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A class-action primer

Keeping your head above water in the wake of the class certification motion

[Ed. Note: Part I of this article, which ran in the February edition of Advocate, dealt with issues that arise during class certification.]

While the motion for class certification often represents the apex of class action litigation, it is essential to be prepared for the issues which arise following this critical juncture. Regardless of whether you have prevailed in your motion for class or been defeated, Part II of this article will provide a basic understanding of the steps to be taken and the statutes and case law which govern.

Order & Notice

Even where class certification has been granted, a plaintiff still faces a number of hurdles which he must overcome to achieve a successful resolution of his litigation. Upon certification of a class, or as soon thereafter as practicable, the court must make an order determining: whether notice to class members is necessary; whether class members may exclude themselves from the action; the time and manner of notice; the content of the notice; and the parties responsible for the cost of notice. (Cal. Rules of Court, rule 3.766(c).) Notice is likewise required under federal law. (Fed. Rules Civ. Proc., rule 23(e).)

It is important to note that an order directing the form of notice or payment of costs of notifying the class is interlocutory in nature. Although it may involve payment of money, it is *not* a final order or a "collateral matter" from which an appeal will lie. (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1227 [11 Cal.Rptr.2d 780, 782].)

The principal purpose of providing notice to the class in a class action is to protect the integrity of the class-action process, one of the functions of which is to prevent burdening the courts with multiple claims where one will do. (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527 [27 Cal.Rptr.3d 839] (modified on denial of rehearing).) Because notice serves such an important function, preparation of the notice and its dissemination can present challenges for both counsel and the court. As such, in an effort to simplify and clarify this aspect of the litigation, we will address common questions and issues pertaining to the notice process.

What is the proper manner of notice?

The manner of notice rests in the sound discretion of the court. And, in cases involving primarily *declaratory, injunctive or mandamus relief*, the court has discretion not to require notice of any kind to be given to the class members. (*Frazier v. City of Richmond* (1986) 184 Cal.App.3d 1491, 1501 [228 Cal.Rptr. 376, 382]; see also Fed. Rules Civ. Proc., rule 23(b)(2)).) However, in class actions where potential members can "opt out," notice is required in order to bind absent class members. (*Home Sav. & Loan Assn. v. Superior Court* (1974) 42 Cal.App.3d 1006 [117 Cal.Rptr. 485].)[i]

Class members who are not named as parties to the action are entitled to due process protection if their rights are to be adjudicated therein. At a minimum, due process requires that: the unnamed class members be given *notice* of the proceedings, and an opportunity to be heard and participate therein (in person or through counsel); that their interests must be *adequately represented* by the named plaintiff; and that they be given the *opportunity to exclude themselves* from the class by executing and returning to the court an "opt out" form. (*Phillips Petroleum Co. v. Shutts*, (1985) 472 US 797, 811-812 [105 S.Ct. 2965].)

What information must the notice contain?

The content of the class notice is subject to court approval. If class members are to be given the right to request exclusion from the class, the notice must include the following:

- A brief explanation of the case, including the basic contentions or denials of the parties;
- A statement that the court will exclude the member from the class if the member so requests by a specified date;
- A procedure for the member to follow to request exclusion from the class;
- A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and
- A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel. (Cal. Rules of Court, rule 3.766(d).)

If the notice pertains to a class action settlement, the notice itself must tell the members everything they need to know to make an informed decision whether or not to be bound by the settlement. (*Amchem Products Inc. v. Windsor* (1997) 521 U.S. 591 [117 S.Ct. 2231].)

What is the proper form for notice?

In determining the manner of the notice, the court must consider: the interests of the class; the type of relief requested; the stake of the individual class members; the cost of notifying class

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members; the resources of the parties; the possible prejudice to class members who do not receive notice; and the *res judicata* effect on class members. (Cal. Rules of Court, rule 3.766(e).)

For adjudication of class claims "for *money damages or similar relief* at law, notice sent by *first class mail* to the last known address of each member of the plaintiff class is sufficient." (*Phillips Petroleum Co. v. Shutts*, *supra,* 472 U.S. at 812.) If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action.

In *Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413], the California Court of Appeal found that using a summary notice, by e-mail, that directed interested class members to an Internet Web site containing a more detailed notice of proposed class action settlement, and that provided hyperlinks to that Web site, was an acceptable manner of giving notice of proposed settlement. In *Chavez*, plaintiffs sued a DVD-rental business, alleging false advertising by defendant that it would send unlimited DVD rentals to customers, with one-day delivery, for a flat monthly fee. Class members routinely conducted business with defendant over the Internet and could be assumed to know how to navigate between the summary notice and the Web site.

The role of the Internet in class-action notification is currently evolving. Use of an informational Web site can provide a cost-effective and constant information source which is instantly accessible to millions of people. A settlement Web site can serve as a document repository with easy access to settlement agreements, notice and other court documents. Further, the site's success can be measured by the number of unique visitors to the page per day. With such attributes, there is a great likelihood that utilization of the Internet as one way of providing class notice will continue to grow.

Who pays?

The next question that one might ask is who is responsible to bear the cost of the notice? Anyone who has been through this process knows that the costs associated with class notice can be exorbitant. Pursuant to California Rules of Court, rule 3.766, "If the class is certified, the court may require either party to notify the class of the action in the manner specified by the court." (*Ibid*.) Typically, the court will order the plaintiff to provide notice and incur the cost of doing so. However, under appropriate circumstances, a defendant may be required to bear or share such costs. (*Hypertouch*, *supra* 128 Cal.App.4th at 1551-1555.)

In determining whether the cost should be allocated *between the parties*, some of the factors normally considered include: the merits of the case; defendant's desire to take advantage of the *res judicata* effects of a class action; the number of named plaintiffs, their financial responsibility, the value and percentage of their holdings as compared with those of the entire class, and their ability to cover the costs; and cost itself. (*Civil Service Employees Ins. Co. v. Sup.Ct.* (1978) 22 Cal.3d 362, 376-380 [149 Cal.Rptr. 360, 368-371] & fn. 10.)

Notice to the class of the final approval hearing in settlement classes

Pursuant to California Rules of Court, rule 3.769, "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." The notice must contain an explanation of the proposed settlement and the procedures through which the class members can object thereto. (*Ibid.*)

Post notice issues

Even after proper notice has been drafted and distributed, there are yet additional obstacles to overcome. Several issues arise in the post-notice stage of class litigation. Class members can opt-out of the settlement or raise formal objections thereto. Understanding the legal basis for these options and the mechanics of how they play out can facilitate a more efficient and painless settlement approval process.

Settlement approval

California Rules of Court, rule 3.769 states that court approval is required for a settlement or compromise of an entire class action or a cause of action in a class action. Generally, in determining whether a proposed settlement is fair, a trial court should consider relevant factors, such as the strength of plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class-action status through trial; the amount offered in settlement, the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement, but the list of factors is not exhaustive and should be tailored to each case. (*In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495 [89 Cal.Rptr.3d 615, 171].) There is a presumption of fairness if the settlement is reached through arm's length bargaining; investigation and discovery are sufficient to allow counsel and the court to act intelligently; counsel is experienced in similar litigation; and the percentage of objectors is small. (*Dunk, supra*, 48 Cal.App.4th at 1802.)

Opting-out

One option available to class members at this stage in the proceedings is the choice to "opt out" of the action and pursue their own independent remedies, such as negotiation with the defendants, or initiation of their own lawsuit. (*Home Sav. & Loan Assn v. Sup.Ct.*, *supra* 42 Cal.App.3d at 1010.) The right to "opt out" is mandatory only for classes certified under Federal Rules of Civil Procedure, rule 23(b)(3) ("common question" ground). It is discretionary for classes certified under (b)(1) (risk of prejudice from separate claims) or (b)(2) (declaratory or injunctive relief appropriate).

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(*Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1608 [277 Cal.Rptr. 583, 594].)

Objecting

The notice of settlement in most cases may prompt some level of objection. Rule 23(e) specifically provides, "[a]ny class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval." (Fed. Rules Civ. Proc., rule 23(e) 28 U.S.C.) Generally, only class members have standing to object to a proposed settlement. (*Gould v. Alleco, Inc.* (4th Cir. 1989) 883 F.2d 281, 284; *In re School Asbestos Litig.* (3rd Cir. 1990) 921 F.2d 1330, 1332-1333.) However, objections can also be raised by any interested parties seeking to intervene to show that the proposed settlement is inadequate or unfair. (See *Amchem, supra*, 521 U.S. 591.) The notice of settlement should specify the procedure and deadline for objecting.

Courts are cautious about inferring support for a complex settlement from lack of objections. Particularly where the stake of each individual class member is small, class members are unlikely to make their positions known. (*In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.* (3rd Cir. 1995) 55 F.3d 768, 812.)

Increasingly, professional objectors have become a major issue in the settlement of class-action litigations. While objectors can aid in fully evaluating the merits of a proposed settlement, professional objectors seek only to obstruct and delay the settlement process so as extract a fee. As noted in Newberg on Class Actions, case law has prescribed a number of indicators that tend to be present when meritless objections are advanced by "professional objectors" or others. (Newberg on Class Actions, § 15:37. Abusive Conduct by Counsel Objecting to Class Action Settlements (2009).) These factors include: objections filed on behalf of individuals to a class-action settlement when the objectors are not actually class members with standing to intervene (*Weissman v. Quail Lodge, Inc.* (9th Cir. 1999) 179 F.3d 1194, 1198; objections filed by the same lawyer in different class actions which are "canned or boilerplate objections;" (*Shaw v. Toshiba America Information Systems, Inc.* (E.D. Tex. 2000) 91 F. Supp. 2d 942, 973); the filing of objections with no colorable merit and no meaningful arguments to advance the interests of the class accompanied by a demand for "attorney fees" by the objector's counsel (*In re Zohdy* (La. 2005) 892 So. 2d 1277, 1282); the filing of inconsistent, conflicting objections to a settlement (*O'Keefe v. Mercedes-Benz USA, LLC* (E.D. Pa. 2003) 214 F.R.D. 266, 297); and the filing of meritless objections to obstruct the class settlement in order to create leverage for the objector to gain advantage in unrelated litigation, in essence, "a hold up." (*In re NASDAQ Market-Makers Antitrust Litigation* (S.D. N.Y. 1999) 187 F.R.D. 124, 131.)

The 2003 amendments to rule 23 reflect an effort to curb professional objectors. (Fed. Rules Civ. Proc., rule 23(e)(5).) By providing that objections may only be withdrawn with the court's approval, rule 23(e)(5) seeks to ensure that objectors have a legitimate purpose.

Denials of class certification

As the saying goes, you can't win them all. So, what happens when class certification is denied? There is no easy answer as a party's best strategy can only be determined by an honest evaluation of the case and a host of factors including, *inter alia*, whether the case was filed in state or federal court, the strength of the case, and the defendant's willingness to settle.

Making your record

Notwithstanding its colorful title, the "death knell" doctrine is a tightly defined and narrow concept. Under this doctrine an order denying the certification of a class is immediately appealable. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699 [63 Cal.Rptr. 724].) As the California Supreme Court articulated in *Daar*, the reason for this rule is that the denial of class certification is "tantamount to a dismissal of the action as to all members of the class other than plaintiff." (*Ibid.*) An appeal is allowed because the action has in fact and law come to an end, as far as the members of the alleged class are concerned. "Since, in theory, the individual plaintiff's action can go forward, the death knell doctrine fits comfortably into the exception to the 'one final judgment' rule that arises when parties have separate and distinct interests; when this is true, there can be a final and appealable judgment for each such party." (See generally, 9 Witkin, Cal. Procedure § 69 (4th ed. 1997).)

Excluded from the death knell doctrine are *inter alia* orders certifying a class, orders partially certifying a class, orders compelling the representative of a class to arbitrate, and orders directing service of notice to class members. (*Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs* ¶¶ 2:39.2-2:39.5 (The Rutter Group 2007).)

Petition for permission to appeal and Federal Rules of Civil Procedure, rule 23(f)

While the right to appeal from the denial of class certification is automatic in state court, it is discretionary in federal court. In the Ninth Circuit, a rule 23(f) petition presents a case worthy of interlocutory review where:

> there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

(*Chamberlain v. Ford Motor Co.* (9th Cir. 2005) 402 F.3d 952, 959.)

Ordinarily, a case warranting interlocutory review of a class certification order will fit within one or more of these guidelines. But the guidelines are not a "rigid test" and the Court will exercise its discretion in granting or denying rule 23(f) review on a case-by-case basis. (*Id.* at 960.) In this regard, the Ninth Circuit has determined that review is warranted "when the district court's decision is

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manifestly erroneous – even absent a showing of another factor." (*Id.* at 959.)

Certifying a "settlement class"

Much of the resurgent interest in class actions has centered on their potential use as a vehicle to settle complex cases. (See *Manual for Complex Litigation* §21.612 (4th ed. 2004).) "Class actions lawsuits rarely go to trial. Some are dismissed on legal motion, but the vast bulk are settled." (Understanding the Class Action Fairness Act of 2005, Professor William B. Rubenstein, 2005). If your case is in this majority, the

> threshold task is to ascertain whether the proposed settlement class satisfies the requirements of rule 23(a) of the Federal Rules of Civil Procedure applicable to all class actions, namely, "numerosity, commonality, typicality, and adequacy of representation."

(*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011 citing *Amchem*, *supra*, 521 U.S. 591.)

Settlements preceding class certification are scrutinized more carefully to make sure that absent class members' rights are adequately protected. (*Wershba v. Apple Computer, Inc.* (2006) 91 Cal.App.4th 224, 236 [110 Cal.Rptr.2d 1450].) While the Supreme Court held in *Amchem* that the use of settlement classes was permissible under rule 23, before the court can approve any settlement, the settlement class must satisfy the normal prerequisites for a class action. (*Amchem*, *supra*, 521 U.S. at 620.)

Claim forms

Most class-action settlements require class members to submit "claim forms" to recover their portion of the class benefit or settlement fund. While the use and need for these claim forms is typically self evident, it is the view of the authors that claim forms have been used inappropriately in many cases. If one examines the rationale for a claim form, a logical conclusion would be that the claim form allows both the class counsel and the defendant's counsel (through the claims administrator) to ensure that the class benefits are being "paid" to those persons who properly fall within the class definition. In other words, the actual injured parties receive the class benefits.

Oftentimes, however, the only benefactor of such claims forms is the defendant. For example, in wage and hour class actions, the ultimate class benefit is usually a negotiated amount of wages, interest and possibly penalties. The settlement fund is typically agreed upon after significant negotiation and inherent discounting (depending on the strength of the case and other factors). Thus, at the end of the day the parties reach an agreement to pay a certain amount to each employee.

If this settlement is a result of arm's length and good-faith negotiations, and the end result is a payment of some amount of past due wages, an employee should not have to fill out a claim form for wages he or she would otherwise have received had the employer not engaged in some type of wrongful conduct. The defendant employer usually provides the list of employees (class members) with the employees' last known addresses. A simple calculation of the employees' share of the class fund should be included in the Notice to the class and the benefits paid to the class after final approval of the settlement – just as if the employer was sending the employee his or her last paycheck.

This process ensures that the wages in the negotiated settlement are paid to all employees and that the wages do not revert back to the employer. In other words, it prevents the defendant employer from further escaping responsibility for past wrongful conduct by allowing a claim form to reduce the amount of wages paid to the class.

While this process may not work in some consumer class actions (although more and more consumer class actions are being resolved without the need to make a claim), it should be class counsel's fiduciary duty to negotiate against the use of claim forms if at all possible to achieve the highest possible participation in the settlement.

Conclusion

Hopefully, after reviewing Part I and Part II of this article you will have a good basic understanding of the issues that will arise during your litigation of a class action, certification of your class, and immediately thereafter. Best of luck with your next class action.

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Endnote:

[1] Generally, in California, class notice requiring an "opt-in" procedure conflicts with the state's class action rules, is constitutionally unnecessary, and undermines the class action device. (*Hypertouch*, supra, 128 Cal.App.4th at 1527.)