



*presents*

# **Class Action Settlement Strategies**

## **Thwarting Professional Objectors and Managing Attorneys Fees, Notice Requirements, and Cy Pres Awards**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

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**Wednesday, January 27, 2010**

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**1 pm Eastern**

**12 pm Central**

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# Class Action Settlements: Governing Law and Recent Cases

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## Federal Rule of Civil Procedure 23(e)

“The claims, issues, or defenses of a *certified class* may be settled ... **only with the court’s approval.**”

- The court may approve only after a hearing and on finding the settlement is “**fair, reasonable, and adequate.**” 23(e)(2).
- The court must direct “**notice in a reasonable manner**” to all who would be bound. 23(e)(1).
- The court *may* refuse to approve unless the settlement gives a **new opportunity to opt out.** 23(e)(4).

## Federal Rule of Civil Procedure 23(e)

### Purposes of Rule 23(e):

“First, it protects the class defendant from plaintiffs who append a class claim merely to strengthen their bargaining power in settlement discussions. Requiring that Rule 23(e) notice be sent out deters the filing and alleging of frivolous class actions....

In addition ... requiring notice also insures that the putative class members’ interests will be protected.”

*Simer v. Rios*, 661 F.2d 655, 665 (7th Cir. 1981), *cert denied* 456 U.S. 917.

## Topic Areas

- Fair, reasonable, and adequate
- Notice
- Coupon Settlements
- Cy pres awards
- Attorneys' Fees
- Opt-out Rights

The background of the slide is a solid dark blue color. Overlaid on this background are several white dotted lines that form a complex, abstract pattern. These lines are curved and intersect, creating a sense of movement and depth. The lines are most prominent on the right side of the slide, where they appear to radiate from a point, and extend towards the left and bottom edges.

Fair, Reasonable, and Adequate

## Fair, Reasonable, and Adequate

- Determination is **discretionary**. *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004), *cert. denied* 125 S.Ct. 372.
- Terms do not have to be perfect. *Dauphin Island Property Owner's Ass'n v. U.S.*, 2009 WL 4263331 (Fed. Cl.).
- Court will examine both the **negotiating process** (procedural fairness), and the **substantive terms** (substantive fairness). *McReynolds v. Richards-Cantave*, 588 F.3d 790 (2nd Cir. 2009).

## Fair, Reasonable, and Adequate

- **Procedural Fairness** – factors include:

- absence of any indication of collusion
- protracted negotiations
- ability and experience of counsel
- discovery to date

*Weinberger v. Kendrick*, 698 F.2d 61 (2nd Cir. 1982), *cert. denied* 464 U.S. 818.

- **Presumption** of reasonability may arise when negotiations are done at **arm's length**, and, e.g.,

- sufficient **discovery** has occurred, *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 588 F.3d 24 (1st Cir. 2009); or
- counsel are **experienced**, *In re Currency Conversion Fee Antitrust Litigation*, 2009-2 Trade Cases P 76,787 (S.D.N.Y. 2009).

## Fair, Reasonable, and Adequate

- **Substantive Fairness** – factors include:
  - Advantages of settlement as opposed to probable outcome of a trial on the merits
  - Probable time, duration, and cost of trial
  - Probability that the claims, issues or defenses could be maintained through trial on a class basis
  - Maturity of the underlying substantive issues
  - Involvement of class members and third parties in settlement negotiations
  - Number and force of objections by class members

## Fair, Reasonable, and Adequate

- **Substantive Fairness** – factors include:
  - Probable resources and ability of parties to pay, collect, or enforce settlement
  - Effect of settlement on other pending actions
  - Similar claims by other classes and subclasses and their probable outcome
  - Comparison of results achieved with those likely to be achieved by others with similar claims
  - Whether right to opt out is included, and if so, how many class members opt out

## Fair, Reasonable, and Adequate

- **Substantive** Fairness – factors include:
  - Reasonableness of attorneys' fees provisions
  - Fairness and reasonableness of procedure for processing individual claims
  - Whether another court has rejected a similar settlement for a similar class
  - Apparent intrinsic fairness of the terms

Manual for Complex Litigation at 316 (4th ed. 2004).

## Fair, Reasonable, and Adequate

- **Side settlements** with class members who have opted out can be made without judicial review. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 4 (1st Cir. 1999).
  - 2003 Amendment to Rule 23(e) explicitly limited court-approval requirement to settlements “of claims, issues, or defenses *of a certified class.*”
- A **non-settling defendant** has standing to object to a partial settlement which purports to strip it of a legal claim or cause of action. *City of Bangor v. Citizens Communications Co.*, 532 F.3d 70 (1st Cir. 2008).

## Fair, Reasonable, and Adequate

- **Recent cases:**
  - ***Bell v. DuPont Dow Elastomers*, 640 F.Supp.2d 890 (W.D.Ky. 2009):** Settlement enjoining all claims from people within a described area was not approved because it would have imposed duties or obligations on third parties without their agreement.

Notice

## Notice

- Notice must be “**in a reasonable manner.**”
  - Compare notice of *certification*, Rule 23(c)(2)(A) governing **limited fund** and **injunctive** class actions (“the court *may* direct appropriate notice”), and Rule 23(c)(2)(B) governing actions based on **common questions and efficiency** (“the court *must* direct ... the *best notice that is practicable* under the circumstances”) (emphases added).
  - A common practice is to simultaneously motion for certification and settlement approval, and a single notice may be given. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981).

## Notice

- Form and content of notice is at “**complete discretion**” of the court. *Battle v. Liberty Nat. Life Ins. Co.*, 770 F.Supp. 1499 (D.C.Ala. 1991).
- **Form of Notice:**
  - Direct mail usually satisfies notice requirements. *See, e.g., County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1422, 1424 (E.D.N.Y. 1989).
  - Individual notice may be impossible, making print, broadcast, and electronic publication necessary and appropriate. *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197 (D.C.Me. 2003).

## Notice

- **Content of Notice:**
  - Need not be “complete source of information.” *In re BankAmerica Corp. Secs. Litigation*, 210 F.R.D. 694 (D.C.Mo. 2002).
  - Items to be considered for inclusion:
    - Class description
    - Statement of purpose, time, and place for hearing
    - Case description
    - Proposed settlement’s description
    - Statement that class counsel will seek fees
    - Statement of procedure for filing objections/claims  
*Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314 (D.C.Pa. 1993).

## Notice

- There are additional notice requirements for **federal** class action settlements, under the Class Action Fairness Act of 2005, 28 U.S.C. § 1715:
  - Defendant must serve notice on appropriate state and federal officials within 10 days after proposed settlement is filed with the court.
  - Class members may choose not to comply or be bound by the settlement if this notice “has not been provided.” 28 U.S.C. § 1715(e).
  - Act provides a detailed list of content to be included in the notice. 28 U.S.C. § 1715(b).
  - Final approval of settlement may not be given until 90 days after this notice is served.

## Notice

- **Recent cases:**
  - ***In re MetLife Demutualization Litigation, 2009 WL 3633898 (E.D.N.Y. 2009)***: Best practicable notice of settlement in action with millions of class members was publication in newspapers, not individual mail, email, or radio/tv ads.
  - ***McKinnie v. JP Morgan Chase Bank, N.A., 2009 WL 5217673 (E.D. Wis. 2009)***: Notice of settlement in two national publications and in a post on internet website was sufficient in case involving ATM overcharge of users who were not bank customers.

## Notice

- **Recent cases:**
  - ***In re Katrina Canal Breaches Consol. Litigation, 2009 WL 2922305 (E.D. La. 2009):*** Identification of Katrina victims by use of third party locator services (LexisNexis and Form 95 filings), and then individual mailings, newspaper publication, radio PSA's throughout the U.S., and dedicated website were collectively sufficient.

## Notice

- **Recent cases:**
  - ***Hernandez v. Vitamin Shoppe Industries, Inc.*, 95 Cal.Rptr.3d 734 (Cal.App. 2009):** Attorney for named plaintiff cannot contact other class members to urge opt-out from proposed settlement.
  - ***Culvahouse v. City of LaPorte*, 2008 WL 2038396 (N.D. Ind. 2008) (not reported in F.Supp.2d):** Stipulation for partial settlement filed on July 24, 2007, notice to appropriate government officials served on August 6, 2007 (13 days later), settlement recommended for approval.

# Coupon Settlements

## Coupon Settlements

- The Class Action Fairness Act of 2005 in part governs court approval of “coupon settlements.” 28 U.S.C. § 1712.
  - Applies to any civil actions commenced on or after February 18, 2005.
  - Court may require that under a coupon settlement, the value of unredeemed or unclaimed coupons shall be distributed to one or more charitable or governmental organizations. 28 U.S.C. § 1712(e).

## Coupon Settlements

- The Class Action Fairness Act of 2005 in part governs court approval of “coupon settlements.” 28 U.S.C. § 1712.
  - Attorneys’ fees attributable to an award of coupons “shall be based on the value to class members of the coupons that are redeemed,” but if “the recovery of the coupons is not used to determine the attorneys’ fee ... any [fee] shall be based upon the amount of time class counsel reasonably expended working on the action.” 28 U.S.C. § 1712(a), (b).

# Cy Pres Awards

## Cy Pres Awards

- Court has the ability to determine the use of **unclaimed funds** when the agreement is silent.  
*Democratic Cent. Comm. V. Washington Metro Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996).
- May also be applicable when class members are **difficult to identify** or when they **change constantly**. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d. Cir. 2007).
- Distribution must be for a purpose that as nearly as possible reflects the **interests of class members** and those similarly situated. *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7<sup>th</sup> Cir. 1989).

## Cy Pres Awards

- A **reverter clause**, returning unclaimed award amounts to the defendant, “can be a useful tool in negotiating a settlement when the total number of eventual claimants is unknown.”  
*McKinnie v. JP Morgan Chase Bank, N.A.*, 2009 WL 5217673 at 5 (E.D. Wis. 2009).
  - “[D]istributing any unclaimed amounts to claimants on a pro rata basis will result in an unwarranted **windfall** for those claimants.” *Id.* (emphasis added).

## Cy Pres Awards

- **Recent cases:**
  - ***McKinnie v. JP Morgan Chase Bank, N.A.*, 2009 WL 5217673 (E.D. Wis. 2009):** Agreed-upon distribution of unclaimed funds that gave 35% to cy pres charity and 65% to defendant was fair, reasonable, and adequate.
  - ***In re Lease Oil Antitrust Litigation*, 570 F.3d 244 (5th Cir. 2009):** State of Texas was wrongly denied intervention as of right, as it had potential claim to cy pres funds based on state law granting ownership of unclaimed property to the State.

# Attorneys' Fees

## Attorneys' Fees

- “In a certified class action, the court *may* award **reasonable** attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Rule 23(h) (emphasis added).
- Court determines if fees are reasonable either as a term of the settlement, or after settlement is reached. *Staton v. Boeing, Co.*, 327 F.3d 938 (9th Cir. 2003).
- Court must guard against opportunistic bargains by class counsel of lesser awards for higher fees. *Polar Int’l Brokerage Corp. v. Reeve*, 187 F.R.D. 108 (D.C.N.Y. 1999).

## Attorneys' Fees

- **Recent cases:**
  - ***In re Dept. of Veterans Affairs Data Theft Litigation*, 653 F.Supp.2d 58 (D.D.C. 2009):** Attorneys' fees below the low end of the standard range (at 18 percent of the common fund) were awarded when the cy pres award would likely dwarf the amount paid to class.
  - ***Maynard Steel Casting Co. v. Sheedy*, 2008 WL 183475 (Wis.App. 2008):** One-third of client's claimed recovery under class settlement was not reasonable, where attorney had no class action experience and did not negotiate the settlement.

# Opt-out Rights

## Opt-out Rights

- In a class action based on **common questions and efficiency**, the court must notify class members that it will “exclude from the class any member who requests exclusion.” Rule 23(c)(2)(B)(v).
- No right to opt out in **limited fund** class actions. *In re Katrina Canal Breaches Consol. Litigation*, 2009 WL 2922305 (E.D. La. 2009).
- No right to opt out of **injunctive** class action unless it is a **term** of settlement, or relief contains significant **money damages**. *Knight v. Alabama*, 469 F.Supp.2d 1016 (N.D.Ala. 2006).

## Opt-out Rights

- Regarding settlement, a court *may* refuse to approve unless the settlement gives a **new opportunity to opt out**. Rule 23(e)(4).
  - This is **discretionary**, and no party or class member may insist on a second opt-out opportunity. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270-71 (2nd Cir. 2006).
- No right to condition opt-outs on court rulings over objections to proposed settlement. *Olden v. LaFarge Corp.*, 472 F.Supp.2d 922 (E.D. Mich. 2007).
- No right to later opt back in. *Valente v. Pepsico, Inc.*, 89 F.R.D. 352 (D.C. Del. 1981).

## Opt-out Rights

- Side settlements with class members who opt out are not subject to judicial review for fairness, reasonability, and adequacy. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 4 (1st Cir. 1999).
- Class members who opt out do not have standing to appeal a later settlement agreement. *Mayfield v. Barr*, 985 F.2d 1090 (C.A.D.C. 1993).

## Opt-out Rights

- **Recent cases:**
  - ***Olden v. LaFarge Corp.*, 472 F.Supp.2d 922 (E.D. Mich. 2007):** Settlement that would have required new election to opt out was not fair, reasonable, and adequate.
  - ***In re Katrina Canal Breaches Consol. Litigation*, 2009 WL 2922305 (E.D. La. 2009):** Approved limited fund class action settlement for Katrina victims would bind all putative class members without the ability to opt out.

## Opt-out Rights

- **Recent cases:**
  - ***Tardiff v. Knox County*, 567 F.Supp.2d 201 (D.Me. 2008):** Named class representative could opt out of settlement agreement in the absence of an explicit term to the contrary.



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# Defending a Class Action Settlement and Maximizing Its Advantages

Presented by:

**David H. Stern**

# Defending a Class Action Settlement and Maximizing Its Advantages

The primary benefit of defending a class action is the preclusive effect of any final judgment – through settlement, motion practice or trial – against all members of the class.

- “[U]nder elementary principles of prior adjudication, a judgment in a properly entertained class action is binding on class members in any subsequent litigation.”

*Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

- With few exceptions – e.g., where individuals have “opted-out” – defendants will not again have to defend claims that were resolved through the earlier class action.

# Defending a Class Action Settlement and Maximizing Its Advantages

- **Claim preclusion**
- **Enforcing claims bar**
  - Claim preclusion in the Second Circuit
  - Injunction from the Settlement Court: Court's injunctive powers to protect settlement

# Claim Preclusion

- “[R]es judicata applies to repetitious suits involving the same cause of action . . . when a court of competent jurisdiction has entered a final judgment on the merits. . . . The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties . . . absent fraud or some other factor invalidating the judgment.”

*Comm’r. of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948).

# Claim Preclusion

- Elements of claim preclusion:
  1. a final judgment on the merits;
  2. rendered by a court of competent jurisdiction;
  3. identity of the parties; and
  4. identity of causes of action.
- With regard to class actions, the 3<sup>rd</sup> element relates to due process rights and notice, which will be addressed in the following slides.

# Claim Preclusion

- The scope of claim preclusion — Courts will look to:
  - the settlement release; and
  - the law of the state where the settlement was entered.
    - In some states, not only will the claims previously brought be barred, but so will the claims that could have been brought.

# Enforcing Claims Bar

- Ways to address a subsequent lawsuit:
  1. invoke claim preclusion in the second court; or
  2. seek an injunction from the settlement court.

# Claim Preclusion in the Second Circuit

- Invoke claim preclusion as an affirmative defense:
  - Move to dismiss the complaint;
  - If that fails, move for summary judgment.

# Claim Preclusion in the Second Circuit

**For example, the First Circuit affirmed dismissal based on claim preclusion/release where:**

- there was a final judgment on the merits;
- notice complied with due process;
  - If there has been appropriate class notice, an individual who has not opted out is bound by the settlement even without actual notice.

*Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

- the class was adequately represented and the settlement fair; and
- the claims were within the scope of the class action/settlement.

# Injunction from the Settlement Court: Court's injunctive powers to protect settlement

- Seek an injunction from the settlement court.
  - Settlement should prohibit class members from instituting, maintaining, participating in or receiving benefits from any other claims encompassed by the settlement.
  - Settlement court may issue an enforcement order preventing class members from bringing a lawsuit involving covered claims in another state or federal court.
  - Enforcing an order from a state court in federal court may not be as easy, and vice versa.



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# CLASS ACTION SETTLEMENTS

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## I. Settlement Strategies

### A. Fair, Reasonable and Adequate Requirement

- Rule 23(e)(2)- “The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.... If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.” See *also Stanton v. Boeing Company*, 3237 F.3d 938, 952 (9<sup>th</sup> Cir. 2003); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9<sup>th</sup> Cir. 1998)
- Where settlement derives from arm’s length transaction Rule 23(e)(2) requirement is presumed met. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9<sup>th</sup> Cir. 1992)



## A. Fair, Reasonable and Adequate Requirement

- The 9<sup>th</sup> Circuit has identified relevant factors to be considered in determining whether a settlement is “fair, reasonable, and adequate”:
  - 1) the strength of plaintiffs' case;
  - 2) the risk, expense, complexity, and likely duration of further litigation;
  - 3) the risk of maintaining class action status throughout the trial; the amount offered in settlement;
  - 4) the extent of discovery completed, and the stage of the proceedings;
  - 5) The experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9<sup>th</sup> Cir. 1998) citing *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993).



## A. Fair, Reasonable and Adequate Requirement

- California Rule of Court, Rule 3.769(g) “Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement.”
- California judges have “broad discretion” to determine whether a settlement is fair, based upon their consideration of the following, non-exhaustive list of factors:
  1. the strength of plaintiffs' case;
  2. the risk, expense, complexity and likely duration of further litigation;
  3. the risk of maintaining class action status through trial;
  4. the amount offered in settlement;
  5. the extent of discovery completed and the stage of the proceedings;
  6. the experience and views of counsel;
  7. the presence of a governmental participant; and
  8. the reaction of the class members to the proposed settlement. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.



## A. Fair, Reasonable and Adequate Requirements

- There is a presumption of fairness if:
  1. the settlement is reached through arm's length bargaining;
  2. investigation and discovery are sufficient to allow counsel and the court to act intelligently;
  3. counsel is experienced in similar litigation; and
  4. the percentage of objectors is small. *Dunk, supra*, 48 Cal.App.4th at 1802.



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## B. Notice Requirements and Use of Alternative Media

- Rule 23(e)(1): “The court must direct notice in a reasonable manner to all class members who would be bound by the proposal”
- The district court has discretion to determine the “reasonable manner” of the notice.  
*Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337 (1<sup>st</sup> Cir. 1991).



## B. Notice Requirements and Use of Alternative Media

- At a minimum due process requires that the unnamed class members:
  - (1) be given *notice* of the proceedings, and an opportunity to be heard and participate therein (in person or through counsel);
  - (2) that their interests must be *adequately represented* by the named plaintiff; and
  - (3) that they be given the *opportunity to exclude themselves* from the class by executing and returning to the court an “opt out” form. (*Phillips Petroleum Co. v. Shutts*, (1985) 472 US 797, 811–812.)



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## B. Notice Requirements and Use of Alternative Media

- CAFA – requires that notice be provided to the proper federal or state official. ( 28 U.S.C. §1715)For federal officials the statute permits notice upon either:
  - (a) the United States Attorney General; or
  - (b) where in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, to person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant)



## B. Notice Requirements and Use of Alternative Media

For state officials:

- (a) the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant;
- (b) person who licenses or otherwise authorizes the defendant to conduct business in the State; or
- (c) the State attorney general ( 28 U.S.C. §1715)



## B. Notice Requirements and Use of Alternative Media

- California Rule of Court, Rule 3.769(f)- “If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.”



## B. Notice Requirements and Use of Alternative Media

- In cases brought under the Consumer Legal Remedies Act, section 1780(f) of the California Civil Code provides that “[a] class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did not request exclusion.”



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## B. Notice Requirements and Use of Alternative Media

- California Rule of Court, Rule 3.766(f) permits the court to order the notice to be issued by alternative media, including “broadcasting on . . . the Internet.” In the recent case of *Chavez v. Netflix* (2008) 162 Cal.App.4th 43, the California Court of Appeal affirmed the use of a summary notice that was sent by e-mail to class members. The summary notice directed any class member wanting more information to a Web site containing a more detailed notice and provided hyperlinks to that Web site.



## C. Coupon Settlements

- The Class Action Fairness Act limits the attorney's fees that can be awarded to class counsel.
- If fees are awarded as a percentage of the coupons to be provided, those fees "shall be based on the value to class members of the coupons that are redeemed." 28 U.S.C. §1712(a)
- If the fees are not based on coupon redemption, they shall be based on a lodestar calculation of time reasonably expended with a court-approved multiplier. 28 U.S.C. § 1712(b)(1-2).
- The court shall also include a fee award for injunctive and equitable relief obtained. *Karraker v. Rent-A-Center, Inc.*, 492 F.3d 896 (7th Cir. 2007).
- California state law is not adverse to coupon settlements. In *Chavez v. Netflix* (2008) 162 Cal.App.4th 43, the Court of Appeal rejected the objectors' argument that "coupon settlements are inherently suspect or improper" and applied the *Dunk* test to find that the settlement was presumptively reasonable.



## D. Cy Pres Awards

- Federal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds. *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir.1984).
- In a settlement context, when an aggregate class recovery cannot economically be distributed to individual class members, or when a balance of the recovery fund remains after individual distribution, the parties, subject to court approval, may agree that undistributed funds will be distributed or disposed of for the indirect benefit of the class. *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 107 A.L.R. Fed. 779 (9th Cir. 1990).



## D. Cy Pres Awards

- The cy pres, or next best use, doctrine originated in the charitable trust field when courts took steps to prevent the failure of trusts. Bogert, *The Law of Trusts and Trustees* (2d ed.) §§ 431- 450;
- California law supports the use of *cy pres* awards. In the *In re Vitamin Cases* (2003) 107 Cal.App.4th 820, the Court of Appeal affirmed a class settlement in which the entirety of the settlement proceeds were distributed *cy pres* because distribution to individual class members was impracticable given the size of the class and the costs of claims administration.
- Section 384 of the California Code of Civil Procedure provides for the *cy pres* distribution of the residue of common fund settlements, and was enacted to promote the utilization of *cy pres*.



## E. Attorneys' Fees

Rule 23(h)(1): “In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

- (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
- (2) A class member, or a party from whom payment is sought, may object to the motion.
- (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
- (4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).



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## E. Attorneys' Fees

- The rule in the Ninth circuit requires that federal courts in diversity actions apply state law with regard to the allowance (or disallowance) of attorneys' fees. *Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985) (citing *Schultz v. Lamp*, 591 F.2d 1268, 1272 (9th Cir.1978).)
- In California, the method of calculating the attorneys' fees depends, in part, on the type of relief obtained.
- In cases involving "common fund" settlements, the courts will award attorneys' fees based on a percentage of the fund. *E.g.*, *Glendale City Employees' Ass'n v. City of Glendale* (1975) 15 Cal.3d 328 (affirming award of attorneys' fees in the amount of 25% of common fund).
- In cases in which the value of the common fund is not easily determined, the courts use the lodestar-multiplier method of calculating attorneys' fees. *E.g.*, *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (where value of fund would be dependent on the amount of coupons redeemed).



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## F. Opt-Out Rights

- Due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an “opt out” or “request for exclusion” form to the court. *Phillips Petroleum Co. v. Shutts* 472 U.S. 797, 812 (1985).
- If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.



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## II. Defending a Settlement and Maximizing its Advantages

### A. Claim Preclusion

- Res judicata, or claim preclusion, “treats a judgment, once rendered, as the full measure of relief to be accorded between the parties on the same claim or cause of action.” ’ *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 887 (9th Cir.2000) (quoting *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir.1988)).
- An action is barred by res judicata where:
  - 1) the prior litigation involved the same parties or their privies,
  - 2) the prior litigation was terminated by a final judgment on the merits, and
  - 3) the prior litigation involved the same ‘claim’ or ‘cause of action’ as the later suit.” *Id.* at 888.

A settlement may have claim preclusive effect if the parties intend so. *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000).



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### III. Collateral attacks on class action settlements Professional Objectors

- Fed. R. Civ. Proc. 23(e)(5): Any class member may object to the proposal if it requires court approval under this subdivision” however, “the objection may be withdrawn only with the court's approval”. *See also* In re Equity Funding Corp. of America Securities Litigation, 603 F.2d 1353 (9th Cir. 1979)
- As noted in Newberg on Class Actions, case law has prescribed a number of indicators that tend to be present when meritless objections are advanced by "professional objectors" or others. Newberg on Class Actions, § 15:37. Abusive Conduct by Counsel Objecting to Class Action Settlements (2009). These factors include:



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- (1) objections filed on behalf of individuals to a class action settlement when the objectors are not actually class members with standing to intervene (*Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198 (9th Cir. 1999));
- (2) objections filed by the same lawyer in different class actions which are "canned or boilerplate objections;" (*Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000));
- (3) the filing of objections with no colorable merit and no meaningful arguments to advance the interests of the class accompanied by a demand for "attorney fees" by the objector's counsel (*In re Zohdy*, 892 So. 2d 1277, 1282 (La. 2005));
- (4) (4) the filing of inconsistent, conflicting objections to a settlement (*O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 297 (E.D. Pa. 2003));
- (5) the filing of meritless objections to obstruct the class settlement in order to create leverage for the objector to gain advantage in unrelated litigation, in essence, "a hold up." *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 124, 131 (S.D. N.Y. 1999).



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# Professional Objectors

## 1. Bond motions

- *Fed. Rules App. Proc. R. 7*: In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.
- “Where a class member refuses to participate in the settlement and appeals only the fee award, serious standing issues arise. The court must closely scrutinize the terms of the settlement agreement to determine whether modifying the fee award would actually benefit the objecting class member. If not, the appeal would not redress his injuries, and he would lack standing to proceed.” *Knisley v. Network Assoc., Inc.*, 312 F.3d 1123, 1126 (9<sup>th</sup> Cir. 2002).

## 2. Sanctions:

- A court may use its inherent powers to sanction attorneys.



## B. Attorneys soliciting opt-outs

- There are ethical limitations on the conduct of counsel seeking to represent objectors.
- Rule 23(d) of the Federal Rules of Civil Procedure gives the court broad powers to make “appropriate orders” to ensure efficient and fair proceedings in a class action. Specifically, the court is authorized to enter orders:
  - (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
  - (3) imposing conditions on the representative parties or on intervenors
  - (5) dealing with similar procedural matters
- The court's Rule 23(d) powers include the authority to enjoin communications with class members to protect them from undue interference. See Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981); See i.e. In re McKesson HBOC, Inc. Securities Litigation, 126 F.Supp.2d 1239 (N.D.Cal. 2000) (limiting pre-certification communications designed to generate opt-outs because there “is no meaningful opportunity to choose where a concerted multimedia effort is made to secure opt-out authorizations before any class is certified.”).
- However, such an order must be based “on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.” Id. at 101, 101 S.Ct. 2193. Any such order must also be “carefully drawn ... [to] limit[ ] speech as little as possible, consistent with the rights of the parties under the circumstances.” Id. at 102, 101 S.Ct. 2193. An injunction restricting communications must be “the narrowest possible relief which would protect the respective parties.” Id. (quoting with approval Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.1977)).