



THE JNL FIRM, LLC

EFFECTIVE AND RELIABLE CLASS ACTION SETTLEMENT MANAGEMENT

Why retain a Class Action Settlement Manager?

The most recent amendments to Rule 23(e)(2)(C), which became effective on December 1, 2018 (the “2018 Amendments”), added new criteria that emphasize the importance of shepherding class action settlements from memorandum of understanding to distribution. Now more than ever, promptly obtaining approval of class action settlements and their distribution to class members, as well as the payment of court-awarded attorneys’ fees, depends on effective and proactive settlement management.

“It will be important to relate the amount of an award of attorney’s fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney’s fees until the court is advised of the actual claims rate and results.”

—RULE 23 ADVISORY COMMITTEE



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When courts evaluate whether a settlement is fair reasonable and adequate, they must now consider “the terms of any proposed award of attorney’s fees, including timing of payment.” Courts already have interpreted that new provision to be at odds with customary “quick pay” attorneys’ fee provisions, and to require consideration of actual claims administrations results to evaluate whether the attorneys’ fees requested are disproportionate to the relief provided to the class.

“Rewarding counsel prior to compensating the class conflicts with Rule 23(e)’s mandate for fairness, reasonableness, and adequacy.”

—HART V. BHH, LLC

For example, one district court, after rejecting as “straining credulity” the argument – one that had prevailed for decades – that quick pay provisions would “would serve Plaintiffs’ purported goal to deter baseless objections,” and after rejecting prior precedent that found that “quick-pay provisions do not harm the class,” held that “[r]ewarding counsel prior to compensating the class conflicts with Rule 23(e)’s mandate for fairness, reasonableness, and adequacy.”

“[T]he plain language indicates that a court must examine whether the attorneys’ fees arrangement short-changes the class. In other words, the new Rule 23(e) makes clear that courts must balance the ‘proposed award of attorney’s fees’ vis-à-vis the ‘relief provided for the class’ in determining whether the settlement is ‘adequate’ for class members.”

—BRISEÑO V. HENDERSON

Courts of appeals also have interpreted this new mandatory consideration as requiring the payment

“[I]t may not be appropriate in every instance for a court to approve payment of attorney’s fees prior to the distribution of settlement funds among class members”

—MIKHLIN V. OASMA
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of attorneys’ fees to be deferred, holding that “the plain language ... [of] the new Rule 23(e) makes clear that courts must balance the ‘proposed award of attorney’s fees’ vis-à-vis the ‘relief provided for the class’ in determining whether the settlement is ‘adequate’ for class members.” They also have found that, “[w]hen assessing whether the fee award is disproportionate to the class benefit,” district courts must consider “the amount of anticipated monetary relief based on the timely submitted claims already made.” That interpretation appears to find support in the Rule 23 Advisory Committee’s instruction that, “[i]n some cases, it will be important to relate the amount of an award of attorney’s fees to the expected benefits to the class,” and that “[o]ne way to address this issue is to defer some or all of the award of attorney’s fees until the court is advised of the actual claims rate and results.

If those or similar interpretations gain purchase in the courts, class counsel would be required to wait to receive all or a substantial portion of their attorneys’ fees until after claims administrations were completed and settlement proceeds were distributed.

Judicial interpretation of another new factor added by the 2018 Amendments – that fairness determinations themselves should consider the actual results of claims processes – also may cause class counsel to wait to receive payment of their attorneys’ fees. Under this provision, according to the Rule 23 Advisory Committee, it “[o]ften will be important” to a court’s consideration of whether a settlement is fair, reasonable and adequate, “to scrutinize the method of claims processing to ensure that it

facilitates filing legitimate claims.” The Advisory Committee also instructs that it “may be important” to require the parties to provide “actual claims experience.” At least one court of appeals has reversed final settlement approval because it found that that “the district court grossly overstated the value of the claims,” and that, “based on the actual claims rate at the time of final approval,” the claim value was just a fraction of what the district court relied upon. This newly mandated focus on class member recovery and participation may lead district courts to extend the customary class action settlement approval schedule until they are provided with claims results and determine that those results support finally approving proposed settlements.

Distributions have been delayed, sometimes for years, while avoidable settlement management matters have been litigated, which not only harms class members, but also burdens courts and hurts class counsel. As distributions linger, dockets are clogged with multidistrict class actions that have been settled for years, courts continue to be called upon to resolve issues that should have been addressed without their intervention, and class counsel have been forced to divert attorneys and to incur expenses to address them. Claims processing inaccuracies and distribution delays also have subjected class counsel to unwarranted scrutiny and criticism. Now, with amended Rule 23’s new mandates, settlement approval and the payment of attorneys’ fees may be substantially delayed if claims administrations are not conducted more accurately and expeditiously.

A variety of factors have contributed to needlessly longer claims administrations. One of them is that class counsel and claims administrators must navigate the often-complex legal issues that are implicated by the competing interests of different class member constituencies. Resolving those issues under the 2018 Amendments requires settlements and their allocations to treat class members equitably relative to each other. Another cause of delay is the ever-increasing volume of objections and challenges – both valid and serial – to claims administrator

proof of claim determinations and distribution calculations. Mishandled administrations also delay distributions. **To avoid or at least reduce these delays, the interests of different class member constituencies must be balanced, poor administrator performance must be recognized and remediated, and claims administration practices and procedures must be appropriately tailored to address the specific circumstances presented by each settlement.**

Causes of Delayed Administrations

Navigating complex legal issues

Claims administrators mishandling administrations

Addressing objections and challenges to claims administrator proof of claim determinations and distribution calculations

But expeditiously and efficiently providing courts with accurate and complete claims administration data may prove more difficult than it may at first appear. Common practice has been to delegate most aspects of settlement management to claims administrators. Under the 2018 Amendments, however, class counsel and class members may be better served by reduced reliance on claims administrators, and for class counsel to drive settlement management, including the selection of administrators that have demonstrated their ability efficiently and accurately to address all claims processing and related issues, and to oversight of the performance of the administrators they select. Otherwise, class counsel may find themselves devoting substantial time (that may not be recoverable) to the resolution of settlement management issues and waiting to receive their fees while interminable distribution delays are resolved.

To address the causes of delayed and mishandled claims administrations, class counsel could assume full responsibility for settlement management, which would require them to resolve a variety of nuanced matters that, until now, often were left to claims administrators. Or class counsel could choose a far more efficient alternative, one that is more likely to result in claims administrations being completed accurately and conducted expeditiously: Outsource substantially all settlement management responsibilities to professionals who possess the highly specialized knowledge and experience necessary to navigate them successfully. The JNL Firm is uniquely positioned to undertake that challenge. Its principal, Jeffrey Leibell, has devoted over 25 years to designing processes and procedures to manage some of the largest and most complex class action settlements in U.S. history, successfully defended claims administrator eligibility determinations and distribution calculations challenged by claimants, and, when necessary, challenged those determinations and calculations and defending the rights of class members. A complete description of Mr. Leibell's experience is available at www.jnlfirm.com. If you would like to discuss the benefits of retaining the JNL Firm to manage a class action settlement, please contact Mr. Leibell at jeff@jnlfirm.com.

