

Class Actions With 'Class'

Class actions are receiving special scrutiny nowadays, and for good reason: class action abuse, typified by coupon settlements that are dwarfed by class counsel's fee, have tarnished the reputation of a procedural vehicle that is essential for righting wrongs that have victimized substantial segments of the public.

The purpose of this article is simply to review some practical pointers about filing, building, managing, and settling class actions while steering well clear of the legal and ethical pitfalls that can attend your dealings with your class in general, and the named class representatives in particular.

Filing a Class Action

First rule: Don't file a class action unless you mean it. A class action triggers the judge's responsibility to ensure that, if in fact there exists a class, you do not sell out their interests. The judge, in effect, becomes a guardian of the interests of the unnamed members of the class.

Be sure to define your class as broadly as possible in your complaint. You can always more specifically define your class, or break it into subclasses, in your motion for class certification. Filing a class action stays the running of the statute of limitations as to the defined class. If you define your class in your complaint too narrowly, you may find in subsequent discovery that a claim exists for a class that was not encompassed in the class definition used in your complaint, and that their statute has already run.

Discovery

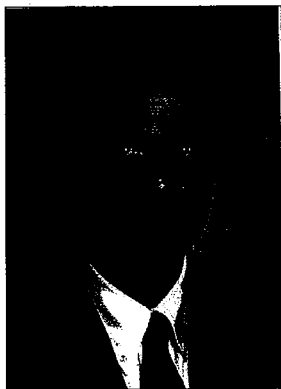
At the outset, you must identify and then locate as many class members as you can, which in large class actions can cost hundreds of thousands of dollars in time and expenses. There are no grounds for objecting to a request that the defendants produce all records from which you can identify not only your class members, but their last known address—establishing numerosity is a requirement for class certification.

After reviewing all documents in the possession of the defendants from which you can identify your putative class members and can obtain their last known addresses, prepare a form letter and a questionnaire for each. The questionnaire should be kept as simple and as short as possible, but should elicit: (a) a description of facts from which you can evaluate the strength of their claim; (b) their contact information (as many of your letters will be forwarded by the post office to new addresses); (c) their age; (d) their sex; (e) their occupation; and (f) their educational background. To increase your response rate, provide your class members with a pre-stamped, self-addressed envelope that they can use to return their completed questionnaire.

Many of your letters will be returned by the post office as undeliverable, so you are going to miss some potential class members with your direct mailing. As a consequence, you must publish notices in newspapers of general circulation in the affected community. I recommend that the notice be at least one quarter of a page in size—it does no good unless people see it. I recommend that potential class members simply be directed by the notice to call a 1-800 number where they will leave their name, a telephone number where they can be reached, and a current address where you can mail your questionnaire.

Identifying Your Named Class Representatives

After you have received all the completed questionnaires, you must then review them and



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schedule interviews of persons whom you believe might make good named class representatives. This is a complicated and time-consuming process, but its importance cannot be minimized. The number of your named class representatives should reflect the size of the class. The Jefferson County strip-search class action had more than 8,000 claimants, and we had 16 named class representatives. (By contrast, a strip-search class action against Franklin County had only about 400 claimants, and had four named class representatives.) To identify class members who would make good named class representatives in the Jefferson County case, we conducted hundreds of interviews over a period of weeks.

Your named class representatives must put forth the best possible “face” for your class. They will be consulted by you and will make decisions regarding litigation strategy, tactics, and settlement, and must therefore have the intellectual capacity and the commitment to the case to perform the work necessary to understand the case’s factual and legal complexities. Their heart must be in the right spot. If any named class representative exhibits any selfishness or a lack of consideration for unnamed class members, they must be dismissed immediately. Named class representatives probably will all be deposed in the course of the litigation and must respond to the defendants’ written discovery requests. However, the law provides that named class representatives can be compensated an additional amount over and above their recovery as a member of the class for their work in the case.

Managing the Class to Settlement

It goes without saying that you must keep the named class representatives thoroughly informed of develop-

ments in the litigation. You should correspond with your named class representatives no less than once every 60 days. I recommend your correspondence be in writing, and be lengthy and detailed. In addition, you should meet with your class representatives at least three or four times a year, and should prepare a detailed written agenda for each meeting. Be prepared to discuss with your class representatives the status of the case, the strategic and tactical decisions that need to be made, and your recommendations. They are the personification of the class that is your client in the case, and you must give them a sense of ownership in the litigation and continue to emphasize the responsibility they bear as class representatives, both to the court and to the unnamed class members.

Be sure that settlement discussions are scheduled sufficiently far in advance to permit a majority, if not all, of your named class representatives to attend personally. It is virtually impossible to settle a class action with an exchange of telephone calls while keeping your named class representatives informed of all the factors bearing on the settlement they will be asked to approve.

And make no mistake about it—it is the named class representatives who decide whether the case will be settled or not. Keep in mind that no class action is settled until after the court has conducted a fairness hearing and has satisfied itself that you have zealously represented the interests of the class as a whole. You will be a witness at the fairness hearing, and may be called upon to defend any one of a number of litigation decisions you made on behalf of the class. It is therefore absolutely essential that you have the knowledge and approval of your named class representatives, not only of the settlement, but for all significant acts you undertake as class counsel.

In the event of a common fund settlement, class counsel must leave it to the named class representatives to determine counsel’s fee. You may have a written contingent fee agreement with each of your named class representatives, but you do not have one with the members of the unnamed class. In the class actions in which I have been lead counsel, I have waived the provisions of the contingent fee contract, and have left it to my named class representatives to decide, on a clean slate, the percentage of the recovery I deserved as my fee. In each instance, the named class representatives unanimously agreed that the percentage set forth in their contingent fee contracts was a fair representation of the fee that I was entitled to receive from the class as a whole. This result is absolutely essential, because at the fairness hearing, you want two or more of your named class representatives to testify in detail about your dealings with the class representatives and the decision they made concerning your fee. Do not walk into a fairness hearing with any skeletons in the closet. The results could be devastating not only to your case, but to your reputation.

So, to recap: Don’t file a class action unless you mean it. Devote the time and effort necessary to select good class representatives, and then treat them like partners in the litigation. Remember that they are calling the shots and trust them in the end. And always, always remember that the judge is looking over your shoulder and, in the end, will personally evaluate, in a written order following the conclusion of the fairness hearing, the integrity with which you have managed your class action.

