GUIDELINES AND BEST PRACTICES

IMPLEMENTING 2018 AMENDMENTS TO

RULE 23 CLASS ACTION SETTLEMENT PROVISIONS

BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

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CHAPTER 1

PROVIDING INFORMATION TO THE COURT TO DECIDE WHETHER TO SEND NOTICE TO CLASS MEMBERS AND APPROVE SETTLEMENT ("FRONT-LOADING")

Federal Rule Civil Procedure 23(e) requires court approval before claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised. As amended, Rule 23(e) adopts a two-stage approval process that requires a court first to approve the sending of notice to class members of the proposed settlement under subdivision (e)(1) and later to hold a hearing and approve the proposed settlement under subdivision (e)(2).

Amended Rule 23(e)(2) lists the core issues of procedure and substance that a court must consider in deciding whether to send notice and approve a proposed settlement. These issues do not displace the multiple criteria for settlement approval developed under circuit law,[1] but rather

[1] The various circuit courts of appeal employ variations on this general test. *See, e.g.*, *In re Elec. Books Antitrust Litig*., 639 F. App'x 724, 726 (2d Cir. 2016); *In re Cendant Corp. Litig*., 264 F.3d 201, 232 (3d Cir. 2001); *see also Moulton v. U.S. Steel Corp*., 581 F.3d 344, 349 (6th Cir. 2009) (considering "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest") (citation omitted); *Bennett v. Behring Corp*., 737 F.2d 982, 986 (11th Cir. 1984) (reviewing "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved").

focus the court's examination on a limited number of core concerns in determining whether a proposed settlement is fair, reasonable, and adequate.

Amended Rule 23(e)(1) requires a court to "frontload" its examination by considering many of the same procedural and substantive factors at the notice stage that it will consider at the approval stage. This development addresses the serious problems of class member confusion and wasted time and effort that follow when a proposed settlement is ultimately disapproved after notice of a proposed settlement is sent to class members. By frontloading the court's review, Rule 23(e)(1) may also save the court, as well as the parties, the time and expense of correcting and supplementing specific factual issues and questions at the final approval stage.

Amended Rule 23(e)(1) effects the frontloading by specifying a new standard that a court should use in deciding whether to send notice of a proposed settlement to class members. The standard requires the court to determine whether it "will likely be able to approve" the proposed settlement, taking into consideration the core procedural and substantive concerns listed under amended Rule 23(e)(2). If a litigation class has not previously been certified in the case, the court must also consider whether it could certify a settlement class. To be clear, although the new standard requires the court to determine that it "will likely be able to approve" the proposed settlement, this standard is more lenient than the eventual standard required to grant final approval. One reason for this lower standard at the preliminary stage is to facilitate notice to the proposed class and to allow the court to consider the proposed class's reaction and opinion when determining whether final approval should be granted.

Counsel must provide the court with sufficient information addressing the Rule 23(e)(2) factors for the court to make its determinations at both the notice and approval stages. The following guidelines explain the rule provisions while the best practices provide guidance on how best to comply with the amended rule.

GUIDELINE 1: Parties should request a court to approve sending notice to class members of a proposed settlement only if the court is likely to be able to: (1) approve the settlement after a hearing and a finding that it is fair, reasonable, and adequate under Rule 23(e)(2); and (2) certify the class.

Notice of settlement is required regardless of whether a class has previously been certified or will be certified as part of the settlement approval. A court may approve sending notice only after it decides that it will likely approve the proposed settlement at a later date. In all cases, the court must initially determine whether class action criteria have been met under Rule 23(a) and (b), which is outside the scope of these guidelines and best practices.

In determining whether to approve sending notice of a proposed settlement, a court must predict that it likely will ultimately approve the settlement after taking into consideration a number of factors, several of which can only be known fully at a later time, *e.g.,* effectiveness of claims administration process and responses of the proposed class.

BEST PRACTICE 1A*:* At both the notice and approval stages, the parties should provide the court with information sufficient for it to decide that the proposed settlement is fair, reasonable, and adequate, in accordance with the topics enumerated in Rule 23(e)(2).

Amended Rule 23(e)(2) sets out five broad topics to help the court determine whether a proposed settlement is fair, reasonable, and adequate. The topics are described as core procedural and substantive concerns. These topics synthesize various lists of factors adopted by circuit law and are designed to focus the court and lawyers on core concerns. The core concerns are not intended, however, to "displace any factors" under established circuit law.

The core concerns are to be finally determined when the court decides whether to grant final approval of the proposed settlement. But to the extent that information is available at the notice stage, the parties should provide the court with all available materials addressing the Rule 23(e)(2) procedural and substantive core concerns that they intend to submit to the court to support approval of the settlement under Rule 23(e)(2). The information must be sufficient for the court to

determine whether it will likely approve the proposed settlement. At the approval stage, the court should also ensure that timely CAFA notice was sent to state and federal attorneys general in accordance with the Class Action Fairness Act of 2005.

> **GUIDELINE 2:** At both the notice and approval stages, a court has wide discretion in determining how much information is sufficient to determine that a proposed settlement is fair, reasonable, and adequate.

A court has wide discretion in assessing the weight and applicability of the core concerns addressed by Rule 23(e) and, given that discretion, should take care to make the review process proportional to the requirements of each particular case.

> BEST PRACTICE 2A*:* In general, if a settlement proposal lacks any indicia of collusion, conflict, or lack of fairness to the class members, a court should not require an exhaustive study and extensive information to make its findings that the proposal is fair, reasonable, and adequate. Conversely, if doubts arise about the fairness of the proposed settlement, the court should require additional information in making its determinations.

In deciding whether to approve notice of a proposed settlement under Rule 23(e)(1) or approve it under Rule 23(e)(2), the court should exercise its discretion in appropriate cases to require less information from the parties if there are no indications that the settlement is unfair, unreasonable, or inadequate.

A court should rely on certain indicators that strengthen the showing that the proposed settlement is fair, reasonable, and adequate, including: (1) supervision of a trusted third-party mediator over settlement negotiations, and particularly the mediator's representation as to the conduct of negotiations at arm's-length and a lack of collusion among the parties; (2) lack of any showing of conflicts of interest; (3) mature and adversarial proceedings that have included considerable discovery, survived dispositive motion practice, and proceeded toward, if not past, class certification; and (4) an absence of or few significant objections to the settlement and optouts despite a comprehensive and wide-reaching notice plan. If one or some combination of these

protections is in place, demanding exhaustive information on every core procedural and substantive concern may not be warranted, for example, demanding extensive studies and information on the precise amount of expected relief, the range of reasonableness of the settlement fund, or the defendant's ability to withstand a greater judgment.[2]

Alternatively, if the settlement relief offered to class members is significant when weighed against the weaknesses of the plaintiff's case, the court may require less information on other factors in the court's analysis. If the amount paid to the class is insignificant, or nonexistent as in a coupon settlement, or if a significant portion of the money made available through settlement is paid into a *cy pres* fund, allocated to attorney's fees, or may revert to defendants; however, the court should require additional information to ensure that there is no collusion and that the settlement class receives adequate relief.

A court should require more information if relief to the class seems insignificant and there is any suggestion that defendants may have "played" plaintiffs' counsel against one another in competing, parallel class actions in a "reverse auction," resulting in less favorable terms for the class. If such indicia are present — *e.g.*, the existence of numerous, competing class actions against the same defendants with settlement initiated by defendants with only one plaintiff group — the court should require counsel to explain and justify the course of events and reasons for the choices made, and any objections raised by competing, non-settling plaintiffs and their counsel should be carefully reviewed and thoroughly considered.

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[2] Where these protections are present, only a few absent class members have submitted objections, and those objections are suspect (*e.g.*, they were filed by counsel known to be "professional" or serial objectors), the court should require counsel for the objectors to appear at the fairness hearing and allow discovery to be taken of the objectors themselves. Such discovery may reveal that the objection is lawyer-driven and that the objector himself has misunderstood or has little knowledge of the settlement's terms. *See, e.g.*, Omnibus Order Granting Final Approval of the Class Action Settlement, Approving Class Counsel's Award of Attorneys' Fees and Costs and Denying the Objectors' Objections to the Settlement at *17, *Morgan v. Pub. Storage*, No. 1:14-cv-21559-UU, 2016 WL 1104393 (S.D. Fla. Mar. 10, 2016) (overruling objection where objector's "deposition revealed that he had no understanding of the lawsuit or the terms of the Settlement Agreement and could not even articulate the basis for his objection").

Cases that settle early in litigation may also warrant additional court inquiry to satisfy the requirements that the settlement be fair, reasonable, and adequate. In some cases, an early settlement may simply reflect that the type of claim is well known, that the underlying facts are not complex, that there are sufficient other settlements to accurately set a market value for the claims, or that there are limited and diminishing funds available as potential sources of recovery. In this situation, no additional inquiry may be needed. But in other cases, although early settlement may well benefit class members by rendering litigation less costly and eliminating the risk of early disposition, it may also result from collusion among the parties or indicate a rushed negotiation guided by a desire for a quick fee. If, for example, a class action settles before the parties have engaged in significant motion practice or discovery, the strength of the plaintiff's claims and the defendant's defenses may be difficult to ascertain. Similarly, the risks attendant to continued litigation and the complexity and likely expense of the proceedings may be unclear when a case is settled before adversarial engagement has even begun. Courts may also have an insufficient sense of the level of skill of the parties' counsel, or the relationship between them, to judge whether behind-the-scenes collusion is likely to have occurred.

A court should also scrutinize a settlement that provides for different amounts or types of relief for subgroups of the settlement class, or where the amount in controversy is considerable and distribution to the class complex. If the parties propose that some class members receive greater or different relief than others, or a complicated claims process may be required, the court should investigate the reasons for the proposal and ensure that there is a rational basis for the proposed allocation and distribution of settlement benefits. But if the amount in controversy is small, or the distribution of settlement funds is direct and simple, less scrutiny may be required.

In sum, if indicia of fairness are apparent and protections for the class are in place, the court should lighten the burden on counsel at the fairness hearing and place heavier reliance on the

representations of counsel as to the settlement's fairness, adequacy, and reasonableness. However, if indicia of collusion or conflict are present or suspected, or the relief to the class seems insignificant under the circumstances presented, the court should require counsel to justify its position and scrutinize a class action settlement more closely.

The following guidelines and best practices address the particular requirements that parties should address and a court should consider.

> BEST PRACTICE 2B*:* Parties should provide information to the court showing that class representatives and counsel have adequately represented the class.

At the notice stage, the parties should provide information on the "actual performance" of counsel acting on behalf of the class up to that time. For example, the parties should describe the discovery completed, including the volume of electronically stored information reviewed, interrogatories submitted, and depositions held. If only limited discovery was conducted, the parties should explain why it was sufficient. Counsel should provide supporting detail in a declaration to the court. They may also provide a declaration from the mediator regarding counsel's work, professionalism, and performance during the mediation process. Similarly, counsel should provide information as to work and actions taken by the class representatives, such as providing deposition testimony, gathering and providing discovery, and assisting counsel in the matter.

The parties may also inform the court about any differences in the claims alleged in the complaint (or that survived the motion to dismiss and summary judgment) and the claims being released in the proposed settlement.

The court will consider the same information when deciding whether to approve the settlement at a later date under Rule 23(e)(2).

> **GUIDELINE 3:** Parties should provide information to the court showing that the settlement was negotiated at arm's length.

The involvement of a neutral or a court-appointed mediator in negotiating the settlement is a strong indicator that the deal was negotiated at arm's length. Parties may wish to submit a declaration from the mediator attesting to the lack of collusion between the parties and providing detail of the parties' mediation efforts, including whether they were conducted at arms' length or were adversarial in nature. Mediators may also attest to the caliber of representation, giving the court additional comfort that class members' interests were adequately represented.[3] The parties may also offer evidence on other details of the settlement process, including the time devoted to settlement negotiations with the opposing party.

The court will consider the same information when it is deciding whether to approve the settlement at a later date under Rule 23(e)(2).

> BEST PRACTICE 3A*:* Parties should provide information to the court showing that the expected relief of the proposed settlement to class members is adequate.

Information comparing the relief provided by the settlement to the relief that class members could potentially recover in litigation is one of the most important core concerns that a court must consider in determining whether the proposed settlement is fair, reasonable, and adequate.

To comply with amended Rule 23(e)(2)(C), the parties should provide information explaining the value of the relief made available to class members, including injunctive and other nonmonetary relief when that value is not apparent from the plain terms of the settlement. In recent lender-placed insurance litigation, for example, class-wide settlements offered class members a percentage of the total amounts they had been overcharged for home owners' insurance. While the percentages may have seemed facially low — class members who submitted claims stood to

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[3] *See, e.g.*, Order Granting Final Approval to Class Action Settlement at *6, *Wilson v. EverBank*, No. 14-CIV-22264BLOOM/VALLE, 2016 WL 457011, (S.D. Fla. Feb. 3, 2016) (crediting mediator's declaration that the settlement was a product of "lengthy and particularly hard-fought negotiations[,]" was "professionally conducted" and "quite adversarial[,]" and that "the caliber of representation on both sides was extraordinary[.]") (citations omitted).

recover 8 to 12.5 percent of the total amounts charged them — class members were in fact recovering almost all of the total *over*charge to their specific accounts. Class counsel provided this context to the courts in their own declarations and motions for approval, and the courts ultimately found that the relief afforded to the class was "extraordinary,"[4] noting that when the injunctive relief provided by the settlements was also considered, the settlements offered class members more than they likely would have ever received at trial, when each class member would be required to provide substantial evidence and proof beyond what the approved claims process required.[5] Amended Rule 23(e)(2)(C) lists four discrete subtopics that the court should consider in assessing the adequacy of the expected relief to the class members.

The court will consider the same information when it is deciding whether to approve the settlement at a later date under Rule 23(e)(2).

> BEST PRACTICE 3A(i): The parties should provide information to the court on costs, risks, and delay of trial and appeal in assessing whether relief provided for the class is adequate.

One of the benefits of a settlement is that the court and the parties avoid the uncertainty, burden, and expense of a full-blown trial on the merits. But in exchange, the settlement will often provide less relief than plaintiffs could recover in their best-case scenario in litigation.

In assessing the adequacy of the proposed settlement, the relief provided to class members by the settlement should be compared with assessments of the range and likelihood of possible class-wide recoveries from litigated outcomes. The assessments may include best-case, worstcase,

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[4] *Braynen v. Nationstar Mortg*., LLC, No. 14-CV-20726-GOODMAN, 2015 WL 6872519, at *4 (S.D. Fla. Nov. 9, 2015) ("[O]ne district court touted settlements like this — that provide near-complete relief to class members on a claims-made basis — as extraordinary . . . .") (referencing *Arnett v. Bank of Am*., N.A., No. 3:11-cv-1372-SI, 2014 WL 4672458 (D. Or. Sept. 18, 2014)).

[5] *See, e.g.*, *Almanzar v. Select Portfolio Servicing, Inc.*, No. 1:14-CV-22586-FAM, 2016 WL 1169198, at *3 (S.D. Fla. Mar. 25, 2016) ("Factoring in the injunctive relief . . . the settlement very likely exceeds what Plaintiffs could have won at trial.") (quoting *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 693 (S.D. Fla. 2014)).

and likely-case results, along with estimates of the likelihood that each type of result will be realized. Recognizing that these assessments of potential future outcomes are necessarily imprecise—and also recognizing that counsel need to preserve their ability to be advocates if the settlement is not approved—courts should take care to tailor the level of precision they require in these assessments to the needs of the case.

> BEST PRACTICE 3A(ii): The parties should provide information on the effectiveness of the proposed method of distributing relief to class members in assessing whether relief provided for the class is adequate.

The parties should describe the proposed plan for equitably and reasonably distributing the settlement funds to class members. The parties should advise the court whether the defendant will pay settlement benefits directly to all class members or require submission of a claim as a condition of recovery. If the benefits are distributed in a "claims-made" settlement, the parties should explain the contemplated claims process and the proposed notice and claims methods to ensure the best practicable recovery by the class. At the notice stage, the parties should provide information showing that any proposed claims-processing method will facilitate the filing of legitimate claims and deter unjustified claims. At the same time, the court should ensure that the claims process is not unduly demanding, burdensome, and oppressive.

> BEST PRACTICE 3B*:* The parties should consider using a professional claims administrator to send notice and claim forms and distribute benefits.

Formulating a notice and administration plan typically requires the expertise of an experienced notice and claims administrator. Experienced claims administrators can provide guidance to the parties on forms of notice, the plan of allocation, and claim form.

Once selected, the parties should provide information to the court describing the claims administrator's experience with other similar settlements, the proposed notice plan for notifying

the class of the proposed settlement and receiving class member claims, and the anticipated and estimated notice and claims administration costs.

The parties' explanation of the claims administration process should address the parties' proposed timeline for giving notice to the class, deadlines for opting out or objecting to the settlement, deadline for responding to objections, deadline for submitting claim forms, and a date for the settlement hearing required by Rule 23(e).

The court will consider the same information when it is deciding whether to grant final approval of the settlement at a later date under Rule 23(e)(2). At that stage, however, measuring the proposed relief may require evaluation of the claims process if the anticipated rate of claims submitted cannot be determined.

> BEST PRACTICE 3C: In determining whether the proposed method of distributing relief is effective, a court should not assume that automatically distributing benefits to all class members is superior to distributing benefits based on submitted claims.

A class settlement may be structured to distribute benefits to all known or identifiable class members, or alternatively it may be structured to distribute benefits only to class members who submit valid claims. Neither structure is inherently superior to the other in all circumstances. A court should therefore consider each method on its own merits.

"[T]he use of a claims process is not inherently suspect."[6] In fact, a claims process may be inevitable in certain settlements, such as where a claim is necessary to identify class members. An example of this situation could be a settlement involving an over-the-counter consumer product, where class members or the details of their purchases may not be readily ascertainable from a defendant's records. But a claims process may have benefits even where its implementation is not

[6] *Poertner v. Gillette Co*., 618 F. App'x 624, 628 (11th Cir. 2015) (citation omitted).

inevitable or strictly necessary, and courts should consider factors other than necessity when reviewing a settlement's structure.

First, assuming that the overall value of a settlement is fixed and the only question is how to distribute that fixed amount of benefits, a claims process may be able to provide complete or otherwise significant relief for the subset of class members who choose to submit claims, whereas an automatic distribution would provide relief to a greater portion of the class but in much smaller amounts. This was the case in lender-placed insurance settlements, where defendants paid class members who participated in claims-made settlements near-complete monetary relief, but paid far less to members of direct-pay classes.[7] In these cases and others, although a claims-made settlement structure did not result in an award to all class members, it did maximize the *opportunity* available to each class member. This approach credits the decision made by each individual class member.[8]

Second, direct-pay settlements may distribute relief to a greater number of class members, but a court should be aware of the limitations in reach. A court should consider how accurate, current, and complete the address data is, as well as whether class members will be given the opportunity to verify the details of their claims addresses at the notice stage. The shakier the address data, the greater the risk of waste created by checks that are discarded, mistaken for junk mail, or sent to the wrong residence. Claims administrators should also consider how to reduce the

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[7] *Compare Arnett*, 2014 WL 4672458, at *12 (direct pay settlement offering class members a net of 2.28% of premiums paid under a 25% fee award observed by court after declining a request for a 30% fee award due to a lack of "special circumstances" justifying a "departure from the benchmark fee of 25%), *with Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV-GOODMAN, 2016 WL 1529902, at *11 (S.D. Fla. Apr. 13, 2016) (claims-made settlement offering class members "near-complete" monetary relief that "very likely exceed[ed] what Plaintiffs could have recovered at trial") (citations omitted).

[8] *See, e.g.*, *Braynen*, 2015 WL 6872519, at *14 ("Negotiating for a smaller amount to go to Class Members would, in effect, unfairly reward some Class Members for their own indifference at the expense of those who would take the minimal step of returning the simple Claim Form to receive the larger amount.").

risk of fraud presented by checks being sent to outdated addresses or cashed by individuals other than the class member at the same address.

Third, if class members would receive only small amounts in a direct-pay structure, the administrative costs may erode the benefits received. These costs may include the costs of printing and mailing large volumes of checks, processing returned payments, and tracking down class members whose addresses may have changed. These costs are typically lower in a claims-made structure because of the lower number of participating class members.

Fourth, if the class members have claims that vary materially in amount, using a claims process may allow the parties to tailor the amounts paid by the settlement and avoid over- or underpayment to individual class members. If, for example, a defendant's records (or lack thereof) do not allow it to ascertain how much, if anything, is due to individual consumers, a claims process allows for self-identification and the provision of detailed claim information.

> **GUIDELINE 4:** The parties should provide information on the proposed attorney's fees, including timing of payments, in assessing whether relief provided for the class is adequate.

At the notice stage, the court should consider the amount of attorney's fees in evaluating the fairness of the proposed settlement. Each jurisdiction may have different applicable standards for the court to determine the appropriate nature of the proposed attorney's fees and costs, such as the "percentage of the fund" and "lodestar/multiplier" standards. The relation between the amount of the attorney's fees and the expected benefits to the class members may be important in some cases in evaluating whether the proposed settlement is fair, reasonable, and adequate. Depending upon the relevant standard in the jurisdiction, the court may also consider other relevant Rule 23 factors in preliminarily determining whether the amount of the proposed attorney's fees and costs are reasonable, such as the work performed by counsel, the risks associated with the case and any other relevant factors provided by counsel in support of preliminary approval. The court may also

determine whether the proposed attorney's fees are being provided by defendants in addition to the relief provided to the class.

> **GUIDELINE 5:** At the final approval stage, the court should consider relief delivered to class members in determining the appropriate award of attorney's fees in accordance with Rule 23(h). In appropriate cases, a court may consider nonmonetary benefits as part of the total relief in relation to the proposed award of attorney's fees in evaluating whether the proposed settlement is fair, reasonable, and adequate.

A court awards attorney's fees in accordance with Rule 23(h). The Committee Note to Rule 23(h) sets out various factors that the court can consider in evaluating a request for attorney's fees, including: (1) work that produced a beneficial result for the class; (2) work that actually achieved a result for class members; (3) settlement provisions that provide for future payment; and (4) nonmonetary provisions that provide actual value for class members. These factors may also be adjusted based upon the accepted method for determining appropriate attorney's fees in that jurisdiction (*i.e.,* percentage of the fund, lodestar, etc.). The court should defer to the recommendations of appointed lead counsel when considering any division of attorney's fees among counsel, and it may give weight to agreements between class counsel and others about the fees claimed by the motion.

A court should consider and analyze settlements involving nonmonetary benefits for class members, according to the 2003 Committee Note accompanying Rule 23(h), to ensure that these benefits have actual value for the class, like injunctive and declaratory relief would in civil rights litigation.

> BEST PRACTICE 5A: In an appropriate case, a court may consider awarding attorney's fees in a class action settlement based on a percentage of the total

monetary awards made available to the class, as opposed to the actual claimed value of the settlement.[9]

Courts have disagreed about whether attorney's fees can be awarded based solely on the monetary value of the relief actually paid to participating class members, typically in a settlement where the total amount is not fixed but fluctuates based on the number and amount of valid claims, as compared with fees based on the total value made available by the settlement.[10]

On one hand, some courts have concluded that class counsel's compensation should be tied to the class's actual recovery, rather than the relief made available to plaintiffs and the class. And the Committee Note to amended Rule 23(e)(2), after acknowledging that awards of attorney's fees are made under Rule 23(h), states: "[T]he relief actually delivered to the class can be a significant factor in determining the appropriate fee award."

On the other hand, other courts have taken into account other items in determining the "actual value" of the relief provided to class members. These courts weigh the significant work and considerable risk assumed by lawyers who undertake to represent consumers in class actions against often large corporate defendants. These courts have concluded that the opportunity to recover meaningful relief by availing themselves of a claims process that is procedurally fair, even though many fail to do so, is "actual value" to the class members. And counsel should not be held to account for class members' failure to take advantage of an otherwise fair and procedurally sound settlement:

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[9] *See, e.g.*, *Poertner*, 618 F. App'x at 629 (holding that indirect benefits to the class—such as injunctive relief or a *cy pres* award—are properly included in a court's valuation of the total "settlement pie" from which the court calculates a reasonable fee).

[10] *See Lopez v. Youngblood*, 2011 WL 10483569, at *3 (E.D. Cal. Sept. 2, 2011) (noting that while "the Ninth Circuit affords district courts "discretion to apply either the lodestar method or the percentage-of-the-fund method in calculating a fee award[,]" "[m]any courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner.") (internal quotations and citations omitted).

> There may be many reasons or no reasons why class members decide to participate in a settlement, *e.g.,* a desire not to be involved in litigation, ideological disagreement with the justice system, their individual experiences with [a product], or sympathy for the defendant. . . . Whatever the underlying reason, that is a decision to be made by each class member. Those decisions, however, do not affect whether the settlement provided to the Class is fair, adequate, and reasonable.[11]

> BEST PRACTICE 5B: The parties should provide information on any agreement made in connection with the proposed settlement in accordance with Rule 23(e)(3).

At the notice stage, the court should be advised of any side agreements in determining whether the relief is adequate. For example, the parties should advise the court of any conditions that must be met, other than the court's approval, to the settlement becoming effective.

The court will consider the same factors when it is deciding whether to approve the settlement at a later date under Rule 23(e)(2).

> BEST PRACTICE 5C*:* The parties should provide information on how the proposed settlement treats class members relative to each other, particularly if the proposed settlement addresses subclasses or other special categories of class members.

The parties should address any differences in treatment of class members, including different payout schedules, limitations, requirements, or other restrictions, and explain how the differences in treatment are linked to differences in the values or facts of the members' underlying claims. Conversely, if the settlement gives all class members the same relief, a court should consider whether differences among class members exist that should require tailored treatment. Defendants, for example, may have identified such differences in opposing certification of a litigation class. Finally, a court should consider whether the proposed class representatives expect to request an award in addition to what they would receive as a class member.

In making these assessments, a court should be mindful that there is a strong public policy favoring settlement in class actions, and that the factors are meant to be considered flexibly in the

[11] *Hall v. Bank of Am*., N.A., No. 1:12-cv-22700-FAM, 2014 WL 7184039, at *8 (S.D. Fla. Dec. 17, 2014).

context of a particular settlement. In considering whether class members are treated equitably relative to each other, courts may note potential differences in class members and possible conflicts of interest. Such potential differences and conflicts alone, however, should not lead to disapproval of a settlement. The parties may legitimately compromise and simplify the treatment of claims to achieve speed, simplicity, and efficiency in claims handling, reducing costs of administration in order to deliver a greater portion of the settlement value to class members as benefits.

The court will consider the same consideration when it is deciding whether to approve the settlement at a later date under Rule 23(e)(2). At that stage, the court may have more information on any potential issues raised by objectors.

> BEST PRACTICE 5C(i): If the differences in the treatment between class members are material or the conflicts of interest are real, a court should consider whether certain safeguards protect the class members and whether the benefits of having a class-wide settlement otherwise outweigh the risks.

If class members are treated differently under the proposed settlement, the court should determine whether the differences in treatment are justified. In making this determination, the court should consider whether the proposed settlement was achieved with the help of a third-party neutral or other mediator in assessing the fairness of the different treatment. Material differences in class members' claims (either in strength or value) may be appropriately addressed in the claim process and plan for allocating the settlement fund to class members.

> BEST PRACTICE 5C(ii): In assessing the equitable treatment of class members relative to each other under Rule 23(e)(2)(D), a court should give due regard to the advantages of simplifying the treatment of claims to achieve efficiency and finality.

Similarly, even if some types of claims would have been too individualized to include in a class certified for litigation purposes (for example, common law fraud and its reasonable-reliance requirement), courts should consider the benefit of obtaining relief through the class action

mechanism for numerous class members, as opposed to requiring them to bring individual claims, and the willingness of defendants to pay a class settlement in order to obtain finality.

In sum, courts' consideration of the equitable treatment factor should be flexible, protecting the absent class members, while taking into account the benefit to class members and defendants of class action resolution.

> BEST PRACTICE 5D*:* Although not required by Rule 23(e)(1), a court should consider holding a hearing on whether to direct notice to the class of a proposed settlement in an appropriate case if the court has questions or concerns about whether the information presented by the parties is sufficient under the multiple Rule 23(e)(2) factors for it to decide that settlement approval at a later stage is likely.

Holding a hearing at the notice stage may be useful to: (i) help the court understand the proposed settlement approval process, which is not always spelled out clearly in the motion papers or settlement agreement; (ii) incorporate any changes the court finds necessary in the notice documents; and (iii) provide the parties with a preview of any concerns the court may have to approval of the settlement so that they may be addressed before notice is given to the class.

If the court has a concern about a particular settlement term, it should consider providing guidance to the parties, so that they can address the concerns and return with an amended proposal for the court's renewed consideration.

Because the court may only approve or deny approval of the settlement, and may not change its terms, any known deficiencies or concerns that could potentially lead to denial of the settlement should be addressed before notice is sent to the class. Otherwise, the court and the parties run the risk of sending out notice to class members, obtaining denial of the settlement, and then having to send out a new notice of new settlement terms — leading not only to additional expenditures of time and money, but also to potential class member confusion due to receipt of multiple notices.

At the notice stage, the court should balance the interests of obtaining enough information to determine whether the court will likely grant approval of the settlement and certify the class, and the interests of getting notice out to the class and avoiding further delay when a final settlement hearing will be held after notice to the class is given and the class has an opportunity to object or opt out.

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