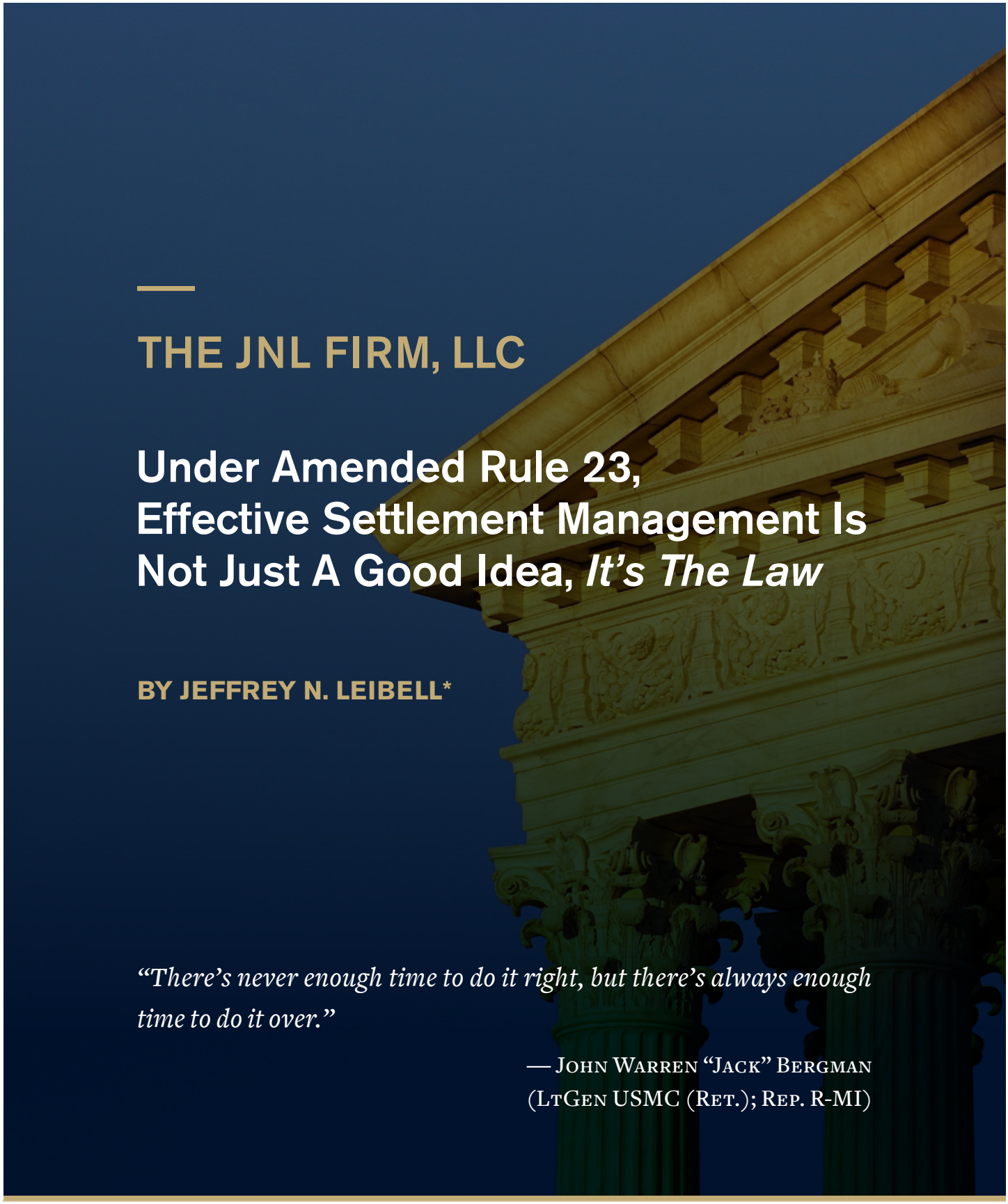

THE JNL FIRM, LLC

Under Amended Rule 23, Effective Settlement Management Is Not Just A Good Idea, *It's The Law*

BY JEFFREY N. LEIBELL*

"There's never enough time to do it right, but there's always enough time to do it over."

— John Warren "Jack" Bergman
(LtGen USMC (Ret.); Rep. R-MI)

THE JNL FIRM, LLC
Class Action Settlement Management
80 Baker Hill Road
Great Neck, New York 11023

Jeffrey N. Leibell
jeff@jnlfirm.com
516.652.2040
www.jnlfirm.com

Summary

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 that effective and proactive class action settlement management – the shepherding of a settlement from handshake to distribution – has on obtaining with as little delay as possible approval of class action settlements and of their distribution to class members, as well as on the payment to class counsel of their court-awarded attorneys' fees. Under the interpretation that courts of appeals already have given to one new factor added by the 2018 Amendments – that fairness determinations must consider actual results of the claims process – district courts may decide to wait to rule on settlement fairness until administrations are sufficiently complete to provide for their consideration claims results. Under that interpretation, therefore, effective and proactive settlement management is fundamental to expeditiously obtaining final settlement approval. And because, under customary "quick pay" provisions, attorneys' fees are not payable until final settlement approval is granted, competent settlement management also is necessary for class counsel's timely receipt of its fees.

Another new factor added by the 2018 Amendments – that the consideration of the fairness of a proposed class action settlement must include the "timing of payment" of attorneys' fees – also may impact when class counsel will receive their fees. Prior to the 2018 Amendments, some district courts already had required class counsel to wait to receive at least a material portion of their fees until all or a substantial part of the settlement proceeds were distributed to authorized claimants. Now, some courts have interpreted the new "timing of payment" factor both to conflict with customary "quick pay" attorneys' fee provisions and, to evaluate whether requested attorneys' fees are disproportionate to the relief provided to the class, to require the consideration of actual claims administrations results. While those interpretations are few and far between—and there are courts that have declined to follow them, if they do gain purchase, class counsel would not receive all or a substantial amount of their fees until at least some portion of settlement proceeds were distributed.

Given the potential substantial adverse consequences of those interpretations of the 2018 Amendments, class counsel should proactively make effective settlement management their primary post-settlement focus so that, as soon as possible after preliminary approval, they may obtain the entry of a final judgment, and, as soon thereafter as possible, the filing of an unchallenged distribution motion.

Introduction

The new "fair, reasonable and adequate" consideration added by Rule 23(e)(2)(C)(ii) "requires courts to examine 'the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims.'"[1] According to the Rule 23 Advisory Committee, it "[o]ften will be important" for courts "to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims";[2] the Advisory Committee also recommends that it "may be important" in connection with the fair, reasonable and adequate evaluation, for courts to require the parties to provide "actual claims experience."[3] So, while class counsel always desire an expedited administration, Rule 23(e)(2)(C)(ii)'s newly mandated focus on class member recovery and participation may cause courts, before ruling on fairness, to more carefully scrutinize class member participation and, therefore, may lead courts to extend the customary class action settlement approval schedule until they are provided with claims results that are sufficient to enable the granting of final approval. Should that occur, the delay in obtaining final approval also would, under customary quick pay provisions, which make attorney fees payable only upon final approval, postpone class counsel's receipt of their fees.

> "[E]ffective and proactive settlement management is essential to efficiently and expeditiously distributing settlement proceeds."

Class counsel's receipt of fees also may be delayed by the new requirement that, when determining the adequacy of relief provided by a proposed settlement, courts must consider "the terms of any proposed award of attorney's fees, including timing of payment."[4] Some courts have relied on that new factor to deny preliminary approval of settlements that include quick pay provisions; other courts have not allowed the presence of a quick pay provision to require denying preliminary approval, but have warned that, at final approval, the payment of fees may be delayed until distribution; and others have granted preliminary and final approval without adjusting the quick pay provision. Nevertheless, class counsel, to mitigate the potential delaying effect of judicial interpretations of that new "timing of payment" factor, should seek to accelerate claims administrations – that is, devote their attention to settlement management – so that claims administrations are conducted efficiently and accurately, and the resulting distribution motions may be filed as soon as possible without incurring substantial class member objections.

But while that solution seems obvious, its execution is likely to be more complicated than it may at first appear. Until now, most aspects of settlement management, including claims administration, have been handled, or at least substantially informed, by claims administrators that likely are not equipped to address in the manner necessary to accommodate the requirements of the 2018

Amendments the various and often nuanced settlement management issues that arise in almost every administration. And because part and parcel of efficient and accurate claims administration is the avoidance of unnecessary class member objections that delay for months, and sometimes for years, judicial approval of distribution motions, the goal of expeditiously and efficiently providing courts with accurate and complete claims administration data may not be easy to achieve. Under the regime apparently imposed by the 2018 Amendments, class counsel, rather than continue to rely on claims administrators, should consider increasing the attention that they devote to settlement management. In addition to selecting claims administrators that have a demonstrated ability efficiently and accurately to address claims processing and related issues, class counsel should consider focusing more effort on their oversight of claims administrator performance.[5] Without class counsel's increased attention on effective and proactive settlement management, they run the risk that distributions will be inordinately delayed—with corresponding delays in the payment of attorneys' fees, and they may find themselves devoting to post-settlement activities time that may not be recoverable.

> "[I]f final approval is delayed, so to, under customary quick pay provisions, will class counsel's receipt of at least a meaningful portion of their court-awarded fees."

Set forth immediately below is an analysis of how courts have interpreted the 2018 Amendments thus far. That analysis is followed by summaries of five regularly occurring settlement management decision points that, to avoid incurring unnecessary expenses and suffering unwarranted delays, must be successfully navigated in all but the simplest administrations.

The Legal Landscape

Practice under the 2018 Amendments, which became effective on December 1, 2018,[6] is still in its nascent stages. Nevertheless, courts have already determined that, although the goal of the 2018 Amendments "is not to displace any factor" previously established by courts,[7] the Supreme Court and Congress did impose additional mandatory standards.[8] Courts throughout the U.S. have generally approached the 2018 Amendments by applying them first and then, only to the extent necessary, addressing any pre-existing standards.[9] It stands to reason, therefore, that, as more proposed class action settlements are presented for approval, courts, either *sua sponte* or because of objections, the making of which have become *de rigueur*,[10] will increase their scrutiny of class member recovery and participation and of the terms of attorney fee provisions.[11]

Under the 2018 Amendments, Courts May Require Claim Results Before Determining Fairness

Some courts already have recognized that the 2018 Amendments place significant importance on class member recovery and participation.[12] In *Briseño v. Henderson*, for example, a panel of the Ninth Circuit relied on amended Rule 23(e)(2)(C)'s new "fair, reasonable and adequate" analysis to reverse as an abuse of discretion a district court's final settlement approval.[13] The panel noted that, in prior precedent established in that Circuit's *Bluetooth* product liability litigation, the court "explained that courts should scrutinize agreements for 'subtle signs that class counsel have allowed pursuit of their own self-interests ... to infect the negotiations," including "'when counsel receive[s] a disproportionate distribution of the settlement.'"[14] The *Briseño* panel then held that "Congress sought to end this practice by changing the text of Rule 23(e)(2)(C)," and, therefore, that "*Bluetooth*'s heightened scrutiny" must be applied "in assessing whether the division of funds between the class members and their counsel is fair and 'adequate.'"[15] After quoting the 2018 Amendments, the court explained:

> "Some courts have ... den[ied] preliminary approval of settlements that include quick pay provisions; other courts ... have warned that, at final approval, the payment of fees may be delayed until distribution ..."

> Under this revised text, district courts must now consider "the terms of any proposed award of attorney's fees" when determining whether "the relief provided for the class is adequate." ... [T]he plain language indicates that a court must examine whether the attorneys' fees arrangement shortchanges 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.[16]

When the attorneys' fees in *Briseño* were compared to the amount of the recovery that was expected rather than to the maximum amount to be recovered if all class members submitted claims,[17] the panel concluded that "plaintiffs' counsel 'receive[d] a disproportionate distribution of the settlement.'"[18]

That same interpretation of the 2018 Amendments was applied in *Kim v. Allison*, in which the court of appeals, in holding that the district court's final approval of a pre-certification settlement was an abuse of discretion, relied upon claims results that were available to, but not considered by, the district court at the time it granted final approval.[19] The majority in *Kim* held that the district court's determination that the settlement was fair, reasonable and adequate was based, in part, "on the extremely doubtful assumption that all members of the class would not only file a claim but also elect the $25 cash alternative."[20] The majority then determined 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 0.745% of that relied upon by the district court:[21]

> When assessing whether the fee award is disproportionate to the class benefit the district court should have considered the amount of anticipated monetary relief based on the timely submitted claims already made. Instead, the court assumed a 100% claims rate when less than 1% of class members had submitted claims by the date of final approval.[22]

> "If interpretations that require the payment of attorneys' fees to be postponed … gain purchase, district courts may decline preliminarily to approve settlement agreements that include what up until now have become customary quick pay provisions."

It is noteworthy as well that, by relying on Rule 23(e)(2)(C)(iii)'s requirement that a court must "consider 'the terms of any proposed award of attorney's fees,'"[23] the *Kim* majority determined that, in some cases, courts should compare claim results to the attorneys' fees requested. That reasoning, according to the Advisory Committee, necessarily would require courts to defer payment of attorneys' fees until claims administrations were sufficiently completed to provide meaningful claims results:

> [I]t 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.[24]

The importance that, as set forth in *Briseño* and *Kim*, claims results now have on a court's consideration of fairness was relied upon in *Granite Construction*, in which the district court, breaking with tradition, scheduled the fairness hearing to occur after the deadline for submitting proofs of claim.[25] At that hearing, the court ordered class counsel to provide, in connection with the court's consideration of fairness, actual claims filing results thus far.[26] Only once those results were provided and considered by the court did it grant final approval:

> At the final approval hearing, the Court requested certain follow up information concerning claim processing and has now received and read all follow up responses. … The Court is convinced that there is no need for further action and that approval of the final settlement is in order.[27]

* * * * *

These interpretations may portend a more generally employed modification to the customary settlement approval timeline. Prior to the 2018 Amendments, claims filing deadlines most often occurred *after* fairness hearings. But if courts require, at least in connection with the final approval of some settlements, to have sufficient claims data available to them *before* undertaking their fairness determinations, fairness determinations will be delayed. And if final approval is delayed, so to, under customary quick pay provisions, will class counsel's receipt of at least a meaningful portion of their court-awarded fees. While at this juncture such a modification may be anomalous, it is difficult to predict if and under what circumstances any district court may impose it. It would be sensible, therefore, for class counsel to be prepared by taking in advance the steps necessary to assure competent settlement management that is likely to result in accurate administrations and conducting distributions with as little delay as possible.

Rule 23(e)(2)(C)(iii) May Be Interpreted to Curtail "Quick Pay" Provisions

The 2018 Amendments may, even if a court does not postpone its fairness determination until it has sufficient claims data, add another wrinkle to the timing of class counsel's receipt of its court-awarded fees. Under new Rule 23(e)(2)(C)(iii), courts are required to consider, in addition to the amount of the attorneys' fees requested, the "timing of payment."[28] Some courts already have interpreted that provision to require denying preliminary approval to settlements that include a quick pay provision;[29] other courts, though they found the inclusion of a quick pay provision was not a death knell for preliminary approval, cautioned that, at final approval, the court was not likely to approve the payment of attorneys' fees before class members received their distributions; and others have approved quick pay provisions. In *Cymbalista v. JPMorgan Chase, N.A.*, for example, the court granted preliminary approval, finding that the quick pay provision "d[id] not render the agreement unreasonable in and of itself,"[30], but warned that, "before granting final approval, the Court may wish to revisit this provision,"[31]. In reaching that determination, the court described as follows the impact that a quick pay provision may have on the fairness of a settlement:[32]

> "Rule 23(e)(2)(C)(ii)'s newly mandated focus on class member recovery and participation ... may lead courts to extend the customary class action settlement approval schedule ... ."

> Courts disagree about the appropriateness of permitting an award of attorney's fees to be paid before class members receive their settlement awards – commonly known as a "quick-pay" provision. Some courts find such provisions problematic and fear that approving a

> quick pay provision dilutes class counsel's incentive to continue fighting to protect the class members after fees are paid. Other courts have found that quick-pay provisions are innocuous because the timing of attorney's fees payment does not affect the size of the settlement fund and a quick payment might deter objections to settlement approval. … Payment of attorney's fees prior to the payment of class member awards may be acceptable when the class's interests are sufficiently protected. The Court is also aware that some agreements propose a middle ground, providing that half of the attorney's fees will be paid at the time of final approval and half will be paid once class member awards have been paid in full.[33]

If interpretations that require the payment of attorneys' fees to be postponed, which also are recommended by the Manual for Complex Litigation,[34] gain purchase, district courts may decline preliminarily to approve settlement agreements that include what up until now have become customary quick pay provisions.[35]

In *Hart v. BHH*, the court, citing Rule 23(e)(2)(C)(iii), denied preliminary approval largely because it determined that "[r]ewarding counsel prior to compensating the class conflicts with Rule 23(e)'s mandate for fairness, reasonableness, and adequacy."[36] The *Hart* court rejected as "strain[ing] credulity" class counsel's argument – one that had prevailed for decades – that a quick pay provision "would serve Plaintiffs' purported goal to deter baseless objections":[37]

> "Even though some courts continue to approve quick pay provisions, the risk that a court may not do so is too great to be discounted … ."

> There are sound reasons for courts to ensure that the class has been compensated prior to attorneys in class-action settlements. When settlement occurs, "the adversarial process melts away." … Valid objectors may come forward, and Plaintiffs would need to stave them off. Cynically, money is the best way to keep lawyers engaged. The interests of the class being paid before the attorneys clearly outweighs any theoretical risk of frivolous objectors.[38]

It also is significant, given the ubiquity and longevity of quick pay provisions,[39] that the *BHH* court rejected "several out-of-district and out-of-circuit decisions [that] reason[ed] that quick-pay provisions do not harm the class,"[40] rejected "a litany of orders in this district where Plaintiffs' counsel secured preliminary approval of settlement agreements containing "'quick-pay' provisions,'" and found that, "in the context of class-action settlement, a searching judicial inquiry is required."[41]

It will be difficult to predict whether these interpretations of Rule 23(e)(2)(C)(iii) will have a wide following. As the *Mikhlin* court observed, for example:

> At least one district court in this Circuit, however, has recently "disagree[d] that there is no harm to the class by paying attorneys first" and concluded that "[t]here are sound reasons for courts to ensure that the class has been compensated prior to attorneys in class-action settlements," including that, "[c]ynically, money is the best way to keep lawyers engaged." *Hart v. BHH, LLC*, 334 F.R.D. 74, 77 (S.D.N.Y. 2020).
>
> While it 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, the court finds that in this case the terms of the proposed award adequately protect the class's interests. Thus, while the timing of the proposed award of attorney's fees does not bolster the case for preliminary approval, it also does not undercut that case where, as here, the majority of other factors weigh significantly in its favor.[42]

Even though some courts continue to approve quick pay provisions, the risk that a court may not do so is too great to be discounted given that the consequences of a court limiting or eliminating an agreed upon quick pay provision is delay, perhaps extensive, in class counsel's receipt of its attorneys' fees.

Delaying the payment of attorneys' fees is not a new concept. Prior to the 2018 Amendments, some courts and lead plaintiffs had already declined to adopt "quick pay" provisions, requiring instead that class counsel defer until after distribution is completed a substantial portion of their court-awarded fees. In connection with the *Petrobras* settlement,[43] for example, the court ordered class counsel to defer until distribution was completed 50% of the $186.5 million in fees – $93.25 million – that the court had awarded:

> "To reduce the potential negative effects that certain interpretations of the 2018 Amendments may have, class counsel should anticipate … increasing judicial scrutiny of actual class member recovery and participation … ."

> This schedule, which the Court has routinely employed in other cases, reflects that, on the one hand, counsel have spent a great deal of time and money to litigate this case and should not have to continue to shoulder the costs of funding this litigation any longer than necessary, but that, on the other hand, counsel should not be paid in full before their clients have received any of their recovery, nor would it be helpful to eliminate an incentive for counsel to monitor the distribution agent and ensure that the settlement funds

are distributed expeditiously. Dispensing half of counsel's fee award now and half later achieves both these purposes.[44]

Under a customary "quick pay" provision, 100% of the court-approved attorneys' fees would have been paid to class counsel when, or shortly after, the settlement funds were deposited into escrow. But because of an objector's appeal, class counsel had to wait fourteen months to receive $93.25 million of court-approved attorneys' fees.[45] An even lengthier delay was imposed – no fees were paid upon final approval – in the recent $2,310,275,000 *Foreign Exchange* settlement: The court deferred payment of 50% of the awarded fees of $300,335,750, or $150,167,875, until an initial distribution was conducted, with the remaining 50% to be paid "upon the substantial distribution of the settlement fund to the remaining claimants."[46] Some courts could now interpret Rule 23(e)(2)(C)(iii) as formalizing the postponement of the payment of attorneys' fees that, prior to the 2018 Amendments, some courts had imposed, and, therefore, may those courts to adopt similar positions.

* * * * *

> "Without class counsel's increased attention on effective and proactive settlement management, they run the risk that distributions will be inordinately delayed … ."

To reduce the potential negative effects that certain interpretations of the 2018 Amendments may have, class counsel should anticipate, as practice under them matures, increasing judicial scrutiny of actual class member recovery and participation, and prophylactically respond by implementing case-specific settlement management features that are likely to result in accurate administrations that enable distributions to occur as soon as practicable.[47] With that goal in mind, described in the next section are five from among a variety of decision points that, in all but the simplest settlement administrations, must be successfully navigated before distribution may be approved.

Settlement Management Decision Points: A Balancing Act

The five decision points described below demonstrate that effective and proactive settlement management is essential to efficiently and expeditiously distributing settlement proceeds. They represent just some of the regularly recuring matters that, if not properly addressed, may cause unnecessary costs to be incurred and unwarranted delays in distributions to be suffered.

1. Distribution Plans Should Balance Expediency with Paying as Many Victims as Possible

"The goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible."[48] But making expediency the sole primary focus of an administration may conflict with class counsel's equally significant obligation to include in those distributions as many class members as possible.[49] Accordingly, when plans of distribution and allocation are designed, including the imposition of documentation requirements and the setting of deadlines, those two interests must be balanced:

> Class administration should be simple and straightforward. In class actions, "courts must use their discretion, and in many cases their ingenuity, to shape decrees or to develop procedures for ascertaining damages and distributing relief that will be fair to the parties but will not involve them in an unduly burdensome administration of the award." Courts should "shape the remedy to meet the exigencies of each case and difficulties in administration should not be allowed to destroy the usefulness of the class action procedure."[50]

Class counsel should, preferably before preliminary approval is sought, consider the specific idiosyncrasies of each settlement and, to encourage class member participation, how those particular circumstances bear on the competing needs both to conduct an accurate administration and to not unnecessarily burden putative class members. For example, the terminology used on the proof of claim form should be clear and simple so as to encourage rather than discourage claim filing; similarly, the information sought from class members should include only what is necessary to process claims. Also, serious consideration should be given to what, if any, documents must be submitted with the claim form, and the length of the claim filing period should consider the sophistication of the class and the information and documentation requirements; those considerations also are relevant to the thresholds for auditing claims and for identifying deficient conditions in them, as well as to the timeframes for claimant responses.[51]

2. Claims Administrator Selection Should Balance Cost with Accuracy

There is a wide disparity among administrators in claims processing accuracy and efficiency. That disparity is the byproduct of selecting claims administrators based predominantly on cost, without sufficient consideration given to objective accuracy and efficiency data.[52] Inferior claims administrations result in delayed distributions and include, at the expense of class members that submit proofs of claim that comply with judicially approved requirements, improper payments to claimants that are not class members, or to those that, though they are class members, submit partially deficient or completely defective proofs of claim.[53] Given the importance of conducting accurate settlement administrations that avoid claimant objections and thus enable accelerated distributions, as well as class counsel's need to rely on the very services that low bidders curtail or eliminate,[54] class counsel should, when selecting administrators, require them to provide with their bids objective data that will enable class counsel to evaluate together with their pricing their claims processing accuracy and efficiency and thus result in selection based on settlement-specific cost-benefit analyses.[55]

3. Addressing Late Claims Should Consider the Practical Implications of *Pioneer*, as Well as the Need for Expediency and Inclusion

Late claims are the bane of existence of nearly every settlement administration. They delay distributions, and, as a result, run afoul of the goal to distribute to legitimate claimants as soon as practicable their settlement recoveries.[56] But to reject late claims perforce, which would accommodate *that* goal, would run afoul of *another* goal with equivalent primacy: to include in the recovery as many legitimate claimants as possible.[57] Also, before any late claim properly may be rejected, it must be subjected to, and fail to satisfy, the excusable neglect standards that the Supreme Court articulated in *Pioneer*.[58] Importantly, courts conducting that analysis are unlikely to recognize as prejudice to timely claimants the reductions in their recoveries that result from accepting late claims.[59] Also, because the *Pioneer* excusable neglect analysis requires the court to consider the reasons proffered to justify lateness, the analysis may require the claims administrator, class counsel and the court to devote substantial time to their evaluations.[60] And when challenging the reasons proffered to justify lateness, class counsel may be required to do more than show that late claimants were sent notices; class counsel may need to show claimants' actual knowledge.[61] Accordingly, the effort to reject late claims may involve more time and expense, and cause distributions to be delayed longer, than would accepting them. To avoid delaying distributions until the resolution of late claims, proactive consideration, preferably before seeking preliminary approval, is advisable, with a bias toward accepting those late claims that are submitted while timely-submitted claims are still being processed.[62] Class counsel also may want to consider including in the settlement notice or in the proof of claim form a disclosure that explains the manner in which class counsel intends to address late claims, as well as any recommended or required steps that should or must be taken or information that must be provided by a putative class member that submits a claim after the deadline.

4. Addressing "Placeholder" Claims Should Consider the Applicability of *Pioneer* and that They Are Not "Late"

"Placeholder claims" – proofs of claim that, to avoid being deemed late, are filed prior to a claim filing deadline but without including the required transactional information – are another scourge to the efficient administration of class action settlements. Like late claims, they often delay distributions. And because placeholder claims are not late, they do not usually implicate the *Pioneer* excusable neglect analysis. One exception is when, so close to, but before, a claim filing deadline, a class member learns of the deadline and the right to submit a proof of claim, that transactional information may not feasibly be submitted before it. In such circumstances, a court may consider the claim under *Pioneer*'s "good faith" prong.[63] Also, the caselaw on curing deficient claims – a placeholder claim is "deficient" because it lacks the required transactional information – supports allowing placeholder claimants the same opportunity to cure as is provided to cure claims that were deemed deficient for other reasons.[64] Lastly, the post-claim filing deadline submissions of transactional information that was missing from a placeholder claim may be deemed to be an amendment of it, and, therefore, under Bankruptcy Code precedent – the same area of the law that produced *Pioneer* – it may be "freely allowed."[65] The upshot, especially under amended Rule 23(e)(2)(C)(ii), is that dealing with placeholder claims, as with late claims, requires planning. Here, too, class counsel may want to consider including in the settlement notice or in the proof of claim form a disclosure that explains any recommended or required steps that should or must be taken by a putative class member that cannot submit with its timely claim the information required by the claim form.

5. Working with Class Action Claims Consultants Should Consider the Benefits They Provide

Class action claims consultants ("CACCs") are retained by class members that prefer to devote their time to operating their own businesses rather than to something unrelated: monitoring federal and state court dockets across the country (and in certain non-U.S. jurisdictions) for class action settlements, determining their eligibility to participate, and, when they believe that they are eligible, to collecting the required data and preparing and submitting proofs of claim to recover.[66] Many CACCs have been and continue to be ethical and work to recover for their clients their full shares of settlement proceeds; in so doing, those CACCs provide valuable services and stimulate claim filing.[67] But there have been, and still are, CACCs that take advantage of class members and that provide to them inferior services, which often has subjected CACCs to significant scrutiny and attempts to bar, or at least discourage, them from retaining clients.[68] With the increased focus on class member participation, class counsel should consider another approach: separate the ethical and competent CACC "wheat" from the unscrupulous and ineffectual CACC "chaff." Class counsel may then benefit from efforts – provided without cost to the class or class counsel – to generate class member participation, while protecting unsophisticated class members from unscrupulous CACCs that prey on them.[69]

Conclusion

The pitfalls associated with the decision points discussed above are not the only ones that must be successfully navigated on the journey from memorandum of understanding to final distribution. These, as well as others, require effective and proactive settlement management. The failure to do so, as has happened all too frequently, may, especially under the 2018 Amendments, subject class counsel to substantial adverse financial and reputational consequences.

Notes

* Jeffrey N. Leibell is the principal of The JNL Firm, LLC, a consulting firm that provides class action settlement management services, and is the Chief Legal & Financial Officer of Financial Recovery Services, LLC ("FRS"), a leading class action claims management consulting firm. Prior to joining FRS, Mr. Leibell was Vice President, Class Action Services at The Garden City Group, Inc., a prominent class action settlement administrator, and, before that, he was the partner at Bernstein Litowitz Berger & Grossmann LLP, a preeminent plaintiff-side class action law firm, responsible for negotiating and documenting the terms of, developing the allocation plans for, and overseeing the administrations of, over $16.4 billion in class action recoveries.

1 *In re GSE Bonds Antitrust Litig.*, 414 F. Supp.3d 686, 694 (S.D.N.Y. 2019) (quoting Fed. R. Civ. P. 23(e)(2)(C)(ii)).

2 Fed. R. Civ. P. 23 Adv. Comm. Notes 2018 Amend. (hereinafter "Adv. Comm. Notes"), Subd. (e)(2) &¶¶ (C) & (D).

3 *Id.*

4 Fed. R. Civ. P. 23(e)(2)(C)(iii).

5 Such supervision may include, among other things, claims administrators' methodologies and capacities for communicating with putative class members and for responding to their inquiries; administrators' processes for managing and utilizing any defendant-provided data that may be relevant; and their procedures, including quality assurance, for receiving and processing proofs of claim and for communicating with claimants.

6 *See, e.g., Proposed Amend. Fed. R. Civ. P., Rules 5, 23, 62 & 65.1*, 324 F.R.D. 904 (Apr. 26, 2018) ("Effective December 1, 2018, absent contrary Congressional action"; Congress took no action to modify or reject the amendments after approval by the Supreme Court).

7 *E.g., In re Payment Card Interch. Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.") (quoting Adv. Comm. Notes, Subd. (e)(2), ¶¶ (C) & (D)).

8 *See, e.g., Montgomery v. Continental Inter. Grp. Trucking LLC*, Civ. No. 19-940, 2021 WL 1339305, at *4, *7 (D.N.M. Apr. 9, 2021) (evaluating settlement under both prior precedent and the new requirements set forth in the 2018 Amendments); *In re Blue Cross Blue Shield Antitrust Litig.*, MDL No. 2406, 2020 WL 8256366, at *6 (N.D. Ala. Nov. 30, 2020) ("The 2018 amendments to Rule 23(e)(2) brought forth substantial and needed changes with respect to the early and final evaluation of class settlements.") (footnote omitted); *Kis v. Covelli Enter., Inc.*, Nos. 4:18-cv-54 & 4:18-cv-434, 2020 WL 2812405, at *3 (N.D. Ohio May 29, 2020) ("In addition to the Rule 23(e)(2) factors, courts may also consider circuit-specific factors in the analysis."); *Payment Card*, 330 F.R.D at 29 ("The Court understands the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors."). The Advisory Committee Notes explain, among other things, that the 2018 Amendments synthesized prior judicially established standards, and noted that "[t]he sheer number of [judicially established] factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2)." Adv. Comm. Notes, Subd. (e)(2), ¶¶ (C) & (D). The solution that the Advisory Committee sets forth is to "direct[] the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." *Id.*

9 *See, e.g., Chavez Rodriguez v. Hermes Land., Inc.*, No. 17-2142, 2020 WL 3288059, at *2 (D. Kan. June 18, 2020) ("[T]he court considers the Rule 23(e)(2) factors as the main tool in evaluating the propriety of the settlement but still addresses the Tenth Circuit's factors below.") (citing Fed. R. Civ. P. 23 & Adv. Comm. Notes); *accord Quiruz v. Spec. Comm., Inc.*, No. 17-cv-03300, 2020 WL 6562334, at *5 (N.D. Cal. Nov. 9, 2020) ("Given that Rule 23 has been amended to list the factors most central to approval of a class action settlement, the Court begins its analysis with those factors."); *Garner Prop. & Mgmt., LLC v. City of Inkster*, No. 17-cv-13960, 2020 WL 4726938, at 8 (E.D. Mich. Aug. 14, 2020) (Amended "Rule 23(e)(2) now instructs courts to consider certain factors when deciding whether the settlement meets this ['fair, reasonable, and adequate.'] standard. ... In addition to the Rule 23(e)(2) factors, courts may also consider circuit-specific factors in the analysis."); *Kis v. Covelli Enter., Inc.*, Nos. 4:18-cv-54, 4:18-cv-434, 2020 WL 2812405, at *3 (N.D. Ohio May 29, 2020) ("In addition to the Rule 23(e)(2) factors, courts may also consider circuit-specific factors in the analysis."); *In re Sonic Corp. Cust'r Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 WL 3773737, at * (N.D. Ohio Aug. 12, 2019) ("According to the 2018 Amendment's Advisory Committee Notes, so long as courts use the [Rule] 23(e)(2) factors as the primary framework, courts may still consider circuit-specific factors in the analysis.").

10 *See, e.g.*, Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 Ford. L. Rev. 475, 476-77 (2020) ("Bad objectors raise objections that have no chance of persuading either the district court or an appellate court to reject the settlement. ... "Ugly objectors raise objections not to improve the settlement but to extort payments from class counsel in exchange for dismissing their objections. Such objectors ... impose serious, and sometimes irreparable, harm on the class action process."); *accord, e.g., In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420, MDL 2420, Ord. Den'g Mot. for Settle, at 4:12-5:2 (N.D. Cal. Mar. 24, 2022) (Denying proposed settlement with objector under amended Rule23(e)(5)(A)-(B)(ii) and noting that "objector blackmail is a well-known class and derivative action phenomenon whereby objectors 'use an appeal [of a class action or derivative settlement] as a means of leveraging compensation for themselves or their counsel.'") (quotations omitted); *In re Equifax Inc. Cust. Data Sec. Breach Litig.*, No. 1:17-md-2800, 2020 WL 256132, at *41-43 (N.D. Ga. Mar. 17, 2020) ("[T]he individuals identified below are serial objectors, ... [and] the class would be best served by final resolution of their objections as soon as practicable so that class members can begin to benefit from the settlement[.]"), *aff'd in part, rev'd in part on other grounds*, 998 F.3d 1014 (9th Cir. 2021).

11 *See, e.g.*, Steven S. Gensler, Lumen N. Mulligan, 1 Fed. R. Civ. Proc., Rules & Comm., *Rule 23 Class Actions*, n.327 and accompanying text ("If claim forms are required, the court may wish to seek information about expected participation rates and the payout model to determine how much of the settlement fund is likely to reach the class members."). "[C]ourts are free to discount the stated face value of a fund if the evidence suggests that the value provided is illusory because few claimants will ultimately receive money from it." *Id.* (citing *Eubank v. Pella Corp.*, 753 F.3d 718, 725-29 (7th Cir. 2014) (Posner, J.) (extensive discussion explaining why face value of fund was illusory)).

12 *See generally* Jessica Erickson, *Automating Securities Class Action Settlements*, 72 Vand. L. Rev. 1817, 1850-51 (2019) ("Recent amendments to Rule 23(e) ... and accompanying guidance to judges stress that they should pay close attention to how class action settlements are distributed.").

13 *Briseño v. Henderson*, 998 F.3d 1014, 1023-26 (9th Cir. 2021).

14 *Briseño*, 998 F.3d at 1025 (citing Fed. R. Civ. P. 23(e)(2)(C); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

15 *Briseño*, 998 F.3d at 1023 (relying on the 2018 Amendments to require applying *Bluetooth*'s heightened scrutiny to settlements proposed after class certification).

16 *Id.* at 1014, 1025-26; *see* Adv. Comm. Notes, Subd. (e)(2), ¶¶ (C) & (D) ("Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. ... [T]he relief actually delivered to the class can be a significant factor in determining the appropriate fee award.").

17 The *Briseño* panel characterized the likelihood of 100% class member participation as "[s]poiler alert: that never happens — not even close." *Id.* at 1020.

18 *Id.* at 1026.

19 *Kim v. Allison*, 8 F.4th 1170, 1180-81 (9th Cir. 2021) (2 to 1 decision); *accord, e.g., McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 610, 611-12 (9th Cir. 2021) (vacating district court's final approval as an abuse of discretion and directing that, "after adjusting the attorneys' fees using the voucher redemption rate," "it will be important for the district court to reconsider whether class counsel received a 'disproportionate distribution of the settlement' in light of the adjusted fee award."); *Roes, 1-2 v. SFBSC Mgmt.*, LLC, 944 F.3d 1035 (9th Cir. 2019) (district court abused its discretion by, among other things, failing to adequately consider actual claim rates when evaluating the proportionality of class counsel's fees); *see, e.g., Carlotti v. ASUS Comp. Int'l*, Case No. 18-cv-03369, 2020 WL 3414653, at *4 (N.D. Cal. June 22, 2020) (evaluating claims rates in connection with settlement approval); *Taha v. Bucks Cty. PA*, C.A. No. 12-6867, 2020 WL 7024238, at *4 (E.D. Pa. Nov. 30, 2020) (same); *Montgomery*, 2021 WL 1339305, at *7 (same); *see also* Rhonda Wasserman, *The New, Improved Class Action Rule: The December 2018 Amendments to Rule 23*, 90 Pa. B.A.Q. 182, 187 (2019) ("Under [23(e)(2)(C)], the parties should provide the court with data about the 'actual claims experience' to allow the court to assess whether it 'facilitates filing legitimate claims' while 'deter[ring] or defeat[ing] unjustified claims ... .'") (alteration in original).

20 8 F.4th 1170, 1179 (9th Cir. 2021).

21 *Id.* at 1179 (citing Fed. R. Civ. P. 23(e)(2)(C)(iii)).

22 *Id.* at 1180-81. This same logic also may be applied to non-reversionary common fund settlements that result in low pro rata recoveries. *Accord Caldwell v. UnitedHealthcare Ins. Co.*, No. C 19-02861, Ord. Den'g Prelim. Settle. App., Doc. 206 (N.D. Cal. Oct. 12, 2021) (proposed settlement unfair because "[t]he Court sees such a large fee for the attorneys, little benefit to the class members and substantial downsides to the class," (at 4); "[s]adly, this is another class settlement proposal in which class counsel get vast amounts of cash but the class members get merely a cosmetic settlement (at 1)).

23 8 F.4th at 1170 (quoting *Briseño*, 998 F.3d at 1024-25).

24 Adv. Comm. Notes, Subd. (e)(1).

25 *See Police Ret. Sys. of St. Louis v. Granite Construct. Inc.*, No. 3:19-cv-04744, Doc. 298, Class Counsel Ltr., at 1 (N.D. Cal. Feb. 28, 2022) ("the schedule the Court established set the final approval hearing not before the claims deadline, but after the claims deadline").

26 *See id.* at 1-2 ("the Court asked 'how many shares are not represented in the claims to date, and how large a problem that is.' (ECF No. 297, Transcript of February 24, 2022 Hearing, at 25:12-13.)).

27 *Granite*, No. 3:19-cv-04744, 2022 WL 816473, at *4 (N.D. Cal. Mar. 17, 2022); *accord Norton v. LVNV Funding, LLC*, No. 18-cv-05051, 2022 WL 562831, at *4 (N.D. Cal. Feb. 24, 2022) (Finding Rule 23(e)(2)(C)(ii) satisfied because, although "[o]nly forty-four notices mailed resulted in actual claims, ... [t]his rate falls at the high end of the expected claim rate of five to ten percent that the parties previously represented to the court."); *Cooks v. TNG GP*, Nos. 2:16-cv-01160 & 2:16-cv-02113, 2021 WL 5139613, at *4 (E.D. Cal. Nov. 4, 2021) (granting final approval under Rule 23(e)(2)(C)(ii) after determining actual average and maximum distribution amounts); *Hameed-Bolden v. Forever 21 Retail, Inc.*, No. CV 18-3019, 2021 WL 5107729, at *6 (C.D. Cal. Sept. 27, 2021) (granting preliminary approval, but noting that, under Rule 23(e)(2)(C), "[t]he size of any fee award will ultimately be determined at the final-approval stage, and there is a good chance that it will be impacted, at least in part, by the extent of the claims actually made by the class members.").

28 *See, e.g., Briseño*, 998 F.3d at 1023-24 (Rule 23(e)(2)(C)(iii) requires courts to consider "the terms of any proposed award of attorney's fees, including timing of payment.") (emphasis removed); *accord* Adv. Comm. Notes, Subd. (e)(2), ¶¶ (C) & (D) ("[e]xamination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement.").

29 *See, e.g., Hart v. BHH, LLC*, 334 F.R.D. 74, 77 (S.D.N.Y. 2020); *Hernandez v. Between the Bread 55th Inc.*, 496 F. Supp.3d 791, 806-08 (S.D.N.Y. 2020); *accord Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 332 (S.D.N.Y. 2019) (Under Rule 23(e)(2)(C)(iii), "given that attorneys' fees would be paid on the Distribution Date ... the Court finds the timing of payment reasonable.").

30 No. 20 CV 456, 2021 WL 7906584, at *8 (E.D.N.Y. May 25, 2021).

31 *id.* at *8 & n.3.

32 No. 20 CV 456, 2021 WL 7906584, at *8 & n.3 (E.D.N.Y. May 25, 2021).

33 *Id.* at *8 (citations omitted); *accord In re PPDAI Group Inc. Sec. Litig.*, No. 18-CV-6716, 2022 WL 198491, at *14, n.14 (E.D.N.Y. Jan. 21, 2022); *Mikhlin v. Oasmia Pharm. AB*, No. 19-CV-4349, 2021 WL 1259559, at *7 (E.D.N.Y. Jan. 6, 2021).

34 *See* Manual for Complex Litig. §21.71 (4th ed. Westlaw 2021) ("[T]he court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered.").

35 *See, e.g.*, 2 McLaughlin on Class Actions (hereinafter, "McLaughlin") §6:24 nn.137 & 138 (17th ed. Westlaw 2020) (A quick pay provision "provides for payment of court-awarded attorneys' fees to class counsel upon trial court approval of the settlement").

36 *Hart*, 334 F.R.D. at 77.

37 *Id.* at 77 (Noting that "the entire purpose of the lawsuit is to compensate the class—not the lawyers."); *see, e.g., 4* William B. Rubenstein, Newberg on Class Actions ("Newberg") §13:8 nn.5-9 (5th ed.) (Westlaw 2018) observing that quick pay provisions "may be unlikely to deliver" on the promise of deterring objector appeals).

38 *Id.* (citing *SEC v. Bear, Stearns & Co.*, 626 F. Supp.2d 402, 403 (S.D.N.Y. 2009)); *accord Between the Bread*, 496 F. Supp.3d at 806-08 ("Having been paid for all of their efforts in this case, they also will not have much of an interest in continuing to pursue the Defendants … .") (citing Rule 23(e)(2)(C)(iii)); *see Perks v. Activehours, Inc.*, No. 5:19-cv-05543, 2021 WL 1146038, at *6 (N.D. Cal. Mar. 25, 2021) (fee reasonable, in part, because it "will only be paid [at] … the same time Settlement Class Members will receive payment.") (citing Rule 23(e)(2)(C)(iii)); *see also* Amanda M. Rose, *Classaction.gov*, 88 U. Chi. L. Rev. 487, 500 (Mar. 2021) ("Class counsel may not have strong incentives to push back against a defendant insisting on a settlement plan that imposes unwarranted costs on class members, provided counsel's fee is not tied to the claims rate and acquiescing is the easiest path to getting paid.").

39 *See, e.g.*, 2 McLaughlin §6:24 n.139 (17th ed. Westlaw 2020) ("Most courts have rejected challenges to quick pay provisions asserting that such provisions create improper incentives for class counsel by effectively making them preferred claimants against the settlement fund."); 4 Newberg §13:8 nn.10-12 (5th ed. Westlaw 2021) ("Notwithstanding the limitations of quick-pay provisions, they appear with surprising frequency in class action settlements."). Importantly, however, only one case cited in support of judicial acceptance of quick pay provisions – each treatise identified *BHH* as the exception – was decided *after* the effective date of the 2018 Amendments; that case relied entirely on precedent from before the effectiveness of the 2018 Amendments and did not mention Rule 23(e)(2)(C)(iii).

40 334 F.R.D. at 77-78 ("This Court disagrees that there is no harm to the class by paying attorneys first.").

41 *Id.* at 78 (orders drafted by class counsel constitute "cookie-cutter jurisprudence" that "masquerade as judicial opinions").

42 *Mikhlin*, WL 1259559, at *7.

43 *In re Petrobras Sec. Litig.*, 317 F.Supp.3d 858, 877 (S.D.N.Y.), *appeal dismissed sub nom.* No. 18-2120, 2018 WL 7108171 (2d Cir. Sept. 13, 2018), and *aff'd*, 784 Fed. Appx. 10 (2d Cir. 2019).

44 317 F. Supp.3d at 877; *see* No. 14-cv-9662, Decl. Claims Admin. …, Doc. 999-1, at ¶¶ 3, 5 (May 11, 2021) ($2.4 billion, or 85% of the net settlement fund, was distributed on or about October 28, 2019; the remaining 15%, $433 million, was distributed on or about February 25, 2020); *accord Granite*, 2022 WL 816473, at *12 ("Half of the award shall be distributed as of the effective date as defined in the settlement agreement. Then remaining half shall be paid when both sides certify that all funds have been properly distributed … ."); *City of Warren Police & Fire Ret. Sys. v. World Wrestling Enter., Inc.*, No. 1:20-cv-02031, 2021 WL 2736135, at *1 (S.D.N.Y. June 30, 2021) (50% of awarded attorneys' fees not payable until "the Net Settlement Fund is distributed to Authorized Claimants."); *Albelo v. Epic Lands. Prods., L.C.*, Case No.: 4:17-cv-0454, 2021 WL 2659082, at 3 (W.D. Mo. June 28, 2021):

> To ensure that Class counsel has a financial incentive to respond to class members' questions and inquiries, the Court is unlikely to approve any settlement where, as here, Class counsel will receive their attorneys' fees before the class members receive their payment. The Court is inclined to withhold dispersing a reasonable amount of attorneys' fees until after their clients have received their settlement checks, the deadline to cash the checks has expired, and the Settlement Administrator files a final report.

City of Birmingham Ret. & Relief Sys. v. Credit Suisse Grp. AG, No. 17 Civ. 10014, 2020 WL 7413926, at *5 (S.D.N.Y. Dec. 17, 2020) ("Lead Counsel is hereby awarded attorneys' fees of $4,030,000.00 … . Three quarters of that amount, or $3,022,500.00, shall be payable immediately, and the remaining $1,007,500.00 shall be payable after all distributions to class members from the settlement fund are complete."); *GSE*

Bonds, 414 F. Supp.3d at 695 ("the other half [of the attorneys' fees] will be paid when distribution of the proceeds to claimants has been very substantially completed."); *In re Refco, Inc. Sec. Litig.*, Case No. 1:05-cv-08626, Ord. Awarding Attorneys' Fees & Expenses, Doc. 781, at ¶5 (S.D.N.Y. Mar. 23, 2011) ("Payment of the [remaining 50%] ... of the attorneys' fees awarded shall be made to Lead Counsel when distribution of the proceeds of the Current Net Total Settlement Fund to claimants has been very substantially completed."); *Lessard v. City of Allen Park*, No. 00-74306, 2005 WL 3671354, at *3 (E.D. Mich. Nov. 28, 2005) (payment of attorneys' fees and costs "shall be made after the performance by Plaintiffs' Class Counsel of their duties").

45 *Compare* No. 14-cv-9662, Stip. of Settle. & Release, Doc. 767-1, at ¶ 1.ddd (Feb. 1, 2018) with No. 14-cv-9662, Doc. 999-1, at ¶ 5. But even had the court not ordered the 50% fee deferral, there still would have been a deferral because the institutional lead plaintiff required class counsel to defer 10%, or $18.65 million, of its fee award until at least 75% of the net settlement fund was distributed. *See* No. 14-cv-9662, Attorney Fee Ltr., Doc. 768 at 2 (Feb. 6, 2018).

46 *In re Foreign Exch. Bench. Rates Antitrust Litig.*, No. 13 Civ. 7789, 2018 WL 5839691, at *6 (S.D.N.Y. Nov. 8, 2018).

47 *See, e.g.*, Adv. Comm. Notes, Subd. (e)(2), ¶¶ (C) & (D) ("[T]he court should be alert to whether the claims process is unduly demanding."); Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges*, 30 (3d ed. 2010) ("If the claims process deters class members from filing claims, the settlement may have less value to the class than the parties assert."). Lower than expected class member participation in settlements, often referred to as claim rates, has been the subject of regular criticism. *See generally, Classaction.gov*, at 500-02 (describing manipulations that, depending on class counsel's incentives and lack of bargaining power, may cause class members not to participate in settlements).

48 4 Newberg §12:15, *Methods for determining individual awards* (Westlaw 2021), *quoted in In re LIBOR-Based Fin. Instr. Antitrust Litig.*, 327 F.R.D. 483, 496 (S.D.N.Y. 2018); *in Krakauer v. Dish Net., LLC*, Case No. 1:14-CV-333, 2017 WL 3206324, at *7 (M.D.N.C. July 27, 2017); *and in Hendricks v. StarKist Co*, Case No. 13-cv-00729, 2015 WL 4498083, at *8 (N.D. Cal. July 23, 2015); *accord In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476, 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26, 2016) ("A principal goal of a plan of distribution must be the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund"); *In re Citigroup Inc. Sec. Litig.*, Nos. 09 MD 2070 & 07 Civ. 9901, 2014 WL 2445714, at *1 (S.D.N.Y. May 30, 2014) ("The Court concludes that ... the class members should receive their recovery as expeditiously as possible."). The 2018 Amendments codify this goal. *See* 4 Newberg §13:53, *Final approval criteria—Rule 23(e)(2)(C)(ii)* (Westlaw 2021) *quoted in, e.g., Moreno v. Beacon Roofing Supply, Inc.*, No. 19cv185, 2020 WL 3960481, at *5 (S.D. Cal. July 13, 2020).

49 *See* Jeffrey N. Leibell, *Late Claims and "Placeholder" Claims: The Banes of Class Action Settlement Management* (cited as "*Late & Placeholder Claims*"), available at www.JNLFirm.com.

50 *Krakauer*, 2017 WL 3206324, at *7 (quoting 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Prac. & Proc. §1784 (3d ed. 2017)), *cited in In re Samsung Top-Load Wash. Mach. Mktg., Sales Prac. & Prods. Liab. Litig.*, MDL No. 17-ml-2792-D, 2020 WL 2616711, at *16 (W.D. Okla. May 22, 2020).

51 A detailed discussion of the necessary balancing is set forth in *Late & Placeholder Claims*.

52 *See* Jeffrey N. Leibell, *"Low Cost" Class Action Claims Administrators: What You Don't Know Will Hurt You* (cited as "*What You Don't Know*"), available at www.JNLFirm.com.

53 *See id.*

54 *Compare, e.g., Mullins v. Direct Digital, LLC*, 795 F.3d 654, 667-68 (7th 2015):

> (To combat the "claim administration issues" of "mistaken or fraudulent claims," courts "rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to take into account the size of the claims, the cost of the techniques, and an empirical assessment of the likelihood of fraud or inaccuracy."); *and*

In re Diet Drugs Prods. Liab. Litig., 236 F.Supp.2d 445, 462 (E.D. Pa. 2002):

> ("Movants have clearly demonstrated that the Trust's ability to … pay legitimate claims is being undercut by the tender of claims that have no reasonable medical basis. … Obviously, this cannot be tolerated. … Accordingly, the Trust may audit all pending and future attestations of [two named cardiologists.]. Based on the evidence in the record, prudence dictates no less."); *and*

In re NFL Players' Concussion Injury Litig., 307 F.R.D. 351, 417-18 (E.D. Pa. 2015) ("Audits are particularly appropriate in this case because … Class Members will receive hundreds of thousands, if not millions of dollars.") (citing Man. Complex Litig. §21.66 (4th ed.) *with What You Don't Know*.

55 A detailed discussion of such cost-benefit analyses is set forth in *What You Don't Know*.

56 *See Late & Placeholder Claims*.

57 *See id.*

58 *See, e.g., Orthopedic Bone Screw*, 246 F.3d at 321-22 ("[T]he "excusable neglect" standard, as announced in the Supreme Court's ruling in *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993), provides the analysis for consideration of untimely claims for inclusion in a class action settlement."). The *Pioneer* Court identified the following four non-exclusive considerations: "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." 507 U.S. at 395.

59 *See id.*

60 *See id.*

61 *See id.*

62 *See Orthopedic Bone Screw*, 246 F.3d at 321 (A court's primary goal when using its "equitable powers is balancing the goals of expedient settlement distribution and the consideration due to late-arriving class members.") (comparing *Georgine v. Amchem Prod., Inc.*, No. 93–0215, 1995 WL 251402, at *5 (E.D. Pa. Apr. 26, 1995) ("This Court has an interest in enforcing its deadlines and ensuring that this litigation finally comes to a conclusion.") *with* Man. Complex Litig. §30.47 ("Adequate time should be allowed for late claims before any refund or other disposition of settlement funds occurs.")); *see also Granite*, 2022 WL 816473, at *4 ("Both Epiq and class counsel affirmed multiple times that Epiq would continue to accept and process claims received after the January deadline, until such time as doing so would impact disbursement … ."). A detailed discussion of late claim issues is set forth in *Late & Placeholder Claims*.

63 *See Late & Placeholder Claims* (discussing, *inter alia*, *In re Elec. Carbon Prods. Antitrust Litig.*, 622 F. Supp.2d 144, 165 (D.N.J. 2007) (under an excusable neglect analysis, considering whether claimant acted in good faith when it filed placeholder claim)).

64 *See id.*

65 *See id.*

66 *See* Jeffrey N. Leibell, *67% of Something Is Better than 100% of Nothing: Competent and Ethical Class Action Claims Consultants Provide Value and Increase Participation in Class Action Settlements*, available at www.JNLFirm.com.

67 *See id.*

68 *See id.*

69 *See id.*