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Structuring Class Settlements to Obtain Court Approval

Attorney Fees, Notice, Claims Rates, Coupon Settlements, Incentive Awards, and More

WEDNESDAY, SEPTEMBER 18, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Structuring Class Settlements to Obtain Court Approval

Alfredo Torrijos
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September 18, 2019

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You settled your class action…

Time to Celebrate?

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Not so fast

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Judicial Approval Is Required

Settlement of a class action requires court approval to prevent fraud, collusion or unfairness to the class

– *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801

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The Role of the Court

A settlement in a class action has the potential to bind absent class members without their approval.

The judge, therefore, must ensure that the settlement is fair, sitting as a guardian for class members.

The court acts as a fiduciary of absent class members by inquiring into the fairness of a proposed class action settlement.

– *Kullar v. Foot Locker* (2008) 168 Cal.App.4th 116, 129

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The Class Action Settlement Process

Settlement agreement	Preliminary approval	Class notice	Final approval
Drafting of settlement agreement, proposed orders, and proposed notice. Selection of claims administrator.	The court's initial inquiry into the fairness, reasonableness, and adequacy of the settlement. Order on dissemination and form of notice.	Dissemination of notice to class. Opportunity for class members to submit claims, opt-out or file objections.	Final review after notice has been distributed to the members of the class. Consideration of attorneys' fees and plaintiff incentive award.

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Goal: Court Approval

Rule 23 Requires Court Approval of Class Action Settlements

Courts typically look to the following factors in determining whether the settlement is "**fair, reasonable and adequate**."

- the risk of fraud or collusion;
- the complexity, expense and likely duration of the litigation;
- the amount of discovery engaged in by the parties;
- the likelihood of success on the merits;
- the opinions of class counsel and class representatives;
- the reaction of absent class members; and
- the public interest.

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Risks of Non-Approval

For Defendant

- Wasted Funds
- Attorney and Executive Time
- Risk of Ongoing Litigation – Additional Exposure, Negative Precedent, etc.

For Plaintiff

- Delay to Class Members' Receipt of the Settlement Benefits
- Risk of Ongoing Litigation for Class Members
- Negative Precedent
- Risk of Ongoing Litigation to Attorney Fees & Future Class Counsel Appointment

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Issues Affecting Approval

Settlement Amount

- As compared To Maximum Recovery
- In Light Of Risks Of Litigation
- Formal/Informal Discovery
- Presentation To Court/Confidentiality

Pay Out

- Structure
  - Common Fund v. Claims Made settlements
  - Pro Rata Adjustment
- Claims Filed Matter
  - Too few claimants
  - Too many claimants

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Issues Affecting Approval (Cont'd)

Claims Process

- On-line
- Paper
- Proof of Purchase
- How the process can encourage or discourage claims

Objectors

- Shake Down or Professional Objectors
- "Public Interest" Objectors
- Plaintiffs' Lawyers who were frozen out
- Common grounds for objections/appeals

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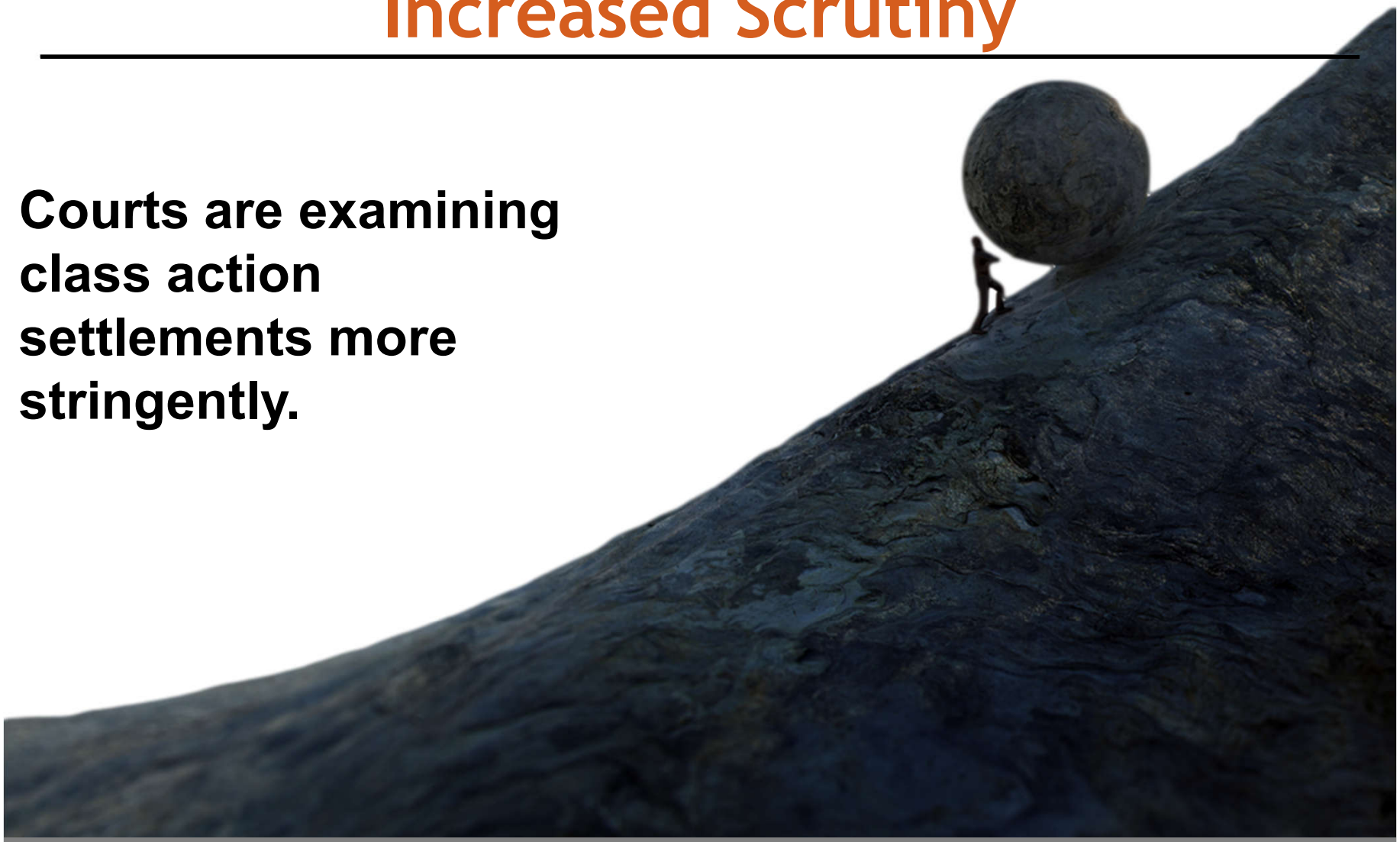
Increased Scrutiny

Courts are examining class action settlements more stringently.



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Issues Requiring Caution

- Notice and claims forms
- Claims made, claims rate, and reversionary/illusory settlements
- Overbroad releases and releases without remedy
- Coupon settlements
- Cy pres relief
- Incentive awards
- Attorneys' fees
- Role of objectors

STRUCTURING CLASS SETTLEMENTS TO OBTAIN COURT APPROVAL

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Class Notice

Federal Rule Civil Procedure 23(c)(2)(b):

- "For any class certified under Rule 23(b)(3), the court must direct to class members the ***best notice that is practicable under the circumstances***, including individual notice to all members who can be identified through reasonable effort."
- "The notice must clearly and concisely state in plain, easily understood language:
  - the nature of the action, including claims issues & defenses;
  - the definition of the class certified;
  - that a class member may enter an appearance through an attorney if the member so desires;
  - that the court will exclude from the class any member who requests exclusion;
  - the time and manner for requesting exclusion; and
  - the binding effect of a class judgment on class members"

Northern District of California's Procedural Guidance

- The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members.
- The notice should include the following information:
  (1) contact information for class counsel to answer questions;
  (2) the address for a website, maintained by the claims administrator or class counsel, that has links to the notice, motions for approval and for attorneys' fees and any other important documents in the case;
  (3) instructions on how to access the case docket via PACER or in person at any of the court's locations.

Northern District of California's Procedural Guidance

Class counsel should consider the following ways to increase notice to class members:

- identification of potential class members through third-party data sources;
- use of social media to provide notice to class members;
- hiring a marketing specialist;
- providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and
- distributions to class members via direct deposit.

Courts Have Denied Preliminary and/or Final Approval Where Proposed Notice Was Deemed Insufficient

Patterson v. Premier Construction Co. Inc., 2017 WL 122986 (E.D.N.Y. Jan. 12, 2017) (denying preliminary approval).

- Use of "vague language" and the fact that dollar amounts available to claimants did not appear until page 5 of the notice caused court to hold notice was "inadequate and misleading."

Chavez v. PVH Corporation, 2015 WL 581382 (N.D. Cal. Feb. 11, 2015) (denying final approval).

- "Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." (citations omitted).
- Here, scope of release was not sufficiently described; approval denied.

Cy Pres Distributions

- May be permitted where the cost of distributions to class members is cost-prohibitive or all where class members have fully recovered.
- A cy pres beneficiary must be related to the nature of a plaintiff's claims because if it is not "tethered to the nature of the lawsuit and the interests of silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel or the court." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011).
- *Frank v. Gaos*, U.S. Supreme Court (2019)

Cy Pres Distributions (cont'd)

Dennis v. Kellogg Company, 697 F.3d 858 (9th Cir. 2012) (reversing settlement approval).

- Allegations of false advertising on Kellogg's cereal product. Proposed *cy pres* recipients were "charities that feed the indigent."
- Ninth Circuit held that appropriate cy pres recipients "are not charities that feed the needy, but organizations dedicated to protecting consumers from . . . false advertising."

Bailes v. Lineage Logistics, 2016 WL 4415356 (D.Kan. Aug. 19, 2016) (denying preliminary approval).

- Case involved fair credit reporting. Proposed cy pres recipient was US Committee for Refugees and Immigrants. Court held recipient "so unrelated to the claims in this case that the court cannot find that class members will benefit from the cy pres provision."

Claim Forms

- Claim forms should be clear, easy to understand, reasonable in what they require, and as short as possible.
- Further tips in FJC's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*
- *See, e.g.*, *Eubank v. Pella Corp.*, 753 F.3d 718, 725 (7th Cir. 2014) (reversing approval) (noting "the claim forms are long," "complicated" and require a claimant to submit a slew of arcane data.")

Problems With Claim Forms Can Cause Court to Deny Approval

There cannot be discrepancies between settlement agreement and claim form:

JWD Automotive, Inc. v. DJM Advisory Group LLC, 2017 WL 2875679 (M.D. Fl. July 6, 2017) (denying preliminary approval).

- Class was defined as "all persons who were sent one or more facsimiles" and called for payment to class members "up to $500 per fax," but claim form had no place for class members who received multiple faxes to so indicate.

Espinoza v. Domino's Pizza, LLC, 2011 WL 13180228 (C.D. Cal. 2011) (denying preliminary approval).

- Court held that claim form's description of class members' rights was not consistent with terms of the settlement.

"Claims-Made" Settlements

- Class settlements can be structured to provide automatic payments/coupons to all class members from a common fund.

- Alternatively, class settlements can be "claims made," requiring class members to effectively opt-in to the settlement proceeds by submitting claims forms.

- Advantages from plaintiffs' counsel's perspective: stated value of settlement exceeds amount actually delivered to class members, for purposes of calculating fee award.

- Advantages from defendants' perspective: Highlights lawyer-driven nature of underlying case; better match between interested class members and remedy.

"Claims-Made" Settlements (cont'd)

- Claims-made settlements are very common in consumer class actions.
- There are practical reasons for requiring claims forms:
  - No records of class member purchases
  - Stale address/contact information for class members
  - Helps ensure that only actual class members participate in the settlement
  - Can maximize the individual relief for those class members who take the time and effort to make a claim
  - Minimizes overall cost to defendant of funding the settlement (e.g., no concerns for unclaimed funds or cy pres)

"Claims-Made" Settlements (cont'd)

- Generally, under a claims-made settlement, a defendant's ultimate settlement obligation is unknown, and depends on the number of the claims submitted and the value of those claims.
- Sometimes, claims-made settlements can include a fixed or "minimum" amount for the defendant's settlement payment, with unclaimed funds:
    - Going to a court-approved cy-pres recipient
    - Being distributed pro rata amount claiming class members
    - Reverting to the defendant

"Claims-Made" Settlements (cont'd)

- Concern for "illusory" settlements.
- Some courts have criticized that "an extremely low response rate" is "the predictable 'economic reality' of claims-made" settlements. *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 298-99 (6th Cir. 2016) (Clay, J., dissenting).
  - "The fact that the vast majority of the recipients of notice did not submit claims hardly shows 'acceptance' of the proposed settlement: rather it shows oversight, indifference, rejection, or transaction costs. The bother of submitting a claim, receiving and safeguarding the coupon, and remembering to have it with you when shopping may exceed the value of a $10 coupon to many class members." *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014).
- Prevailing wisdom in consumer cases is that claims rates can be in the range of 1-10%. In reality, claims rates vary widely and are difficult to predict—we have seen them approach 100% in some cases.

"Claims-Made" Settlements (cont'd)

FJC Checklist for Claims Process

- Is a claims process really necessary?
- Does the claims process avoid steps that deliberately filter valid claims?
- Are the claim form questions reasonable, and are the proofs sought readily available to the class members?
- Is the claim form as short as possible?
- Is the claim form well-designed with clear and prominent information?
- Have you considered adding an online submission option to increase claims?
- Have you appointed a qualified firm to process the claims?
- Are there sufficient safeguards in place to deter waste, fraud, and/or abuse?

Settlement Releases

- "[I]n order to achieve a comprehensive settlement ... a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action." 5 Alba Conte & Herbert Newberg, Newberg on Class Actions § 16:7 (4th ed. 2007).
  - *But see Bond. v. Ferguson Enters., Inc.*, No. 1:09-CV-01662, 2011 WL 284962, at *7 (E.D. Cal. Jan. 25, 2011) (holding that a release for "unrelated claims of any kind or nature that class members may have against defendants" was overbroad).
- Courts may release even those claims over which the court would not have had jurisdiction. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

Retroactive Narrowing of Class Releases After Final Approval

Retroactive narrowing based on due process or unique class action principles

- "It seems to us unlikely that a plaintiff class's claims would ever be based on the identical factual predicate as the claims of a third party who did not adequately represent the class's interests. We conclude that the claims raised by [plaintiffs] in this case are not derived from the same 'transaction or occurrence' as the claims of the [prior] Class Plaintiff, and therefore were not released by the [prior] Settlement." *Hesse v. Sprint Corp*., 598 F.3d 581, 592 (9th Cir. 2010).

Different approach – class action settlements are like any other contract

- "We look to the intent of the settling parties to determine the preclusive effect of a dismissal with prejudice entered in accordance with a settlement agreement, rather than to general principles of claim preclusion…. The best evidence of [the parties'] intent is ... the settlement agreement itself ..., as interpreted according to traditional principles of contract law." *Wojciechowski v. Kohlberg Ventures, LLC*, 923 F.3d 685 (9th Cir. 2019) (quotation marks and citations omitted).

Objectors

- Role/types of objectors
  - “Real” class member objectors.
  - True Believers.
  - Professional objectors.

- Professional objectors
  - Habitually object solely for purpose of delaying proceeding and extracting a payoff.
  - Courts routinely discount/overrule such objections, and have even threatened sanctions and disbarment.
  - Discovery into arrangements between serial objectors and counsel, previous objections, etc.
  - Appellate bonds.
  - Quick-pay provisions.
  - RICO suit against serial objectors.

Objectors (cont'd)

Recent Changes to Rule 23(e)

- Requires an objector to a class action settlement state its objections "with specificity."
- Requires an objector to identify whether its objections to a settlement apply to the entire class, a subset of the class, or the objector alone.
- Requires court approval for the withdrawal of objections to class settlements or of appeals challenging a district court's refusal to credit an objection.
  - Subjects "payoffs" of objectors to judicial scrutiny and potentially exposes parties who negotiate payoff deals to discovery and sanctions
- Changes do not apply solely to professional or serial objectors.

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Coupon Settlements

Where Class members receive coupons or vouchers but class counsel is paid in cash.

Congress concerned that coupon settlements "may incentivize lawyers to negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.

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Coupon Settlements (cont.)

Unlike cash settlements, coupon settlements hard to value (redemption rates, restrictions on coupons)

- difficult valuation makes district court consideration of fees more complex

- gives class counsel opportunity to puff the perceived value of the settlement to enhance their own compensation

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Coupon Settlements (cont.)

What is a "coupon"?? (*In re EasySaver Rewards Litigation; In re Online DVD Rental Antitrust Litigation*)

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In re HP Inkjet Printer Litig.

Ninth Circuit reversed an attorneys' fee award as part of a global settlement of three consumer class actions alleging unfair business practices, because the lower court's calculation of the award did not properly include the value of coupons given as part of the relief in violation of CAFA.

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In re HP Inkjet Printer Litig.

Court emphasized the abuses CAFA was designed to eliminate, including "discouraging coupon settlements—particularly those where presumably valuable (but actually worthless) coupons form some part of the basis for an attorneys' fees award," and concluded that where a settlement provides relief only in the form of coupons, then the fee award must be based on redemption value of the coupons.

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In re HP Inkjet Printer Litig.

Because the lower court's lodestar attorneys' fee award included an estimate of value of both injunctive and coupon relief, the Ninth Circuit held that "the district court abused its discretion where it made a rough estimate of the ultimate value of this settlement, and then awarded fees in exchange for obtaining coupon relief without considering the redemption value of the coupons."

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In re HP Inkjet Printer Litig.

Court also noted that "the responsibility for this error lies principally with the parties" due to their structuring the settlement so that no coupons could issue until after entry of a final judgment, so that it was "impossible for the district court to calculate the redemption value of the coupons as required by § 1712(a)."

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Incentive Awards

District Courts must scrutinize incentive awards for class representatives, so that they do not undermine the adequacy of the class representatives.

Incentive Awards may not be disproportionately large and should not be routine: “[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.” *Staton v. Boeing Co.,* 327 F.3d 938, 975-78 (9th Cir.2003).

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Incentive Awards (cont.)

Conditioned Incentive Awards: courts reject because they "cause the interests of the class representatives to diverge from the interests of the class." *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1161 (9th Cir. 2013)

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Class Counsel's Entitlement to Fees

Fee Shifting

Courts may award attorneys' fees to class counsel in fee shifting cases, where the responsibility to pay attorney fees is statutorily or otherwise transferred from the prevailing plaintiff or class to the defendant.

California law permits fee shifting on certain statutory causes of action, when a plaintiff has acted as a private attorney general by enforcing an important right affecting the public interest (CCP, § 1021.5), and in contract cases where the contract provides for an award of fees to the prevailing party (Civ. Code, § 1717).

Common Fund Doctrine

In the absence of fee shifting, courts may award attorneys' fees to class counsel pursuant to the common fund doctrine. This is also called "fee spreading."

Fee spreading occurs when a settlement or adjudication results in the establishment a common fund for the benefit of the class. The award of attorneys' fees under the common fund doctrine is necessary to prevent absent class members' unjust enrichment, since they benefited from class counsel's efforts.

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Judicial Approval Is Required

To "avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement."

– *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003)

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

– Fed. Rules Civ. Proc., rule 23(h)

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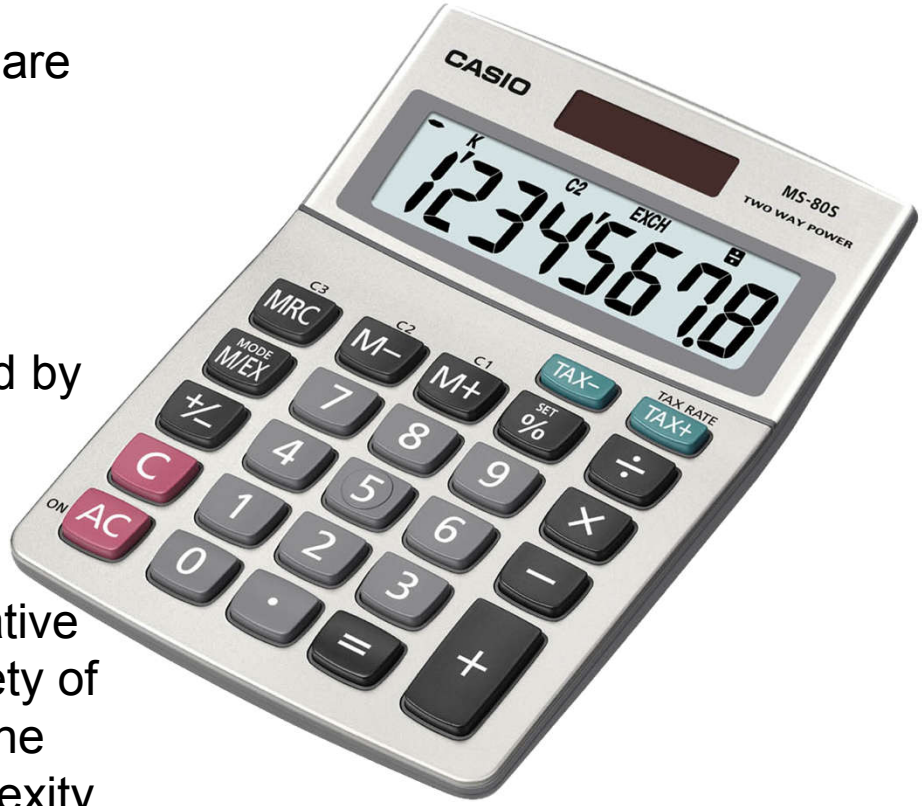
Two Methods for Calculating Fees

Percentage-of-the-Fund Method

- Calculates the fee as a percentage share of a recovered common fund or the monetary value of plaintiffs' recovery.

Lodestar-Multiplier Method

- Calculates the fee by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate.
- Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier" to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.



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Pros and Cons of Each Method

Lodestar-Multiplier Method

Pros

- Provides for better accountability.
- Encourages plaintiffs' attorneys to pursue marginal increases in recovery.

Cons

- Creates and disincentive for early settlement of cases.
- Encourages lawyers to expend excessive, perhaps unnecessary, hours.
- The need for documentation and examination of detailed billing records greatly increases the amount of time and effort devoted to fee matters and, therefore, consumes too large an amount of judicial resources in its application.

Percentage-of-the-Fund Method

Pros

- Is easy to calculate.
- Establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery.
- Encourages early settlement, which avoids protracted litigation.

Cons

- May provide incentives to attorneys to settle for too low a recovery because an early settlement provides them with a larger fee in terms of the time invested.
- Where the class settlement is for a very large amount, a percentage fee may be criticized as providing counsel a windfall in relation to the amount of work performed.

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Which method applies?

- In statutory fee shifting cases, where the prevailing party's fees are ordered paid by the non-prevailing party, the lodestar method is generally adopted.
- Currently, all the circuit courts either mandate or allow their district courts to use the percentage method in common fund cases; none require sole use of the lodestar method.
- Most state courts also concluded the percentage method of calculating a fee award is either preferred or within the trial court's discretion in a common fund case.

"[F]ederal and state courts alike have increasingly returned to the percent-of-fund approach, either endorsing it as the only approach to use, or agreeing that a court should have flexibility to choose between it and a lodestar approach…"

– *Strawn v. Farmers Ins. Co. of Oregon* (2013) 353 Or. 210, 219

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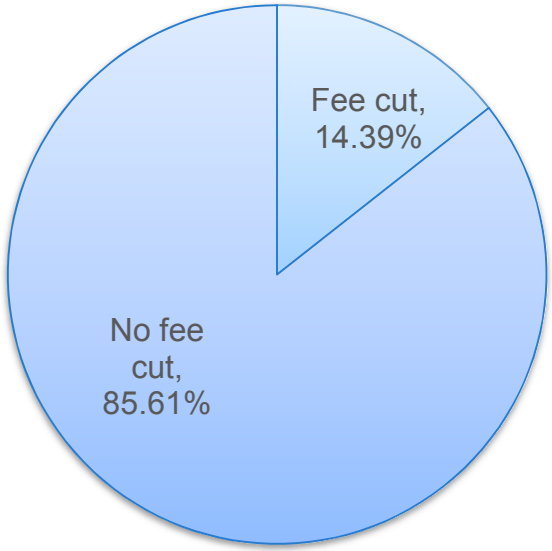
How frequently do courts cut fees?

- Data on the how frequently courts cut class counsel's requested fees is sparse.
- A 2015 article in the Columbia Law Review reported the results from the examination of the fee requests and awards in 431 class actions that settled between 2007 and 2012 and found that requested fees were cut by courts 14.39% of the time (i.e., in 62 of the 431 cases examined). Put another way, in 6 out of 7 cases, class counsel received precisely the fee requested.
- All of the cases reviewed, however, were securities class actions. It is entirely possible that courts may cut fees in non-securities cases at higher or lower rates.



– Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee Setting in Securities Class Actions*, 115 Colum. L. Rev. 1371 (Oct. 2015)

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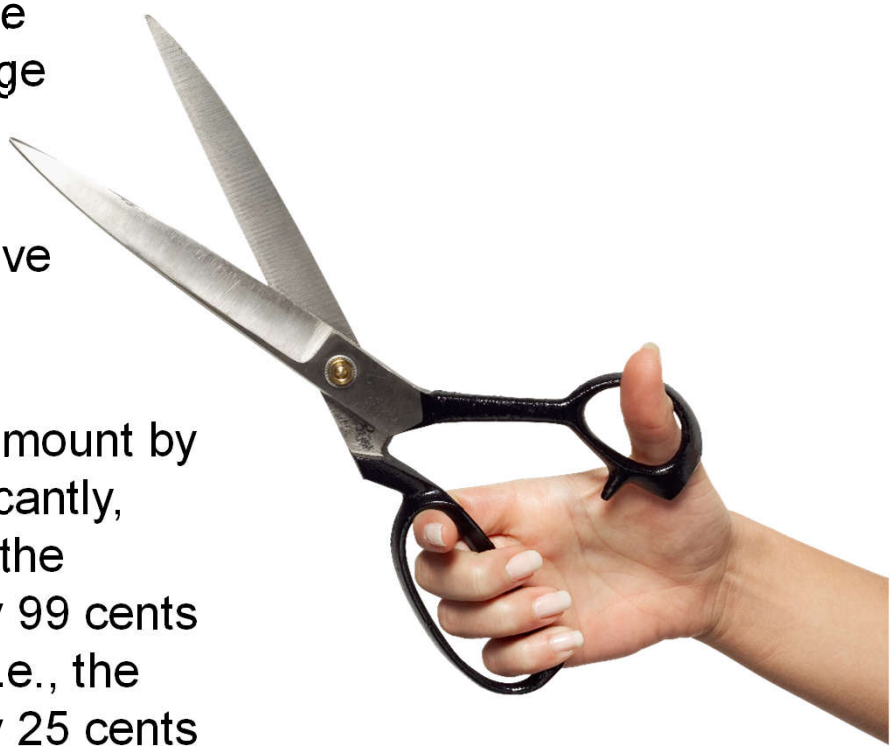
How large are the cuts?

- As reported by the authors in *Is the Price Right? An Empirical Study of Fee Setting in Securities Class Actions*, in those cases where the requested fees are reduced, the average cut is 21.72%.
- In other words, on average, class counsel whose fees are cut receive approximately 78 cents of every dollar requested.
- The authors found, however, that the amount by which fees were reduced varied significantly, with the cuts ranging from 0.92% (i.e., the attorneys were awarded approximately 99 cents of every dollar requested) to 74.67% (i.e., the attorneys were awarded approximately 25 cents of every dollar requested).



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Why do courts cut fees?

Rationale	Percentage
The requested fee is "too large"	40.32%
The requested fee is "too large given the work performed by the attorneys"	35.48%
Requested fee fails a lodestar cross-check	32.26%
The requested fee is "too large given lead counsel's actual risk of non-recovery"	30.65%
Requested fee is "out of line with fees in similar cases"	30.65%
The court cannot rely on the market for setting attorneys' fees	4.84%
Requested fee not the result of arm's-length bargaining	1.61%

– Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee Setting in Securities Class Actions*, 115 Colum. L. Rev. 1371 (Oct. 2015)

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Attorneys' fees vs. class recovery

- Courts are increasingly evaluating requested attorneys' fees against the recovery provided to class members.
- In *Banks v. Nissan North America Inc.*, 2015 WL 7710297 (N.D. Cal. Nov. 30, 2015), Judge Hamilton denied final approval of a class settlement in a suit alleging defective brakes in Nissan vehicles because class counsel's fee represented the lion's share ($3.43 million) of the $4.27 million settlement fund.

- According to the court, "where 6.5% of the payout goes to class members, and 80.2% goes to the attorneys purporting to represent those class members, the tail is clearly wagging the dog." Noting that a significant percentage of the 1,500-member class would receive less than $20, the court said it would need to see a more "substantial benefit" to class members to justify such a large award to class counsel.

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Banks v. Nissan North America

- Class counsel in *Banks v. Nissan North America Inc.* asserted that it was entitled to attorneys' fees based on the lodestar method, noting that the fee request represented a negative multiplier of .76.
- The court, however, noted that it could not simply accept counsel's lodestar figure "without any scrutiny," given the court's obligation to "calculate the lodestar figure based on the number of hours reasonably expended on the litigation."
- The court concluded that it could not engage in this analysis since class counsel did not submit billing records.
- The court additionally noted that it would not allow parties to circumvent the 25% benchmark requirement by artificially structuring the fees separate from settlement benefits.

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In re Bluetooth Headset

- Even if you are seeking fees pursuant to the lodestar method, courts may nonetheless consider the recovery to the class in determining whether the requested fees are reasonable.
- The trial court in *In re Bluetooth Headset* awarded fees based on the lodestar method. Objectors argued that the trial court should have treated this settlement as producing a "constructive common fund" and employed a percentage-of-recovery method to assess the reasonableness of the fee award.
- The Ninth Circuit stopped short of requiring the district court to treat it as a constructive common fund case, but it did "agree with objectors that the district court needed to do more to assure itself – and us – that the amount awarded was not unreasonably excessive in light of the results achieved."

"Notably, the district court made (1) no explicit calculation of a reasonable lodestar amount; (2) no comparison between the settlement's attorneys' fees award and the benefit to the class or degree of success in the litigation; and (3) no comparison between the lodestar amount and a reasonable percentage award. On this record, we lack a sufficient basis for determining the reasonableness of the award."

– *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011)

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Actively Searching for Collusion

"[C]ourts … 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."

– *In re Bluetooth Headset*, 654 F.3d at 946

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Warning Signs of Collusion

Disproportionate Attorneys' Fee	Clear Sailing Provisions	Kicker Arrangements
"when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded"	"when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries 'the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class'"	"when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund"

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Disproportionate Attorneys' Fees

Red flags:

- fees which are paid separately from common fund
- fees that are greater than the settlement benefits made available to the class

Solutions:

- if the settlement establishes a common fund, set fees as a percentage of fund
- if possible, value the non-monetary benefits provided to class by the settlement
- establish reasonableness of fees with lodestar cross-check

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Clear Sailing Provisions

A "clear sailing provision" is agreement whereby the defendant has agreed that it will not oppose class counsel's application for fees and costs up to a set amount.

"Although clear sailing provisions are not prohibited, they 'by [their] nature deprive[ ] the court of the advantages of the adversary process' in resolving fee determinations and are therefore disfavored."

– *In re Bluetooth Headset*, 654 F.3d at 946

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Kicker Arrangements

A kicker arrangement reverts unpaid attorneys' fees to the defendant rather than to the class

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Kicker + Clear Sailing = Trouble

"[A] kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger of collusion already suggested by a clear sailing provision. If the defendant is willing to pay a certain sum in attorneys' fees as part of the settlement package, but the full fee award would be unreasonable, there is no apparent reason the class should not benefit from the excess allotted for fees. The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees."

– *In re Bluetooth Headset*, 654 F.3d at 949

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Thank you

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