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Civil Procedure: Class-Settlement Distribution and Accounting

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Civil Procedure

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Introduction

Recognizing that many class actions settle, the Civil Rules Advisory Committee amended Rule 23 of the Federal Rules of Civil Procedure in 2018 "to address issues related to settlement."[2] A "basic focus" of the Advisory Committee was "the extent and types of benefits that settlement will confer on members of the class," including "the relief actually delivered to the class."[3]

Because settlement distribution occurs outside the usual structure of adversarial litigation and court adjudication, what relief is "actually delivered" to class members under a settlement's terms can be difficult to ascertain. Accordingly, the U.S. District Court for the Northern District of California promulgated, on November 1, 2018, *Procedural Guidance for Class Action Settlements* (Guidance).[4] Among other things, the Guidance encourages the parties to file a post-distribution accounting to measure the extent and type of benefits that class-action settlements actually confer on class members.[5]

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[1] Excerpted and adapted from Brandon A. Prince, Vaughn R. Walker, & Scott Dodson, *Preliminary Report on Class-Action Settlement Distributions in the Northern District of California* (May 30, 2023).

[2] FED. R. CIV. P. 23, 2018 Adv. Cmte. Note.

[3] *Id.*

[4] The Northern District amended the Guidance on December 5, 2018, and again on August 4, 2022.

[5] The Guidance encourages post-distribution accountings to include the following information: total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average, median, maximum, and minimum recovery per claimant, the methods of notice and the methods of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, plaintiffs' counsel's updated lodestar total, the lodestar

This preliminary report assesses the performance of the Guidance in its first three years and offers recommendations to better achieve the objectives of the Guidance.

Methodology

Under the supervision of Vaughn Walker, former chief judge of the Northern District and Affiliated Scholar at the Center for Litigation and Courts, students enrolled in a seminar at University of California Law, San Francisco compiled and analyzed post-distribution reports filed under the Guidance. After the seminar concluded, one student continued the research under Judge Walker's supervision and created an original database of information on post-distribution accountings. Data collection was by hand using Bloomberg Dockets, supplemented by the assistance of three Northern District judges: Jacqueline Scott Corley, Thomas Hixson, and Donna Ryu.

The database includes 234 class actions that ended in a final settlement between November 1, 2018, and January 31, 2022. This total includes 95 wage-and-hour cases, 77 consumer cases, 23 securities cases, and 39 other cases.

Researchers collected as much distribution data as possible, but a major limitation of the study is the failure of parties to follow a uniform post-distribution accounting template. As a result, post-distribution accountings varied in their level of detail and lacked comparability. Some accountings omitted certain categories entirely. Others did not appear as a single report but instead were composed of one or more "status updates" with the court regarding the settlement-distribution statistics. Often, these status updates only concerned the actual distribution process (e.g., uncashed checks and distribution attempts) and did not report the other post-distribution accounting information specified in the Guidance. For cases without a post-distribution accounting, researchers collected all distribution data available in docket filings.

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multiplier, the number of class members availing themselves of nonmonetary relief and the aggregate value redeemed.

Findings and Results

Four key findings emerge from the data.

First, compliance with the Guidance is infrequent, but court encouragement helps. In only 39% (92 of 234) of the cases falling under the Guidance was a post-distribution accounting filed. Specific court requests for reports do seem to prod the parties into filing one. When the judge asked for an accounting, the parties complied 76% of the time. Shockingly, however, the parties failed to file a post-distribution accounting in 23 cases in which the court *did* request one. In only 7% of cases was a post-distribution accounting filed without any prompting by the court.

In some cases without a court request, the presiding judge may have concluded that a post-distribution accounting was unnecessary because of small class size, small gross-settlement total, or complete and rapid distribution of the available funds. Because the Guidance stresses that, "[e]ven though the guidance is highly recommended, the parties must comply in the first instance with the specific orders of the presiding judge"[6] parties may have believed that the lack of a court order absolved them of the requirement to file a report.

Second, significant amounts of the settlement fund allocated for class members appear not to have gone to the class. Although the percentages of unclaimed funds are small (2% of settlements with distribution reports and 7% of all settlements), the dollar amounts are high. For the 85 settlements with post-distribution accountings reporting this metric, nearly $36 million went unclaimed. For all 167 settlements with data on this metric, nearly $203 million went unclaimed.

It is possible that the lack of reporting on cy pres distributions and the short length of time between the initial distribution and the filing of some post-distribution accountings help explain the large amounts of unclaimed funds. Before the August 2022 amendments to the Guidance, accountings were to be filed within 21 days of the distribution of attorney fees and sending out the first settlement distribution. (The Guidance now requires the accounting to be filed within 21 days of the settlement checks becoming stale—or, if checks are not used, once all funds have been distributed to the class

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[6] *Procedural Guidance for Class Action Settlements* (N.D. Cal. Dec. 5, 2018).

and cy pres beneficiaries.) Administrators likely tracked down and paid class members in additional rounds of distribution made after post-distribution accountings had already been filed. Such activities may also have caused an increase in administration costs not reflected in the collected data. Tax payments on the settlement, as well as payments required under statutes like the California Private Attorney General Act (PAGA), may also represent a portion of these unclaimed totals. In other words, the net unclaimed amounts reported here may overstate the amounts ultimately left unclaimed. Future studies of distributions may reveal a more accurate picture of unclaimed funds.

Third, claimant participation remains modest. The data reveal an average claims rate of 31% to 33% and a median claims rate of 12% among class members. Given the size of the classes, these percentages suggest that substantially large numbers of claimants never file a valid claim form. Significant percentages of class members who receive payments by check never cash them (21% to 25% on average, 12% to 15% by median). These figures suggest that as much as 80% of class members never obtain any recovery.

Fourth, distribution notice and methods have not embraced technology. Despite the wide availability and use of digital communication and payment, the settlements skewed heavily toward physical notice by mail and payment by check: around 40% of all settlements provided notice *only* by mail. Given the numbers of class members, notice by mail likely is the most expensive form of notice. Notice by mail also lacks platform integration between notice and claim form. As for payment, 64% of settlements used paper checks as the *sole* form of payment distribution.

The predominance of paper checks to pay the settlement class may help explain why the distribution process is often cumbersome and requires repeated distributions. The use of paper checks requires administrators to perform multiple rounds of check distribution. After each distribution, the court, parties, and other class members must wait for the checks to expire or come back as undeliverable in the mail to assess whether the amount of money remaining in the fund justifies another attempted round of distribution. If another round is justified, the administrator must then expend additional funds finding the remaining settlement members through processes like address tracing. These costs, in turn, reduce the settlement payout to the class. And plaintiffs' counsel must file additional paperwork with the court to provide interim updates on the status of distribution. In short, the issuance and delivery of paper checks is likely both the most expensive form of payment and the least deposited form of payment, though more analysis is needed to confirm these suppositions.

Recommendations

The Northern District is to be commended in piloting an innovation geared toward shedding light on an important and understudied facet of class-action justice. Nevertheless, three improvements could be made.

First, compliance with the Guidance should be mandatory. Under the current wording of the Guidance, compliance is not robust. To increase the frequency of post-distribution accountings, the Guidance should clearly state that an accounting is required unless suspended by court order. Further, the court should remind the parties and settlement administrator of the requirement as part of its monitoring functions. Finally, judges should consider withholding 10% of the attorney fees until the filing and subsequent approval of the final post-distribution accounting.

Second, the accounting format should be standardized to simplify reporting, ensure consistency, and guard against incompletion. A standardized, electronic input form could allow for easy comparison and ensure that all cases use the same formula to calculate a given statistic in the post-distribution accounting.

Third, the court should embrace technology. The low claim rate in cases requiring a claim form suggests that affirmative efforts required of claimants greatly reduce participation. The generation of multiple paper-check distributions alone will not solve this problem because many individuals still fail to take the step of cashing the check and collecting their funds.

The increasing ubiquity of digital payments and online banking creates an opportunity to improve class benefits by using electronic notices and automatic payments. For example, a consumer class action involving a product could use data on the payment methods used by the class to purchase the product and distribute the eventual settlement back to these accounts. However, this subject requires further research and analysis, including the privacy implications that may arise in the access of consumers' purchasing and financial information to facilitate automatic payments.

In general, the compensatory success of a class action depends upon the amounts ultimately received by class members and the percentages of class members receiving amounts. Even if a claims rate of 2% is currently normal for some kinds of classes,[7] normality does not mean acceptability. Low claims rates and low per-claimant amounts create stark contrasts between class benefits and class-counsel fees,[8] which feed the narrative that class actions enrich lawyers at the expense of clients. The goal of effective reform of class-settlement administration should be to maximize class participation and recovery whenever compensation is a significant aim of the action. The use of technology to encourage participation and to minimize costs is a key mechanism for achieving that goal.

Conclusion

Nationally, settlement distributions lack transparency. This lack of transparency means that court oversight is less effective, academic study is impossible, and, ultimately, class benefits are likely to suffer. The Northern District's decision to require post-distribution accounting is a significant first step in the process of improving the efficacy of class-action settlement distribution. By creating a district-wide requirement, the Northern District is improving court monitoring and enabling study of settlement-distribution trends. Future studies should focus on more comprehensive and detailed analyses of post-distribution figures in light of the August 2022 amendments to the Guidance and any other reforms adopted in light of the recommendations made here.

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[7] *See* Norcia v. Samsung Telecomm. Am., 3:14-cv-00582-JD, Dkt. 199, at 6 (N.D. Cal. July 20, 2021) (asserting that a claims rate of just over 2% "is on par with similar cases" in the consumer-class context).

[8] *Id.*