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## PRACTICE TIP

### Products Class Action Incentive Awards

#### *Pointers for Practitioners*

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Class actions have become a common fixture for product liability practitioners. Anyone who gets involved in prosecuting or defending a class action will quickly recognize that seeking redress via a class action is fraught with its own particular difficulties in a rapidly changing area. This article discusses the Ninth Circuit's recent decision in *Rodriguez v. West Publishing Co.*, 563 F.3d 948 (9th Cir. 2009), that specifically considered the viability of incentive awards and their impact on the adequacy of class representatives.

In a typical litigation, and even in class action litigations, pre-answer dispositive motions may well be the first battleground on which plaintiff and defense counsel meet. If such a motion is not made, or is not granted, the plaintiff's subsequent motion for class certification will be the most significant motion facing defense counsel in a class action litigation.

In federal court, Rule 23 of the Federal Rules of Civil Procedure sets forth mandatory requirements that govern class actions. Rule 23(a) requires that the plaintiff demonstrate numerosity, commonality and typicality in the class. Under Rule 23(a)(4), the representative parties must also "fairly and adequately protect the interests of the class." For ex-

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ample, in a product liability class action, class representatives generally must have purchased and used the product at issue. The absence of adequate class representatives is fatal to a class certification.

The recent *Rodriguez* decision has important implications for defense counsel opposing class certification and for parties in negotiating class settlements.

#### INCENTIVE AWARDS

One of the many aspects unique to class action litigation is the use of the incentive award, which is a sum of money awarded to class representatives in addition to that which they may already be awarded as a member of the class.

Courts that have approved this method of rewarding class representatives have determined that the representatives may be compensated for the services they provide on behalf of the class, and the risks they face during the pendency of a class action. *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001).

One plaintiffs' lawyer has recommended that the court consider the following, among other things, when assessing an incentive award: a) the risk to the plaintiff in commencing suit, both financially and otherwise; b) the notoriety and/or personal difficulties encountered by the representative plaintiff; c) the extent of the plaintiff's personal involvement in the suit in terms of discovery responsibilities and/or testimony at depositions or trial; d) the duration of the litigation; and e) the plaintiff's personal benefit (or lack thereof) purely in his capacity as a member of the class. *In re U.S. Bioscience Securities Litigation*, 155 F.R.D. 116 (E.D. Pa. 1994).

Incentive awards have drawn criticism because, among other things, class representatives are fiduciaries to the class. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members. *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977).

If class representatives expect an award in addition to their share of the recovery, they may be tempted or perceived as being tempted to accept suboptimal settlements that are not in the best interests of the class members to whom they owe a fiduciary responsibility. Moreover, courts have noted that incentive awards pose a danger of collusion. Class action settlements are subject to court review, and overly generous awards may result in the rejection of a proposed class settlement. *Sheppard v. Consolidated Edison Co.*, 2000 U.S. Dist. LEXIS 20629 (E.D.N.Y. 2000); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713 (E.D.N.Y. 1989); *Holmes v. Continental Can. Co.*, 706 F.2d 1144 (11th Cir. 1983).

#### THE RODRIGUEZ DECISION

The fears underlying these criticisms recently came to life in *Rodriguez*, where the incentive award took a form that implicated the inequity of such awards and the potential conflict that they create between the class representative — a fiduciary — and the class. In *Rodriguez*, in reviewing a proposed settlement agreement, the court was tasked with determining the appropriateness of *ex ante* incentive agreements contained in plaintiffs' counsel's retainer agreement with five of the seven class representatives. This incentive agreement required class

counsel to request predetermined incentive awards based on the amount of the final settlement.

The agreements at issue provided that class counsel was to seek payment for each class representative based on a sliding scale. That is, if the settlement amount was greater than or equal to \$500,000, then a \$10,000 incentive award would be sought; if it was \$1.5 million or more, a \$25,000 incentive award would be sought; if it was \$5 million or more, a \$50,000 incentive award would be sought; and if it was \$10 million or more, a \$75,000 incentive award would be sought.

The incentive agreements, which tied class representatives' compensation "to a sliding scale based on the amount recovered," created unacceptable conflicts, according to the Ninth Circuit, because they "disjoined the contingency financial interests of the contracting representatives from the class ...." The court was particularly troubled by the fact that once a threshold cash settlement was met, the contracting representatives had a disincentive to go to trial, because their contracted-for incentive award would be "at risk in return for only a marginal individual gain ...."

Additionally, the incentive agreements would give the contracting representatives a disproportionate interest in a monetary settlement as opposed to other remedies. This particular interest set them apart from other members of the class and destroyed the adequacy of their representation. Finally, *Rodriguez* noted the danger of class representatives "shopping plaintiffships" to the attorneys offering the highest incentive agreement.

The material conflict created by the incentive agreement would have proved fatal to this class settlement because the absence of material conflicts of interest between the class representatives and class counsel with other class members is "central to adequacy and, in turn, to due process for absent members of the class." However, while the court found that the very existence of the incentive agreements in *Rodriguez* undercut the suitability of the class representatives to fulfill their role, the court ultimately declined to vacate the settlement because two of the seven class representatives were not party to the *ex ante* incentive agreements. The court accepted the position that the

adequacy of the representation requirement can be satisfied as long as one of the class representatives is an adequate class representative.

The *Rodriguez* court reversed and remanded the district court's award of attorney's fees to class counsel. The court said it was appropriate for the district court to consider whether class counsel could represent both the class representatives with whom there was an incentive agreement, as well as absentee class members, without affecting the entitlement to fees.

#### LESSONS FOR CLASS AND DEFENSE COUNSEL

*Rodriguez* is a warning to plaintiffs' counsel to be wary of exposing class certification to a fatal defect by contracting to request incentive awards that are tied to the dollar amount of the ultimate settlement. In the end, the *Rodriguez* settlement was upheld because two of the seven class representatives had not signed the incentive agreements. In the absence of the two non-conflicted class representatives, class counsel may have worked for years on the case and brought it to successful settlement only to have the settlement rejected for failure to satisfy the adequacy-of-representation requirement.

In addition to refraining from entering into these kinds of incentive agreements with class representatives, class counsel should also consider *Rodriguez's* general criticism of excessive incentive awards. The *Rodriguez* court emphasized the need to demonstrate that additional compensation is due because of the class representatives' work on behalf of the class, and for any risk undertaken in bringing the action. Class representatives are on notice that they should keep records of time spent and monetary expenditures for litigation related expenses.

Finally, class counsel should be vigilant not to request excessive incentive awards that put class representatives in conflict with the class. As the *Rodriguez* court observed, this may create a danger of plaintiffs bringing class actions "principally to increase their own leverage to attain a remunerative settlement for themselves ...."

The *Rodriguez* decision also provides useful tools for defense counsel in opposing class certification. Defense counsel should use the lessons of *Rodriguez* in framing discovery requests and deposition

questions to reveal any conflict between class representatives and the remainder of the class. For example, as part of class discovery, defense counsel may inquire into the relationship with or between the class plaintiffs and any class counsel in the action, including, but not limited to, a retention agreement or engagement letter.

Defense counsel should be prepared during discovery disputes to argue the significance of discovery of agreements between class counsel and the representatives, which could include incentive agreements or refer to incentive awards. In this connection, defense counsel should note that the attorney-client privilege may well not protect retainer agreements or engagement letters from discovery. *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238 (2nd Cir. 1986).

If a dispute concerning these discovery requests develops, defense counsel should be prepared to refer to the *Rodriguez* analysis to explain how such agreements are probative of the adequacy of the proposed class representatives and bear directly on the appropriateness of class certification. In addition, defense counsel should be prepared to depose the class representatives about whether they are a party to such an agreement. Armed with this information, defense counsel will have additional ammunition at the outset of the litigation with which to battle class certification.

If the class has already progressed and settlement negotiations have commenced, defense counsel should confirm that the class representatives are not a party to any incentive agreements that would destroy their adequacy and put the settlement at risk.

The holding in *Rodriguez* provides an important lesson for both plaintiff and defense counsel. While incentive awards can prove to be a useful tool for plaintiffs in attracting class representatives, they are open to exploration by defense counsel who are entitled to know whether there is a real conflict between class representatives and the proposed class.