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GUIDELINES FOR MOTIONS FOR PRELIMINARY AND FINAL APPROVAL OF CLASS SETTLEMENT (with comments referencing authorities)

Motions for Preliminary Approval of Class Settlement

(a) Class definition

A motion for preliminary approval of a class wide settlement should set forth the proposed class definition or the definition of the class that already has been certified. It should provide an estimate of the number of persons included in the class.

(b) Case summary

The motion should list the causes of action alleged in the operative complaint and describe the legal and factual basis for the claims. The motion should summarize the investigation and discovery conducted by proposed class counsel and should include a reasonable estimate of the nature and amount of recovery that could be obtained on behalf of the class if plaintiffs' claims prevailed. The motion should explain why a court should find that the proposed settlement was negotiated at arms-length and is not collusive.

(c) Settlement terms and evaluation

The motion should set forth the reasons why the court should find that the proposed settlement compromise is fair, adequate and reasonable, and treats class members equitably relative to each other, given the costs, risks and probability of success if the litigation continued. The motion should describe the proposed terms of the settlement including the following, with citation to the paragraph of the settlement agreement governing each item:

(1) The nature of any injunctive relief;
(2) The amount and manner of distribution of the compensation to be provided to class members, including the amount, or an estimate, of what each class member will receive;
(3) Whether, and under what circumstances, amounts available for payment in settlement might not be paid to class members or might revert to the defendant;
(4) The scope of the release of class members' claims;
(5) Any provision for tax treatment of settlement amounts; and
(6) A statement of any affirmative obligations to be undertaken by class members or class counsel and the reasons for any such obligations.

(d) Settlements requiring submission of claims

If the proposed settlement requires class members to submit a claim in order to receive compensation, the motion should set forth the reasons why information is required to be furnished by class members in order to obtain recovery and an estimate of the anticipated claims rate. The motion should describe actions to be undertaken by class counsel to encourage submission of claims.

(e) "Coupon" settlements

If compensation to class members includes a coupon or voucher, the motion should describe the terms and conditions of use of the coupon or voucher and whether or not it is transferrable.

(f) Cy pres distributions

If the proposed settlement includes a cy pres distribution, the motion should set forth the reasons why such distribution fulfills the purposes of the lawsuit. The motion should be accompanied by (1) a declaration describing the proposed cy pres recipient, the proposed uses of the cy pres distribution, information sufficient to conclude that the recipient will be financially accountable for the funds, and (2) a declaration disclosing any interests or involvement by counsel or any party in the governance or work of the cy pres recipient. The motion should identify the provisions of the settlement ensuring that amounts agreed to be paid in settlement that are not in fact paid are distributed to an appropriate cy pres recipient.

(g) Notice to class members

The motion should include a "Statement regarding class notice" in conformance with California Rule of Court 3.766(b) and should state why the manner of giving notice complies with CRC 3.776(e)-(f). The content of the notice should comply with CRC 3.766(d) and in addition should set forth: (1) the material terms of the settlement, (2) the proposed fees and costs of administration, (3) details about the court hearing on settlement approval and submission of objections, and (4) how the class member can obtain additional information. Class action settlement notice formats illustrated on the website of the Federal Judicial Center (www.fjc.gov) are preferred.

(h) Typicality and adequacy of representation

The motion should set forth (1) the reasons why the named class representative has claims typical of the class and is an adequate class representative; and (2) the reasons why the proposed class counsel adequately represents the class and a description of counsel's experience.

(i) Costs and fees

The motion should set forth the following:

(1) The proposed fees to be paid to class counsel, the manner of payment and a preliminary justification under existing case law for such fees. Any agreement, express or implied, that has been entered into with respect to the payment of attorneys' fees or the submission of an application for the

approval of attorneys' fees must be set forth in full. All fees proposed to be paid to any counsel must be disclosed.

(2) Any proposed incentive payment to a named class representative and the justification for such payment.

(3) An estimate of costs of administration, why such costs are reasonable and the proposed means for payment of administrative costs.

(j) Exhibits to the motion

A motion for preliminary approval of a class wide settlement should include the following exhibits:

(1) A complete copy of the proposed settlement agreement.

(2) A proof copy version of the proposed notice to the class, prepared in compliance with CRC 3.766, and any envelope to be used to send the notice.

(3) A proof copy version of any proposed claim form.

(4) A proof copy version of any form a class member may use to request exclusion from the class.

(5) A proposed schedule for class notice, objection, opt-out, claim submission, motion for final approval and motion for attorneys' fees.

(k) Additional information

The moving parties should include any additional information that may be relevant to review of the fairness, adequacy and reasonableness of the proposed settlement. The court may require submission of additional information as appropriate to ensure an adequate review of the fairness of the proposed settlement.

COMMENTS AND AUTHORITIES

The purpose of these guidelines is to assist counsel in placing before the court information that ordinarily is required for appropriate review of proposed settlements. Following these guidelines should avoid delay and provide a thorough record for appropriate court review of proposed class settlements.

Settlement of a class action requires court approval to prevent fraud, collusion or unfairness to the class. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801.) The court acts as a fiduciary of absent class members by inquiring into the fairness of a proposed class action settlement. (*See, id.; Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129; *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151.)

Ordinarily the adversary system incentivizes parties to present the facts and law that favor their respective interests. Courts rely on this process to identify the principles that should guide their decisions. However, once a class representative, proposed class counsel and a defendant have agreed to settle on a class wide basis, the presentation to the court requesting settlement approval generally is unilateral rather than adversarial. At that point, both class counsel and defense counsel have an incentive to highlight the strengths of the settlement and to downplay any weaknesses. (*See generally, Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 555; Principles of the Law of Aggregate

Litigation (American Law Institute 2010) section 3.02, comment a; section 3.05, comment b.)

Preliminary approval of a proposed class settlement does not bind the court to grant final approval of the settlement. However, because the settlement approval process often involves relatively substantial administrative costs (*e.g.,* costs of notice), a court should be given as much information as possible at the preliminary approval phase, and the court should endeavor to express any reservations that are apparent based on the information provided.

Subdivisions (b)-(c)

In order to determine whether a class settlement is fair, adequate and reasonable, a court must be provided with "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133; *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 790, 802-803.) It is important to consider the scope of the release in order to understand what the class is giving up in exchange for the settlement.

Regarding subsection (c)(3), when unclaimed funds are retained by or revert to the defendant, there can be substantial difficulties in valuing the settlement. Moreover, the settlement structure may provide an incentive for defendant to insist on provisions that deter class participation. (*See generally,* Rothstein & Willging, Managing Class Action Litigation: A Pocket Guide for Judges (Federal Judicial Center 2005) at p. 13.) An influential monograph on class actions suggests that "prorating the total settlement amount among the class members who file claims . . . is a straightforward way to avoid the possibility of unclaimed funds and has become a standard practice in class settlements." (*Id.*)

Subdivisions (d)-(e)

The court must be able to assess accurately the compensation proposed to be paid to the class and to evaluate whether there are any barriers to class participation in the settlement. See comments regarding subsection (c)(3), *supra.*

Subdivision (f)

A cy pres distribution must fulfill the purposes of the underlying cause of action. (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 722.) It is important to the public's confidence in the administration of justice that any cy pres recipient be a responsible entity that will use the cy pres award for designated purposes. Moreover, cy pres distributions to entities in which the parties, counsel or the court have an interest or affiliation may raise questions as to whether the recipient was chosen on the merits. (*See* Principles of the Law of Aggregate Litigation (American Law Institute 2010) section 3.07, comment b.)

If a proposed settlement does not expressly provide that funds not claimed by the class are retained by, or revert to, the defendant, Code of Civil Procedure section 384 requires payment of the residue to a cy pres recipient. (*Cundiff v. Verizon California, Inc.* (2008) 167 Cal.App.4th 718, 728-729.)

Subdivision (i)

California Rule of Court 3.769(b) sets forth requirements for disclosure of agreements concerning proposed attorneys' fees.

Subdivision (j)

Review of the notice and claim form is required to ensure that the due process requirements of notice and opportunity to be heard are met and that barriers to class member participation are eliminated or minimized.

Motions for Final Approval of Class Settlement

(a) Information considered at the time of preliminary approval

A motion for final approval of a class settlement should attach as exhibits (1) a copy of the motion for preliminary approval, and (2) a copy of the court's order granting preliminary approval.

(b) Class notice and class response to the proposed settlement

The motion should include the following information concerning settlement administration, supported by declarations:

(1) How notice in fact was given, including, (i) information concerning any undeliverable notices and efforts undertaken to locate class members' contact information, and (ii) and an explanation of any variance from the notice process ordered by the court.

(2) The number of class members who have opted out, with an exhibit listing the names of class members who opted out.

(3) The number of class members who have objected and a summary of the objections. Copies of all objections should be filed as an exhibit to the motion.

(4) If class members were required to submit claims to receive compensation, a statement of the number of claims submitted and an estimate of the amount to be paid to class members pursuant to such claims.

(c) Evaluation of the settlement

The motion should discuss why the settlement is fair, adequate and reasonable and treats class members equitable relative to each other. The motion should respond to any class members' objections to the settlement.

(d) Costs and fees

(1) With respect to attorneys' fees, the motion should include a lodestar calculation and supporting evidence, and a justification under existing case law for the fees sought by proposed class counsel, including a justification for any multiplier sought. All fees proposed to be paid to any counsel must be disclosed.

(2) With respect to costs, the motion should include a declaration supporting the reasonableness of amounts sought in accordance with Code of Civil Procedure section 1033.5(c).

(3) If the settlement includes any proposed incentive payment to a named class representative, the motion should include a declaration of the named representative, explaining the effort expended by that representative on behalf of the class, or other facts justifying the proposed incentive payment.

(4) The motion should include a declaration of the settlement administrator justifying the proposed payment of administrative costs.

(e) Final report on settlement administration

The Court may order class counsel to file a final report summarizing all distributions made pursuant to the approved settlement, supported by declaration.

COMMENTS AND AUTHORITIES

Subdivision (b)

The extent of class participation in a claims-made settlement may bear on whether the approved notice plan was adequate and whether there were barriers to class participation. Moreover, a court may consider the degree to which the settlement benefits were in fact of interest to class members as one factor in awarding fees. (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 61.)

Subdivision (d)(1)

The lodestar is the primary method for establishing the amount of reasonable attorneys' fees, although it may be appropriate in some cases to "cross-check" the lodestar in comparison to a percentage of a common fund recovery. (*Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556-558.)

Subdivision (d)(2)

An incentive fee award to a named class representative must be supported by evidence that quantifies time and effort expended by the individual and a reasoned explanation of financial or other risks undertaken by the class representative. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 806-807.)