

An Interview with Judge Gail Andler about Class Action Settlements

By Jessica Scott – September 8, 2016

Negotiating a class action settlement involves different considerations from settling your run-of-the-mill case. But once you have made it over the hurdle of agreeing on a settlement, the process does not end there. Settling a class action case is like crossing the finish line and being told you still have two miles to run. Approval and administration of the settlement require additional work from the parties and the court, extending the life of the case for months, if not years. To flush out the unique considerations every lawyer must prepare for when negotiating a class action settlement, I enlisted the help of Judge Gail A. Andler, who is in her 23rd year as a California trial judge. She has spent the last 10 years as a complex civil judge, devoting a substantial part of her time to class action litigation. Judge Andler evaluates, on average, two class action settlements per week. This article reflects her insight into the unique considerations associated with settling class actions.

As Judge Andler aptly recognized, “most class action cases settle.” If you have never settled a class action before, however, you may begin with only vague notions that settling a class action is different from settling an individual action. To provide the best representation for your client, you should be fully apprised of two particular differences between class and individual settlements, even before you start to negotiate.

First, you must know the universe of potential exposure and costs. Unlike an individual settlement, a class settlement amount may not end with agreement on a monetary benefit to the class. You must be fully prepared to address various costs to ensure that your clients do not end up paying more (or receiving less) than they bargained for. Class counsel will expect to be paid attorney fees and costs, which can often be substantial, especially when considered in relation to the class benefit. One side will also have to hire and pay a settlement administrator to provide notice to the class, process claims, maintain a website or call center, and issue payments. Depending on the size of the class and the type of notice the court approves, costs for a settlement administrator can be several hundred thousand dollars.

Negotiation of the settlement therefore must cover who will pay for the administrator, and who will pay for attorney fees and costs. In a common fund settlement from which costs and fees will be paid, you must factor in attorney fees and court costs, as well as settlement administration costs, to fully evaluate the benefit left to the class for actual payout.

There also are class settlements where the defendant agrees to pay for attorney fees and administration costs separate from any payment to the class, a structure most commonly seen in statutory fee-shifting cases. This usually takes the form of the defendant’s agreeing not to object

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to class counsel's request to the court for fees up to a certain amount. If you are defense counsel negotiating such a settlement, you must ensure that your client is prepared for the outer limits of potential total exposure. Doing so, however, is trickier than one would expect, as the parties should negotiate fees only once they reach an agreement on the class benefit, lest there appear to be collusion between the parties where class counsel is willing to accept a smaller recovery for the class in return for red carpet treatment on fees. As Judge Andler recognized, "judges must scrutinize proposed class action settlements to ensure there is no collusion between the parties in agreeing not to oppose a fee request. Where the fees requested by counsel appear large in relationship to the benefit to the class, a detailed explanation is required to satisfy the concerns of the court."

Second, class action settlements require court approval and supervision. The fact that class settlement typically cannot be confidential is perhaps the most obvious consequence of the need for court approval, yet it seems surprising to many defendants. If you are defense counsel, you must prepare your clients for the reality that whatever they agree to pay in settlement will be available in the public domain. For some clients, that is enough to nix the idea of a class settlement entirely. For those that can live with it, they will not only be on the hook for the settlement payouts, but will also have to continue to pay attorney fees to their counsel well after the parties agree to settle due to the plethora of filings required to obtain preliminary and final approval of the settlement from the court.

As for the required filings, there are several. The first filing is typically the motion requesting preliminary approval of the settlement, which must include copies of the proposed written settlement agreement, a proposed plan for class notice, and any proposed notice documents. As Judge Andler explains, you must tell your judge in these filings "how [your] proposed settlement benefits the class, and how much will go into the pockets of the individual class members at the end of the day. The parties should not only provide a concise summary of the 'deal points' in the negotiated settlement but also clearly set forth the damages model and the amount of the average class member's recovery along with the expected highest and lowest payouts per class member. The briefing should address the overall value of the claims and discuss generally the factors that caused the value to be compromised, such as potential proof problems, the financial condition of the defendant, nonmonetary benefits to the class, etc." Further, says Judge Andler, "the briefing must also address the qualifications of counsel and the suitability of the class representative, and must justify all amounts deducted from the gross settlement for fees, costs, enhancements, and any other amounts."

Judge Andler requires this information, as will your judge, because judges must "exercise [their] independent review and discretion before approving" even stipulated settlements. "This makes class action settlements unique because the judge must act as a fiduciary to the absent class members."

Once the court preliminarily approves the settlement, notice plan, and notice documents, the case does not end there. The parties must then execute the notice plan and take any other required

steps, usually through a settlement administrator—a process that can last months or even years. Class members will be given notice and an opportunity to object or opt out, and can file their claims (if the settlement is a claims-made settlement, instead of an automatic pro-rata distribution). And the parties must return to the court to request final approval of the settlement.

Before final approval, the court will conduct a fairness hearing, at which time it will consider objections to the settlement, if properly lodged. Judge Andler expects the parties to “file a written response to written objections stating why they believe the objections are without merit,” and sometimes she has “asked the parties to meet with the objectors to try to understand their concerns.” If the court grants final approval of the settlement at the fairness hearing, then the time to appeal will begin to count down. Only once that time has expired will class members and class counsel actually receive any payout.

Negotiating a class settlement and seeing it through to conclusion requires managing client expectations, being prepared for the circumstances unique to class actions, and educating the court. Keeping these considerations in mind will help you make it to the *real* finish line of a final, court-approved, binding class action settlement.

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[Jessica Scott](#) is a partner at Wheeler Trigg O’Donnell LLP in Denver, Colorado.