Standards and Guidelines for Litigating and Settling Consumer Class Actions

Third Edition, 2014

National Association of Consumer Advocates
1730 Rhode Island Avenue NW, Ste. 710
Washington, DC 20036
Phone: (202) 452-1989
Fax: (202) 452-0099
Email: info@naca.net

TABLE OF CONTENTS

Introduction to the Third Edition

by

Executive Director Ira Rheingold

In the mid-Nineties, responding to criticism of consumer class actions, the National Association of Consumer Advocates (NACA) decided to seek a consensus of ethical and effective class action practices. Starting with an initial draft, and incorporating suggestions and comments from many sources, NACA adopted its "Standards and Guidelines for Litigating and Settling Consumer Class Actions" in 1997.

The Guidelines have proven helpful to lawyers and courts alike. Through the years, a significant number of courts have referred to the Guidelines, including *Boyle v, Giral*, 820 A.2d 561, 569 fn. 8 (D.C.C.A. 2003); *Braud v. Transport Service Co. of Illinois*, 2010 WL 3283398 (2010 E.D. La.); *Figueroa v. Sharper Image Corp*., 517 F. Supp. 2d 1292, 1308 (S.D. Fla. 2007); *Henderson v. Eaton*, 2002 WL 31415728, *6 (E.D.La. 2002); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197, 204 (D.Me. 2003); *In re Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7-12 Litigation*, 447 F.Supp.2d 612, (E.D.La. 2006); *In re Mexico Money Transfer Litigation (Western Union and Valuta)*, 164 F.Supp.2d 1002, 1028-1030 (N.D.Il. 2000); *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 278 F.3d 175, 194 fn. 1 (3rd Cir. 2002); *Milkman v. American Travellers Life Ins. Co*., 2002 WL 778272, *7-9 (Pa.Com.Pl. 2002); *Moody v. Sears*, 2007 WL 2582193 (N.C. Super. 2007); *State v. Homeside Lending, Inc*., 826 A.2d 997, 1009-1011 (Vt. 2003); and *Wilson v. DirectBuy, Inc*., 2011 WL 2050537 (D. Conn. 2011).

The Guidelines have formed the basis of expert testimony, both in support of class action settlements and in support of objections to bad settlements. Most importantly, perhaps, they achieved their primary goal of setting the standard for litigating and settling consumer class actions. Many of the Guidelines have been embraced and adopted by courts and their principles were reflected in the 2004 changes to Federal Rule of Civil Procedure 23.

In 2006, to reflect both the adoption of these changes to Rule 23, as well as the quickly changing landscape of class action litigation, NACA issued the revised Guidelines 2nd. This Second Edition addressed new issues, including specific problems with the class action device in predatory home lending litigation, the exponential growth of forced arbitration, and the use of offers of judgment, under Federal Rule 68 and state counterparts, to forestall class actions.

On May 13, 2014, in an effort to keep the Guidelines current and relevant, NACA issued this Third Edition of the Guidelines. Drafted by a committee of some of the most principled and experienced class action lawyers in the country, Steve Gardner, Rob

Bramson, Seth Lesser, Mike Quirk, Stuart Rossman, and Brian Wolfman and the tireless assistance of Amanda Howell and Erika Knudson, the Third Edition thoroughly updates the law, including eliminating the previous Guideline on arbitration, which no longer has any practical use, thanks to a series of unfortunate decisions by the U.S. Supreme Court.

It is our hope that this Third Edition of the Guidelines both continues to offer assistance to lawyers and courts alike, and remains the standard that encourages only the most ethical and thoughtful of consumer class actions.

GUIDELINE 1

The Propriety Of Class Actions When Individual Recoveries Are Small

A. The Issue

Opponents and critics of consumer class actions often question whether some illegal business practices are inappropriate for class treatment because individual recoveries are too small to warrant individual actions and the attorneys' fees that are recovered dwarf the individual damages. Frequently, defendants propose that a class should not be certified because the relief to each class member is too small to warrant a class action.

From the standpoint of consumers and their advocates, class actions for small-damages claims are essential to achieve the compensatory and deterrent goals of consumer protection. Damages that are too small to make it possible to litigate an individual case can be combined in a class action to make provision of relief and punishment of unlawful conduct possible.

B. Discussion

The argument emphasizing the amount of relief to individual class members instead of the total class-wide sum that the defendant will pay appears to be based on the conclusion that some recoveries to class members may be so trivial that they do not warrant redress.

Class action lawyers and other advocates hold the contrary view and believe that the focus on individual compensation misses a central point of class actions: deterring misconduct by the defendants. The class action device is particularly appropriate in consumer cases where individual recoveries are small, but the total claim, in the aggregate, involves substantial sums, often millions of dollars in damages. Class actions serve an important purpose beyond simply compensating the injured. Often, class counsel and class representatives act as private attorneys general, vindicating cumulative wrongs, obtaining significant injunctive relief or institutional change, and requiring disgorgement of illegal profits.[1] Rejecting class actions because individual recoveries are small, while ignoring the aggregate amounts involved, encourages wrongful conduct and largely immunizes entities caught stealing millions in ten-dollar increments.

An example of the type of wrongdoing this line of argument would immunize is found in the consumer class actions challenging excessive late and over-limit charges on credit card accounts, which were criticized because class members "are eligible for only

[1] H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS §§ 5.49 & 5.51 (4th ed. 2002) (cited herein as "NEWBERG").

a few dollars apiece in compensation," while class counsel get "millions."[2] The critics of this type of class action argue that when individual recoveries range from $5 to $50, a court should deem the amount to be trivial. Such a constricted view disregards the deterrent value of aggregate enforcement, as the defendants in these types of class actions often have to disgorge millions of dollars of ill-gotten gains.

The Supreme Court long has recognized that without Rule 23, claimants with small claims would not be able to obtain relief.[3] To the same effect is *Phillips Petroleum Co. v. Shutts*:[4] "Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."[5] The class-wide damages in *Shutts* totaled almost $3 million.[6] The 1966 Advisory Committee Notes to Rule 23 echo this concern: "These interests [in individual litigation] may be theoretical rather than practical; . . . the amounts at stake for individuals may be so small that separate suits would be impracticable."[7]

The Supreme Court reaffirmed the availability of class actions for small consumer cases in *Amchem Products, Inc. v. Windsor*,[8] where it noted that in small stakes consumer cases, common issues readily predominate.[9] Many federal and state courts cited *Amchem's* conclusion that common issues readily predominate in consumer class actions, and certified consumer classes, despite the existence of some individual issues.

Recently, the Court has imposed new limitations on class action certification. In *Wal-Mart v. Dukes*,[10] the Court held that when individual determinations predominate over common questions of law, claims should be litigated individually. The claims presented in *Dukes* were complicated by individual determinations of damages and causation that most small-claims cases do not encounter. Nonetheless, *Dukes* presents a new hurdle because now a party seeking class certification has the burden of affirmatively demonstrating elements that overlap with the merits of the claim.[11]

---

[2] Max Boot, *Guardian of the Lawyers' Honey Pot*, WALL ST. J., Sept. 19, 1996.

[3] *See Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980).

[4] 472 U.S. 797 (1985).

[5] *Id.* at 809.

[6] *Id.* at 801.

[7] Fed. R. Civ. P. 23 Advisory Committee's note, 1966 amendment.

[8] 521 U.S. 591 (1997).

[9] *Id.* at 624.

[10] 131 S. Ct. 2541 (2011).

[11] *Id.* at 2551.

Courts must make a rigorous review at the certification stage that frequently overlaps with the merits of the case.[12] In *Comcast Corp. v. Behrend*,[13] the rigorous review consisted of reviewing the capability of a mathematical model to identify the economic injury for the entire class, which the lower courts erred in not considering as it pertained to the merits of the case.[14] Other courts facing consumer actions acknowledge that there are many ways to show economic injury to satisfy this requirement.[15] And since *Comcast*, courts have continued to certify classes even where the class plaintiff's damages models were incapable of showing exact damages for the entire class.[16] Class actions for small consumer claims remain the most appropriate remedy.

The availability of the class action remedy is particularly important with respect to consumer protection claims. As the Newberg treatise explains:

> The desirability of providing recourse for the injured consumer who would otherwise be financially incapable of bringing suit and the deterrent value of class litigation clearly render the class action a viable and important mechanism in challenging fraud on the public.[17]

The simple fact is that no private lawyer will accept a case for $50, $500, or often even $5,000 in recoverable damage, because dilatory defense tactics will force attorneys' fees that are a significant multiple of the plaintiff's possible recovery and many courts will not adequately compensate a contingent-fee lawyer in such a situation.

In addition, assuming that it is desirable for a court to weigh the potential "costs" of class action litigation against its potential "benefits," it would be a mistake to focus solely on monetary relief recoverable as damages or restitution. Rather, many consumer class actions provide an additional social benefit—deterrence. Recovering a significant aggregate sum from a defendant will deter similar wrongful practices in the future by that defendant and by other similarly situated entities. This deterrent exists regardless of the amount recovered by individual class members. Moreover, injunctive relief can specifically prohibit resumption of a wrongful activity.

---

[12] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

[13] *Id.*

[14] *Id.* at 1433.

[15] *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1105 (9th Cir. 2013).

[16] *See, e.g.*, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013); *Harris v. comScore, Inc.*, 292 F.R.D. 579, 589 (N.D. Ill. 2013); Ellen Meriwether, *Comcast Corp. v. Behrend: Game Changing or Business As Usual?*, 27(3) ANTITRUST 57, 61 (Summer 2013).

[17] NEWBERG at § 21.30; *see also Van Jackson v. Check 'N Go of Ill., Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000) ("[C]lass actions were designed for, with small or statutory damages brought by impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant.").

Judge Richard Posner put it succinctly:

> The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.[18]

The importance of deterrence in consumer cases is shown by the frequency with which Congress and the state legislatures have included fee-shifting provisions in consumer protection statutes. By shifting fees, Congress and the state legislatures encourage enforcement of consumer laws through a system of "private attorneys general," even where the amount of damages at stake would be too small to support litigation if the plaintiff had to absorb the cost of attorneys' fees.[19] This recognition of the importance of enforcing consumer protection laws, even in cases where the amount of damage to an individual consumer is small, is at least as applicable in the class action context as in the individual case context.

NACA strongly believes that one small-claims consumer class action that provides real relief to thousands of consumers will always be superior to the theoretical potential to litigate thousands of individual small lawsuits. Such a theoretical potential will never become a reality when the individual claims are small. In our society, consumers engage in far more economic transactions than previously, and do so with nationwide or regional companies using take-it-or-leave-it standardized forms, contracts, and sales methods. To combat abuses in these practices, class actions continue to be essential.

Using class actions to deter widespread consumer fraud may be better than the only practical alternative: punitive damage awards. If small compensation class actions are discouraged, the alternative will be to seek large punitive damage awards on behalf of a few consumers who, while litigating relatively small individual claims, can prove willful, widespread misconduct by defendants. While both alternatives may extract large payments from defendants, class actions distribute that payment to many or all of the victims, rather than providing relief to the few consumers who prevailed in their individual punitive damage claims.

In addition, the primary remedy sought in any small-claims class action is often equitable in nature, making the payment of money to individual class members second-

---

[18] *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

[19] *See, e.g., De Jesus v. Banco Popular de Puerto Rico*, 918 F.2d 232, 234 (1st Cir. 1990) (construing the Truth in Lending Act).

ary to the far more valuable prospective relief. The Court in *Dukes* did not foreclose the possibility of class certification under Rule 23(b)(2) for every claim for back pay, but it did say, "at a minimum, claims for *individualized* relief (like the pay back at issue here) do not satisfy the Rule."[20] When individualized determinations overshadow injunctive and equitable relief sought by a class, then certification under Rule 23(b)(2) is improper.

Another argument against small-claims class actions is the inefficiency of distributing small checks to many class members. In light of the development of automated systems and the availability of simple and inexpensive Internet claims processes, this supposed inefficiency becomes less urgent.

It becomes even less urgent when one considers that many of these cases involve an ongoing business relationship—credit card, banking transactions, and utility payments, to name just a few instances—where the individual payment amounts can be determined based on the defendant's records and the ultimate payment made by credit to an existing account. No proof of claim is required, nor must the financial system process a number of small checks.

The most important consideration weighing in favor of small-claims class actions is that the alternative—taking no action at all and thus permitting the defendant to get away with illegal behavior—is a far less positive result from a law-enforcement and justice perspective.

Finally, what may seem "small" to those of us fortunate enough to be lawyers and judges may be significant to those consumers whose annual incomes are at or below the poverty level. A check for $100.00 represents almost one percent of the total annual poverty guideline allotment for one person under the United States Department of Health and Human Services 2014 poverty guidelines.[21] For a low-income consumer, that "trivial" $100.00 individual recovery has significant value, equivalent, as a percentage of income, to a $1,000 recovery by a single person earning $100,000 a year.

While class actions, like any procedures, may sometimes be abused, protections against abuse already exist. Courts may and do refuse to allow classes to be certified where the potential recovery to each consumer is nominal or where a distribution would consume such substantial time and expense that the class members are unlikely to receive any appreciable benefit.[22] Further protections are found in the requirements

---

[20] *Dukes*, 131 S. Ct. at 2557 (emphasis in original).

[21] 79 Fed. Reg. 3593, 3594 (Jan. 22, 2014).

[22] *See, e.g.*, *Buchet v. ITT Consumer Financial Corp.*, 845 F. Supp. 684 (D. Minn. 1994); *Blue Chip Stamps v. Superior Court*, 18 Cal. 3d 381, 386 (Cal. 1976); *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 459 (Cal. 1974).

that courts must find any settlements to be fair and reasonable to the members of the class[23] and that courts must approve attorneys' fees.

Recent Supreme Court rulings addressing the enforcement of mandatory arbitration clauses in putative consumer and other types of class actions represent a significant threat to the law-enforcement and deterrent goals advocated herein. In these decisions, a bare majority of the Supreme Court has required arbitration of small-value consumer claims with no availability of a class action, effectively, if not explicitly, finding that a corporation's right to enforce an arbitration clause in an adhesion contract may trump a consumer's right to vindicate her state and federal-law claims. In *AT&T v. Concepcion*,[24] the Court did not dispute the dissent's claim that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system[,]" but instead simply answered that "states cannot require a procedure that is inconsistent with the [Federal Arbitration Act (FAA)], even if it is desirable for unrelated reasons."[25]

In *American Express Co. v. Italian Colors Restaurant*,[26] the Court extended *Concepcion* by holding that the FAA requires enforcement of an arbitration clause provision prohibiting class actions even as applied to federal statutory claims, and even where the plaintiffs have proven beyond dispute that the arbitration clause will prevent them from vindicating their claims. Justice Kagan, writing for three dissenting Justices, summarized and answered this holding as follows:

> So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.
>
> And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.
>
> That answer is a betrayal of our precedents, and of federal statutes like the antitrust laws.[27]

NACA wholeheartedly concurs with this assessment.

In the wake of *Concepcion* and *Italian Colors*, lower courts still may find some arbitration clauses unconscionable if they contain provisions *other than* an express class action ban that prevent consumers from vindicating their legal claims, consistent with the

---

[23] Fed. R. Civ. P. 23(e).

[24] 563 U.S. 321, 131 S. Ct. 1740 (2011).

[25] 131 S. Ct. at 1753.

[26] 133 S. Ct. 2304 (2013).

[27] *Id.* at 2313 (Kagan, J. dissenting).

FAA's savings clause providing for application of generally applicable state contract law such as the doctrine of unconscionability.[28]

The only comment[29] that opposed small-claims class actions came from an industry trade group, which limited its comments to debt collection class actions filed under the Fair Debt Collection Practices Act (FDCPA). The commenter concluded that a plaintiff would be better off filing an individual claim under the FDCPA rather than filing a class action where the damages are split between numerous plaintiffs. NACA does not agree with this comment because it fails to consider the curative nature of class actions—stopping that debt collector from harassing consumers in the future—as well as the economies of scale discussed above. The same commenter also opposed a class action based on what it termed an "inadvertent" violation of the FDCPA (such as failure to provide the federally required notice of rights), because it concluded that such a lawsuit would not have the desired deterrent effect since the violation was inadvertent.

NACA disagrees with the commenter's conclusion that the failure to comply with federal law can ever be considered "inadvertent"—at best, it reflects a casual lack of interest in the debtor's rights under federal law. That commenter added, with respect to class certification, that the "court should look to the actual benefit to the plaintiffs, the alleged violation, and the effect of a class action upon the defendant debt collector as a condition of class certification." NACA does not believe that these substantive issues are relevant to consideration of a normal Rule 23(b)(3) FDCPA lawsuit.

C. NACA Guideline

Despite recent barriers to certification, class actions particularly are appropriate in consumer cases where individual recoveries are small, but involve many thousands or millions of dollars in damages in the aggregate. This is precisely the type of case that encourages compliance with the law and results in substantial benefits to the litigants and the rule of law. Denying class certification in such instances would unjustly enrich the wrongdoer, who would get to keep any ill-gotten gains. Class actions should be deemed appropriate because individual damages are too small to warrant redress without a class suit, so long as significant and indivisible aggregate monetary or equitable benefits to the class are sought. This is especially true in cases with claims for which a legislative body has provided a fee-shifting remedy to encourage private enforcement actions.

---

[28] *See* 9 U.S.C. § 2; *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

[29] Beginning in 1995, when these Guidelines were initially considered, NACA received many comments, from both advocates and industry representatives. Where relevant, the Guidelines discuss some of the comments.

Additional considerations favoring small-claims classes are: (1) availability of equitable relief as the primary goal, (2) increased use of automated payment systems to calculate and distribute individual damage amounts, and (3) the *cy pres* alternative to a truly inefficient distribution discussed in more detail in Guideline 7.

GUIDELINE 2

Settlements When Other Class Actions Are On File

A. The Issue

Settling class actions when other similar cases are pending raises unique issues such as coordination of settlement discussion, reverse auctions, different relief based on laws of different states, the substantive scope of the class, and pending or potential individual lawsuits.

B. Discussion

This is one of the most complex issues in the Guidelines. There is general agreement that class counsel should be sensitive to the potential for wiping out claims asserted in other pending cases by settling a case, and should resist doing so. This problem is particularly apparent where 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 claims settled, but offers no increased benefit to the additional class members or settlement of the additional claims.[30] There is also concern about the filing of nationwide class actions and agreeing to settlements that do not exclude from the class cases pending in certain states or locales. In either instance, the interests of the classes will not be well served by settlements that do not maximize benefits to class members.

One area of particular concern exists when many cases are pending in state and federal courts and thus cannot be consolidated under the federal multi-district litigation ("MDL") rules.[31] Class counsel from California might be concerned about becoming involved in a related case pending in a rural area of Texas or Louisiana, where they are unfamiliar with the rules and traditions of practice. The Manual for Complex Litigation addresses this issue, and proposes several procedural steps to increase coordination. These steps include: (1) joint conference calls among all judges, (2) coordination of discovery, and (3) joint appointment of experts.[32]

The Class Action Fairness Act (CAFA) addressed these concerns by allowing removal of truly large, truly multistate class actions to federal court, where they can then be handled under the MDL rules.[33] Nonetheless, because class definitions and claims

---

[30] 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 3 addresses release problems specific to class actions involving homes.

[31] 28 U.S.C. § 1407.

[32] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.14 (2004).

[33] 28 U.S.C. § 1453.

may be crafted to avoid federal court removal, the possibility of litigation in multiple forums still exists.

Advocates for individual consumers may also 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 largely addressed at settlement time 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 of providing significantly greater relief.

It is always possible, and in many cases preferable, to avoid this problem by tailoring the class definition and claims to cover a limited number of states and using the state laws that offer the greatest protection to consumers. This may require that the class be divided into subclasses based on state of residence or contract formation, but it will not make the class action unmanageable. Indeed, by setting out 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.

Another area of concern is the settlement of cases 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 its terms. The potential for collusion and abuse is obvious if a lawyer agrees to a bad deal in order to secure fees. For example, in one settlement involving competing classes, the court found 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*."[34]

Commenters agreed that class counsel in overlapping actions should communicate with each other and work together to ensure that class members obtain the maximum settlement benefit. The personal interests of particular class counsel in receiving attorneys' fees could discourage such cooperation at times. Commenters generally agreed that courts should be encouraged not to approve settlements in "copycat" actions and to consolidate actions whenever possible.[35]

---

[34] *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1323 (S.D. Fla. 2007) (emphases added).

[35] For what remains an excellent discussion of these issues, co-authored by one of the drafters of the Guidelines, see Brian Wolfman and Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996).

Other considerations when litigating one of several class actions include secrecy, both during discovery and at the time of settlement. Class counsel sometimes enter into confidentiality agreements during discovery limiting their ability to share discovery with lawyers litigating similar cases elsewhere. This fosters competition and conflict rather than cooperation. One simple way to avoid this problem is to enter into agreements with the other counsel that provide that all counsel are cooperating in all cases, in which case it is possible to share the results of discovery with each other without violating a confidentiality agreement.

Secrecy at the time of settlement is always something to be avoided,[36] but when there are competing class actions the problems may be exacerbated because it can frustrate 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, including motions for class certification—can expedite case handling and minimize costs to each counsel. Nationwide access to PACER and the adoption of electronic case filing, together with the ability to scour the Internet and legal sources such as Westlaw and Lexis, allows a simple and inexpensive way to look for other cases.

C. NACA Guideline

Class counsel should attempt to learn of any preexisting cases and to communicate with other plaintiffs' counsel in such cases before or promptly after filing an overlapping case.

Class counsel should cooperate with each other to the maximum extent feasible in the pre-trial stage. This can be accomplished by agreeing to conduct joint discovery, use joint experts, and coordinate document production—or at a minimum, share discovery among counsel in similar cases—and, where possible, by allocating responsibility for researching and drafting important pleadings and coordinating scheduling of important motions, including motions on the pleadings, for summary judgment, and for class certification.

Class counsel should avoid confidentiality agreements that restrict their ability to share discovery with lawyers in other related cases.

As soon as possible, class counsel should serve the defendant with discovery requests that force the defendant to disclose any other potentially related lawsuits, in order to coordinate litigation.

---

[36] *See* Guideline 10 on confidentiality issues.

Early in the lawsuit, class counsel should also ask the court to order the defendant to get permission from the court before entering into any settlement in another case that would affect the class representative or class members.

Class counsel should encourage joint litigation of other related lawsuits, both in discovery and in settlement.

Class counsel should be alert to the possibility that a defendant in multiple cases may seek to conduct a reverse auction (discussed above). Bearing in mind the entitlement of class counsel to a fair fee given all the circumstances, the interests of the class must remain paramount.

Class counsel should not agree to expand the class definition at the settlement stage, except in rare circumstances and only if the expanded definition results in significant relief to the newly-added members of the class. Class counsel should refrain from agreeing to unnecessarily broad releases that wipe out claims asserted in other pending individual or class cases. Class counsel should be cautious about settling anything beyond what is alleged in the complaint and mindful of preserving the opt-out rights of class members.[37] This caution is especially important in class actions involving homes, for all the reasons discussed in detail in Guideline 3.[38]

Before agreeing to any release of claims in a settlement agreement, class counsel should get from the defendant a list of any then-pending cases in which the defendant could, or might, take the position that the release would extinguish such claims. Far preferably, class counsel should not agree to release claims in other actions unless they are the same as those at issue in the settling class, and this should be clearly stated in the final judgment. At a minimum, if these claims are not excluded, then class counsel must evaluate those claims separately and provide for separate and additional consideration in the settlement. Failing to do so might constitute inadequate representation.[39]

When a settlement has been reached, counsel should always notify class counsel and the court in other cases involving the same defendant and the same or similar issues. Such notice should occur well before the fairness hearing, leaving enough time to give those counsel the opportunity to appear.

Class counsel should never agree to a settlement term that in any way restricts their right to discuss the settlement or disclose all its terms and all settlement documents to the public. This includes gag orders, confidentiality agreements, and anything

---

[37] *See* Guideline 9 on class member releases.

[38] *See* Guideline 3 on class actions involving homes.

[39] *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (2004).

else that prevents or restricts class counsel's ability to communicate with class members or other members of the public.[40]

Class counsel should resist preliminary orders that stay individual litigation of related claims or other actions by absent class members. If any such stay orders are nonetheless entered, they must allow individual class members with pending individual litigation an immediate right to opt out of the settlement and thus no longer be bound by the stay.[41]

As soon as possible after settlement, class counsel should notify persons and groups who are known to have an interest in the proceedings that a tentative settlement has been reached and that a preliminary hearing will be scheduled to consider the fairness and adequacy of the settlement. This goes beyond CAFA's requirement that a defendant must 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 . . . ."[42]

In cases involving specific substantive rights, notice should be sent to groups with specific interest and expertise in that area of the law, such as legal services organizations when homes are the subject of litigation, or utility advocacy groups when utilities are at issue.[43]

---

[40] *See* Guideline 10 on confidentiality.

[41] *See* Guideline 3 on class actions involving homes.

[42] 28 U.S.C. § 1715.

[43] *See* Guideline 3 on class actions involving homes and Guideline 11 on improved notice of settlement.

GUIDELINE 3

Class Actions Involving Homes

A. The Issue

Class action cases that involve homes deserve special standards because of the economic and personal value of home ownership to affected class members. The gravity of harms that homeowners may incur should they participate, or fail to participate, in a settlement necessitates heightened awareness to all aspects of the class action. This Guideline covers class actions that involve homes, including but not limited to cases raising causes of action addressing mortgage lending and servicing practices, and deed or home equity theft.

B. Discussion

The use of class actions to resolve disputed claims related to homeownership has raised serious concerns among advocates who represent individuals in actions against lenders and other parties. Consumer class actions are vital to ensuring that lenders, creditors, and other agents adhere to the law, but rarely are the stakes so high for consumers in class actions as they are in cases involving homes. For most consumers, the home is by far their biggest asset, and losing a home and its equity can ruin a family financially. Moreover, foreclosures can have a devastating effect on the stability of families and communities.

Home cases differ from many other consumer class actions in several important respects. In addition to the greater economic and personal stakes for the individual consumer, home cases are different because mortgage finance involves complex and long-term transactions in which a discrete unlawful practice that is challenged through a class action is likely to be a small part of the parties' transactional relationship. Class counsel therefore must give careful attention to this broader transactional context at every stage of litigation, from framing the claims to determining the scope of the release in a settlement.

The most controversial aspect of class actions in cases involving homeowners is the effect of a class action settlement agreement's release of claims on individual class members' ability to protect their homes from foreclosure. Class action settlements that offer what might otherwise seem like large monetary class awards are not appropriate if they leave individual homeowners more vulnerable to foreclosure, which might be avoided through individual litigation. In home cases, individual relief often means the opportunity to regain homeownership, or to restructure the underlying loan. Resolution of class actions involving homes must not jeopardize the ability of class members to remain in their homes by releasing the claims and defenses available in litigation that make continuation of homeownership possible.

Home cases also are different from other consumer class actions because many consumers may be able to pursue the claims at issue through individual litigation. 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 some individual cases. Some state-law remedies are more substantial than those available under federal law. Thus, in home cases involving certification of national or multi-state classes, class counsel must be attentive to differences in the interests of class members from different states.

Such individual homeowner litigation sometimes may be put into jeopardy by a class action. Although any class action could adversely affect individual litigation of similar claims, the stakes are higher when homeownership is involved and a class action prevents individual cases from going forward. This may occur through mandatory consolidation procedures such as the federal court multidistrict litigation ("MDL") rules, which require that pre-trial proceedings in all cases (individual and class action alike) involving the same practices by the same defendant be litigated in one court. Representation of the interests of homeowners in individual cases is more difficult in MDL cases. The difficulties created by the transfer for individual litigants can include the following: (1) transfer to an MDL proceeding could "result in their actions entering some black hole, never to be seen again;"[44] (2) once a case is transferred, individual litigants have little input into, and less control of, the course of the proceedings; (3) any benefit derived from choice of forum may be lost; (4) due to the complexity of most MDL proceedings, they tend to move at a slower pace than the usual individual federal case; (5) conflicts between the interests of the individual homeowners and the class may arise; (6) since the transferee judge can hear dispositive motions and also has discretion to retain proceedings for settlement purposes, the vast majority of transferred actions in fact do not emerge from the MDL;[45] and (7) the judge in a distant forum may be less willing to issue interim injunctive relief to stop a foreclosure arising after the transfer since such an order would affect property in another state.

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. The filing of class actions against national companies by government agencies, as well as by private class action lawyers, has 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

---

[44] *See, e.g.*, *In re Asbestos Prods. Liab. Litig.* (No. Vi), 771 F. Supp. 415, 421 (J.P.M.L. 1991).

[45] 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 112.03[6][b] at 112-29 (3d ed. 2005).

a practical solution for advocates to deal with an overwhelming number of cases involving the same players and practices. Thus, class actions in home cases 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.

C. NACA Guideline

This Guideline is not meant to address every issue that may arise in class actions involving homeownership. Many of the other Guidelines address issues that arise in all types of class actions, and should be considered to apply in cases involving homeownership just as in any other class action. This Guideline, by contrast, is meant to focus on the unique issues and concerns that arise in class actions involving homeownership.

1. *Developing a Case*

a. Narrowly draft the complaint.

Class counsel should narrowly draft the complaint and precisely define the scope of claims sought to be redressed. Class counsel should refrain from alleging a laundry list of claims challenging different types of practices. Class members typically fare better through more carefully defined class actions. When homeownership may be at stake, the amount and type of relief to the individual has heightened importance. 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 that is litigated to judgment, *res judicata* could preclude not just the litigated claims, but also non-litigated claims that arise from a common nucleus of operative facts.[46]

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 superior state-law remedies, particularly in cases where multiple practices are challenged. Class actions that target a specific practice based on a federal claim, and leave the homeowner with significant individual claims, are sometimes appropriate. When such 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 to any class members. If such laws exist and a state-law class is feasible, counsel must consider separate treatment of persons in such states either through creation of adequately represented subclasses or by

[46] Nonetheless, 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.").

separating them out entirely from a multi-state class. Similarly, counsel should consider whether to carve out states where there are 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 is comprised of a reasonable number of 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.[47]

2. *Settlement Considerations*

a. Consult with lawyers handling individual cases.

Consulting with lawyers who handle individual cases and other class actions concerning the same defendant and subject matter on an ongoing basis throughout the settlement process may be invaluable for class counsel. These lawyers have a unique perspective that can only add to the litigation of class actions and will be able to provide guidance regarding how certain settlement terms, such as a release-of-claims provision or an ongoing injunctive relief program, may affect individual class members in the future. It may be beneficial to include these lawyers as consultants during the litigation and settlement process for the class's benefit, both to maximize the value of the relief obtained for individual homeowners and to avoid any harm from an overbroad release. Do not agree to confidentiality agreements that prohibit class counsel from consulting with knowledgeable advocates over potential settlement terms.

Class counsel also must assess whether to carve out from a settlement those class members who are in the most jeopardy of losing their homes because they are already in foreclosure or are in default on their mortgage loans.

b. Limit the release.

The release of claims in any class action settlement involving homeownership must be narrowly and carefully drafted. Releases must be written so as not to impact non-certified claims or potential claims, and to 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

[47] These committees are expressly permitted in the MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004).

arise from a common nucleus of operative facts should never be released. However, defendants usually will insist on a release of all claims arising from the common nucleus of operative facts that could have been but were not brought, so appropriate value for any such claims too must be obtained if they are ever to be released.

Class members also generally should not release potential individual claims in consideration of injunctive relief against a lender, servicer, or other entity, unless such relief results in significant individual benefits or protections to the class members. In assessing the fairness and reasonableness of a settlement, the value of individual relief obtained in light of the claims litigated and released is paramount, as even multi-million dollar settlements may not result in significant monetary relief to individual homeowners in larger size class actions.

c. Preserve defenses.

The release should *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 where this 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 also must 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.

d. Craft creative and comprehensive settlements.

When possible, class counsel should craft creative settlements that include meaningful equitable and 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.

Settlements involving disbursements of money must factor in consequences upon 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, such as in the Attorneys General settlement with Household/Beneficial, to seek agreement from the government agency that settlement funds will not affect class members' benefits. Consult with knowledgeable practitioners so as to minimize the impact on class members' sustenance income.

Class counsel should also seek agreements that the defendant will repair the credit of class members. Failure to do so can trap class members in the subprime market needlessly.

e. Avoid blanket stays of litigation.

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 during this time period by the defendant 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 restrictive on 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.

f. Include stay of foreclosure proceedings and illegal conduct.

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.

g. Avoid the use of proof of claim forms.

In home cases, it is rarely, if ever, the case that the identity of class members cannot be determined. As discussed in Guideline 12, claim forms put an additional burden on class members as a condition of obtaining relief. Therefore, class counsel should avoid the use of claim forms in home cases, except under unusual circumstances. Settlement monies should be distributed to class members without claim forms unless it is impossible to determine class membership or damage amounts, or if other considera-

tions prevail.[48] Settlement monies should be divided based upon the value of individual class members' claims. Class damages and restitution should be distributed by account credits and checks without claim forms, unless it is proven impossible to determine class membership or damage amounts.

h. Make class notices short and understandable.

As in any class action settlement, notice to class members should be no longer than necessary, and readily understandable to persons known to be in the class. In notice provided directly to class members, a summary set forth in easy-to-read language and fonts should be encouraged, possibly on a page labeled "Summary" with fuller details in the rest of the notice.[49] It is important for counsel to carefully craft an understandable settlement notice in home equity cases because of the significant rights and potential for loss of rights in these cases. Keep in mind the make-up of the class members. Lawyers may consider sending an explanatory letter on letterhead of a non-profit, counseling agency, or consumer rights group to garner closer attention by the class member. For example, if a subclass of borrowers is entitled to special relief, a letter explaining more fully their opportunity to benefit from the class action may enhance participation. Providing a letter that supplements the class notice may alleviate some conflicts in the notice-writing process as well.

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.

Class counsel should also mail a copy of the 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 that are involved in counseling class members on issues relating to the claims alleged in the class action should be notified as well.

[48] For an in-depth discussion of the use of claim forms, see Guideline 12, Claim Forms.

[49] For an in-depth discussion of class notices, see Guideline 11, Improved Notice of Settlement.

i. Provide mechanisms to monitor the settlement.

Settlements should include specific mechanisms for monitoring of equitable relief. Court or independent monitors are effective mechanisms to ensure compliance with broad-based equitable orders.[50] 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. It may be advisable to include language in the settlement agreement stating that the court retains jurisdiction to enforce the settlement.[51] 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 a foreclosure proceeding. 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 in order to enforce the settlement's terms.

[50] For an in-depth discussion regarding the monitoring of settlements, see Guideline 16.

[51] *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

GUIDELINE 4

Coupon settlements

A. The Issue

Several years ago, there appeared to be a trend towards increased use of coupon[52] settlements, offering relief to the class members in the form of coupons that are redeemable on future purchases from the defendant. These settlements came under increasing judicial scrutiny, including scrutiny spearheaded by NACA and the 1997 version of these Guidelines. In some settlements, the value of the coupons was negligible or the coupons did little or nothing to address the alleged fraud.

The issue of coupon class action settlements also became a legislative issue, with the State of Texas in 2003 passing a law requiring the attorneys' fees in class action settlements utilizing coupons to be paid in coupon.[53] More significantly, however, CAFA mandated calculating attorneys' fees in coupon settlements on the value of the coupons redeemed.[54] Congress' rationale, expressed in CAFA's findings, was that one of the abuses of the class action device was class action settlements where "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value."[55]

Even before Congress' action, coupon settlements were decreasing as a result of increased judicial scrutiny. The seminal case, and a good example of a coupon settlement that should never have been proposed for court approval, is the General Motors ("GM") side-saddle pickup truck case. That class action sought to resolve a significant vehicle fire safety hazard: exploding side-saddle gas tanks on GM pickups that killed many people and burned thousands. The plaintiffs alleged that the trucks were flawed by a dangerous and latent design defect—the placement of the gas tanks outside the frame rail—that increases the likelihood that their fuel tanks will rupture in side-impact crashes, causing fuel-fed fires. The class action sought a recall of these GM trucks, with restitution and refunds to all class members, and an order directing GM to pay for the retrofitting of all GM pickups to correct the fuel tank defects.

In the settlement, however, class counsel abandoned the recall/retrofit remedy in favor of an approach that limited class members' recovery to discount coupons to buy new GM trucks. There was no provision requiring GM to recall or repair the trucks, or to reimburse owners who made the repairs themselves, nor was there any provision re-

---

[52] These are variously referred to by such terms as "coupon," "certificate," and "voucher." NACA uses "coupon" throughout this version of the Guidelines.

[53] Tex. Civ. Prac. & Rem. Code § 26.003.

[54] 28 U.S.C. § 1712.

[55] Pub. L. No. 109-2, 119 Stat. 4 (Feb. 18, 2005).

quiring GM to warn consumers about the hazards of the trucks, despite the demand for such relief in the complaint. In other words, nothing in the settlement addressed the animating principle of this lawsuit: that these GM pickup trucks posed a serious—but remediable—safety hazard.

The settlement was criticized and rejected by both federal and state courts.[56] One of the criticisms was that the coupons were inadequate as the sole redress for the injured class members.

The GM case, and others, served to demonstrate the problems inherent in non-cash coupon settlements. In the years after the GM case, courts began demanding more stringent class protections.

Coupon settlements must be distinguished from other forms of relief that do not actually deliver dollars into the hands of the class but which may be entirely appropriate. For example, credits to existing accounts are usually adequate substitutes for mailing checks to each class member; indeed, crediting accounts is more efficient than mailing and the savings should be passed on to the class members through larger distributions. 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 *cy pres* awards is advisable, as discussed in Guideline 7. The comments below are directed solely to coupon settlements that only offer class members the opportunity to purchase a product or service from the defendant in the future at a claimed discount from the regular price to the consumer.

B. Discussion

Aside from the effect of CAFA, which caused counsel to be generally wary of coupon class action settlements, the considered view today is that unless a coupon settlement provides increased benefits to class members and possesses certain safeguards, they should be avoided for the following reasons:

1. Except in unusual circumstances, there is usually no principled reason why delivery of cash settlements cannot be achieved, aside from the fact that the defendant prefers not to do so.

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 more, others get less. This situation is

---

[56] *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); *Bloyed v. General Motors Corp.*, 881 S.W.2d 422 (Tex. App. 1994), *aff'd*, *General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996).

at its most aggravated when the coupon requires purchase of a new car or other "big ticket" item.

3. Even where the coupon is for a small ticket item or 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.

4. Policy considerations disfavor rewarding the wrongdoing defendant with new sales from the victims of its illegal practices.

This is not to say that coupon settlements are invariably suspect. Such relief can, in some instances, provide benefits to classes that would support entering into one. A defendant could be willing to settle for coupons whose actual value to the class could be materially greater than a cash settlement that the defendant might otherwise make. This is because coupons can provide benefits to a defendant—the defendant obtains increased sales, a chance to re-establish brand loyalty, lower administrative costs when the settlement otherwise might require a claims review, or a delay of settlement payments until the future. This could be weighed against the nature of the underlying claim and whether it was the kind of activity that could make class members wish to avoid giving any additional business to the company (as opposed to a claim that involved what would be considered less reprehensible behavior).

Class members could benefit by avoiding the inconvenience of having to fill out and submit claim forms. Coupons can also lead to substantial administrative convenience and efficacy: they can be directly mailed, obviating the need for claim forms; they can avoid the situation where checks are returned as undeliverable (or otherwise); they can avoid the possibility of unredeemed funds; and they can avoid the problem of a defendant who wishes a reverter from a common fund. These are all laudable concerns of value to a class.

Such settlements may also make sense where the individual cash recovery may be so small that it is exceeded by the costs of the cash distribution and, therefore, a greater coupon value or coupon distribution could be the most (if not the only) effective way to provide the class with benefits. Finally, coupons may be all that an impoverished defendant may be able to provide. Thus, particular facts involved in a proposed coupon settlement may justify it, such as one case, where proponents averred that the coupons involved could be redeemed for any merchandise sold at Sears stores (not merely the services and merchandise at issue in the litigation) and that 99.2% of the coupons issued were redeemed.[57] Similarly, in another case, a settlement "provided that Jiffy Lube would stop charging the environmental fee in its company-owned stores and

[57] *In re Sears Auto. Ctr. Consumer Litig.*, No. C-92-227-RHSFMS(JSB), 1997 WL 27112, at *1 (N.D. Cal. Jan. 17, 1997).

would give those customers a coupon good for $5 off an oil change."[58] The court of appeals affirmed the trial court's settlement approval, noting 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 stated it would be reasonable to assume that the practice would have continued if no lawsuit had been brought. . . . The expert also stated the coupons were an additional benefit. . . . Here, the expert noted 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."[59]

C. NACA Guideline

Coupon settlements have many disadvantages and should be proposed by class counsel only in the rare case. Coupon settlements embolden defendants to try to obtain them in other cases and thereby adversely affect the ability to obtain monetary relief in other cases. Nonetheless, the rare instances do exist where they may be appropriate or add value to a settlement that otherwise could not be obtained for a class. Such instances include settlements where: (1) the primary goal of the litigation is injunctive and the defendant agrees to an injunction; (2) the coupons are good for the purchase of small ticket consumable items which class members are likely to purchase, and represent true discounts that would not otherwise be available; (3) the coupons are freely transferable, (4) the coupons are in addition to, and can be added to, any already-existing coupons or sales incentives; or (5) the coupons are stackable (i.e., a consumer can use more than one in a transaction).

A few additional precepts are clear:

Coupon-based settlements should never require identifiable class members to purchase major, large ticket items from the defendant as the sole significant relief to the class.

Coupons should usually have some form of guaranteed cash value. For example, the coupons could have a lesser cash redemption value (either upon issuance or within a reasonable period of time) that still gives the class members a benefit that is significant in relation to the actual damages that would be provable at trial.

Coupon settlements should never be proposed to the court unless it is apparent that the defendant is providing greater true value (i.e., not just the face value of the coupons or their potential value) to class members than would be available from a monetary settlement. Even though there may be legitimate tax or financial-accounting

---

[58] *Bayhylle v. Jiffy Lube Int'l, Inc.*, 146 P.3d 856, 858 (Okla. Civ. App. 2006).

[59] *Id.* at 860.

reasons why a greater recovery for class members can be had from a coupon settlement, class counsel should inquire about a defendant's claimed reasons why it cannot do a monetary settlement, as well as inquire as to any already-extant or planned coupon discounts or pending sales initiatives.

The beginning assumption should always be that defendants prefer coupon to monetary settlements because they believe the true value to be less. Since defendants will usually be in a superior position to predict the ultimate redemption rate and benefit to the class, their preference for a coupon settlement must be viewed with skepticism. Also, as discussed above, the nature of the underlying claim should be considered to avoid leaving class members with the choice of doing business with a defendant whose conduct appeared reprehensible instead of getting money outright.

Coupons should be redeemable for any goods or services offered by the defendant, not just the goods or services at issue in the case. Such a coupon could have especial value for class members. Particularly with consumer products, a coupon good for any good or service offered by the defendant will be far more valuable to the class and more likely to be redeemed.

Finally, in considering a coupon settlement, counsel might wish to consider the administrative advantages of such a settlement, as discussed above.

Class counsel and defendants should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon. By doing so, a public record will be made of what works and what does not work in coupon settlement cases.

GUIDELINE 5

Additional Compensation to Named Plaintiffs

A. The Issue

Serving as a class representative sometimes requires significantly greater effort, and sometimes greater risk, than is required of the absent class members. In addition, the class representative's willingness to serve in that capacity enables the litigation to be brought in the first place. This Guideline addresses the considerations when class counsel seek court approval of additional compensation to a class representative beyond the representative's *pro rata* share of settlement proceeds.

B. Discussion

Early cases take the view that it is a conflict of interest for named plaintiffs to receive anything more than their proportionate share of damages in amounts which are equal to those received by absent class members. The theory was that named plaintiffs, like class counsel, are fiduciaries to the class and should not benefit from class litigation any more than the similarly situated absent class members. Similar concerns presumably underlie the prohibition of these awards in private securities cases, except to the extent they reimburse the named representatives for expenses incurred in the action (including lost wages).[60]

After those early cases, however, many courts have approved extra payments to named plaintiffs in recognition of their efforts in achieving a settlement.[61] A 2006 comprehensive empirical study showed that extra payments to named plaintiffs were made in 28% of class action settlements reported over a nine-year period.[62]

Many cases note the public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases.[63] These cases are based on the premise that named plaintiffs undertake obligations, provide input, and

---

[60] *See* 15 U.S.C. § 78u-4(a)(4); *see also* 15 U.S.C. § 78u-4(a)(2)(A)(vi) (requiring named plaintiff in securities litigation to file a sworn certification with the complaint that "states that the 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 ordered or approved by the court in accordance with paragraph (4)"). *But see Great Neck Capital Appreciation Inv. P'Ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 412 (E.D. Wis. 2002) (approving incentive awards in securities case).

[61] *See, e.g.*, *Espenscheid v. Directstat USA, L.L.C.*, 688 F.3d 872, 876-77 (7th Cir. 2012) (Posner, J.); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1037–38 (8th Cir.2002); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

[62] Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1308 (2006).

[63] *Espenscheid*, 688 F.3d at 876-77; *Cook*, 142 F.3d at 1016; *In re Cendant Corp.*, 232 F. Supp. 2d 327, 344 (D.N.J. 2002); *Van Vraken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 300 (D. Cal. 1995) (listing factors).

take risks not shared equally by absent class members, thus justifying different treatment. Recent cases continue to make these same points.[64]

The amounts awarded in reported cases vary widely from small payments to amounts in the tens or—rarely—even hundreds of thousands of dollars or more.[65] But most extra payments are more modest. A large study found that the median award was $4,357.[66]

Recently, a few courts have suggested a possible return to the early decisions' insistence that class representatives receive similar settlement recoveries to those received by the class members.[67]

One court of appeals has held that an agreement under which extra payments for named plaintiffs increase as the total settlement value increases, but then tops out at a certain settlement amount, creates an impermissible conflict of interest because it discourages class representatives to push for more in settlement once the maximum has been reached.[68] Moreover, the same court of appeals has held that a retainer agreement that makes eligibility for an extra payment to named representatives contingent on support for a class action settlement proposed by class counsel creates an impermissible conflict of interest and constitutes inadequate representation.[69]

C. NACA Guideline

---

[64] *See, e.g.*, *Espenscheid*, 688 F.3d at 876-77 (Posner, J.) (noting that an "incentive reward is designed to compensate [the named plaintiff] for bearing the[] risks" that she will have to pay costs as well as for time "spent sitting for depositions and otherwise participating in the litigation") (internal citations omitted).

[65] *See, e.g.*, *Cobell v. Salazar*, 679 F.3d 909, 916 n.5, 922-23 (D.C. Cir. 2012) (affirming payments ranging from $150,000 to $2 million in unusually lengthy and complex settlement totaling $3.4 billion); *Fears v. Wilhelmina Model Agency, Inc.*, No. 02-civ-4911(HB), 2005 U.S. Dist. LEXIS 7961, at *9-10 (S.D.N.Y. 2005) (approving incentive awards of $25,000 and $15,000; noting cases approving awards as low as $336 and as high as $303,000). *See* Eisenberg & Miller, *supra*, 53 UCLA L. REV. at 1308.

[66] *See* Eisenberg & Miller, *supra*, 53 UCLA L. REV. at 1308.

[67] *See In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) (leaving open the question whether extra payments are ever permissible); *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1161 (9th Cir. 2013) (holding that "incentive 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).

[68] *See Rodriguez v. W. Publ'g Corp.* 563 F.3d 948, 958-60 (9th Cir. 2009); *see also Rodriguez v. Disner*, 688 F.3d 645, 653-58 (9th Cir. 2012) (holding that attorneys who represented the conflicted named representatives committed an ethical violation, and affirming denial of attorney fees to those attorneys).

[69] *Radcliffe*, 715 F.3d at 1164-68.

Awards to named plaintiffs are appropriate in recognition of their willingness to undertake the representation of class members. Consumers who represent an entire class should be compensated reasonably when their efforts are successful and compensation would not present a conflict of interest. The amount that is reasonable depends on the circumstances of the case, including the factors listed below. Whatever the amount, the payment must be submitted to the court for approval.

In some cases, the amount requested as an incentive award, given the court's knowledge about the advanced stage of the case or other procedural facts, will be so obviously reasonable that only minimal scrutiny will be required for approval, at least in the absence of any objection from class member. In all other cases where the court is considering whether to award an extra payment, it should consider various factors, including (1) whether the plaintiff incurred expenses or spent time responding to written discovery, conferring with counsel about case background or settlement issues, or performing any other tasks associated with the prosecution of the litigation; (2) whether the plaintiff's deposition was taken, how long it took, the amount of travel or whether other disruption in schedule was involved; (3) whether the plaintiff testified at trial or at any pre-trial hearing; (4) whether the plaintiff assumed any risks as a result of undertaking representation of the class, including risks of liability for costs or attorneys' fees, or risk of adverse extra-judicial action by defendant; and (5) the size of each plaintiff's individual claim in comparison to the extra payment sought by the named representative.

GUIDELINE 6

Class Member Buyoffs/Rule 68

A. The Issue

Defendants sometimes make offers of judgment to class representatives under Federal Rule of Civil Procedure 68 or state analogues in an effort to defeat class actions. If the offer is made prior to class certification and would satisfy all of the class representative's claimed damages and associated relief (such as attorneys' fees), the defendant may argue that the offer moots the class representative's claims and, as a result, the class action as well. Put another way, defendants maintain that a pre-certification offer for the full amount of the representative's claim requires dismissal of the entire action, including, therefore, the claims of the putative class. By using offers of judgment directed at the class representative, a defendant may buy off the entire class for the price of a single class representative's claim. Even in cases involving more than one class representative, the cost to the defendant would equal no more than the aggregate value of the class representatives' claims, which is often pocket change to a defendant facing a potential class comprising thousands of harmed consumers. The defendant thus gets rid of a potentially costly problem at bargain-basement prices. More importantly, the absent putative class members get no relief, and the public is deprived of the full measure of the law's deterrent effect—exactly what a class action is supposed to deliver.

A similar "pick off" problem can occur where the offer is a straightforward settlement offer to the class representative rather than a formal offer of judgment. However, in that circumstance, the only issue is whether the class representative decides to accept the offer. An unaccepted settlement offer should not carry with it any continuing impact on the putative class action case.

B. Discussion

This use of offers of judgment poses a threat to class actions, particularly consumer class actions where any one plaintiff's damages generally are small, and thus will only be recovered if the class action device is available. Moreover, it might encourage multiple actions where one class action would promote efficiency. This threat was recognized in *Deposit Guaranty National Bank v. Roper*,[70] where the Supreme Court noted that "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions;

[70] 445 U.S. 326 (1980).

moreover, it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement."[71]

An accepted settlement offer or Rule 68 offer of judgment by the only class representative (or by all representatives) will end an uncertified putative class action unless the court allows the substitution of new individuals to seek certification going forward. That much is uncontroversial, although some courts have expressed a dim view of defendants who make such "pick off" settlement offers in class actions.[72]

Some, but not all, decisions have held that pre-certification offers of judgment are improper in a class action, at least where a motion for class certification is pending.[73] These cases—which held that the *pendency* of a class certification motion kept the class claims alive—created an incentive for defendants to make offers of judgment *before* a certification motion had been filed. In *Weiss v. Regal Collections*,[74] the Third Circuit held that even where an offer of judgment had been made prior to the filing of a class-certification motion, "[a]bsent undue delay in filing a motion for class certification, . . . where a defendant makes a Rule 68 offer to an individual claim[ant] that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint."[75]

A more difficult question is whether an *unaccepted* Rule 68 offer that would, if accepted, provide full relief to the plaintiff moots that plaintiff's claims.[76] Some courts have held that such mootness also moots any putative class action predicated upon such claims.[77] These courts have ruled that mootness has occurred even though (1) unaccepted offers generally are nullities in contract law; and (2) Rule 68 provides that an offer "is considered withdrawn" if not accepted within 14 days after it is made.[78]

In *Genesis HealthCare v. Symczyk*,[79] the Supreme Court held, by a 5-4 vote, that a defendant in a Fair Labor Standards Act (FLSA) collective action can obtain dismissal of the entire action by offering complete relief to the named plaintiff before the collective

---

[71] *Id.* at 339.

[72] *Kagan v. Gibraltar Sav. & Loan Ass'n*, 35 Cal. 3d 582 (1984).

[73] *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003); *Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir. 1999); *see* NEWBERG at § 15.36 (4th ed. 2002).

[74] 385 F.3d 337 (3d Cir. 2004).

[75] *Id.* at 348.

[76] *See Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948, 952-53 (9th Cir. 2013) (detailing circuit split).

[77] *Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir. 1999).

[78] *See* Fed. R. Civ. P. 68 (a)-(b).

[79] 133 S. Ct. 1523 (2013).

action is certified.[80] According to the Court, the offer of complete relief to the named plaintiff rendered moot the entire case, including the absentees' claims. Although FLSA *collective* actions are not Rule 23 *class* actions—the principal difference being that the FLSA requires absentees to opt in to the collective suit—some courts may apply *Genesis* to Rule 23 cases.

But *Genesis* was premised on the *assumption* that the defendant's unaccepted offer to the plaintiff of "complete relief" mooted the plaintiff's individual claims. The Court made this assumption because the plaintiff conceded the point below and did not contest it until its Supreme Court merits brief.[81] Based on that assumption that the representative plaintiff's claims were moot, the Court held that the entire FLSA collective action was moot. The *Genesis* majority, therefore, did not reach the question whether an *unaccepted* offer of complete relief moots a named plaintiff's claims.

The four-Justice dissent, written by Justice Kagan, took a different approach. It opined, first, that the question whether an unaccepted offer of complete relief can moot a plaintiff's claims was properly before the Court, and, second, that "an unaccepted offer of judgment cannot moot a case."[82]

> We made clear earlier this Term that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." . . . "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." . . . By those measures, an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer "leaves the matter as if no offer had ever been made." [case citations omitted] Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn." Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.
>
> For this reason, Symczyk's individual claim was alive and well when the District Court dismissed her suit. Recall: Genesis made a settlement offer

[80] *Id.*

[81] *Id.* at 1528–29.

[82] *Id.* at 1533 (Kagan, J., dissenting).

> under Rule 68; Symczyk decided not to accept it; after 10 days, it expired and the suit went forward. Symczyk's individual stake in the lawsuit thus remained what it had always been, and ditto the court's capacity to grant her relief. After the offer lapsed, just as before, Symczyk possessed an unsatisfied claim, which the court could redress by awarding her damages. As long as that remained true, Symczyk's claim was not moot, and the District Court could not send her away empty-handed. So a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home.[83]

The Ninth Circuit, in *Diaz v. First American Home Buyers Protection Corp.*,[84] has followed Justice Kagan's dissent, holding that an unaccepted offer of complete relief cannot moot a plaintiff's claim.[85] Given the dissent's powerful logic, other circuits are likely to follow suit. On the other hand, an accepted offer, made prior to class certification, will, under *Genesis*, moot the named representative's claim and, thus, likely the entire class action unless additional or substitute representatives remain.

C. NACA Guideline

Class counsel should bear in mind the critical importance of impressing upon prospective clients that an individual who accepts the role of representative in a class or collective action has far more at stake than her own claims. The representative takes on a fiduciary responsibility to the class, an effective promise that the claims of the absent putative class members will be vindicated whenever possible.[86] Class action lawyers should therefore counsel their prospective representative clients on these fiduciary responsibilities and, specifically, on the possibility that defendants will attempt to undermine those responsibilities by making offers of judgment. Although a class representative retains the right to accept a pre-certification settlement or offer of judgment, a prospective class representative advised of his or her fiduciary responsibilities to the class will be less likely to accept because of its potential to derail the class action that the class representative has pledged to support. Class representatives willing to refuse offers of judgment play an important role in preserving the class action.

Advocates should not accept at face value a defendant's assertion that an offer of judgment, even if accepted, will fully redress the named plaintiff's claims. Completely

---

[83] *Id.* at 1533-34.

[84] 732 F.3d 948 (9th Cir. 2013).

[85] *Id.*; *see also Bais Yaakov Of Spring Valley v. ACT, Inc.*, No. 12-40088-TSH, 2013 WL 6596720 (D. Mass. Dec. 16, 2013).

[86] *See* Fed. R. Civ. P. 23(a)(4) (requiring, as a condition of class certification, that "the representative parties will fairly and adequately protect the interests of the class").

satisfying the plaintiff's litigation demands can be a tall order. For instance, often a defendant's offer for a sum certain will not fully redress the plaintiff's claims measured at their maximum when those claims (or associated relief, such as attorneys' fees) are for unliquidated amounts that cannot be shown to have fully compensated the plaintiff's injuries until the claims are litigated to judgment. If the defendant cannot show that its offer would provide the named plaintiff with complete relief, then the named plaintiff's claim cannot be deemed moot, and both her claim and the class action remain alive.

Any conclusion that a class representative's claim is rendered moot by an offer of judgment for complete relief is based on mootness doctrine under Article III of the Constitution, which governs the justiciability of claims in *federal* courts. Advocates should be aware that state-court mootness doctrine may be considerably more flexible and may not allow an accepted pre-certification offer of complete relief to a named plaintiff to moot a class action.

GUIDELINE 7

Cy Pres Awards

A. The Issue

Cy pres arises in two different contexts in a class action: First, and by far most commonly, money remains in a settlement fund after distribution to class members. Second, a developing approach seeks *cy pres* at the beginning of the case, either as the sole monetary relief or in addition to distribution of funds to class members.

This Guideline addresses the contexts in which a *cy pres* distribution might arise and the factors that determine whether a particular *cy pres* distribution is appropriate. When is *cy pres* meaningful? How is the suitability of a *cy pres* recipient determined? What is the role of the court and of class counsel in recommending recipients of an award?

B. Discussion

1. Origins of *cy pres* in class actions.

The term "*cy pres*" comes from the Norman-French phrase "*cy pres comme possible*"—as near as possible.[87] A *cy pres* distribution occurs when funds from a settlement or judgment that belong to the class are distributed instead to organizations for the benefit of the class.[88] The concept of *cy pres* originated in trust law, in the area of wills as a way to "effectuate the testators intent in making charitable gifts."[89]

Courts have widely adapted the *cy pres* concept to the class action context as a way to distribute money belonging to the class rather than having it revert to the defendants.[90] Theoretical underpinnings notwithstanding, as *cy pres* has evolved in the

---

[87] "*Cy pres* is a rule of construction which courts employ to carry out the spirit of a trust's terms when literal application of such terms is not feasible." Susan Beth Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought By State Attorneys General*, 68 FORDHAM L. REV. 361, 406 n.212 (1999).

[88] A related alternative distribution method is fluid recovery (also called rolling restitution) where there is no direct payment to the class or to an organization, but rather the defendant agrees to some form of price reduction in the future. For example, if a fast food company were sued for charging excess sales tax, a *cy pres* distribution could consist of a payment of an amount to a food bank. A fluid recovery in the same case could consist of the company reducing the price of all its food products for a sufficient period of time to all its customers to recoup the tax overcharges prospectively. This Guideline will discuss some fluid recovery cases, but focuses on *cy pres* distributions.

[89] *E.g.*, *Dennis v. Kellogg*, 697 F.3d 858, 8119 (9th Cir. 2012).

[90] 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 McCall, Sturdevant, Kaplan,

class action context, its doctrine and opinion have diverged from *cy pres*' original trust doctrine. Some commenters disagree with the analogy of disbursements of settlement or damage funds in the class action context to the original *cy pres* doctrine. Those commenters feel that giving money to others, as part of a class action settlement, should be justified (or not) on its own terms—not by analogy to the original *cy pres* doctrine of trust law.

Regardless of its origins, now that a substantial amount of authority regarding *cy pres* in the class action context has developed in its own right, it is no longer necessary to look to trust law for authority on *cy pres*.

2. Current practices as to *cy pres*.

In most class actions, one of the most important considerations is forcing the defendant to disgorge undeserved profits. *Cy pres* is a good way to avoid reversion of residual funds to the defendant.[91] Because settlement funds in a class action settlement are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only when it is not logistically feasible and economically viable to make additional pro rata distributions to class members.[92] Including a *cy pres* component in the settlement agreement, after all claims are paid to identified class members, ensures that reversion does not occur—and also furthers the interests of the class members.

Newberg discusses the policies behind *cy pres* awards and concludes that *cy pres* distributions can be an appropriate exercise of the court's general equitable powers.[93] Newberg's conclusion is supported by a growing amount of case law.

Courts have found that including *cy pres* distributions, as part of a settlement agreement, are appropriate under the following circumstances:[94]

---

and Hillebrand, *Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 HASTINGS L. J. 797 (1995).

[91] Providing for a reversion allows the defendant to recoup disgorged amounts if not enough class members make claims. When there is a reversion, the defendant has every incentive to find ways to discourage an active and robust claims process. It is never appropriate for funds to revert to the defendant. It can be beneficial to include a consent decree with the settlement that ensures that the settlement fund shall be nonrefundable to the defendant.

[92] *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011). The court held that a class action settlement generates property interests, and each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves; the settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.

[93] NEWBERG at § 10.16 *et seq.*

[94] *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.1990); *In re Agent Orange Product Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987); *Nelson v. Greater Gadsden Housing Authority*, 802 F.2d 405, 409 (11th Cir. 1986); *Bebchick v. Public Utilities Commission*, 318 F.2d 187 (D.C. Cir. 1963); *State of West*

1. There is money remaining after the class members have been awarded damages.[95]

2. It is economically infeasible to distribute to the class. This occurs when the class members cannot be identified, the class composite changes, or when the *pro rata* share of the settlement is too small to justify individual payments.[96]

State courts have also approved *cy pres* remedies. The propriety of *cy pres*, including creation of a consumer trust fund, was discussed by the California Supreme Court in *State of California v. Levi Strauss*.[97] The court concluded (although its opinion discussed "consumer trust funds" rather than using the phrase "*cy pres*") that these awards are appropriate where there is a connection between the proposed use of the fund and the class on whose behalf the case was litigated, or where the proposed use furthers the purpose of the statutes that formed the basis for the underlying suit.[98]

When choosing an organization to receive *cy pres* funds it is important to remember that "[n]ot just any worthy recipient can qualify as an appropriate cy pres beneficiary."[99] The objective of *cy pres* is to achieve the best approximation, after distrib-

---

Virginia v. Chas Pfizer Co., 314 F. Supp. 710, 728 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079, 1083 (2d Cir. 1971); *Simer v. Rios*, 661 F.2d 655, 676 (7th Cir. 1981).

[95] *In re Pharm. Indus. Average Wholesale Price Litig*., 588 F3d 24 (1st Cir. 2009), the settlement including *cy pres* was found to be reasonable because all class members that filed a claim would receive treble damages and the *cy pres* distribution would only be the residual amount. In *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), the Second Circuit remanded the case back to the district court because it *failed* to consider using the excess funds towards treble damages for the class members.

[96] *In re Tyco Int'l Multidistrict Litig*., 535 F. Supp. 2d 249 (D.N.H. 2007), the settlement called for the continued re-distribution of unclaimed funds to class members according to their *pro rata* shares, until the costs of such re-distributions made it economically unfeasible to continue doing so.

[97] 41 Cal. 3d 460 (Cal. 1986). "As an alternative to individual distribution, interveners' declaration proposed that the settlement money be used to establish a nonprofit corporation which would administer a 'consumer trust fund.' This corporation would engage in consumer protection projects, including research and litigation. It would be controlled by a board of nine directors, five appointed by the Governor and four by the Attorney General. The corporation would be organized so that it could receive funds from future class action settlements." *Id.* at 466.

[98] *Id.* at 472-473; *see also Boyle v. Giral*, 820 A.2d 561, 569 n.8 (D.C. 2003). There are a number of unreported cases supporting this position: *Vasquez v. Avco Fin. Servs. of Southern California*, No. NCC-11833B (Los Angeles Super. Ct. Apr. 24, 1984); *Beasley v. Wells Fargo Bank* (San Francisco Superior Court Case No. 861555) and a related case, *Kovitz v. Crocker National Bank* (San Francisco Superior Court Case No. 868914); *McClendon v. Sec. Pacific Nat'l Bank* (Alameda County Superior Court Case No. 613722-5); *Patterson v. ITT Consumer Fin. Corp.* (San Francisco Superior Court Case No. 936818); *In re Domestic Air Transp. Antitrust Litig*., No. 1-90 C 2485 MHOS & MAL No. 861 (consolidated Nov. 2, 1990); and *Starr v. Fleet Finance, Inc.* (Cobb County Georgia Superior Court Civil Action No. 9210-2314-06).

[99] *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (holding district court abused its discretion in approving class action settlement of suit challenging false advertisements of Frosted Mini Wheats).

uting funds to class members, of righting the wrongs caused by the underlying lawsuit. A *cy pres* award beneficiary must qualify as "the next best distribution" to giving the funds directly to class members.[100]

In 2012, the Ninth Circuit issued a cautionary decision, with an interesting discussion regarding the appropriateness of *cy pres* recipients. In *Dennis v. Kellogg Co.*,[101] the court reversed a district court settlement approval because the *cy pres* portions of the settlement were not sufficiently related to the plaintiff class or to the class's underlying false advertising claims. The court said, "[W]here, as here, class counsel negotiates a settlement agreement before the class is even certified, courts 'must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.' "[102]

Once it has been determined that *cy pres* is appropriate, courts have found:

1. The best use of *cy pres* funds is when they are used for purposes closely related to their origin.[103]

2. The funds may be distributed for a purpose near as possible to the underlying lawsuit.[104]

3. The funds may be distributed to a reputable charity or public service organization.[105]

When choosing a *cy pres* recipient, courts have stated that it is appropriate to consider:

1. The objectives of the underlying statute.

2. The nature of the underlying suit.[106]

---

[100] *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d. 1301, 1305 (9th Cir. 1990).

[101] 697 F.3d 858 (9th Cir. 2012).

[102] *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012). The settlement was also denied because of excessively high attorneys' fees.

[103] *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *see also In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012); *Nachshin v. AOL, L.L.C.*, 663 F.3d 1034, 1038-39 (9th Cir. 2011).

[104] *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679 (8th Cir. 2002).

[105] In *Plotz v. NYAT Maintenance Corp.*, No. 98 Civ. 8860(RLE), 2006 WL 298427 (S.D.N.Y. Feb. 6, 2006); *see also* NEWBERG at § 10:17 (4th ed.) (stating that, "[u]nder the equitable doctrine of *cy pres*, a court may distribute the residue of a class action settlement fund to an alternate recipient, typically a charitable organization").

[106] In *In re American Tower Corp. Sec. Litig.*, 648 F. Supp. 2d 223 (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.

3. The interests of the class members.[107]

4. The geographic scope of the case.[108]

Commenters unanimously agree that *cy pres* remedies are appropriate to ensure that undistributed residues are used to provide indirect benefit to absent members of the plaintiff class or to further the purposes of the statutes that formed the basis for the underlying litigation. There is less agreement surrounding whether it is appropriate to use a *cy pres* distribution for an entire settlement.

There have been two divergent views on the propriety of *cy pres* awards of the entire damage fund with no distribution to the class. One view is that counsel's fiduciary duty to the members of the class requires that there must always be a direct distribution to class members, and only the undistributed residue used for a *cy pres* remedy. There is significant agreement that class counsel should never limit refunds artificially by paying significant *cy pres* amounts without having first allowed for class member claims.

The other view is that where individual recoveries are unduly costly to distribute or too small to warrant the cashing of checks, *cy pres* awards of the entire damage fund is appropriate.[109] The Court of Appeals for the District of Columbia held that *cy pres* distributions, including the entire amount of the consumer settlement fund rather than just the residue, are being used or advocated increasingly where direct distribution of set-

---

[107] In *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*, Nos. 01-2118(CKK), 2007 WL 2007447 (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.

[108] In *Nachshin v. AOL, L.L.C.*, 663 F.3d 1034 (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.

[109] *Gammon v. GC Services Ltd. P'ship*, 162 F.R.D. 313 (N.D. Ill. 1995), was a suit under the Fair Debt Collection Practices Act involving a proposed class of four million people, each of whom would be entitled to 13 cents if plaintiffs prevailed. Class counsel, moving to certify the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, suggested *cy pres* distribution of the entire damage award. The defendant did not dispute the propriety of this remedy, which the court assumed would be suitable. Citing NEWBERG, the court noted that class actions are designed not only to compensate individuals who have been harmed, but also to deter violations of the law, especially when small individual claims are involved. It concluded: "Disgorgement of illegal gains from wrongdoers, together with . . . application of the recovery for the benefit of class members under *cy pres* doctrines, would fulfill the deterrence objectives of class actions." *Id.* at 321, quoting NEWBERG at § 4.36. (Note that, in *Mace v. Van Ru Credit Corporation*, 109 F.3d 338, 345 n.5 (7th Cir. 1997), *Gammon* was limited to its own unique facts.) In *Catala v. Resurgent Capital Servs., L.P.*, No. 08-cv-2401(NLS), 2010 WL 2524158 (S.D. Cal. June 22, 2010), the court approved a class action in which the entire settlement went to *cy pres*. This was because it was impractical to distribute the funds directly to the class members—each class member's share would have also worked out to be about 13 cents.

tlement funds to individual class members is impractical; and where important consumer goals, such as disgorgement of ill-gotten gains from and deterrence of future over-pricing and manipulation of market allocation by the offending entities, can be achieved."[110]

In 2013, Judge Posner wrote an opinion that reversed a district court order decertifying a class and in the process discussed the concept of *cy pres*-only distributions:

> But even when as in this case the aggregate claim—the sum of all the class members' claims—is meager, such treatment will often be appropriate. A class action, like litigation in general, has a deterrent as well as a compensatory objective. See, e.g., 1 Rubenstein, *et al.*, *supra*, §§ 1:7–8. "[S]ociety may gain from the deterrent effect of financial awards. The practical alternative to class litigation is punitive damages, not a fusillade of small-stakes claims."[111]

The opinion concluded its *cy pres* discussion with the observation that "[a] time-saving alternative might be a class action with the stated purpose, at the outset of the suit, of a collective award to a specific charity. We are not aware of such a case, but mention the possibility of it for future reference."[112]

An advantage of the use of *cy pres* (whether or not it is sought at the outset of the case) is that it often can serve as a substitute for a coupon-only settlement.[113]

Many commenters favor NACA's endorsement of a principle that when the relief to the class is quite small and when distribution would be economically inefficient, the better choice is to provide a significant *cy pres* payment rather than a *de minimis* check to each class member. Commenters have not been able to agree on the ceiling for this decision. Indeed, in some instances, $20 may be too little to warrant the effort, while in other cases, $10 may be enough.

Courts have a duty to apply the correct legal standards governing *cy pres* distributions and class counsel's role is to ensure that the court does not abuse its discretion in approving a *cy pres* settlement. It is the court's role to protect the absent class members' interests; courts should carefully review the competence and record of organizations that are proposed as recipients. NACA believes that serious consideration should be given to using the unclaimed portion of the award for a long-term grant to an existing organization with competence in the issues raised in the underlying litigation. This en-

---

[110] *Boyle v. Giral*, 820 A.2d 561, 569 (D.C. 2003).

[111] *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013).

[112] *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013).

[113] Coupon settlements are discussed in detail in Guideline 4.

sures that projects are of sufficient duration to result in real and concrete benefit to absent class members.

One commenter also voiced concerns that *cy pres* recipients might be chosen who might otherwise become objectors to the settlement, pointing out the inevitable conflict between the recipient's financial self-interest and its obligation to its members or constituents. And certainly, groups that object to a settlement should never be given a *cy pres* payment later in that case. (This does not mean that a public interest group that sometimes files objections to inadequate class action settlements should never accept *cy pres* funds, but rather that it should never do so in a case where it has any interest—as counsel for the class, as objector, as amicus curiae, or otherwise.)

3. Developments in *cy pres* law.

The use of *cy pres* in class actions—consumer class actions in particular—has become commonplace. However, in recent years, courts have indicated misgivings about some current practices in awarding *cy pres*.

Nachshin v. AOL, L.L.C.[114] serves as a cautionary case. All parties agreed that the monetary damages were small and difficult to ascertain. The maximum recovery at trial would have been the unjust enrichment AOL received as a result of its footer advertisement sales, or about $2 million. Divided among the more than 66 million AOL subscribers, each member of the class would receive only about 3 cents. The cost to distribute these payments would far exceed the maximum potential recovery. In lieu of a cost-prohibitive distribution to the plaintiff class and at the district judge's suggestion, the parties agreed that AOL would make a series of charitable donations.[115]

This distribution seems on its face to be a good thing—good organizations got the money—but it was not a good proposal, in two ways.

---

[114] 663 F.3d 1034, 1037 (9th Cir. 2011).

[115] In this case, because the 66,069,441 plaintiffs were geographically and demographically diverse, the parties claimed they could not identify any single charitable organization that would benefit the class or be specifically germane to the issues in the case. The proposed settlement—rejected by the Ninth Circuit—was that AOL would donate $25,000 to three charitable beneficiaries: (1) the Legal Aid Foundation of Los Angeles, (2) the Federal Judicial Center Foundation, and (3) the Boys and Girls Club of America (shared between the chapters in Los Angeles and Santa Monica). *See also Perry v. Fleet Boston Fin. Corp.*, 229 F.R.D. 105 (E.D. Pa. 2005), where the court reasoned that although *cy pres* distributions are usually used for residual funds, they can also be appropriate when the individual claims of class members are quite small. Thus, instead of allowing defendants' wrongs to go unpunished because there is not a viable class, *a cy pres* distribution is appropriate. In *In re Katrina Canal Breaches Consol. Litig.*, 263 F.R.D. 340 (E.D. La. 2009), the court reasoned that, in a case in which distribution of individual claims may shrink recovery by class members because of a burdensome process, a *cy pres* distribution may be relevant from the start. The Fifth Circuit reversed the district court opinion on immunity grounds, but did not address *cy pres* issues. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 451 (5th Cir. 2012).

First, the concept that AOL was making charitable contributions misses the point of *cy pres*—the money no longer belongs to the defendant but to the class members—and AOL should not be the one to make the distributions. There is agreement that it is the duty of class counsel (not the defendant) to propose *cy pres* recipients to the court for approval. In addition, commenters suggest that, because *cy pres* funds are by definition property of the class as a whole, participation of the defendant in the selection of the *cy pres* recipient raises serious problems. There is really no circumstance in which it is appropriate for a defendant to participate in the selection process.

It is quite true that many defendants (1) do not want worthy and effective organizations to get the money to do good work, (2) prefer to see the money go to noncontroversial uses, and (3) too often, will attempt to have the funds allocated to organizations they control or already support (which gives the defendant impermissible control over the *cy pres* and dilutes the benefit of the *cy pres* since the defendant is not adding new dollars for good purposes, but often merely taking credit for old dollars it already was committed to spend).[116] At a minimum, care must be taken to ensure that no *cy pres* payments are proposed to any entity in which any defendant has any interest, financial or otherwise.

Second, and the reason that the Ninth Circuit rejected the proposal, was the fact that the proposed recipients—the Legal Aid Foundation of Los Angeles, the Federal Judicial Center Foundation, and the Boys and Girls Club of America (shared between the chapters in Los Angeles and Santa Monica—were "charities which, though no doubt pursuing virtuous goals, have little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved."[117]

The Ninth Circuit was quite clear in its condemnation of *cy pres* that was not as close as possible to giving the money directly to class members:

> When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety. . . . To remedy some of these concerns, we held in *Six Mexican Workers* that *cy pres* distribution must be guided by (1) the

---

[116] An industry group commenter said, "a *cy pres* distribution in an FDCPA class action should be made to an organization that promotes education of consumer laws and laws relating to the credit and collection industry." Although this might be an acceptable *cy pres* recipient, NACA does not believe it is the only possible one. NACA observes that industry groups often favor consumer education efforts over any advocacy that might actually curtail abusive industry practices.

[117] *Nachshin v. AOL, L.L.C.*, 663 F.3d 1034, 1039 (9th Cir. 2011).

objectives of the underlying statute(s) and (2) the interests of the silent class members.[118]

One year later, the Ninth Circuit reaffirmed its position on *cy pres*. In *Dennis v. Kellogg Co.*,[119] the court expressed concern about "the distinct possibility that the asserted $5.5 million value of the product *cy pres* award and the remaining cash *cy pres* award will only be of serendipitous value to the class purportedly protected by the settlement," and rejected the settlement, and remanded the case.[120]

Courts' dislike of self-dealing when distributing funds will continue to be an issue.[121]

A recent pronouncement by the Chief Justice of the United States Supreme Court added to growing skepticism about *cy pres*, when Chief Justice Roberts issued a peculiar statement when the Court denied certiorari in Facebook case. Although he agreed with denial of certiorari, the Chief Justice noted that *cy pres* remedies "are a growing feature of class action" and that in the future, the Court might need to "address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on."[122]

Thus, the Ninth Circuit and other courts keep an eagle eye on *cy pres* settlements—from a position of adhering to the purposes of *cy pres*—while the Chief Justice raises questions about the very idea of *cy pres*.

C. NACA Guideline

For all the reasons discussed above, NACA encourages lawyers to consider *cy pres* when appropriate but to adhere to the highest possible standards of advocacy and ethical conduct when proposing *cy pres*. This Guideline is aimed at helping lawyers avoid known or future pitfalls.

---

[118] *Id.* at 1038-39.

[119] 697 F.3d 858 (9th Cir. 2012).

[120] *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012).

[121] It is, perhaps, ironic that the American Law Institute has inserted itself into this fray, by proposing that *cy pres* policies would be well-fulfilled by itself receiving *cy pres* funds, which it could use "to further its mission of clarifying and improving the law." Am. L Inst., Undistributed Class Action Funds, www.ali.org/index.cfm?fuseaction=support.cy_pres_statement (last visited Apr. 7, 2014).

[122] *Marek v. Lane*, 134 S. Ct. 8 (2013).

When it is not possible to distribute all settlement funds to class members, class counsel should negotiate for a *cy pres* distribution rather than agreeing to a reversion. Class counsel should recommend *cy pres* remedies that will provide indirect benefit to absent members of the class or which will further the purposes of the underlying litigation. They should also recommend mechanisms which will provide for monitoring by class counsel, and, ultimately, judicial oversight of the expenditure of the funds.

When feasible, direct distribution to class members always takes precedence over an initial *cy pres* distribution. If the potential distribution to individual class members is significant and can be achieved as a practical matter, then that always is the best method. As discussed in Guideline 12 (Claim Forms), the best practice is to issue checks directly to class members (or credit their existing accounts with the defendant) without requiring them to file claim forms at all.

Class counsel should insist on direct distribution of damages to class members before recommending a *cy pres* remedy for the undistributed residue except in unusual circumstances. These include instances where individual recoveries are unduly costly to distribute because, for example, defendants have no computerized records that would enable them to generate a list of class members' names and addresses, or where individual damages are too small to warrant the issuance, processing, and cashing of checks.

It is the duty of class counsel to make sure *cy pres* distributions are well-founded and appropriate.[123] In proposing a *cy pres* remedy, class counsel should propose a disposition of the unclaimed portion of the award that will (1) protect the interests of the persons injured by the illegal conduct and thus indirectly benefit absent class members, and/or (2) promote the purposes of the statutory prohibitions sought to be enforced in the underlying litigation. In other words, *cy pres* distributions must protect and promote the interests of the class and be sufficiently related to the plaintiff class and claims.

Class counsel should insist that the recipients of the award be accountable to the court and should enter into a memoranda of understanding to that effect with recipient organizations. Limiting restrictions should be imposed upon recipients to make sure that funds are used appropriately. Class counsel should then monitor the recipients to ensure that these goals are met.[124]

---

[123] In *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*, Nos. 01-2118(CKK), 2007 WL 2007447 (D.D.C. July 10, 2007), the court recognized that plaintiff's counsel took steps to ensure the money would go to causes related to the lawsuit.

[124] One commenter noted that *cy pres* awards should not provide long-term employment for class counsel, and proposed selection of a recipient that did not require monitoring. NACA believes that there is no re-

Class counsel should be prepared to show the court how the organization selected to receive the *cy pres* funds has the ability and competence to work for the interests the underlying litigation sought to protect. This can be accomplished by providing information to the court about the current or proposed officers, directors, and staff of the organization. The work to be done by an existing or new organization should be set forth in a comprehensive proposal, together with time tables for accomplishing that work, which should indicate how the class will be indirectly benefited or the purposes of the underlying statutes will be furthered by these efforts.

Class counsel should ensure that no *cy pres* payments are proposed to any entity in which any defendant has any direct or indirect interest, financial or otherwise. Under no circumstance should the defendant have any role in the choice of the *cy pres* recipient. Class representative and class counsel should recommend a recipient of *cy pres* funds to the court, to be approved as part of the fairness hearing.

To ensure full accountability, counsel should ensure sufficient disclosure of the details of the *cy pres* plan and the *cy pres* recipients as part of the notice to the class of any settlement, and should monitor the recipients to ensure that they use the *cy pres* funds strictly in accordance with the terms of the court's order. For long-term projects, counsel can oversee performance by requiring quarterly meetings with recipient organizations, semi-annual plans for work to be undertaken, and periodic reports of past accomplishments. Counsel should be entitled to compensation for work necessary to monitor implementation of the *cy pres* remedy at standard rates, with no enhancement or multiplier.

---

cipient who should be given unfettered and unreviewed use of *cy pres* money, because it is class counsel's duty to ensure that the *cy pres* funds were in fact spent in the interests of the class.

GUIDELINE 8

Attorney Fee Considerations

A. The Issue

The issue of attorneys' fees is important in class actions. If awards of attorneys' fees 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 fair and reasonable fee awards upon success. On the other hand, fee awards that are too high do not serve the best interests of the class members and have become the rallying point for criticism of class actions in general.

The prime focus of criticism is the size of the fees. In many instances, this problem is more apparent than real. For example, when the individual recovery is $50.00 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 were $15 million, then fees are less than 14% of the total class recovery. This makes the fee reasonable with respect to the total recovery, which is the proper comparison. Criticism focused on a comparison between total fees and individual recoveries are either ill-informed or merely convenient cover for persons who oppose consumer class actions for other reasons.

But some criticism of excessive fees cannot be so easily dismissed. In particular, compelling criticism has been directed at cases in which the actual cash received by the class is minimal, if any, and the only other benefits received by the individual members are coupons of questionable value.[125]

B. Discussion

The fundamental goal when calculating attorneys' fees in consumer class actions is to provide sufficient reward to motivate qualified class counsel to bring worthy cases, while avoiding unnecessary and undeserved payment. Importantly, given the required 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, but there is no perfect solution. Differences of opinion exist about the best method for calculating attorneys' fees, as well as the details of such a calculation.

---

[125] These considerations are discussed in the next section.

One viewpoint holds that class counsel should be paid only by lodestar (i.e., reasonable number of hours spent times a reasonable hourly rate), enhanced by multipliers when appropriate.[126]

Generally speaking, this is the approach mandated when calculating a defendant's liability for fees in a "fee-shifting" case, i.e., where the statute sued upon provides that the losing defendant is required to pay the prevailing plaintiff's fees. The difference of opinion centers on whether this is also the best approach to use when fees are being paid out of class relief or as part of a settlement agreement to resolve a class case. 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 virtually unbridled discretion. Therefore, adherence to the lodestar/multiplier approach makes some class actions impossible to bring, because rational class counsel are unwilling to file a case where the possibility of adequate compensation is unknowable. Some commenters noted another disadvantage to the lodestar/multiplier approach, contending that it provides little or no incentive to seek early settlement where available or for class counsel to perform work as efficiently as possible, instead inviting "churning." 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.[127]

The alternative method for calculating attorneys' fees in a class action case which recovers monetary relief (or its equivalent) for the class is to award an amount equal to a percentage of the total recovery obtained for the class members in the case.[128] While the precise percentage varies by case, there is authority for presuming an award in the 20%–30% range to be reasonable and appropriate in most cases.[129] Proponents of this

---

[126] 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*).

[127] REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237 (1985).

[128] *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).

[129] *See, e.g., Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989); *see also* the REPORT OF THE THIRD CIRCUIT TASK FORCE, *supra* note 127.

approach note that it keeps class counsel's financial interest closely aligned with that of the class itself, approximates the "free market" negotiated fees obtained in traditional contingency litigation (in which contingent fees of 33% to 40% are common), and avoids the disadvantages of lodestar/multiplier analysis noted above. 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 a standardized percentage approach (e.g., 20%–30%) results 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, rather than using an approach which does not do so.

Valuing the common fund, upon which a percentage may be based, also raises issues in some circumstances. 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. There is the issue of "coupon settlements," in which the relief to the class is in the form of coupons that entitle class members to purchase a product or service in the future at a discount or at no charge. These problems, which were discussed extensively in the original version of these Guidelines, have largely been resolved by the 2003 amendments to Rule 23 and the 2005 enactment of 28 U.S.C. § 1712. However, difficult questions of statutory interpretation remain due to the "poorly drafted" wording of this enactment.[130]

When a proposed settlement includes a *cy pres* distribution, some courts have suggested that it may be appropriate, when calculating attorneys' fees, to award a lower percentage for the portion of the fund going to *cy pres* as opposed to the class members themselves.[131]

One additional valuation issue remains. Many settlements are stated in total dollar amount available to the class, but provide that the unclaimed funds will revert back to the defendant. The amount of such reverting funds is likely to be higher when claim forms are required before class members receive their distribution,[132] but *some* amount of unclaimed funds will exist in almost any class action because many class members

[130] *In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013).

[131] *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178-79 (3d Cir. 2013).

[132] *See* Guideline 11 on improved notice of settlement.

cannot be located with reasonable diligence. Whatever portion of the originally available settlement is returned to the defendant arguably reduces the actual "fund" obtained by class counsel for the class. The case law is mixed regarding this issue.[133] 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 dependent upon the amount actually paid to class members. The Advisory Committee Notes to the 2003 amendments to Rule 23, subdivision h, suggest that courts examine the extent to which claims procedures result in actual payout to the class, but does not squarely take a position on this conflict among the circuits.

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.[134] This has the benefit of flexibility but suffers the disadvantage of unpredictability.

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.[135]

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.[136]

While this may avoid windfalls in individual cases, a "blended" approach would seem to undermine one of the purposes of the percentage of the fund method of calcu-

---

[133] *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*).

[134] *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).

[135] *See, e.g., Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (percentage of the fund method preferred in common fund cases, but either method permissible).

[136] *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).

lating fees, i.e., the possibility of a large fee relative to effort required as an incentive to undertake difficult and risky cases. It also is inconsistent with the observed results of the free market in individual contingent cases, which generally provide for set percentages based solely on client recovery.[137]

It is important to note that these alternative bases for awarding fees are not necessarily in 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.*,[138] 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).[139]

Whatever the method used to calculate fees, any contingent fee award must take into account the difficulty, complexity, and the risk of the case; the relief obtained for the class; the delay in payment; and the fact that some cases will result in no fee at all. Therefore, it is entirely appropriate in most class action cases to award fees that are in excess of a fee calculated solely on an hourly basis without any multiplier.[140]

When a fee is to be calculated on a percentage basis, there is no fixed percentage that is appropriate to all cases, though the vast majority of awards fall within the 20%–30% range. Some commenters and case law urge a "sliding scale" approach to percentage awards, i.e., the percentage awarded should be smaller when the class recovery is unusually large. But this view is controversial.[141] On the other hand, there are also cases where a percentage award in the "normal" range may be unreasonably low, for exam-

---

[137] *Cf. In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (ultimate goal in awarding class counsel fees is to match as closely as possible the "market rate" for legal services in the case).

[138] 860 F.2d 250 (7th Cir.1988).

[139] *Venegas v. Mitchell*, 495 U.S. 82 (1990).

[140] This concept is expressly stated in cases such as *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).

[141] *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").

ple, in a case where the primary relief obtained 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.[142] Some commenters argue that there is an inherent problem with negotiating fees with opposing counsel, even when counsel have first agreed on relief to the class. These commenters feel that because the court has an independent duty to examine the fees, early agreement does little but create the appearance of collusion between class counsel and the defendant.[143] Others contend that settlement often would be impossible to achieve unless the defendant understands the extent of their total exposure, and urge that there is no reason not to reach agreement on fees (subject to the court's later review) so long as negotiating fees follows agreement on relief for the class on the merits.[144]

C. NACA Guideline

Reasonable attorneys' fees must be awarded in consumer class actions so that lawyers are provided sufficient incentive to undertake the substantial risks involved in privately enforcing consumer protection laws. But excessive and unreasonable amounts should be neither sought nor awarded. 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 attorneys' fee is assessed from the defendant, not the class). We recognize that the determination of what is an "excessive" request is often difficult and uncertain. But this difficulty does *not* mean that a reasonable request equates to whatever a particular court might award in a procedural context where there may not be adversary briefing on the issue. Obligations to the class and concern for the long-run integrity of the class action system of justice require that class counsel not take undue advantage, even if a court might let it pass.

l. Fee Discussions During Settlement Negotiations.

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

---

[142] *In re GMC Pick-Up Truck Fuel Tank Prods. Liab Litig.*, 55 F.3d 768, 804 (3d Cir. 1995).

[143] *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).

[144] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.7 (2004).

all other statutory claims.[145] 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. In fact, some jurisdictions prefer that all fee discussions be postponed until the settlement is judicially approved, or at least until settlement negotiations have been concluded.[146]

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 to pay fees. It is also acceptable to negotiate fees after all relief has been agreed on for the class, and then submit the entire agreement to both the court and the class for review and approval.

In common fund cases, where recovery is not based on a fee-shifting statute, there is no need to discuss fees with the defendant because the class clients, not the defendant, pay the fee from the fund that was created by their counsel, in an amount decided by the court. If the amount of a fee is sought to be justified on a "percentage of the fund" basis, counsel should not negotiate a settlement that is 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.[147] So-called "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.

2. 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.[148] While 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 presented in percentage of the fund terms, absent direction otherwise from the court. Courts should ordinarily entertain fee requests on this basis in common fund

---

[145] *See White v. New Hampshire*, 455 U.S. 445, 452 n.14 (1982).

[146] *See In re Cmty. Bank of Northern Virginia*, 418 F.3d 277, 308 (3d Cir. 2005).

[147] *Staton v. Boeing*, 327 F.3d 938, 969–972 (9th Cir. 2003).

[148] *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).

cases, unless specific factors (such as significant injunctive or other non-monetary relief, other difficulties in assessing the true monetary value of class relief, etc.) justify the use of lodestar/multiplier analysis rather than percentage analysis in the particular case.

In the absence of special circumstances, the percentage award should generally fall within (or close to) the benchmark range of 20% to 30% of the fund value.[149]

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. Such cross-checks in typical cases simply add another level of analysis, and may even undermine the purposes of the percentage-of-the-fund approach. Where injunctive or other non-monetary relief is obtained, or where the common fund is difficult to value or its value depends upon future contingencies (such as the redemption of coupons), the lodestar/multiplier approach may properly supplant the percentage-of-the-fund benchmarks.

3. Issues Arising in Cases with Fee-Shifting Claims.

In a common fund case where the underlying claims are based on fee-shifting statutes, it is generally best to seek an additional amount representing the right to fees from the defendant directly, in order to maximize the net recovery to the class. It may be appropriate in such a case to merge the statutory fee into the common fund,[150] and to request fees measured as a percentage of the now-augmented total recovery.

In a statutory fee-shifting case that is not converted to a common fund case, fees should be recovered solely from the defendant and be based on lodestar analysis.

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 which may revert or has already reverted back to the defendant as undistributed funds. While it may be relevant to the calculation of a reasonable fee (for example, perhaps justifying a slightly larger percentage than otherwise appropriate) that a large total amount was initially made available for distribution to class members, the benchmark percentage figures (i.e., 20%–30%, in most cases) should be applied after

---

[149] *See, e.g.*, *Vizcaino v. Microsoft*, 290 F.3d 1043 (9th Cir. 2000), *cert. denied sub nom.*, *Vizcaino v. Waite*, 537 U.S. 1018 (2002) (1996–2001 survey of common funds valued at $50–$200 million; fees of 25%–40% awarded in half of the 34 cases examined); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 308 (3d Cir. 2005) (noting studies showing fee awards over 25% in large recovery cases); *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291 (9th Cir. 1994); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (20%–30% viewed as the "benchmark").

[150] *See Skelton*, *supra*.

deducting amounts that the defendant does not ultimately pay out as part of the settlement or judgment. It is the actual amount paid by defendant to class members, or in *cy pres* distribution, that represents the recovery in the case from which a percentage fee should be calculated. 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. Alternatively, and preferably, settlements can be negotiated which provide that any unclaimed funds be distributed *cy pres* rather than reverting back to the defendant. In that situation, a fee based on a percentage of the entire settlement amount can properly be brought upon final approval of the settlement.

5. Notice to the Class of Intent to Seek Fees.

Before the court can give final approval to a proposed class action settlement, notice must be provided to the class outlining the terms of the settlement.[151] One of the terms which should always be included in such notice is the maximum amount of attorneys' fees which class counsel will or may seek as part of the settlement. 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 intend 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, since that number would not be meaningful, or in pure statutory fee-shifting contexts, where 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.

Absent a compelling reason otherwise, the deadline stated in the class notice for class member objections should be after the date upon which class counsel will file their motion for attorneys' fees. One circuit has held that this timing is required as a matter of due process.[152]

6. Fees for Future Monitoring.

As discussed more fully in Guideline 15, counsel should be aware of the need to monitor the defendant's compliance with the settlement or judgment terms. The preferable way to provide for such effort is to include within any request for fees a provision

---

[151] Fed. R. Civ. P. 23(e)(1).

[152] *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 995 (9th Cir. 2010).

that an additional lodestar request may be submitted seeking compensation for such future efforts.

GUIDELINE 9

Class Member Releases

A. The Issue

The release of claims by representative plaintiffs and class members raises several questions. Is it appropriate to release class claims without individual class member signatures? When may the scope of the class claims released exceed the scope of claims certified by the court or the scope of the pleadings? Should the scope of the class representative's individual release be identical to the scope of the class release?

B. Discussion

In agreeing to settle a class action, the 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.[153] As in individual cases, defendants generally insist upon including releases within a negotiated settlement document. In some cases, defendants may also seek individual releases from class members, either as part of the language contained in claim forms or as an endorsement on settlement distribution checks. There does not appear to be any benefit from releases that do not exceed the scope of the *res judicata* bar, but neither does there appear to be any harm.

Before *Matsushita Electric Industrial Co. v. Epstein*,[154] 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."[155] 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.[156]

The Supreme Court's decision in *Matsushita* holds that *res judicata* bars relitigating non-certified claims (and even claims not contained in the pleadings) 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 should include a determina-

---

[153] *See Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

[154] *Id.*

[155] NEWBERG at § 12.17, at 321 (4th ed. 2002).

[156] *Id.* at 321*ff.*

tion that plaintiffs and class counsel adequately represent the class on all of the settled issues, even if certification of some of the issues was previously denied.

The unanimous view of those who submitted comments to the Guidelines was that if the scope of the class-wide release is limited to those claims certified by the court for class treatment, individual releases are unnecessary and unproductive. Although the consensus was that class counsel should be cautious in discussing settlement of claims beyond the scope of an earlier class certification order (or, if no order has yet been entered, beyond the scope of the pleadings), one commenter raised the issue that a defendant may be reluctant to pay substantial amounts to settle a case without the assurance that unpleaded claims are released. Several comments suggested that if settlement of such claims is agreed to, counsel should seek additional settlement compensation for class members.

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 necessary. For example, cases involving housing fraud typically involve several legal claims. Although not all of the claims may be suitable for class certification, the class representative must plead all claims, including individual claims, in a single complaint. One comment stressed that it is more favorable 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.[157] When there is a contested class certification motion, the only opportunity usually comes immediately after certification. Although a post-certification settlement requires notice of the settlement terms and an opportunity to object, class members are usually not given a second opportunity to opt out. 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.

In addition, there are serious, and probably fatal, objections to any settlement that purports to release potential future claims of persons who have not suffered any damage at the time of settlement. Settlements of this nature are rare, or even unknown, in consumer cases. Therefore, this Guideline will not discuss in depth the many issues relating to these settlements. 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. The Supreme Court addressed future-damage issues in *Amchem*

[157] *See* Fed. R. Civ. P. 23(e)(4).

Products, Inc. v. Windsor.[158] There, the Court found that including future-damaged persons in the class defeated the predominance requirement of Rule 23(a)(4) and also made it impossible for the named class members (who were not future-damaged) to represent the interests of the absent future-damaged class members, as required by Rule 23(b)(4).[159] In addition, the Court noted that there were significant problems of adequate notice to a class that included persons who were not then aware of their damages.[160] The CAFA of 2005 addressed these concerns as well, declaring that "a class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided."[161]

C. NACA Guideline

Except in unusual circumstances, counsel should not agree to any settlement that releases non-certified or non-pleaded claims. In addition, a claim should not be released unless the settlement includes relief for the claim. In such circumstances where non-certified or non-pleaded claims are released, class members must be given a later opportunity to exclude themselves from the settlement. The scope of the release must be fully set forth in the notice.[162] Counsel must strive to make the release understandable to class members.

Class counsel should proceed cautiously in discussing settlement of claims outside the scope of the pleadings or certified claims. The doctrines of *res judicata* and collateral estoppel may preclude subsequent class litigation based on alternative legal theories arising out of the same set of facts and thus it may be reasonable to release alternative claims that could have been asserted, even if not contained in the pleadings or specifically certified. There may well be circumstances where broad application of collateral estoppel is inappropriate and class counsel should be careful to avoid those circumstances.[163] Class counsel must discover the scope of cases pending against the defendant to be able to make a determination whether a "general release" is appropriate. To protect class members from releasing claims unknown or unforeseen to class counsel,

---

[158] 521 U.S. 591 (1997).

[159] *Amchem*, 521 U.S. at 624–627.

[160] *Id.* at 628.

[161] Pub. L. 109–2, 119 Stat. 5 (2005).

[162] When the scope of release in a proposed settlement of a class action is fully disclosed in the class notice, with opportunity for opting out, then such disclosure will strongly support the scope of release. Fed. R. Civ. P. 23(e).

[163] See Guideline 3 for a discussion of how collateral estoppel from an excessively broad release can damage homeowners.

counsel may consider adding a warning to the release exempting claims contained in pending litigation not disclosed by the defendant as of the time of settlement.

Class counsel should approach provisions that release claims not only against a named defendant but also against an absent third party with care. While 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 giving immunity to other wrongdoers without additional compensation for the class. Counsel should be particularly wary of third-party releases that identify the releases by description and not by name.

If a defendant seeks a release of claims arising from factual circumstances not alleged in the complaint, or as to which certification has been sought but not granted, class counsel should resist releasing these claims or, if appropriate, seek additional compensation to the class for such releases. Class counsel should be aware that a release of absent class members' claims not arising from the same factual predicates may be invalid and may increase the risk of settlement disapproval. If possible, negotiating certified claims should precede negotiating non-certified ones. Adequacy of representation as to non-certified claims should be addressed in the briefs supporting a proposed settlement.

Although a "general release" may be appropriate for the named class representatives, absent class members should not be required to release independent individual claims or claims as yet unknown in order to receive settlement benefits. Specifically, if the class settlement only provides injunctive benefits that do not result in restitution or other monetary payments to individual class members, the release should provide that individual damages claims are not being released. Similarly, class counsel should resist releasing procedural rights related to those individual damages claims, such as the right to proceed as a class.

In settling any consumer debt class action, class counsel should avoid release language that amounts to a confession of the validity of the debts or a waiver of class members' rights to defend collection actions or to seek *vacatur* of judgments. In settling class actions involving homes, class counsel should be especially careful not to include broad release language, and should expressly exempt or carve out from the release's coverage any class member's defenses to, or rights to, enjoin a foreclosure on their home.[164]

If class counsel has deemed it appropriate to require class members to submit a proof of claim form in order to receive compensation, then class counsel must seriously

[164] For additional guidance on releases in class actions involving home, see Guideline 3.

evaluate whether class members who fail to submit a claim form should be bound by any release.[165] Class counsel should consider requiring some form of direct (not publication) notice before releases bind a class member. In any such 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 to class members.[166] Conversely, in cases where submission of a claim form triggers coverage by a release, Class counsel should also 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 notice on the claim form that class members will release all claims should they return the form. This language may confuse and scare class members, particularly if the settlement fund is not a predetermined amount, but rather paid per claim form returned.

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.

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, and may in certain circumstances constitute a criminal offense. Class counsel should also avoid releases that purport to restrict public authorities' rights to bring civil enforcement or *parens patriae* claims; such releases are highly likely to prompt objections from state Attorneys General.

[165] For guidance on the appropriateness of using claim forms, see Guideline 12.

[166] For additional guidance on notice, see Guideline 11.

GUIDELINE 10

Confidentiality

A. The Issue

Because they are representative actions, class proceedings must be public. 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 upon whether basic information about the class action litigation is available. Because consumer class actions address widespread, similar practices by a defendant, the details about those practices are likely to be of interest to other victims who are considering filing (or have already filed) individual cases seeking damages. Widespread wrongful practices are also likely to be of greater public interest.

Nevertheless, privacy concerns may be raised by disclosure of certain information exchanged in discovery or filed with the court in consumer class actions, as with other types of litigation. Legitimate privacy concerns must be balanced against the interests of absent class members or non-litigants' legitimate reasons for making consumer class action information publicly available.

B. Discussion

Some commenters argue that class counsel should never voluntarily agree to a protective order that permits a defendant to designate discovery documents and information "confidential" and thereby precluding public access. These commenters recognize that there are some limited circumstances in which the courts have recognized legitimate bases for confidentiality, such as true "trade secrets" or other clear grounds. Those who opposed entry into such agreements for protective orders contend that they are almost always overbroad and defendants reflexively "over-designate" materials with little justification. By stipulating to entry of broad protective orders, class counsel fail to work against this overall trend, which offends public policy. Therefore, these commenters argue that the better approach is to require the defendant to make a showing to the court under the fairly stringent applicable standards.[167]

---

[167] *See, e.g.*, *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (general presumption in favor of public access to court records); *Goldstein v. Forbes* (*In re Cendant Corp.*), 260 F.3d 183, 193 (3d Cir. 2001) (presumption has particular force in class action cases); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (noting split in circuits regarding necessity of showing specific alleged harm to establish "good cause" under Fed. R. Civ. P. 26(c) for a protective order, but concluding that such specificity is always required if the claimed harm from disclosure is contended to be a threat to business as opposed to personal interests).

Other commenters disagree. Generally, while these commenters agree that defendants frequently designate too many documents as confidential and that the public interest would be better served with fewer and narrower protective orders, they believe that refusing to stipulate to a protective order often delays discovery. These commenters note that their primary obligation is to their clients and the class members, and believe that delay should be avoided whenever possible. Several commenters also note that some courts seem skeptical about, or even hostile to, class counsel's motives for declining to stipulate, even where class counsel does nothing more than insist on the showing required under the relevant case law.

Another issue involving confidentiality is whether the terms of class action settlements can ever be kept secret from class members, and if so, under what circumstances. While all commenters agree that such secrecy should be rare, they differ on the question of whether they might ever be proper.

In many kinds of litigation other than class actions, stipulations to keep settlement terms confidential are common. Generally, where the parties advise a court of confidential terms, the usual rules regarding filings under seal apply and the court may conclude that such terms should remain unavailable to public inspection under those rules.[168]

This general rule has little or no application in class action cases. It is not suited to the different context of class action litigation, where absent class members have a direct interest in access to settlement terms pertaining to their claims. Absent class members must be permitted to review any proposed settlement terms before deciding whether to object or, if applicable, opt out of the case. Thus, it is indisputable that class action settlements cannot routinely be made confidential, and that the terms of class action settlements may not be kept confidential, except in rare circumstances where the settling parties can show that sealing particular information will not harm the class's interests and is necessary to protect individual interests.

There is a related argument that putative class counsel may not, before class certification is decided, sign individual settlements that contain confidentiality agreements because putative class members have an interest in assessing the conduct and outcome of litigation where their claims have been asserted.

However, some commenters believe that portions of settlement documents should occasionally be protected from public view. For example, if a plaintiff's or class members' personal information—such as social security numbers—were included within settlement documents, that information should not become publicly available to persons who might misuse it. Some of these commenters believe that analogous corporate

[168] *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004).

financial or proprietary information might also merit secrecy in some contexts. These commenters propose that the question be left for case-by-case review and approval by the court presiding over the class action.

Other commenters argue that only a black letter rule against confidentiality can protect the overriding public interest. These commenters insist that any other position opens the door to excessive proposals for confidentiality in a context where the courts may not be fully briefed about the absent class members' rights. Instead of permitting confidentiality in class action settlements, these commenters urge that settlement documents be drafted to omit truly personal or proprietary information.

Another commenter said that the results of class action distribution should be publicly available. This commenter proposed that courts should require public filings by the parties or the settlement administrator detailing the amounts ultimately claimed or distributed when the settlement process has been completed.

C. NACA Guideline

Class counsel should vigilantly oppose overbroad and unnecessary confidentiality in class action cases. Absent class and putative class members have a direct interest in assessing the defendant's conduct at issue, and the public has a heightened interest because of the widespread nature or effects of this conduct.

Except where the exigencies of the case and the interests of the class demand it, class counsel should not agree to a proposed stipulation containing overbroad confidentiality terms regarding discovery merely to avoid the effort required to litigate the merits of the confidentiality question or to obtain earlier discovery. As with any issue in litigation, however, there may be a range of reasonable provisions regarding confidentiality and class counsel may properly compromise on this question with a defendant negotiating in good faith.

Class action settlement documents must remain open and available to the public in virtually all circumstances, including pre-certification. In rare cases, the parties might properly stipulate that specific personal or proprietary information in such documents be sealed from public view. But under no circumstances may the amount of the settlement, the amount of attorneys' fees sought or awarded, or the scope of the release of claims of either the class representatives or the class members be kept confidential. These core provisions must be publicly available before and after approval of any proposed class action settlement.

GUIDELINE 11

Improved Notice of Settlement

A. The Issue

One recurring and significant problem with class action settlements has been class notice form and content, particularly for settlement notices. Over the years, a consensus has 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 Federal Rule of Civil Procedure 23 to include Rule 23(c)(2)(B), which now requires that a notice "must concisely and clearly state in plain, easily understood language: the nature of the action[;] the definition of the class certified[;] the class claims, issues, or defenses[;] that a class member may enter an appearance through counsel if the member so desires[; and] the binding effect of a class judgment on class members under Rule 23(c)(3)."

In turn, and as the Federal Rule 23 Advisory Committee notes state, the Federal Judicial Center has created "illustrative clear-notice forms" that can "provide a helpful starting point for [some] actions."[169] But some commentators and practitioners believe that even these simplified forms are too complicated. For one, the products liability class action summary notice form fills a full page and contains—even if not in dense or legalistic language—a great deal of hard-to-digest information.

Increasingly, for publication or posting on websites, practitioners have been turning to more simplified forms of summary notice that state, in plain terms and using easier-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 availability of opting out or objecting. One advantage of this approach is that these bolder, more widely published, and possibly smaller notices permit a broader reach. Such "summary notices" also usually provide telephone, website, and physical addresses from which fuller notices—containing all the information required by Rule 23(c)(2)(B) as well as additional detail—can be obtained.

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

[169] *See* www. fjc.gov (Federal Judicial Center website).

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, what are the verbatim terms of the release, etc.) set forth below.

Another issue is what form the notice is to take. Options include direct mail, newspaper and magazine publication, email, Internet websites, Internet press-releases, on-site (i.e., in-store) postings, and even, in some large class action settlements, radio and television advertisements. Increasingly, courts have approved email notice, post-card notice, web banner notice, and other forms of new media notice.[170] They are often also used as supplemental or additional forms of notice.[171]

B. Discussion

There is consensus in favor of simple, easy-to-read informative notices. To the extent differences arise, they are of two varieties: first, whether all forms of notice must contain everything set forth in Rule 23(c)(2)(B) or whether a form of summary notice directing class members to fuller notices will suffice, and, second, the negotiation of actual notices in actual cases. At least one commentator strongly believed the Federal Judicial Center's (FJC) form of notices included all the necessary and relevant information and that forms of summary notice were not sufficient. But a larger number of practitioners appeared to believe that, if appropriately used and disseminated, summary notices can be more effective and that the FJC's form notices were too detailed.

While it may not be constitutionally required, the prudent practice is to include the identities of all proposed recipients of *cy pres* distributions as envisioned by the settlement, as well as an explanation of the circumstances under which those organizations may receive distributions, within at least the full form of class notice.[172]

As a practical matter in negotiating the notice forms, practitioners will find that defendants will often wish to include more information and present it in a more complicated fashion while class counsel will wish to present less information in a more straightforward fashion, in an attempt to influence the likelihood that class members will seek further information because they have read, paid attention to, and understood the notice. For example, although defendants may often wish to see in notices the exclusions from the class (e.g., employees, officers, agents, subsidiaries of defendants), class counsel will argue that information needs only to be in a full notice and not in a summary notice.

---

[170] *See, e.g.*, NEWBERG at § 8:30 (5th ed.).

[171] In some jurisdictions, state laws may require specific forms of notice. This Guideline does not discuss these particularized forms of notice.

[172] *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 181 (3d Cir. 2013).

Nor is there much divergence, in theory, as to the manner of notice. Here, again, the main conflicts arise in the actual development of notice programs. Depending upon the structure of the settlement, defendants may wish to see less notice—to minimize claims or adverse publicity—than class counsel wishes. However, the settlement arrangements regarding cost of notice may alter these generalities, since class counsel will not wish to "use up" the funds otherwise available for distribution to the class by demanding notice beyond what is necessary. Similarly, if no prior notice of certification has been disseminated, defendants may have concerns about *res judicata* preclusiveness if notice can be argued to fall below due process requirements. For class actions falling within the scope of CAFA, defendants must provide notice to the pertinent public entities as set forth in 28 U.S.C. § 1715.

C. NACA Guideline

NACA continues to support simplified, plain language disclosure of the salient aspects of a class, including the settlement terms. If anything, the use of a summary notice should be pressed for as a means to ensure wider, not more limited, dissemination. While such determinations invariably depend on the nature of the case, as well as the size and make-up of the class, NACA believes summary notices can be valuable and should be encouraged, provided that they offer enough information to be meaningful. Certainly, an easy way to obtain a full notice (i.e., a website address) must be provided. Summary notices can either be summaries at the beginning of a "full" notice (as where notice has been provided by direct mail) or two-tiered notices—summary notices combined with available full-form notices. Summaries or summary notices should be considered if doing so can broaden the reach of the notice by permitting more widespread dissemination. A practitioner using a summary notice, however, must ensure that the physical size of the notice remains noticeable enough to catch the attention of class members. When used, the most salient items of information that should be set forth include:

- 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, and the nature and form of the individual relief 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.

Within a full notice, in addition, the following information should be included:

- The total maximum fees, in dollars, to be sought by the class attorneys, and the method whereby they were calculated (hourly, hourly with a multiplier, percentage, or a combination), as well as the source from which payment will be sought.

- 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 defendants.
- Options available to class members including at least opting out and objecting.
- What the class member would release by not opting-out from the settlement.

NACA recommends, where appropriate, that counsel consider soliciting the advice of readability experts (often found at local universities) to recommend simplified ways of expressing the relevant concepts. Even though this may be cost-prohibitive or unnecessary in many cases, it is a matter worth considering, particularly if the parties have reached an impasse on the notice's wording or where a defendant is insisting upon legalistic or technical wording. At the very least, readability of the notice should be checked using a word processor. Most word processing programs today have a tool that allows the grade level of a document to be checked. Although this is an imprecise measure, it can give class counsel a general understanding of their writing's complexity.

NACA further recommends that class counsel consider the additional forms of notice discussed above (such as emails and postcards), to ensure that notice is not a formality, but something likely to be noticed by class members. A short one-page summary, or even a postcard, is perhaps more likely to be read by consumers than a multipage notice. At a minimum, class counsel should consider using these types of notice as alternative or supplemental notice in addition to traditional printed notice.

Finally, NACA recommends considering non-English notice publication, in addition to English notices, where a substantial portion of the class may not be fluent in English. If much or most of the class does not speak English, then the notice must be in the other language.

GUIDELINE 12

Claim Forms

A. The Issue

Claim forms may be used in class action settlements as a means to identify class members and to determine the amount of relief class members are entitled. Claim forms may have the undesirable effect of eliminating eligible class members from participation in the settlement, however, and are not appropriate in all cases. Class counsel must consider whether it is appropriate to use claim forms for the distribution of funds in a class action settlement. If claim forms are determined to be appropriate to use, 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 claim form process.

B. Discussion

There are diverse viewpoints regarding whether claim forms should be used to distribute class action settlement funds. While some may argue that claim forms are never appropriate, most agree that in limited circumstances, they may be a necessary means to distribute settlement funds. The most common view is that claim forms only should be used as a last resort.

There is a very strong view that claim forms are never appropriate if the identity and probable location of class members can be determined, such as in class actions involving home loans or credit accounts. It seems that in these cases, the primary reason to use claim forms is to limit class recovery or to whittle the class down so that participating members receive more relief. This may have an adverse effect, however, on less-sophisticated class members who are unable to understand the claim form process. One commenter noted that claim forms may be sought by defendants, especially in tandem with an opt-out class, as a way of limiting recovery and wiping out many class members' claims.

A less stringent view is that claim forms may be appropriate even if the class members can be identified but the extent of the damages cannot reasonably or economically be determined for each member. One commenter suggested that in such cases, distributing proceeds on a *pro rata* basis to each class member providing an additional opt-in claim form to do so and thereby participate at a higher level if their claims are found to be meritorious. This too, though, might have the undesirable effect of excluding less sophisticated class members who may not understand the notice instructions.

A third viewpoint is that claim forms are an appropriate method to divide a limited settlement fund to those class members who affirm their injury. Requiring class members to affirm their eligibility for relief under penalty of perjury, or under oath,

however, may scare class members to cause them not to participate or may violate religious beliefs that prevent individuals from taking oaths. This too may discriminate against the least sophisticated class members.

C. NACA Guideline

In general, claim forms should be avoided. While claim forms may be an appropriate means to ensure equitable distribution of damages in some cases, class claim forms and procedures can reduce the number of class members who receive recovery and the amount paid by the defendants. Claim forms should be used only if deemed necessary. Claim forms put an additional responsibility on class members to be proactive in receiving recovery of damages to which they are entitled, and therefore, the use of claim forms should be limited to the circumstances described below. Class members who fail to act by returning a claim form may be bound by a general release of claims and defenses. The class member may suffer a significant harm by releasing claims, such as in a home equity loan case, and will not receive any compensation for their injury simply because they did not understand the claim form process. Claim forms may have the effect of discriminating against class members who cannot read or understand the settlement notice and form, or who do not have easy access to legal assistance to help them make an informed decision regarding whether they should participate as a class member, and the repercussions if they fail to do so. Claim forms are inappropriate when the settlement relief is an account credit in a defined amount that the defendant can administer based on its records.

Claim forms may be necessary only when: (1) class members cannot be adequately identified from the defendant's records; or (2) class members must provide information to establish eligibility for relief or to ascertain the scope of damages and the information is not available in the defendant's records or otherwise available from third parties. To determine whether it is appropriate to use a claim form process, class counsel should consider the following: (1) the likelihood that class members may not participate in the class action because they do not understand the claim form process, (2) the likelihood that the claims administrator can obtain correct addresses for class members, (3) the general level of sophistication among the class members, (4) the consequences that the release of claims may have on class members who do not return a claim form, and (5) the defendant's effort to retain control over the process in order to reduce its liabilities by minimizing claims.

Claim forms may be appropriate as a method for class members to "opt in" to a settlement. Yet in "opt-out" class actions, claim forms should be avoided unless information to be provided by the class member is truly necessary to effectuate and administer a fair and reasonable settlement, as discussed above.

Class counsel must ensure 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 accurate information presented at the receiving end of the call, as well as an opportunity for the class member to speak directly with a person who is knowledgeable about the class action and settlement, and who can explain the benefits and detriments of returning the claim form. It may be also advantageous to direct individuals to a website for additional information regarding the class action and settlement, provided that the class member has an opportunity to ask specific questions regarding the lawsuit and will receive directly responsive information.

Claim forms, like the notice, should be kept as simple as possible.[173] The notice should prominently explain to class members both the benefits of returning claim forms and the consequences of not returning them. In opt-out class action settlements, if claims are being released by the settlement, the claim form should explain in plain language the claims that will be released, whether or not the class member submits the claim form, unless the class member opts out of the settlement. The claim forms should contain highly readable instructions aimed at the least sophisticated potential class member. Format, type size, clarity, and "readability score" of the text should be carefully considered. Settlements that require class members to opt-out, but also require class members to send in claim forms to receive compensation, should be carefully considered because of the potential release of claims by members who fail to do either, yet receive no compensation.

Class counsel should do everything possible to minimize the class members' burden in completing and returning claim forms. Claim forms should not require the class member to provide information that is already available to the defendant 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 in the circumstances. Claim forms should not require notarization because many class members do not have easy access to notary services. Claim forms should not require a declaration under penalty of perjury. Some religious beliefs preclude sworn oaths and requiring class members to affirm their entitlement to relief under penalty of perjury may scare some individuals away from returning the form. Courts have approved claim forms that are "affirmed" rather than sworn.

The claim-form process should provide that ample efforts will be made to determine class members' locations and that the best available mail or publication process is being used. Class counsel must ensure that adequate time is available for response. While the appropriate period may vary from case to case, claims periods should almost never be less than ninety days. Defendants should include a postage-paid envelope for

[173] *See* Guideline 11 on effective class notices.

the class member to return the claim form. If a pre-paid post card is considered, privacy concerns should be taken into account.

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 provide for sending acknowledgments to class members who return claim forms to reduce disputes regarding whether claim forms were returned.

Class counsel should consider whether releases in the settlement agreement should bind class members who do not return the claim form. This is particularly important where the settlement is on a claims-made basis and amounts not claimed will revert to the defendant. The issue of releases is discussed in Guideline 9. Class counsel should also be aware that some courts have ruled that attorneys' fees in claims-made settlements should be based on the amount actually claimed, not the amount theoretically available.[174]

[174] The issue of fees is discussed in Guideline 8.

GUIDELINE 13

Communications With Class Members (Including Soliciting Opt-Outs, and Class List Marketing)

A. The Issue

This Guideline addresses improper, or at least questionable, communications with class members from defendants.[175] The issue has arisen most often when a defendant tries to "buy off" the class by picking off class members or otherwise changing the terms of its relationship with the class.[176] Common ways defendants attempt to render claims moot are by convincing class or punitive 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.[177] 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 members. The situation led the court to impose sanctions.[178]

B. Discussion

The parameters of appropriate communication can be defined by two timeframes: before or after class certification. Communications prior to class certification are far more complicated than after a class is certified because no attorney-client relationship exists between class counsel and putative class members (thus bad behavior by the defendant occurs more frequently before a class is certified). 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 serve to frustrate the fair balance of interests

---

[175] *See* Guideline 11 on effective class notices. Plaintiff's counsel can also engage in improper or questionable communications with class members, most often in the form of solicitation of class members where cases are pending. Unlike defense counsel, plaintiff's counsel has a legitimate interest in sufficient contact with putative class members to ascertain uniformity, typicality and other issues pertinent to class certification.

[176] The issue discussed in this Guidelines relates to absent class members and is distinct from issues discussed in Guideline 6, Offers of Judgment to Class Representatives, which involves defendants' attempts to "buy off" putative class representatives.

[177] *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 254 (S.D.N.Y. 2005) (lender's imposition of retroactive arbitration clause barring class claims 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 plaintiff).

[178] *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).

essential to justice and violate disciplinary rules prohibiting such communications.[179] The American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility has issued a formal opinion on the issue of contact by counsel with putative members of a class prior to class certification.[180] The formal opinion requires that both plaintiff's and defense counsel comply with Model Rule 4.3 under such circumstances.[181]

Once the class has been certified, the plaintiff's attorney represents all class members and defendant's attorneys may not communicate directly with class members. State rules of professional responsibility, based on the ABA's Rule of Professional Conduct 4.2,[182] mandate that class members be treated as parties represented by a lawyer and prohibit communication from defendants.[183]

Defendants argue that communicating with class members pits First Amendment rights against the court's duty to protect the class from false and misleading infor-

---

[179] *In re McKesson HBOC, Inc., Sec. Litig.*, 126 F. Supp. 2d 1239 (N.D. Cal. 2000); *Rankin v. Board of Educ.*, 174 F.R.D. 695 (D. Kan. 1997); *In re Friedman*, 23 P.3d 620, 628 (Alaska 2001) (dicta) (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) (any contact must not discourage class membership through miscommunication); *In re Air Commc'n & Satellite Inc.*, 38 P.3d 1246 (Colo. 2002) (communication from defendant; corrective notice ordered).

[180] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445 (Apr. 11, 2007).

[181] *Id.*

> Model Rule 4.3: Dealing with Unrepresented Person
>
> 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.

See, e.g., *Nagy v. Jostens, Inc.*, 91 F.R.D. 431 (D. Minn. 1981) (court enjoined defendants from further inappropriate contacts with class members and required corrective action be taken in regard to past contacts); *see also Bowens v. Atlantic Maint. Corp.*, 546 F. Supp. 2d 55 (E.D.N.Y. 2008) (Fair Labor Standards Act case in which defendant was prohibited, pre-certification, from attempting to influence class members).

[182] The ABA Model Rules of Professional Conduct were adopted in 1983 to replace the ABA Model Code of Professional Responsibility and have been subsequently amended several times, most recently in 2002. A majority of jurisdictions have adopted professional standards based on the Model Rules. Some jurisdictions have retained professional standards based on the older Model Code.

[183] *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).

mation and that *any* restraint on communications from defendants to class members violate plaintiffs' First Amendment rights. Courts have repeatedly rejected this assertion. "In the realm of litigation, a fair and just result *often* presupposes restraints on the speech of the parties."[184] While the First Amendment protects speech, including commercial speech, courts necessarily possess inherent powers to protect classes and their own judicial integrity. Moreover, false and misleading communications can, even if legal and permitted as an exercise of free speech, bring the judicial system into disrepute.

C. NACA Guideline

NACA appreciates and recognizes the fundamental importance of First Amendment rights. But false and misleading class member solicitations are beyond the scope of the First Amendment and need to be scrutinized by courts to ensure that class members are not confused, taken advantage of, or coerced into giving up their rights. Defense communications with class members enticing them to abandon or settle their claims on an individual basis undermine the court's authority to protect classes and should not be countenanced. Limiting communication between the defense and class members ensures that the judicial system's integrity is not impugned. When class counsel learns of a defendant's effort to communicate with class members, consideration should be given to going to the court to obtain an order preventing such communication as well as to obtain, if warranted by egregious activity, sanctions.

[184] *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 (1984) (discussing variety of ways First Amendment rights may be "subordinated" during litigation).

GUIDELINE 14

Role of Objectors

A. The Issue

The role of objectors is often the subject of fractious discussion by advocates and defendants alike. There are essentially four types of objectors to class action settlements: (1) public interest groups whose goals are to improve the settlement and to enhance the credibility of class actions generally, (2) private class counsel whose own cases would be precluded by the settlement of another class action, (3) a small group of lawyers who attempt to make a living from making objections, and (4) individual class members who object for any number of reasons.

The primary issues that arise because of these multifarious objectors are: (1) the utility of meritorious objections to public and judicial perception of class actions, including the use of objections as a check on overbroad releases, inadequate recoveries, excessive attorneys' fees, or inadequate notices; (2) the role of objections in the context of competing class actions or individual liability cases; (3) the role of the lawyers who have made objections a professional specialty; (4) the role of class counsel in dealing with, and responding to, objections; and (5) the propriety of awarding fees to objectors.

B. Discussion

Any of the four types of objectors listed above can have an effect on the settlement, but their effects can be mapped on a diminishing scale.

Objections by public interest groups have the highest level of credibility and thus the highest level of success. Close behind on the spectrum of credibility and success are objections by private class counsel whose own cases are likely to result in better benefits to class members and have effectively been hijacked by the settling class counsel (often with the encouragement or complicity of the defendant). Next are objections by lawyers whose sole aim lies in making an objection. These lawyers are rarely successful, primarily because many are essentially "greenmailers" whose goal in objecting is to extract fees for themselves. Courts often react strongly and negatively to this type of objector.

The last type of objector—an individual class member—is generally motivated by sincere concerns, and may point out true problems. However, it is an unfortunate fact that individual objections will usually fall by the wayside unless another type of objector takes up the cause. These objections are often idiosyncratic, motivated by concerns outside the review of the specific court, such as an enmity to class actions generally or a desire to obtain personal injury damages. For these reasons, these Guidelines will not attempt to encourage or restrict the activities of individual class members.

1. Benefits of meritorious objections

Honestly motivated objections can provide many benefits. In the short term and on an informal basis, an objector might convince class counsel that a proposed settlement is inadequate and should be improved. If that does not work, a formal objection can either improve a bad settlement or convince a court to reject it, thus forcing the parties to renegotiate a better deal for the class while the objector counsel looks over their shoulders. As one commenter noted, in many instances and especially with public interest objectors, complete rejection of a bad settlement—and not merely negotiating a better settlement—is a proper goal.

In a broader sense, this type of objection also serves to enhance judicial and public perceptions of class actions generally, and these objections seem to have created real benefits.[185] For example, by heightening judicial knowledge of their inadequacies, frequent objections to coupon-only settlements appear to have caused an actual decline in their use.

2. Role of objections in competing cases

Lawyers pursuing their own cases, which are often but not always class actions, may see the hoped-for benefits of their lawsuit disappear when another class action unknown to them is settled. There is general consensus that it is completely appropriate for this type of class counsel to object to the other settlement. There is also general consensus that class counsel should always attempt to learn of any competing or conflicting lawsuits and to cooperate and coordinate with the lawyers in those cases.[186]

Beyond these observations, the always-present question is whether the objecting counsel is motivated by a sincere conviction that his own lawsuit will get better benefits for the class (or for an individual) than the settled case. His opinion may be developed from positive rulings already obtained, greater experience in handling cases of that type, better law in the specific state, or any of a number of other factors.

The alternative to a sincere conviction on behalf of the class is the objecting counsel's concern that they will be left out of the fee division. The validity of this concern can vary depending on many other factors, including the ones in the preceding paragraph.

Most importantly, there exists the real possibility that the objecting class counsel is quite right about his case being the better one. The defendant may have either sought out a minor pending class action or offered to convert an individual action into a class action for settlement purposes. In some instances, the defendant may even have ap-

---

[185] *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir.1995); *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 849 (5th Cir. 1998).

[186] *See* Guideline 2.

proached 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.[187]

3. Role of greenmailers

Objections can serve many good purposes, but there are objections filed by lawyers who are not sincerely invested in improving a settlement and whose only interest lies in improving their own bank balances. Objector counsel who object solely to extract fees for themselves (instead of seeking to improve the settlement) are widely condemned as "greenmailers," and these Guidelines will use that term.

Two commenters felt that an objector's motivation was completely irrelevant. NACA agrees that the validity of an objection should not turn solely on the subjective good faith of objector counsel, but also has found that greenmailers rarely contribute substantively to improving a settlement. NACA thus concludes that it is appropriate for the objector's motivation to be considered.

Many courts are unaware of the practice of objecting solely for fees and may consider class counsel's use of terms such as "greenmailer" to be nothing more than rhetorical name-calling. But other courts are familiar with the practice. As one court noted, "some of the objections were obviously 'canned' objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests."[188]

Rule 23 addresses the issue of greenmailers by providing that (1) any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval, but (2) such an objection "may be withdrawn only with the court's approval."[189] This rule change prevents greenmailers from filing objections, collecting fees, and disappearing. Courts must now determine whether the objector can in fact go away, and the rule change provides the opportunity and the incentive for the court to review the effect of the objection.

4. Role of class counsel

Class counsel may benefit from dealing cooperatively with objectors, encouraging their comments and discouraging formal objections, while remaining receptive to valid criticisms. If class counsel and objector counsel approach the defendant together, with suggestions to improve the settlement (and the implicit threat of formal objection),

---

[187] *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 823–825 (1999).

[188] *Shaw v. Toshiba America Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000); *see also O'Keefe v. Mercedes-Benz U.S., L.L.C.*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) (quoting *Shaw*).

[189] Fed. R. Civ. P. 23(e)(4).

the defendant is likely to be far more willing to consider those improvements than if a formal objection is filed and fought by class counsel.

5. Fees for objectors

There is general consensus that valid objections filed by sincere objector counsel should be reflected in a fee award, based on the improvement to the settlement. Commenters differed as to the appropriate way to calculate those fees. One commenter said that objectors should generally obtain fees on a lodestar-plus-multiplier basis, but that the multiplier should be based on the risk of non-recovery as well as the degree of value added. This commenter added that fees in value-added cases should be based on the incremental increase to the fund.

C. NACA Guideline

Although objectionable class action settlements do exist, they are in the significant minority. While it is impossible to define an objectionable settlement generally, the litmus test is whether the settlement is fair, adequate, and reasonable to the class as a whole.

By protecting the interests of the absent class members, valid objections to bad settlements play an important role in class action practice. Lawyers who learn of a bad settlement (whether through publicity, independently, or because they have a competing class action) may appropriately represent their clients in filing an objection to the settlement. Their goal can be to improve the terms of the settlement or to convince the court to reject the settlement entirely.

The hallmarks of an objectionable settlement include releases that are far broader than the claims for which relief was actually obtained, illusory benefits such as worthless coupons, disproportionate benefits to the representative plaintiffs and class counsel, notices designed not to reach the class or not to provide class members all the information they need, intra-class conflicts, no-opt-out certifications in cases involving monetary relief, excessive attorneys' fees, and settlements with secrecy provisions.

Class counsel should be aware of these hallmarks and should strive to ensure that their settlements avoid them for two reasons: Most importantly, this ensures that the settlement is indeed a good one for the class. Secondarily, but more pragmatically, this will protect a good settlement from falling prey to a greenmailer's objections.

Class counsel whose settlements receive objections should be prepared to respond honestly and fully to inquiries from the objectors, including reasonable discovery. One commenter felt that many courts would not permit discovery by an objector. NACA disagrees with this comment for two reasons. First, the recent amendments to Rule 23 reflect a desire to make the settlement approval process more transparent, with the result that more courts are likely to permit limited reasonable discovery. Second,

and more importantly from a best-practices standpoint, class counsel should be willing to open the settlement process to those class members whom they claim to represent, regardless of whether they might persuade a court to deny all discovery. As discussed above, the objector may have a good point and class counsel always have a duty to the class members to ensure that they have indeed obtained the best settlement possible.

In most instances, objectors who add real value to a settlement should be paid on a lodestar basis with a multiplier. However, fees awarded to class counsel and objector counsel should be commensurate with the benefits each obtains for the class. For example, if class counsel settle a case for refunds of $500,000, but objector counsel succeed after an adversary contest in raising the refund level to $2,500,000, class counsel should be compensated based on the $500,000, but objector counsel should be rewarded for the entire $2,000,000 improvement. In this example, it is not reasonable to award class counsel any fee based on the improved amount. It is reasonable to award objector counsel a fee that is based on a percentage of the improved amount instead of merely a lodestar with multiplier. Of course, if class counsel immediately and cooperatively works with objector counsel to obtain that improved settlement, the fee considerations might be different.

The source of these fees should generally be either the defendant or class counsel. As one court noted, "the cash fund available to the class members should not be reduced by the award of attorney fees to the objectors' counsel and that the benefits to the class, both monetary and non-monetary, should not be reduced in any fashion. In keeping with this conclusion, the attorney fees awarded to objectors are to be paid by Class Counsel and [the defendant] as they may agree, but without diminution in the value afforded to the class."[190] Another court was more direct: "There appears neither persuasive reason nor precedent for requiring these fees to be paid by the defendants in the circumstances present in this case. On the other hand, because his objections improved the settlement for the class, [objector counsel] shared with class counsel the work of producing a beneficial settlement. It is appropriate that they also share in the fund awarded to recognize the cost of producing the benefit to the class."[191]

As a corollary, an objector who is no more than a greenmailer should receive nothing at all. The best course is to refuse to pay greenmailers. However, there might be instances where the cost of getting rid of a greenmailer is far less than the benefit to the class of making a good settlement final and thus available to class members.

---

[190] *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 974 (E.D. Tex. 2000); *see also Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 417 (E.D. Wis. 2002) (following *Shaw*).

[191] *Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp. 2d 175, 176 (D. Mass. 1998); *see also Johnson v. Scott*, 113 S.W.3d 366, 377 (Tex. App. 2003) (quoting, following *Duhaime*).

GUIDELINE 15

Monitoring Settlement Compliance

A. The Issue

Class counsel's duty to monitor the implementation and enforcement of class action settlements raises a number of important considerations. At settlement, 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 efforts in monitoring the settlement and enforcing compliance.

B. Discussion

The monitoring of class settlements is often overlooked by counsel and left as a role for the settlement administrator. But monitoring by class counsel, the class's appointed representative, is necessary. Class counsel should never view monitoring as solely the responsibility of the settlement administrator, which is a neutral third party, or of the defendant, whose interests likely are antagonistic (or at best indifferent) to the class's. Class counsel must take an active role in ensuring that defendants comply with the settlement terms and court orders. Because of feelings of good will arising at the time a settlement is made between the parties, class counsel might underestimate the need for ongoing monitoring.

In cases involving only the distribution of funds, the role of class counsel, as well as the time commitment, may be more 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 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. The roles of the parties typically will be more involved and will require more forethought. Class counsel must be attentive to the need of class members to seek additional compensation or some other appropriate relief if they are harmed by defendant's failure to implement the terms of the settlement, and to the need of counsel to be compensated for its work and costs in securing this relief.

When a class action is resolved by settlement or court order, provisions for monitoring implementation of the settlement or order must be provided for in the final approval and dismissal order for the district court to retain jurisdiction over the settlement's enforcement.[192]

A defendant may resist monitoring mechanisms for obvious reasons, including additional expenses associated with monitoring and the fear of additional litigation. But mechanisms such as reporting requirements and dispute resolution processes may be mutually agreed upon that may actually appeal to the defendant by lessening the need for plaintiffs' counsel to seek post-settlement relief through further litigation. Attorneys' fees and costs should be provided for in the settlement or court order to allow class counsel to properly monitor the action.

C. NACA Guideline

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

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 is properly distributing the settlement relief, including credits to class members' accounts. It is even more important in cases involving equitable and injunctive relief that the settlement or a separate court order require sufficient independent monitoring to ensure compliance by the defendant. Especially in cases involving injunctive relief of an on-going nature, monitoring provisions are needed to help ensure that the settlement's reform is implemented permanently.

Information regarding the defendant's compliance with settlements or court orders should be compiled into a report filed with the court. Monitoring reports should detail the defendant's efforts to comply with the class settlement or other court orders. These reports should contain enough factual information to permit a monitor or judge to determine independently that the defendant is timely complying with the class set-

[192] *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381 (1994) (federal district court does not retain jurisdiction over settlement enforcement after dismissal with prejudice; "[t]he situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement) or by incorporating the terms of the settlement agreement in the order.").

tlement or court orders. Where a class settlement involves a claims process for distributing money to class members, the monitoring reports 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. These monitoring reports should be filed with the court and should be available to class members on request.

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.

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. Should a dispute arise regarding implementation of the settlement or order, the settlement should provide for confirmatory discovery on disputed issues. 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.

Sufficient resources should be devoted to respond to class members and their counsel about the settlement and defendant's compliance. Settlements involving injunctive relief that may affect individual class members should contain a mechanism, to the extent possible, to allow class members to individually enforce violations of the injunctive provision.

The settlement and the court's approval order should authorize the court to retain jurisdiction over class member enforcement actions. Counsel should ensure that adequate means, such as websites and toll-free numbers, are available for class members to report violations. Confidentiality clauses may impede effective monitoring, especially where they prohibit class members from accessing information regarding a defendant's settlement compliance.[193] Confidentiality clauses should be carefully drafted, to the extent that they are even appropriate, to allow class members to obtain information they may need to enforce the settlement. In cases where privacy is a heightened concern, the use of an independent monitor may be provided to ensure privacy concerns are met.

Settlements and court orders should provide a mechanism to award class counsel attorneys' fees and expense reimbursement for monitoring implementation, and enforcing the settlement. For class actions that require ongoing verification and monitor-

[193] Confidentiality clauses are discussed in Guideline 10.

ing, class counsel should press for fee-shifting provisions for work associated with enforcing the settlement or order. Where additional fees are not available, class counsel remains obligated to ensure that the settlement is monitored properly and is enforced, and counsel must be compensated out of the initial fee and expense award.

For two reasons, however, counsel should 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 performed.[194] 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.[195] 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 non-contingent, 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.[196]

[194] *Bowling v. Pfizer, Inc.*, 927 F. Supp. 1037, 1044 (S.D. Ohio), *aff'd*, 102 F.3d 777, 780 (6th Cir. 1996).

[195] *See id.*; *see also Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 378-80 (D. Mass. 1997).

[196] *See Bowling v. Pfizer, Inc.*, 102 F.3d 1147, 1151-52 (6th Cir. 1998).