Lessons In Crafting Valid Employment Class Settlements

By **Christopher Braham** (December 4, 2020)

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Aspiring employment lawyers ask questions of their mentors. Try this one: Did you ever go to trial on a wage and hour class action?

The answers — ranging from "no" to "almost but …" and rarely to "once" — reveal an important truth: Employment lawyers handling class actions better know the inner workings of getting class settlements approved.

The U.S. District Court for the Northern District of California's recent decision in Monplaisir v. Integrated Tech Group LLC[1] shows why. There, the court declined to approve a settlement that "unduly rewards counsel at plaintiffs' expense, appears more a product of arbitration agreements than the merits, and unfairly burdens a discrete portion of the class and collective members."

Ouch! District courts will closely review the facts of the case at hand and the terms of the settlement to ensure they are not blessing sweetheart deals. Simply put, there are rules to learn and intricacies that must be understood before an employment lawyer seeks an order approving a class action settlement.

An instructive starting point in this regard is the U.S. Court of Appeals for the Ninth Circuit's 2019 decision in Roes v. SFBSC Management LLC.[2] That case involved the alleged misclassification of exotic dancers as contractors, alleging violations of both the Fair Labor Standards Act and the California Labor Code. There, the appellate court overturned a $2 million settlement that the Northern District of California had approved.

The district court had misapplied a presumption of validity, which only applies to settlements when class certification has been done in advance of settlement. The Ninth Circuit noted that, "when the parties negotiate a settlement before a class has been certified, the district court must apply a higher level of scrutiny for evidence of collusion or other conflicts of interest before approving the settlement."

Fair enough but what here caused concern? There were multiple warning signs:

- Insufficient reach so that a third of the class did not receive notice of the settlement;
- An unexplained acceptance of a settlement for 4.3% of the claimed class damages; and
- An allocation of less to class members ($864,115) than to class counsel ($950,000).

Let's look at how that trilogy of approval triggers plays in employment class actions.

Reach is less often an issue in employment cases but the short engagements in SFBSC proved the exception. Due process requires notice reasonably calculated to apprise all class members of the settlement and its terms. This task can prove problematic in cases that involve transient workforces. Parties seeking to settle these actions may need to move beyond traditional mail notice to email or posting notice on a public website as well.

Settlements require explanations. Parties must explain why the settlement consideration is

fair and reasonable relative both to the potential damages at issue and the risk associated with litigation on the merits. Parties also will be expected to explain what discovery was conducted, whether formally or informally, and why it confirms that the amount negotiated reasonably balances risk versus recovery.

Allocation of the settlement fund is critical. Courts seek to ensure faithful representation by tethering the value of an attorney fee award to the value of the class recovery and will use the lodestar method to cross-check the percentage fee to ensure there is a reasonable relationship between fees sought and the benefit to the class. Fee awards in excess of 25% of the recovery invite such scrutiny.

Courts will also scrutinize incentive awards to the named plaintiff. Parties must include sufficient facts in their settlement papers that inform the court why the award and amount is justified.

Meanwhile, the U.S. Court of Appeals for the Eleventh Circuit's September **decision** in Johnson v. NPAS Solutions LLC[3] may portend more frequent challenges given that decision's conclusion that such payments are a per se violation of the named plaintiff's fiduciary obligations to maximize the recovery to the class.

Meet the above-referenced trilogy and your class settlement is starting to come into shape for approval. But, there is more to be done. The Federal Judicial Center's pocket guide for judges on approving class action settlements should be required reading for counsel.[4]

In addition to that guide, remember that consistency is also a requirement for counsel seeking to get their settlement approved: Terms across the motion for settlement approval, the settlement agreement and the proposed notice all must mirror each other. Counsel need to sweat the details so that class members are given clear information.

Another recurring issue is the release language. In individual settlements, releases cover "all claims since Adam and Eve left the Garden of Eden through the date of this release whether known or unknown." For single-plaintiff settlements, there are no limits; but, in class action settlements, there are limits.

In approving class action settlements, the court must balance fairness to absent class members with the defendant's interest in finality. As the U.S. District Court for the Southern District of California noted in Brawley Public Safety Employee Association v. City of Brawley in January, this means "a release provision that tracks plaintiffs' wage and hour claims without requiring the plaintiffs to waive unrelated claims tips in favor of approval."[5]

Courts will approve a release of any and all wage and hour claims that were made or could have been made in the lawsuit based on the same factual predicate.[6] Thus, approvable release language in such actions could read as follows:

> This settlement releases all claims: (a) for worked but unpaid time; (b) for unpaid or underpaid overtime; (c) for missed rest or meal breaks; and (d) concerning payroll requirements, wage statement or notice requirements, or pay practices or procedures. Collectively, all such claims arising between October 4, 2016 and the date of final approval of this Settlement — whether under the Fair Labor Standards Act (FLSA) or any state law governing wage and hour claims — will be defined as the "Covered Claims."

Pursuant to the California Court of Appeal for the Second Appellate District's 2010 holding in Villacres v. ABM Industries Inc.,[7] class cases arising in California may also release claims under the state's Private Attorneys General Act, even when no PAGA claim was pled. The California Supreme Court's March decision in Kim v. Reins International California Inc., **holding** that a PAGA claim may still move forward even if an individual settles their own claim, does not change this rule; there, unlike in Villacres, the release specifically excluded a known PAGA claim.

Counsel must also confront the issue of what to do with any uncashed settlement checks. Parties frequently opt to distribute such funds to charities under the cy pres doctrine. Yet, such provisions still generate controversy. In 2019, the U.S. Supreme Court had an opportunity to rule on the propriety of cy pres awards in class litigation in Frank v. Gaos but ultimately decided to punt on the issue.[8]

Class settlements comprised entirely of a cy pres award face heavy scrutiny. Yet, this is rarely a concern in employment disputes because cy pres awards in these type of cases generally relate only to a small proportion of the class recovery that could not be paid to certain class members. As such, cy pres clauses in employment settlements face far less scrutiny.

There are also sometimes concerns about the selection of the beneficiary of the cy pres award: Does it need to be an entity directly promoting the interests being pressed by this class? Parties looking to stay out of the legal fray relating to cy pres awards can always consider assigning unclaimed funds to the state's unclaimed property fund.

Finally, it would be remiss to omit the often maligned reversion settlements. These provisions carry a presumption that the benefit of the settlement favors class counsel, not class members. Courts nonetheless can be persuaded to approve such settlements where, for example, attorney fees decelerate relative to any funds that revert back to the employer.

Litigating class actions requires more than a working knowledge of Rule 23 of the Federal Rules of Civil Procedure and the standards for class certification; more than the substantive law of the particular employment claims asserted; and more than the nuanced differences of litigating class versus individual claims.

Litigating class actions requires a comprehensive understanding of the endgame: how class settlements should be structured for judicial approval. Beyond this tutorial, there is always more: some issues unique to a given case and others of more universal scope, such as the settlement notice requirements embedded in the Class Action Fairness Act for cases in federal court.

It's always something else; sometimes, getting class action settlements approved feels like trying to walk on the ceiling. On those days, class action lawyers envy the line from lawyer J. Cheever Loophole played by Groucho Marx in the 1939 film "At The Circus" — "I have an agreement with the houseflies; the flies don't practice law and I don't walk on the ceiling."

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[1] Monplaisir et al. v. Integrated Tech Group LLC, et al. , Case No. 19-CV-01484-WHA (N.D. Cal. Nov. 7, 2020).

[2] Roes v. SFBSC Management LLC , 944 F.3d 1035 (9th Cir. 2019).

[3] Johnson v. NPAS Solutions LLC , 975 F.3d 1244 (11th Cir. 2020).

[4] See https://www.uscourts.gov/sites/default/files/classgde.pdf.

[5] Brawley Public Safety Employee Association v. City of Brawley , Case No. 19-CV-01891, 2020 WL 487416, *3 (S.D. Cal. Jan. 30, 2020).

[6] Reyn's Pasta Bella, LLC v. Visa USA, Inc. , 442 F.3d 741, 748 (9th Cir. 2006).

[7] Villacres v. ABM Industries Inc. , 189 Cal. App. 4th 562 (2010).

[8] See Frank v. Gaos , 139 S.Ct. 1041, 1046 (2019).