Settling a class action lawsuit presents ethical and procedural issues that are quite distinct from the average lawsuit. For example, under federal standards, the plaintiff must prove that the class meets all the requirements for certification and that the settlement is fair, reasonable, and adequate. In recent years, courts have subjected class settlements to increased levels of scrutiny. This program will focus on the law applicable to the settlement of class action litigation and will provide best practices and strategies for structuring a class action settlement. The program will also discuss the use and benefit provided by cy pres awards in class action settlements.

Program Chair & Moderator:
Lisa B. Kim, Senior Associate, Reed Smith LLP

Speaker:
Cornelia Dai, Partner, Hadsell Stormer Richardson & Renick, LLP
Terence N. Hawley, Partner, Reed Smith LLP
Laboni Hoq, Litigation Director, Asian Americans Advancing Justice – Los Angeles
Class Action, Class Action, Go Away:
Best Practices in Settling a Class Action Lawsuit
November 8, 2014
10:45 a.m. – 12:00 p.m. (75 minutes)

I. Introduction – Lisa Kim, Moderator (10 minutes)
   A. Introduction of panelists
   B. General background on federal law that governs class action settlement – FRCP 23 and CAFA.

II. General Issues in Negotiating and Structuring a Class Settlement (20 minutes)
   A. The panelists will discuss various issues that arise during the negotiation and structuring of a class action settlement. Cornelia Dai and Laboni Hoq will speak from a plaintiff’s perspective and Terence Hawley and Lisa Kim will speak from a defendant’s perspective.
   B. Topics that will be covered by the panelists include:
      1. Ethical obligations that Plaintiff’s counsel must be aware of with regard to representation of the class vs. class representative;
      2. Individual vs. class settlement;
      3. Type/amount of relief for class, including discussion regarding non-cash settlements, injunctive relief, claims-made settlements, and reversionary settlements;
      4. Cy Pres Awards;
      5. Incentive awards for class representatives;
      6. The timing of attorney’s fee negotiations and the size of fee;
      7. Termination clauses and reservation of rights;
      8. Confidentiality and media coverage;
      9. Mediation; and
      10. General tactical strategy and issues.
   C. Recent developments in the law will be addressed where applicable for the specific topics listed above.

III. Settlement Approval Process (35 minutes)
   A. The panelists will explain the general settlement approval process and speak on the following topics and/or stages:
      1. Timing of class settlement, i.e., whether a pre- or post-certification settlement, and how this will impact the approval process, as well as the standard of review;
      2. Required proof of class certification requirements (if pre-certification);
      3. Required proof of fairness, reasonableness, and adequacy; as well as lack of collusion;
      4. CAFA requirements;
      5. Preliminary approval hearing;
      6. Class notice; and
      7. Final approval hearing.
B. The panelists will then discuss various hurdles in obtaining court approval, including:
   1. Insufficient relief to class;
   2. Overbroad release;
   3. Excessive fees or incentive payments;
   4. Procedural issues;
   5. Objectors and Appeals; and
   6. Claims-made and reversionary settlements.

C. Recent developments in the law will be addressed where applicable for the specific topics listed above.

IV. Q&A – Questions and audience discussion will be encouraged (10 minutes)

The following is a short list of statutes and case law that will be discussed throughout the presentation. We will be adding to this list as we finalize our materials.

- FRCP 23
- Class Action Fairness Act of 2005
- In re Bluetooth Headset Products Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011).
- Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012).
- Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012).
- Marek v. Lane, 134 S. Ct. 8 (U.S. 2013).
- In re: High-Tech Employee Antitrust Litig, Case No. 5:11-cv-02509-LHK, Order denying Plaintiff’s Motion for Preliminary Approval of Settlement with Adobe, Apple, Google, and Intel (N.D. Cal. Aug. 8, 2014).
Today’s Discussion

I. Background on Federal Law Governing Class Actions

II. General Principals of Class Settlement

III. Common Hurdles regarding Class Settlement and Best Practices to Overcome Them

IV. Questions and Answers
I. General Background of Federal Law Governing Class Actions

- Federal Rules of Civil Procedure, Rule 23
  - Rule 23 sets forth the procedural requirements for class action lawsuits
  - Two primary purposes:
    1) to determine when representative litigation is appropriate; and
    2) to protect the due process rights of absent class members.

  - It expands federal subject matter jurisdiction over class actions
  - It imposes restrictions on attorneys' fees in coupon settlements
  - It requires that state and/or federal regulators be notified of any class action settlements

General trend toward closer scrutiny of class actions and class settlements

Settlement-only class certification standard:

- “[A] district court need not inquire whether the case, if tried, would present intractable management problems, . . . . But other specifications of the [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.”

General trend toward closer scrutiny of class actions and class settlements

Heightened certification standard following Wal-Mart v. Dukes:

- Circuit and district courts have “variously recognized that [Wal-Mart v.] Dukes: (1) sets forth a ‘heightened standard of commonality[;]’ (2) ‘represents a significant restatement of the commonality requirement[;]’ (3) clarifies the Rule 23(a) commonality element; and (4) ‘undoubtedly increas[es] the burden on class representatives by requiring that they identify how common points of facts and law will drive or resolve the litigation[.]’”

**Procedural Overview: [Part 1]**

- **Preliminary Approval**: (FRCP 23(e)(3))
  - **Class Certification**: (FRCP 23(a),(b) & (g))
    - Rule 23(a)—(1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation
    - Rule 23(b)—(1) individual adjudications would be impossible or unworkable; (2) relief sought must affect the entire class at once; or (3) predominance of common issues
    - Rule 23(g)—Appointment of counsel
      - “Class counsel must fairly and adequately represent the interests of the class” (FRCP 23(g)(4))
      - Fiduciary obligation to unnamed class members
      - Ethical obligations: class representatives vs. absent class members
      - Court will scrutinize work counsel has done and any potential conflicts (FRCP 23(g)(1)(A) and (B))
  - Settlement terms; notice; fees and costs

**Procedural Overview: [Part 2]**

- **Notice**: (FRCP 23(c)(2)(b) and 23(e)(1); 23 U.S.C. § 1715)
  - To class—Informing absent class members of settlement terms, means to participate and be bound, and object or opt-out
  - To state/federal officials—CAFA notification requirement

- **Fee and Cost Motion**: (FRCP 23(h))
  - Request must be made by noticed motion and directed to class members in a reasonable manner
  - Right to object by class members
  - Hearing optional but findings by district court required
Procedural Overview: [Part 3]

- **Final Approval:** (FRCP 23(e)(2))
  - Opportunity for court to address objectors, opt-outs, participation rates, reasonableness of attorneys’ fees and incentive payments
  - Courts consider whether a class action settlement is “fair, reasonable, and adequate:”
    - the risk of fraud or collusion;
    - the complexity, expense and likely duration of the litigation;
    - the amount of discovery engaged in by the parties;
    - the likelihood of success on the merits;
    - the opinions of class counsel and class representatives;
    - the reaction of absent class members; and
    - the public interest.
  - *Vassalle v. Midland Funding LLC,* 708 F.3d 747, 754 (6th Cir. 2013).

Role of the Court

- Court acts as fiduciary for absent class members, “to ensure ‘the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.’” *In re High-Tech Empl. Antitrust Litig.,* Case No.11-CV-02509-LHK 2014 WL 3917126 at *11 (N.D. Cal. Aug. 8, 2014)
  - Absent class members may be bound by settlement without their approval, so court must assess overall fairness to protect their interests
  - Court approval required for settlement or dismissal of “claims, issues or defenses of a certified class” (FRCP 23(e))
  - When settlement binds absent class members, court can only approve after a hearing (FRCP 23(e)(2))
III. COMMON HURDLES AND BEST PRACTICES TO OVERCOME THEM

Concerns Over Type and Amount of Relief
Overarching concern: interests of absent class members not being protected, so settlement is unfair

Monetary Relief

- *In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555 (N.D. Cal. 2013)
  - $324.5 million antitrust settlement *rejected* at preliminary approval stage as being at least $50 million too low
  - District court found class recovery was proportionally lower than recovery in earlier settlement involving different group of defendants and that plaintiffs’ case had only gotten stronger since prior settlement
  - Plaintiffs’ arguments re: risk of trial rejected
Injunctive Relief

- Courts will assess whether injunctive relief provides a sufficient benefit to the class in light of the strength of claims, scope of release, proposed fees, and other factors.
  - *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) (court found that website and labelling changes provided only rudimentary information and were of negligible value)
  - *Richardson v. L’Oreal USA, Inc.*, 991 F. Supp. 2d 181 (D.D.C. 2013) (labelling changes found insufficient to justify release covering future damages class actions)
  - *Felix v. Northstar Location Servs., LLC*, 290 F.R.D. 397 (W.D.N.Y. 2013) (injunctive relief deemed not meaningful given defendant’s prior cessation of conduct at issue)

“Coupon” or “soft money” settlements

*Class Action Fairness Act of 2005:*

- “In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable and adequate for class members.”

  - Fee award based on value of coupons redeemed, not coupons offered, and court “may receive expert testimony” on this subject
  - “Fair, reasonable and adequate” language mirrors Rule 23, but courts construe CAFA as requiring greater scrutiny than before
“Coupon” or “soft money” settlements

• Challenges/Issues:
  - What constitutes a “coupon” settlement for purposes of CAFA?
    - No statutory definition
    - A settlement that requires class members to make new purchases?
    - Any settlement with a provision for nonmonetary compensation?
  - What is the actual value of the settlement?
    - Use of expert?
  - Federal standards v. state standards

“Coupon” or “soft money” settlements

• Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646 (7th Cir. 2006)
  - Court found that pre-paid envelopes offered to class members were analogous to coupons because some envelopes would not be used and envelopes required class members to continue doing business with the defendant. Thus, the settlement should have been subjected to higher level of scrutiny. Reversed and remanded.

• In re HP Inkjet Printer Litig., 716 F.3d 1173 (9th Cir. 2013) (settlement providing for coupon and injunctive relief rejected where fee award was based on estimate of total value of settlement without determination of the redemption value of the coupon component)

• In re Dry Max Pampers Litig., 724 F.3d 713 (6th Cir. 2013) (refund program did not provide real benefit because most class members would not have kept receipts required for program and relief was merely an extension of previous program to which most class members already had access)
Claims Made, Reversionary Settlements

Claims made, reversionary settlements allow settlement funds to revert back to the defendant if less than the anticipated number and amount of class claims are made

- Claims made, reversionary settlements are disfavored because they create incentives for defendants and class counsel
  - Encourages “sweetheart” deals where the parties inflate the purported value of the settlement funds to get court approval, when in reality portion of funds will revert to defendants
  - Parties not incentivized to provide robust notice program, and rather make claims process difficult and convoluted
  - Class counsels’ fees often based on funds available and not funds claimed, so not incentivized to provide sufficient notice or make claims process accessible

Claims Made, Reversionary Settlements (Cont’d)

- Claims made, reversionary settlements are disfavored by courts
  - Sylvester v. CIGNA Corp., 369 F. Supp. 2d 34, 53 (D. Me. 2005) (court did not approve settlement; “reverter clauses are generally suspect and need to be viewed cautiously since they undercut the deterrent effect of class actions.”)

  - Practice Pointers (plaintiffs’ perspective):
    - Class Counsel should “Just Say No” to Reversion
    - If Defense Counsel insists, negotiate a floor amount which defendants will pay regardless of claims made, and build in safeguards to ensure robust notice program and accessible claims process
    - Eliminate claims process (e.g. requirement that class members return claim forms) when you have sufficient information to determine amounts owed to class members
Cy Pres

“Cy pres” is a means of distributing unclaimed, non-distributable class settlement funds to the “next best” class of beneficiaries

- Federal courts are scrutinizing proposed cy pres awards more closely, but it remains a viable means to support non-profit, charitable organizations whose interests/activities are aligned with the objectives of the litigation
  - The cy pres distribution “should be guided by the objectives of the underlying statute and the interests of the silent class members.”
    - Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990)

Cy Pres (Cont’d)

Key Considerations in Designating as Cy Pres:

1. Distribute money to class where feasible/practical
   - Distribution to class required: Baby Prods (3d Cir.); Klier v. Elf Autochem. (5th Cir.)
   - Distribution of entire settlement to cy pres ok: Hughes v. Kore Indiana Enterp. (7th Cir.); In re Microsoft Litig. (D. Md.)

2. Interest/activities of org should match objectives of the litigation
   - Org’s work must be closely related to underlying statutes, not merely topic of case: Dennis v. Kellogg (9th Cir.)

3. Geographic reach of org should match geographic scope of class
   - Naschin v. AOL (9th Cir.); In re Airline Ticket Comm’n Antitrust Litig. (8th Cir.)

4. Avoid conflicts between org and parties/court
   - Issues re use of settlement for PR or existing obligations: Marek v Lane (Facebook) (9th Cir.); Dennis v. Kellogg (9th Cir.)
Breadth and Scope of Release

Release will bar later claims where:

- Released claims are based on *identical factual predicate*
- Released claims were *adequately represented* in prior case (i.e., must be alignment of interests)
  
  - *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) ("[A] court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presented in the class action."

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Attorneys’ Fees and Incentive Awards

- Conflict Between Class Counsel & Class Representatives and Absent Class Members
Attorneys’ Fees

Timing of fee negotiations:
• The Supreme Court has held it is not unethical to negotiate fees as part of overall class action settlement.

“Clear Sailing” agreements:
• A “clear sailing” agreement is “one where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling.”
  • Not prohibited, but disfavored.
  • In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 949 (9th Cir. 2011).

Attorneys’ Fees

Primary factors relevant to a determination of reasonable attorneys’ fees:
• Time and labor spent
• Fee amount
• Results obtained
• Magnitude and complexity of case
• Counsel’s experience and reputation
• Awards in similar cases

• See In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 942 n.7 (9th Cir. 2011) (identifying 12 factors relevant to determination of reasonableness of fees).
Attorneys’ Fees

**Methods of calculating fees:**

1) Lodestar (with multiplier) method

2) Percentage of fund method

“**Cross-checking:** Courts encouraged “to guard against an unreasonable result by cross-checking their calculations against a second method.”

- *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 922 (9th Cir. 2014) (citation omitted).

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Incentive Awards

**Incentive awards undermining adequacy of class reps.:**

- Courts must “scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives.”

**Determining the appropriateness of incentive awards:**

- “In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.”
  - *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).
Class Notice Issues

• “The Court must direct notice in a reasonable manner to all class members who would be bound by the proposal” (FRCP 23(e)(1))
  • FRCP 23(b)(1) and (b)(2): notice not required because class is not bound, but a court may nonetheless order it (FRCP 23(c)(2)(B))
  • FRCP 23(c)(2)(B): “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” (FRCP 23(c)(2)(B))

• Preliminary approval can be denied due to an insufficient notice plan
  • Walters v. Hughes Commc’ns. Inc., No. 09-2136 SC, 2011 WL 2650711 at *45 (N.D. Cal. Jul. 6, 2011) (“parties must … clearly and explicitly communicate the scope of the release … design the best notice plan practicable … and provide the Court with a realistic reach calculation for the plan.”)

Class Notice (Cont’d)

Notice Best Practices

• Make sure notice includes all information required by Rule 23, and is written in clear, easily understood language; translate notice if necessary (FRCP 23(c)(2)(B))

• Design a notice plan that has a high reach percentage (e.g. 70-95%), and appropriate distribution medium (mail, e-mail, web, publication, etc.)

• Make sure key provisions of the settlement and claims process are prominently placed in the notice, using layout techniques (e.g. headings)

• Use a notice administrator that makes it easy for class members to get up to date information about the settlement, e.g. call centers, websites, etc.
Defense Concerns Regarding Notice

- Who bears the cost?
- Confidentiality and privacy issues re class member information
- Negative publicity, reputational concerns
- Harmful or biased language in notice
- Picking the right administrator
- Implementation issues, scope of obligations, etc.
- Business disruption

Objectors and Appeals

- Class settlements are generally governed by the final judgment rule
- Absent class members who properly objected to settlement have standing to appeal
- Fee award may be appealed by class counsel
- *Dennings v. Clearwire Corp.*, 928 F. Supp. 2d 1270 (9th Cir. 2013)
  - Numerous tactics employed to defeat attorney who filed serial objections, including taking depositions of attorney’s clients, requiring appeal bond to be posted, and expediting appeal.
- Rejection of class settlement appealable?
Satisfaction of Rule 23 Requirements

- *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (reversing certification of settlement classes for noncompliance with Rule 23 requirements but noting that 23(b)(3) manageability requirement was inapplicable in the context of settlement)

- *Rodriguez v. Nat'l City Bank*, 726 F.3d 372 (3d Cir. 2013) (affirming district court’s refusal to certify settlement class in action alleging discrimination in mortgage pricing, where plaintiffs failed to satisfy Rule 23(a)’s commonality requirement pursuant to *Wal-Mart v. Dukes*)

- *In re Am. Int’l Grp., Inc. Secs. Litig.*, 689 F.3d 229 (2d Cir. 2012) (plaintiffs’ inability to establish Rule 23(b)(3) predominance through “fraud on the market” theory of reliance did not preclude certification of settlement class because 23(b)(3)’s manageability requirement does not apply in settlement context)

- Importance of phase of proceedings

QUESTIONS?