Class-action settlements in an ever-more-crowded field

Courts get tougher on procedure and defendants play one plaintiff against the other

By Tara Mohseni and Jahan Sagafi

As the class-action field becomes more crowded, courts are careful to ensure that the various procedures are followed precisely. In this increasingly complex area, plaintiffs' lawyers have to grapple with new challenges. A major challenge is getting the case settled. This article discusses some of the tricky obstacles to settling your class action.

For example, you may face obstruction not just from the defendant, but also from other plaintiffs' lawyers willing to settle the case for less than full value. In addition, judges have been increasingly attentive to the substance of class-action settlement agreements. While sometimes that can create a burden for lawyers, in many cases it actually strengthens the plaintiff's hand. This article aims to summarize key issues in class-action settlement procedure.

The observations and recommendations in this article apply to class actions under Fed. R. Civ. P. 23 and Cal. Civ. Proc. 382, as well as collective actions under section 216(b) of the FLSA and "hybrid" class actions (wherein FLSA and state law claims are brought together in the same action). They will also likely be useful in PAGA representative actions. For ease of discussion, we refer to all of these representative actions as "class actions."

Problem #1: Reverse auctions

A reverse auction is where Plaintiffs A and B are pursuing overlapping (or virtually identical) claims in two proceedings (often with one in state court and one in federal court), and one plaintiff agrees to a settlement of low value because the plaintiff's lawyer either does not realize how valuable the case is or he just wants to earn a fee (unfortunately, it happens). The trick here is that the defendant is smart enough to play Plaintiffs A and B against each other, and pick the one in the weaker bargaining position to negotiate a settlement with.

Reverse auctions appear to be increasingly common. As more plaintiffs' attorneys enter the fray, there is a greater chance of two overlapping actions being pursued. In addition, defendants appear to see overlapping actions as an opportunity to make mischief, wiping out two cases for less than the price of one.

There are a few things you can do to minimize the chance of a reverse auction. First, coordinate with counsel in overlapping cases. Try to get a discovery coordination order on file in both cases, so you can collaborate with the other plaintiffs' attorney, and avoid being in the dark about the other case. If the other lawyer won't "play nice," you can intervene in their case to help monitor it. If they reach a bad settlement, try to explain how it's deficient, but at this point you should expect to have to fight. It's time to intervene and explain to the court why preliminary approval is not justified.

Intervention

Intervention is a delicate matter. Usually, a plaintiff fending off a reverse auction has a strong argument that she should be allowed to intervene. Under Fed. R. Civ. P. 24(a)(2), to intervene, (1) your motion must be timely, (2) you must present a protectable interest, and (3) that interest must not already be protected by existing counsel.[1]

In intervening, it is useful to also make the substantive arguments about the flaws in the proposed settlement. That way, regardless of the outcome of the intervention motion, the court is aware of the defects and can take them into account in deciding whether to grant approval. Ideas about potential defects are listed below.

This approach sometimes works. See, e.g., *Cullan & Cullan LLC*, 2014 WL 347034, at *10 ("In light of its timing, the pendency of other actions, the size of the class, the amount of the settlement and some 'red flags' that could be signs of potential abuse or collusion, the court finds that the parties' motion for preliminary approval should be denied at this time."); (*Galeener v. Source*, No. 13-cv-04960-VC (N.D. Cal.) (approving $10 million settlement after state court had rejected competing proposed settlement); (*Litty v. Merrill Lynch & Co., Inc.*, No. 14-cv-00425-PA-PJW (C.D. Cal.) (denying preliminary approval due to proposed intervenors' objections regarding increased class size and inadequate settlement amount, plus overbroad release).

How does the Court know whether to approve the settlement?

For settlements with a Rule 23 or Cal. Civ. Proc. secton 382 component, class members generally need the opportunity to opt out if they don't like the deal, so court approval is a two-step process: preliminary approval, then notice goes out to the class so class members can opt out or object, followed by final approval, where the court considers updated information, such as class members' responses. For FLSA-only or PAGA settlements, generally it's a one-step process, because there's generally no opt-out right.

Either way, in approving a settlement, the court must at least satisfy itself that the class settlement is within the "ball park" of reasonableness[2] or the "range of reasonableness"[3] – ultimately, the settlement must be "fair, reasonable, and adequate."[4] For FLSA settlements, the court "must scrutinize the settlement for fairness and determine that the settlement is a fair and reasonable resolution of a bona fide dispute over FLSA provisions."[5] In practice, these various standards converge on the common-sense question – Is this settlement a fair deal for the class members?

The remainder of this article addresses deficiencies with settlements that all plaintiffs' attorneys should avoid.

Problem #2: Settlement amount is too low or not explained

The first thing you should look at is the settlement amount. Is it high enough, when compared to the total exposure the defendant faces for the claims being released (not just for the claims pled in the complaint or actually litigated – the release may be broader). In recent years, courts are much more active in scrutinizing your math, to ensure that the claims are being valued appropriately and the discount factor is reasonable. You should consider providing an analysis of overall exposure and calculate the percentage of that exposure accounted for by the settlement. Inadequate information[6] or a steep discount[7] can warrant denial of approval.

In calculating damages, be sure to extrapolate from the data you have to the whole liability period. That generally means extrapolating forward from the end date of the data to a reasonable preliminary approval date – often six months or more. Judge Chhabria of the Northern District of California forcefully made this point in denying preliminary approval of the proposed $12,250,000 settlement in *Cotter v. Lyft, Inc*., which resulted in a revised settlement of $27 million.

Problem #3: Overly broad or vague releases

Another item that defendants push for is a broad release. Courts are increasingly monitoring releases for overbreadth and vagueness, and have recently denied preliminary approval due to defective releases. Releases must "directly track the allegations in the complaint,"[8] i.e., be tied to the "factual predicate" alleged in the complaint.[9] Releases of additional claims not pled or litigated are red flags. This is because the settlement is an exchange of money (and perhaps injunctive relief) for "peace" – a release of claims by the class members. So long as the class members are getting paid fair consideration for their releases, the settlement should pass muster. But where the release extends beyond the scope of what's being "bought" by the defendant, the settlement runs afoul of these principles.

Problem #4: Passive FLSA releases

Because only those plaintiffs who expressly join an FLSA collective action are bound by its results,[10] courts consistently reject settlements that release claims of individuals who have not affirmatively opted into the litigation.[11] This is in stark contrast to true class actions, which are opt-out, and allow for class members who do nothing to release their claims.

Problem #5: Cease-fire

Defendants are often wary of possible future litigation. It is important to remember that plaintiffs' counsel cannot agree not to represent particular clients in the future.[12]

Problem #6: Overly restrictive confidentiality provisions

Another aspect of a settlement agreement that defendants often try to sneak in relates to confidentiality. This comes in many forms. A defendant

might even request that the whole settlement be filed under seal. Do not agree! Thankfully, courts are scrutinizing confidentiality provisions very carefully,[13] citing the public policy behind the FLSA and the goal of making employees aware of their rights.[14] Some limitations may be acceptable, such as a joint press release, or plaintiffs' counsel's agreement to respond to press inquiries in certain ways.

Defendants sometimes request that plaintiffs agree to limits on counsel's ability to refer to the litigation (not just the settlement) in the future. But counsel must be allowed to market their experience and to refer to litigation in public court filings addressing their adequacy for appointment as class counsel. In fact, Cal. R. Prof. Conduct 1-500 prohibits attorneys from agreeing to (or even proposing agreement to) a restriction on their right to practice law. So BASF Ethics Opinion 2012-1 prohibits defense lawyers from demanding (and prohibits us from agreeing to) settlement terms that prevent us from "disclosing public information regarding [our] handling of a particular type of case."[15]

Problem #7: Attorneys' fee requests inadequately documented

Courts appropriately look carefully at attorneys' fee applications. Not only should your motion trumpet the value you created and the reasonableness of the percentage you are requesting, but also, it is generally wise to provide a lodestar "cross-check" – submission of time summaries of the contemporaneously recorded time records. Explain how duplicative work was avoided and work was "pushed down" to the lowest-cost lawyers and support staff.

Conclusion

"Class action settlements are different from other settlements."[16] Oh, how true! Because they're not just a matter of private contract, but implicate the rights of individuals not present in court, judges properly exercise great oversight of class action settlements. This scrutiny can often be used by plaintiffs' attorneys to our clients' advantage. If your defendant is pressing for concessions in the class settlement agreement, try a little research into the issues, and call on your fellow social justice warriors for input. Those efforts can go a long way in securing the best result for the class possible.


Mohseni

Tara Mohseni is a newly admitted attorney and graduate of UC Hastings College of the Law. She found her passion for furthering employees' rights in the workplace through experiences like participating in the Workers' Rights Clinic at the Employment Law Center, and working as a law clerk at The Dolan Law Firm. *She also participated in the UC Hastings Alternative Dispute Resolution team, and served as a symposium editor for the Hastings Women's Law Journal. Tara currently works at* Outten & Golden LLP, *primarily in the class-action practice group, prosecuting employment discrimination and wage and hour cases.*


Sagafi

Jahan C. Sagafi is the partner in charge of the San Francisco office of Outten & Golden LLP, *where he represents employees in class actions asserting wage and hour, discrimination, and other claims. Mr. Sagafi is active in the legal community, having served on the boards of Alliance for Justice, the San Francisco American Constitution Society (ACS) chapter, the ACLU of Northern California, and Public Advocates. Earlier in his career, he was a partner at* Lieff, Cabraser, Heimann & Bernstein *and clerked for the Honorable William W. Schwarzer of the Northern District of California. He is a frequent speaker and writer regarding employment litigation, class action jurisprudence, and other issues.*

Endnotes

[1] *Wilderness Society v. U.S. Forest Service,* 630 F. 3d 1173, 1177 (9th Cir. 2011).
[2] *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal. 3d 488 (1985).
[3] *Bickley v. Schneider Nat'l, Inc.*, No. 08-CV-05806 JSW, 2016 WL 4157355, at *1 (N.D. Cal. Apr. 25, 2016).
[4] FRCP23(e)(2).
[5] *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003); *Lynn's Food Stores, Inc. v. U.S.*, 679 F. 2d 1350, 1355 (11th Cir. 1982).
[6] See, e.g., *Ramirez v. Ricoh Americas Corp.*, No. 13–CV–9073 (KNF), 2015 WL 413305 (S.D.N.Y. Jan. 30, 2015); *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170 (S.D.N.Y. 2015) ("The parties have not 'provide[d] the Court with each party's estimate of the number of hours worked or the applicable wage. . . .' The parties' submission lacks also any declarations, affidavits or exhibits substantiating its arguments. In the absence of such information, the Court cannot discharge its duty to ensure that the proposed settlement is fair and reasonable.").
[7] *In Re High Tech Employee Antitrust Litig.*, No. 11-CV-02509 LHK, 2014 WL 3917126 (N.D. Cal. Aug. 8, 2014).
[8] *Christensen v. Hillyard, Inc*., No. 13-CV-04389 NC, 2014 WL 37499523 (N.D. Cal. July 30, 2014); *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2014 WL 1477630, at *6-7 (N.D. Cal. Apr. 15, 2014).
[9] See *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 180 (W.D.N.Y. 2011) ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.") (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005).
[10] *McElmurry v. IBM Bank Nat. Ass'n*, 495 F.3d 1136, 1139 (9th Cir. 2007).
[11] See, e.g., *Lounibas v. Keypoint Gov't Solutions, Inc.*, No. 12-cv-00636-JST, 2013 WL 3752965 (N.D. Cal. July 12, 2013); *Tijero v. Aaron Bros., Inc.*, No. C 10-01089 SBA, 2013 WL 60464, at *8-9 (N.D. Cal. Jan. 2, 2013); *Kakani v. Oracle Corp.*, 2007 WL 1793774 at *7 (N.D. Cal. 2007).
[12] Model Rules of Prof'l Conduct R. 5.6 cmt. 2 (1983).
[13] See, e.g., *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015).
[14] See, e.g., *Martinez v. Gulluoglu LLC*, 2016 WL 206474 (S.D.N.Y. Jan. 15, 2016) ("[C]ourts in this Circuit have routinely found confidentiality provisions in FLSA settlements against public policy…. As the court explained in Souza, confidentiality provisions that impose an obligation on a settling plaintiff to refrain from discussing any aspect of the case or the settlement come into conflict with Congress' intent... both to advance employees' awareness of their FLSA rights and to ensure pervasive implementation of the FLSA in the workplace."); *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1242 (M.D. Fla. 2010) ("By including a confidentiality provision, the employer thwarts the informational objective of the [FLSA's] notice requirement by silencing the employee who has vindicated a disputed FLSA right.").
[15] http://www.sfbar.org/ethics/opinion_2012-1.aspx.
[16] *In re Dry Max Pampers Litig*., 724 F.3d 713, 715 (6th Cir. 2013).