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***375** NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

Standards and Guildeines for Litigating and Settling Consumer Class Actions

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***377** INTRODUCTION

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Consumer class actions serve an important function in our judicial system and can be a major force for economic justice. They often provide the only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class. Frequently, many consumers are harmed by the same wrongful practice, yet individual actions are impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit. Without class actions, wrongdoing businesses would be able to profit from their misconduct and retain their ill-gotten gains. Class actions by consumers aggregate their power, enable them to take on economically-powerful institutions, and make wrongful conduct less profitable.

In recent years, class actions--and particularly class actions which are resolved by settlement--have been subjected to considerable public criticism. At times, this criticism has been warranted. However, much of the criticism has been generated by self-appointed professional objectors and by self- interested entities who are motivated by a desire to immunize themselves from liability for wrongs rather than by any concern for the public interest. Certain types of businesses, such as financial institutions and insurers, commonly deal with large numbers of consumers in similar ways. Often, such businesses are essentially immune from individual suits for damages since the amounts at issue as to any particular consumer are small. These entities harbor an expectable dislike for the class action procedural device, since it provides an effective tool for consumer redress in such situations. While such entities are entitled to have their voices heard in any public debate, it appears that a concerted effort has been initiated in recent years to undermine the legitimate uses for class actions by over-emphasizing the relatively infrequent occasions when abuses of the procedure occur.

In Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), the Supreme Court stated:

A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled ***378** $1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee- spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23.

Id., 445 U.S. 326, 338 n. 9, 100 S.Ct. 1166, 1174 n. 9 emphasis added].

In a similar vein, the California Supreme Court recognized in its landmark decision in Vasquez v. Superior Court, 4 Cal.3d 800, 808, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) that:

Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society ... The alternatives of multiple litigation (joinder, intervention, consolidation, the test case) do not sufficiently protect the consumer's rights because these devices 'presuppose a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention." [Citation omitted.]

The California court further recognized that class actions generally have beneficial by-products, including a therapeutic effect on sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance of multiple lawsuits involving identical claims.

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Even when individual actions could be brought, it is only through class action status and class-wide discovery that the defendant's wrongful practice and its effect on large numbers of similarly-situated consumers may be carefully and accurately determined. Class action discovery thus can improve the strength and size of the eventual recovery for affected consumers.

Class actions also can be abused. Moreover, any abuse is sure to be the focus of much adverse comment in the media and to be used in an attempt to change the law to disfavor class suits and thereby insulate abusive business practices from effective review. Through this paper, the National Association of Consumer Advocates (NACA) is undertaking to provide guidelines to specify what practitioners should be doing under the current state of the law. In some instances, the law does not require compliance with the standards set forth here, in others it does, and in yet others there is a split of authority. Except where expressly stated, this paper does not argue for a change in the law. Instead, NACA seeks to educate practitioners about how to avoid conduct which is, or may appear to be, improper and about the most appropriate and effective way to fulfill the special obligations of class counsel to the class. Thus, the paper addresses how to curb abuses, while advocating keeping class actions as a vehicle for protecting consumers and holding economically powerful interests responsible for the harm they do.

NACA is comprised of consumer lawyers and advocates. The views of many NACA members were solicited and received before this paper was written, as well as after it was circulated in draft form. Often, different members expressed opposing viewpoints. This paper is intended to reflect ***379** the majority view in those instances where there was any significant difference of opinion among members.

This paper is directed toward use of class actions within the context of consumer cases. It is not intended to address class actions in other contexts, such as mass torts or employment discrimination cases, which often involve more substantial individual recoveries and a different mix of public policy and procedural considerations.

ISSUES ADDRESSED

1. The propriety of class actions when individual recoveries are small

A. The Issue

Questions recently have been raised about whether some illegal business practices are inappropriate for class treatment because individual recoveries are too small to warrant individual actions and the attorney's fees which are recovered dwarf the individual damages. The Preliminary Draft of the Proposed Amendments to the Federal Rules of Practice and Procedure issued by the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States suggests a new subparagraph (F) to Rule 23(b)(3) which would allow courts, in deciding whether to certify a class, to weigh the probable relief to individual class members against the costs and burdens of class litigation. The Summary for Bench and Bar, distributed by the Administrative Office of the U.S. Courts, contains the following comment about proposed subparagraph (F): "In 'small claims' class actions, it may justify refusal to certify a class even though subparagraphs (A) and (B) would push toward certification because individual class members are not practically able to pursue separate actions."

B. Viewpoints

The new proposed subparagraph F requires consideration of the relief to individual class members instead of the size of the total sum that the defendant will pay to the entire class. The genesis of this proposal appears to be the viewpoint that some recoveries to

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class members may be so trivial that they do not warrant redress. Noting that the traditional justification for litigation is individual remedial benefit and that most private wrongs go without redress, proponents of this rule change urge that "we should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers." Request for Comment at 26.

Attorneys who litigate consumer class actions hold the contrary view and believe that the focus on individual compensation misses a central point of class actions: deterring misconduct by the defendants. The class action device is particularly appropriate in consumer cases where individual recoveries are small, but which, in the aggregate, involve substantial sums, often millions of dollars in damages. Class actions serve an important purpose beyond simply compensating the injured. Often, class counsel and class representatives act as private attorneys general vindicating cumulative wrongs and obtaining significant injunctive relief or institutional change, and requiring disgorgement of illegal profits. HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 5.49 & 5.51 (3d ed. 1992) [cited herein as "Newberg"]. To refuse to permit class actions on the ***380** grounds that individual recoveries are small, while ignoring the aggregate amounts involved, would encourage wrongful conduct and largely immunize entities engaged in schemes to steal millions in $10 increments.

An illustrative example is found in the consumer class actions challenging excessive late and overlimit charges on credit card accounts which were criticized on the grounds that class members "are eligible for only a few dollars apiece in compensation" while class counsel get "millions." Max Boot, WALL ST. J., Sept. 19, 1996. If Rule 23(b)(3)(F) were adopted, it could provide a basis for refusing to certify these classes because individual recoveries ranged from $3 to $50, which a court might deem to be trivial. Such a constricted view disregards the facts. For example, in the related Wells Fargo Bank and Crocker National Bank cases, total damages of almost $10 million were recovered, plus interest, and more than $6.5 million was distributed directly to the plaintiff classes. Each class member received the full amount which he or she was overcharged, plus interest, through credits to current customers' accounts and refunds to former customers. Moreover, $3.3 million was given to consumer organizations which provided indirect benefit to absent class members, and the Banks were required to pay all but $115,668 of the $2,130,118 awarded in attorney's fees for work in the trial court. The plaintiff classes were required to pay only 1.28% of the fund for fees.

These charges were imposed by the Banks in violation of California law. It would be unsound as a matter of policy to allow these large corporations to enrich themselves by $10 million through illegal conduct simply because each affected customer was overcharged by $50 or less.

The Supreme Court has long recognized that without Rule 23 claimants with small claims would be unable to obtain relief. See Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 338 n. 9, 100 S.Ct. 1166, 1174 n. 9, 63 L.Ed.2d 427 (1980), quoted above. To the same effect is Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). "Class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available." Id. at 809, 105 S.Ct. at 2973.

In addition, assuming that it is desirable for a court to weigh the potential "costs" of class action litigation against its potential "benefits," it would be a mistake to focus solely on monetary relief recoverable as damages or restitution. Rather, many consumer class actions provide an additional social benefit--deterrence. Recovery of a significant aggregate sum from the defendant will have a deterrent effect on resumption of the same or similar wrongful practices in the future, both by that defendant and by other

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similarly-situated entities. This deterrent effect is present regardless of the amount recovered by individual class members. Moreover, injunctive relief can specifically prohibit resumption of a wrongful activity.

The importance of the deterrence factor in consumer cases is evidenced by the frequency with which Congress and the state legislatures have included fee- shifting provisions in consumer protection statutes. By including fee-shifting provisions, Congress and the state legislatures seek to ***381** encourage enforcement of these consumer laws through a system of "private attorneys general," even where the amount of damages at stake would be too small to support litigation if the plaintiff had to absorb the cost of attorney's fees. See, e.g., de Jesus v. Banco Popular de Puerto Rico, 918 F.2d 232, 234 (1st Cir.1990) (construing the Truth in Lending Act). This recognition of the importance of enforcing consumer protection laws, even in cases where the amount of damage to an individual consumer is small, is at least as applicable in the class action context as in the individual case context.

Indeed, the use of class actions to deter widespread consumer fraud is probably preferable to the only practical alternative: punitive damage awards. If small compensation class actions are discouraged, the alternative will be to seek large punitive damage awards on behalf of a few consumers who, while litigating relatively small individual claims, can prove willful, wide- spread misconduct by the defendant. While both alternatives result in the appropriate extraction of a large payment from the defendant, class actions result in the distribution of that payment to the victims of the practice, rather than providing a seeming windfall to the few consumers who prevailed in their individual punitive damage claims.

Finally, what may seem "small" to those of us fortunate enough to be lawyers and judges may be significant to those consumers whose annual incomes are at or below the poverty level. The sum of $50.00 represents two percent of the total annual poverty guideline allotment per family member under the United States Department of Health and Human Services 1995 poverty guidelines. For a low income consumer, that "trivial" $50.00 individual recovery has significant value, equivalent, as a percentage of income, to a $2,000 recovery by a single person earning $100,000 a year.

While class actions, like any procedures, sometimes may be abused, protections against abuse already exist. Courts may and do refuse to allow classes to be certified where the potential recovery to each consumer is nominal or where a distribution would consume such substantial time and expense that the class members are unlikely to receive any appreciable benefit. See e.g., Buchet v. ITT Consumer Financial Corp., 845 F.Supp. 684 (D.Minn.1994); Blue Chip Stamps v. Superior Court, 18 Cal.3d 381, 386, 134 Cal.Rptr. 393, 556 P.2d 755 (1976); City of San Jose v. Superior Court, 12 Cal.3d 447, 459, 15 Cal.Rptr. 797, 525 P.2d 701 (1974). Further protections are found in the requirements that courts must find any settlements to be fair and reasonable to the members of the class, F.R.CIV.P. 23(e), and that courts must approve amounts to be paid as attorney's fees.

C. NACA Guideline

The class action device is particularly appropriate in consumer cases where individual recoveries are small, but which, in the aggregate, involve millions of dollars in damages. This is precisely the type of case which encourages compliance with the law and results in substantial benefits to the litigants and the court. Denial of class certification in such instances would result in unjust advantage to the wrongdoer. Class actions should be deemed appropriate precisely because individual damages are too small to warrant redress absent a class suit, so long as significant aggregate pecuniary and/or nonpecuniary benefits to the class are sought. This is ***382** particularly true in cases with claims for which a legislative body has provided a fee-shifting remedy to encourage private

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enforcement actions.

2. Certificate Settlements

A. The Issues

There appears to be an increasing use of certificate settlements, offering relief to the class members in the form of certificates that are redeemable on future purchases from the defendant. Questions have been raised about the propriety of such settlements.

It is important to differentiate between certificate settlements, which are discussed herein, and other settlements that do not deliver dollars directly into the hands of the class members, which may well be appropriate. An example of the latter type of settlement is one in which credits are issued to class members' accounts with the defendant. When credits are made to existing accounts, the effect is similar to delivering cash, with increased efficiency.

By contrast, the General Motors ("GM") sidesaddle pickup truck case is a good example of the type of certificate settlement that should never have been proposed for court approval. That class action sought to resolve the worst vehicle-fire safety hazard in history: exploding side-saddle gas tanks on GM pickups that have killed hundreds of people and badly burned more. The plaintiffs alleged that these trucks are flawed by a dangerous and latent design defect--the placement of the gas tanks outside the frame rail--that increased the likelihood that their fuel tanks will rupture in side-impact crashes, causing fuel-fed fires. The class action sought a recall of these GM trucks, with restitution and refunds to all class members, and an order directing GM to pay for the retrofitting of all GM pickups to correct the fuel tank defects.

However, in the settlement, class counsel abandoned the recall/retrofit remedy in favor of an approach that limited class members' recovery to discount coupons to buy new GM trucks. There was no provision requiring GM to recall or repair the trucks, or to reimburse owners who made the repairs themselves, nor was there any provision requiring GM to warn consumers about the hazards of the trucks, despite the demand for such relief in the complaint. In other words, nothing in the settlement addressed the animating principle of this lawsuit: that these GM pickup trucks pose a serious--but remediable--safety hazard.

The settlement was criticized and rejected by both federal and state courts. In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir.); cert. denied, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); Bloyed v. General Motors Corp., 881 S.W.2d 422 (Tex.App.--Texarkana 1994), aff'd, General Motors Corp. v. Bloyed, 916 S.W.2d 949 (Tex.1996). One of the main points of criticism was the inadequacy of the certificates as the sole redress for the injured class members.

The GM case, and others, have served to demonstrate the problems inherent in non-cash settlements. It is important to note, however, that settlements that do not actually deliver dollars into the hands of the class may be entirely appropriate. For example, credits to existing accounts are ***383** usually adequate substitutes for mailing checks to each class member; indeed, crediting is more efficient than mailing and should serve as the basis for increasing the amount paid to each class member. Similarly, if the amounts available to each class member are so small as to make delivery by checks economically unviable or if the class members are impossible to determine with certainty, distribution of the class benefit through cy pres awards is advisable, as discussed in Issue 6 below. The comments here are directed solely to certificate settlements that only offer class members the opportunity to purchase a product or service from the defendant in the future at a claimed discount from the regular price to the consumer.

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B. Viewpoints

The potential problems with non-cash settlement of class members' damages are many:

• There is no principled reason why delivery of cash settlements cannot be achieved, aside from the fact that the defendant prefers not to do so.

• For most of the class, redemption may not be an option, because they are unwilling or unable to make a future purchase. Thus the class members are not equally compensated--some get more, others get less. This situation is at its most aggravated when the certificate requires purchase of a new car or other "big ticket" item.

• Even where the coupon is for a small ticket item or is freely transferable, the defendant may be able to use its specialized knowledge of the industry to recover the cost of the coupon in the marketing of the relevant product.

• Policy considerations disfavor rewarding the wrongdoing defendant with new sales from the victims of its illegal practices.

• The actual value of certificates is uncertain, making valuation of attorney's fees impossible on a percentage basis, especially where discounted prices are common.

• Proponents of certificate settlements claim that use of certificates makes settlements easier because the defendant is more willing to settle for terms that will only mean a discount from the retail price of the product or because the cost to the defendant is in the future, requiring the immediate outlay of less money. Proponents stress that the particular facts involved in a proposed certificate settlement may justify it, pointing for example, to In re Sears Automotive Center Consumer Litigation, (N.D.Cal. No. 92-2227 RHS), in which these proponents averred that the certificates involved could be redeemed for any merchandise sold at Sears stores (not merely the services and merchandise at issue in the litigation) and that 99.6% of the certificates issued were redeemed.

C. NACA Guidelines

Certificate settlements have many disadvantages and should be proposed by class counsel only in the rare case. For example, if (1) the primary goal of the litigation is injunctive and the defendant agrees to an injunction, or the certificates are good for the purchase of small ticket consumable items which class members are likely to purchase, or the certificates represent true discounts that would not otherwise be available, (2) the certificates are ***384** freely transferable, and (3) there is a market-maker to insure a secondary transfer market, a certificate settlement might be appropriate. A few basic positions are clear:

• Certificate-based settlements should never require identifiable class members to purchase major, large ticket items from the defendant as the sole significant relief to the class.

• Certificates should have some form of guaranteed cash value. For example, the certificates could have a lesser cash redemption value (either upon issuance or within a reasonable period of time) that still gives the class members a benefit that is significant in relation to the actual damages which would be provable at trial. As a less-preferable approach, the defendant could contract with a market maker that would promise to purchase all available certificates for a set price that is significant in relation to the likely recovery at trial.

• Certificate settlements should never be proposed to the court unless it is apparent

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that the defendant is providing greater true value (i.e., not just the face value of the certificates or their potential value) to class members than would be available from an all-cash settlement. There may be legitimate tax or financial-accounting reasons why a greater recovery for class members can be had from a non-cash settlement. However, class counsel should inquire about the defendant's reasons for preferring a non-cash settlement. The beginning assumption should always be that the defendant prefers a non-cash to a cash settlement because it believes the true value to be less. Since the defendant will usually be in a superior position to predict the ultimate redemption rate and benefit to the class, its preference for a non-cash settlement should be viewed with skepticism.

• A settlement involving certificates should require a minimum level of redemption by the class members within a reasonable period of time. In the event actual redemption does not meet this minimum level, the defendant should provide alternative relief in the form of a common fund. This requirement protects against the use of a meaningless certificate settlement that has little or no impact on a defendant, and little or no compensatory value to the plaintiff class.

• Class counsel and defendants should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon. By doing so, a public record will be made of what works and what does not work in non-cash settlement cases.

3. Settlements When Other Class Actions Are on File

A. The Issue

Settlement of a class action when other similar cases are pending requires consideration of a series of specific questions. How should class counsel approach settlement when other class actions, whether putative or certified, have been filed? How can "reverse auctions" be avoided? How should counsel deal with differing geographic and/or substantive scope of multiple class actions?

***385** B. Viewpoints

This issue was the most complex of all issues considered. There is general agreement that class counsel should be sensitive to the potential for wiping out claims asserted in other pending cases by settling a case, and should resist doing so. This problem is particularly apparent where the defendants suggest expanding a settlement class beyond the class definition contained in the complaint or in a prior order certifying a class, or expanding the claims settled, but offer no increased benefit to the additional class members or for settlement of the additional claims. There is also concern about the filing of nationwide class actions and agreeing to settlements which do not exclude from the class cases pending in certain states or locales. In either instance, the interests of the classes will not be well served by settlements which do not maximize benefits to class members.

One particular area of concern exists when the multiple cases are pending in both state and federal courts and thus cannot be consolidated under the federal multi-district litigation rules. 28 U.S.C. § 1407. Class counsel from California might be concerned about becoming involved in a related case pending in a rural area of Texas or Louisiana, where they are unfamiliar with the rules and traditions of practice. The Manual for Complex Litigation addresses this issue, and proposes several procedural steps to increase coordination. These steps include (1) joint conference calls among all judges (2) coordination of discovery, and (3) joint appointment of experts. MANUAL FOR COMPLEX LITIGATION, THIRD §§ 30.3, 31.14, & 31.3 (1995).

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Another area of concern is the settlement of cases through a "reverse auction" by which defendants propose a cheap settlement and shop around among plaintiffs' counsel until they find a lawyer willing to settle on their terms. Although there is no empirical evidence that this problem exists, anecdotes abound, and the potential for collusion and abuse is obvious if a lawyer agrees to a bad deal in order to secure fees.

Commenters agreed that class counsel in overlapping actions should communicate with each other and work together to ensure that class members obtain the maximum settlement benefit. The personal interests of particular class counsel in receiving attorney's fees could discourage such cooperation at times. One member proposed that courts should be encouraged not to approve settlements in "copy cat" actions and to consolidate actions whenever possible. However, experience in the federal securities area suggests that use of a "first to file" rule (whether used to determine who will be lead counsel or which should be favored for settlement approval) often produces unsatisfactory results.

Cooperation among class counsel through a variety of means including sharing discovery, conducting joint discovery, using joint experts, coordinating document production, and coordinating scheduling of important motions, including motions for class certification, can expedite the handling of cases and minimize the cost to each counsel.

C. NACA Guidelines

Class counsel should attempt to learn of any pre-existing cases and to communicate with other plaintiffs' counsel in such cases prior to or promptly after filing an overlapping case. Counsel should cooperate with each other to the maximum extent feasible in the pre-trial stage by agreeing to conduct ***386** joint discovery, use joint experts, and coordinate document production, or at a minimum sharing discovery among counsel in similar cases; and, where possible, by allocating responsibility for researching and drafting important pleadings and coordinating scheduling of important motions, including motions on the pleadings, for summary judgment, and for class certification.

Counsel should be alert to the possibility that a defendant in multiple cases may seek to conduct a "reverse auction," in which it negotiates separately with various plaintiffs' counsel and attempts to strike a settlement most favorable to it. Bearing in mind the entitlement of class counsel to a fair fee given all the circumstances, the interests of the class must remain paramount.

Counsel (1) should be reluctant to agree to expand the class definition at the settlement stage, (2) should refrain from agreeing to unnecessarily-broad releases which wipe out claims asserted in other pending cases, and (3) should be cautious about settling anything beyond what is alleged in the complaint and mindful of preserving the opt-out rights of class members.

When a settlement has been reached, counsel should always notify class counsel and the court in other cases involving the same defendant and the same or similar issues. Such notice should occur well before the fairness hearing, in sufficient time to permit those counsel the opportunity to appear.

After settlement, class counsel should also consider notifying persons and groups who have an interest in the proceedings that a tentative settlement has been reached and that a preliminary hearing will be scheduled to consider the fairness and adequacy of the settlement. For example, Trial Lawyers for Public Justice and Public Citizen would routinely be notified of class action settlements, the National Association of Attorneys General would receive notice of settlements involving motor vehicles which states purchase in large quantities, the American Association of Retired Persons would receive notice of settlements involving schemes that adversely affect the elderly such as telemarketing

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fraud and home equity scams, and NACA and the National Consumer Law Center would receive notice of settlements in consumer class actions such as challenges to deceptive home improvement financing schemes or overcharges by financial institutions. While such notification should not be an invariable rule, it should be the practice usually followed.

4. Additional compensation to named plaintiffs

A. The Issue

Is it appropriate to provide additional sums to named plaintiffs, beyond what each class member receives, and, if so, when and in what amounts?

B. Viewpoints

Earlier cases reflect a view that it is a conflict of interest for named plaintiffs to receive anything more than their proportionate share of damages in amounts which are equal to those received by absent class members. The theory was that named plaintiffs, like class counsel, are fiduciaries to the class, so every dollar they receive is taken from class members.

Recently, some decisions have recognized that modest incentive awards to named plaintiffs, in the range of $2,000-3,000, are generally desirable in ***387** order to compensate people for their efforts in achieving the results obtained and thereby encourage them to serve as class plaintiffs. GMAC Mortg. Corp. of Pa. v. Stapleton, 236 Ill.App.3d 486, 177 Ill.Dec. 697, 808, 603 N.E.2d 767, 776 (1 Dist.1992); In re GNC Shareholder Litigation: All Actions, 668 F.Supp. 450, 451 (W.D.Pa.1987); Troncelliti v. Minolta Corp., 666 F.Supp. 750, 752 (D.Md.1987); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 709-710 (E.D.Mich.1985).

Payments of even larger sums may be appropriate and necessary to compensate class representatives for the time they spend on the litigation. It is sometimes the case that named plaintiffs are subjected to embarrassment and harassment by defense counsel, and are required to submit to multiple days of depositions or to turn over their financial records for review. Named plaintiffs also may contribute to the litigation by reviewing records, reviewing and commenting on pleadings, responding to written discovery, giving assistance or advice to counsel and testifying at depositions and trial. It is appropriate that they receive additional payments to reimburse them for expenses they incur and time they spend in participating in the litigation. See, e.g., Bryan v. Pittsburgh Plate Glass Co., 59 F.R.D. 616, 617 (W.D.Pa., 1973), aff'd, 494 F.2d 799 (3rd Cir.1974), cert. denied., 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974), reh. den., 420 U.S. 313, 95 S.Ct. 836, 42 L.Ed.2d 844 (1975) (approving special awards to those members of the plaintiff class who were most active in the prosecution of the case and who devoted substantial time and expense on behalf of the class); Thornton v. East Texas Motor Freight, 497 F.2d 416, 420 (6th Cir.1974) (approving granting earlier seniority to those class members who had protested and helped to end discriminatory employment policy); Harris v. Pernsley, 654 F.Supp. 1042, 1052-1053 (E.D.Pa.1987) (approving damage award to named plaintiff based on meritorious conduct); Genden v. Merrill Lynch, Pierce, Fenner & Smith, 700 F.Supp. 208, 210 (S.D.N.Y.1988) (approving award of $20,085 to one named plaintiff who, as an attorney, rendered consultative services to class counsel).

C. NACA Guideline

Awards to named plaintiffs are appropriate compensation for the time and expense they incur in serving as class representatives. The consumers who fight on behalf of an entire class should be reasonably compensated for their efforts when those efforts are successful. For anything more than modest sums in the range of $2,000-3,000, the amounts

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of such awards should be based on the amount of time and money expended in connection with prosecuting the case, or other special circumstances.

5. Class Member Releases

A. The Issues

When is it appropriate to release class claims without individual class member signatures? May the scope of releases exceed the scope of the claims certified by the Court?

B. Viewpoints

In agreeing to settle a class action, the defendant understandably wishes to obtain protection against later suits by class members for the same alleged wrongs that are being settled through the class actions. Ordinary ***388** principles of res judicata and collateral estoppel apply in the class action context to bar subsequent re-litigation of claims, so long as there was adequate representation of the class in the earlier case. Matsushita Electric Industrial Co., Ltd. v. Epstein, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996). Nevertheless, as in individual cases, defendants generally insist upon the inclusion of releases within a negotiated settlement document. In some cases, defendants may also seek individual releases from class members, either as part of the language contained in claim forms or as an endorsement on settlement distribution checks. There does not appear to be any benefit from releases which do not exceed the scope of the res judicata bar, but neither does there appear to be any harm.

Prior to Matsushita, there was some uncertainty whether class-wide releases which were broader than the scope of the pleadings and/or certified claims were binding upon individual class members in subsequent litigation. As a noted commentator states: "A class action settlement agreement cannot release the claims of absent class members. Only absent class members can releasetheir own claims." Newberg §§ 12.17, at 12-52 (3d ed. 1992). However, Newberg subsequently notes that an alternative to individual releases is the inclusion of "a constructive release clause in the settlement agreement" to the effect that acceptance of settlement benefits releases whatever claims are described in the settlement agreement. Id. at 12-52--12-56.

The Supreme Court's recent decision in Matsushita, supra, clearly holds that res judicata bars re-litigation of non-certified claims (and even claims not contained in the pleadings) which are released on a class-wide basis, so long as there is adequate representation and an opportunity to opt out. Court approval of a proposed settlement should include a determination that plaintiffs and class counsel adequately represent the class on all of the settled issues, even if certification of some of the issues was previously denied.

It was the unanimous view of those who submitted comments that individual releases are unnecessary and unproductive if the scope of the class- wide release is limited to those claims certified by the court for class treatment. There was also consensus that class counsel should be cautious in discussing settlement of claims beyond the scope of a prior class certification order (or, if no order has yet been entered, beyond the scope of the pleadings). Several comments suggested that counsel should seek additional settlement compensation if settlement of such claims is agreed to.

The opportunity to opt out of a proposed settlement is particularly important if claims are being settled which have not been previously certified by the Court. It is common practice to offer class members only one opportunity to opt out of a class action. When there is a contested class certification motion, that opportunity usually comes

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immediately after certification. A subsequently-proposed settlement requires notice of the settlement terms and an opportunity to object, but usually not a second opportunity to opt out. If claims are being settled which were not described in the initial class notice, serious fairness issues are raised by the lack of a second opt-out opportunity.

***389** In addition, there are very serious, and probably fatal, objections to any settlement that purports to release potential future claims of persons who have not suffered any damage at the time of settlement. Settlements of this nature are rare, or even unknown, in consumer cases. Therefore, this paper will not discuss in depth the many issues relating to these settlements. However, we note that even if it were possible to notify such future-damaged class members, it is impossible to provide any meaningful notice and opportunity to opt out, since they have not been injured and thus cannot assess what the proposed settlement means to them. The Supreme Court addressed future-damage issues this past Term in Amchem Products, Inc. v. Windsor, 521 U.S. ----, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In that case, the Court found that including future-damaged persons in the class defeated the predominance requirement of Rule 23(b)(3) and also made it impossible for the named class members (who were not future-damaged) to represent the interests of the absent future-damaged class members, as required by Rule 23(b)(4). 521 U.S. at ---------, 117 S.Ct. at 2250-51, 138 L.Ed.2d at 713- 714. In addition, the Court noted that there were significant problems of adequate notice to a class that included persons who were not then aware of their damages. 521 U.S. at ----, 117 S.Ct. at 2252, 138 L.Ed.2d at 716.

C. NACA Guidelines

Class counsel should proceed cautiously in discussing settlement of claims other than those alleged in the pleadings and certified by the court. However, since the doctrines of res judicata and collateral estoppel will preclude subsequent litigation based on alternative legal theories arising out of the same set of facts, it is often reasonable to release any such alternative claims which could have been asserted, even if not contained in the pleadings or specifically certified. Except in unusual circumstances, counsel should not agree to any settlement which releases non-certified claims unless class members will be given a subsequent opportunity to exclude themselves from the settlement.

If a defendant seeks a release of claims arising from factual circumstances not alleged in the complaint, or as to which certification has been sought but not granted, class counsel should seek additional compensation to the class for such releases. If possible, negotiation of the certified claims should precede negotiations as to non-certified ones. Adequacy of representation as to non-certified claims should be addressed in the briefs supporting a proposed settlement.

A "general release" may be appropriate for the named class representatives. However, absent class members should not be required to release independent individual claims or claims as yet unknown in order to receive settlement benefits. Specifically, if the class settlement only provides injunctive benefits that do not result in restitution or other monetary payments to individual class members, the release should provide that individual damages claims are not being released.

***390** 6. Cy pres awards

A. The Issue

It is typically the case that not all class members can be located to receive their pro rata share of a damage award, and questions arise concerning what happens to the undistributed residue. They include: Are there circumstances under which the residue should revert to the defendant? Under what circumstances is a cy pres distribution of all

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or part of the settlement fund appropriate? What is class counsel's role in recommending recipients of such awards?

B. Viewpoints

Respondents unanimously agreed that cy pres remedies are appropriate to ensure that undistributed residues are used to provide indirect benefit to absent members of the plaintiff class or to further the purposes of the statutes which formed the basis for the underlying litigation. This view is supported by the case law. Bebchick v. Public Utilities Commission, 318 F.2d 187 (D.C.Cir.) (en banc) cert. denied 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963) approved use of the funds collected in an invalid fare increase for the benefit of those who paid it, that is, those who use that transit system. A fund was created in this non-class case to be used by the Commission to benefit transit users in any pending or future rate proceedings or to cover costs which might otherwise lead to an increase in fares, or aid in determining whether fares should be reduced.

Several other circuits have approved the use of cy pres remedies. An early antibiotic antitrust class action settlement included the creation of a trust fund from which indirect benefit could be conferred upon consumers as a whole, and the settlement was approved, with the details of the cy pres remedy left to be resolved at later hearings. State of West Virginia v. Chas. Pfizer Co., 314 F.Supp. 710, 728 (S.D.N.Y.1970): aff'd, 440 F.2d 1079, 1083 (2d Cir.1971). The Seventh Circuit has adopted an approach requiring a case-by- case analysis of whether the use of a cy pres remedy is consistent with the policy reflected by the statute violated and whether the statute embodies policies of deterrence, disgorgement, or compensation. Simer v. Rios, 661 F.2d 655, 676 (7th Cir.1981), cert denied, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982) (finding an award inappropriate because it would not serve the goals of deterrence or disgorgement on the particular facts of that case).

In Nelson v. Greater Gadsden Housing Authority, 802 F.2d 405, 409 (11th Cir.1986), the court held that compensatory damages which were not claimed by class member public housing tenants were to be used by the housing authority to increase the energy efficiency of the apartment units or to improve the appliances supplied by defendant. In Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1307 (9th Cir.1990), the Ninth Circuit noted that the Eleventh Circuit's decision "expressly approved the use of fluid recovery to distribute unclaimed class action funds" and expressed its agreement, holding that the district court properly considered cy pres distribution of unclaimed funds, although it found the specific use which had been approved inappropriate. The court reversed and remanded to the trial court to determine what remedy would best effectuate the goals of the underlying statute and the interests of the absent class members. Id. at 1309.

***391** Similarly, the Second Circuit in In Re Agent Orange Product Liability Litigation, 818 F.2d 179, 185 (2d Cir.1987), concluded that a district court may set aside a portion of settlement proceeds for programs designed to assist the class in order to maximize the beneficial impact of the settlement fund on the needs of the class. The Court distinguished its earlier decision in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.1973) ("Eisen III"), vacated and remanded on other grounds, 417 U.S. 156 (1974) which reversed a trial court order allowing fluid recovery through a price reduction. The court explained that the fluid recovery at issue in Eisen III would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not and would result in a greatly increased number of doubtful but astronomical class claims in the federal courts. That concern was not present in Agent Orange, which was maintainable as a class action regardless of the form of recovery available to the plaintiff class. In Re Agent Orange Product Liability Litigation, supra, at 185.

Other courts approving cy pres remedies also have distinguished Eisen on the basis that

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the fluid recovery sought in that case would have eliminated statutorily required individual proof of damages and circumvented class action manageability requirements. Nelson v. Greater Gadsden Housing Authority, supra, at 409; Six Mexican Workers v. Arizona Citrus Growers, supra, at 1307. Those issues are very different from the question of cy pres distribution of unclaimed funds, an issue which does not subject defendants to greater liability or alter their substantive rights. Id. In addition, Newberg criticizes the Eisen III rationale as defective and inconsistent with the historic purposes of class action remedies and concludes that "cy pres distributions have long been recognized as appropriate exercises of the court's general equitable powers under appropriate circumstances". Newberg, § 10.22 at 10-57.

State courts have also approved cy pres remedies in a number of unreported decisions in California and Georgia. See, e.g., Vasquez v. Avco Financial Services of Southern California, Los Angeles Superior Court Case No. NCC-11833B; Beasley v. Wells Fargo Bank, San Francisco Superior Court Case No. 861555, and a related case, Kovitz v. Crocker National Bank, San Francisco Superior Court Case No. 868914; McClendon v. Security Pacific National Bank, Alameda County Superior Court Case No. 613722-5; Patterson v. ITT Consumer Financial Corporation, San Francisco Superior Court Case No. 936818; In Re: Domestic Air Transportation Antitrust Litigation, No. 1-90 C 2485 MHOS & MAL No. 861 (consolidated Nov. 2, 1990); and Starr v. Fleet Finance, Inc., et al. Cobb County Georgia Superior Court Civil Action No. 9210-2314-06.

The propriety of fluid recovery, including creation of a consumer trust fund, was recognized by the California Supreme Court in State of California v. Levi Strauss, 41 Cal.3d 460, 224 Cal.Rptr. 605, 715 P.2d 564 (1986). Following the general principles that wrongdoing must be deterred and that deterrence requires disgorgement of ill-gotten gains, the court approved cy pres distribution of the portion of a damage fund which could not be distributed to the consumers who had been overcharged.

***392** The court concluded that such awards are appropriate where there is a nexus between the proposed use of the fund and the class on whose behalf the case was litigated, or where the proposed use furthers the purpose of the statutes which formed the basis for the underlying suit. In either instance, the use of the fund will provide indirect benefit to absent class members. The rationale for such awards is further explained in McCall, Sturdevant, Kaplan and Hillebrand, Greater Representation for California Consumers--Fluid Recovery, Consumer Trust Funds, and Representative Actions, 46 Hastings Law J. 798 (1995).

Thus, the case law supports creation of cy pres remedies in cases which are litigated to conclusion. Moreover, it is clearly permissible to settle with defendants and include a cy pres provision in the agreement, because a defendant may agree to a settlement which provides for fluid recovery notwithstanding the Eisen rule, Beecher v. Able, 575 F.2d 1010, 1016 n. 3 (2d Cir.1978).

There are two views on allowing residues to revert to defendants. One considers that an unacceptable alternative which would reward defendants for engaging in wrongful conduct, except where there are no ill-gotten gains to be disgorged. The other is that it is appropriate where there is no incentive for defendants to fail to distribute the damage award or to assist in locating absent class members because allowing the return of the residue may enable counsel to negotiate better relief to known class members and obtain an agreement as to injunctive relief.

There are also two divergent views on the propriety of cy pres awards of the entire damage fund with no distribution to the class. One view is that counsel's fiduciary duty to the members of the class requires that there must always be a direct distribution to class members, and only the undistributed residue used for a cy pres remedy. The other view is that where individual recoveries are unduly costly to distribute or too small to

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warrant the cashing of checks, cy pres awards of the entire damage fund is appropriate.

There is some authority for using a cy pres remedy for the entirety of a statutory damage award when the amount of damages to each class member is too small to warrant distribution. Gammon v. GC Services Ltd. Partnership 162 F.R.D. 313 (N.D.Ill.1995) was a suit under the Fair Debt Collection Practices Act involving a proposed class of four million people, each of whom would be entitled to 13 cents if plaintiffs prevailed. Class counsel, moving to certify the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, suggested cy pres distribution of the entire damage award. The defendant did not dispute the propriety of this remedy, which the court assumed would be suitable. Citing Newberg, the court noted that class actions are designed not only to compensate individuals who have been harmed, but also to deter violations of the law, especially when small individual claims are involved. It concluded: "Disgorgement of illegal gains from wrongdoers, together with ... application of the recovery for the benefit of class members under cy pres doctrines, would fulfill the deterrence objectives of class actions." Id. at 321, quoting Newberg, § 4.36. (Note that in Mace v. Van Ru Credit Corporation, 109 F.3d 338, 345 (7th Cir.1997), Gammon was limited to its own unique facts.)

***393** There is agreement that it is the role of class counsel, who have been found to be adequate representatives of the class, to recommend cy pres recipients. We propose that NACA adopt the guidelines set forth in the McCall, Sturdevant, Kaplan and Hillebrand article at pp. 850-851.

Since it is the role of the court to protect the interests of absent class members, the court should carefully review the competence and record of organizations that are proposed as recipients. We believe that serious consideration should be given to using the unclaimed portion of the award for a long-term grant to an existing organization with competence in the issues raised in the underlying litigation. This will ensure that projects are of sufficient duration to result in real and concrete benefit to absent class members.

C. NACA Guidelines

In proposing a cy pres remedy, class counsel should propose a disposition of the unclaimed portion of the award that will either (1) protect the interests of the persons injured by the illegal conduct and thus indirectly benefit absent class members or (2) promote the purposes of the statutory prohibitions sought to be enforced in the underlying litigation. Counsel should also insist that the recipients of the award be accountable to the court and should enter into memoranda of understanding to that effect with recipient organizations.

If counsel wishes to propose that a new organization receive the unclaimed funds, class counsel should be prepared to show the court how that organization has the ability and competence to work for the interests the underlying litigation sought to protect. This can be accomplished by providing information to the court about the current or proposed officers, directors, and staff of the organization. The work to be done by an existing or new organization should be set forth in a comprehensive proposal, together with time tables for accomplishing that work, which should indicate how the class will be indirectly benefited or the purposes of the underlying statutes will be furthered by these efforts.

To ensure full accountability, counsel should usually negotiate a formal agreement with the proposed recipients which binds the recipients to restrictions on the use of the funds, and requires them to comply with accounting, auditing, and reporting requirements. Such a negotiated agreement offers assurance to the court that the proposed recipient will use the funds strictly in accordance with the terms of the court's order. For long term projects, counsel can oversee performance by requiring quarterly meetings with recipient

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organizations, semi-annual plans for work to be undertaken, and periodic reports of past accomplishments. Counsel should be entitled to compensation for work necessary to monitor implementation of the cy pres remedy at standard rates, with no enhancement or multiplier.

Class counsel should agree that undistributed residues revert to defendants only in unusual circumstances. For example, reversion may be acceptable where there is no incentive for defendants to fail to perform their obligations in connection with distribution of the damage award and where there are no ill- gotten gains to be disgorged.

***394** Class counsel should insist on direct distribution of damages to class members before recommending a cy pres remedy for the undistributed residue except in unusual circumstances. These include instances where individual recoveries are unduly costly to distribute because, for example, defendants have no computerized records which would enable them to generate a list of class members' names and addresses, or where individual damages are too small to warrant the issuance, processing, and cashing of checks.

Class counsel should recommend cy pres remedies which will provide indirect benefit to absent members of the class or which will further the purposes of the underlying litigation. They should also recommend mechanisms which will provide for monitoring by class counsel, or, ultimately, judicial oversight of the expenditure of the funds.

7. Attorneys fee considerations

A. The Issue

The issue of attorneys' fees is extremely important in class actions today, both because it serves as a rallying point for criticism of class actions and because the criticisms of excessive fees are in some instances well grounded. This is also a difficult and complicated issue since fee awards may be made on three different bases: statutory fee shifting, in which defendant pays the fee; common fund, in which the class members pay the fee from their recovery; and common benefit, in which the defendant pays the fee. There is no one problem and no one cure.

The prime focus of criticism is the size of the fees. In many instances, this problem is more apparent than real. For example, when the individual recovery is $50.00 per consumer, an attorneys' fee of $2 million seems excessive at first glance. However, if the dollars actually recovered by the individual class members in such a case were $15 million, then fees are less than 14% of the total recovery achieved for the class. This makes the fee reasonable with respect to the total actual recovery.

However, the cases that receive the most criticism are those where the class does not obtain cash recovery that is several times the fees received by the attorneys. The strongest criticism is directed at cases in which the actual cash received by the class is minimal, if any, and the only other benefits received by the individual members are certificates, of questionable value. The GM Pickup Truck cases, In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability litigation, 55 F.3d 768 (3rd Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); Bloyed v. General Motors Corp., supra, and the Bronco II case, In re: Ford Bronco II Products Liability litigation, 1995 WL 373061 1995 U.S. DIST. LEXIS 3507 (E.D.La.1995) (rejecting settlement of a class action challenging dangerous vehicles that provided relief to the class in the form of a flashlight and safety video but no damages) are well known examples of this problem, but it had its roots in cases such as the airline antitrust settlement, which also provided certificates to consumers and millions of dollars in attorneys' fees to the class lawyers.

***395** B. Viewpoints

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There are a variety of proposed solutions, none of which would take care of the problem entirely. One viewpoint holds that class counsel should be paid only by hourly lodestar rates, enhanced by multipliers when appropriate, and that percentage calculation of fees is not appropriate. The leading lodestar calculation cases, which primarily consider time spent, hourly rates, the work done, and the results obtained, are: Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir.1974); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir.1973), on remand, 382 F.Supp. 999 (E.D.Pa.1974), rev'd on other grounds, 540 F.2d 102 (3d Cir.1976) (en banc). Because the availability of multipliers of the lodestar fee is uncertain, prohibiting percentage fees could make some class actions impossible to bring, if the resources needed to commit to the litigation were so sizable that the only way a law firm could economically justify taking on the case, and running the risk of recovering nothing, would be the potential of a large percentage recovery. In addition, some commentators have suggested that basing a fee on an hourly rate could lead some class counsel to perform unnecessary work ("churning").

The opposite end of the spectrum from this viewpoint holds that a percentage recovery in the 20-30% range is entirely appropriate and should be left to court approval. Percentage fees have been held appropriate in common fund cases: Boeing Co. v. Van Gemert, 444 U.S. 472, 478-79, 100 S.Ct. 745, 749- 50, 62 L.Ed.2d 676 (1980); In re Activision Securities Litigation, 723 F.Supp. 1373 (N.D.Cal.1989); Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268 (9th Cir.1989); and have been required in cases not involving a fee shifting statute in Swedish Hospital Corp. v. Shalala, 1 F.3d 1261 (D.C.Cir.1993) and Camden I Condominium Association v. Dunkle, 946 F.2d 768 (11th Cir.1991). However, some commenters urge that this approach could in class counsel being unduly compensated for insufficient time and effort.

Others feel that a blended approach is best--evaluating both percentage and lodestar fees, to determine a reasonable fee for the particular case. Under this approach judges would make a lodestar calculation based on the hours spent and hourly rates and compare that figure with the percentage awards made in similar cases. See, Strang v. JHM Mortgage Secs. Ltd. Partnership, 890 F.Supp. 499, 502-03 (E.D.Va.1995) (comparing the lodestar and percentage of common fund calculations to conclude that 25% rather than 30% of the fund was a reasonable fee).

Still others urge that different bases for fee awards raise different issues and require different solutions. A complicating factor is that it is not always clear whether a case is a common fund, a fee-shifting, or a common benefit case. If the entire case is based on statutes that provide for fee- shifting (and most consumer class actions are primarily based on fee-shifting statutes), some commenters felt that it would be inappropriate for class counsel to seek fees based on a percentage of the amount awarded the class. This view finds support in case law holding that the lodestar calculation is required in fee shifting cases: City of Burlington v. Dague, 505 U.S. 557, 562, 112 S.Ct. 2638, 2641, 120 L.Ed.2d 449 (1992); Blum v. Stenson, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984). These commenters found it even more objectionable if class counsel sought ***396** to obtain percentage fees out of the amounts awarded the class, rather than insisting that the defendant pay the fees over and above all amounts given the class. These commenters felt that this problem was particularly acute in instances where fees are assessed against members of the class who did not actually receive any monetary benefit. This situation can arise when class members' recoveries are credited to their accounts with the defendant but not every class member receives a credit.

These alternative bases for awarding fees are not necessarily in conflict: fees could be recovered from the defendant under a fee shifting statute or other theory and paid into the common fund, with class counsel receiving a percentage of the total recovery. This

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approach finds support in Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir.1988), which involved the settlement of statutory fee shifting claims. The court noted that a settlement merges all claims, including the client's statutory fee shifting claim, into one common fund that belongs to the class clients, and ordered fees to be calculated under common fund principles. This view is also consistent with case law noting that the amount which an opposing party can be required to pay as a "reasonable" fee may be substantially less than a reasonable fee owed by the client (or class of clients). Venegas v. Mitchell, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990).

Whatever the method of calculating fees there is no question that any contingent fee award must take into account the difficulty, complexity, and the risk of the case, the relief obtained for the class, as well as the fact that some cases will result in no fee at all. Therefore, it is entirely appropriate in most class action cases to award fees that are in excess of a fee calculated solely on an hourly basis without any multiplier.

When a fee is to be calculated on a percentage basis, there is no fixed percentage that is appropriate to all cases. A fee of 10% on a class recovery of $100 million might be excessive depending on the circumstances. On the other hand, a 40% fee award would be insufficient in a case where the primary relief sought is injunctive and the payment to the class minimal, but where thousands of hours of attorneys' time was required and the extent of the injunctive relief justified it.

Some commenters argue that there is an inherent problem with negotiating fees with opposing counsel, even when counsel have first agreed on relief to the class. Since the Court has an independent duty to examine the fees, these commenters feel, prior agreement does little but create the appearance of collusion between class counsel and the defendant. Others contend that settlement often would be impossible to achieve unless the defendants understand the extent of their total exposure, and urge that it is preferable to obtain relief promptly for class members and that there is no reason not to reach agreement on fees so long as negotiation of fees follows the obtaining of an agreement to relief for the class on the merits.

C. NACA Guidelines

Reasonable attorneys fees must be awarded in consumer class actions because fees are the incentive for lawyers to engage in private enforcement of the law, but excessive and unreasonable amounts should not be sought or awarded. Because the issue of reasonable attorneys' fees is one that will be determined by the merits of the lawsuit and the nature of the settlement, ***397** there is no one possible remedy for the abuses that exist. However, a variety of partial solutions will be beneficial.

• Time to discuss fees. Because the Supreme Court has recognized that in a fee-shifting case the defendant has an economic interest in resolving the fee issues in a settlement negotiation along with all other statutory claims [see White v. New Hampshire, 455 U.S. 445, 452 n. 14, 102 S.Ct. 1162, 1167 n. 14, 71 L.Ed.2d 325 (1982)], class counsel should avoid any conflicts of interest that may increase the danger of an improper quid pro quo detrimental to the class. For example, if a defendant offers a $5 million lump sum settlement, with $4 million for the class and $1 million to counsel, it would be improper to accept this offer contingent upon $3 million being made available to the class and $2 million available to counsel. It would be appropriate, however, to state that the $4 million for the class is acceptable as long as counsel's compensation is increased. One alternative is to obtain the defendant's binding agreement to all class relief and then to submit the fees issue to the court for determination. In statutory fee-type cases, an acceptable alternative is to obtain the defendant's agreement on class relief contingent on successfully negotiating an agreement on fees. It is also acceptable to negotiate fees after all relief has been agreed on for the class,and then submit the

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entire agreement as a whole to both the court and the class for review and approval. In common fund cases, there is no need to discuss fees with the defendant since the class clients, not the defendant, pay the fee from the fund that was created by their counsel, subject to court approval.

• Percentage Benchmarks for most Common Fund Cases. For the vast majority of common fund cases, courts and counsel should examine the reasonableness of the fees requested by the percentage benchmarks that have been recognized in similar cases. See, e.g., Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768 (11th Cir.1991); Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir.1989); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir.), cert. denied, 488 U.S. 822, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1272 (D.C.Cir.1993); Bebchick v. Washington Metro Area Transit, 805 F.2d 396, 406-407 (D.C.Cir.1986); see also In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 820-21 (3d Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); In re Continental Illinois Secs. Litig., 962 F.2d 566, 572 (7th Cir.1992). In the absence of special circumstances, including either an unusually large monetary recovery or a relatively small monetary recovery coupled with very beneficial but difficult to value equitable relief, the courts have recognized percentage benchmarks ranging from 19 percent to 45 percent of the common fund. See, e.g., In re Greenwich Pharmaceutical Sec. Litig., [1995] Fed.Sec.L.Rep (CCH) ¶98,774, p. 92,523 (E.D.Pa. Apr. 26, 1995); In re SmithKline Beckman Corp. Secs. Litig., 751 F.Supp. 525, 533 (E.D.Pa.1990); In re Unysis Corp. Retiree Med. Benefits ERISA Litig., 886 F.Supp. 445, 467 (E.D.Pa.1995); Mashburn v. National Medical Healthcare, Inc., 684 F.Supp. 679, 692 (M.D.Ala.1988); In re Activision Secs. Litig., 723 F.Supp. 1373, 1374-78 (N.D.Cal.1989). As one court has observed, "[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the ***398** contingent fee, then the contingent fee is the 'market rate'." Kirchoff v. Flynn, 786 F.2d 320, 324 (7th Cir.1986).

In the few (often highly publicized) cases in which the monetary relief, however valued or estimated, exceeds $30 million, reasonable fees will nearly always, though not necessarily, represent smaller than the benchmark percentages. In such cases, courts have encouraged use of a lodestar analysis to cross-check the reasonableness of fees in such large cases. See, e.g., General Motors, 55 F.3d at 822; In re Washington Public Power Supply Sys. Litig., 19 F.3d 1291, 1295, 1298 (9th Cir.1994). Although such cross-checks in typical cases simply add another level of analysis, and may even undermine the purposes of the percentage-of-the-fund approach, in large cases the cross- checks are a useful tool in protecting the class from windfall fee awards. Similarly, when the common fund is relatively small or difficult to value precisely and the common benefit is undoubtedly valuable but difficult to quantify, the lodestar approach may properly supplant the percentage-of-the- fund benchmarks. Provided the class receives real value and is receiving benefits commensurate with the fees to be awarded to class counsel, it is not per se unreasonable for counsel to set aside a monetary fund from which attorneys fees will be paid even though the class may be receiving primarily equitable benefits. However, counsel should be aware that "the timing of fee negotiations" in such cases may be considered as a factor by the courts in the "review of the adequacy of the class' representation." General Motors, 55 F.3d at 803-04.

• Recovering fees from the class. In a common fund case where the underlying claims are based on fee-shifting statutes, it is generally best to negotiate an additional amount representing the right to fees from the defendant directly, in order to limit the fees paid by class counsel's clients and maximize the total recovery to the class. It may be appropriate in such a case to merge the statutory fee into the common fund (see Skelton, supra), and to also obtain a portion of the fees from the common fund. The same is true in common benefit cases. In instances where the only source of fees is the common fund,

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class counsel must insure that (1) no class member is assessed fees if that member did not receive a benefit and (2) the percentage of fees assessed against any class member is a reasonable percentage of that class member's recovery. Class counsel must refuse to discuss any proposal by a defendant to pay one amount itself or to pay nothing itself but agree to class counsel seeking a greater amount from a common fund. If the defendant can be persuaded to offer an additional sum for fees, that can be accepted as a credit toward a common fund award made by the court. In a statutory fee shifting case which is not converted to a common fund case, fees should be recovered solely from the defendant and be based on the lodestar.

• Non-cash settlements. In a case where relief to the class is not paid in cash (or by credit to an existing account), the attorneys' fees should be based solely on a lodestar rate, with a multiplier when appropriate under existing case law. Otherwise, it is impossible to determine the value of the actual relief received by the class (as opposed to the theoretical value of non-cash relief) on which to base a percentage amount. If an agreement is negotiated with the defendant as to an amount of fees which the defendant will not contest, class counsel should still submit sufficient documentation to ***399** the court to justify, on a lodestar basis, whatever amount of fees is being sought. Alternatively, a percentage fee might be recovered, but only after a delay, as described below.

• Percentage fee request if cash value of settlement cannot be determined at time of settlement approval. In some situations, the total cash value of a settlement may not be calculable at the time the settlement is finally approved. The two most common situations where this is true are (1) certificate settlements, where it is unknown how many of the certificates will ultimately be redeemed; and (2) "claims made" settlements, where it is unknown what proportion of the available funds will be claimed by class members or paid to a cy pres recipient. In such cases, it is inappropriate for class counsel to seek a percentage fee unless one of the following is true: (a) the settlement provides for a minimum settlement level which is guaranteed to be paid (either to class members or as a cy pres payment) and the fee sought is based upon a percentage of the minimum amount; (b) the settlement provides for an initial payment to class members (or as a cy pres payment) and the fee is sought based on a percentage of that initial payment; or (c) approval of payment of the fee to class counsel is not requested until such time as the court can accurately assess the actual value of the settlement (i.e. after the deadline for class member claims are after the certificates expire).

• Notice to the class of fees. Another essential, but not sufficient, component of reform is a requirement that the maximum amount of attorneys' fees to be sought must be disclosed to the class members at the time the notice of proposed settlement is sent to them, stated as a total dollar amount. In a common fund case where a percentage will be sought, that fact and the specific percentage to be requested should be stated in the notice. In statutory fee shifting cases, the lodestar, if agreed to by the parties, should be disclosed in the class notice. If there is no agreement, the amount class counsel intend to request from the court should be disclosed. It is also a good idea to disclose the amount of fees per class member, but the members of the class have the right to know how much their attorneys are making in total. For example, the class must be told that the lawyers will receive $2 million, but could also be told that this amounts to $6.67 per class member. The average fee per class member need not be disclosed when recoveries vary substantially among class members, since that number would not be meaningful.

8. Improved Notice of Settlement

A. The Issues

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One significant problem with class action settlements is that Rule 23 does not specify the content of notice to the class. Consequently, the notices given to the class, whether individually or by publication, are not uniform and often are in such fine print and sufficiently complicated and unclear that the class members do not understand the nature of the relief sought or obtained in their names. They therefore do not actually have the information necessary to make an informed decision as to whether to remain members of the class, to opt out, or to object to the settlement.

***400** B. Viewpoints

Currently, there is no group advocating or opposing improved notice to the class. However, industry groups and the defense bar are readying attacks on class actions that could be fatal to the ability of individual consumers to use class actions to stop deceptive and illegal practices and to obtain relief after being victimized. Part of any consideration of changing class action practice should include finding a way to insure that the absent class members have the best tools possible to decide whether or not to support a class action settlement. Both the MANUAL FOR COMPLEX LITIGATION, THIRD and the foremost treatise on class actions recommend the content of notices of proposed settlements. The Manual suggests that notice include a description of the essential terms of the settlement, information about attorneys' fees, disclosure of any special benefits for class representatives, specification of the time and place of the hearing to consider approval of the settlement, and an explanation of the procedure for allocating and distributing the settlement. § 30.212 (1995). Newberg & Conte recommend that notice contain a description of the litigation, summary of the proposed settlement, requested allowance for attorneys' fees, procedure for filing proofs of claims, procedure for filing appearances and objections, and procedure for obtaining documents related to litigation and settlement. Newberg, supra, at § 8.32.

C. NACA Position

NACA should support a drive for simplified, plain-language, standardized disclosure of the salient aspects of a settlement. Disclosure should be required only of those points that are most important for consumers to know. This simplified form would be the first page of the class notice, whether by publication or individual mail. The details would continue to be placed in the body of the class notice.

The standard form of notice should include the following:

• A clear statement of how the consumer can tell whether he or she is a member of the class.

• The number of members of the plaintiff class.

• The total amount of relief to be granted the class, stated in dollars where the payment is in cash or credit to an account.

• The individual relief to be received by each member of the class, broken down into sub-classes if necessary. Where this cannot be determined in advance of the claims process, there should be a good faith estimate of the range of individual recoveries for class members.

• The total maximum fees, in dollars, to be sought by the class attorneys, and the method whereby they were calculated (hourly, hourly with a multiplier, percentage, or a combination), as well as the source from which payment will be sought.

• Proposed distribution of any unclaimed funds, including whether they will revert to

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defendants.

- Options available to class members including at least opting out and objecting.
- ***401** . An address to write for further information regarding the settlement.

9. Approval of Settlement Classes

A. The Issue

The growing use of settlement classes, especially when coupled with the increasingly-frequent proposals of settlements where the class members do not receive either monetary or equitable relief, raises serious concerns that the interests of the absent class members have not been adequately represented. The holdings in Amchem Products, Inc. v. Windsor, --- U.S. ----, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) and In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995) should serve as a harbinger of increased judicial scrutiny of settlements of this nature.

B. Viewpoints

Most commenters agreed that the preferred approach is to seek and obtain class certification prior to any discussion of settlement. By seeking court involvement at an early stage, the class has the advantage of an adversary- based determination of such vital issues as adequacy of representation of the class, adequacy of class counsel, and the exact make-up of the class.

Settlements before certification create problems. Commenters differed in the best approach to take. One approach to post-settlement certification entails a two-step process. First, the issue of certification would be the subject of a plenary hearing, after notice to the class but without notice of settlement of the merits. After the trial court has determined that the case should be certified as a class following hearing, the notice of settlement and of class certification would not need to be addressed again, and the trial court would focus on the Rule 23(e) determination that the settlement is fair, adequate, and reasonable to the class as a whole, as the law requires.

Another approach to post-settlement certification, which is acceptable under the holdings of the Third Circuit, combines the two hearings into one, with notice to the class of both the certification and the fairness issues to be considered. The trial court would conduct a plenary hearing into both the certification of the class and the fairness issues, only reaching the fairness issues after determining the nature of the class to be certified pursuant to both subsections (a) and (b) of the Rule.

Under Rule 23(c)(1), the trial court has always had the power to make certification conditional, before decision on the merits. It would appear to be within the scope of the Rule to make certification conditional on finality of the settlement, providing no subsequent res judicata effect if the settlement itself is rejected. Certainly, this approach adheres much more closely to the Rule than certification after less than full consideration of all Rule 23 requirements. This approach meets the holdings of the Third Circuit and also provides the salient benefit of avoiding both the appearance and the actuality of either collusion or inadequate representation of the absent class members.

Some commenters felt that negotiating settlement prior to obtaining class certification is appropriate because it enables counsel to obtain prompt ***402** resolution of cases to the benefit of the class. Those commenters also felt that it was a waste of time for a court to conduct a hearing on class certification if the defendant had agreed to class

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settlement and that the chance to opt out provided sufficient protection to the class members.

The Supreme Court reviewed the Third Circuit's holding in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir.1996), aff'd sub nom. Amchem Products, Inc. v. Windsor, --- U.S. ----, 117 S.Ct. 2231, 138 L.Ed.2d 689. The opinion held that the decision of the Court of Appeal bears modification because it did not indicate that settlement is relevant to a class certification. It further held that the court did properly consider the terms of the settlement in concluding that the class certification could not be upheld because common questions did not predominate and future claimants' interests were not adequately represented.

The rule to be derived from that opinion is that a court must find that the requirements of Rule 23, subdivisions (a) and (b) are satisfied in order to approve a class certification in the context of a settlement. The analysis need not take into account the manageability of the case if it were to be tried, since if the settlement is approved there will be no trial, but must include consideration of the subdivision (a) requirements of numerosity, commonality of questions of law or fact, typicality of the claims or defenses of the representative parties with those of the class, and adequacy of representation in that the representative parties will fairly and adequately protect the interests of the class. Additionally, the court held that certification of a class requires compliance with the provisions of subdivision (b)(1), (2), or (3). In a Rule 23(b)(3) case such as this, in order to certify a class a court must find that common questions of law or fact predominate, but a common interest in a fair compromise can not satisfy the predominance requirement. In language that will be useful to litigators handling consumer protection cases, the court distinguished mass tort cases from consumer class actions, noting: "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the anti- trust laws." 117 S.Ct. at 2250; 138 L.Ed.2d at 713.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Rules Committee") has recently proposed for comment an entirely new Rule 23(b)(4) that specifically permits use of a class in a settlement that did not otherwise meet the requirements of Rule 23(b)(3). See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure published in August, 1996. This proposal does not provide any criteria for a court's determination whether such settlement certification is proper; it is based solely on the agreement of the parties. Among others voicing strong opposition to this proposal is a group of some 150 law professors. The objections of the law professors are threefold: (1) the proposal contains no limiting guidelines or principles, (2) it fails to address serious constitutional and statutory problems, and (3) it formalizes what has until now been an extremely controversial practice and invites collusion.

C. NACA Guidelines

The specific Rule 23(b)(4) proposed by the Rules Committee fails to provide guidance for district courts' exercise of discretion in approving a ***403** settlement class and therefore must be rejected as it is currently worded. It is unnecessary to amend Rule 23 at all to obtain the positive benefits of appropriate settlement classes.

The preferable method is to obtain class certification prior to entering into settlement negotiations. However, the dynamics of settlement often create situations where settlement is reached early in the proceedings, before class certification. In those cases, as part of the settlement, class determination may be made contingent on finality of the approval of the settlement, as is commonly done when a court certifies a class "for settlement purposes only." If the Rules Committee proposes a revised new rule, NACA should

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address it, and this position may change.

10. Interlocutory Appeal of Class Certification

A. The Issue

The Rules Committee also proposed a new Rule 23(f), permitting interlocutory appeals of a district court order granting or denying class certification. The right to appeal is discretionary with the court of appeals. The proposed rule provides also that such an appeal does not stay the proceedings unless the district or appellate court orders.

B. Viewpoints

It is difficult to imagine a scenario where a defendant would not attempt to appeal an order granting class certification. It is also difficult to imagine a scenario where if appeal is permitted, either the district court or the court of appeals would not stay the proceedings.

On the other hand, the likelihood of a plaintiff appealing a denial and seeking a stay of proceedings is minimal. However, it is virtually certain that, if the plaintiff did appeal a denial of certification, the defendant would seek, and likely obtain, a stay pending the appeal. Therefore, the rule as written does little to advance a plaintiff's situation, but does provide significant dilatory opportunities for defendants.

The California state court approach is a variant on this theme. It is silent on the issue of stay, but permits immediate appellate review only of denial of certification, on the ground that a denial is a "death knell" because it effectively terminates the entire action as to the class. Granting class certification is not such an order, and is only harmful to the defendant if the plaintiff prevails at trial and on appeal, both on certification issues and on the merits, so is not immediately reviewable. See Stephen v. Enterprise Rent-A-Car, 235 Cal.App.3d 806, 1 Cal.Rptr.2d 130 (1991) and Rosack v. Volvo of America Corp., 131 Cal.App.3d 741, 182 Cal.Rptr. 800 (1988).

C. NACA Position

The California state court approach is a balanced approach that preserves the rights of both plaintiffs and defendants. Immediate appeal should be allowed only if certification is denied.

SUMMARY AND CONCLUSION

Most class actions work the way Congress and the courts intended. They provide an efficient and appropriate way to obtain relief for many individuals ***404** harmed by illegal practices. In the consumer law area, class actions are particularly appropriate because many people can be harmed by the same illegal practice, and the damages are often both quantifiable and individually too small to warrant separate lawsuits.

Nonetheless, there are abuses by class counsel and the public perception is that some of those abuses are increasing. Rather than precipitously attacking the problem by restricting the availability of the class action device to consumers, the better practice is a combination of increased court scrutiny of class action settlements and heightened commitment on the part of class counsel to avoid even the appearance of abuse.

The NACA guidelines and positions set forth in this paper are intended to give both bar and bench a reference point for aggressive yet responsible class action advocacy.

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