



ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

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STRAUSS HAUER & FELD LLP



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Introduction

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Overview

- **Communications with Proposed Class Members**
- **Settlement Considerations**
- **The In-House Perspective**



Know Your Jurisdiction's Rules

- **Ethical rules and obligations can vary across jurisdictions**
- **Always consult the rules for the jurisdiction in which your matter is pending and in which you practice**
- **Some jurisdictions are more consumer-friendly than others**



Communications with Proposed Class Members



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Ethical Obligations

- ABA Model Rule 4.2 states that counsel may not communicate with a represented party about the subject of the representation without the consent of the represented party's attorney or unless otherwise authorized by law or court order.
- ABA Model Rule 4.3 prohibits providing legal advice to unrepresented parties other than advice to retain counsel if there is a reasonable possibility of a conflict of interest between the unrepresented party and the lawyer's client.



Communicating with Putative Class Members

Class Action under Rule 23

1 Start of a Class Action: One or several plaintiffs filed a lawsuit on behalf of all similarly situated persons aka the putative class members. Named plaintiffs are represented by counsel.

3 Opt-out: the period where the class members receive notice that they are members of the class and is provided the opportunity to opt out of the class action and retain the right to pursue their own action individually and no longer be represented by class counsel.

2 Class certification: the Court certifies a defined class of similarly situated people whose rights will be adjudicated by the rulings going forward. The class members are now represented by class counsel.



Communicating with Putative Class Members

- There are no bright line rules on defendants communicating with putative class members but there are some guide posts:



Look at the rules and policies of the court where the action is pending



Timing of Communications



Nature of Communications



Communications to Putative Class Members

A putative consumer class action is filed, allegedly on behalf of all of the company's customers nationwide, with much online commentary about the substantive allegations in the complaint. The company is considering communicating with its customers regarding the issues raised by the case.



Hypothetical: Putative Class Communications

Can the company email a statement to putative class members (its customers) regarding the case?

Yes, there are no limits on communications to customers.

Yes, but only as it relates to routine business practices.

Yes, but the communication must not undermine confidence in class counsel.

No, not under any circumstances.



Hypothetical: Putative Class Communications

Can the company communicate with individual customers to prepare their individual declarations to support the company's anticipated opposition to class certification?

Yes, but the company would have to seek leave from the court.

Yes, but the company would have to notify plaintiff's counsel.

Yes, as long as the communications are not coercive.

It depends on the jurisdiction where the case is pending.



Hypothetical

Can a company attorney reply to an unsolicited email that is received from a potential class member regarding a consumer class action lawsuit?

Depends on whether the lawsuit was filed yet.

Depends on the jurisdiction.

Depends on the judge.

No.



Hypothetical: Putative Class Communications

How might a court address a violation of the rules on communicating with putative class members?

Require the offending party to issue a retraction/correction.

Permit the non-offending party to issue a statement of its own in response.

Require court approval of future communications with the putative class.



Special Concerns About Communications With Current Employees

- **Coercion**
- **Improper incentives**
- **Payment for time worked**
- **Asymmetry of access**



***Belaire-West* Notices**

- **Plaintiff requests contact information for putative class members**
- **Due to privacy rights, affected individuals must be sent a notice and allowed to “opt out”**
- **Managers and supervisors may get questions from employees and may need to be advised how to respond**



Hypothetical

In an employment class action, the defendant wants to gather declarations from current employees to support its opposition to class certification. Can the company require its employees to participate in interviews with outside counsel?

Yes, as long as the company pays them for their time.

Yes, as long as the interview is kept confidential from the employee's supervisors.

Yes, but a court may discount the evidence.

No, the interviews must be strictly voluntary.



Example “*Miranda Warning*” for Current Employees

- Nature of the claims
- Plaintiff is seeking money on behalf of putative class members, including the employee
- Attorney represents the company, not the employee
- Information employee shares may be used to help company’s defense
- Employee may decide not to participate, and may end the interview at any time
- No benefit or detriment for participating or not participating
- Employee may speak with plaintiff’s attorneys
- Tell the truth



Private Attorneys General Act (PAGA)

- Popular alternative to employment class actions in California
- Plaintiff must be an “aggrieved employee”
- Must exhaust administrative remedies by giving notice of claims to the state
- After giving notice and a statutory waiting period, plaintiff is deputized to seek civil penalties on the state’s behalf
- 75% of civil penalties go to the state, 25% go to aggrieved employees
- Class certification is not required



Private Attorneys General Act (PAGA)

Can the defendant in a PAGA action communicate with the allegedly aggrieved employees?

Yes, provided the communication is not misleading or coercive.

Yes, but only during the waiting period (i.e., before the plaintiff is deputized to bring the claims).

No, once the lawsuit is filed, communications with allegedly aggrieved employees are prohibited.



Settlements



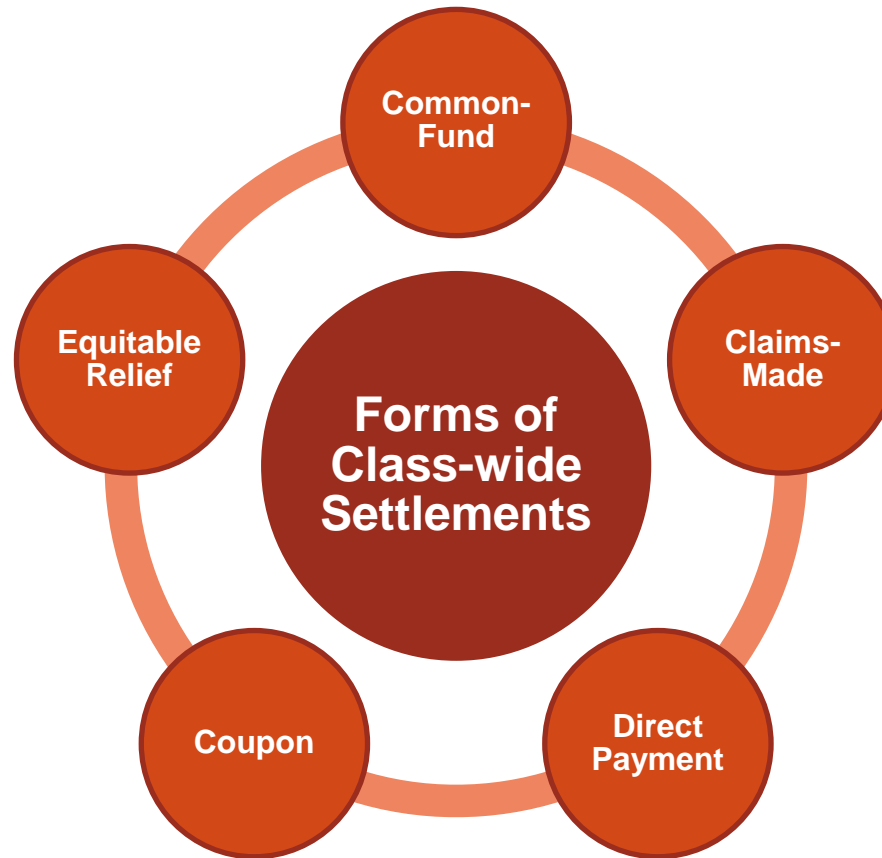
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Types of Settlements

- **Individual vs. Class-wide Settlements**



Ethical Considerations in Settlements

- May differ when class is or is not certified.
- Potential and inherent conflicts of interest.
- Fed. R. Civ. P. 23(e) sets forth standard for approving class settlements to determine that the terms of the settlement are fair, reasonable, and adequate to class members.



Hypothetical: Settlements

- A putative class action complaint is filed against the company.
- The company has communicated to plaintiffs' counsel its grounds for moving to compel arbitration and/or to dismiss the complaint.
- Plaintiff's counsel seeks an individual settlement resolving the claims of the named plaintiffs and dismissal of the putative class claims.
- The company is willing to agree to individually settle the lawsuit, but as part of the settlement agreement, the company wants to add a provision to buy peace, such that counsel won't sue on the same claims on behalf of other plaintiffs.
- **Is the “buy peace” provision ethically okay?**

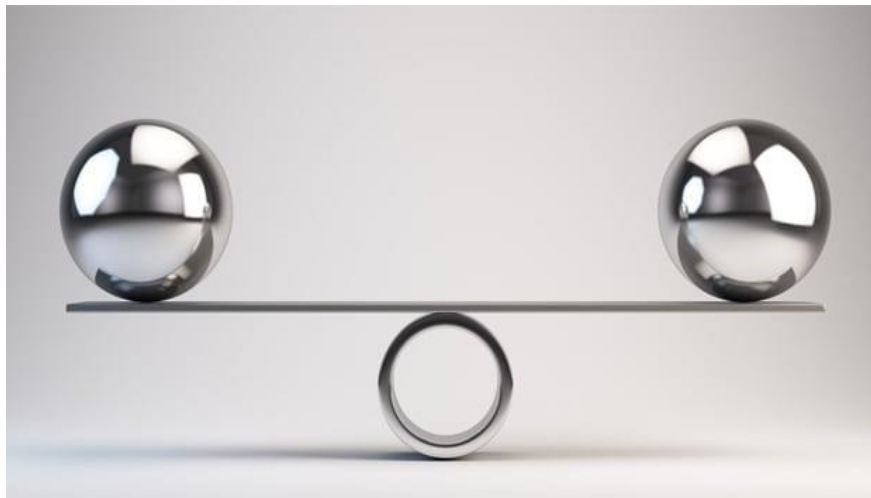
Yes

No



Hypothetical: Settlements

- **Question:** Is the “buy peace” provision ethically okay?
- **Answer:** Yes, but the parties must comply with Cal. Bus. & Prof. Code 16600.



Hypothetical: Settlements

- The individual settlements fell through and the class action moved forward through class certification discovery. The nationwide class allegations were dismissed, and the proposed class is limited to the state where the lawsuit is filed.
- On the eve of hearing the motion for class certification, we reach a tentative agreement with class counsel to settle on a claims-made basis, with reverter to the company of any unclaimed funds.

Is the claims-made reverter structure ethically okay for class counsel?

☒ Yes

☐ No



Hypothetical: Settlements

- **Question:** Is the claims-made reverter structure ethically OK for class counsel?
- **Answer:** Yes, a claims-made reverter structure is not unethical for class counsel *per se*, however many courts disfavor them.



Potential for Collusion in Claims-Made Reverter Settlements

- **Gross Settlement Amount:** \$3,000,000
- **Class Members Receive:** \$2,000,000 (67%)
- **Attorneys' Fees:** \$1,000,000 (33%)

But if only 40% of class members submit claims...

- **Amount Paid By Defendant:** \$1,800,000
- **Class Members Receive:** \$800,000 (44%)
- **Attorneys' Fees:** \$1,000,000 (56%)



Factors That Weigh in Favor of Claims-Made Reverter Settlements

- **Difficult to verify class membership**
- **Significant portion of class participates in settlement**
- **Attorneys' fees reasonable in comparison to amount paid to class members**



Hypothetical: Settlements

As part of the class settlement agreement, we want to add a provision to buy peace, such that counsel won't sue on the same claims. Class counsel is willing to do that, for a side agreement that we will pay his pre-filing investigator's fees (\$25K).

Is the proposed side agreement okay?

It depends on the jurisdiction.

It depends on how much the class is getting.

It depends on how much class counsel is getting.

No.



Hypothetical: Settlements

- **Question:** Is the proposed side agreement okay?
- **Answer:** A, B, or C. Such side agreements are often accepted and upheld by courts so long as they are disclosed and not unreasonably high relative to other terms of the settlement. However, a California court would likely be skeptical of this agreement, particularly considering Bus. & Prof. Code § 16600.



Hypothetical: “Picking Off” Class Members

- A class action alleges that a restaurant chain’s managers and lead cooks were misclassified as exempt employees. The main issue in dispute is whether employees spent more than 50% of their time on exempt duties.
- *Prior to class certification*, defendant offers individual settlements to as many employees as possible, settling with several hundred of them.
- In the settlements, employees acknowledge that they spent more than 50% of their time on exempt duties, release their misclassification claims, and agree not to participate in any class action including the released claims.

Is this attempt to “pick off” putative class members ethical?

Yes, if there is a bona fide dispute that any wages are due.

No, because it prohibits the employees from participating in a class action.

No, because asking current employees to waive their claims in this manner creates an undue risk of coercion.



Questions?



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