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PRACTICE TIP

Class Actions: Where's the Beef?

By Ronald J. Levine and
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Product liability practitioners will recall that in 2005 the Class Action Fairness Act (CAFA) was enacted in response to a Congressional finding that class action settlements may too often result in a monetary windfall to class counsel, while leaving class members with awards of little or no value. Despite the fact that product liability class action settlements are subject to judicial scrutiny to ensure substantive and procedural fairness, there is surprisingly little data available regarding how much cash relief class members actually receive post-settlement. The scant literature that is available on post-settlement distributions reveals that many class actions are still being settled on terms that often benefit the lawyers involved, while not delivering meaningful compensation to the class members.

In 2012, the U.S. House of Representatives' Subcommittee on the Constitution investigated the post-CAFA world and demonstrated that, although CAFA has been a success in certain respects, the legislation has not cured some of the continuing failings in the class action system. Specifically, the testimony in Washington confirmed what

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Contacting and Compensating a Non-Party/ Former Employee Fact Witness

The Legal and Ethical Issues

By John J. Weinholtz and Kevin T. Saunders

Every good civil trial movie worth the price of admission seems to have as its climax the former employee who has long harbored some dark secret about the employer that is now revealed on the stand years later and that saves the day for the downtrodden plaintiff (and even more downtrodden attorney). Hollywood has repeated this formula successfully through the decades with, as examples, the former operating room nurse providing the true admitting record in *The Verdict* (1982); the former chemical company employee providing information about chemicals that were dumped into the town's water supply in *A Civil Action* (1998); and the former gas company employee testifying that he preserved records, against the gas company's direction, showing chromium contamination in the groundwater in *Erin Brockovich* (2000). While former employees can make for good drama on the movie screen, they can present legal and ethical issues that make for unwanted drama in real world litigation, unless counsel is careful.

CONTACTING A NON-PARTY/FORMER EMPLOYEE

In the movies, the former employee fortuitously arrives out of nowhere, eagerly agreeing to a clandestine meeting with counsel at which the "smoking-gun" evidence is provided. In the real world, counsel must work hard just to locate the knowledgeable former employee and then work even harder to convince the person to take a phone call or show up at a meeting, not knowing whether the person is the consummate "company man" or the embittered, terminated curmudgeon, or is a type somewhere in between.

What is the rule for *ex parte* contact with a corporate adversary's former employee? Most courts and ethics boards have concluded that *ex parte* contact is

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any product liability lawyer who handles class actions already knew — the law has not put an end to the recurring problem that counsel are too often the only winners in the class action system.

In light of the recurring difficulty in providing class members with meaningful cash awards, the legislatures and courts should refocus on the value of non-cash awards in resolving class actions. In the instances in which class counsel bring meritorious product liability actions that are resolved through changes in products or services offered by defendants, class counsel should be entitled to compensation even though it may be difficult to value the result.

CLASS ACTIONS: AN INNOVATION TO SERVE CONSUMERS WITH SMALL CLAIMS

As a means for addressing numerous small claims, the class action represents an important innovation in the American legal system. The class action procedure makes the prosecution of the claims possible by enabling an attorney to pool them together into one large case and then get paid out of the total recovery in the action. Class actions have developed into an important device in the litigation framework, with class action awards often at the upper ends of the larger settlements and judgments.

While class actions are a unique litigation structure, they are generally resolved in the same manner as most other civil litigations: via

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a settlement. However, unlike the usual civil settlements that product liability lawyers negotiate every day behind closed doors, judges must approve a class action settlement to make sure that its terms are fair to the entire class.

Even with this judicial approval, after the judge signs off on a class settlement agreement, little information is available about how many class members actually receive compensation and to what extent. An analysis of the scarce information that is available does not paint an encouraging picture in cases where small cash amounts are rewarded to a consumer class which is largely unidentified. In many instances, only a small percentage of settlement awards actually goes to consumer class members. Product liability lawyers — on both sides of class actions — know that while the plaintiffs' lawyers can be well-compensated, often in the millions of dollars, only a fraction of the class may take home any cash relief.

DETERMINING THE CLASS TAKE RATE

The class take rate typically depends on the following central factors: 1) whether the consumer class's addresses are known or unknown; 2) the amount of relief that can be recovered by a class member filing a claim (that is, is it worth taking the time to fill out the form?); 3) the ease of submitting a claim; and 4) the amount of time allocated for filing claims.

Product liability cases in which there are no records of the names and addresses of the consumers, and where the individual payments are relatively low, will have the lowest take rates. It is difficult to advise a consumer public, who did not register their purchases, that a settlement has been reached. And, even if the consumer sees the notice in a published advertisement, it is questionable whether a consumer will go to the effort of filling out the claims forms, no matter how convenient the system may be for filing a claim. On the other hand,

there is a greater likelihood that the recovery will be delivered to consumers whose names and addresses are known, who receive significant awards, and who do not have to do more than cash a check to recover their settlement awards.

THE RISKS INHERENT IN THE CURRENT STRUCTURE

Thus, especially in mass suits involving relatively small individual claims, the class action system may not be able to deliver cash rewards to a consumer settlement class. Some members of the judiciary have openly expressed concern that class counsel may not be serving the best interests of the class, and have suggested that the courts take a closer look at benefits actually delivered to the class.

United States Supreme Court Justice Sandra Day O'Connor, for example, in her opinion regarding the denial of a petition for a writ of certiorari in the *Int'l Precious Metals Corp. v. Waters* action, identified several "troubling consequences" that may occur when attorney fees are approved without an inquiry as to the actual value of class recovery. 120 S. Ct. 2237 (2000). Specifically, Justice O'Connor expressed concern that disproportionate attorney fee awards may "decouple" the interests of the class from that of their counsel, encourage the filing of needless lawsuits, and provide defendants with a strong motive to entice class counsel to settle lawsuits in a manner that is detrimental to the class. *Id.* at 2237-38.

Judge Richard Posner expressed similar sentiments in the *Thorogood v. Sears, Roebuck, and Co.* decision. 547 F.3d 742 (7th Cir. 2008). According to Judge Posner, a downside of the class action system is the substantial conflict of interest that exists between the members of the class and the class lawyers: "The class members are interested in relief for the class but the lawyers are interested in their fees, and the class members' stakes in the litigation are

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too small to motivate them to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests." *Id.* at 744.

THE HOUSE OF REPRESENTATIVES EXPLORES THE ISSUE

This subject was explored in depth by the House Subcommittee on the Constitution. The House hearings highlighted concerns about continuing deficiencies of the class action litigation system. Two noteworthy suggestions for reform were offered in order to combat exploitation of the class action device:

- Implementing a requirement that assurances be provided up front that there are actually class members interested in bringing a class action lawsuit. This would help to thwart lawyers who bring class action lawsuits solely for personal profit motives.
- Insertion of an additional requirement into the class action certification process which mandates that, before a court certifies a class, the court must assure itself that a favorable outcome would significantly benefit the members of a class.

RECOMMENDATIONS FROM THE FEDERAL JUDICIAL COMMENTATORS

The Federal Judicial Center (FJC), which offers official guidance for federal judges on managing class action litigation, advises judges to evaluate monetary and nonmonetary results achieved before awarding attorneys' fees. In cases involving monetary benefits, the FJC urges judges to insist on actual information on claims filed to determine the benefit to class members and to use that information both to place a value on the settlement and to award attorneys' fees. The FJC encourages judges to hold back the portion of any attorney fee award that is linked with contingent benefits (such as coupons) until af-

ter the redemption period has ended and the value of the benefits can be established by calculating class members' actual use.

Indeed, the 2003 Advisory Committee Notes to Federal Rule of Civil Procedure 23(h) also suggest that courts examine the extent to which claims procedures result in actual payouts to the class: "Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members ... the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known."

Some courts have followed such a procedure. For example, in *Strong v. BellSouth Telecommunications, Inc.*, the court held that it was not an abuse of discretion for a district court to consider the actual award paid out to the class in determining whether a fee application was reasonable. 137 F.3d 844, 852-53 (5th Cir. 1998).

TAKE A CLOSER LOOK AT THE ALTERNATIVES

What would the courts discover if they actually audited all class cash distributions? It would be fair to predict that they would find many cases in which a fraction of the settlement class members actually took advantage of the relief they were being offered. No matter how hard counsel may try to distribute the awards, it may be virtually impossible to get the funds into the hands of unknown consumers who are not interested in making claims.

Indeed, in recognition of the problem inherent in distributing settlement funds to the class, alternate devices have been built into settlements — such as "cy pres" distributions of the remainder of the unclaimed fund to charities.

Those devices have been criticized by some courts as not really delivering a direct benefit to the class, and have resulted in settlements being rejected by courts. In other cases,

courts have taken the position that once the funds are paid into the settlement pot, the funds should not be returned to the defendant. Nevertheless, when courts are hard pressed to find an appropriate disposition for the unclaimed funds, returning them to the defendants is certainly a logical result.

In light of the increasing use of class actions in product liability cases, the courts must be active gatekeepers and toss out "junk" claims. However, in those instances in which the class claims are meritorious, and the defendant chooses to resolve the claim through settlement, the courts must recognize these limitations in setting up a settlement fund. While it may be easier to justify a class counsel award when a large fund is established, the class members may not be receiving any real value.

Since it can be very difficult, if not impossible, to deliver cash "beef" to consumers in many product liability cases, some courts entertain non-cash settlements of consumer product liability class actions. Recognizing the limitations of cash settlements, courts are approving settlements with non-cash benefits to the consumer public, such as a change in a product or its packaging, or a revision in a products claims process. Class counsel fees can still be awarded to compensate attorneys for accomplishing such changes.

Understandably, when the class receives no monetary distribution, but class counsel are amply rewarded, some courts require that approval of a settlement be supported by a clear explanation of why disproportionate fees are justified and do not betray the class's interest. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) in which the Ninth Circuit rejected a settlement, which provided for enhanced warning, but no common fund. The Ninth Circuit instructed the district court to "conduct a more searching inquiry into the fairness of the negotiated distribution of funds [and]

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consider the substantive reasonableness of the attorneys' fee request in light of the degree of success attained" on remand. *Id.* at 938.

Nevertheless, many class actions outside of the product liability field,

such as employment claims, have been settled with injunctive relief, and the courts have tackled the task of evaluating the settlement and awarding appropriate fees.

CONCLUSION

As the legislatures and the courts continue to explore the class action process, and work to end its abuses,

they must take an even closer look at the end game. If the consumers are not going to be running to claim cash benefits, then the pursuit of something other than cash may be the next best alternative.



Fact Witnesses

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not be adversely affected by refraining from giving such information." Thus, if the company's counsel is to say anything, it should only be to tell the former employee that he or she will probably receive a call from opposing counsel requesting an interview and that the former employee is free to choose either to do the interview, or to refuse to do it. See *Fischbach v. Founders Court Inc.*, No. 2:94-CV-00765, 2:95-CV-00211, 1996 U.S. Dist. LEXIS 8256, at *4 (M.D.N.C. May 16, 1996); *North Carolina State Bar v. Graves*, 274 S.E.2d 396, 399 (N.C. Ct. App. 1981).

COMPENSATING A NON-PARTY/ FORMER EMPLOYEE FACT WITNESS

Often, a non-party fact witness will ask to be paid for his or her "trouble" — that is, for lost time and expenses incurred in providing information or testimony. Can counsel for either side to a lawsuit agree to pay a non-party fact witness? In most jurisdictions, the answer is yes, but with certain limitations and restrictions, with which counsel must be very careful to comply.

Typically, a non-party fact witness is entitled to an attendance fee plus a certain rate per mile. In New York, for instance, the Civil Practice Law and Rules 8001 (a) provides that the subpoenaed trial witness is entitled to \$15 per day and \$.23 per mile. However, while Model Rule 3.4(b) provides that it is improper for a lawyer to "counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law," it is "not improper to pay a witness's expenses"

ABA Model Rules of Prof'l Conduct R. 3.4, comment 3 (2012).

While the Rule and its comments do not further define "expenses," an ABA Formal Opinion provides much more detail:

A lawyer, acting on her client's behalf, may compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402, at 1 (1996). The attorney is directed to inform the witness that the payment is for the loss of time, not "for the substance (or efficacy) of the [] testimony" and to ensure compensation is "reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony."

Id. at 1-2.

What amount of money constitutes "reasonable" compensation that does not convey an appearance of impropriety or a wrongful attempt to influence testimony? Would, for example, a payment of \$10,000 for no more than a few hours of testimony be considered reasonable and permissible? The New York Court of Appeals recently confronted this very issue in *Caldwell v. Cablevision Systems Corp.*, No. 19, 2013 N.Y. LEXIS 115, at ** 3 (N.Y. Feb. 7, 2013).

In *Caldwell*, the defendant paid a treating emergency room doctor \$10,000 to testify solely about a single entry in his notes regarding plaintiff's statement as to how

an accident occurred, which contradicted the plaintiff's trial testimony. On cross-examination, the doctor denied that his testimony was influenced by the payment, stating simply that he was at trial to "testify to my records." He testified only about the entry in his emergency room notes. No professional opinion was sought or given.

Plaintiff's counsel asked the trial judge to strike the doctor's testimony or, alternatively, to issue a curative instruction or a jury charge concerning monetary influence. The trial judge denied plaintiff's counsel's request, however, and gave only the general, pattern jury instruction bias charge to the jury, which made no reference to the doctor's testimony or the payment he received. The jury later returned a defense verdict finding that defendant's negligence was not a significant factor in plaintiff's injury. *Id.* at **4.

The Court of Appeals, like the Appellate Division, was "troubled by what appears to be a substantial payment to a fact witness in exchange for minimal testimony," and agreed with plaintiff that the trial judge should have "instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable." *Id.* at ** 5, 9. The Court of Appeals, however, found that the failure to give such a

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