posted in a county jail).

<sup>141</sup> See, *e.g.*, NEWBERG at § 8:30 (5th ed.).

processing programs. Although an imprecise measure, this check can give class counsel a general understanding of the complexity of the notice's writing.

## Guideline 11

### Claim Forms

Class counsel should approach settlement discussion with a presumption *against* using claim forms, so that claim forms are used only where necessary.

Claim forms should not be used when the identity and location of class members can be determined from the defendant's records, or when relief provided by the settlement is an account credit in an amount that the defendant can administer based on its records.

Claim forms may be appropriate when (1) class members cannot be adequately identified from the defendant's records or other sources; (2) information about class members is needed to establish eligibility for relief or to ascertain the scope of damages and that information is unavailable from sources other than the class members themselves; or (3) the settlement is an "opt-in" settlement. Claim forms may also be appropriate when the settlement offers more than one form of relief from which each class member may choose. In that situation, the settlement should provide a default option so that submission of the form is not required for class members to receive a settlement benefit.

**Content of the claim form:** When class members must submit a claim form to receive settlement benefits, class counsel must ensure that sufficient resources are available to assist class members who have questions about the claims process. The notice and claim form should include a toll-free number with information about the settlement, as well as an opportunity for the class member to speak directly with a person knowledgeable about the class action and settlement who can explain the benefits and consequences of returning the claim form.

Claim forms, like the notice, should be as simple as possible.<sup>142</sup> The claim form should clearly explain the procedures for submitting the form so that a class member can seek payment from the settlement fund. The claim form should prominently identify the deadline to submit the claim form and should explain to class members both the benefits of returning the form and the consequences of not returning it. In particular, if the settlement releases class members' claims, the claim form should explain in plain language the claims that will be released and that they will be released regardless of whether the class member submits the claim form, unless the class member opts out of the settlement. The claim form should contain easily understood instructions aimed at the least sophisticated class member. Format, type size, clarity, and the readability score of the text should be carefully considered.

To minimize class members' burden in completing and returning claim forms, claim forms should not require the class member to provide information that is available to the defendant

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<sup>142</sup> See Guideline 10.

and should not require the class member to provide information that is unnecessary to the claims process or that a reasonable person would consider confidential. Claim forms should not require notarization because notarization often costs money and many class members do not have easy access to a notary. Claim forms should not require a declaration under penalty of perjury because some peoples' religious beliefs preclude sworn oaths and because signature under penalty of perjury may scare some individuals away from returning the form.

When claim forms are used, the importance of adequate notice is amplified to ensure that the forms reach class members. When the claim form is mailed to class members, class members should be provided a postage-paid envelope for the class member to return the form. If a pre-paid postcard is used, privacy concerns should be considered. Class counsel should also make claim forms available on the settlement website, which should also allow online submission of the form.

The deadline for submission of the form must allow adequate time for response. Although the appropriate time period will vary from case to case, the claims period should generally be a minimum of 90 days from the date notices go to class members.

Class counsel must provide resources that are sufficient to monitor the claims process and to assist class members with disputed claims, including providing assistance through any court-approved claims resolution mechanism. When feasible, counsel should consider sending acknowledgments to class members who return claim forms to reduce disputes regarding whether claim forms were returned.

Where a claim form is necessary, class counsel should consider whether the releases provided in the settlement agreement should bind class members who do not submit a claim form, or whether, instead, the release should not apply, particularly where the settlement is on a claims-made basis and amounts not claimed will revert to the defendant. (Releases are discussed in Guideline 9.)

## **Discussion**

Claim forms are sometimes used in class action settlements to identify class members and to determine the amount of relief to which class members are entitled. Although claim forms may in some circumstances be an appropriate means to ensure equitable distribution of damages, claim forms and claiming procedures can reduce the number of class members who recover, and the amount paid by the defendant. Claim forms put an additional responsibility on class members to be proactive in receiving money to which they are entitled, yet a class member who fails to return a claim form may be bound by a general release of claims and defenses but receive no compensation in return. Claim forms may also discriminate against class members who cannot understand the settlement notice and form, or who do not have easy access to legal assistance to help them make an informed decision about whether they should return the form and the repercussions if they fail to do so. Claim forms also increase the cost of settlement administration, reducing the amounts available for class members. And claim forms are

never needed, and therefore always inappropriate, when the relief provided by the settlement is an account credit in an amount that the defendant can administer based on its records.

When use of claim forms is appropriate, counsel must consider what information to include in the claim form, whether class members who fail to submit a claim form will be bound by a release, and what mechanisms are necessary to ensure the integrity of the claims process.

Claim forms are not appropriate if the identity and location of class members can be determined, such as in class actions involving home loans or credit accounts. In that situation, using claim forms limits class recovery whittles down class participation so that participating members receive more relief. Claim forms may be appropriate even when the class members can be identified but, without more information, the extent of each class member's injury (and therefore recovery) cannot reasonably be determined.



## Guideline 12

### Objectors

1. Class members subject to a class action settlement may object to it. Lawyers representing objectors to a proposed class action should aim either to improve the settlement's terms or to convince the court to reject the settlement.
2. The warning signs of an objectionable settlement include (1) releases that are far broader than the claims for which relief was obtained, (2) illusory benefits such as worthless coupons, (3) inadequate relief compared to the value of the class members' claims, (4) disproportionate benefits to the representative plaintiffs and class counsel, (5) notices that are unlikely to reach many class members or to provide class members all the information needed to understand the proposed settlement, (6) intra-class conflicts, (7) excessive attorneys' fees, and (8) secrecy provisions.
3. Class counsel should respond fully to inquiries from objectors. Because class counsel has a duty to the class members to ensure that they have obtained the best settlement possible, they should not reflexively oppose objections. They should be open to considering the merits of the objections raised.
4. At the proposed settlement stage, the court lacks an adversarial presentation from the parties. Reasonable discovery by objectors should be allowed to assist objectors in providing the court with a full information with which to assess whether a settlement is fair, reasonable, and adequate.
5. Objectors' counsel who add value to a settlement may be entitled to an attorney fee award reflecting their efforts and success. The method of calculation and the source of payment depend on the type of settlement improvement (monetary or non-monetary) obtained. Fees awarded to class counsel and objectors' counsel should be commensurate with the benefits each obtains for the class.
6. Any request for attorney fees sought by objectors' counsel must be approved by the court.
7. Objectors' counsel whose work does not improve the settlement should not receive attorney fees through the settlement or attorney fees or any other payment from class counsel or the defendant.

### Discussion

By protecting the interests of the absent class members, valid objections to settlements play an important role in class action practice.

#### 1. Benefits of meritorious objections

Objections can provide many benefits. An objection can prompt improvements to a settlement or convince a court to reject it, thus forcing the parties to renegotiate a better deal for the class. The Advisory Committee Notes on Rule 23 (2018) recognized that "Good-faith objections can

assist the court in evaluating a proposal under Rule 23(e)(2)."<sup>143</sup>

In a broader sense, an objection may enhance judicial and public perceptions of class actions generally. For example, by heightening judicial knowledge of the inadequacies of coupon-only settlements, frequent objections helped prompt a sharp decline in their use.

In contrast, as the 2018 Committee Note observed, “some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process.” Objections filed by lawyers who are not sincerely seeking to improve a settlement and whose interest lies in extracting a fee for themselves are unlikely, in fact, to improve a settlement.<sup>144</sup>

## 2. Objections from class members pursuing separate cases

Lawyers pursuing cases that overlap with the proposed settlement may see the hoped-for benefits of their clients’ lawsuits disappear when their clients’ claims would be released through a proposed class action settlement. If counsel in a non-settling case conclude that the settlement is fair, adequate, and reasonable to the class as a whole and not detrimental to their clients, they should not object.

Counsel in non-settling cases (either an individual case or a class action) sometimes file objections on behalf of their clients when the settlement would offer their client less than they expect to obtain through their separate case. In some instances, the defendant may have either sought out the weaker pending class action or offered to convert an individual action into a class action for settlement purposes. The defendant may even have approached counsel it deemed likely to be open to a settlement with more favorable terms than it might otherwise obtain in either a class action or in individual actions, with the intent of precluding the effect of other lawsuits.<sup>145</sup> In those situations, objections on behalf of plaintiffs in other cases are likely.

## 3. Role of class counsel

Class counsel should attempt to deal cooperatively with objectors, encouraging their comments and remaining receptive to valid criticism. If class counsel and objectors’ counsel approach the defendant together, with a joint proposal to improve the settlement, the defendant may be more willing to consider those improvements.

## 4. Fees for objectors’ counsel

If an objection results in an improved settlement, objectors’ counsel may be entitled to a fee award for that improvement. The 2018 Committee Note expressly approves paying a objectors’ counsel who provides valuable services to the class: “It is legitimate for an objector to seek

<sup>143</sup> [https://www.law.cornell.edu/rules/frcp/rule\\_23](https://www.law.cornell.edu/rules/frcp/rule_23) (2018 Committee Note).

<sup>144</sup> *Shaw v. Toshiba America Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (noting that “some of the objections were obviously ‘canned’ objections” filed by objectors “simply [to] extract a fee by lodging generic, unhelpful protests”); *O’Keefe v. Mercedes-Benz U.S., L.L.C.*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) (quoting *Shaw*).

<sup>145</sup> See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 823–825 (1999).

payment for providing such assistance under Rule 23(h).” As required by Rule 23(e)(5)(B), any attorney fees sought by objectors’ counsel must be submitted to, and approved by, the court.

The method of calculating an appropriate fee depends on the nature of the improvement. When the objection results in additional monetary relief for the class, objectors’ counsel should seek a fee calculated as a percentage of the additional relief, with the fee usually paid out of the improved class relief.

When the improvement to the settlement is non-monetary in nature (for example, a narrowed release of class member claims or improving notice so that more class members partake in relief), the lodestar-plus-multiplier method is generally more appropriate. In that circumstance, the objector’s fee will usually be paid out of the fees that would otherwise go to class counsel. If an objection results in both kinds of improvement, both calculation methods may be applicable.

## Guideline 13

### Attorney Fees

Reasonable attorney fees must be awarded in consumer class actions so that lawyers have sufficient incentive to undertake the substantial risks involved in privately enforcing consumer-protection laws.

1. Fee discussions during settlement negotiation. Class counsel should not discuss attorney fees during settlement negotiations until after reaching agreement on all relief to class members.
2. Clear-sailing provisions. Class counsel should be wary of clear-sailing provisions, which provide that a defendant will not oppose class counsel's fee and cost requests.
3. Percentage benchmarks for most common fund cases. For the vast majority of common-fund cases, courts and counsel should examine the reasonableness of the fees requested by the percentage benchmarks that have been recognized in similar cases. The common fund should include all monetary benefits obtained for the class, the monetary value of any non-monetary relief whose value can be fairly estimated, and *cy pres* distributions.
4. Calculation of the fund when undistributed amounts revert to the defendant. The amount of the fund on which a percentage award is calculated should exclude any amount that reverts to the defendant.
5. Cases with fee-shifting claims. In a statutory fee-shifting case, fees should be recovered solely from the defendant and be based on the attorneys' lodestars: reasonable hourly rates multiplied by hours reasonably expended on the litigation. In a common fund case where the underlying claims are based on fee-shifting statutes, it is generally best to seek an additional fee directly from the defendant to maximize the net recovery to the class.
6. Notice to the class of intent to seek fees. The class notice should include the maximum amount of attorney fees that class counsel will request after final approval of the settlement. Absent a compelling reason otherwise, the deadline stated in the class notice for class member objections should be after the date on which class counsel will file their motion for fees, so that class members have a reasonable time to object to the fee request.

## Discussion

Attorney' fees are an important component of consumer class actions. If fee awards are too low, attorneys will not have the incentive to undertake consumer class claims on a contingent basis. The public-policy goals furthered by worthy class actions, which include recovering money for consumers and deterring illegal conduct by defendants, cannot be achieved without the promise of reasonable fees when successful. On the other hand, fee awards that are too high do not serve the best interests of the class members and have led to criticism of class actions in general.

In many instances, criticism about the size of fee awards is based on an inapt comparison between individual class-member recoveries and the fee awarded for recoveries for all class members. For example, when the individual recovery is \$50 per consumer, an attorneys' fee of \$2 million might seem excessive at first glance. But if the total dollars actually recovered by the individual class members is \$15 million, then fees would be less than 14% of the total class recovery. Fees in this circumstance would be reasonable judged against the total recovery, which is the proper comparison. Criticism focused on a comparison between total fees and individual recoveries are either ill-informed or convenient cover for people who oppose consumer class actions for other reasons.

But some criticism of excessive fees cannot be so easily dismissed. In particular, compelling criticism was directed at cases in which the actual cash received by the class was minimal, if any, and the only other benefits received by the individual members were coupons of questionable value, although passage of 28 U.S.C. § 1712 in 2005 largely resolved these issues.<sup>146</sup>

The fundamental goal when calculating attorney fees in consumer class actions is to provide a sufficient fee to motivate qualified class counsel to bring worthy cases, while avoiding unnecessary and undeserved payment. Importantly, given out-of-pocket expenditures, the contingent risks involved, and the substantial delays in payment inherent in representing consumer classes, basic economics dictates that the "sufficient reward" in a successful case must be more than merely hourly compensation at an otherwise reasonable hourly rate.

There are a variety of proposed approaches for calculating fees, but there is no perfect solution.

One method for calculating class action attorney fees is to award an amount equal to a percentage of the total monetary recovery obtained for the class.<sup>147</sup> The precise percentage of the fund approved may vary by case.<sup>148</sup> Some considered—and influential—analyses have concluded that as a general rule, this percentage-of-the-fund approach should be used in common-fund class actions, with the percentage being based on both the monetary and nonmonetary value

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<sup>146</sup> Coupon settlements are discussed in Guideline 5.

<sup>147</sup> See, e.g., *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993) (percentage method required in common-fund cases); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) (same).

<sup>148</sup> See, e.g., *Paul, Johnson, Alston & Hunt v. Grauldy*, 886 F.2d 268 (9th Cir. 1989); see also the Report of the Third Circuit Task Force, *supra* note 127.

of the settlement.<sup>149</sup> In addition, proponents argue that the *possibility* of a large fee in comparison to effort provides the necessary incentive for the risk-taking required of prospective class counsel when deciding whether to initiate difficult and expensive litigation with knowledge that—at best—no payment will be obtained for several years, and—at worst—no payment will be obtained at all if the litigation is unsuccessful.

Opponents of the percentage method contend that it may result in overpayment in some cases, where either the effort required by class counsel was relatively modest or the size of the case was so large that even extensive efforts are overcompensated. More generally, those who advocate the lodestar/multiplier approach stress their preference that fee awards be based directly on an assessment of work done.

Valuing the common fund, on which a percentage may be based, also raises difficulties in some circumstances, particularly when the value of the settlement is uncertain, in which case a lodestar approach can be used.<sup>150</sup> Ignoring the difficulties inherent in valuing various forms of equitable relief, even a facially “simple” common fund may not necessarily translate directly into dollars in the pockets of class members.

The alternative to a percentage approach is the lodestar approach (reasonable hours times a reasonable hourly rate), enhanced by multipliers when appropriate.<sup>151</sup> Generally speaking, this is the approach mandated when calculating a defendant’s liability for fees in a statutory fee-shifting case, when plaintiff is suing under statute that requires the losing defendant to pay the prevailing plaintiff’s fees and the fee is determined under the statute. Some courts will apply a lodestar approach even where there is a common fund, and the basic argument in favor of the lodestar/multiplier approach is that it provides for careful review of both the time claimed as reasonable and the hourly rates sought for that time. Proponents of this approach also argue that it effectively matches reward to worthwhile effort and avoids windfalls in easy cases.

But there are disadvantages to the lodestar/multiplier approach. The first is that the award of multipliers of the lodestar fee is inconsistent and depends upon the trial court’s exercise of discretion. Therefore, adherence to the lodestar/multiplier approach makes some class actions impossible to bring, because some class counsel are unwilling to file a case where the possibility of adequate compensation is unknowable. Another criticism is that the lodestar/multiplier approach provides little or no incentive to seek early settlement when available or for class

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<sup>149</sup> American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.13 (2010).

<sup>150</sup> American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.13(b) (2010) (also noting that the lodestar method should be used in situations where fees will be awarded under a fee-shifting statute that requires a lodestar approach or where the court makes a specific finding that the percentage method would be unfair or inapplicable based on the specific facts of the case).

<sup>151</sup> The leading lodestar/multiplier cases are: *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); and *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), *on remand*, 382 F. Supp. 999 (E.D. Pa. 1974), *rev’d on other grounds*, 540 F.2d 102 (3d Cir. 1976) (*en banc*).

counsel to perform work as efficiently as possible, instead inviting “churning” — that is, to do more work than necessary or useful. Finally, the effort required of the parties in submitting, and the court in scrutinizing, the detailed evidence documenting all time spent and evidentiary support for hourly rates claimed is burdensome and often develops into time-consuming satellite litigation.<sup>152</sup>

When a proposed settlement includes a *cy pres* distribution, some courts have suggested that it may be appropriate to award a lower percentage for the portion of the fund going to *cy pres* as opposed to the class members themselves or even to exclude such amounts altogether from the fee analysis.<sup>153</sup>

In those few settlements that provide that unclaimed funds will revert to the defendant, the portion of the settlement fund that is returned to the defendant arguably reduces the actual fund obtained by class counsel for the class. The case law is mixed on the effect of this situation on the determination of a reasonable attorney fee award.<sup>154</sup> Proponents of the “gross recovery” approach argue that the total amount made available to the class is a result of counsel’s efforts and, therefore, should be the basis for any percentage recovery. Opponents argue that the monetary value achieved for the class is represented by the amount paid to class members, not the amount theoretically available. Opponents also express concern that class counsel will not have the financial incentive to argue against unnecessary (or unnecessarily complicated) claim forms if payment is not tied to the amount actually paid to class members. The Advisory Committee Notes to the 2003 amendments to Rule 23(h) suggest that courts examine the extent to which claims procedures result in actual payout to the class.

The interaction between the lodestar/multiplier and percentage approaches is sometimes complex. In many federal circuits, the district court has discretion to choose between the lodestar/multiplier or the percentage method.<sup>155</sup> Some circuits express a preference for the percentage method in common fund cases but permit the trial court to exercise discretion contrary to that preference.<sup>156</sup> These approaches have the benefit of flexibility but suffers the disadvantage

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<sup>152</sup> Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985).

<sup>153</sup> *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178–79 (3d Cir. 2013).

<sup>154</sup> See also *Int’l Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (Statement of Justice O’Connor). Compare *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 852 (5th Cir. 1998) (finding that district court did not abuse its discretion in setting lodestar-calculated fee award in light of actual payout excluding reversionary funds, noting that the case did not involve a true common fund but instead merely a pre-calculated maximum possible payout), with *Williams v. MGM–Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (finding that benchmark for fee award is 25% of entire fund, and district court abused its discretion in basing award on actual distribution to class), and *Waters v. International Precious Metals Corp.*, 190 F.3d 1291, 1296 (11th Cir. 1999) (finding no abuse of discretion for district court to base percentage on entire fund so long as it understood possibility of reversion; distinguishing *Strong*). See also *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013) (district court can reduce the applicable percentage calculated on the gross amount made available to the class if it appears that class counsel “has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class”).

<sup>155</sup> See, e.g., *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012), cert. denied, 133 S. Ct. 317 (2012); *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010).

<sup>156</sup> See, e.g., *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (percentage of the fund method preferred in common fund

of unpredictability. Moreover, it leaves open the possibility that the judicial philosophy of a particular judge will dictate always choosing the method that leads to the highest or lowest fee award in each case.

A trend in some federal courts has been to use the lodestar/multiplier approach (or some variant) to cross-check the reasonableness of a dollar amount reached via the percentage method.<sup>157</sup> Though this may avoid windfalls in individual cases, this blended approach would seem to undermine one of the purposes of the percentage of the fund method of calculating fees, that is, the possibility of a large fee relative to effort required as an incentive to undertake difficult and risky cases.

These alternative bases for awarding fees don't necessarily conflict. Fees could be recovered from the defendant under a fee-shifting statute using a lodestar approach and paid into the common fund, with class counsel receiving a percentage of the resulting total recovery. This approach finds support in *Skelton v. General Motors Corp.*,<sup>158</sup> which involved the settlement of statutory fee-shifting claims. The court noted that a settlement merges all claims, including the client's statutory fee-shifting claim, into one common fund that belongs to the class clients, and ordered fees to be calculated under common-fund principles. This view is also consistent with case law noting that the amount an opposing party can be required to pay as a "reasonable" fee may be substantially less than a reasonable fee owed by the client (or class of clients).<sup>159</sup>

Whatever the method used to calculate fees, any contingent fee award must consider the difficulty, complexity, and the risk of the case; the relief obtained for the class; the delay in payment; and that some cases will result in no fee at all. Therefore, it is appropriate in most class actions to award fees in excess of a fee calculated solely on an hourly basis without any multiplier.<sup>160</sup>

When a fee is to be calculated on a percentage basis, a fixed percentage is appropriate in all cases, though the vast majority of awards falls within the 20%–30% range. Some case law suggests a "sliding scale" approach to percentage awards, with the percentage smaller when the class recovery is unusually large. But this view is controversial.<sup>161</sup> On the other hand, in some

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cases, but either method is permissible).

<sup>157</sup> *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047, 1050 (9th Cir. 2002).

<sup>158</sup> 860 F.2d 250 (7th Cir.1988).

<sup>159</sup> *Venegas v. Mitchell*, 495 U.S. 82 (1990).

<sup>160</sup> See, e.g., *Fischel v. Equitable Life Assurance Soc'y of the United States*, 307 F.3d 997, 1008 (9th Cir. 2002) ("[i]t is an abuse of discretion to fail to apply a risk multiplier, however, when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky."). See also *Vizcaino v. Microsoft*, 290 F.3d 1043 (9th Cir. 2000), *cert. denied sub nom.*, *Vizcaino v. Waite*, 537 U.S. 1018 (2002) (survey of many decisions demonstrates that multipliers between 1 and 4 are the norm in common fund cases).

<sup>161</sup> See *In re Cendant Corp. Litig.*, 264 F.3d 201, 284 (3d Cir. 2001) (citing conflicting authorities and noting argument that this approach provides an incentive to "settle cheap").



cases, a percentage award in the normal range may be unreasonably low, for example, when the primary relief is a significant injunction, with relatively modest monetary recovery for the class. The equitable relief might, in a particular case, justify a fee that far exceeds 30% of the monetary component of the recovery.

A distinct question, unrelated to the fee-calculation method, arises when class counsel negotiates a settlement. Simultaneously negotiating class relief and attorneys' fees for class counsel creates a potential conflict of interest.<sup>162</sup> Some argue that there is an inherent problem negotiating fees with opposing counsel, even when the parties have first agreed on relief to the class, and contend that the court has an independent duty to examine the fees provision anyway, early agreement does little but create the appearance of collusion between class counsel and the defendant.<sup>163</sup> Others contend that settlement often would be impossible to achieve unless the defendant understands the extent of its total exposure, and saying that there is no reason not to reach agreement on fees (subject to the court's later review), as long as negotiating fees follows agreement on relief for the class.<sup>164</sup>

Ultimate authority over fee awards rests with the court. Nevertheless, NACA firmly believes that class counsel have a special obligation not to submit excessive fee requests because fees—directly or indirectly—reduce the amount otherwise available to class members (except in pure fee-shifting situations, where the attorney fees is assessed from the defendant, not the class). We recognize that what constitutes an “excessive” request can be difficult and uncertain. But that does *not* mean that a reasonable request is whatever the court might award; after all, there may not be adversarial briefing on the issue. Obligations to the class and concern for the long-term integrity of the class action require that class counsel not take advantage, even if a court might let it pass.

The Supreme Court has recognized that in a fee-shifting case the defendant has an economic interest in resolving the fee issues in a settlement negotiation along with all other statutory claims.<sup>165</sup> Therefore, class counsel should not simply refuse to discuss fees in negotiating settlement. However, class counsel should avoid circumstances that may increase the danger of an apparent or actual improper *quid pro quo* detrimental to the class. Some jurisdictions prefer that all fee discussions be postponed until the settlement on the relief for the class is judicially approved, or at least until settlement negotiations on that relief have concluded.<sup>166</sup>

In statutory-fee cases, an acceptable alternative is to obtain the defendant's agreement on class relief contingent on successfully negotiating an agreement on fees. If an agreement cannot be reached, the settlement might provide that the court will determine the defendant's obligation

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<sup>162</sup> *In re GMC Pick-Up Truck Fuel Tank Prods. Liab Litig.*, 55 F.3d 768, 804 (3d Cir. 1995).

<sup>163</sup> See *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947–949 (9th Cir. 2011); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1293 (11th Cir. 1999).

<sup>164</sup> Manual for Complex Litigation (Fourth) § 21.7 (2004).

<sup>165</sup> See *White v. New Hampshire*, 455 U.S. 445, 452 n.14 (1982).

<sup>166</sup> See *In re Cmty. Bank of Northern Virginia*, 418 F.3d 277, 308 (3d Cir. 2005).

to pay fees.

In common-fund cases, where recovery is not based on a fee-shifting statute, class counsel need not discuss fees with the defendant because the class clients, not the defendant, pay the fee from the fund created by class counsel, in an amount decided by the court. If the fee is sought on a percentage-of-the-fund basis, class counsel should not negotiate a settlement contingent on the approval of any minimum amount. Instead, the court should be left to approve the substantive settlement itself, and only then decide the amount of a fair fee.<sup>167</sup> “Clear sailing” agreements (in which the defendant agrees not to oppose a fee request of up to a certain amount) are of no relevance in such cases and should be avoided unless the historical animosity between the parties or counsel suggests the likelihood of an essentially malicious opposition by a defendant with no actual interest in the outcome of the fee award.

Though, as noted, many circuits leave it to the trial court to select between the percentage and the lodestar/multiplier methods—and class counsel must, of course, comply with the court’s decision—most fee requests in pure common-fund cases should be sought as a percentage of the fund, absent contrary direction from the court. Courts should ordinarily entertain fee requests on this basis in common-fund cases, unless specific factors (such as significant injunctive or other non-monetary relief, other difficulties in assessing the monetary value of class relief, etc.) justify the use of lodestar/multiplier analysis rather than percentage analysis in the case. The common fund should include all monetary benefits obtained for the class, the monetary value of any non-monetary relief that can reasonably be valued, and *cy pres* distributions. Absent special circumstances, the percentage award should generally fall within (or close to) the benchmark range of 20% to 30% of the fund.

The amount of the fund on which a percentage award is calculated should exclude any amount that may revert or has already reverted to the defendant as undistributed funds. Though it may be relevant to the calculation of a reasonable fee that a large total amount was initially made available for distribution to class members (perhaps justifying a slightly larger percentage than otherwise appropriate), the benchmark percentage figures (20%–30%, in most cases) should be applied after deducting amounts that the defendant does not ultimately pay out. If class counsel does not wish to wait until the claims process is complete to seek fees, then a partial payment may be sought based upon a percentage of any minimum payout guaranteed in the settlement agreement.

Courts should limit the use of a lodestar crosscheck to unusually large cases in which the monetary relief, however valued or estimated, exceeds \$50 million, where reasonable fees may constitute a percentage smaller than the benchmark. Crosschecks in smaller-value cases simply add another level of analysis and may even undermine the purposes of the percentage-of-the-fund approach. When injunctive or other non-monetary relief is obtained, or where the common fund is difficult to value or its value depends on future contingencies (such as the redemption of coupons), the lodestar/multiplier approach may properly supplant the

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<sup>167</sup> *Staton v. Boeing*, 327 F.3d 938, 969–972 (9th Cir. 2003).

percentage-of-the-fund benchmarks.

When a lodestar approach is used (either as the sole means to determine fees or as a crosscheck of a percentage analysis), class counsel should bear in mind that the hourly rates requested must be supported by at least a minimal evidentiary showing of their reasonableness given the prevailing market rates for similar litigation by attorneys of comparable skill, experience, and reputation. The evidentiary showings needed vary widely by jurisdiction and class counsel are strongly advised to thoroughly research case law in the particular forum where fees are sought before submitting a fee application. Excellent starting points for research are 5 Newberg on Class Actions § 15:39 et seq. (5th ed.) and National Consumer Law Center, Consumer Class Actions Section 19.3.6.2 (10th ed. 2020), updated at [www.nclc.org/library](http://www.nclc.org/library).

In the settlement context, class counsel should avoid settlement agreements that give class counsel an inordinate share of the settlement proceeds or award fees that are disproportionate to the value of the settlement that benefits class members directly. This is particularly of concern<sup>168</sup> when a settlement provides only injunctive or coupon relief or involves primarily *cy pres* awards.<sup>169</sup>

Class counsel should also be wary of “clear sailing” provisions. A clear sailing provision provides that a defendant will not oppose class counsel’s fee and cost requests.<sup>170</sup> Federal courts are increasingly scrutinizing these provisions under the view that they are a sign of potential collusion between counsel and the defendant.<sup>171</sup>

The notice of a proposed settlement should always include the maximum attorney fees that class counsel will or may seek. In a common-fund case where a percentage will be sought, that fact and the specific maximum percentage to be requested should be stated in the notice. In statutory fee-shifting cases, the lodestar, if agreed to by the parties, should be disclosed in the class notice. If there is no agreement, the amount class counsel intends to request from the court should be disclosed. It is also a good idea to disclose the amount of fees per class member, if that can be easily calculated, even in approximation. For example, the class must be told that the lawyers will seek \$2 million in fees but could also be told that this equates to \$6.67 per class member. The average fee per class member need not be disclosed when recoveries vary substantially among class members, because that number would not be meaningful, or in pure statutory fee-shifting contexts, when the amount has not been negotiated in advance as part of the settlement, but instead will be determined by the court and paid by the defendant.

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<sup>168</sup> *Bluetooth*, 654 F.3d at 947.

<sup>169</sup> See, e.g., *Bluetooth (cy pres awards)*; *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 610 (9th Cir. 2021) (voucher awards).

<sup>170</sup> *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

<sup>171</sup> *Id.* at 947; *In re Natl. Football League Players Concussion Injury Litig.*, 821 F.3d 410, 447 (3d Cir. 2016); *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 295-96 (5th Cir. 2017); *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712-13 (7th Cir. 2015); *In re Target Corp. Customer Data Security Breach Litig.*, 892 F.3d 968, 979 (8th Cir. 2018); *In re Samsung Top-Load Washing Machine Mktg., Sales Practices, and Prods. Liability Litig.*, 997 F.3d 1077, 1088-1090 (10 Cir. 2021).

Absent a compelling reason otherwise, the deadline stated in the class notice for class member objections should be sufficiently after the date upon which class counsel will file their motion for attorney fees to allow class members to adequately consider the fee request and object to it. Several circuits have held that this timing is required as a matter of due process and Rule 23(h).<sup>172</sup>

As discussed more fully in Guideline 13, counsel should be aware of the need to monitor the defendant's compliance with the settlement or judgment terms. If the main fee award is based on a lodestar analysis, class counsel should be authorized to make follow-up lodestar fee requests to recover for monitoring work.

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<sup>172</sup> *Keil v. Lopez*, 862 F.3d 685, 705 (8th Cir. 2017); *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 995 (9th Cir. 2010).

## Guideline 14

### Monitoring Settlement Compliance

All class action settlements provide class counsel authority to evaluate whether the defendant is complying with the settlement terms and, if necessary, to enforce them. Class counsel should seek post-resolution protections for the class, such as periodic reporting on compliance by the defendant to class counsel, to be included in the court order.

1. A monitoring report regarding the defendant's compliance with settlements or court orders should be filed with the court. Monitoring reports should detail the defendant's compliance with the settlement or other court orders. These reports should contain enough information to permit a monitor or judge to determine independently that the defendant is timely complying with the settlement or court orders. Where a settlement involves a claims process for distributing money to class members, the monitoring report should include specific numbers regarding claims, such as the number of claiming class members and the amounts of their recoveries, both individually and in the aggregate.
2. The settlement and relevant court orders should require the defendant to verify in a timely filing with the court, under penalty of perjury, that it has met its obligations under the settlement agreement.
3. The settlement and the court's approval order should provide that the court retains jurisdiction over class members' enforcement actions.
4. Class counsel should ensure that adequate means, such as websites and toll-free numbers, are available for class members to report violations. Confidentiality clauses should be avoided because they otherwise may impede effective monitoring, especially if they prohibit class members from accessing information regarding a defendant's settlement compliance.<sup>173</sup>
5. Settlements and court orders should provide a mechanism to award class counsel attorney fees and expense reimbursement for monitoring implementation and enforcing the settlement.

#### Discussion

Class counsel's duty to monitor the implementation and enforcement of class action settlements raises a number of important considerations. In settlement negotiations, class counsel must address the parties' roles in implementing the settlement and monitoring compliance with its requirements. Class counsel must consider the extent of monitoring required, which specific monitoring mechanisms are appropriate, the remedies available to class members for the defendant's non-compliance, and what compensation is available to class counsel for their

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<sup>173</sup> Confidentiality clauses are discussed in Guideline 2.

efforts in monitoring the settlement and enforcing compliance.

Class counsel should never view monitoring as solely the responsibility of the settlement administrator, which is a neutral third party, or of the defendant. Class counsel must take an active role in ensuring that defendants comply with the settlement terms and court orders.

Monitoring provisions will vary depending on the relief provided and the claims involved. Where monetary relief is provided, the settlement should require the defendant or the settlement administrator to file with the court sufficient information to ensure that the defendant or settlement administrator properly distributes the settlement relief, including credits to class members' accounts. It is even more important in cases involving injunctive relief that the settlement or a separate court order require sufficient independent monitoring to ensure compliance by the defendant.

Settlements and court orders should authorize class counsel to enforce the settlement based on the monitoring reports or on information independently gathered by class counsel. The settlement should provide for discovery on issues regarding implementation of the settlement or order. The settlement should establish a process for resolution of post-settlement disputes, including post-settlement claims disputes, if any. For settlements involving long-term injunctive relief, class counsel should consider the potential effects of changes in conditions that may require future modifications of the injunction's terms, and, where appropriate, class counsel should consider specifying procedures to manage disputes over proposed modifications.

Sufficient resources should be devoted to respond to inquiries from class members and their individual counsel about the settlement and defendant's compliance, including potential enforcement proceedings related to injunctive provisions when enforcement is necessary.

When the settlement uses claim forms rather than direct distribution based on the defendant's records, the possibility of fraudulent claims exists, particularly when the payments to class members will be large.<sup>174</sup> Under most settlement structures, payments for fraudulent claims will reduce the funds for legitimate claims. Therefore, class counsel should ensure that reasonable protective procedures are in place. Every experienced settlement administrator has established screening methods for detecting suspicious claims (for instance, multiple claims from the same address). However, class counsel should monitor any decisions to ensure the proper balance between maximizing payments of legitimate claims and minimizing unjustified payments. Follow-up inquiries may yield additional information bearing on the legitimacy of a claim.

In settlements involving only the distribution of funds, the role of class counsel, as well as the time commitment, may be easily anticipated. Concerns include verifying that funds are properly distributed to class members and that residual funds, if any, are accounted for and distributed as the settlement provides. Class actions providing for credits to class members' accounts may require additional scrutiny to ensure that class members' accounts are credited

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<sup>174</sup> See *United States v. Bosgang*, 467 F. App'x 27, 28–29 (2d Cir. 2012) (defendant convicted of submitting fraudulent claim in securities class action settlement; court notes prior similar attempts by the same defendant).

properly.

Settlement monitoring provisions may be especially useful in cases involving injunctive relief, particularly when the relief includes reforms to ongoing business practices. These cases present difficult challenges in predicting the amount and length of time that class counsel must monitor the case post-settlement. Class counsel must be attentive to the need of class members to seek additional compensation or other appropriate relief if they are harmed by defendant's failure to implement the settlement, and to the need of counsel to be compensated for its work and costs in securing this relief.

The settlement also should establish a process by which the parties can resolve post-settlement disputes, including post-settlement claims disputes, if any. For settlements involving long-term injunctive relief, class counsel should consider the potential effects of changes in conditions that may require future modifications of the injunction's terms, and, where appropriate, class counsel should consider specifying procedures to manage disputes over proposed modifications.

A defendant may resist monitoring mechanisms for obvious reasons, including additional expenses associated with monitoring and fear of additional litigation. But mechanisms such as reporting requirements and dispute resolution processes may appeal to the defendant because they reduce the need for plaintiffs' counsel to seek post-settlement relief through further litigation.

Attorney fees and costs should be provided for in the settlement or court order to allow class counsel to properly monitor the action.

If the fee award in the case is based on a percentage of the fund, class counsel should emphasize to the court that the percentage should be set at a level that acknowledges the need for future as well as past work on the case.<sup>175</sup> For class actions where the fee award is based on a lodestar, class counsel should press for entitlement to an additional lodestar award for post-approval work associated with enforcing the settlement or order.<sup>176</sup> When additional fees are not available, class counsel nevertheless remains obligated to ensure that the settlement is monitored properly and is enforced.

In lodestar cases, however, it is preferable that counsel be compensated separately for post-settlement monitoring and enforcement efforts (rather than out of the initial fee and expense award). First, the prospect of a future fee award for work performed to monitor, implement, and enforce a class action settlement both encourages class counsel to live up to their duties to the class and allows the court to judge the quantity and quality of services when they are

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<sup>175</sup> See *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1068 (8th Cir. 2015) (additional award for monitoring settlement following percentage award for main case not an abuse of discretion where work required was unforeseeable at the time of the first award).

<sup>176</sup> *Blackman v. D.C.*, 633 F.3d 1088 (D.C. Cir. 2011) (affirming District Court award of almost \$1,500,000 in fees for monitoring settlement compliance).

performed.<sup>177</sup> This method is preferable to an enhanced, and necessarily “guesstimated” award, made before the court knows whether, and in what circumstances and amounts, future work will be required.<sup>178</sup> Second, because attorneys’ fees for settlement implementation and enforcement are paid post-settlement, where it is no longer possible that the litigation will fail, fees should be calculated on a lodestar basis—that is, counsel should receive a fee based on the number of hours reasonably expended on behalf of the class multiplied by counsel’s reasonable hourly rates.<sup>179</sup>

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<sup>177</sup> *Bowling v. Pfizer, Inc.*, 927 F. Supp. 1037, 1044 (S.D. Ohio), *aff’d*, 102 F.3d 777, 780 (6th Cir. 1996).

<sup>178</sup> *See id.*; *see also Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 378–80 (D. Mass. 1997).

<sup>179</sup> *See Bowling v. Pfizer, Inc.*, 102 F.3d 1147, 1151–52 (6th Cir. 1998).



## Guideline 15

### Class Actions Involving Homes

Class actions involving homeownership demand special attention because of the economic and personal value of homeownership to affected class members, which raises the stakes of their participating, or failing to participate, in these cases. Consumer advocates in class action cases involving homeownership should:

1. In litigation:
  - a. Narrowly draft the complaint with an eye toward the scope of an eventual release of claims and its impact on homeownership;
  - b. Focus on state-specific claims and remedies;
  - c. Avoid broad prospective terms that might impact individual homeowners in subsequent individual litigation.
2. In settlement:
  - a. Limit the release of claims to those for which the relief is adequate in light of the scale and duration of the covered transactions;
  - b. Preserve defenses to foreclosure and other actions that may be filed against the homeowner;
  - c. Craft injunctive mechanisms to assist class members to stay in their homes, such as guidelines for loan modifications or interest-rate reductions;
  - d. Avoid blanket stays of individual litigation, or else make any stay mutual so as to cover individual foreclosure proceedings;
  - e. Provide notice that highlights issues impacting homeownership and that reaches advocates who can assist class members with exercising their rights;
  - f. Provide effective monitoring mechanisms to maximize the likelihood that relief protecting homeownership will reach class members.

## Discussion

Class actions involving homeownership differ from other consumer class actions in important respects. For most consumers, their home is by far their biggest asset, and losing a home and its equity can ruin a family financially. Foreclosures can have a devastating effect on the stability of families and communities.<sup>180</sup> Home cases also are different from other consumer cases because mortgage finance involves complex, long-term transactions with high exit costs for refinancing. In this setting, a discrete unlawful practice challenged through a class action is likely to be a smaller part of the surrounding transaction than in most consumer cases. Class counsel must give careful attention to these higher stakes at every stage of litigation, from framing the claims to determining the scope of the release of claims in a settlement.

The scope of the release and its impact on class members' ability to protect their homes from foreclosure are the most critical aspects of these cases. As discussed in Guideline 9, while avoiding an overbroad release is important in every class action, it is essential in cases involving homes. Class action settlements that offer what might seem like large monetary class awards in the aggregate are not appropriate if they leave homeowners more vulnerable to foreclosure, which they might otherwise avoid through offensive or defensive litigation. In homeowner cases, individual relief often means the opportunity to preserve homeownership, such as by restructuring the underlying loan. Resolution of class actions involving homes must not jeopardize the ability of class members to remain in their homes by releasing claims and defenses that can be used to prevent foreclosure.

The high value of home claims also makes it more likely than in other consumer cases that class actions will co-exist with substantial individual litigation of the same claims. A wide range of federal and state consumer-protection statutes and state common-law doctrines applicable to lender, broker, or third-party agent behavior can provide for substantial recoveries in individual cases. Some state-law remedies are more substantial than those available under federal law. These potential recoveries can pose challenges in home-ownership cases, especially those involving national or multi-state classes.

On the other hand, class actions in home cases have helped raise awareness of problems such as predatory lending and predatory servicing before they became national news. Private class actions and cases by government agencies against national lenders and servicers have had a significant impact on the lending industry. Large monetary settlements can be meaningful in that they provide cash to class members, act as deterrents to defendants, and may influence industry behavior. Class actions against a single entity have led to industry-wide reforms and may be responsible in part for preventing greater proliferation of abuse. Class actions also present a practical solution for advocates to deal with an overwhelming number of cases

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<sup>180</sup> See, e.g., *Chase Bank, N.A. v. City of Cleveland*, 695 F.3d 548, 551 (6th Cir. 2012) (addressing public nuisance claim by city government based upon community harms caused by predatory subprime mortgage lending practices).

involving the same players and practices. Class actions in home cases thus can serve important consumer-protection goals when they are litigated and settled with the necessary care to the substantial individual interests that are at stake.

## 1. Developing a Case

### a. Narrowly draft the complaint.

Though class counsel always should carefully draft the complaint and precisely define the scope of claims sought to be redressed, this is critical in home-ownership cases. Narrowly focusing the class case helps to ensure that the relief obtained for homeowners reasonably relates to the harms that can be litigated on a class basis without releasing potentially valuable individual claims and defenses. Counsel also must give due consideration to the possibility that, in a class action litigated to judgment, *res judicata* could preclude both litigated and non-litigated claims that arise from a common nucleus of operative facts.<sup>181</sup>

### b. Focus on state-specific claims and remedies.

Class counsel should assign appropriate geographical limits to a class. Nationwide classes may jeopardize the availability of more valuable state-law remedies. Class actions that target a specific practice based on a federal claim, and leave the homeowner with significant individual claims, are sometimes appropriate. When a multi-state or nationwide class is feasible with respect to a particular claim, class counsel still must determine whether any state laws provide greater remedies for that claim. If they do, then counsel must consider separate treatment of people in those states either through creation of adequately represented subclasses or by separating them out entirely from a multi-state class. Similarly, class counsel should consider whether to carve out states where there are pending statewide class actions or significant individual or mass litigation pending against the same defendant for the same practices.

### c. Multidistrict litigation.

If a court orders multidistrict litigation in a case that may result in the transfer of individual homeowner cases to a distant forum, class counsel should promptly seek court approval for a steering committee that meaningfully includes attorneys who represent the individual homeowners. The purpose of the committee should be to provide representation of the individual interests in the decision-making of the lead counsel, and to provide a conduit to the court when the interests of the individual homeowners differ from those of the class.<sup>182</sup>

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<sup>181</sup> Although narrow drafting is essential, the Supreme Court has recognized a narrower scope of claim and issue preclusion in the class action setting. *See Cooper v. Federal Reserve Bd. of Richmond*, 467 U.S. 867, 874 (1984) (“A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.”).

<sup>182</sup> *See* MANUAL FOR COMPLEX LITIGATION, FOURTH § 10.221 (2004).

## 2. Settlement Considerations

### a. Limit the release.

The release of claims in any class action settlement involving homeownership must be narrowly and carefully drafted. Releases must not release non-certified claims or potential claims and must permit the homeowner to pursue individual or class claims addressing practices other than those that were the basis of the class action litigation. For example, class members should never release claims regarding loan origination if the class case only addresses servicing abuses. Claims that do not arise from a common nucleus of operative facts should never be released. For all claims that are released, a settlement must obtain relief commensurate with their potential value.

### b. *Explicitly* preserve defenses.

The release must *explicitly* preserve all defenses to foreclosure or other proceedings filed against the homeowner, even when the release otherwise bars the homeowner from seeking affirmative recovery on the same subject. This protection of foreclosure defenses cannot be inferred or left open to interpretation, as class action settlement releases often are drafted quite broadly, so that a judge in a future case who has to interpret a release will be unlikely to infer an intent to carve out defenses if the exception from the release was not made explicit. In some instances, homeowners must raise defenses to foreclosure through an affirmative suit, such as an action to enjoin a non-judicial foreclosure. Therefore, the release must also make clear that affirmative relief in response to a threatened foreclosure is likewise preserved. The release should also preserve the class member's right to raise claims through a bankruptcy proceeding, such as through a recoupment action, when the lender has instituted foreclosure proceedings against the borrower. The settlement, order, and notice should specifically state that class members might raise claims as a defense to foreclosure or through an injunctive or recoupment action to prevent foreclosure.

### c. Craft injunctive relief to preserve homeownership.

When possible, class counsel should craft settlements that include meaningful injunctive relief. Monetary disbursements often do not provide the most meaningful relief to homeowners with unaffordable predatory loans. When possible and achievable without an overly broad release, settlements should include mechanisms to assist class members to stay in their homes, such as guidelines for loan modifications or interest-rate reductions for borrowers in defined categories, or cash funds for foreclosure relief. Injunctive relief should provide that the defendant will take specific steps to remedy the specific predatory lending or servicing practices addressed by the litigation. In cases involving a holder, lender, servicer, or other entity with which the homeowner will continue to have a relationship long after the settlement, the

settlement should establish parameters for a positive on-going relationship between the parties. The settlement also should set up a system to help homeowners who continue to experience trouble with their loan related to the claims of the lawsuit. Class counsel also should seek settlement provisions requiring the defendant will repair the credit of class members. Failure to do so can trap class members in the subprime market.

Settlements involving disbursements of money must factor in consequences on a class member's government benefits. Sums as low as \$200 can jeopardize an entire family's receipt of Medicaid, Supplemental Security Income benefits, food stamps, or other benefits. It may be possible to seek agreement from the government agency that settlement funds will not affect class members' benefits.<sup>183</sup> Consult with knowledgeable practitioners to minimize the impact on class members' sustenance income.

- d. Avoid blanket stays of individual litigation, or else ensure mutuality by staying foreclosure proceedings and preliminarily enjoining illegal conduct.

Class counsel should not agree to blanket stays of affirmative litigation pending settlement approval. Homeowners must retain the opportunity to defend foreclosure actions that may be initiated by the defendant at that time and to protect themselves in non-judicial foreclosure states where homeowners must affirmatively sue to enjoin an extra-judicial process. At a minimum, if individual litigation is stayed, the stay must be mutually restrict the parties so that the defendant is prohibited from initiating or continuing foreclosure in or outside of court, all statutes of limitations and repose (*e.g.*, the Truth in Lending extended-rescission period) must be expressly tolled, and class members who opt out must be allowed before settlement approval to resume or initiate individual litigation. Class counsel should make every effort to enjoin the defendant from initiating or continuing foreclosure proceedings and from engaging in the unlawful conduct at issue towards class members pending the settlement or resolution of litigation.

- e. Special notice considerations for home-ownership cases.

If debt is forgiven as part of the settlement, and that debt will be reported to the IRS, the class notice must advise class members as to the amount of forgiven debt that will be reported and that there may be tax consequences because, in many circumstances, forgiven debt is treated as taxable income. The notice must also state the importance of seeking tax advice and contain instructions to obtain tax assistance including a reference to the IRS-sponsored Volunteer Income Tax Assistance (VITA) programs and the IRS toll-free number that class members can call to find a VITA program near them.

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<sup>183</sup> The state Attorneys General 2002 settlement with Household/Beneficial is an illustration of the success of cooperation. See Sally Peacock, "How the Household Settlement Uncorked a Law Enforcement Bottleneck," available at <https://tinyurl.com/ynafnm2f>.

Class counsel should also mail a copy of the class notice to local consumer lawyers and legal services offices who are known to represent individuals in actions against the defendant. Housing counselors and other entities involved in counseling class members on issues relating to the claims alleged in the class action should be notified as well.

f. Mechanisms to monitor the settlement.

As discussed in Guideline 14, settlements should include specific mechanisms for monitoring of injunctive relief. Here again, this is especially important in class action settlements providing injunctive relief related to home ownership because of the complexity and longevity of home-mortgage finance. Court or independent monitors are effective mechanisms to ensure compliance with broad-based injunctive orders. Defendants often appreciate the opportunity to have issues resolved by informal means rather than through adversarial contempt proceedings in separate actions. Class counsel should argue strenuously that all monitoring reports must be part of the public record. A point-person should be designated within the defendant's company, especially when litigating against national lenders, to answer future questions regarding the settlement, and to address special circumstances of individual class members. *Counsel should always* include language in the settlement agreement stating that the court retains jurisdiction to enforce the settlement.<sup>184</sup> On the other hand, it may be equally important *not* to give the settlement court *exclusive* jurisdiction over interpretation and enforcement, particularly in nationwide or multi-state class cases, as a dispute over the settlement may later arise in individual consumer or foreclosure litigation where the consumer represented by local counsel should not have to travel to a distant forum for resolution by a settlement judge who lacks familiarity with the individual consumer's post-settlement claims.

The agreement should expressly allow class members to cite the settlement terms (and demonstrate any failure by defendant to comply with them) in later individual litigation between the defendant and a class member, including in defense to foreclosure. Regardless of whether the settlement terms specifically provide for it, if the defendant materially fails to comply with the settlement, class members may move to intervene or otherwise seek to reopen the class action to enforce the settlement's terms.

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<sup>184</sup> See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).