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by Aashish Y. Desai

Confirmation CLASS

The confirmation process for class action settlements is far more complex than in traditional litigation

The process of finalizing the settlement of class action litigation can seem shrouded in mystery. The procedures—and their pitfalls—for presenting a class action settlement to the courts have largely eluded the focus of commentators. The basic structure for getting a settlement approved seems straightforward. To prevent fraud, collusion, or unfairness to the absent class members, a settlement requires court approval,[1] and the trial court has "broad discretion" to determine the fairness of a settlement.[2] The job, then, of counsel on both sides is to convince the court that the proposed settlement is fair, reasonable, and adequate for all concerned.[3]

Despite the seeming clarity of the process, practitioners should be aware that the devil is in the details. Often the determination of whether a settlement passes legal muster depends on terms negotiated long before any motion is brought to the court. Indeed, the court's approval of the settlement and notice requirements provide a measure of assurance that the rights of the absent class members have been carefully considered and that class members are afforded an opportunity to voice their views on the settlement. With this in mind, the formulation of an effective settlement strategy is vital.

California courts favor settlement.[4] Nevertheless, court approval of class action settlements is a protracted and complex two-step process. First, counsel submit the pro-

Aashish Y. Desai is a partner at Mower, Carreon & Desai, LLP, where he prosecutes class action lawsuits involving wage and hour, antitrust, and consumer issues.

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posed settlement terms, and the court makes a preliminary fairness evaluation. If the preliminary evaluation of the proposed settlement does not disclose grounds for doubting its fairness or any other obvious deficiencies, such as unduly preferential treatment of class representatives or excessive compensation for attorneys, and the proposal appears to fall within the range of those with a possibility for approval, the court will order the issuance of notice to the class members of a formal fairness hearing. At the hearing, arguments and evidence may be presented in support of and in opposition to the settlement.[5]

Courts make three basic rulings at preliminary approval hearings: 1) approval of a settlement class (if there has been no prior certification order), 2) approval of the terms of the settlement, and 3) approval of class counsel's application for attorney's fees and costs.[6] Unfortunately, the strength of the findings made at these preliminary hearings vary. Some courts take a hard and careful look at the settlement proposal at this stage. But other courts take the position that if a settlement falls within the "range of reasonableness" required for a settlement offer, or is presumptively valid, tentative approval is warranted, noting that a more careful evaluation will be made at the final approval stage.

In *Amchem Products, Inc. v. Windsor*,[7] the U.S. Supreme Court addressed the settlement class issue. It held that a district court faced with a settlement-only class need not inquire whether the case would present intractable problems of trial management, but the other requirements for certification must still be satisfied. Thus, any request for preliminary approval of a class settlement should include a section on why certification would be appropriate, albeit within the context of a settlement.[8] By doing this, defendants and plaintiffs can unite on the certification issue. The defendants can, if appropriate, inform the court that while they do not contest the conditional certification for purposes of settlement, if the matter were litigated the case would likely present intractable problems of trial management. If the case has been certified prior to settlement, the parties should refer to the prior findings and rulings of the trial court for support.

A presumption of fairness exists when: 1) the settlement is reached through arm's-length negotiation, 2) investigation and discovery are sufficient, 3) counsel are experienced in similar litigation, and 4) the number of objectors is small.[9] A mediator can offer significant help to counsel with meeting this presumption, particularly if the mediator's assessment is accompanied by a written liability and damage analysis.[10] The court's responsibility to the absent class members must not be perfunctory.

California state courts generally consider whether counsel had sufficient information to make an informed evaluation, the likelihood of success at trial, and the possible range of recovery. This analysis necessitates a comparison between the proposed settlement and the potential results at trial, discounted for the risk of not prevailing.[11] The defendant's financial position at the time of the settlement may also provide the court with helpful information—and parties are relying more and more upon expert witnesses to provide input on the overall possible range of recovery at trial.[12] Also, when a settlement is presented before significant discovery, the court may require additional evidence of fairness, such as corporate declarations supporting settlement.[13] Clearly, class action settlements cannot be evaluated simply by using mathematical yardsticks.

At the preliminary approval hearing, the court will also enter an award conditionally approving attorney's fees and costs to class counsel. Counsel for the class is entitled to his or her attorney's fees out of the so-called common settlement fund.[14] If the case is brought under a statute that authorizes fees to the prevailing party, class counsel is entitled to fees under a separate doctrine.[15] California law provides for mandatory fee awards when fee statutes are involved.[16] Courts may base their calculations on the "lodestar" or "multiplier" method.[17]

When the value of the settlement is contingent on the claims filed, it is now settled law in federal court that the court should look to the total benefit provided to the class, regardless of the claims rate, when establishing a reasonable fee.[18] Unfortunately, state court judges in California tend to vary greatly in their awards of attorney's fees based upon the total benefit provided to the class members.

Moreover, California Code of Civil Procedure Section 384 states that any reversion from a common fund settlement must be distributed pursuant to the cy-pres (next best use) doctrine. This statute arguably prohibits reversion to the defendant from a remainder in the settlement fund. However, the California Court of Appeal has recently interpreted this statute to prohibit reversion only in those cases in which the parties have "not made other provisions" for those funds.[19] Thus, if the parties detail the reversion process in the settlement agreement, the prohibition under Section 384 should not be implicated. Class counsel may then be taking a risk on attorney's fees if the settlement results in a low claims rate and the state court judge does not follow the federal authority on the total benefit theory of awarding fees.

When defendants agree to pay class counsel a certain sum into a separate fund in addition to the class settlement fund, the court may conditionally approve that arrangement subject to objections at final approval[20]: "In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the [court] must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper."[21] Generally, however, the court will likely request sufficient underlying factual data to make a "reasonable fee" award—whether based on a common fund or lodestar theory.[22]

Notice of the Settlement

The rules require notice of a class settlement "in such manner as the court directs."[23] The committee formed by the U.S. Supreme Court to provide guidance on the federal rules suggest that class notice be couched in "plain, easily understood language."[24] This is not as simple as it sounds. Factual uncertainty, legal complexity, and the complications of litigation make it increasingly difficult for practitioners to comply with this requirement—and trial courts, for the most part, are not demanding compliance. Thus, class notice, particularly in state court, tends to be overly legalistic and practically incomprehensible to members of the general public. Indeed, most notices still use pleading-style headers and clumsy legalese to explain the claims and legal rights to the class. One study noted that 77 percent of the notices issued last year did not have a clear or concise headline; 73 percent did not adequately reveal the attorney's fees requested; and 81 percent did not explain what the term "opting-out" means.[25]

The major issue that arises is whether sufficient information is in the notice to allow the absent class members to make a decision about whether they should accept, object, or refuse the proposed settlement.[26] Often the specific recovery cannot be computed until the total claims and the total amount of fees and expenses have been calculated. However, other times, counsel will know exactly how much is at stake for each class member before notice is issued. For example, in the typical wage and hour overtime case, employers often agree to pay an amount certain for each week the employee has worked.[27] Counsel can then, utilizing the employer's payroll records, determine the approximate value of each class member's claim, particularly if the employer is demanding a reversion of the remaining funds.[28] The notice can specifically note the individual recovery, allowing each class member to make an informed decision about whether to accept the proffered settlement. While this type of exactitude is not required, counsel should include the information, if possible, in each class

MCLE Test No. 172

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. The trial court has limited discretion to determine whether a class action settlement is fair.
True.
False.

2. California courts favor settlement.
True.
False.

3. The only factor used by courts to determine if a presumption of fairness exists in a class action settlement is whether the settlement was reached through arms-length negotiation.
True.
False.

4. California law provides for mandatory fee awards when fee statutes are involved.
True.
False.

5. Reversion of excess funds to a defendant is prohibited only in those cases in which the parties have not made other provisions for those funds.
True.
False.

6. After the court preliminarily approves a class action settlement, notice to the class generally is required.
True.
False.

7. Court rules prohibit sending notice of a settlement of a class action via the Internet.
True.
False.

8. Class representatives have veto power over an otherwise fair settlement.
True.
False.

9. Class representatives are not entitled to awards of compensation for the services they provide during litigation.
True.
False.

10. If a class member is not named as an official class representative, he or she is not entitled to an incentive award even if the class member was active and critical.
True.
False.

11. Claims that are not certified may be released as long as there is adequate representation and an opportunity to exclude, known as the opt-out provision.
True.
False.

12. The parties to a settlement have no standing to object at a final approval hearing.
True.
False.

13. Current trends reveal that class action objectors usually are well-meaning class members who just want to do the right thing.
True.
False.

14. A class member who files a request for exclusion from the settlement has standing to object to its terms.
True.
False.

15. At a final fairness hearing, the trial court must independently analyze the recommendations of the litigants to ensure that the best interests of the class members are protected.
True.
False.

16. In assessing the settlement proposal, the court should look to its individual component parts rather than the settlement as a whole.
True.
False.

17. The final class action judgment must include a provision for the trial court to retain jurisdiction of the parties to enforce the terms of the settlement.
True.
False.

18. The final rulings of a class action will be binding on all absent class members and therefore preclude reconsideration in another forum.
True.
False.

19. In federal court, unnamed class members must formally intervene in the action to have standing to appeal.
True.
False.

20. No authority suggests that class notice should be couched in plain and easily understood language.
True.
False.

MCLE Answer Sheet #172

CONFIRMATION CLASS

Name _____

Law Firm/Organization

_____

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3.	☐ True	☐ False
4.	☐ True	☐ False
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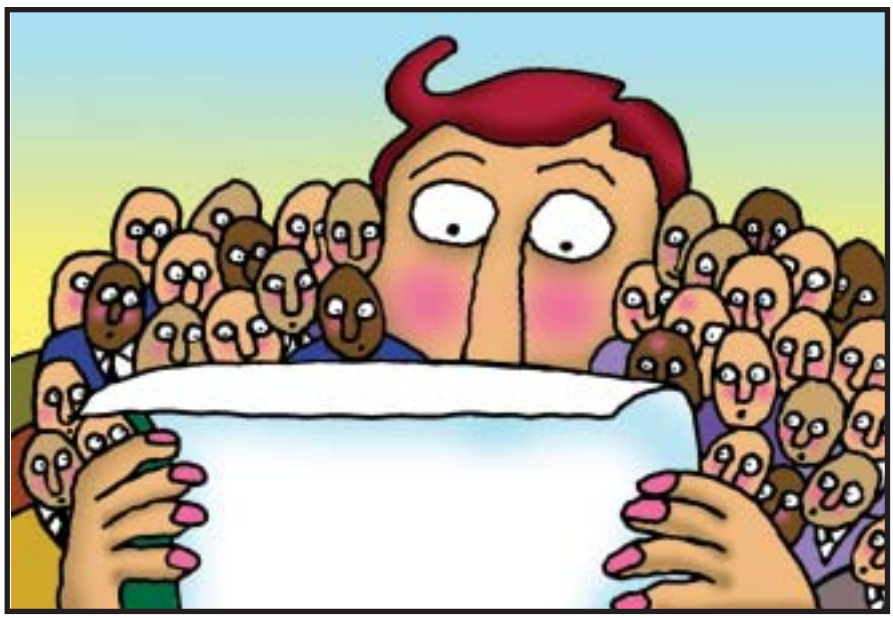
11.	☐ True	☐ False
12.	☐ True	☐ False
13.	☐ True	☐ False
14.	☐ True	☐ False
15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

notice, because doing so may go a long way toward alleviating due process concerns regarding absent class members.

After the court has issued preliminary notice, the parties have the burden of assisting the court with the distribution of the notice to the class members—either by mail or publication.[29] This is accomplished by hiring so-called Third-Party Administrators (TPAs) to assist counsel in this process. The use of TPAs has evolved into a cottage industry. The list of class members, along with the corresponding contact information, is given to the TPA, who then takes over the task of preparing and stuffing envelopes with the class notice. The notices are mailed to the class members. Some TPAs will also issue, for example, 1099 and W-2 tax forms, calculate payroll taxes, and resolve disputes by claimants. The settlement agreement should state specifically whether the parties agree to a TPA to administer the settlement—and if so, who pays for the TPA's services—well before any motion is filed with the court.



If specific contact information for class members is unavailable, publication is required. Announcements regarding a significant number of settlements have been published in newspapers, magazines, and on the Internet.[30] The rules do not require that every class member actually receive notice; they do require the court to establish a procedure that is "reasonably calculated" to apprise all interested parties of the action.[31] As technology evolves, the mechanics of class distribution will likely become more creative.

In most cases, absent class members are required to file a proof of claim to be entitled to the settlement proceeds. The procedure for filing proofs is normally specified in the class notice. The claim forms are generally mailed with the class notice and often are attached to the published notice, if notice is by publication. The form usually is designed by counsel for the parties and approved by the court; however, third parties and expert witnesses are increasingly providing input on the most effective approaches to disseminate clear and concise notice. While some defendants have attempted to require claimants to obtain notary public stamps and 800 telephone numbers for requesting claim forms, most courts have rejected such measures because they discourage class participation.

A class member who files a proof of claim is entitled to know whether his or her claim was rejected or accepted. Most settlements should establish a procedure in which class members who file rejected claims are afforded an opportunity to cure the defect with the administrators of the settlement fund as long as they act promptly and within a specific time period.

Participation Payments

Class representatives have a special role in class actions. Since they act as the de facto voice of the class, they should be consulted during settlement negotiations. Obtaining the approval of the class representative is crucial during the preliminary approval process; likewise, the objection of class representatives to a proposed settlement may draw special concern from the court. However, a class representative does not have veto power over an otherwise fair settlement.[32] The theory is that the individual interests of any one class member, even a class representative, cannot be elevated over the best interests of the class as a whole: "The named plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement in order to secure their individual demands."[33] Therefore, while the class representative is free to object to the proposed settlement, this objection does not preclude a settlement that may fairly resolve the claims of the entire class, including the objecting class representative.

Class settlements often provide for incentive or service awards to compensate the named class representatives for the services they provide during litigation.[34] Courts note that class representatives who accept the risks and burdens of litigation deserve something extra for their efforts.[35] However, not all courts agree with this approach, and some older case law even describes these payments as a bounty.[36] Those that authorize participation payments usually look at 1) the time and effort put into the litigation, 2) the risk of retaliation, 3) whether the litigation involved the furtherance of a public policy, and 4) the relationship of value between the participation award and the class recovery.[37]

There is also authority for providing incentive awards to "active" class members—that is, those class members who helped with the litigation but are not named as an official class representative.[38] Courts have allowed these payments based upon, for example, the relative strength of the individual cases, the willingness of the active class members to attend depositions and mediations, or the contributions to the litigation strategy.[39]

Whenever participation payments are offered in a class settlement, class counsel would be well-advised to submit a detailed declaration from each class representative or active class member who is requesting the court for these awards. Additionally, class counsel should be careful—particularly during settlement negotiations, but throughout the settlement process—to never promise more than can be delivered regarding these awards.

The scope of the release given to settling defendants in a class action is vital. Defendants will naturally want, and request, the broadest release possible from the class. The average class member, however, will likely have no idea what claims are being released when reading the class notice, so class counsel and the court must guard against unreasonably broad release language.[40] The U.S. Supreme Court has held that claims not certified may be released as long as there is adequate representation and an opportunity to exclude—the "opt-out" provision.[41] However, other courts have criticized overbroad releases and refused to approve the settlement.[42]

The parties to the settlement have standing to object.[43] While there are a multitude of possible reasons to challenge a class action settlement, some of the more prevalent center on issues of timing, procedure, type of

RON OVERMYER

relief, the amount of the settlement, and the amount of attorney's fees class counsel may be receiving.[44]

The right to object is facing increasing scrutiny. At one time, an objector usually was the well-meaning class member who reviewed the class notice and determined that something was wrong. Out of a sense of moral obligation, this objector would then participate in the judicial review process, hopefully increasing the benefits for the absent class members. However, in recent years, objectors have become big business.[45] Professional objectors have emerged, with the hope of extracting a fee for lodging unhelpful, canned pleadings at the final approval stage.[46]

Courts have taken notice. In *Shaw v. Toshiba American Information Systems, Inc.*, an objector wrote that it was "abundantly clear that Sears will enjoy increased floor traffic in its stores from those class members who actually use the coupon thereby benefitting Sears even further."[47] In response, the court wryly noted that:

> "Sears" has nothing to do with this particular lawsuit. Moreover, there is no evidence—nor did this objector offer any evidence—that there are Toshiba "stores" that would enjoy "increased floor traffic"….[T]his particular court would venture to say this particular language has previously been filed in another class-action lawsuit involving "Sears." Perhaps that's where it should have stayed.[48]

Class members who file a request for exclusion from the settlement have no standing to object.[49] The test of standing to file an objection is whether the objector is affected by the proposed settlement. For example, members who file a request for exclusion are affirmatively excluded from the terms of the settlement. Thus, they should not be allowed the right to complain about a settlement that does not have an impact on their legal rights. Also, nonsettling defendants have no standing to object to the fairness of a proposed settlement, but they may be able to object to any terms that prevent them from seeking indemnification from the settling defendants.[50]

Good settlements include mandatory provisions for filing objections. The basic format often requires objectors to submit written objections to the court and serve them on counsel before a specific date prior to the final fairness hearing. Failure to comply with the mandatory provisions waives the objector's right to participate at the final fairness hearing.[51]

Final Fairness Hearing

The burden of proving the fairness of the settlement is on the proponents. As a practical matter, the majority of settlements are approved if the court is satisfied that experienced counsel took part in arm's length negotiations to achieve them. At the hearing, plaintiffs and defendants come together to jointly present the settlement to the court, and both are vested in a favorable outcome. Thus, absent third-party objectors, the parties are united at this phase of litigation. The court must therefore independently analyze the recommendations of the litigants to assure that the best interests of the absent class members are protected.[52]

In determining whether a settlement proposal should be approved, the court assesses the settlement as a whole rather than its component parts.[53] As one court observed, "[U]ltimately, the [court's] determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice."[54]

The factors courts use to determine fairness include:

1) The strength of the plaintiffs' case.
2) The risk, expense, complexity, and likely duration of further litigation.
3) The risk of maintaining class status throughout trial.
4) The gross amount of the settlement.
5) The extent of discovery and investigation.
6) The stage of the proceedings.
7) The experience and views of counsel.
8) The reaction of the absent class members to the proposed settlement.
9) To the extent appropriate, the government's participation in the litigation.[55]

The documents usually submitted at the final approval hearing include:

1) A final memorandum of the underlying facts and legal basis for the settlement.
2) A declaration from the TPA specifying the claims process and the number of opt-outs.
3) A final motion for approval of the requested attorney's fees and costs (perhaps with the billing records).
4) The total recovery and benefit to the class members after factoring the fees and expenses.
5) Declarations from the class representatives seeking enhancement awards.
6) A declaration from class counsel on any remaining issue.

The parties should ask the court to enter a final judgment.[56] The judgment should include a provision for the court to retain jurisdiction over the parties to enforce the terms of the judgment.[57]

If the trial judge approves the class action settlement as fair and reasonable to the absent class members, litigants should consider including a provision in the final judgment to allow the judge to have jurisdiction over any collateral matters related to the settlement. That may provide a basis for transfer if class counsel is subsequently sued by an absent class member in a malpractice action. Indeed, the court in *Janik v. Rudy, Axelrod & Zieff*,[58] in a malpractice action based upon the underlying litigation, noted that "the rulings of the class action will be binding on the members of the class and preclude reconsideration of those matters in another forum."[59] A judge who presided over the underlying class action will be far less likely to allow the collateral attack to proceed.[60]

Appeal after Settlement Approval

Orders approving settlements are appealable as final judgments. Until recently, federal courts had taken various positions on the ability of unnamed class members to file appeals. Some said that unless the unnamed class members had formally intervened in the action and the court gave them intervenor status, the appeal was without merit since there was no official standing in the underlying litigation.[61] Others held that under certain circumstances, unnamed class members could appeal, but generally they lacked standing.[62]

The U.S. Supreme Court settled the issue in an unexpected fashion in *Devlin v. Scardelletti*.[63] A retiree sought to intervene in a class action to challenge the amount of settlement proceeds he was set to receive from his retirement plan.[64] He did not successfully move to intervene in the underlying litigation and was not a named plaintiff in the retirement plan case. Thus, both the district court and the Fourth Circuit held that he lacked standing to bring the appeal.

Justice Sandra Day O'Connor, writing for the majority, held that as a member of the class, the petitioner had an interest in the settlement—and that interest created a "case or controversy" sufficient to satisfy the standing requirements.[65] The Court reasoned that an absent class member implicates injury, causation, and the right of redress—the hallmarks of Article III. The petitioner's legal rights were his own, he belonged to a discrete class of interested parties, and his complaint fell within the zone of interests of the requirement that a settlement be fair to all.[66] The Court noted that it has never restricted the right to appeal only to named parties to the litigation. Thus, absent class members now maintain appellate rights without being forced to first file a successful motion to intervene.[67]

The inherent uncertainties of class action litigation make settlement an attractive option to all parties. During settlement negotiations, the parties often come to a financial deal but fail to consider the many other issues that must be addressed during the settlement process. This failure has led courts to withhold both preliminary and final approval of the settlement terms and, in some cases, has resulted in the collapse of the settlement altogether.

Settlement agreements in contemporary class actions are a fundamental departure from traditional litigation to the extent that the real litigants never appear before the court, even though it is their interests that are being litigated. As a result, the legal machinery surrounding class action settlements is complex, with many simultaneous moving parts. A settlement strategy that addresses these complicated elements is vital to success. ■

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[1] Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1800 (1996); CAL. R. OF CT. 3.770(a); In re Microsoft I-V Cases, 135 Cal. App. 4th 706, 723 (2006).

[2] Rebney v. Wells Fargo Bank, 220 Cal. App. 3d 1117, 1138 (1990) (noting that the trial court should consider various factors for proposed settlement).

[3] NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS §11.42 (4th ed. 2002) (citing federal law) (hereinafter NEWBERG). In the absence of California law on the subject, California state courts look to federal authority. Vasquez v. Superior Court, 4 Cal. 3d 800, 821 (1971).

[4] Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 236 (1976).

[5] ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) §30.31 (2004) (hereinafter MANUAL).

[6] NEWBERG, *supra* note 3, at §11.26 (noting that the authority to enter such orders is inherent under FED. R. CIV. P. 23(d)(5)).

[7] Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[8] In re A.H. Robins Co., Inc., 880 F. 2d 709 (4th Cir. 1989) ("[T]he requirement of Rule 23 may be more easily satisfied in the settlement context than the more complex litigation context.").

[9] Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1801 (1996).

[10] Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 245 (2001) (noting that the court may consider "other factors" when balancing the settlement with the particular circumstances of each case).

[11] Dunk, 48 Cal. App. 4th at 1800-02.

[12] Hanlon v. Chrysler Corp., 150 F. 3d 1011, 1027 (9th Cir. 1998) (holding that the settlement is taken as a whole).

[13] *See* MANUAL, *supra* note 5, at §30.41.

[14] Boeing Co. v. Van Gemert, 444 U.S. 472, 480-81 (1980) (holding that the court has power to award attorney's fees in class action settlements based upon the equitable "common fund" doctrine).

[15] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Wershba, 91 Cal. App. 4th at 254 (noting various ways to award attorney's fees to class counsel); Lealao v. Beneficial Cal. Inc., 82 Cal. App. 4th 19, 39-40 (2000) (discussing enhancement of attorney's fees under lodestar calculation).

[16] Serrano v. Unruh, 32 Cal. 3d 621, 624 (1982).

[17] PLCM Group, Inc. v. Drexler, 22 Cal. 4th 1084, 1095 (2000); Thayer v. Wells Fargo Bank, 92 Cal. App. 4th 819, 834 (2001) (noting that no rule limits the factors that may justify an exercise of judicial discretion to adjust the lodestar); *but see* Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air, 478 U.S. 546, 565 (1986) (holding that upward adjustment for lodestar in federal court is only appropriate in certain "rare" and "exceptional" cases).

[18] Boeing, 444 U.S. at 472-75; Williams v. MGM-Pathe Communic'ns Co., 129 F. 3d 1026, 1027 (9th Cir. 1997) (abuse of discretion to base fee award on actual distribution instead of entire fund recovered).

[19] In re Microsoft I-V Cases, 135 Cal. App. 4th 706, 706-10, 723 (2006).

[20] Prandini v. National Tea Co., 557 F. 2d 1015 (3d Cir. 1977).

[21] Zucker v. Occidental Petrol. Corp., 192 F. 3d 1323, 1328 (9th Cir. 1999). The Ninth Circuit has held that 25% of the gross settlement is the benchmark award for fees. Hanlon v. Chrysler Corp., 150 F. 3d 1011, 1029 (9th Cir. 1998); *but see* Williams, 129 F. 3d at 1027 (awarding 33% of total fund amount); In re Activision Sec. Litig., 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (noting that fee awards in common fund cases "almost always hover[] around 30% of the fund created by the settlement").

[22] Estien v. Christian, 507 F. 2d 61, 64 (3d Cir. 1975) (noting that the information necessary to apply a fee award "can be supplied by affidavits, stipulations or a hearing"). All agreements entered into by the parties on the issue of attorney's fees must be disclosed to the court at the time of settlement or dismissal. CAL. R. OF CT. 3.769(b).

[23] FED. R. CIV. P. 23(e) (The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement.).

[24] FED. R. CIV. P. 23(e), Advisory Committee Notes on class notice, ¶13.

[25] Class Action Notice Plain Language Study (directed by Shannon R. Wheatman, Ph.D., Hilsoft Notifications, and with Terri R. LeClercq, Ph.D., senior lecturer in law, University of Texas at Austin) (noting that only a mere 13 percent of the notices studied contained "concise, plain language" and avoided unnecessary legalese).

[26] Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950) (holding that the central purpose of due process is an opportunity to be heard).

[27] Bell v. Farmers Ins. Exch., 115 Cal. App. 4th 715, 747-51 (2004) (discussing average calculations to compute overtime back-pay awards).

[28] *Id*.

[29] Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 251 (2001) (noting that class notice e-mailed and published on Internet Web site for 30 days was adequate); Hypertouch, Inc. v. Superior Court, 128 Cal. App. 4th 1527, 1551 (2005) (The court may order a means of notice "reasonably calculated to apprise the class members of the pendency of the action.").

[30] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (The court must provide the best notice practicable, under the facts presented, to the class members.).

[31] Ryan v. California Interscholastic Fed'n, 94 Cal. App. 4th 1048, 1072 (2001).

[32] Laskey v. International Union, 638 F. 2d 954 (6th Cir. 1981); Kincade v. General Tire & Rubber Co., 635 F. 2d 501 (5th Cir. 1981).

[33] Parker v. Anderson, 667 F. 2d 1204, 1211 (5th Cir. 1982).

[34] Bell v. Farmers Ins. Exch., 115 Cal. App. 4th 715, 726 (2004) (upholding service award to named plaintiffs).

[35] Huguley v. General Motors Corp., 128 F.R.D. 81, 85 (E.D. Mich. 1989).

[36] Flinn v. FMC Corp., 528 F. 2d 1169, 1176 (4th Cir. 1975) (The named plaintiff "disclaimed any right to a preferred position in the settlement."); In re Gould Sec. Litig., 727 F. Supp. 1201, 1209 (N.D. Ill. 1989) (describing incentive award as a "bounty").

[37] Bell, 115 Cal. App. 4th at 726; Huguley, 128 F.R.D. at 85 (awarding enhancement to class representatives for "onerous burden" of litigation); Bryan v. Pittsburgh Plate Glass Co., 59 F.R.D. 616, 617 (W.D. Pa. 1973) (approving "special awards" to class representatives for active involvement).

[38] Stanton v. Boeing, 327 F. 3d 938 (9th Cir. 2003).

[39] *See id*. at 977-78.

[40] National Association of Consumer Advocates, Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375 (1998).

[41] Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367 (1996).

[42] Reynolds v. Beneficial Nat'l Bank, 288 F. 3d 277 (7th Cir. 2002) (refusing court approval because two classes were absorbed into the settlement even though their claims were sharply different from those in the original complaint); National Super Spuds v. New York Mercantile Exch., 660 F. 2d 9, 18-9 (1981) ("We decline to permit the uncompensated release of claims resting on a separate factual predicate from that settled in the class action.").

[43] In re Equity Funding Corp. of Am. Sec. Litig., 603 F. 2d 1353 (9th Cir. 1979).

[44] In re Microsoft I-V Cases, 135 Cal. App. 4th 706, 706-10, 723 (2006).

[45] NEWBERG, *supra* note 3, at §11:55.

[46] *Id*.

[47] Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942 (E.D. Tex. 2000).

[48] *Id*. at 974.

[49] Gould v. Alleco, Inc., 883 F. 2d 281 (4th Cir. 1989) (Rule 23(e) permits only class members to object to settlements.); Rebney v. Wells Fargo Bank, 220 Cal. App. 3d 1117, 1128 (1990) (same).

[50] Altman v. Liberty Equities Corp., 54 F.R.D. 620, 625 (S.D. N.Y. 1972).

[51] E.E.O.C. v. Local 638, 674 F. Supp. 91 (S.D. N.Y. 1987) (court may in its discretion consider objections that are untimely or improperly filed).

[52] Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1802 (1996).

[53] Hanlon v. Chrysler Corp., 150 F. 3d 1011, 1026 (9th Cir. 1998) (holding that "settlement is the offspring of compromise; the question…is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion").

[54] Officers for Justice v. Civil Serv. Comm'n, 668 F. 2d 615, 625 (9th Cir. 1982) (internal quotation marks omitted).

[55] Hanlon, 150 F. 3d at 1026.

[56] CAL. R. OF CT. 3.769(h) (If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment.).

[57] *Id*.; Frankin & Frankin v. 7-Eleven Owners for Fair Franchising, 85 Cal. App. 4th 1168, 1173 (2000) (holding that trial courts also retain jurisdiction to grant postjudgment injunctive relief, but only to preserve the status quo until the appeal is decided).

[58] Janik v. Rudy, Axelrod & Zieff, 119 Cal. App. 4th 903 (2004) (supporting notion that class counsel should request a finding on the adequacy of representation and the adequacy of the settlement from the trial court, because these findings may well doom any subsequent malpractice action by an absent class member).

[59] *Id*. at 946.

[60] Payne v. National Collection Sys., Inc., 91 Cal. App. 4th 1037, 1047 (2001) (holding that collateral estoppel and res judicata principles apply to class action judgments).

[61] Gottlieb v. Wiles, 11 F. 3d 1004 (10th Cir. 1993) (no standing without formal intervention); Mayfield v. Barr, 985 F. 2d 1090 (D.C. 1993) (same).

[62] Marshall v. Holiday Magic, Inc., 550 F. 2d 1173 (9th Cir. 1977) (unnamed class member may have standing to appeal from settlement approval); Bell Atl. Corp. v. Bolger, 2 F. 3d 1304 (3d Cir. 1993) (same).

[63] Devlin v. Scardelletti, 536 U.S. 1, 5 (2002). One California court has ruled that if an unnamed class member appears and properly objects at the final fairness hearing, he or she would have standing to appeal the class action judgment. Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 236 (2001).

[64] Devlin, 536 U.S. at 2-4.

[65] *Id*. at 5.

[66] *Id*. at 5-6.

[67] *Id*.