

12 Tips for Settling Class Actions

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The successful resolution of every class action lawsuit is case- and company-specific. Still, certain issues and strategic considerations arise in nearly every matter. The following tips address many of the considerations typically involved in settling class action lawsuits from the defendant's perspective. **1. SETTLE AT THE OPTIMAL TIME**

The right time will vary by case. Knowing when it arises requires an understanding of the strength of the plaintiff's case, the potential outcomes, the risks of settling or not settling for your client, and the client's business needs. **2. UNDERSTAND THE PROS AND CONS OF COURT INVOLVEMENT**

A judge who rules in a balanced manner may promote settlement by pointing out the weaknesses in each side's case, while a judge who consistently favors one side may effectively discourage settlement. Learn your judge's class settlement track record early on in the case. **3. CONSIDER USING A MEDIATOR**

Successful mediators promote compromises that advance the interests of all parties, not their own. They do not approach cases with pre-conceived resolutions in mind. Consider mediators with a proven track record in your client's industry. Seek recommendations from others in your client's industry. **4. STRUCTURE YOUR CLASS SETTLEMENT TO REACH MAXIMUM CLOSURE ON YOUR EXPOSURE**

To get maximum closure for the money spent on settlement, factors to consider include release/bar language; a ban on contribution/indemnity claims by joint tortfeasors against the settling defendant; and the effects on civil litigation, the client's business operations, and state enforcement and remediation actions. **5. BE CREATIVE AND ADOPT THE FORM(S) OF SETTLEMENT THAT BEST FIT(S) YOUR CASE**

The best settlements are based on knowledge and understanding of the client's business and prior similar settlements. The relief must be tailored to fit the alleged wrongdoing with the goal of maximizing the benefit to the class members, while minimizing the client's cost. Settlements may involve, for example, a combination of credits, payments, and enhancements to existing contract benefits or products. **6. DECIDE WHETHER TO USE A CLAIMS PROCESS**

Some settlements have a two-tier structure: general relief, which is usually fairly modest in amount and which any class member can receive by doing nothing; and more substantial relief that can be obtained only in a claim process in which the class member must prove damage or loss as a result of the defendant's wrongful conduct. Actuaries experienced in class settlements can make reasonable projections of the likely cost of different settlement models. **7. REMEMBER THAT SETTLEMENTS**

MUST BE FAIR, ADEQUATE, AND REASONABLE

Generally, class settlements must be approved by a court as fair and adequate for the class members. Attorneys should help their clients structure settlements that have a reasonable prospect of being approved, given any class settlement track record of the judge hearing the case, class settlement approval jurisprudence generally, and the Federal Judicial Center's class settlement pocket guide for judges, which describes the "red flags" that may lead to the disapproval of proposed class settlements. **8. TAKE THE SHOWING FOR A SETTLEMENT CLASS SERIOUSLY**

Part of the class settlement approval process requires a court finding that class certification for purposes of settlement is appropriate. Be careful not to make admissions that may make it difficult for the client to contest a motion for class certification in another case, and include a statement reserving the right to contest certification for litigation purposes. **9. KNOW YOUR SUBJECT AREA AND ADVERSARY**

AND ADVERSARY

Mine other settlements for ideas. Know the client's business. This includes understanding the type of settlement relief the client can provide, the relative cost of different forms of relief, the regulatory implications of different forms of relief, and the potential operational impacts of implementing the settlement. Also be aware of the terms of any other class settlements your adversary has presented to a court for approval. **10. USE A PROPER AND WELL-PUBLICIZED CLASS NOTICE**

Pursuant to [Federal Rule of Civil Procedure 23\(c\)\(2\)\(B\)](#), notice must be clear, concise, and easily understood. The U.S. Supreme Court has [held](#) that it must also reflect a "desire to actually inform" absent class members, consistent with due process requirements. Federal Judicial Center form notices provide guidance. Classes certified under Rule 23(b)(3) must provide all class members with an opportunity opt out of the class, but if that opportunity was provided after a contested certification, the settlement notice need not provide class members a second opt out opportunity.

11. CONSIDER USING A PROFESSIONAL SETTLEMENT ADMINISTRATOR

A professional administrator can perform many settlement administration tasks efficiently and avoid the disruption to the client's business that would result if the client performed the tasks itself.

Administrators routinely handle large mailings to the class; deal with returned mail; run telephone call centers to handle class members' questions; keep necessary statistics and provide reports to counsel and the court; testify, if necessary, as an objective professional, on settlement administration issues; run claim processes; and mail settlement relief checks. **12. REMEMBER TO**

SEND CLASS ACTION FAIRNESS ACT (CAFA) NOTICES

[CAFA](#) requires notice of class action settlements to appropriate federal and state officials by each defendant, in each state where a class member resides. While the failure to comply with CAFA does not make the settlement invalid, it may compromise the ability of the client to enforce the release provisions of the settlement to bar later lawsuits by class members. It is important that a client adequately appreciate these steps and the internal resources that a class settlement will require, as it is not uncommon for the administration of a class settlement to take two years or more from the final approval of the settlement by the court.

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