

CLASS ACTION SETTLEMENTS:

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Why Are Class Action Settlements Tricky?

- The court is in control
 - Court gives preliminary and final approval
 - Settlement must be “fair, reasonable and adequate”
- The class gets notice
 - Notice administrators run the program
 - Putative class members can opt out
- Confidentiality is not an option
 - Class settlements are always public

Why Settle With A Class?

- Pros
 - Get relief from surge of lawsuits
 - Comprehensive release for past actions
 - Protection from future actions
 - More certainty
 - Positive publicity opportunities
- Cons
 - Big dollars or business changes for settlement
 - Use of your time and resources
 - No confidentiality
 - Possibility of negative publicity

What About Class Notice?

- FRPC 23(b)(3) class settlements require notice to the class and opportunity to opt out
- “Best notice practicable under circumstances, including individual notice to all members who can be identified through reasonable effort”
- Timeline for preliminary approval, notice, opt outs, objections and final approval
- Notice administrator plays a key role

How To Handle Settlement Claims Administration

- Class counsel often disappears
- Keep claims process simple
- Choose a good claims administrator
- Set a timeline for completion of claims process

How To Choose Settlement Terms

- Paying money is easy
- Making business practice changes is cheaper but more difficult
- Drafting the settlement agreement

How To Address Settlement Enforcement

- The court retains jurisdiction
- Include a streamlined compliance dispute procedure
- Include a mediation or arbitration clause

What To Do When You Have Dueling Class Actions

- Class actions with same class and claims in different courts can proceed on parallel tracks
- Dueling class actions set up a race to final judgment
- Choose more favorable forum, judge, class counsel and settlement terms
- Settlement should expand class definition and claims to encompass all competing class actions

Lessons Learned From Settlements Where Dueling Class Actions

- *Sutter v. Horizon Blue Cross* (D.N.J.)
Participation in nationwide class settlement sparked dispute over objectors in statewide class settlement.

- *Grider v. Keystone Central* (E.D.PA)
District court in statewide class action enjoined parties from settlement in nationwide class action. Third Circuit vacated the injunction.

How To Work With Class Counsel On Settlement

- Select a solid partner for negotiating settlement
- Make sure settlement negotiations are at arms length
- Settle on terms for the class first
- Draft the settlement agreement
- Stay out of the fray on attorneys' fee battles

It's The Release, Stupid!

- The release is the most important term of a class settlement
- Benefits of the broad release *In re Managed Care*
 - Eleventh Circuit says it bars tortious interference and defamation claims
 - Used to enjoin UCR/Ingenix litigation by non-participating providers

Do You Want A Bar Order?

- What is a bar order?
 - Order barring related lawsuits
 - Order barring contribution actions by non-settling defendants against settling defendant
- Are they enforceable?
 - Generally, yes, if settlement is fair
 - Be clear about what is barred