How to win court approval for your class-action settlement

Learn to avoid delays that occur if the court rejects or requires modification of your settlement.

By Bryan Schwartz and Randall Crane

You filed a class action in California State or Federal District Court, and, after negotiations and perhaps the assistance of a qualified neutral, everyone signed a settlement agreement. Congratulations! It is tempting to see the work as finished and expect approval, if not applause, from the already overworked case management judge. Not so fast. Recent cases set a higher standard for the trial court in reviewing a proposed settlement.

Courts will now evaluate (among other things): whether the settlement is fair to absent class members; the enhancements paid to representative plaintiffs; whether or not the settlement is a claims-made, reversionary settlement; the amount of attorneys' fees and costs sought; and the scope of the release the settlement imposes on absent class members. To address these factors, we give you five rules to keep in mind to avoid unpleasant courtroom surprises and delay that may occur if the court rejects your settlement or requires modification.

Rule #1: Give the court all the facts

Your opinions and the views of opposing counsel as to the reasonableness of your own settlement agreement will only go so far.

The California Court of Appeal, in *Clark, et. al. v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, rejected the trial court's approval of a $2 million settlement to a class of plumbers and dispatchers. In that case, the trial court had accepted, without further inquiry, declarations of class counsel that overtime claims had no value. Objecting class members maintained that class counsel had grossly misunderstood and misapplied the method of calculating the amount of overtime pay due to the class. In remanding the matter for further proceedings, the appellate court concluded that the court approved the settlement without a "substantial explanation" of the manner in which a core legal issue was evaluated, so that the trial court had lacked information sufficient to make its own "informed evaluation of the fairness of the settlement."

Clark followed the Court of Appeal decision in *Kullar et. al. v. Foot Locker Retail, Inc*. (2009) 168 Cal.App.4th 116. In *Kullar*, objectors argued that the trial court erred in finding the terms of the settlement to be fair, reasonable, and adequate without any evidence in the record of the amount to which class members would be entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the agreed recovery. The court agreed with objectors that the trial court bore the ultimate responsibility to ensure the reasonableness of the settlement terms. Although the trial court was not required to decide the ultimate merits of class members' claims before approving a proposed settlement, an informed evaluation could not be made without an understanding of the strength of the merits of the case, the available defenses, the amount in controversy, and the realistic range of outcomes of the litigation. (For a United States District Court case taking a similar approach, see, e.g., *Kakani v. Oracle Corp.* (N.D.Cal. June 19, 2007) 2007 WL 1793774).

The lesson from these decisions is that – notwithstanding any presumption of fairness your agreement should receive, since it was negotiated at arms'-length – the court must see more than the agreement of the parties, even if skilled and experienced trial counsel recommend approval of the settlement after mediation before an experienced third party. At a minimum, be sure to: (1) summarize in detail the investigation, discovery, and evidence supporting the settlement; and, (2) analyze the probable trial value of the case and the strength of available defenses.

Rule #2: Show that your representative plaintiffs have earned enhancements

A second point raised in *Clark* addressed the $25,000 enhancements provided by the settlement to the two named

plaintiffs. The trial court found that the enhancements were "fair and reasonable" based on their declaration that they had spent "countless hours" on the case and had a potential stigma in their future employment. The appellate court wanted much more. The trial court should not accept "conclusory statements" in the absence of "supporting evidence or reasoned argument."

Likewise, in Federal Court, the trial court has the discretion to reject incentive awards, unless they are based upon evidence presented to the court of the extent of risk the class representatives undertook in commencing suit, the personal difficulties they encountered, the hours and energy they spent personally in prosecuting the case, the duration of the litigation overall, and the extent of their personal gain from the suit without enhancements. (*Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299.) Federal courts, like state courts, are taking a harder look at even modest suggested enhancements, and may not approve or may reduce them, unless you have submitted detailed declarations or other evidence from your clients showing how much they have put into your case. (See, e.g., *Munoz v. UPS Ground Freight, Inc.* (N.D. Cal. 2009) 2009 WL 1626376, *6.)

As you litigate your class action, be sure your class representatives are made aware of the importance of tracking their efforts and the impact of the action upon them (particularly if retaliation has occurred), if they hope to be rewarded at the conclusion of litigation.

Rule #3: Claims-made, reversionary settlements are dead

One settlement practice which both California and Federal courts have rejected in recent years is the reversionary, "claims-made," settlement. In this kind of settlement, defendants receive a complete waiver and agree to pay an amount of money – and plaintiffs' attorneys collect fees based upon a percentage of this amount of money – even though both sides know that defendants will only, in actuality, be paying a fraction of the agreed-upon amount.

The idea of a reversionary, claims-made settlement is that the defendants will actually be paying "up to" the amount indicated, depending on the number and value of the claims that are submitted. So, if only 50 percent of eligible claims are submitted, then defendants may wind up paying only half of the agreed-upon amount, with the rest reverting to defendants, though the plaintiffs' attorneys still collect fees on the full settlement amount.

In *Kakani v. Oracle Corp.*, 2007 WL 1793774, the Northern District of California explained that a reversionary scheme creates a "bonanza" for the defendant, because the defendant eliminates all liability as to class members, regardless of how many claims they actually pay. The Court further rejected calculation of the plaintiffs' counsel's fees based on the total settlement amount, rather than the actual amount paid to class members, since such might lead to plaintiffs' counsel receiving more than the entire class.

The *Kakani* court effectively concluded what any lay person would know instinctively, looking at a class-action settlement in which a company gets off the hook cheaply while the plaintiffs' lawyers and representative plaintiffs make out big: that such a settlement does not suggest arms'-length bargaining, but rather, stinks of collusion. The inference may not be justified in every case - but even this appearance of conspiracy can be and should be avoided. (See also, *Glass v. UBS Financial Services, Inc.* (9th Cir. 2009) 331 Fed.Appx. 452, 456 (reversionary provisions are generally "problematic").)

California state courts have followed the Federal Courts' lead in looking with disfavor upon reversionary, claims-made settlements, with one superior court judge in the complex litigation unit of Alameda County ruling unequivocally that, "The Court will not approve a settlement that contains a reversion to a defendant," and denying proposed settlements on that ground. The judge in question, Steven A. Brick, relies upon "Managing Class Action Litigation: A Pocket Guide for Judges," published by the Federal Judicial Center, which addresses reversion clauses and explains that a "reversion clause creates perverse incentives for a defendant to impose restrictive eligibility conditions and for class counsel and defendants to agree to an inflated settlement amount as a basis for counsel fees."

Judge Brick also relies upon the *Kullar* decision's holding, requiring parties seeking approval of a class settlement to demonstrate the true value to the class of the settlement, and showing that such represents a reasonable compromise. It is impossible to show the value of a settlement to the class, and hence, that the settlement value is reasonable, if a settlement promises money which ultimately reverts to the employer under the agreement's terms.

There are many ways to avoid the pitfall of a reversionary, claims-made settlement – the first of which is for plaintiffs and their counsel, when negotiating an agreement, to absolutely reject any offer containing such a term. Defendants and their counsel should be made to understand that the dollar value reached at the end of the negotiation is the actual amount defendants are spending – and not a penny less. Waived claims should be paid claims. It is up to plaintiffs' advocates to do everything we can to make sure that the bad guys do not get off easy for their violations – and claims-made, reversionary settlements are inherently an easy out.

Rather than having a reversion, a settlement can contain terms distributing unclaimed funds to the participating class members in a second allocation. If the remainder amount is modest, it should go directly to a suitable *cy pres* recipient. (See, e.g., *Tarlecki v. Bebe Stores, Inc.* 4

(N.D. Cal. May 14, 2009) 2009 WL 1364340, **3. See also Cal. Code Civ. Proc., §384 (unallocated remainder goes to *cy pres*); *Cundiff v. Verizon California, Inc.* (2008) 167 Cal.App.4th 718, 721-722 (applying §384).)

Rule #4: Justify your fees

You should not assume that your court will agree that you are entitled to fees reflecting 40 percent, a third, or even 25 percent of the common fund in your class-action settlement. Of course, we believe that because we take the risk in class litigation, we deserve the reward when we succeed. Yet, even in common fund cases, courts are looking critically at lodestar fees to determine the appropriateness of the multiplier that would result from using the common fund method, judged against the actual payout to the class members. Be ready!

In *Tarlecki*, Judge Marilyn Hall Patel of the Northern District of California reduced attorneys' fees from the desired $290,000 award (a modest 21.3 percent of the common fund, and *less* than the attorneys' lodestar of billed fees, of nearly $310,000) to $200,000, noting that the $290,000 sought would equal approximately 86.2 percent of the total actually recovered by the class in the claims-made settlement. Judge Patel weighed the low response rate, the weak merits of the underlying case, and the rapidity with which the settlement was obtained in making a downward departure from the Ninth Circuit's 25 percent benchmark for attorneys' fees in a class action, common fund case. Judge Patel's award was based on a finding regarding the "work that was actually done," and a decision that "work in the amount of $200,000 is, or should have been, sufficient to accomplish what plaintiffs' counsel accomplished." (See also generally, *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043.)

Judge Patel is not the only judge, when determining fee awards, willing to take a hard look at the work performed by plaintiffs' counsel. Building upon (among others) the oft-cited decision in *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26, by Presiding Justice J. Anthony Kline of San Francisco's 1st District Court of Appeal, recent California decisions have suggested that your common fund fee award may be measured against the lodestar fees proven – and your lodestar award (in a case where there is no common fund established) may be measured against what it might be in a common fund case, *i.e.*, as a reasonable percentage of the class recovery. (See, e.g., *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (trial court properly cross-checked the common fund attorneys' fees against lodestar fees and determined whether the common fund percentage sought was reasonable based upon the fairness of the would-be lodestar multiplier); *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 65 (common fund method may be used to cross-check the lodestar against the value of the class recovery).)

Thus, though it is true that detailed time sheets are not *required* of class counsel to support fee awards in class-action cases (e.g., *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254-255), you will have much smoother sailing on fees if you are able to show that your lodestar is close to or exceeds what you hope to reap from attorneys fees in a common fund settlement. (See, e.g., *McPhail v. First Command Financial Planning, Inc.* (S.D. Cal. March 30, 2009) 2009 WL 839841, *8 ("the proposed attorneys' fee award [in a common fund class-action settlement] is less than Class Counsel's lodestar calculation, buttressing the Court's finding of reasonableness.").)

Rule #5: Limit the release to claims raised in the suit

Your opposing counsel will want the class to waive every claim they can imagine – whether or not it was part of your suit, and whether or not they are paying your class members for such claims. Be careful.

In addition to its concerns regarding the claims-made, reversionary settlement, the *Kakani* decision rejected the scope of the settlement release in that matter, which purported to release a host of state law claims not raised in the federal action – without paying consideration for those additional released claims. But *Kakani* is not the only Federal Court case in the Ninth Circuit in the last several years which has sent the parties back to the drawing board regarding the scope of the release contemplated in their agreement. (See, e.g., *Apparicio v. Radioshack Corp.* (C.D.Cal. May 21, 2009) 2009 WL 1490560, *2; *Cf. Vasquez v. Coast Valley Roofing, Inc.* (E.D.Cal. November 17, 2009) 670 F.Supp.2d 1114 (finding significant in granting preliminary approval of class settlement, "These released claims appropriately track the breadth of Plaintiffs' allegations in the action and the settlement does not release unrelated claims that class members may have against defendants.").)

Similarly, it has long been the law in California that courts must closely scrutinize class settlement terms that are outside the scope of the operative complaint. (See *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134. Courts have been re-affirming *Trotsky* and taking a harder look at whether the scope of the release is fair and reasonable to the class – *i.e.*, whether adequate compensation is provided for each separate claim released and whether each is encompassed by the complaint (or an amended complaint).)

In conclusion, class-action lawyers need to keep in mind why most of us came to this area of the law – to make an impact on unlawful practices impacting large segments of the population, by hitting wrongdoers the only way we can make it count – at the bottom line. Letting businesses and public agencies off


Schwartz

the hook relatively cheaply – with broad waivers for which absent class members get little or nothing in return – is wrong, whether the plaintiffs' lawyers and their named plaintiffs reap a hefty reward or not. Courts are attuned to this now – and we should be, too.

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