NACA CLASS ACTION GUIDELINES
(AS REVISED 2006)

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Guideline 1 — The Propriety Of Class Actions When Individual Recoveries Are Small

A. The Issue

Questions are often raised whether some illegal business practices are inappropriate for class treatment because individual recoveries are too small to warrant individual actions and the attorney fees that are recovered dwarf the individual damages. Frequently, defendants propose that a class should not be certified because the relief to each class member is too small to warrant a class action.

From the standpoint of consumers and their advocates, class actions are essential to achieve the goals of consumer protection. Damages that are too small to make it possible to litigate an individual case can be combined in a class action to make meaningful relief possible.

B. Discussion

The argument in favor of considering relief to individual class members instead of the size of the total sum that the defendant will pay appears to be based on the conclusion that some recoveries to class members may be so trivial that they do not warrant redress.

Class action lawyers and other advocates hold the contrary view and believe that the focus on individual compensation misses a central point of class actions: deterring misconduct by the defendants. The class action device is particularly appropriate in consumer cases where individual recoveries are small, but that, in the aggregate, involve substantial sums, often millions of dollars in damages. Class actions serve an important purpose beyond simply compensating the injured. Often, class counsel and class representatives act as private attorneys generally vindicating cumulative wrongs, obtaining significant injunctive relief or institutional change, and requiring disgorgement of illegal profits. H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS §§5.49 & 5.51 (4th ed. 2002) [cited herein as "NEWBERG"]. Rejecting class actions because individual recoveries are small, while ignoring the aggregate amounts involved, encourages wrongful conduct and largely immunizes entities caught stealing millions in $10 increments.

An illustrative example is found in the consumer class actions challenging excessive late and over-limit charges on credit card accounts, which were criticized because class members "are eligible for only a few dollars apiece in compensation" while class counsel get "millions." Max Boot, WALL ST. J., Sept. 19, 1996. The proponents of the rejection of classes like this argue that when individual recoveries range from $5 to $50, a court should deem the amount to be trivial. Such a constricted view disregards the facts.

The Supreme Court has long recognized that without Rule 23, claimants with small claims would not be able to obtain relief. *See Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 338 n. 9 (1980), quoted above. To the same effect is *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985). "Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about

$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available." *Id*. at 809. The 1966 Advisory Committee Notes to Rule 23 echo this concern: "These interests [in individual litigation] may be theoretical rather than practical: . . . the amounts at stake for individuals may be so small that separate suits would be impracticable."

More recently, the Supreme Court reaffirmed the availability of class actions for small consumer cases, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), where it noted that in small stakes consumer cases common issues readily predominate. 521 U.S. at 624.Many federal and state courts cited *Amchem's* conclusion that common issues readily predominate in consumer class actions, and certified consumer classes, despite the existence of some individual issues.[1]

The availability of the class action remedy is particularly important with respect to consumer protection claims. As the Newberg treatise explains:

> The desirability of providing recourse for the injured consumer who would otherwise be financially incapable of bringing suit and the deterrent value of class litigation clearly render the class action a viable and important mechanism in challenging fraud on the public.

NEWBERG at § 21.30. S*ee also Watkins v. Simmons and Clark, Inc*. 618 F. 2d 398, 404 (6th Cir. 1980) (Class action certifications to enforce compliance with consumer protection laws are "desirable and should be encouraged.")

The simple fact is that no private lawyer will accept a case for $50, $500, or often even $5,000 in recoverable damage, because dilatory defense tactics will force attorney fees that are a significant multiple of the plaintiff's possible recovery and many courts will not adequately compensate a contingent-fee lawyer in such a situation.

In addition, assuming that it is desirable for a court to weigh the potential "costs" of class action litigation against its potential "benefits," it would be a mistake to focus solely on

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[1] *See, e..g.*, *Arenson v. Whitehall Convalescent & Nursing Home*, 164 F.R.D. 659, 666 (N.D. Ill. 1996); *Cope v. Metropolitan Life Ins. Co.*, 696 N.E.2d 1001, 1009 (Ohio 1998); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 64 (D. Mass. 1997); *Eshagi v. Hanley Dawson Cadillacs Co.*, 574 N.E.2d 760, 766 (Ill. Ct. App. 1991); *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d. 51, 57 (Cal. 1979); *Fogie v. Rent-a Center*, 867 F. Supp. 1398, 1404 (D. Minn. 1993); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 952-953 (Tex. 1996); *In re Prudential Ins. Co. America Sales Litig.*, 148 F.3d 283, 314-15 (3d Cir. 1998); *Logsdon v. National City Bank*, 601 N.E. 2d. 262, 272 (Ohio Ct. App. 1991); *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210, 218 (Minn. 1987); *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d 693, 696 (N.Y. App. Div. 1986), aff'd, 516 N.Y.S.2d 652 (N.Y. 1987); *Wells v. McDonough*, 1998 U.S. Dist. LEXIS 4441, at *18-20 (N.D. Ill. Mar. 23, 1998). Also see NEWBERG at § 21.1.

monetary relief recoverable as damages or restitution. Rather, many consumer class actions provide an additional social benefit — deterrence. Recovering a significant aggregate sum from a defendant will deter similar wrongful practices in the future by that defendant and by other similarly situated entities. This deterrent exists regardless of the amount recovered by individual class members. Moreover, injunctive relief can specifically prohibit resumption of a wrongful activity.

Judge Richard Posner put it succinctly: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative — no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied — to no litigation at all." *Carnegie v. Household Intern., Inc*., 376 F.3d 656, 661 (7th Cir. 2004).

The importance of deterrence in consumer cases is shown by the frequency with which Congress and the state legislatures have included fee-shifting provisions in consumer protection statutes. By shifting fees, Congress and the state legislatures encourage enforcement of consumer laws through a system of "private attorneys general," even where the amount of damages at stake would be too small to support litigation if the plaintiff had to absorb the cost of attorney fees. *See, e.g., De Jesus v. Banco Popular de Puerto Rico*, 918 F.2d 232, 234 (1st Cir. 1990) (construing the Truth in Lending Act). This recognition of the importance of enforcing consumer protection laws, even in cases where the amount of damage to an individual consumer is small, is at least as applicable in the class action context as in the individual case context.

NACA strongly believes that one small claims consumer class action that provides real relief to thousands of consumers will always be superior to the theoretical potential to litigate thousands of individual small lawsuits. Such a theoretical potential will never become a reality when the individual claims are small. In our society, consumers engage in far more economic transactions than previously and do so with nationwide or regional companies using take-it-or-leave-it standardized forms, contracts, and sales methods. To combat abuses in these practices, class actions continue to be essential.

Using class actions to deter widespread consumer fraud may be better than the only practical alternative: punitive damage awards. If small compensation class actions are discouraged, the alternative will be to seek large punitive damage awards on behalf of a few consumers who, while litigating relatively small individual claims, can prove willful, wide-spread misconduct by defendants. While both alternatives may extract large payments from defendants, class actions distribute that payment to the victims, rather than providing relief to the few consumers who prevailed in their individual punitive damage claims.

In addition, the primary remedy sought in any small claims class action is often equitable in nature, making the payment of money to individual class members secondary to the far-more-valuable prospective relief.

Another argument against small claims class actions is the inefficiency of distributing small checks to many class members. In light of the development of automated systems and the availability of simple and inexpensive Internet claims processes, this supposed inefficiency becomes less urgent.

It becomes even less urgent when one considers that many of these cases involve an ongoing business relationship — credit card, banking transactions, and utility payments to name just a few instances — where the individual payment amounts can be determined based on the defendant's records and the ultimate payment made by credit to an existing account. No proof of claim is required, nor must the financial system process a number of small checks.

The most important consideration militating against opposition to small claims class actions is that the alternative — taking no action at all and thus permitting the defendant to get away with illegal behavior — is a far less positive result.

Finally, what may seem "small" to those of us fortunate enough to be lawyers and judges may be significant to those consumers whose annual incomes are at or below the poverty level. A check for $100.00 represents one percent of the total annual poverty guideline allotment for one person under the United States Department of Health and Human Services 2005 poverty guidelines. 70 Fed.Reg 8373, 8374 (FeB. 18, 2005). For a low-income consumer, that "trivial" $100.00 individual recovery has significant value, equivalent, as a percentage of income, to a $1,000 recovery by a single person earning $100,000 a year.

While class actions, like any procedures, may sometimes be abused, protections against abuse already exist. Courts may and do refuse to allow classes to be certified where the potential recovery to each consumer is nominal or where a distribution would consume such substantial time and expense that the class members are unlikely to receive any appreciable benefit. *See e.g., Buchet v. ITT Consumer Financial Corp.,* 845 F. Supp. 684 (D. Minn. 1994); *Blue Chip Stamps v. Superior Court*, 18 Cal. 3d 381, 386 (1976); *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 459 (1974). Further protections are found in the requirements that courts must find any settlements to be fair and reasonable to the members of the class, F. R. CIV. P. 23(e), and that courts must approve attorney fees.

The only comment that opposed small claims class actions came from an industry trade group, which limited its comments to debt collection class actions filed under the Fair Debt Collection Practices Act (FDCPA"). The commenter concluded that a plaintiff would be better off filing an individual claim under the FDCPA rather than filing a class action where the damages are split between numerous plaintiffs. NACA does not agree with this comment because it fails to consider the curative nature of class actions — stopping that debt collector from harassing consumers in the future — as well as the economies of scale discussed above. The same commenter also opposed a class action based on what it termed an "inadvertent" violation of the FDCPA (such as failure to provide the federally required notice of rights), because it concluded that such a lawsuit would not have the desired deterrent effect because the violation was inadvertent. NACA disagrees with the commenter's conclusion that the failure to

comply with federal law can ever be considered "inadvertent" — at best, it reflects a casual lack of interest in the debtor's rights under federal law. That commenter added, with respect to class certification, that the "court should look to the actual benefit to the plaintiffs, the alleged violation, and the effect of a class action upon the defendant debt collector as a condition of class certification." NACA does not believe that these substantive issues are relevant to consideration of a normal 23(b)(3) FDCPA lawsuit.

C. NACA Guideline

Class actions are particularly appropriate in consumer cases where individual recoveries are small, but involve many thousands or millions of dollars in damages in the aggregate. This is precisely the type of case that encourages compliance with the law and results in substantial benefits to the litigants and the court. Denying class certification in such instances would unjustly enrich the wrongdoer, who would get to keep its ill-gotten gains. Class actions should be deemed appropriate because individual damages are too small to warrant redress without a class suit, so long as significant aggregate monetary or equitable benefits to the class are sought. This is especially true in cases with claims for which a legislative body has provided a fee-shifting remedy to encourage private enforcement actions.

Additional considerations favoring small claims classes are (1) availability of equitable relief as the primary goal, (2) increased use of automated payment systems to calculate and distribute individual damage amounts, and (3) the *cy pres* alternative to a truly inefficient distribution discussed in more detail in Guideline 7.

Guideline 2—Settlements When Other Class Actions Are On File

A. The Issue

Settling class actions when other similar cases are pending raises unique issues such as coordination of settlement discussion, reverse auctions, differing geographic issues, the substantive scope of the class, and pending or potential individual lawsuits.

B. Discussion

This is one of the most complex issues in the Guidelines. There is general agreement that class counsel should be sensitive to the potential for wiping out claims asserted in other pending cases by settling a case, and should resist doing so. This problem is particularly apparent where the defendants suggest expanding a settlement class beyond the class definition contained in the complaint or in an earlier order certifying a class, or expanding the claims settled, but offer no increased benefit to the additional class members or for settlement of the additional claims.[2] There is also concern about the filing of nationwide class actions and agreeing to settlements which do not exclude from the class, cases pending in certain states or locales. In either instance, the interests of the classes will not be well served by settlements that do not maximize benefits to class members.

One area of particular concern exists when the many cases are pending in state and federal courts and thus cannot be consolidated under the federal multi-district litigation ("MDL") rules. 28 U.S.C. §1407. Class counsel from California might be concerned about becoming involved in a related case pending in a rural area of Texas or Louisiana, where they are unfamiliar with the rules and traditions of practice. The Manual for Complex Litigation addresses this issue, and proposes several procedural steps to increase coordination. These steps include (1) joint conference calls among all judges (2) coordination of discovery, and (3) joint appointment of experts. Manual for Complex Litigation, Fourth (2004) § 20.14.

The 2005 amendments to Title 28 alleviated these concerns by allowing removal of truly large, truly multistate class actions to federal court, where they can then be handled under the MDL rules. 28 U.S.C. § 1453. Nonetheless, because class counsel may craft their class definition and their claims to avoid federal court removal, the possibility of litigation in multiple forums still exists.

Advocates for individual consumers may also have concerns about a multi-state or national class action that seeks to hold the defendant to one standard, when some of the states whose citizens are class members may have laws that offer greater relief to consumers, such as minimum statutory damages or automatic enhancement of actual damages. This concern may be

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[2] Guideline 9 on class member releases addresses the propriety of releasing claims beyond those alleged in the complaint and instructs against releasing claims for which no compensation is given.

largely addressed at settlement time by preserving defenses to actions by the defendant against class members, especially when rights in foreclosure, repossession, and other significant matters are concerned unless state law remedies have the potential of providing significantly greater relief.

It is always possible, and in many cases preferable, to avoid this problem by tailoring the class definition and claims to cover a limited number of states and using the state laws that offer the greatest protection to consumers. This may require that the class be divided into subclasses based on state of residence or contract formation, but it will not make the class action unmanageable. Indeed, by setting out subclasses at the outset, it is possible to avoid (or at least blunt) the defendants' frequent complaint that the need to interpret several state laws for one class makes a case unmanageable.

Another area of concern is the settlement of cases through a "reverse auction" by which defendants propose a cheap settlement and shop around among plaintiffs' counsel until they find a lawyer willing to settle on their terms. Although there have been no empirical studies showing the extent of this problem, anecdotes abound, and the potential for collusion and abuse is obvious if a lawyer agrees to a bad deal in order to secure fees.

Commenters[3] agreed that class counsel in overlapping actions should communicate with each other and work together to ensure that class members obtain the maximum settlement benefit. The personal interests of particular class counsel in receiving attorney fees could discourage such cooperation at times. Commenters generally agreed that courts should be encouraged not to approve settlements in "copycat" actions and to consolidate actions whenever possible.

For an excellent discussion of these issues, co-authored by a commenter, see B. Wolfman and A. Morrison, "Representing the Unrepresented in Class Actions Seeking Monetary Relief," 71 N.Y.U. L. Rev. 439 (1996).

Other considerations when litigating one of several class actions include secrecy, both during discovery and at the time of settlement. Class counsel sometimes enter into confidentiality agreements during discovery limiting their ability to share discovery with lawyers litigating similar cases elsewhere. This fosters competition and conflict rather than cooperation. One simple way to avoid this problem is to enter into agreements with the other counsel that provide that all counsel are cooperating in all cases, in which case it is possible to share the results of discovery with each other without violating a confidentiality agreement.

Secrecy at the time of settlement is also a problem. Sometimes, class counsel agree with the

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[3] In these Revised Guidelines, "commenters" refers both to individuals who made comments when these Guidelines were initially considered in 1995 and to those who commented on the draft Revised Guidelines. These Revised Guidelines incorporate many suggestions, both editorial and substantive, made by commenters, without need for discussion. Where appropriate to the context, the Revised Guidelines will discuss some comments.

defendant to some restrictions on public statements about the settlement, whether as a restriction on statements to the press or as an actual limit on disclosure of some of the settlement terms to class members or others. Because one of the prime rules for class settlements is that they must be transparent and easily reviewed by class members in their entirety, any form of secrecy agreement creates far more problems than it avoids. Confidentiality issues are discussed in detail in Guideline 10.

Cooperation among class counsel through various means—including sharing discovery, conducting joint discovery, using joint experts, coordinating document production, and coordinating scheduling of important motions, including motions for class certification—can expedite case handling and minimize costs to each counsel. Nationwide access to PACER and the adoption of electronic case filing, together with the ability to scour the Internet and legal sources such as Westlaw and Lexis, allows a simple and inexpensive way to look for other cases.

C. NACA Guideline

Class counsel should attempt to learn of any preexisting cases and to communicate with other plaintiffs' counsel in such cases before or promptly after filing an overlapping case.

Class counsel should cooperate with each other to the maximum extent feasible in the pre-trial stage by agreeing to conduct joint discovery, use joint experts, and coordinate document production; or at a minimum share discovery among counsel in similar cases; and, where possible, by allocating responsibility for researching and drafting important pleadings and coordinating scheduling of important motions, including motions on the pleadings, for summary judgment, and for class certification.

Class counsel should avoid confidentiality agreements that restrict their ability to share discovery with lawyers in other related cases.

As soon as possible, class counsel should serve the defendant with discovery requests that force the defendant to disclose any other potentially related lawsuits, in order to coordinate litigation.

Early in the lawsuit, class counsel should also ask the court to order the defendant to get permission from the court before entering into any settlement in another case that would affect the class representative or class members.

Class counsel should encourage joint litigation of other related lawsuits, both in discovery and in settlement.

Class counsel should be alert to the possibility that a defendant in multiple cases may seek to conduct a "reverse auction," in which it negotiates separately with various plaintiffs' counsel and attempts to strike a settlement most favorable to it. Bearing in mind the entitlement of class counsel to a fair fee given all the circumstances, the interests of the class must remain paramount.

Class counsel should not agree to expand the class definition at the settlement stage, except in rare circumstances and only if the expanded definition results in significant relief to the newly-added members of the class. Class counsel should refrain from agreeing to unnecessarily broad releases that wipe out claims asserted in other pending individual or class cases. Class counsel should be cautious about settling anything beyond what is alleged in the complaint and mindful of preserving the opt-out rights of class members.[4] This caution is especially important in class actions involving homes, for all the reasons discussed in detail in Guideline 3.

Before agreeing to any release of claims in a settlement agreement, class counsel should get from the defendant a list of any then-pending cases in which the defendant could, or might, take the position that the release would extinguish such claims. Far preferably, class counsel should not agree to release claims in other actions unless they are the same as those at issue in the settling class, and this should be clearly stated in the final judgment. At a minimum, if these claims are not excluded, then class counsel must evaluate those claims separately and provide for separate and additional consideration in the settlement. Failing to do so might constitute inadequate representation. *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (2004).

When a settlement has been reached, counsel should always notify class counsel and the court in other cases involving the same defendant and the same or similar issues. Such notice should occur well before the fairness hearing, leaving enough time to give those counsel the opportunity to appear.

Class counsel should never agree to a settlement term that in any way restricts their right to discuss the settlement or disclose all its terms and all settlement documents to the public. This includes gag orders, confidentiality agreements, and anything else that prevents or restricts class counsel's ability to communicate with class members or other members of the public.[5]

Class counsel should resist preliminary orders that stay individual litigation of related claims or other actions by absent class members but do not also contain a similar restriction on defendants. If any such stay orders are nonetheless entered, they must allow individual class members with pending individual litigation an immediate right to opt out of the settlement and thus no longer be bound by the stay.[6]

After settlement, class counsel should notify persons and groups who are known to have an interest in the proceedings that a tentative settlement has been reached and that a preliminary hearing will be scheduled to consider the fairness and adequacy of the settlement. This goes beyond the requirement in the 2005 amendment to Title 28 that a defendant must provide "the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement . . . ." 28 U.S.C. § 1715.

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4 See Guideline 9 on class member releases.

5 See Guideline 10 on confidentiality.

6 See Guideline 3 on class actions involving homes.

In cases involving specific substantive rights, notice should be sent to groups with specific interest and expertise in that area of the law, such as legal services organizations when homes are the subject of litigation or utility advocacy groups when utilities are at issue.[7]

[7] See Guideline 11 on improved notice of settlement and Guideline 3 on class actions involving homes.

Guideline 3—Class Actions Involving Homes

A. The Issue

Class action cases that involve homes deserve special standards because of the importance of home ownership. The gravity of harms which can be incurred by homeowners should they participate, or fail to participate in a settlement, necessitates heightened awareness to all aspects of the class action. This guideline is intended to cover class actions that involve homes, including but not limited to cases involving causes of action regarding lending, mortgage servicing, and deed or home equity theft.

B. Discussion

The use of class actions to resolve disputed claims related to homeownership has raised several concerns among advocates representing individuals in actions against lenders and other parties. Consumer class actions are vital to ensuring lenders, creditors and other agents adhere to the law, but rarely are the stakes so high for the class member as they are in consumer cases involving homes. For most consumers, the home is their biggest asset and losing a home, and its equity, can ruin a family financially. Moreover, foreclosures can have a devastating effect on the stability of families and communities. Fair debt collection, fair credit reporting and other consumer class actions may insure that consumers are not charged excessive amounts, but the dollar value of the individual claims rarely, if ever, equate to the value of potential claims in home cases.

Generally, home cases differ from other consumer actions in that they potentially involve a wide range of legal claims and theories, and often include a combination of federal and state laws. For example, a predatory lending case involving a series of abuses may involve federal claims under the Truth In Lending Act (TILA), the Homeownership and Equity Protection Act (HOEPA), the Real Estate Settlement Protections Act (RESPA), and the Equal Credit Opportunities Act (ECOA). The same case may also involve violations of state law doctrines of unfair and deceptive trade practices, contract law, unconscionability, misrepresentation and state predatory lending laws and statutes regulating broker or third-party agent behavior. When some or all of these claims exist, the potential recovery to each individual homeowner can be substantial. Under some circumstances, remedies under state laws may be more significant than those available under the federal statutes. Certification of a multi-state or national class cases in such circumstances raises important and potentially difficult issues.

Appropriate representation of the interests of homeowners in individual cases is more difficult when such cases are transferred to distant forums and become part of larger, more complicated proceedings. This can occur when multi-district litigation (MDL) procedures are invoked to require that pre-trial proceedings in all cases involving the same defendant be litigated in the same court. The difficulties created by the transfer for individual litigants can include the following: 1) transfer to an MDL proceeding could “result in their actions entering

some black hole, never to be seen again;"[8] 2) once a case is transferred, individual litigants have little input into and less control of the course of the proceedings; 3) any benefit derived from choice of forum may be lost; 4) due to the complexity of most MDL proceedings, they tend to move at a slower pace than the usual individual federal case; 5) conflicts between the interests of the individual homeowners and the class may arise; 6) since the transferee judge can hear dispositive motions and also has discretion to retain proceedings for settlement purposes, the vast majority of transferred actions in fact do not emerge from the MDL;[9] and 7) the judge in a distant forum may be less willing to issue interim injunctive relief to stop a foreclosure arising after the transfer since such an order would affect property in another state.

Class actions in cases involving homes have been successful in raising nationwide awareness of problems such as predatory lending and predatory servicing. The filing of nationwide class actions against national companies by government agencies, as well as by private class action lawyers, has had a significant impact on the lending industry. Large monetary settlements can be successful in that they provide cash to class members, act as deterrents to defendants and may influence industry behavior. Class actions against a single entity, have lead to reforms throughout the industry may be responsible in part for the prevention of greater proliferation of abuse. Class actions also present a practical solution for advocates to deal with an overwhelming number of cases involving the same players. Defendants in some circumstances prefer class actions to having to litigate a large number of claims individually.

What has been most in controversy, however, is the ability of individual class members to protect their homes from foreclosure, during or after a class action case. Class actions settlements that may offer what otherwise seem to be large monetary class awards are not appropriate if they leave individual homeowners vulnerable to foreclosure in the future that might be avoided through individual litigation. All too often, class members typically – if ever -- do not receive the relief they would have gotten had they pursued their claims individually. In cases involving homes, class members often receive less in proportion to the value of their claims than class members receive in other types of consumer cases. In home cases, individual relief often means the opportunity to regain homeownership, or to restructure the underlying loan. Resolution of class actions involving homes must not jeopardize the ability of class members to remain in their homes by over-broadly releasing claims and defenses.

C. NACA Guideline

The other guidelines address some of the concerns apparent in class actions involving homes. This guideline raises heightened concerns present in cases involving homes.

1. *Developing a Case*

a. Narrowly draft the complaint.

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[8] *See, e.g., In re Asbestos Prods. Liab. Litig.* (No. Vi), 771 F. Supp. 415, 421 (J.P.M.L. 1991).
[9] 17 Moore's Federal Practice 112.03[6][b] at p. 112-29 (3rd Ed. 2005).

Class counsel should be careful to narrowly draft the complaint and limit the scope of claims sought to be redressed. Counsel should refrain from alleging a laundry list of claims. Class members typically fare better through smaller class actions. When homeownership may be at stake, the amount and type of relief to the individual has heightened importance. Narrowly focusing the class case helps ensure that the relief obtained for homeowners reasonably relates to the harms which can be litigated on a class basis without releasing potentially valuable individual claims and defenses. Counsel must give due consideration, however, to the possibility that *res judicata* could preclude non-litigated claims should the case be litigated to judgment.

b. Consider geographical limits.

Class counsel should assign appropriate geographical limits to the class. Nationwide classes are generally discouraged, especially where multiple claims are plead. Class actions that target a specific practice and are based on a federal claim but leave the homeowner with significant individual claims may be acceptable in special circumstances. When a multi-state or nationwide class is feasible on a particular claim, class counsel should determine whether individual state laws provide materially better remedies for certain class members for that claim. If such laws exist and a state law class is feasible, counsel should consider whether those state residents should be excluded from or made a separate subclass of the multi-state or nationwide class. Similarly, counsel should consider whether to carve out states where state class actions or significant other litigation against the defendant is pending.

2. Settlement Considerations

a. Consult with lawyers handling individual cases.

Consider consulting with lawyers who handle individual cases and other class actions concerning the same defendant and subject matter on an ongoing basis throughout the settlement process. These lawyers have a unique perspective that can only add to the litigation of class actions and will be able to provide guidance regarding how certain settlement terms may affect individual class members in the future. It may be beneficial to include these lawyers as consultants during the litigation and settlement process for the benefit of the class. Do not agree to confidentiality agreements that prohibit class counsel from discussing the terms of the settlement with other advocates.

Consideration also should be given to carving out states from a settlement where it is likely or probable that class members in most jeopardy of losing their homes can receive adequate representation to pursue individual claims.

b. Limit the release.

The release must be very narrowly drafted. Releases must be written not to impact non-certified claims or potential claims to permit the homeowner to pursue individual or class claims unrelated to the litigation. For example, counsel should never release claims regarding loan origination if the case involves servicing abuses. Class members should not release potential

individual claims in consideration of injunctive relief against a lender, servicer, or other entity, unless such relief results in significant individual relief to the class members. Depending on the size of the class, even multi-million dollar settlements, may not result in significant monetary relief to individual homeowners.

c. Preserve defenses.

The release must explicitly preserve all defenses to foreclosure or other proceedings filed against the homeowner, even when the release otherwise bars the homeowner from seeking affirmative recovery on the same subject. In some instances, homeowners must raise defenses through an affirmative suit, such as an action to enjoin a non-judicial foreclosure. Therefore, the release must make clear that affirmative relief in response to a threatened foreclosure is unequivocally permitted. The release should also preserve the class member's right to raise claims through a bankruptcy proceeding, such as through a recoupment action, when lender has instituted foreclosure proceedings against the borrower. The settlement, order and notice should specifically state that class members may raise claims as a defense or through a recoupment action.

d. Craft creative and comprehensive settlements.

When possible, craft creative settlements that include meaningful equitable and injunctive relief. Monetary disbursements often do not provide the most meaningful relief to homeowners with unaffordable predatory loans. When possible and achievable without an overly-broad release, settlements should include mechanisms to assist class members to stay in their homes, such as guidelines for loan modifications or interest rate reductions for borrowers in defined categories, or cash funds for foreclosure relief. Injunctive relief should provide that the defendant will take specific steps to remedy the specific predatory lending or predatory servicing practices addressed by the litigation. In cases involving a holder, lender, servicer or other entity with whom the homeowner will continue to have a relationship with after the settlement, the settlement should establish parameters for a positive on-going relationship between the lender and the borrower. The settlement should set up a system to help homeowners who continue to experience trouble with their loan related to the claims of the lawsuit, as well.

Settlements involving disbursements of money must take into consideration consequences upon a class member's government benefits. Sums as low as $200 can jeopardize an entire family's receipt of Medicaid, SSI benefits, food stamps or other benefits. It may be possible, such as in the Attorneys General settlement with Household/Beneficial, to seek agreement from the government agency that settlement funds will not affect class members' benefits. Consult with knowledgeable practitioners so as to minimize the impact on class members' sustenance income.

Class counsel should also seek agreements that defendant repair the credit of class members. Failure to do so can trap class members in the subprime market needlessly.

e. Avoid blanket stays of litigation.

Class counsel should not agree to blanket stays of affirmative litigation pending settlement approval. Homeowners must retain the opportunity to defend foreclosure actions that may be initiated during this time period by the defendant and to protect themselves in non-judicial foreclosure states where homeowners must affirmatively sue to enjoin an extra-judicial process. At a minimum, if individual litigation is stayed, the defendant should be prohibited from initiating or continuing foreclosure proceedings, all statutes of limitations and of repose (e.g., the Truth in Lending extended rescission period) should be expressly tolled and opt-outs should be allowed before settlement approval to permit the initiation or resumption of individual litigation.

f. Include stay of foreclosure proceedings and illegal conduct.

Class counsel should make every effort to enjoin defendant from initiating or continuing foreclosure proceedings and from engaging in unlawful and other questionable conduct that may be at issue against class members pending the litigation and settlement.

g. Avoid the use of proof of claim forms.

In home cases, it is rarely, if ever the case that the identity of class members cannot be determined. As discussed in Guideline 16, claim forms put an additional burden on class members as a condition of obtaining relief. Therefore, class counsel should avoid the use of claim forms in home cases, except if exceptional circumstances exist. Settlement monies should be distributed to class members without claim forms unless it is impossible to determine class membership, damage amounts or if other considerations prevail.[10] Settlement monies should be divided on a pro rata basis depending on individual circumstances. Class damages and restitution should be distributed by account credits and checks without claim forms, unless it is proven impossible to determine class membership or damage amounts.

h. Make class notices short and understandable.

Settlement notice to class members should be short and understandable. In notice provided directly to class members, a direct summary set forth in easy-to-read language and fonts should be encouraged, possibly on a page labeled “Summary” with fuller details in the rest of notice.[11] It is important for counsel to carefully craft an understandable settlement notice in home equity cases because of the significant rights and potential for loss of rights in these cases. Keep in mind the make-up of the class members. Lawyers may consider sending an explanatory letter on letterhead of a non-profit, counseling agency or consumer rights group to garner closer attention by the class member. For example, if a subclass of borrowers is entitled to special relief, a letter explaining more fully their opportunity to benefit from the class action may

[10] For an in-depth discussion of the use of claims forms, see Guideline 12, Claim Forms.
[11] For an in depth discussion of notices, see Guideline 11, Improved Notice of Settlement.

enhance participation. Providing for a letter that supplements the class notice may alleviate some conflicts in the notice-writing process, as well.

If debt is forgiven as part of the settlement and that debt will be reported to the IRS, the class notice must advise class members as to the amount of forgiven debt that will be reported to the Internal Revenue Service and that there may be tax consequences. The notice must also state the importance of seeking tax advice and contain instructions to obtain tax assistance including a reference to the IRS sponsored Volunteer Income Tax Assistance (VITA) programs and the IRS toll-free number that class members can call to find a VITA program near them.

Class counsel should also mail a copy of the notice to local consumer lawyers and legal services offices who are known to represent individuals in actions against the defendants. Housing counselors and other entities that are involved in counseling class members in issues relating to the claims alleged in the class action should be notified as well.

i. Provide mechanisms to monitor the settlement.

Settlements should include specific mechanisms for the ongoing monitoring of equitable relief. Court or independent monitors are effective mechanisms to ensure compliance with broad-based equitable orders.[12] Defendants often appreciate the opportunity to have issues resolved by informal means rather than through adversarial contempt proceedings in separate actions. Class counsel should argue strenuously that all monitoring reports should be part of the public record. A point-person should be designated within the defendant's company, especially when litigating against national lenders, to answer future questions regarding the settlement, and to address special circumstances of individual class members. It may be advisable to include language in the settlement agreement stating that the court retains jurisdiction to enforce the settlement. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

The agreement should expressly allow class members to cite the settlement terms (and demonstrate any failure by defendant to comply with them) in later individual litigation between the defendant and a class member, including in defense to a foreclosure proceeding. Regardless whether the settlement terms specifically provide for it, if the defendant materially fails to comply with the terms of the settlement, class members may seek to intervene or otherwise seek to reopen the class action to enforce its terms.

j. Multi-District Litigation

Once a court orders multi-district litigation in a case that may result in the transfer of individual cases to a distant forum, class counsel should promptly seek court approval for a steering committee comprised of a reasonable number of attorneys representing individual homeowners. The purpose of the committee should be to provide representation of the individual

[12] For an in-depth discussion regarding the monitoring of settlements, see Guideline 16.

interests in the decision-making of the lead counsel and to provide a conduit to the court when the interests of the individual homeowners differ from those of the class. Such committees are expressly permitted in the Manual for Complex Litigation § 10.221 (2005).

Guideline 4—Certificate settlements

A. The Issue

Several years ago, there appeared to be a trend towards increased use of certificate settlements, offering relief to the class members in the form of certificates that are redeemable on future purchases from the defendant. These settlements came under increasing judicial scrutiny, including scrutiny spearheaded by NACA and the 1997 version of these guidelines. In some settlements, the value of the coupons was negligible or the coupons did little or nothing to address the alleged fraud. The issue of coupon class action settlements also became a political issue, with the State of Texas in 2003 passing a law requiring the attorney fees in class action settlements utilizing coupons to be paid in coupon. Tex. Civ. Prac. & Rem. Code § 26.003.

In 2005, Congress followed, requiring the setting of attorney fees in coupon settlements to be based upon the value of the coupons redeemed. 28 U.S.C. § 1712. Congress' rationale, expressed in the Act's findings, was that one of the abuses of the class action device was class action settlements where "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value."109 P.L. 2, 119 Stat. 4 (109th Cong. 1st Sess.).

Even before Congress' action, coupon settlements were decreasing as a result of increased judicial scrutiny. The seminal case and a good example of a coupon settlement that should never have been proposed for court approval is the General Motors ("GM") side-saddle pickup truck case. That class action sought to resolve a significant vehicle-fire safety hazard: exploding side-saddle gas tanks on GM pickups that killed many people and burned thousands. The plaintiffs alleged that the trucks were flawed by a dangerous and latent design defect—the placement of the gas tanks outside the frame rail—that increases the likelihood that their fuel tanks will rupture in side-impact crashes, causing fuel-fed fires. The class action sought a recall of these GM trucks, with restitution and refunds to all class members, and an order directing GM to pay for the retrofitting of all GM pickups to correct the fuel tank defects.

In the settlement, however, class counsel abandoned the recall/retrofit remedy in favor of an approach that limited class members' recovery to discount coupons to buy new GM trucks. There was no provision requiring GM to recall or repair the trucks, or to reimburse owners who made the repairs themselves, nor was there any provision requiring GM to warn consumers about the hazards of the trucks, despite the demand for such relief in the complaint. In other words, nothing in the settlement addressed the animating principle of this lawsuit: that these GM pickup trucks posed a serious—but remediable —safety hazard.

The settlement was criticized and rejected by both federal and state courts. *In re: General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.); *cert. denied*, 116 S.Ct. 88 (1995); *Bloyed v. General Motors Corp.,* 881 S.W.2d 422, (Tex. App.—Texarkana 1994), *aff'd, General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996). One of the criticisms was that the certificates were inadequate as the sole redress for the injured class members.

The GM case, and others, served to demonstrate the problems inherent in non-cash coupon settlements. In the years after the GM case, courts began demanding more stringent class protections.

"Coupon" settlements must be distinguished from other forms of relief that do not actually deliver dollars into the hands of the class but which may be entirely appropriate. For example, credits to existing accounts are usually adequate substitutes for mailing checks to each class member; indeed, crediting accounts is more efficient than mailing and the savings should be passed on to the class members through larger distributions. Similarly, if the amounts available to each class member are so small as to make delivery by checks not economically viable or if the class members are impossible to determine with certainty, distribution of the class benefit through *cy pres* awards is advisable, as discussed in Guideline 7. The comments below are directed solely to certificate settlements that only offer class members the opportunity to purchase a product or service from the defendant in the future at a claimed discount from the regular price to the consumer.

B. Discussion

Aside from the effect of 28 U.S.C. § 1712, which was intended to, and probably will, cause counsel to be wary of coupon class action settlements, the considered view today is that unless a coupon settlement provides increased benefits to class members and possesses certain safeguards, they should generally be avoided for the following reasons:

1. Except in unusual circumstances, there is usually no principled reason why delivery of cash settlements cannot be achieved, aside from the fact that the defendant prefers not to do so.

2 . For most of the class, redemption may not be an option, because they are unwilling or unable to make a future purchase from the defendant. Thus the class members are not equally compensated—some get more, others get less. This situation is at its most aggravated when the certificate requires purchase of a new car or other "big ticket" item.

3. Even where the coupon is for a small ticket item or is freely transferable, the defendant may be able to use its specialized knowledge of the industry to recover the cost of the coupon in the marketing of the relevant product.

4. Policy considerations disfavor rewarding the wrongdoing defendant with new sales from the victims of its illegal practices.

Proponents of certificate settlements point to benefits that can be obtained from coupon settlements that can, in some instances, provide benefits to classes that would support entering into one. Defendants may be willing to settle for coupons whose actual value to the class is greater than a cash settlement the defendant might otherwise make. This is because coupons can provide benefits to a defendant—the defendant obtains increased sales, a chance to re-establish brand loyalty, lower administrative costs when the settlement otherwise might require a claims review, or a delay of settlement payments until the future. Classes can benefit by additional

consideration or by avoiding the inconvenience of having to fill out and submit claim forms. Such settlements may also make sense where the individual cash recovery may be so small that it is exceeded by the costs of the cash distribution and, therefore, a greater coupon value or coupon distribution could be the most (if not the only) effective way to provide the class with benefits. Finally, certificates may be all that an impoverished defendant may be able to provide. Thus, particular facts involved in a proposed certificate settlement may justify it, such as one case [*In re Sears Automotive Center Consumer Litigation*, (N.D. Cal. No. 92-2227 RHS)], where proponents averred that the certificates involved could be redeemed for any merchandise sold at Sears stores (not merely the services and merchandise at issue in the litigation) and that 99.6% of the certificates issued were redeemed.

C. NACA Guideline

Certificate settlements have many disadvantages and should be proposed by class counsel only in the rare case. Any such settlements embolden defendants to try to obtain them in other cases and thereby adversely affect the ability to obtain monetary relief in other cases. Congress' finding that they can constitute an abuse appears well founded. Nonetheless, the rare instances do exist where they may be appropriate or add value to a settlement that otherwise could not be obtained for a class. Such instances include: (1) if the primary goal of the litigation is injunctive and the defendant agrees to an injunction, or the certificates are good for the purchase of small ticket consumable items which class members are likely to purchase, or the certificates represent true discounts that would not otherwise be available, (2) where the certificates are freely transferable, (3) where the coupons are in addition to and can be added to any already-existing coupons or sales incentives, (4) where the coupons should be stackable (i.e., a consumer can use more than one in a transaction); and (5) where there is a market-maker to insure a secondary transfer market. Conversely, even if, for example, a market-maker cannot be obtained or established as part of the settlement, a coupon settlement provisions prohibiting a market maker should be unacceptable. A few additional basic positions are clear:

Certificate-based settlements should rarely, if ever, require identifiable class members to purchase major, large ticket items from the defendant as the sole significant relief to the class, and any such settlement involving a large ticket item certainly must require the coupon to have the protections set out immediately above, including transferability and the ensuring that a market maker will be available.

Certificates should have some form of guaranteed cash value. For example, the certificates could have a lesser cash redemption value (either upon issuance or within a reasonable period of time) that still gives the class members a benefit that is significant in relation to the actual damages which would be provable at trial. Less-preferably, the defendant could contract with a market maker that would promise to purchase all available certificates for a set price that is significant in relation to the likely recovery at trial.

Certificate settlements should never be proposed to the court unless it is apparent that the defendant is providing greater true value (*i.e.,* not just the face value of the certificates or their

potential value) to class members than would be available from an all-cash settlement. Even though there may be legitimate tax or financial-account-ing reasons why a greater recovery for class members can be had from a non-cash settlement, class counsel should inquire about defendants' reasons for preferring a noncash settlement, as well as inquire as to any already-extant or planned coupon proposals or pending sales initiatives. The beginning assumption should always be that defendants prefer non-cash to cash settlements because they believe the true value to be less. Since defendants will usually be in a superior position to predict the ultimate redemption rate and benefit to the class, their preference for a non-cash settlement should be viewed with skepticism.

A settlement involving certificates should require a minimum level of redemption by the class members within a reasonable period of time. If actual redemption does not meet this minimum level, the defendant should provide alternative relief in the form of a common fund or, as has been done in some case, a second release of additional coupons, perhaps printed in a newspaper as, in effect, a fluid recovery mechanism.

Consideration should be given to providing coupons for multiple goods, not just the goods at issue in the case. Particularly with consumer products, a coupon good for several different products is usually far more valuable to the class and more likely to be redeemed.

Class counsel and defendants should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon. By doing so, a public record will be made of what works and what does not work in non-cash settlement cases.

Guideline 5— Additional Compensation to Named Plaintiffs

A. The Issue

Serving as a class representative generally requires significantly greater effort, and sometimes greater risk, than is required of the absent class members. In addition, the class representative's willingness to serve in that capacity enables the litigation to be brought in the first place. This Guideline addresses the considerations applicable when class counsel seeks court approval of additional compensation to a class representative beyond the representative's *pro rata* share of settlement proceeds.[13]

B. Discussion

Early cases reflect a view that it is a conflict of interest for named plaintiffs to receive anything more than their proportionate share of damages in amounts which are equal to those received by absent class members. The theory was that named plaintiffs, like class counsel, are fiduciaries to the class, and should not benefit from class litigation to any extent not shared by all similarly situated class members. Similar concerns presumably underlie the apparent prohibition upon such awards in private securities cases. *See*, 15 USC §78u-4(a)(4) (1995). *But see*, *Great Neck Capital Appreciation Inv. P'Ship, L.P. v. Pricewaterhousecoopers*, 212 F.R.D. 400, 412 (D. Wis. 2002) (approving incentive awards in securities case).

Most recent decisions, however, have approved the incentive award payments to named plaintiffs in recognition of their efforts in achieving the results obtained. Many cases note the obvious public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *In re Cendant Corp*., 232 F. Supp. 2d 327, 344 (D.N.J. 2002); *Van Vraken v. Atlantic Richfield Co*., 901 F. Supp. 294, 300 (D. Cal. 1995) (listing factors). These cases are based on the fundamental premise that named plaintiffs undertake obligations, provide input and take risks not shared equally by absent class members, thus justifying different treatment.

The amounts awarded in reported cases vary widely from token payments to amounts in the tens or—rarely—even hundreds of thousands of dollars. *See e.g.*, *Fears v. Wilhelmina Model Agency, Inc.,* 2005 U.S. Dist. LEXIS 7961, 9-10 (S.D.N.Y. 2005) (approving incentive awards of $25,000 and $15,000; noting cases approving awards as low as $336 and as high as $303,000 with most awards being in the $10,000 to $50,000 range).

Many commenters argued that modest incentive payments should be made routinely available in class cases in recognition of the fact that class representatives are voluntarily assuming extra responsibilities beyond those of absent class members. These commenters

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[13] This Guideline is not intended to address the possibility of undisclosed agreements by any person to make payments to a class representative *without* express court approval, which raise far different issues and appear to be expressly barred by FRCP, Rule 23(e)(C)(2).

differed on the question of what amount should be routinely awarded, absent special circumstances or individual justification of a larger amount. One commenter argued that the adoption of any specific "routine" amount is arbitrary and that every case should be examined individually.

C. NACA Guideline

Awards to named plaintiffs are appropriate in most cases in recognition of plaintiffs' willingness to undertake the representation of class members to whom they owe nothing. Consumers who fight on behalf of an entire class should be reasonably compensated, indeed rewarded, for their commitment when those efforts are successful. The amount that is reasonable depends upon the circumstances of the case, including the factors listed below. Whatever the amount, the payment must be submitted to the court for approval if the case has been (or will be, as part of a settlement) certified as a class action.

Payments of up to $5,000 should not require overly particularized court examination before approval. In most cases, payments below that amount can be justified by the bare fact that the class representative consented to act on behalf of the absent class members, assuming the fiduciary responsibilities and inconveniences that accompany that role. But if the case settled very early after commencement or there were many class representatives, smaller amounts may be more appropriate.

Payments greater than $5,000 may often be appropriate, but should not be automatically sought or awarded. Award of larger amounts should be based upon the court's examination of the specific circumstances of the case and the plaintiffs' efforts on behalf of the class. In deciding whether a larger award is justified, counsel and the court should consider factors such as: (a) Whether the plaintiff incurred expenses or spent time responding to written discovery, conferring with counsel about case background or settlement issues, or performing any other tasks associated with the prosecution of the litigation; (b) Whether the plaintiffs' deposition was taken, how long it took, the amount of travel or whether other disruption in schedule was involved; (c) Whether the plaintiff testified at trial or at any pre-trial hearing; (d) Whether the plaintiff assumed any risks as a result of undertaking representation of the class, including risks of liability for costs or attorney fees, or risk of adverse extra-judicial action by defendants; and (e) The size of the plaintiff's individual claim in the case *vis-à-vis* the efforts required as class representative.

Apart from any incentive payment, it may be appropriate for the class representative to receive amounts in settlement which exceed his or her pro rata share, if the additional payments are in settlement of individual claims not asserted on behalf of the class or released as to absent class members. Such payments are *in addition to* the recovery obtained for the class, and—while subject to judicial review to insure fairness—do not represent special treatment for the named plaintiffs. But such payments must represent reasonable payments for settlement of the non-class claims. Furthermore, if the representative plaintiff is receiving

payment for his or her individual claims, that fact should be taken into account by counsel and the court in considering whether an incentive payment is also appropriate, and if so, in what amount.

Guideline 6— Class Member Buyoffs/Rule 68

A. The Issue

For at least a period of time, practitioners report there was a growing use of offers of judgment under Federal Rule of Civil Procedure 68 or state analogues made to class representatives to derail and defeat class actions. Inasmuch as the offer could be made for the entirety of the class representative's putative damages (plus some amount additional to make it all-encompassing), the deterrent effect of an offer of judgment to a class representative was clear. By using offers of judgment directed at the named class representative, a defendant could, in effect, buy off the entire class for the monetary price of a single class representative. Even where there may have been more than one class representative or others class members available who had not been included as representatives, the cost would—at most—be that of several class members' damages.

B. Discussion

The use of offers of judgment posed an inherent threat to the nature and efficacy of class actions, particularly consumer class actions where any individual's damages could be relatively modest. While Proponents of Rule 68 asserted that they were merely utilizing the law as it stood and that a class action was a procedural, not substantive, device that there was a distinct threat to the class action mechanism would appear difficult to dispute. It was recognized, for instance, by the Supreme Court in *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed.2d 427 (1980), where the Court recognized the issue, "Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." On the other hand, however, there are occasions where no real class may exist and the case was brought as a class action due to a mistaken understanding or even as a mechanism to obtain a higher putative value for the case from the outset.

Case law had long recognized that offers of judgment was improper, at least where a motion for class certification had been made. *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003); *Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir. 1999); NEWBERG at § 15.36 (4th ed. 2002). The incentive created thereby to avoid offers of judgment by rushing to move for class certification left unanswered the propriety of an offer of judgment before a motion for certification. This was resolved by the Third Circuit in *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004), where the court held that "[a]bsent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint." It is commonly recognized that this decision probably resolves the debate and practitioners report

that the more reputable and experienced defense counsel are no longer attempting to make Rule 68 offers.

C. NACA Guideline

NACA believes that to avoid continued unproductive litigation in this area courts should not merely reject offers of judgment in the context of class actions (at least until class certification has been denied) but should affirmatively recognize the impropriety of such offers where they are used as a mechanism to subvert and derail class actions. That a putative class representative can reject such an offer now appears to be juridically clear.

Except when it is apparent that no class could be certified, NACA also believes that putative class counsel should counsel the client against accepting an offer of judgment made to a putative class representative before a decision on a motion for class certification. Acceptance of such offers will only tend to encourage defendants to continue making such offers.

Guideline 7—*Cy Pres* Awards

A. The Issue

Often, not all class members can be located to receive their pro rata share of a damage award. What happens to the undistributed residue? Are there circumstances under which the residue should revert to the defendant? Under what circumstances is a *cy pres* distribution of all or part of the settlement fund appropriate? What is class counsel's role in recommending recipients of such awards?

B. Discussion

A *cy pres* distribution occurs when funds from a settlement or judgment that belong to the class are distributed instead to organizations for the benefit of the class.[14] A related alternative distribution method is fluid recovery (also called rolling restitution) where there is no direct payment to the class or to an organization, but rather the defendant agrees to some form of price reduction in the future. For example, if a fast food company were sued for charging excess sales tax, a *cy pres* distribution could consist of a payment of an amount to a food bank. A fluid recovery in the same case could consist of the company reducing the price of all its food products for a sufficient period of time to all its customers to recoup the tax overcharges prospectively. This Guideline will discuss some fluid recovery cases, but is focused on cy pres distributions.

Commenters unanimously agreed that *cy pres* remedies are appropriate to ensure that undistributed residues are used to provide indirect benefit to absent members of the plaintiff class or to further the purposes of the statutes that formed the basis for the underlying litigation.

NEWBERG discusses the policies behind *cy pres* awards and concludes that *cy pres* distributions can be an appropriate exercise of the court's general equitable powers. NEWBERG, §10.16 *et seq.*

NEWBERG's conclusion is supported by the case law. E.g., *Bebchick v. Public Utilities Commission*, 318 F.2d 187 (D.C. Cir. 1963); *In Re Agent Orange Product Liability Litigation*, 818 F. 2d 179, 185 (2d Cir. 1987); *State of West Virginia v. Chas Pfizer Co*., 314 F. Supp. 710, 728 (SDNY 1970), *aff'd*, 440 F.2d 1079, 1083 (2d Cir. 1971); *Simer v. Rios*, 661 F.2d 655, 676 (7th Cir. 1981); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F. 2d 1301, 1307 (9th Cir. 1990); and *Nelson v. Greater Gadsden Housing Authority*, 802 F.2d 405, 409 (11th Cir. 1986).

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[14] "The term '*cy pres* ' appears to derive from the Norman-French term '*cy pres comme possible,*' meaning 'as near as possible.' *Cy pres* is a rule of construction which courts employ to carry out the spirit of a trust's terms when literal application of such terms is not feasible." Susan Beth Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought By State Attorneys General,* 68 FORDHAM L. REV. 361, 406 n. 212 (1999).

The Second Circuit opinion *In Re Agent Orange Product Liability Litigation* is particularly worth noting. The Court concluded that a district court may set aside a portion of settlement proceeds for programs designed to assist the class in order to maximize the beneficial impact of the settlement fund on the needs of the class. The Court distinguished its earlier decision in *Eisen v. Carlisle & Jacquelin,* 479 F. 2d 1005 (2d Cir. 1973) ("*Eisen III"), vacated and remanded on other grounds*, 417 U.S. 156 (1974), which reversed a trial court order allowing fluid recovery by reducing prices. The court explained that the fluid recovery at issue in *Eisen III* would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not and would result in a greatly increased number of doubtful but astronomical class claims in the federal courts. That concern was not present in *Agent Orange*, which was maintainable as a class action regardless of the form of recovery available to the plaintiff class. *In Re Agent Orange Product Liability Litigation, supra*, at 185.

State courts have also approved *cy pres* remedies. The propriety of *cy pres*, including creation of a consumer trust fund, was recognized by the California Supreme Court in *State of California v. Levi Strauss,* 41 Cal. 3d 460 (1986). The court concluded that *cy pres* awards are appropriate where there is a nexus between the proposed use of the fund and the class on whose behalf the case was litigated, or where the proposed use furthers the purpose of the statutes that formed the basis for the underlying suit. *Id*. at 472-473. *See, also, Boyle v, Giral*, 820 A.2d 561, 569 fn. 8 (D.C.C.A. 2003).[15] The rationale for *cy pres* awards is further explained in McCall, Sturdevant, Kaplan, and Hillebrand, "Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions," 46 Hastings Law J. 797 (1995).Thus, the law supports *cy pres* remedies in cases that are litigated to conclusion.

In the settlement context, it is clearly permissible to settle with defendants and include a *cy pres* provision in the agreement, because a defendant may agree to a settlement that provides for *cy pres* notwithstanding the *Eisen III* rule discussed above. *Beecher v. Able,* 575 F. 2d 1010, 1016 n. 3 (2d Cir. 1978).

There are two views on allowing residues to revert to defendants. One view considers that an alternative that would reward defendants for engaging in wrongful conduct is unacceptable, except where there are no ill-gotten gains to be disgorged. The other is that it is appropriate where there is no incentive for defendants to fail to distribute the damage award or to assist in locating absent class members because allowing the return of the residue may enable counsel to

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[15] There are a number of unreported cases supporting this position: *Vasquez v. Avco Financial Services of Southern California*, Los Angeles Superior Court Case No. NCC-11833B; *Beasley v. Wells Fargo Bank*, San Francisco Superior Court Case No. 861555, and a related case, *Kovitz v. Crocker National Bank,* San Francisco Superior Court Case No. 868914; *McClendon v. Security Pacific National Bank*, Alameda County Superior Court Case No. 613722-5; *Patterson v. ITT Consumer Financial Corporation*, San Francisco Superior Court Case No. 936818; *In Re: Domestic Air Transportation Antitrust Litigation*, No. 1-90 C 2485 MHOS & MAL No. 861 (consolidated Nov. 2, 1990); and *Starr v. Fleet Finance, Inc., et al.* Cobb County Georgia Superior Court Civil Action No. 9210-2314-06.

negotiate better relief to known class members and obtain an agreement as to injunctive relief.

There are also two divergent views on the propriety of *cy pres* awards of the entire damage fund with no distribution to the class. One view is that counsel's fiduciary duty to the members of the class requires that there must always be a direct distribution to class members, and only the undistributed residue used for a *cy pres* remedy. The other view is that where individual recoveries are unduly costly to distribute or too small to warrant the cashing of checks, *cy pres* awards of the entire damage fund is appropriate. One commenter said that traditional *cy pres* payments should only be made when the funds cannot be sensibly distributed to class members. This commenter gave an example of a settlement where the class members received direct payments, but there was also an initial *cy pres* distribution. In that instance, the class members could have been paid the amount in the *cy pres* fund. This commenter questioned whether it was possible to reconcile such an initial *cy pres* distribution with the theory of *cy pres* as being the next best alternative to direct distribution.

There is authority for using a *cy pres* remedy for the entirety of a statutory damage award when the amount of damages to each class member is too small to warrant distribution. *Gammon v. GC Services Ltd. Partnership*, 162 F.R.D. 313 (N.D.Ill. 1995), was a suit under the Fair Debt Collection Practices Act involving a proposed class of four million people, each of whom would be entitled to 13 cents if plaintiffs prevailed. Class counsel, moving to certify the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, suggested *cy pres* distribution of the entire damage award. The defendant did not dispute the propriety of this remedy, which the court assumed would be suitable. Citing NEWBERG, the court noted that class actions are designed not only to compensate individuals who have been harmed, but also to deter violations of the law, especially when small individual claims are involved. It concluded: "Disgorgement of illegal gains from wrongdoers, together with ... application of the recovery for the benefit of class members under *cy pres* doctrines, would fulfill the deterrence objectives of class actions." *Id*. at 321, quoting NEWBERG, §4.36. (Note that in *Mace v. Van Ru Credit Corporation,* 109 F.3d 338, 345 fn. 5 (7th Cir. 1997), *Gammon* was limited to its own unique facts.)

More recently, the court of appeals for the District of Columbia held that *cy pres* "distributions, including the entire amount of the consumer settlement fund rather than just the residue, are being used or advocated increasingly where direct distribution of settlement funds to individual class members is impractical; and where important consumer goals, such as disgorgement of ill-gotten gains from and deterrence of future over-pricing and manipulation of market allocation by the offending entities, can be achieved. " *Boyle v, Giral*, 820 A.2d 561, 569 (D.C.C.A. 2003).

There is agreement that it is the duty of class counsel to recommend *cy pres* recipients. In addition, commenters suggested that, because *cy pres* funds are by definition property of the class as a whole, participation of the defendant in the selection of the *cy pres* recipient raises serious problems. One commenter stated that he could not envision any circumstance in which it was appropriate for a defendant to participate in the selection process. However, another commenter said that a recipient that meets with the defendant's approval could result in greater

monetary benefits for the recipients.

It is quite true that many defendants (1) do not want worthy and effective organizations to get the money to do good work, (2) prefer to see the money go to non-controversial uses, (3) too often, will attempt to have the funds allocated to organizations it controls or already supports (which gives the defendant impermissible control over the *cy pres* and dilutes the benefit of the *cy pres* since the defendant is not adding new dollars for good purposes, but often merely taking credit for old dollars it already was committed to spend).[16] At a minimum, care must be taken to insure that no *cy pres* payments are proposed to any entity in which any defendant has any interest, financial or otherwise.

An advantage of the use of *cy pres* is that it often can serve as a substitute for a coupon-only settlement. Many commenters favor NACA's endorsement of a rule of thumb that says that when the relief to the class is quite small and when distribution would be economically inefficient, the better choice is to provide a significant *cy pres* payment rather than a *de minimis* check to each class member. Commenters have not been able to agree on the ceiling for this decision. Indeed, in some instances, $20 may be too little to warrant the effort while in other case, $10 may be enough.

Because it is the courts' role to protect the absent class members' interests , courts should carefully review the competence and record of organizations that are proposed as recipients. NACA believes that serious consideration should be given to using the unclaimed portion of the award for a long-term grant to an existing organization with competence in the issues raised in the underlying litigation. This will ensure that projects are of sufficient duration to result in real and concrete benefit to absent class members.

One commenter added concerns that *cy pres* recipients might be chosen who could otherwise be objectors to the settlement, pointing out the inevitable conflict between the recipient's financial self-interest and its obligation to its members or constituents.

C. NACA Guideline

In proposing a *cy pres* remedy, class counsel should propose a disposition of the unclaimed portion of the award that will either (1) protect the interests of the persons injured by the illegal conduct and thus indirectly benefit absent class members or (2) promote the purposes of the statutory prohibitions sought to be enforced in the underlying litigation. Class counsel should also insist that the recipients of the award be accountable to the court and should enter into

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[16] An industry group commenter said that "a *cy pres* distribution in an FDCPA class action should be made to an organization that promotes education of consumer laws and laws relating to the credit and collection industry." Although this might be an acceptable *cy pres* recipient, NACA does not believe it is the only possible one. NACA observes that industry groups often favor consumer education efforts over any advocacy that might actually curtail abusive industry practices.

memoranda of understanding to that effect with recipient organizations.[17] They should then monitor the recipients to insure that these goals are met.[18]

If class counsel wish to propose that a newly created organization receive the unclaimed funds, class counsel should be prepared to show the court how that organization has the ability and competence to work for the interests the underlying litigation sought to protect. This can be accomplished by providing information to the court about the current or proposed officers, directors, and staff of the organization. The work to be done by an existing or new organization should be set forth in a comprehensive proposal, together with time tables for accomplishing that work, which should indicate how the class will be indirectly benefited or the purposes of the underlying statutes will be furthered by these efforts.

Class counsel should insure that no *cy pres* payments are proposed to any entity in which any defendant has any interest, financial or otherwise.

Indeed, unless exceptional circumstances exist, the defendant should not have any role in the choice of the *cy pres* recipient. Instead, the class representative and class counsel should recommend a recipient of *cy pres* funds to the court, to be approved as part of the fairness hearing.

To ensure full accountability, counsel should insure disclosure of the details of the *cy pres* plan and the *cy pres* recipients as part of the notice to the class of any settlement, and should monitor the recipients to insure that they use the *cy pres* funds strictly in accordance with the terms of the court's order. For long term projects, counsel can oversee performance by requiring quarterly meetings with recipient organizations, semi-annual plans for work to be undertaken, and periodic reports of past accomplishments. Counsel should be entitled to compensation for work necessary to monitor implementation of the *cy pres* remedy at standard rates, with no enhancement or multiplier.

Class counsel should insist on direct distribution of damages to class members before recommending a *cy pres* remedy for the undistributed residue except in unusual circumstances. These include instances where individual recoveries are unduly costly to distribute because, for example, defendants have no computerized records that would enable them to generate a list of class members' names and addresses, or where individual damages are too small to warrant the

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[17] One commenter expressed the view that federal courts do not have the constitutional power to monitor or enforce any agreements with non-party *cy pres* recipients. NACA disagrees with this comment, because the non-party recipient submits to the jurisdiction by agreeing to accept the funds. If there is any doubt, this can be made an express condition of the distribution.

[18] One commenter noted that *cy pres* awards should not provide long-term employment for class counsel, and proposed selection of a recipient that did not require monitoring. NACA believes that there is no recipient who should be given unfettered and unreviewed use of *cy pres* money, because it is class counsel's duty to insure that the *cy pres* funds were in fact spent in the interests of the class.

issuance, processing, and cashing of checks.

Class counsel should recommend *cy pres* remedies which will provide indirect benefit to absent members of the class or which will further the purposes of the underlying litigation. They should also recommend mechanisms which will provide for monitoring by class counsel, and, ultimately, judicial oversight of the expenditure of the funds.

Guideline 8 — Attorney Fee Considerations

A. The Issue

The issue of attorney fees is important in class actions. If awards of attorney fees are too low, attorneys will not have the incentive to undertake, on a contingent basis, representing putative consumer class claims. The public policy goals, which include recovering money for consumers and deterring illegal conduct by defendants, furthered by worthy class actions cannot be achieved without the promise of fair and reasonable fee awards upon success. On the other hand, fee awards that are too high do not serve the best interests of the class members and some such awards have become the rallying point for criticism of class actions in general.

Considering attorney fees issues can be difficult and complicated because fee awards may be made on at least three different bases: statutory fee shifting, in which defendant pays the fee; awards from a common fund, in which the fees are paid out of the class members' recovery; and common benefit awards, in which the defendant pays the fee even in the absence of a fee shifting statute.

The prime focus of criticism is the size of the fees. In many instances, this problem is more apparent than real. For example, when the individual recovery is $50.00 per consumer, an attorneys' fee of $2 million might seem excessive at first glance. But if the total dollars actually recovered by the individual class members in such a case were $15 million, then fees are less than 14% of the total class recovery. This makes the fee reasonable with respect to the total recovery, which is the proper comparison. Criticism focused on a comparison between total fees and individual recoveries are either ill-informed or merely convenient cover for persons who oppose consumer class actions for other reasons.

But some criticism of excessive fees cannot be so easily dismissed. In particular, compelling criticism has been directed at cases in which the actual cash received by the class is minimal, if any, and the only other benefits received by the individual members are certificates of questionable value. The GM Pickup Truck cases, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir.), *cert. denied*, 516 US 824 (1995); *Bloyed v. General Motors Corp*., supra, and the Bronco II case, *In re: Ford Bronco II Products Liability litigation*, 1995 WL 373061 1995 U.S. DIST. LEXIS 3507 (E.D.La.1995) (rejecting settlement of a class action challenging dangerous vehicles that provided relief to the class in the form of a flashlight and safety video but no damages) are well known examples, but this problem had its roots in earlier cases such as the airline antitrust settlement, which also provided certificates to consumers and millions of dollars in attorney fees to the class lawyers.

In 1997, NACA criticized settlements that tied attorney fees to the "face" amount of certificates, rather than the actual value to the class of such non-monetary relief. 176 F.R.D. at 398-399. The Advisory Committee Notes to the 2003 amendments to Rule 23 echoed that criticism, stating that settlements "involving non-monetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class." Similarly,

28 USC §1712, enacted in 2005, provides: "If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorneys' fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed."

B. Discussion

The fundamental goal for approaches to calculation of attorney fees in consumer class actions is to provide sufficient reward to motivate class counsel to bring worthy cases, while avoiding unnecessary and undeserved overpayment. There are a variety of proposed approaches, but there is no perfect solution. Differences of opinion exist about the basic method for calculating attorney fees, as well as the details of such a calculation.

One viewpoint holds that class counsel should be paid only by lodestar (*i.e.*, reasonable number of hours spent times a reasonable hourly rate), enhanced by multipliers when appropriate. The leading lodestar/multiplier cases are: *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir.1974); *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir.1974); and *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp*., 487 F.2d 161 (3d Cir.1973), *on remand*, 382 F.Supp. 999 (E.D.Pa.1974), *rev'd on other grounds*, 540 F.2d 102 (3d Cir.1976) (*en banc*).

Generally speaking, this is the approach mandated when calculating a defendants' liability for fees in a "fee shifting" case, *i.e.*, where the statute sued upon provides that the losing defendant is required to pay the prevailing plaintiff's fees. The basic argument in favor of the lodestar/multiplier approach is that it provides for careful review of both the time claimed as reasonable and the hourly rates sought for that time. Proponents of this approach also argue that it effectively matches reward to worthwhile effort and avoids windfalls in easy cases.

But there are disadvantages to the lodestar/multiplier approach: (a) The award of multipliers of the lodestar fee is inconsistent and depends upon the trial court's exercise of discretion. Therefore, adherence to the lodestar/multiplier approach could make some class actions impossible to bring, if the resources needed to commit to the litigation were so sizable that the only way a law firm could economically justify taking on the case, and running the risk of recovering nothing, would be assurance—if the case is successful—of the likelihood of recovery of a multiplier of the lodestar amount or the potential of a large percentage recovery; (b) Some commentators contend that the lodestar/multiplier approach provides no incentive for class counsel to perform work as efficiently as possible, instead inviting "churning," and to seek early settlement where available; and (c) The effort required of the parties in submitting, and the court in scrutinizing, the detailed evidence documenting all time spent and evidentiary support for hourly rates claimed is burdensome and often develops into time-consuming satellite litigation. *See generally*, "Court Awarded Attorney Fees," REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237 (1985) ("1985 Third Circuit Report").

The alternative method for calculating attorney fees in a class action case which recovers

monetary relief (or its equivalent) for the class is to award an amount equal to a percentage of the total recovery obtained for the class members in the case. *See, e.g., Camden I Condominium Association v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) (percentage method required in common fund cases); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993) (same). While the precise percentage varies by case, there is authority for presuming an award in the 20-30% range to be reasonable and appropriate in most cases. *See, e.g., Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir.1989). *See also,* 1985 Third Circuit Report, *supra.* Proponents of this approach note that it keeps class counsel's financial interest closely aligned with that of the class itself, approximates the "free market" negotiated fees obtained in traditional contingency litigation (in which contingent fees of 33% to 40% are common), and avoids the disadvantages of lodestar/multiplier analysis noted above. In addition, proponents argue that the *possibility* of a large fee in comparison to effort required provides the necessary incentive for the risk-taking required of prospective class counsel when deciding whether to initiate difficult and expensive litigation with knowledge that —at best—no payment will be obtained for several years, and—at worst—no payment at all will be obtained if the litigation is unsuccessful.

Opponents of the percentage method contend that a standardized percentage approach (e.g., 20%-30%) results in overpayment in some cases, where either the effort required by class counsel was relatively modest or the size of the case was so large that even extensive efforts are overcompensated. More generally, those who advocate the lodestar/multiplier approach stress their preference that fee awards be based directly on an assessment of work done, rather than using an approach which does not do so.

Valuing the common fund, upon which a percentage may be based, also raises issues in some circumstances. Ignoring the difficulties which are inherent in valuing various forms of equitable relief, even a facially "simple" common fund may not necessarily translate directly into dollars in the pockets of class members. First there is the issue of "coupon settlements," in which the relief to the class is in the form of certificates which entitle class members to purchase a product or service in the future at a discount or at no charge. These problems, which were discussed extensively in the original version of these Guidelines, have largely been resolved by the 2003 amendments to Rule 23 and the 2005 enactment of 28 U.S.C. §1712.

One additional valuation issue remains. Many settlements are stated in total dollar amount available to the class, but provide that the unclaimed funds will revert back to the defendant. The amount of such reverting funds is likely to be higher where claim forms are required before class members receive their distribution,[19] but *some* amount of unclaimed funds will exist in almost any class action because many class members cannot be located with reasonable diligence. Whatever portion of the originally-available settlement is returned to the defendant arguably reduces the actual "fund" obtained by class counsel for the class. The case law is mixed regarding this issue. *Compare*, *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 852 (5th Cir. 1998) (District Court did not abuse its discretion in setting lodestar-calculated fee award in light of actual payout excluding reversionary funds, noting that the case

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[19] See Guideline 11 on improved notice of settlement.

did not involve a true common fund but instead merely a pre-calculated maximum possible payout), *with Williams v. MGM-Pathe Communications Co.,* 129 F.3d 1026, 1027 (9th Cir. 1997) (benchmark for fee award is 25% of entire fund, and District Court abused its discretion in basing award on actual distribution to class); *Waters v. International Precious Metals Corp***.,** 190 F.3d 1291, 1296 (11th Cir. 1999) (no abuse of discretion for District Court to base percentage on entire fund so long as it understood possibility of reversion; distinguishing *Strong*). *See also, International Precious Metals Corp. v. Waters***,** 530 U.S. 1223 (2000) (Statement of Justice O'Connor). Proponents of the "gross recovery" approach argue that the total amount made available to the class is a result of counsel's efforts and therefore, should be the basis for any percentage recovery. Opponents argue that the monetary value achieved for the class is represented by the amount paid to class members, not the amount theoretically available. Opponents also express concern that class counsel will not have the financial incentive to argue against unnecessary (or unnecessarily complicated) claim forms if payment is not dependent upon the amount actually paid to class members. The Advisory Committee Notes to the 2003 amendments to Rule 23, subd. h, suggest that courts examine the extent to which claims procedures result in actual payout to the class, but does not squarely take a position on this conflict among the circuits.

The interaction between the lodestar/multiplier and percentage approaches is sometimes complex. In many federal circuits, the district court has discretion to choose between the lodestar/multiplier or the percentage method. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047, 1050 (9th Cir. 2002); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241 (8th Cir. 1996). Some circuits express a "preference" for the percentage method in common fund cases, but permit the trial court to exercise discretion contrary to that preference. *See, e.g.*, *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (percentage of the fund method preferred in common fund cases, but either method permissible).

A recent trend in some federal courts has been to use the lodestar/multiplier approach (or some variant) to cross-check the reasonableness of a dollar amount reached via the percentage method. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047, 1050 (9th Cir. 2002); *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001) (noting that use of lodestar/multiplier analysis to cross-check is time-consuming, and advising that other factors be used to assess reasonableness where feasible). While this may perhaps avoid windfalls in individual cases, a "blended" approach would seem to undermine one of the purposes of the percentage of the fund method of calculating fees, *i.e.* the possibility of a large fee relative to effort required as an incentive to undertake difficult and risky cases. It also is inconsistent with the observed results of the free market in individual contingent cases, which generally provide for set percentages based solely on client recovery. *Cf.*, *In re Synthroid Mktg. Litig***.,** 264 F.3d 712, 718 (7th Cir. 2001) (ultimate goal in awarding class counsel fees is to match as closely as possible the "market rate" for legal services in the case). One commenter argued, however, that the 20%-30% range for percentage awards is arbitrary, merely reflecting historical court awards, since there is no actual "market" for class counsel representation. This commenter believes that a lodestar crosscheck is necessary if such percentages are to be the starting point for fee awards.

A complicating factor is that it is not always clear whether a case is a common fund, a fee-shifting, or a common benefit case. Which category (or categories) the case falls into may have implications for the potential recovery of fees from the defendant and the optimal method for calculating class counsel's fees. It is important to note that these alternative bases for awarding fees are not necessarily in conflict: fees could be recovered from the defendant under a fee-shifting statute or other theory and paid into the common fund, with class counsel receiving a percentage of the resulting total recovery. This approach finds support in *Skelton v. General Motors Corp*., 860 F.2d 250 (7th Cir.1988), which involved the settlement of statutory fee shifting claims. The court noted that a settlement merges all claims, including the client's statutory fee shifting claim, into one common fund that belongs to the class clients, and ordered fees to be calculated under common fund principles. This view is also consistent with case law noting that the amount that an opposing party can be required to pay as a "reasonable" fee may be substantially less than a reasonable fee owed by the client (or class of clients). *Venegas v. Mitchell*, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990).

Whatever the method used to calculate fees, any contingent fee award must take into account the difficulty, complexity, and the risk of the case, the relief obtained for the class, and the delay in payment, as well as the fact that some cases will result in no fee at all. Therefore, it is entirely appropriate in most class action cases to award fees that are in excess of a fee calculated solely on an hourly basis without any multiplier. This concept is expressly stated in cases such as *Fischel v. Equitable Life Assurance Society Of The United States*, 307 F.3d 997, 1008 (9th Cir. 2002) ("[i]t is an abuse of discretion to fail to apply a risk multiplier, however, when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky."). *See also*, *Vizcaino v Microsoft*, 290 F.3d 1043 (9th Cir. 2000), *cert. denied sub nom.*, *Vizcaino v. Waite*, 154 L. Ed. 2d 425 (2002) (survey of many decisions in which they are granted demonstrates that multipliers between 1 and 4 are the norm in common fund cases).

When a fee is to be calculated on a percentage basis, there is no fixed percentage that is appropriate to all cases, though the vast majority of awards fall within the 20%-30% range. Some commenters and case law urge a "sliding scale" approach to percentage awards, i.e., the percentage awarded should be smaller when the class recovery is unusually large. But this view is controversial. *See*, *In re Cendant Corp. Litig*., 264 F.3d 201, 284 (3d Cir. 2001) (citing conflicting authorities and noting argument that this approach provides an incentive to "settle cheap"). On the other hand, there are also cases where a percentage award in the "normal" range may be unreasonably low, for example, in a case where the primary relief obtained is a significant injunction, with relatively modest monetary recovery for the class. The equitable relief might, in a particular case, justify a fee that far exceeds 30% of the monetary component of the recovery.

A distinct question, unrelated to the fee-calculation method, arises when class counsel negotiates a settlement. Simultaneously negotiating class relief and attorney fees for class counsel creates a potential conflict of interest. *In re GMC Pick-Up Truck Fuel Tank Prods.*

LiabLitig., 55 F.3d 768, 804 (3d Cir. 1995). Some commenters argue that there is an inherent problem with negotiating fees with opposing counsel, even when counsel have first agreed on relief to the class. Because the Court has an independent duty to examine the fees, these commenters feel, early agreement does little but create the appearance of collusion between class counsel and the defendant. *See Waters v. International Precious Metals Corp*., 190 F.3d 1291, 1293 (11th Cir. 1999). Others contend that settlement often would be impossible to achieve unless the defendants understand the extent of their total exposure, and urge that that there is no reason not to reach agreement on fees (subject to the court's later review) so long as negotiating fees follows agreement on relief for the class on the merits. MANUAL FOR COMPLEX LITIGATION, Fourth, §21.7 (2004).

C. NACA Guideline

Reasonable attorney fees must be awarded in consumer class actions so that lawyers are provided sufficient incentive to undertake the substantial risks involved in privately enforcing consumer protection laws. But excessive and unreasonable amounts should be neither sought nor awarded. Ultimate authority over fee awards rests with the court. Nevertheless, NACA firmly believes that class counsel have a special obligation not to submit excessive fee requests because fees—directly or indirectly—reduce the amount otherwise available to class members (except in "pure" fee-shifting situations, where the attorneys' fee is assessed from the defendant, not the class). We recognize that the determination of what is an "excessive" request is often difficult and uncertain. But this difficulty does *not* mean that a reasonable request equates to whatever a particular court might award in a procedural context where there may not be adversary briefing on the issue. Obligations to the class and concern for the long-run integrity of the class action system of justice require that class counsel not take undue advantage, even if a court might let it pass.

l. Fee Discussions During Settlement Negotiations.

The Supreme Court has recognized that in a fee-shifting case the defendant has an economic interest in resolving the fee issues in a settlement negotiation along with all other statutory claims. *See White v. New Hampshire*, 455 U.S. 445, 452 n. 14, 102 S.Ct. 1162, 1167 n. 14, 71 L.Ed.2d325 (1982). Therefore, class counsel should not simply refuse to discuss fees in negotiating settlement. But class counsel should avoid circumstances that may increase the danger of an apparent or actual improper *quid pro quo* detrimental to the class. In fact, some jurisdictions prefer that all fee discussions be postponed until the settlement is judicially approved, or at least until settlement negotiations have been concluded. *See In re Community Bank of Northern Virginia*, 418 F.3d 277, 308 (3d Cir 2005). One alternative is to obtain the defendant's binding agreement to all class relief and then to submit the fees issue to the court for determination.

In statutory fee-type cases, an acceptable alternative is to obtain the defendant's agreement on class relief contingent on successfully negotiating an agreement on fees. If an agreement cannot be reached, the settlement might provide that the court will determine the

defendant's obligation to pay fees. It is also acceptable to negotiate fees after all relief has been agreed on for the class, and then submit the entire agreement to both the court and the class for review and approval.

In common fund cases, there is no need to discuss fees with the defendant because the class clients, not the defendant, pay the fee from the fund that was created by their counsel, in an amount decided by the court. If the amount of a fee is sought to be justified on a "percentage of the fund" basis, counsel should not negotiate a settlement that is contingent on the approval of any minimum amount. Instead, the court should be left to approve the substantive settlement itself, and only then decide the amount of a fair fee. *Staton v. Boeing*, 327 F.3d 938, 969-972 (9th Cir. 2003). So-called "clear sailing" agreements (in which the defendant agrees not to oppose a fee request of up to a certain amount) are of no relevance in such cases and should be avoided unless the historical animosity between the parties or counsel suggests the likelihood of an essentially malicious opposition by a defendant with no actual interest in the outcome of the fee award.

2. Percentage Benchmarks for Most Common Fund Cases.

For the vast majority of common fund cases, courts and counsel should examine the reasonableness of the fees requested by the percentage benchmarks that have been recognized in similar cases. *See, e.g., Camden I Condominium Association v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) (percentage method required in common fund cases); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993) (same). While many circuits leave it to the trial court to select between the percentage and the lodestar/multiplier methods—and class counsel must, of course, comply with the court's decision—most fee requests in common fund cases should be presented in percentage of the fund terms, absent direction otherwise from the court. Courts should ordinarily entertain fee requests on this basis in common fund cases, unless specific factors (such as significant injunctive or other nonmonetary relief, other difficulties in assessing the true monetary value of class relief, etc.) justify the use of lodestar/multiplier analysis rather than percentage analysis in the particular case.

In the absence of special circumstances, the percentage award should generally fall within (or close to) the benchmark range of between 20% and 30% of the fund value. *See, e.g.*, *Vizcaino v Microsoft*, 290 F.3d 1043 (9th Cir. 2000), *cert. denied sub nom.*, *Vizcaino v. Waite*, 154 L. Ed. 2d 425 (2002) (1996-2001 survey of common funds valued at $50-$200 million; fee awards of 25%-40% awarded in half of the 34 cases examined); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (20%-30% viewed as the "benchmark"); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 308 (3d Cir. 2005) (noting studies showing fee awards over 25% in large recovery cases); *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291 (9th Cir. 1994).

Courts should limit the use of a "lodestar crosscheck" to unusually large cases, in which the monetary relief, however valued or estimated, exceeds $50 million, where reasonable fees may constitute a percentage smaller than the benchmark. Such cross-checks in

typical cases simply add another level of analysis, and may even undermine the purposes of the percentage-of-the-fund approach. Where injunctive or other non-monetary relief is obtained, or where the common fund is difficult to value or its value depends upon future contingencies (such as the redemption of coupons), the lodestar/multiplier approach may properly supplant the percentage-of-the-fund benchmarks. Provided the class receives real value and is receiving benefits commensurate with the fees to be awarded to class counsel, it is not per se unreasonable for counsel to set aside a monetary fund from which attorney fees will be paid even though the class may be receiving primarily equitable benefits. But counsel should be aware that "the timing of fee negotiations" in such cases may be considered as a factor by the courts in the "review of the adequacy of the class' representation." *General Motors*, 55 F.3d at 803-04. And the settlement itself should not depend on the court's approval of the amount of fees proposed by the parties. *Staton, supra.*

3. Issues Arising in Cases with Fee-Shifting Claims.

In a common fund case where the underlying claims are based on fee-shifting statutes, it is generally best to negotiate an additional amount representing the right to fees from the defendant directly, in order to limit the fees paid by class counsel's clients and maximize the total recovery to the class. It may be appropriate in such a case to merge the statutory fee into the common fund (*see Skelton*, *supra*), and to also obtain a portion of the fees from the common fund. If the defendant can be persuaded to offer an additional sum for fees, that can be accepted as a credit toward a common fund award made by the court. In a statutory fee shifting case which is not converted to a common fund case, fees should be recovered solely from the defendant and be based on lodestar analysis.

4. Calculation of the "Fund" When Undistributed Amounts Revert to the Defendant.

The amount of the "fund" on which a percentage award is calculated should exclude any amount which may revert or has already reverted back to the defendant as undistributed funds. While it may be relevant to the calculation of a reasonable fee (for example, perhaps justifying a slightly larger percentage than otherwise appropriate) that a large total amount was initially made available for distribution to class members, the benchmark percentage figures (i.e. 20%-30%, in most cases) should be applied after deducting amounts that the defendant does not ultimately pay out as part of the settlement or judgment. It is the actual amount paid by defendant to class members, or in *cy pres* distribution, that represents the recovery in the case from which a percentage fee should be calculated. If class counsel does not wish to wait until the claims process is complete to seek fees, then a partial payment may be sought based upon a percentage of any minimum payout guaranteed in the settlement agreement. Alternatively, and preferably, settlements can be negotiated which provide that any unclaimed funds be distributed *cy pres* rather than reverting back to the defendant. In that situation, a fee based on a percentage of the entire settlement amount can properly be brought upon final approval of the settlement.

5. Notice to the Class of Intent to Seek Fees.

Before the court can give final approval to a proposed class action settlement, notice must be provided to the class outlining the terms of the settlement. F.R.C.P., Rule 23(e)(1)(B). One of the terms which should always be included in such notice is the maximum amount of attorney fees which class counsel will or may seek as part of the settlement. In a common fund case where a percentage will be sought, that fact and the specific maximum percentage to be requested should be stated in the notice. In statutory fee shifting cases, the lodestar, if agreed to by the parties, should be disclosed in the class notice. If there is no agreement, the amount class counsel intend to request from the court should be disclosed. It is also a good idea to disclose the amount of fees per class member, if that can be easily calculated, even in approximation. For example, the class must be told that the lawyers will seek $2 million in fees, but could also be told that this equates to $6.67 per class member. The average fee per class member need not be disclosed when recoveries vary substantially among class members, since that number would not be meaningful, or in pure statutory fee-shifting contexts, where the amount has not been negotiated in advance as part of the settlement, but instead will be determined by the Court and paid by the defendant.

6. Fees for Future Monitoring.

As discussed more fully in Guideline 16, counsel should be aware of the need to monitor the defendant's compliance with the settlement or judgment terms. The preferable way to provide for such effort is to include within any request for fees a provision that an additional lodestar request may be submitted seeking compensation for such future efforts.

Guideline 9— Class Member Releases

A. The Issue

The release of claims by representative plaintiffs and class members raises several questions. Is it appropriate to release class claims without individual class member signatures? When may the scope of the class claims released exceed the scope of claims certified by the court or the scope of the pleadings? Should the scope of the class representative's individual release be identical to the scope of the class release?

B. Discussion

In agreeing to settle a class action, the defendant understandably wishes to protect against later suits by class members for the same alleged wrongs that are being settled through the class action. Ordinary principles of *res judicata* and collateral estoppel apply in the class action context to bar claims from being litigated again later, so long as there was adequate representation of the class in the earlier case. *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996). As in individual cases, defendants generally insist upon including releases within a negotiated settlement document. In some cases, defendants may also seek individual releases from class members, either as part of the language contained in claim forms or as an endorsement on settlement distribution checks. There does not appear to be any benefit from releases which do not exceed the scope of the *res judicata* bar, but neither does there appear to be any harm.

Before the *Matsushita* case, there was some uncertainty whether class-wide releases that were broader than the scope of the pleadings or certified claims were binding upon individual class members in later litigation. As a noted commentator states: "A class action settlement agreement cannot release the claims of absent class members. Only absent class members can release their own claims." Newberg §§ 12.17, at 12-52 (3d ed. 1992). But Newberg later notes that an alternative to individual releases is to include "a constructive release clause in the settlement agreement" advising that acceptance of settlement benefits releases whatever claims are described in the settlement agreement. Id. at 12-52--12-56.

The Supreme Court's decision in *Matsushita* holds that *res judicata* bars re-litigating non-certified claims (and even claims not contained in the pleadings) that are released on a class-wide basis, so long as there is adequate representation and an opportunity to opt out. Court approval of a proposed settlement should include a determination that plaintiffs and class counsel adequately represent the class on all of the settled issues, even if certification of some of the issues was previously denied.

The unanimous view of those who submitted comments to the guidelines was that if the scope of the class-wide release is limited to those claims certified by the court for class treatment, individual releases are unnecessary and unproductive. Although the consensus was that class counsel should be cautious in discussing settlement of claims beyond the scope of an

earlier class certification order (or, if no order has yet been entered, beyond the scope of the pleadings), one commenter raised the issue that a defendant may be reluctant to pay substantial amounts to settle a case without the assurance that unpleaded claims are released. Several comments suggested that if settlement of such claims is agreed to, counsel should seek additional settlement compensation for class members.

While it is unusual for individual claims of a named representative to be asserted together with class claims in one complaint, in some cases instances this may be necessary. For example, cases involving housing fraud typically involve several legal claims. Although not all of the claims may be suitable for class certification, the class representative must plead all claims, including individual claims, in a single complaint. One comment stressed that it is more favorable to avoid including individual claims when possible.

The opportunity to opt out of a proposed settlement is particularly important if claims are being settled that have not been previously certified by the Court. Although it is common practice to offer class members only one opportunity to opt out of a class action, a second opportunity may be advisable. *See* Rule 23(e)(3). When there is a contested class certification motion, that opportunity usually comes immediately after certification. Although a post-certification settlement requires notice of the settlement terms and an opportunity to object, class members are usually not given a second opportunity to opt out. If claims are being settled that were not described in the initial class notice, failure to give a second opt-out opportunity raises serious fairness issues.

In addition, there are serious, and probably fatal, objections to any settlement that purports to release potential future claims of persons who have not suffered any damage at the time of settlement. Settlements of this nature are rare, or even unknown, in consumer cases. Therefore, this guideline will not discuss in depth the many issues relating to these settlements. Even if it were possible to notify such future-damaged class members, it is impossible to provide any meaningful notice and opportunity to opt out because they have not been injured and thus cannot assess what the proposed settlement means to them. The Supreme Court addressed future-damage issues in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). There, the Court found that including future-damaged persons in the class defeated the predominance requirement of Rule 23(a)(4) and also made it impossible for the named class members (who were not future-damaged) to represent the interests of the absent future-damaged class members, as required by Rule 23(b)(4). 521 U.S. at 624-627, 117 S.Ct. at 2250-51, 138 L.Ed.2d at 713- 714. In addition, the Court noted that there were significant problems of adequate notice to a class that included persons who were not then aware of their damages. 521 U.S. at 628, 117 S.Ct. at 2252, 138 L.Ed.2d at 716. The Class Action Fairness Act of 2005 addressed these concerns, as well, declaring that "a class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided." PL 109-2, 2005 S 5; 119 Stat 5.

C. NACA Guideline

The scope of the release should be limited to the claims alleged in the pleadings and certified by the court. In addition, a claim should not be released unless the settlement includes relief for the claim. Except in unusual circumstances, counsel should not agree to any settlement which releases non-certified or non-plead claims. In such circumstances, class members must be given a later opportunity to exclude themselves from the settlement. The scope of the release must be fully set forth in the notice.[20] Counsel must strive to make the release understandable to class members.

Class counsel should proceed cautiously in discussing settlement of claims outside the scope of the pleadings or certified claims. The doctrines of *res judicata* and collateral estoppel preclude subsequent class litigation based on alternative legal theories arising out of the same set of facts and thus it may be reasonable to release alternative claims that could have been asserted, even if not contained in the pleadings or specifically certified. Alternative individual claims arising out of the same set of facts may not necessarily be barred and therefore, the release should not include such non-barred claims unless fair compensation is paid for the claims. Class counsel must discover the scope of cases pending against the defendant to be able to make a determination whether a "general release" is appropriate. To protect class members from releasing claims unknown or unforeseen to class counsel, counsel may consider adding a warning to the release exempting claims contained in pending litigation not disclosed by the defendant as of the time of settlement.

If a defendant seeks a release of claims arising from factual circumstances not alleged in the complaint, or as to which certification has been sought but not granted, class counsel should resist releasing these claims or, if appropriate, seek additional compensation to the class for such releases. If possible, negotiating certified claims should precede negotiating non-certified ones. Adequacy of representation as to non-certified claims should be addressed in the briefs supporting a proposed settlement.

Although a "general release" may be appropriate for the named class representatives, absent class members should not be required to release independent individual claims or claims as yet unknown in order to receive settlement benefits. Specifically, if the class settlement only provides injunctive benefits that do not result in restitution or other monetary payments to individual class members, the release should provide that individual damages claims are not being released unless counsel has investigated the claims adequately and determined them to be

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[20] When the scope of release in a proposed settlement of a class action is fully disclosed in the class notice, with opportunity for opting out, then such disclosure will strongly support scope of release. Fed.Rules Civ. Proc.Rule 23(e), 28 U.S.C. If a class member demonstrates that they were not provided notice required under subsection (b), that class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree. Class Action Fairness Act of 2005, 119 Stat 5.

meritless or of extremely limited value. In settling class actions involving homes, class counsel should be especially careful not to include broad release language.[21]

If class counsel has deemed it appropriate to require class members to submit a proof of claim form in order to receive compensation, then class counsel must seriously evaluate whether class members who fail to submit a claim form should be bound by any release.[22] Class counsel should also consider carefully, based on the type of case, the scope of the release, and the value of the compensation as compared to the value of the claims being released, whether to include language on the claim form regarding the requirement of the class member to release claims should they return the form. This language may confuse and scare class members, particularly if the settlement fund is not a predetermined amount, but rather paid per claim form returned.

Guideline 10—Confidentiality

A. The Issue

Because they are representative actions, class proceedings must be public. Absent class members cannot fairly be bound by proceedings that are kept secret from them. Decisions regarding whether to opt out of the case, participate in a proposed settlement, seek to intervene, or file a separate individual action all depend upon whether basic information about the class action litigation is available. Because consumer class actions address widespread, similar practices by a defendant, the details about those practices are likely to be of interest to other victims who are considering filing (or have already filed) individual cases seeking damages.

Nevertheless, privacy concerns may be raised by disclosure of certain information exchanged in discovery or filed with the court in consumer class actions, as with other types of litigation. Legitimate privacy concerns must be balanced against the legitimate wishes of absent class members or non-litigants' legitimate reasons for making consumer class action information publicly available.

B. Discussion

Some commenters argue that class counsel should never voluntarily agree to a protective order that permits a defendant to designate discovery documents and information "confidential" thereby precluding public access. These commenters recognize that there are some limited circumstances in which the courts have recognized legitimate bases for confidentiality, such as true "trade secrets" or other clear grounds. Those who opposed entry into such agreements for protective orders contend that they are almost always overbroad and defendants reflexively "over-designate" materials with little justification. By stipulating to entry of broad protective orders, class counsel fail to work against this overall trend, which offends public policy. Therefore, these commenters argue that the better approach is to require the defendant to make a

[21] For additional guidance on releases in class actions involving homes, see Guideline 3.
[22] For guidance on the appropriateness of using claims forms, see Guideline 12.

showing to the court under the fairly stringent applicable standards. *See, e.g.*, *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (general presumption in favor of public access to court records); *Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 193 (3d Cir. 2001) (presumption has particular force in class action cases); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y., 2002) (noting split in circuits regarding necessity of showing specific alleged harm to establish "good cause" under FRCP 26(c) for a protective order, but concluding that such specificity is always required if the claimed harm from disclosure is contended to be a threat to business as opposed to personal interests).

Other commenters disagree. Generally, while these commenters agree that defendants frequently designate too many documents as confidential and that the public interest would be better served with fewer and narrower protective orders, they expressed the opinion that refusing to stipulate to a protective order often delays discovery. These commenters note that their primary obligation is to their clients and the class members and that delay should be avoided where possible. Several commenters also noted that some courts seem skeptical about or even hostile to class counsel's motives for declining to stipulate, even where class counsel does nothing more than insist on the showing required under the relevant case law.

Another issue involving confidentiality is whether the terms of class action settlements can ever be kept secret from class members, and if so, under what circumstances. While all commenters agree that such secrecy should be rare, they differ on the question whether they might ever be proper.

In many kinds of litigation, stipulations to keep settlement terms confidential are common. Generally, where the parties apprise a court of confidential terms, the usual rules regarding filings under seal apply and the court may conclude that such terms should remain unavailable to public inspection under those rules. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004). This general rule has little or no application in class action cases, because the absent class members must be permitted to review any proposed settlement terms before deciding whether to object or, if applicable, opt out of the case. Thus, it is indisputable that class action settlements cannot routinely be made confidential.

However, some commenters believe that portions of settlement documents should occasionally be protected from public view. For example, if a plaintiff's or class members' personal information—such as social security numbers—were included within settlement documents, that information should not become publicly available to persons who might misuse it. Some of these commenters believe that analogous corporate financial or proprietary information might also merit secrecy in some contexts. These commenters propose that the question be left for case-by-case review and approval by the court presiding over the class action.

Other commenters argue that only a black letter rule against confidentiality can protect the overriding public interest. These commenters insist that any other position opens the door to excessive proposals for confidentiality in a context where the courts may not be fully briefed about the absent class members' rights. Instead of permitting confidentiality in class action

settlements, these commenters urge that settlement documents be drafted to omit truly personal or proprietary information.

Another commenter said that the results of class action distribution should be publicly available. This commenter proposed that courts should require public filings by the parties or the settlement administrator detailing the amounts ultimately claimed or distributed when the settlement process has been completed.

C. NACA Guidelines

Class counsel should vigilantly oppose overly-broad and unnecessary confidentiality in class action cases. Except where the exigencies of the case and the interests of the class demand it, class counsel should not agree to a proposed stipulation containing overly-broad confidentiality terms regarding discovery merely to avoid the effort required to litigate the merits of the confidentiality question or to obtain earlier discovery. As with any issue in litigation, however, there may be a range of reasonable provisions regarding confidentiality and class counsel may properly compromise on this question with a defendant negotiating in good faith.

Class action settlement documents must remain open and available to the public in virtually all circumstances. In rare cases, the parties might properly stipulate that specific personal or proprietary information in such documents be sealed from public view. But under no circumstances may the amount of the settlement, the amount of attorney fees sought or awarded, or the scope of the release of claims of either the class representatives or the class members be kept confidential. These core provisions must be publicly available before and after approval of any proposed class action settlement.

Guideline 11— Improved Notice of Settlement

A. The Issue

One recurring and significant problem with class action settlements has been class notice form and content, particularly for settlement notices. Over the years, a consensus has developed that traditional "tombstone" and other forms of settlement notice were too often presented in such fine print and were sufficiently complicated and unclear that the class members did not understand the nature of the relief sought or obtained in their names. The notices therefore did not provide the information necessary for class members to make an informed decision whether to remain members of the class, to opt out, or to object to the settlement.

The view that notices were too complicated and confusing led to the 2003 amendment of Federal Rule of Civil Procedure 23 to include Rule 23(c)(2)(B), which now requires that a notice "must concisely and clearly state in plain, easily understood language: the nature of the action[;] the definition of the class certified[;] the class claims, issues, or defenses, that a class member may enter an appearance through counsel if the member so desires[; and] the binding effect of a class judgment on class members under Rule 23(c)(3)."

In turn, and as the Federal Rule 23 Advisory Committee notes state, the Federal Judicial Center has created "illustrative clear-notice forms" that can "provide a helpful starting point for [some] actions." *See* www.fjc.gov. But some commentators and practitioners believe that even these simplified forms are themselves too complicated. For one, the products liability class action summary notice form itself fills a full page and contains—even if not in dense or legalistic language—a great deal of hard-to-digest information.

Increasingly, for publication or posting on web sites practitioners have been turning to more simplified forms of summary notice that state, in plain terms and using easier-to-read graphic fonts and presentation, the nature of the case, who is in the class, what relief is sought and, for settlement notices, the relief available and the availability of opting out or objecting. One advantage of this approach is that it can permit a broader reach by having the notices be bolder and possibly smaller but more widely published. Such "summary notices" usually, in turn, also provide telephone, website, and physical addresses from which more full notices—containing all the information required by Rule 23(c)(2)(B) as well as even further detail —can be obtained.

Full notices now often have a summary at the outset of the most salient points (e.g., who is in the class, what relief is sought or being provided by settlement, how claims can be made, who counsel is or what fees they might be requesting, and how counsel can be contacted), with the full details of the settlement (including, for example, such items as who is excluded, what are the verbatim terms of the release, etc.) set forth below.

Another issue is what form notice is to take. Options include direct mail, newspaper and magazine publication, email, Internet websites, Internet press-releases, on-site (i.e., in-store)

postings, and even, in some large class action settlements, radio and television advertisements. Little guidance has been provided in this area either as a matter of judicial decision-making or of commentator guidance, except for the broad admonition that the notice meet the Constitutional directive of being the best notice practicable. (In some jurisdictions, state laws may require some specific forms of notice.)

B. Discussion

There appears to be no conflict in viewpoints as to what is desired as to the form of notice. Unanimity exists in favor of simple, easy-to-read informative notices. To the extent differences arise, they are of two varieties: first, whether all forms of notice must contain everything set forth in Rule 23(c)(2)(B) or whether a form of summary notice with fuller notices being made available will suffice, and, second, the negotiation of actual notices in actual cases. At least one commentator strongly believed the Federal Judicial Center's form of notices included all the necessary and relevant information and that forms of more summary notice were not sufficient. But more practitioners appeared to believe that, if appropriately used and disseminated, summary notices can be more effective and that the Federal Judicial Center's form notices were somewhat more detailed than necessary.

As a practical matter in negotiating the notice forms, practitioners will often find that defendants (not always, but as a rule) will wish to include more, instead of less, information and present it in a more complicated, rather than simple, fashion while class counsel will wish to present less information in a more straightforward fashion in order to increase the likelihood that class members will seek further information because they have read, paid attention to, and understood the notice. For example, although defendants may often wish to see in notices the exclusions from the class (e.g., employees, officers, agents, subsidiaries of the defendant), class counsel will argue that information needs only to be in a full notice and not in a summary notice.

Nor is there much divergence, in theory, as to the manner of notice. Here, again, the main conflicts arise in the actual development of notice programs and, not surprisingly, defendants wish to see less, while class counsel wish to see greater, dissemination of settlement notices. The positions sometimes reverse when the notice is simply of the certification—then, class counsel, often having to pay for notice in the first instance, may desire less notice whereas defendants may press for more notice in order to drive class counsel to the settlement bargaining table.

C. NACA Guideline

NACA continues to support simplified, plain language disclosure of the salient aspects of a class, including the settlement terms. NACA also supports notice that is designed to reach as many class members as possible. While such determinations invariably depend on the nature of the case, the class size and its make-up, NACA believes summary notices can be valuable and should be encouraged, provided that they remain detailed enough to be meaningful. Certainly, while they can catch consumer class members' attention most readily, an easy way to obtain

fuller notice must be provided. Summary notices can either be summaries at the beginning of a "full" notice (as where notice has been provided by direct mail) or two-tiered notices—summary notices combined with available full-form notices. Summaries or summary notices should be considered if doing so can broaden the reach of the notice by permitting more widespread dissemination. A practitioner using a summary notice, however, must ensure that a defendant does not agree to summary notice as a way to save money by simply shrinking the size of the notice. If anything, the use of a summary notice should be pressed for as a means to ensure wider, not more limited, dissemination. When used, the most salient items of information that should be set forth include:

- A clear statement explaining how to tell whether a consumer is a class member.
- (For settlement classes.) The total amount of relief to be granted the class, stated in dollars where the payment is in cash or credit to an account, and the nature and form of the individual relief each class member could obtain.
- How further information can be obtained and more than one means (e.g., phone, fax, email, websites, and mail) of obtaining information should be provided.
- Within a full notice, in addition, the following information should be included:
    - The full range of recoveries that class members could obtain, either at trial or through the settlement.
    - The total maximum fees, in dollars, to be sought by the class attorneys, and the method whereby they were calculated (hourly, hourly with a multiplier, percentage, or a combination), as well as the source from which payment will be sought.
    - The nature of the claims in the case and the defenses to those claims.
    - Proposed distribution of any unclaimed funds, including whether they will revert to defendants.
    - Options available to class members including at least opting out and objecting.
    - What the class member would release by not opt-ing-out from the settlement.

As to forms of notice, NACA believes that there is rarely a reason why, in addition to the traditional forms of direct mail and publication, Internet publication, email, websites and, when appropriate, notification of concerned groups should not all be undertaken and utilized in addition to the traditional forms.

NACA also recommends, where appropriate, that counsel might consider soliciting the advice of readability experts (often found at local universities) to recommend simplified ways of expressing the relevant concepts. Even if this may be cost-prohibitive or unnecessary in many cases, it is a matter worth considering, particularly if the parties have reached an impasse on the notice's wording or where a defendant is insisting upon legalistic or technical wording. At the very least, readability of the notice should be checked using a word processor. (Most word processing programs today have a tool that allows the grade level of a document to be checked. Although this is an imprecise measure, it can give class counsel a general understanding of their writing's complexity.)

Finally NACA recommends considering non-English notice publication, in addition to English notices, where a substantial portion of the class may not speak English.

Guideline 12—Claim Forms

A. The Issue

Claim forms may be used in class action settlements as a means to identify class members and to determine the amount of relief class members are entitled. Claim forms may have the undesirable effect of eliminating eligible class members from participation in the settlement, however, and are not appropriate in all cases. Class counsel must consider whether it is appropriate to use claim forms for the distribution of funds in a class action settlement. If claim forms are determined to be appropriate to use, counsel must consider what information to include in the claim form, whether class members who fail to submit a claim form will be bound by a release, and what mechanisms are necessary to ensure the integrity of the claim form process.

B. Discussion

There are diverse viewpoints regarding whether claim forms should be used to distribute class action settlement funds. While some may argue that claim forms are never appropriate, most agree that in limited circumstances, they may be a necessary means to distribute settlement funds. The most common view is that claims forms only should be used as a last resort.

There is a very strong view that claims forms are never appropriate if the identity and probable location of class members can be determined, such as in class actions involving home loans or credit accounts. It seems that in these cases, the primary reason to use claim forms is to limit class recovery or to whittle the class down so that participating members receive more relief. This may have an adverse affect, however, on less-sophisticated class members who are unable to understand the claim form process. One comment noted that claims forms may be sought by defendants, especially in tandem with an opt-out class, as a way of limiting recovery and wiping out many class members' claims.

A less stringent view is that claims forms may be appropriate even if the class members can be identified but the extent of the damages cannot reasonably or economically be determined for each member. One comment suggested that in such cases, distributing proceeds on a pro rata basis to each class member providing an additional opt-in claim form to do so and thereby participate at a higher level if their claims are found to be meritorious. This too, though, might have the undesirable affect of excluding less sophisticated class members who may not understand the notice instructions.

A third viewpoint is that claims forms are an appropriate method to divide a limited settlement fund to those class members who affirm their injury. Requiring class members to affirm their eligibility for relief under penalty of perjury, or under oath, however, may scare class members to cause them not to participate or may violate religious beliefs that prevent individuals from taking oaths. This too may discriminate against the least sophisticated class members.

Claim forms are perhaps most appropriate to use in cases where class members cannot be identified and must come forward with verification of entitlement to a recovery of funds.

C. NACA Guideline

The Appropriateness of Using Claim Forms

In general, claims forms should be avoided. While claim forms may be an appropriate means to ensure equitable distribution of damages in some cases, class claim forms and procedures can reduce the number of class members who receive recovery and the amount paid by the defendants. Claim forms should be used only if deemed necessary. Claims forms put an additional responsibility on class members to be proactive in receiving recovery of damages to which they are entitled and therefore, the use of claim forms should be limited to the circumstances described below. Class members who fail to act by returning a claim form may be bound by a general release of claims and defenses. The class member may suffer a significant harm by releasing claims, such as in a home equity loan case, and will not receive any compensation for their injury simply because they did not understand the claim form process. Claim forms may have the effect of discriminating against class members who cannot read or understand the settlement notice and form, or who do not have easy access to legal assistance to help them make an informed decision regarding whether they should participate as a class member, and the repercussions if they fail to do so. Claims forms are inappropriate when the settlement relief is an account credit in a defined amount that the defendant can administer based on its records.

Claim forms may be necessary only (i) when class members cannot be adequately identified from the defendant's records; or (ii) when class members must provide information to establish eligibility for relief or to ascertain the scope of damages and the information is not available in the defendant's records or otherwise available from third parties. To determine whether it is appropriate to use a claim form process, class counsel should consider the following: (i) the likelihood that class members may not participate in the class action because they do not understand the claims form process, (ii) the likelihood that the claims administrator can obtain correct addresses for class members, (iii) the general level of sophistication among the class members, (iv) the consequences that the release of claims may have on class members who do not return a claim form, and (v) the defendant's effort to retain control over the process in order to reduce its liabilities by minimizing claims.

Claims forms may be appropriate as a method for class members to "opt in" to a settlement. Yet in "opt-out" class actions, claims forms should be avoided unless information to be provided by the class member is truly necessary to effectuate and administer a fair and reasonable settlement, as discussed above.

The Use of Claim Forms

Class counsel must ensure sufficient resources are available to assist class members who have questions about the claims process. The notice and claim form should include a toll-free number with accurate information presented at the receiving end of the call, as well as an opportunity for the class member to speak directly with a person who is knowledgeable about the class action and settlement, and who can explain the benefits and detriments of returning the claim form. It may be also advantageous to direct individuals to a website for additional information regarding the class action and settlement, provided that the class member has an opportunity to ask specific questions regarding the lawsuit and will receive directly responsive information.

Claim forms, like the notice, should be kept as simple as possible.[23] The notice should prominently explain to class members both the benefits of returning claims forms and the consequences of not returning them. In opt-out class action settlements, if claims are being released by the settlement, the claim form should explain in plain language the claims that will be released, whether or not the class member submits the claim form, unless the class member opts out of the settlement. The claim forms should contain highly readable instructions aimed at the least sophisticated potential class member. Format, type size, clarity and "readability score" of the text should be carefully considered. Settlements that require class members to opt-out, but also require class members to send in claim forms to receive compensation should be carefully considered because of the potential release of claims by members who fail to do either, yet receives no compensation.

Class counsel should do everything possible to minimize the class members' burden in completing and returning claims forms. Claims forms should not require the class member to provide information that is already available to the defendant and should not require the class member to provide information that is unnecessary to the claims process or that a reasonable person would consider confidential in the circumstances. Claim forms should not require notarization because many class members do not have easy access to notary services. Claim forms should not require a declaration under penalty of perjury. Some religious beliefs preclude sworn oaths and requiring class members to affirm their entitlement to relief under penalty of perjury may scare some individuals away from returning the form. Courts have approved claim forms that are "affirmed" rather than sworn.

The claim-form process should provide that ample efforts will be made to determine class members' locations and that the best available mail or publication process is being used. Defendants should include a postage-paid envelope for the class member to return the claim form. If a pre-paid post card is considered, privacy concerns should be taken into account.

Class counsel must provide resources that are sufficient to monitor the claims process and to assist class members with disputed claims, including providing assistance through any

[23] See Guideline 11 on effective class notices.

court-approved claims resolution mechanism. When feasible, counsel should provide for sending acknowledgements to class members who return claim forms to reduce disputes regarding whether claim forms were returned.

Guideline 13—Communications With Class Members (Including Soliciting Opt-Outs, and Class List Marketing)

A. The Issue

This Guideline addresses improper, or at least questionable, communications with class members from defendants.[24] The issue has arisen most often when a defendant, in effect, tries to "buy off" the class by picking off class members or otherwise changing the terms of its relationship with the class, either before or after class certification. *See, e.g.*, *Loatman v. Summit Bank*, 174 F.R.D. 592 (D.N.J. 1997) (sanctions imposed where defendant tried to obtain allegiance of named class representative and "drive a wedge" between class representative and class counsel and defendant had been instructed not to contact plaintiff); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 254 (S.D.N.Y. 2005) (lender's imposition of retroactive arbitration clause barring class claims after putative class action was filed is prohibited by Rule 23 as an unauthorized communication interfering with the rights of litigants). In one case, a defendant attempted to convince class members to opt out of a class action, even over the court's instructions not to communicate with class members, a situation that led the the court to impose sanctions. *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) (affirming sanctions and discussing the courts' powers to control communications with class members). (The issue discussed here relates to absent class members and is distinct from that discussed in Guideline 6, Offers of Judgment to Class Representatives, which involves defendant's attempts to "buy off" putative class representatives themselves.)

B. Discussion

Communicating with class members pits First Amendment rights against the court's duty to protect the class from false and misleading information. While the First Amendment protects speech, including commercial speech, courts necessarily possess inherent powers to protect classes and their own judicial integrity. Moreover, false and misleading communications can, even if legal and permitted as an exercise of free speech, bring the judicial system into disrepute. Although not directly in point, the Advisory Committee notes for Rule 23 state, "[n]otice is available fundamentally 'for the protection of the members of the class or otherwise for the fair conduct of the action' and should not be used merely as a device for the undesirable solicitation of claims." On the other hand, plaintiffs' counsel has a legitimate interest in sufficient contact with putative class members to ascertain uniformity, typicality and other issues pertinent to class

[24] Plaintiffs' counsel can also engage in improper or questionable communications with class members, most often in the form of solicitation of class members where cases are pending or in the context of soliciting opt-outs from settlements. *E.g., In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1241-46 (N.D. Cal. 2000) (misleading solicitation of class members enjoined and curative notice required); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75 (D. Mass., 2005) (relating to misleading internet attempts to solicit opt-outs). Although NACA is not presently taking a position on this issue, should the matter continue to draw attention, NACA may do so in the future.

certification. As to communications between defendants and class counsel, the tension is between the rights of parties to communicate between themselves in litigation (even if an attorney is prohibited from contacting an opposing party represented by counsel) and the integrity of the class action device.

C. NACA Guideline

NACA appreciates and recognizes the First Amendment rights at issue in these matters. But false and misleading class member solicitations are beyond the scope of the First Amendment and need to be scrutinized by the Courts to ensure that class members are not confused and the judicial system's integrity is not impugned. Furthermore, defense efforts to communicate with class members to entice them to abandon or settle their claims on an individual basis undermines the court's authority to protect classes and should not be countenanced. When class counsel learns of a defendant's effort to communicate with class members, consideration should be given to going to the court to protect the attorney-client and class relationship to obtain an order preventing such communication as well as obtain, if warranted by egregious activity, sanctions, *see Kleiner, supra*, 751 F.2d at 1198-99; *Loatman, supra*, 174 F.R.D. 592.

Guideline 14—Role of Objectors

A. The Issue

The role of objectors is often the subject of fractious discussion, by advocates and defendants alike. There are essentially four types of objectors to class action settlements: (1) public interest groups whose goals are to improve the settlement and to enhance the credibility of class actions generally, (2) private class counsel whose own cases have been precluded by the settlement of another class action, (3) a small group of lawyers who attempt to make a living from making objections, and (4) individual class members who object for any number of reasons. The issues that arise because of these multifarious objectors are: (1) the utility of meritorious objections to the public and judicial perception of class actions, including the use of objections as a check on overbroad releases, inadequate recoveries, excessive attorney fees, or inadequate notices; (2) the role of objections in the context of competing class actions or individual liability cases; (3) the role of class counsel in dealing with and responding to objections; and (4) the role of the lawyers who have made objections their professional specialty.

B. Discussion

Of these four types of objectors, any of them can have an effect on the settlement, but on a diminishing scale.

Objections by public interest groups have the highest level of credibility and thus the highest level of success, followed by objections by private class counsel whose own cases are likely to result in better benefits to class members and whose own cases have effectively been hijacked by the settling class counsel (often with the encouragement or complicity of the defendant).

On the other hand, objections by lawyers whose sole aim lies in making the objection are rarely successful, primarily because many such lawyers are essentially "greenmailers" whose sole goal is to object and extract fees for themselves. Courts often react strongly and negatively to these objections.

The last type of objector—individual class members—are generally motivated by sincere concerns, and they may point out true problems. But it is an unfortunate fact that individual objections will usually fall by the wayside unless another type of objector takes up the cause. In addition, these objections are often quite idiosyncratic, motivated by concerns outside the review of the specific court, such as an enmity to class actions generally or a desire to obtain personal injury damages. For these reasons, these Guidelines will not attempt to encourage or restrict the activities of individual class members.

1. Benefits of meritorious objections

Honestly motivated objections can provide many benefits. In the short term and on an informal basis, an objector might convince class counsel that the settlement indeed was

inadequate and should be improved. If that does not work, a formal objection can either improve a bad settlement or convince a court to reject it, thus forcing the parties to renegotiate a better deal for the class, with the objector counsel looking over their shoulders. As one commenter noted, in many instances, and especially with public interest objectors, complete rejection of a bad settlement—and not merely negotiating a better settlement—is a proper goal.

In a broader sense, this type of objection also serves to enhance judicial and public perceptions of class actions generally. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.,* 55 F.3d 768, 820 (3rd Cir.1995) and *Strong v. BellSouth Telecommunications, Inc*., 137 F.3d 844, 849 (5th Cir.1998). And these objections seem to have created real benefits. For example, frequent objections to coupon-only settlements, by heightening judicial knowledge of their inadequacies, appear to have caused an actual decline in their use.

2. Role of objections in competing cases

Lawyers whose own cases, often but not always class actions, may see the hoped-for benefits of their lawsuit evanesce when another class action unknown to them is settled. There is general consensus that it may be completely appropriate for these class counsel to object to the other settlement. There is also general consensus that class counsel should always attempt to learn of any competing or conflicting lawsuits and to cooperate and coordinate with the lawyers in those cases, as discussed in Guideline 2.

Beyond these observations, there is always the question whether the class counsel is motivated by a sincere conviction that his own lawsuit will get better benefits for the class (or for an individual) than the settled case. This may be because of positive rulings already obtained, greater experience in handling cases of that type, better law in the specific state, or any of a number of other factors.

The alternative to a sincere conviction on behalf of the class is the class counsel's concern that they will be left out of the fee division. The validity of this concern can vary depending on many other factors, including the ones in the preceding paragraph.

Most importantly, there is the real possibility that the objecting class counsel is quite right about his case being the better one, because the defendant may have either sought out a minor pending class action or offered to convert an individual action into a class action for settlement purposes. In some instances, the defendant may even have approached counsel it deemed likely to be open to a settlement that the defendant wants, with more favorable terms than it might otherwise obtain in either a class action or in individual actions, with the intent of precluding the effect of other lawsuits. *See, e.g., Ortiz v. Fibreboard Corp*., 527 U.S. 815, 823-825 (1999).

3. Role of class counsel

Class counsel may benefit from dealing cooperatively with objectors, encouraging their comments but also discouraging formal objections, all the while being receptive to valid

criticisms. If class counsel and objector counsel both approach the defendant with suggestions to improve the settlement, the defendant is likely to be far more willing to consider those improvements than if a formal objection is filed and fought by class counsel.

4. Role of greenmailers

Objections can serve many good purposes. But there are objections filed by lawyers who are not sincerely interested in improving the settlement and whose only interest lies in improving their own bank balances. Objector counsel who object solely to extract fees for themselves are widely condemned as "greenmailers" and these Guidelines will use that term.

Two commenters felt that an objector's motivation was completely irrelevant. NACA agrees that the validity of an objection should not turn solely on the subjective good faith of objector counsel, but also has found that greenmailers rarely contribute substantively to improving a settlement. NACA thus concludes that it is appropriate for the objector's motivation to be considered.

Many courts are unaware of the practice and may consider class counsel's use of terms such as "greenmailer" to be nothing more than rhetorical name-calling. But other courts are familiar with the practice. As one court noted, "some of the objections were obviously 'canned' objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests." *Shaw v. Toshiba America Information Systems, Inc.,* 91 F.Supp.2d 942, 973 (E.D.Tex. 2000).

The recent amendments to Rule 23 also addressed this issue, by providing that any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval, but also requiring that such an objection "may be withdrawn only with the court's approval." Rule 23(e)(4). This rule change prevents greenmailers from filing objections, collecting fees, and disappearing. Courts must now determine whether the objector can in fact go away, and the rule change provides the opportunity and the incentive for the court to review the effect of the objection.

5. Fees for objectors

There is general consensus that valid objections filed by sincere objector counsel should be reflected in a fee award, based on the improvement to the settlement. Commenters differed as to the appropriate way to calculate those fees. One commenter said that objectors should generally obtain fees only a lodestar-plus-multiplier basis, but that the multiplier should be based on the risk of non-recovery as well as the degree of value added. This commenter added that fees in value-added cases should be based on the incremental increase to the fund.

C. NACA Guideline

Although objectionable class action settlements do exist, they are in the significant minority. While it is impossible to define an objectionable settlement generally, the litmus test is whether

the settlement is fair, adequate, and reasonable to the class as a whole.

By serving to protect the interests of the absent class members, valid objections to bad settlements play an important role in class action practice. Lawyers who learn of a bad settlement (whether through publicity, independently, or because they have a competing class action) may appropriately represent their clients in filing an objection to the settlement. Their goal can be to improve the terms of the settlement or to convince the court to reject the settlement entirely.

The hallmarks of an objectionable settlement include releases that are far broader than the claims for which relief was actually obtained, illusory benefits such as worthless coupons, disproportionate benefits to the representative plaintiffs and class counsel, notices designed not to reach the class or not to provide class members all the information they need, intra-class conflicts, no-opt-out certifications in cases involving monetary relief, excessive attorney's fees, and settlements with secrecy provisions.

Class counsel should be aware of these hallmarks and should strive to ensure that their settlements avoid them all, for two reasons. Most importantly, this insures that the settlement is indeed a good one for the class. Secondarily, but more pragmatically, this will protect a good settlement from falling prey to a greenmailer's objections.

Class counsel whose settlements receive objections should be prepared to respond honestly and fully to inquiries from the objectors, including reasonable discovery. One commenter felt that many courts would not permit discovery by an objector. NACA disagrees with this comment for two reasons. First, the recent amendments to Rule 23 reflect a desire to make the settlement approval process more transparent, with the result that more courts are likely to permit limited reasonable discovery. Second, and perhaps more importantly from a best-practices standpoint, class counsel should be willing to open the settlement process to those class members whom they claim to represent, regardless whether they might persuade a court to deny all discovery. As discussed above, the objector may have a good point and class counsel always have a duty to the class members to insure that they have indeed obtained the best settlement possible.

In most instances, objectors who add real value to a settlement should be paid on a lodestar basis with a multiplier. But fees awarded to class counsel and objector counsel should be commensurate with the benefits each obtains. For example, if class counsel settle a case for refunds of $500,000, but objector counsel succeed after an adversary contest in raising the refund level to $2,500,000, class counsel should be compensated based on the $500,000, but objector counsel should be rewarded for the entire $2,000,000 improvement. In this example, it is not reasonable to award class counsel any fee based on the improved amount. It is reasonable to award objector counsel a fee that is based on a percentage of the improved amount, instead of merely a lodestar with multiplier. Of course, if class counsel immediately and cooperatively works with objector counsel to obtain that improved settlement, the fee considerations might be different.

The source of these fees should generally be either the defendant or class counsel. As one court noted, "the cash fund available to the class members should not be reduced by the award of attorney fees to the objectors' counsel and that the benefits to the class, both monetary and non-monetary, should not be reduced in any fashion. In keeping with this conclusion, the attorney fees awarded to objectors are to be paid by Class Counsel and Toshiba as they may agree, but without diminution in the value afforded to the class." *Shaw v. Toshiba America Information Systems, Inc*., 91 F.Supp.2d 942, 974 (E.D.Tex. 2000). Another court was more direct: "There appears neither persuasive reason nor precedent for requiring these fees to be paid by the defendants in the circumstances present in this case. On the other hand, because his objections improved the settlement for the class, [objector counsel] shared with class counsel the work of producing a beneficial settlement. It is appropriate that they also share in the fund awarded to recognize the cost of producing the benefit to the class." *Duhaime v. John Hancock Mut. Life Ins. Co*., 2 F.Supp.2d 175, 176 (D.Mass. 1998).

As a corollary, an objector who is no more than a greenmailer should receive nothing at all. The best course is to refuse to pay greenmailers. However, there might be instances where the cost of getting rid of a greenmailer is far less than the benefit to the class of making a good settlement final and thus available to class members.

Guideline 15—Arbitration

A. The Issue

More and more companies are requiring customers to relinquish their constitutional right of access to the public court system as a condition for obtaining a wide range of essential goods and services. Instead of going to court, customers must submit any future legal claim to private secret arbitration proceedings under a company's pre-dispute binding mandatory arbitration ("BMA") clause.

Because they are created and controlled entirely by the companies, these BMA clauses allow companies to impose dispute resolution rules that maximize their own advantage at consumers' expense. Several commentators, including one official from an ostensibly neutral arbitration service, have proclaimed that BMA clauses give companies the opportunity for "do-it-yourself civil justice reform." Perhaps the most common anti-consumer term written into many or most BMA clauses is a provision prohibiting consumers from participating in class actions.

The ubiquity of these BMA clauses in the consumer economy raises a host of complex and fundamental legal issues. The first is when, if ever, it is appropriate to enforce a company's BMA clause against consumers, including those who are members of putative or certified classes. Second is the closely related issue of whether companies have a right under either state or federal law to enforce BMA clauses that strip consumers of the right to obtain class-wide relief. Finally, if consumer class action claims can be brought in cases where a BMA clause applies to class members, then questions remain as to what rules and procedural protections for class members apply in the private arbitral forum. In recent years, a considerable number of courts and commentators have begun to grapple with these issues.

B. Discussion

Many consumer advocates view the enforcement of standard form, pre-dispute BMA clauses as the biggest threat to consumers in today's justice system. While proponents claim that BMA clauses benefit consumers and businesses alike by providing a faster, cheaper, and less formal alternative to litigating in court, *see, e.g.*, Eric J. Mogilnicki and Kirk D. Jensen, ARBITRATION AND UNCONSCIONABILITY, 19 GA. St. U. L. Rev. 761, 765-68 (2003); *see also Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265, 280 (1995), consumer advocates dispute these contentions. They point out that arbitration can be vastly more expensive than litigation for consumers, with private arbitrators charging parties hourly fees of $250 to $600 or more for their services. *See* Frederick L. Miller, ARBITRATION CLAUSES IN CONSUMER CONTRACTS: BUILDING BARRIERS TO CONSUMER PROTECTION, 78 Mich. B.J. 302, 303 (1999). Moreover, "informal" procedures of arbitration often entail significant curtailments on a party's discovery rights, so that a consumer who bears the burden of proof may be unable to obtain the evidence necessary to establish a company's wrongdoing. *See* Jean Sternlight, PANACEA OR CORPORATE TOOL?: DEBUNKING THE SUPREME

COURT'S PREFERENCE FOR BINDING ARBITRATION, 74 Wash. U. L.Q. 637, 683-84 (1996). There is also evidence showing that arbitrators tend to favor "repeat players," the companies that impose the arbitration clauses and give the arbitrators their business. *See* Lisa B. Bingham, EMPLOYMENT ARBITRATION: THE REPEAT PLAYER EFFECT, 1 Employee Rts. & Emp. Pol'y J. 189 (1997); Caroline E. Mayer, WIN SOME, LOSE RARELY? ARBITRATION FORUM'S RULINGS CALLED ONESIDED, Wash. Post. March 1, 2000 (showing that a bank won all but 87 out of 20,000 arbitrations against consumers). Finally, and more fundamentally, advocates argue that a consumer's right of access to the civil justice system is too important to be waived through a standard-form adhesion contract where a consumer's actual consent to the waiver is questionable at best. *See, e.g.*, Richard C. Reuben, DEMOCRACY AND DISPUTE RESOLUTION: THE PROBLEM OF ARBITRATION, 67 Law & Contemp. Probs. 279, 309-18 (2004).

Many companies impose BMA clauses against consumers solely for the purpose of limiting their liability by getting rid of class actions. As proponents of arbitration and corporations' rights see it, "the potential for class action litigation is significantly reduced if the consumers have agreed to arbitrate their disputes," so that "each day that passes brings the risk of multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place." Alan S. Kaplinsky and Mark J. Levin, EXCUSE ME, BUT WHO'S THE PREDATOR?, Business Law Today 739 (May/June 1998). Of course, there is nothing inherent to the arbitral forum that would prevent consumers from asserting class action claims. Cf. *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2406-07 (2003) (plurality) (question of whether consumers can bring class claims under arbitration clause is a matter of contract interpretation). Therefore, many companies design their arbitration clauses to prohibit consumer class actions explicitly, and at all costs. *See* Kaplinsky & Levin, ARBITRATION UPDATE: *GREEN TREE FIN. CORP. V. BAZZLE*, 59 Bus. Lawyer 1265, 1272 (May 2004). Some courts have enforced these clauses, finding that class actions are waivable procedural devices that are unimportant to consumers or to statutory enforcement schemes where fee-shifting provisions still give lawyers an incentive to represent individual consumers. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002). Other courts have rejected this argument and found that clauses barring class relief are unconscionable because they prevent consumers from vindicating small-value claims and are extremely one-sided since the only claims they wipe out are those brought by consumers. *See, e.g., Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003); *Discover Bank v. Superior Court*, 113 P.3d 1100, 26 Cal.4th 148, 162-63 (2005).

While there is abundant authority examining the validity of arbitration clauses that bar consumer class actions, there is little judicial or secondary authority addressing whether or how class actions should be conducted in arbitration. This dearth of authority likely reflects the fact that most companies have no desire for arbitration with consumers once their attempts to wipe out class actions fail. *See, e.g.,* Kaplinsky & Levin, Arbitration Update, 59 Bus. Lawyer at 1272 (advising companies to make no-class action arbitration clauses non-severable to prevent class arbitration). Nonetheless, the fact that even some consumer class actions are being conducted in arbitration makes it necessary to address the questions of what rules and protections for absent class members apply, and what is the proper allocation of authority between courts and

arbitrators in applying them.

Professor Jean Sternlight argues that absent class members should have the same due process rights and receive the same procedural protections in arbitration as they would in court before a judgment or settlement can extinguish their damages claims. *See* Jean R. Sternlight, AS MANDATORY BINDING ARBITRATION MEETS THE CLASS ACTION, WILL THE CLASS ACTION SURVIVE?, 42 William and Mary L. Rev. 1, 110-11 (Oct. 2000). These include the requirements of notice and an opportunity to be heard, the right to opt-out damages claims, and the right to have adequate class representation that the Supreme Court has held are necessary for an out-of-state court's judgment to bind absent class members. *Id*. at 111; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Professor Sternlight further argues that, since arbitrators are selected by the named parties alone, courts must play an active role in guarding the rights of absentees either by making these due process determinations themselves or else by closely reviewing an arbitrator's determinations. *Id*. at 111-14. An opposing viewpoint would likely shift the focus to contractual rights, relying on Supreme Court decisions such as *Green Tree v. Bazzle* and *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), which address the availability of class actions and statutory remedies as matters of contract interpretation that are decided by an arbitrator. But since pre-dispute BMA clauses are created and controlled entirely by companies, it is doubtful that a purely contract-based system for protecting class members' rights would ever be fair and adequate.

Finally, a host of issues arise concerning what uses of arbitration (if any) are appropriate for processing class members' claims in the settlement of a judicial class action. These questions go to whether, in the absence of any contractual assent or agreement, (1) class members can be required to submit claims to an arbitrator for determinations of liability or damages; and (2) whether the costs of any such arbitration can be imposed against class members.

While no commentator has disputed the substance of the Statement and Guideline that follow, two commentators did state their belief that this Statement and Guideline are out of place here because they are directed towards action by Congress and the courts, rather than by class counsel representing consumers. Nevertheless, NACA concludes that it is appropriate and indeed necessary to address the full range of mandatory arbitration-related issues raised herein for at least two reasons. First, because BMA clauses pose the single biggest threat to access to justice for absent class members and other consumers today, challenging the prevailing interpretations of the law that allow their use is perfectly in line with the Guidelines' pro-class member goals. Second, the discussion and Guideline addressing the rights of absent class members in arbitrated class actions is directed towards the conduct of counsel who represent class members in these cases.

C. NACA Statement and Guideline

Consumers should not be bound by pre-dispute binding mandatory arbitration clauses. Whatever the merits of private arbitration when it is freely chosen between businesses with comparable bargaining power and commercial sophistication, a consumer's right of access to the

public court system is too fundamental to be waived unwillingly or unknowingly through standard-form contracts. The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*., has been construed to require federal and state courts to enforce most arbitration clauses against consumers. *See, e.g., Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265 (1995). Either Congress or the courts should reassess this prevailing interpretation of the FAA, and should distinguish between negotiated business agreements where arbitration may be appropriate and standard-form consumer, employment, and even franchise contracts where companies impose arbitration as a condition of doing business. It is particularly ironic that the FAA was recently amended to protect car dealers against arbitration clauses imposed by large manufacturers, but still allows these very same dealers to impose these clauses upon even more vulnerable car buyers. At the very least, the FAA should be amended to rein in the sweeping scope of preemption recognized by courts and allow states to protect consumers against mandatory arbitration.

Likewise, companies should never be allowed to enforce mandatory arbitration clauses that strip consumers of the right to participate in class actions. These clauses deprive consumers of an essential mechanism for vindicating their statutory and common law claims and holding corporations accountable to them and to the public. If companies can enforce these clauses and eliminate class actions, then entire areas of corporate wrongdoing that result in small individual damages (but significant aggregate damages) will be insulated from challenge. Since these no-class-action arbitration clauses are exculpatory for companies and are extremely one-sided in effect because they only take away claims from consumers and never from the companies themselves, courts should find these clauses unconscionable or against public policy under the general principles of contract and consumer protection law that currently govern arbitration clauses under the FAA.

Just as courts should not allow companies to enforce arbitration clauses stripping consumers of the right to assert class claims, it should go without saying that class counsel should never agree to a class action settlement term that would impose on class members a binding mandatory arbitration clause that bars class-wide claims in future cases. Since these clauses are extremely damaging to the interests of consumers, class counsel's agreement to such a clause restricting class members' rights in future cases would raise serious questions concerning the adequacy of class representation by counsel.

If consumer class actions are to be held in arbitration, class counsel must ensure that class members receive the same due process and procedural protections as they would in court before they can be bound by a judgment. These include the due process requirements of the best practicable notice, an opportunity to be heard and to object to any settlement, the right to opt out of a certified class, and the right to adequate representation by the named plaintiffs and class counsel, all of which are necessary under *Shutts* for out-of-state court judgments to bind absentees. These also include the Rule 23 and state class action law requirements of commonality, typicality, and predominance of common issues in damages cases, as these likewise are "designed to protect absentees by blocking unwarranted or overbroad class definitions."*Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Since these protections are constitutionally-based, they should be applied by courts even if class members

are bound by contract to have an arbitrator decide the merits of their underlying claims. Alternatively, if the FAA is construed to give arbitrators initial authority to make even these constitutionally-based determinations, then the arbitrators must make a sufficient record on these matters to facilitate careful judicial review to ensure that the rights of absent class members are not compromised through the arbitral process.

Finally, settling parties may require absent class members to submit to arbitration as part of a claims process in a judicial class action settlement, provided that (1) the class members have a right to opt out of the settlement; (2) arbitration is used solely for making individual causation or damages determinations, but not for deciding liability issues; and (3) class members not be required to pay any of the costs of the arbitration process.

Guideline 16— Monitoring Settlement Compliance

A. The Issue

The monitoring of class settlements and court orders requires a number of considerations. The extent of the need to monitor settlement agreement implementation needs to be determined, as well as the roles of the parties in the monitoring process. Mechanisms for monitoring must be established. Compensation for time and costs involved in post-settlement monitoring of the class action agreement must also be considered. Mechanisms may be needed to allow class members an opportunity for additional relief, should defendants fail to comply with the settlement.

B. Discussion

The monitoring of class settlements or court orders is often an overlooked step in class action cases, usually left as a role for the administrator of the settlement. But monitoring is a necessary component of class actions. Class counsel should not consider monitoring the responsibility of the defendant and the claims administrator only. Class counsel should take an active role in ensuring that defendants comply with settlement plans and court orders. Because of feelings of mutual agreement and understanding at the time a settlement is made between the parties, the need for ongoing monitoring can be underestimated, and undervalued because it is an unknown variable at time of settlement.

In cases involving solely the distribution of funds, or other monetary compensation, the role of class counsel, as well as the time frame, may be more easily anticipated. Concerns include verifying funds are properly distributed to class members and that residual funds, if provided in the settlement, are accounted for and distributed in accordance with the agreement. Class actions providing for credits to class members' accounts may require additional scrutiny.

There is a special need for monitoring provisions in cases involving injunctive relief, especially when the relief includes reforms or changes in business practices that are on-going. These cases may present more difficult challenges in predicting the length of time, and the amount of time, class counsel will need to monitor the case post-settlement. The roles of the parties typically will be more involved and will require more forethought. A heightened concern may be the need of class members to seek additional compensation if they are harmed by defendant's failure to implement the terms of the settlement.

A trial court overseeing a class action will retain the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment. *See* Fed.R.Civ.P. 23(c)(1)(C); *In re Integra Realty Resources, Inc.,* 354 F.3d 1246, 1261 (10th Cir.2004); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) (District Court retained jurisdiction over subsequent enforcement proceeding after execution of stipulation and order of dismissal.) When a class action is resolved by settlement or court order, it is widely believed that provisions for monitoring implementation of the settlement or order must be provided for in the final documents. Defendants may resist

monitoring mechanisms for obvious reasons, including additional expenses associated with monitoring and the fear of additional litigation. But mechanisms can be mutually agreed upon that may actually appeal to the defendant by lessening the need for plaintiffs' counsel to seek post-settlement relief through further litigation. Attorneys' fees and costs should be provided for in the settlement or court order to allow class counsel to properly monitor the action.

C. NACA Guideline

All settlements should contain provisions sufficient to allow class counsel to evaluate whether the defendant is complying with settlement terms and, if necessary, to enforce the settlement. When class action cases are resolved by court order, class counsel should seek post-resolution protections for the class to be included in the court order.

Monitoring provisions will vary depending on the relief provided and the claims involved. Where monetary relief is provided for, provisions should be included that require the defendant or the settlement administrator to provide information necessary to assure that the defendant or claims administrator is properly administering the distributions required by the settlement, including credits to class members' accounts. In cases involving equitable and injunctive relief, it is even more essential that the settlement or court order include provisions that require sufficient independent monitoring to assure compliance by the defendant. Especially in cases involving equitable and injunctive relief of an on-going nature, monitoring provisions are a necessary component to help ensure that the reform obtained as a result of the legal action is implemented permanently.

Information regarding defendants' compliance with settlements or court orders should be compiled into a report, when appropriate. Monitoring reports should detail the efforts the defendant has made to comply with the class settlement or order. These reports should contain enough factual information to permit a monitor or judge to determine independently that the defendant is complying in a timely way with the provisions of the class settlement or order. Monitoring reports also should be filed with the court or otherwise should be available to class members and their counsel upon request.

The settlement or court order should also include provisions requiring the defendant to verify in a timely filing with the court, under penalty of perjury, that it has complied with its obligations under the settlement agreement. In cases involving injunctive or equitable relief, defendants should be required to file "Affidavits of Compliance".

Settlements and court orders should include provisions to allow class counsel to enforce the settlement based on the monitoring reports or on information independently gathered by class counsel. Should a dispute arise regarding the efficacy of the implementation of the settlement or order, the settlement should provide for confirmatory discovery on disputed issues. Provisions also should be set forth establishing a process by which the defendant must allow class counsel to resolve post-settlement disputes, including post-settlement claims disputes, if any.

Sufficient resources should be devoted to respond to class members and their counsel about issues of settlement and defendant's compliance. Settlements involving injunctive relief that may have a direct affect on individual class members should contain a mechanism, to the extent possible, to allow class members to individually enforce violations of the injunctive provision, when such violations result in harm to a class member. Confidentiality clauses may impede effective monitoring, especially where such clauses prohibit class members from accessing information regarding a defendant's compliance with settlement terms.[25] Confidentiality clauses should be carefully drafted, to the extent that they are even appropriate, to allow class members to obtain the necessary information they may need to enforce terms of the settlement. In cases where privacy is a heightened concern, the use of an independent monitor may be provided to ensure privacy concerns are met.

Settlements and court orders should take into consideration the additional expenses class counsel and class members may have to expend to monitor implementation, and enforce its terms if necessary. For class actions that require the ongoing verification and monitoring, class counsel should consider pressing for fee shifting provisions for work associated with enforcing the settlement or order. If additional fees will not or may not be available, class counsel must consider verification and monitoring as an obligation of counsel based on any fees awarded for the case, and should take this obligation into consideration when negotiating fees or requesting an award for the court.

[25] Confidentiality clauses are discussed in Guideline 10.