Adrianne De Castro
DESAI LAW FIRM, P.C.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2021

Crossing the finish line to approval of your class-action settlement

COURTS ARE INCREASINGLY SCRUTINIZING SETTLEMENTS TO FERRET OUT POTENTIAL CONFLICTS AND COLLUSION

You see it ahead: the finish line to a marathon class-action case you have been litigating for months, maybe years, with formidable opposing counsel. You've finally reached a settlement after intensive negotiations and you can put this case behind you. But not so fast. Before you can cross the finish line, you have got one more lap around the track because rule 23 of the Federal Rules of Civil Procedure requires class-action settlements to be approved by the court.

While once a straightforward process, court approval of class-action settlements has become a time-consuming and daunting final lap. Courts have applied increasing scrutiny to class-action settlements, asking the parties to submit multiple rounds of briefing and possibly to revise settlement terms in the exercise of their fiduciary duties to the absent class members.

Settling parties and lawyers should not be deterred. Understanding (and avoiding) the common roadblocks to court approval can help get your class-action settlement over the finish line.

Basic requirements of class-action settlement approval

When I first began practicing nearly 17 years ago, class-action settlements were basically rubber-stamped by courts, with little criticism or pushback. Over the last 10 years, however, courts have applied heightened scrutiny to class-action settlements at the preliminary approval stage, resulting in delays of a final resolution. Courts are now requiring additional supplemental briefing, and even requiring the parties to revise the settlement terms. (See *Roes 1-2 v. SFBSC Management LLC* (9th Cir. Dec. 11, 2019) 944 F.3d, 1035, 1049-1050 ["*SFBSC*"] [settlements will only be given presumption of validity when class certification has been done in advance of the settlement]; *Johnson v. NPAS Solutions, LLC.*, Case No. 18-12344 (11th Cir. Sept. 17, 2020) (*"Johnson"*) [rejecting the norm of routinely approving class-action settlements noting that "familiarity breeds inattention."].)

Courts' increasing scrutiny stems from a robust execution of its fiduciary duty to protect the interests of absent class members and guard against collusion and conflict. (*7-Eleven Owners for Fair Franchising v. The Southland Corp.* (2000) 85 Cal.App.4th 1135, 1146-47 ["the trial court was under a fiduciary duty running to the absent class members to ensure the settlement was 'fair, adequate and reasonable.'"].]; *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 555.)

To protect the interests of absent class members, rule 23(c) of the Federal Rules of Civil Procedure obligates courts to approve class-action settlements before they become final to ensure the settlements are "fair, reasonable and adequate." Class-action settlements in California courts are governed by state procedural rules that are generally modeled after the rules set forth under rule 23. (See e.g., Cal. Rule of Court, 3.769., *Settlement of class actions*.) In addition, various courts have local rules, guidelines, and checklists for preliminary approval requiring specific information at preliminary approval. (See, e.g., http://www.lacourt.org/division/civil/pdf/PreliminaryApprovalofClassActionSettlement.pdf.)

Under Rule 23(c), in evaluating a settlement proposal for approval, a district court considers whether:

(a) the class representatives and class counsel have adequately represented the class;

(b) the proposal was negotiated at arm's length;

(c) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under rule 23(c)(3); and

(d) the proposal treats class members equitably relative to each other. (Fed. Rules Civ. Proc., rule 23(c)(2).)

In the Ninth Circuit, plaintiffs will more specifically have to show how the settlement meets the factors listed in *Staton v. Boeing Co*. (9th Cir. 2003) 327 F.3d 938, which largely overlap with the Rule 23 requirements. (*Id.* at 959 ["a district court must [ultimately] consider a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."].)

Roadblock no. 1: The settlement is not fair because it was reached too early and the relief to the class is not enough

A court's examination of fairness and adequacy is informed by a number of factors, including some that raise red flags that may stop a court from approving a settlement.

One factor is the timing of the settlement. On the one hand, early settlements are encouraged so as not to waste judicial resources and attorney time. (See *Ressler v. Jacobson* (M.D. Fla. 1992) 822 F.Supp. 1551, 1554-1555 ["early settlements are to be encouraged"];

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2021

In re M.D.C. Holdings Sec. Litig., Case No. CV 89-0090 E (M) (S.D. Cal. Aug. 30, 1990) 1990 U.S. Dist. LEXIS 15488, at *1, *21 ["[e]arly settlements benefit everyone involved"].) On the other hand, early settlements may suggest collusion among the attorneys to resolve the case to the detriment of the class. (See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.* (3d Cir. 1995) 55 F.3d 768, 814, [court should be wary before approving a settlement of a class action in its early stages]; *Luevano v. Campbell* (D.D.C. 1981) 93 F.R.D. 68, 86 ["it is important to consider whether the settlement was reached after extensive factual development, so that counsel on both sides would have had information sufficient to make a reasonable assessment of their risks"].) This should not discourage early settlement. Instead, lawyers should be prepared to address the court's likely skepticism.

Exchanging preliminary discovery related to both the merits of the case and class certification before settlement negotiations is one way to assure the court that the settlement was informed and fair. For example, in a wage-and-hour class action, the parties can exchange discovery to determine the putative class size and related work weeks. Informal discovery may include pay or time records (perhaps via sampling), the company's policies regarding the claims, and depositions of the class representative and a designated corporate witness. This discovery can be critical to support a showing that despite an early resolution, the settlement is informed by investigation and analysis of evidence. Any exchange of discovery or investigation should be memorialized and documented in a detailed attorney declaration submitted in support of preliminarily approval.

An early settlement may also be the result of other factors such as the defendant's financial status, pending legislation related to the claims, or significant prior litigation. To assure the court that there is no collusion, explain these circumstances in detail and by sworn declaration if defendant's solvency is at issue. (See *Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2010) 716 F.Supp.2d 848, 851; *In re Wells Fargo Loan Processor Overtime Pay Litig.* (N.D. Cal. Aug. 2, 2011) 2011 U.S. Dist. LEXIS 84541, at *16 ["fact-intensive inquiries and developing case law present significant risks to plaintiffs' claims and potential recovery"].)

Still another element of fairness a court may consider is when the relief to the class provided by the settlement is far below the potential liability. This does not mean that the settlement must be a complete win for the class. Courts give considerable weight to the views of experienced counsel in making this assessment. (See, e.g., *In re Nasdaq Market-Makers Antitrust Litig.* (S.D.N.Y. Jan. 18, 2000) 2000 WL 37992, at *2 ["[a]n allocation formula need only have a reasonable, rational basis"]; *In re American Bank Note Holographics, Inc.* (S.D.N.Y. 2001) 127 F. Supp. 2d 418, 430 ["[a]s with other aspects of settlement, the opinion of experienced and informed counsel [on appropriate allocation] is entitled to considerable weight"].)

However, a court will be skeptical of a settlement where the relief to the class is far below the potential liability. In *Monplaisir,* plaintiffs alleged that defendant failed to pay its workers minimum wage, overtime, and shorted their wages over breaks and meal periods. The court denied approval of the $1.6 million settlement, holding it was inadequate given the workers' maximum potential recovery is about $10.9 million. The court (Judge Alsup) noted that the parties had not put forth sufficient explanation of why the $1.6 million settlement was adequate especially when it represented only 15% of the potential recovery.

The court recognized that the slim results seem to be related to defendant's success in compelling arbitration. While understandable, the court explained that this reduction was not the result of a "rigorous analysis" of the actual merits of plaintiffs' claims. (*Order,* p. 4.) The court was additionally concerned that the settlement class included individuals who were not subject to arbitration, and thus, the value of their claims was higher than those who were subject to arbitration. These individuals were therefore unfairly burdened with a lower value settlement. *Monsplaisir* illustrates the need for detailed analysis that includes a comparison of the total value of the case versus the relief provided to the class, and the evidentiary and legal bases for the reductions made.

Reynolds v. Beneficial National Bank (7th Cir. 2002) 288 F.3d 277, 284 reiterates some of the same concerns articulated in *Monsplaisir* except with regard to released claims. In *Reynolds*, the court rejected a settlement that provided no consideration for release of claims that were estimated to be worth $20 million, and no explanation for why these claims were released. Without further explanation, the court rejected the settlement because the broad release of these claims indicated possible collusion between the parties. Circuit courts are in accord that approval of a settlement will not be granted without explanation of the consideration provided for the release of certain claims. (See *Mirfasihi v. Fleet Mortgage Corp.* (7th Cir. 2006) 450 F.3d 745, 748 [requiring convincing justification for a settlement that extinguished the claims, yet provided no relief for one segment of the class]; see also, *Molski v. Gleich* (9th Cir. 2003) 318 F.3d 937, 954 ["In sum, the class members received nothing; the named plaintiff and class counsel received compensation for his injury and their time; and the defendant escaped paying any punitive or almost any compensatory damages..."].)

Tips for showing your settlement is adequate and fair

To avoid having your settlement rejected on adequacy or fairness grounds, consider doing the following before requesting court approval of your settlement:

- Exchange preliminary or informal discovery to support a showing that

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2021

the settlement was reached after an analysis and investigation of the claims, even if the settlement was reached early;

- Provide detailed explanations of the value of the claims considering the legal landscape, defendant's finances, or other information; and
- Support and explain why the relief is proper including the basis for any deductions (i.e., enforceable arbitration agreements, defendant's financial status, pending legislation affecting claims).

(See *Nicole Correa v. Zillow Group, Inc. et al.*, Case, No. 8:19-cv-00921-JLS-DFM (C.D. Cal. 2020, November 12, 2020) [requiring counsel prior to preliminary approval to provide a reasonable breakdown of defendant's maximum potential liability and detailed explanation of the proposed allocation].)

Roadblock no. 2: The proposed enhancement awards create a conflict

While enhancement or incentive awards are fairly common in class actions, they can be grounds for a court rejecting a settlement because they create a potential conflict between the class representative and the class. A class representative may be incentivized to settle a case for a promised enhancement award even if it is not in the best interests of the class. A court is more likely to find a conflict and reject a settlement when the size of the enhancement award is large relative to the relief provided to the class, and/or an incentive award is so large that it diminishes the total settlement to the class. (See, e.g., *Eubank,* 753 F.3d at 723; *Radcliffe v. Experian Info. Solutions, Inc*. (9th Cir. 2013) 715 F.3d 1157, 1164; see also *Espenscheid v. DirectSat USA LLC* (7th Cir. 2012) 688 F.3d 872, 876 [median award for enhancement award is about $4,000].)

Enhancement awards are meant to recognize a class representative's willingness to prosecute the case on behalf of the class, assume the risks associated with litigation, and potentially expose herself to liability for defendants' costs, or if the suit is found frivolous, for defendants' attorneys' fees. Despite these well-accepted principles, some enhancement awards may raise a court's suspicion. For example, the *Rodriguez* cases illustrate that if an enhancement award is promised to a class representative, and/or tied directly to the total settlement amount, a court will likely reject the settlement. In *Rodriguez v. W. Publ'g Corp.* (*Rodriguez I*), 563 F.3d 948, and *Rodriguez v. Disner* (*Rodriguez II)* (9th Cir. 2012) 688 F.3d 645, the Ninth Circuit affirmed the denial of approval of a $49 million anti-trust settlement involving defendants who were providers of bar review courses because based on their retainer agreements with the class representatives, class counsel was obligated to seek enhancement awards from the fund that corresponded to the settlement value (e.g., if the amount were greater than or equal to $500,000, class counsel would seek a $10,000 award for each of them; if it were $1.5 million or more, counsel would seek a $25,000 award). (*Rodriguez I,* 563 F.3d at 957.)

The district court held (and the Ninth Circuit affirmed) that the enhancement payments created a conflict between the class, the class representative, and class counsel "from day one" because the awards were tied to the ultimate recovery for the class. The court was rightfully concerned that once a certain threshold was met, the class representative may be disincentivized to prosecute the case further even if that may be in the best interests of the class. After remanding the case, district court concluded that the incentive agreements had created a conflict resulting in forfeiture of class counsel's entitlement to fees. (*Rodriguez II,* 688 F.3d at 652-656 [affirming].)

The *Rodriguez* cases serve as a cautionary tale for plaintiffs' attorneys. Enhancement awards should not be promised to any proposed class representatives lest they create a conflict that would result in forfeiting your fees. One extreme approach to squashing any potential conflict altogether came out of the Eleventh Circuit just last year. In *Johnson v. NPAS Solutions,* the court barred any enhancement award whatsoever, finding that such awards had no basis in the Federal Rules of Civil Procedure, even though they had become commonplace. In *Johnson,* plaintiff alleged violations of the Telephone Consumer Protections Act ("TCPA") for abusive robocalls. The case settled for $1.4 million with a proposed enhancement payment of $6,000. The court overturned the lower court's approval of the settlement and enhancement award reasoning that the award was "decidedly objectionable" and invalid since there was no basis for it in the Federal Rules of Civil Procedure. While *Johnson* represents a departure from legal precedent and is likely an anomaly, particularly since it relied on two Supreme Court cases that pre-date present day class action rules, the case does highlight a court's likely suspicion of enhancement awards that are not sufficiently supported by evidence.

Tips for getting proposed enhancement awards approved

Based on this array of cases, keep your settlement on the right track by taking a few of these steps:

- Do not guarantee an enhancement award for your putative class representative and explain that if a settlement is reached, any enhancement award must be approved by the court;
- Do not tie any proposed enhancement award to the settlement amount;
- Advise the class representative to track the time spent on the case like a billable hour so it can be the basis of a detailed declaration in support of any proposed enhancement award;
- Any proposed enhancement award should be commensurate with the work, time, and effort the class representative spent on the case including their emotional investment, the risk of retaliation, and any strain it may have put on their family or personal life. (See e.g., *Ridgeway v. Walmart, Inc.*, (N.D. Cal. 2017) 269 F. Supp.3d 975, 1003 [reducing incentive award from $50,000 to $15,000 based

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2021

on a review of work performed by class representatives].);
- Any proposed enhancement award should be reasonably proportional to the average class member recovery and if it isn't, explain why. (See *Carlin v. DairyAmerica, Inc.* (E.D. Cal. 2019) 380 F.Supp.3d 998, 1027 [reducing incentive award by half from $90,000 to $45,000 since average class member recovery was approximately $1,000].)

Roadblock no. 3: The requested attorneys' fees are too much

A settlement's proposed attorneys' fees can also thwart court approval of a settlement. Courts are wary of potential "sweetheart deals" that may indicate collusion between the parties that creates a conflict with the class. (See *Jamison v. Butcher and Sherred* (1975) 68 F.R.D. 479, 484 ["the present arrangement leaves the unfortunate impression that defendants are buying themselves out of the lawsuit by direct compensation to plaintiffs' counsel"].)

One conservative approach to addressing a court's concern about collusion and conflict is to negotiate attorneys' fees separate and apart from any settlement for the class. (See *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 923; *Prandini v. National Tea Co.* (3rd Cir. 1977) 557 F.2d 1015 [deferring any consideration of counsel fees until after the approval of the class action settlement]; see also, *Norman v. McKee* (N.D.Cal. 1968) 90 F.Supp. 29, 36 (*aff'd*, 431 F.2d 769 (9th Cir. 1970); *Jamison v. Butcher & Sherred* (E.D. Pa. 1975) 68 F.R.D. 479, 484 ["the issue of attorney's fees is more properly reserved for judicial consideration after settlement of the gross amount to be paid to the class"]; see also, 1 Moore on Federal Practice (Manual for Complex Litigation), Rule 1.46; 3B Moore's Federal Practice, ¶ 23.07(1).)

Realistically, attorneys' fees are negotiated as part of the entire settlement, subject to court approval. The law establishes that class counsel who secured a settlement are entitled to reasonable attorneys' fees to compensate them for their work on behalf of the class. (*Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ["a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole"].)

The purpose of this doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." (*In re Washington Pub. Power Supply Sys. Sec. Litig.* (9th Cir. 1994) 19 F.3d 1291, 1300.) In the Ninth Circuit, the district court has discretion in a common fund case to choose either the "percentage-of-the-fund" or the "lodestar" method in calculating fees, that is an award of fees based on the number of hours the attorneys and their employees worked multiplied by the hourly rates prevailing in the community. (*Fischel v. Equitable Life Assur. Soc'y* (9th Cir. 2002) 307 F.3d 997, 1006; *Wininger v. SI Mgmt. L.P.* (9th Cir. 2002) 301 F.3d 1115, 1123-24; n. 9.)

Where a court uses the "percentage-of-the-fund" method, the Ninth Circuit has recognized twenty-five percent as the benchmark percentage for the fee award. (See *Paul, Johnson, Alston & Hunt v. Graulty* (9th Cir. 1989) 886 F.2d 268, 272.) Attorneys can certainly request an amount above the 25% benchmark. For example, class counsel may request one-third of the settlement fund, an amount more commonly awarded in state court. However, the Ninth Circuit has found a request of one-third to be within the range of reasonableness if class counsel can justify this amount. (See, e.g., *Knight v. Red Door Salons, Inc.* (N.D. Cal. Feb. 2, 2009) No. 08-01520 CD, at *6 [observing that class action fee awards average around one-third of the recovery]; *Laffitte v. Robert Half International Inc.*, (2016) 1 Cal.5th 480 (2016) [upholding an award of common fund attorney fees in a wage and hour settlement that provided for a one-third recovery of fees for class counsel].) In the Ninth Circuit, this upward adjustment must be supported by the factors set forth in *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50 (9th Cir. 2002) which are: (1) the exceptional results for the class; (2) the risk for its counsel; (3) whether any individual non-monetary benefits were obtained; (4) whether the fee is at or below market rates; and (5) the burden on class counsel of prosecuting the case, including whether the case was litigated on a contingency basis.

The first *Vizcaino* factor – the results achieved for the class – is likely one focus of a court's inquiry on whether the attorneys' fees request is justified. Recent caselaw indicates that an assessment of the results achieved for the class are not measured solely by money and are specific to the facts of the case. In *Matthew Campbell v. Facebook, Inc.*, Case No. 17-16873 (9th Cir., March 3, 2020) for example, the court rejected an objector's arguments that the deal was "worthless" to Facebook users and overly lucrative for their lawyers because the settlement resulted in non-monetary injunctive relief requiring Facebook to update its Data Policy to disclose its collection of information to its users, and declaratory relief confirming that Facebook does not engage in certain practices at issue related to sharing of user data to third parties. The Ninth Circuit affirmed the approval of the $3.89 million in attorneys' fees, holding that while the class did not receive much, it also did not give up much.

In *Littlejohn v. Ferrara Candy Company*, Case No. 19-55805 (9th Cir., June 30, 2020), the panel similarly unanimously approved a nationwide injunctive relief-only class-action settlement. The case was brought on behalf of California consumers who purchased products that allegedly contained synthetic malic acid. The Ninth Circuit affirmed approval of $272,000 in attorneys' fees, even though there was no compensation for class members. Instead, the settlement provides that the company remove the phrase "no artificial flavors" from SweeTARTS packages and to identify dl-malic acid as an ingredient. In its opinion affirming the district court's approval of

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2021

the settlement, the Ninth Circuit rejected the arguments of objectors, holding the settlement provided value to the class on the ground that purchasers of the SweeTARTS products "tend to be repeat buyers who would derive value from the settlement's injunctive relief upon each future purchase."

Littlejohn and *Campbell* illustrate monetary value alone is not determinative of whether class counsel's attorneys' fees are justified, so long as the parties can show the class received a meaningful result from the settlement.

When a monetary settlement is reached, however, a court will compare the amount of attorneys' fees requested to the monetary recovery to the class to expose any conflict or collusion between the parties. In *SFBSC Management*, 944 F.3d at 1047, the Ninth Circuit engaged in this analysis and ultimately reversed a district court's approval of a $2 million class settlement that provided for $950,000 in attorneys' fees. The Ninth Circuit sided with objectors who called the deal a "pittance given what we're entitled." The settlement resulted in $864,115 split among 4,681 proposed class dancers and $950,000 for attorneys under a "clear-sailing" provision that provided defense counsel would not oppose any such request. The court found the disparity and the "clear-sailing" provision to be indicators of collusion between the parties and thus, grounds for rejecting the settlement.

Monplaisir, a case decided last year, further highlights a court's likelihood of rejecting a settlement because the attorneys' fees are unsupported by any meaningful results for the class. There, the court rejected a wage-and-hour class-action settlement in part because the proposed $1.5 million in attorneys' fees would be an extraordinary "steal for class counsel" who would receive 28-45% of the total settlement amount. The court explained, "counsel earns an extraordinary fee by winning an extraordinary result for their clients. They have not yet done so here, and this order will not bless counsel's sweetheart deal." In other words, class counsel had not made a sufficient showing why such a significant award, above the 25% benchmark was warranted or justified.

The resounding principles of these cases is that an attorneys' fees award will not be approved without sufficient support and explanation as to the work done, and the results achieved for the class. (See also, *Witchko v. Schorsch et al.*, Case No. 1:15-cv-06043 (S.D.N.Y.) [lack of billing records to support $23 million attorney fee request in case regarding accounting practices at real estate business]; *Snyder, et al. v. Ocwen Loan Servicing, LLC*, Case No. 14 C 8461 (D.C. Ill. 2018) [rejecting final approval of a $17.5 million settlement that included $5.3 million in fees explaining that it was too much for their "relative lack of success" and the "Court cannot simply defer" to opinion of class counsel, "particularly when they stand to gain millions of dollars from the proposed settlement"].)

Tips to get your attorneys' fees approved

To justify the request for attorneys' fees, be sure to:

- Provide the court detailed time records to show the work performed. While these are normally required by the court only at final approval, you may consider including them at the preliminary approval stage.
- If you are making a request for fees above the Ninth Circuit's 25% benchmark, include thorough analysis of the *Vizcaino* factors including the results achieved on behalf of the class.
- Think twice before including any "clear-sailing" provision in the settlement agreement that is likely to draw additional scrutiny from the court. (See *In Re Bluetooth Headset Prods. Liab. Litig.* (9th Cir. 2011) 654 F.3d 935, 946 ["clear-sailing" provisions may be considered "important warning signs of collusion," "increase likelihood that class counsel will have bargained award something of value to the class."].)
- Be explicit about the facts that demonstrate the settlement and any attorneys' fees requested were the result of fair negotiations without collusion (i.e., the request for fees is below the lodestar amount; the parties used a mediator; the settlement was the result of a mediator's proposal).

Roadblock no. 4: The class notice is inadequate

Rule 23(e)(1) requires that notice to a class of a proposed settlement must inform them of: (1) the nature of the pending litigation; (2) the general terms of the proposed settlement; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the fairness hearing. (See Newberg on Class Actions (4th Ed. 2002) § 8.32.) The notice must also indicate an opportunity to opt-out, that the judgment will bind all class members who do not opt-out, and that any member who does not opt-out may appear through counsel. (Fed. Rules Civ. Proc., rule 23(c)(2)(B).) The form of notice is "adequate if it may be understood by the average class member." (Newberg on Class Actions (4th Ed. 2002) § 11.53.) Notice to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." (*Amchem Prods. v. Windsor* (1997) 521 U.S. 591, 617.)

If the notice is not the best notice practicable, it will be grounds for rejecting a settlement. (See *Roes 1-2 v. SFBSC Management*, 944 F.3d at 1047 [rejecting the proposed notice and requiring electronic notice via social media and online message boards because the mailed notices and posters in defendant's clubs were not the best notice practicable in light of evidence that 1,546 of 4681 notices mailed to workers came back as undeliverable].)

Tips for ensuring your class notice is the best practicable notice

Here are some tips for ensuring your notice meets muster:

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2021

- Include a general description of the lawsuit without using legalese; (See, e.g., *Mendoza v. United States* (9th Cir. 1980) 623 F.2d 1338, 1351 ["very general description of the proposed settlement" satisfies standards].);
- The notice should include the attorneys' fees and enhancement awards requested; (See *Valerio v. Boise Cascade Corp.* (N.D. Cal. 1978) 80 F.R.D. 626, 636-37);
- The notice should include clear, concise information of how to opt-out or dispute a claim. Increasingly, courts may require separate forms to dispute or opt-out of a settlement, so be prepared to revise the settlement terms to include these forms;
- Include a clear description of how a class member's settlement share will be calculated;
- If there is a co-counsel agreement, include a general description in the class notice;
- During these pandemic times, include information that any fairness hearing may be held via Zoom and include that information on the third-party administrator's website;
- Provide for electronic notice in addition to notice by mail;
- Determine if the class notice needs to be in multiple languages. If not, explain to the court why notice in English is sufficient; and
- Include information about the claims that will be released if they participate in the settlement.

Conclusion

Obtaining court approval of a class-action settlement may take a few tries; courts are increasingly scrutinizing settlements to ferret out potential conflicts and collusion. Thus, the parties should be prepared to look beyond general legal analysis and factual summary in presenting their settlement to the court for approval. Instead, the parties should provide detailed explanations and analysis of the settlement terms, especially any reductions from the potential liability, the justification for attorneys' fees and any proposed enhancement awards, and the adequacy of the notice. Taking this extra time and diligence will pay off and, hopefully, get your settlement across the finish line.

Adrianne De Castro is a Senior Associate at Desai Law Firm, P.C. *in Irvine. Her practice focuses exclusively on plaintiff-side employment and consumer class actions. She is a lecturer at the U.C., Irvine School of Law where she teaches Employment Discrimination. Ms. De Castro is a 2005 graduate of U.C. Berkeley School of Law. She can be reached at: adrianne@desai-law.com.*