

## Beware California Northern District's Class Action Updates

By **Niki Mendoza** (November 13, 2018, 12:45 PM EST)

If you are a class action litigator and haven't been paying attention to the "guidance" on class action settlements issued by the Northern District of California, you should now. Several judges recently have denied preliminary or final approval of class action settlements, citing the failure of the parties to address the issues referenced in the guidance. And now the district has taken the time and resources to update the guidance — so judges will be paying attention. The guidance, updated as of Nov. 1, 2018, is available on the district website.<sup>[1]</sup> The guidance preamble explains that parties who fail to follow the guidance may face unnecessary delay or denial of class action settlement approval. The parties, therefore, should consider the guidance as early as during settlement negotiations.



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The primary takeaways include the following.

### Is There a Change to the Class Definition?

The guidance provides that, when seeking preliminary approval, the motion should explain any differences between the class proposed for settlement purposes (the settlement class) and the class either certified (litigation class) or proposed in the operative complaint (putative class), and an explanation as to why the differences are appropriate. More and more courts — in this district and nationwide — are questioning why the settlement class should be any different (typically broader, for defendants to obtain more releases) than the class previously proposed or certified. When negotiating a proposed settlement, therefore, the parties should seriously consider whether a requested change to the class definition is necessary to accomplish the recovery and peace sought.

### Are the Claims Released the Same as the Claims Alleged?

Similarly, the guidance provides that the preliminary approval motion should explain any differences between the claims to be released in the proposed settlement and the operative claims in the case, and explain why the differences are appropriate. Like with any changes to the class definition, expansion of the claims to be released may peak the judge's interest and should be well thought out during settlement negotiations.

### What Is the Actual Recovery Versus the Potential Recovery, and How Is the Recovery to Be Distributed?

The guidance provides that the preliminary approval motion should include information as to what the anticipated class recovery is (amount and type), as compared to the potential recovery if the plaintiffs had fully prevailed after trial and appeals, and whether there is any potential for reversion of funds to the defendant. The motion should also discuss the factors that led to the compromise, typically framed by the plaintiffs as the “risks” to recovery. The motion should also explain the proposed plan for allocating the settlement fund among class members, and if class members are required to complete claim forms to be potentially eligible for recovery, an estimate of the claims rate, and reasons and examples supporting that estimate. The guidance also requests specific information regarding the selection of the settlement administrator and the settlement administrator’s experience.

The guidance also recommends that class counsel provide certain specific data related to at least one past comparable class settlement involving the class counsel and the same or similar clients, claims and/or issues. The data should be presented in easy-to-read charts, allowing quick comparison, and include information such as settlement amount, class size, notice data, claims rate, average recovery per class member, cy pres donations, administrative costs, attorneys’ fees, and benefit conferred on the class in coupon or nonmonetary relief settlements.

### **How Will the Class Be Notified?**

The guidance walks through the types of information that should be included in a notice of class action settlement. It also acknowledges the digital age. The guidance provides that class counsel should consider increasing notice to class members and increasing class participation by utilizing third-party data sources to identify class members, using social media, hiring a market specialist, providing a settlement website that estimates claim amounts for specific class members, and allowing for distributions through direct deposit. The guidance also explains (with examples) that certain information should be included in the notice, related to opt-outs, and objections.

### **What Are the Requested Attorneys’ Fees, Incentive Awards and Cy Pres Awardees?**

The guidance provides that the preliminary approval motion should provide information regarding the anticipated requested attorneys’ fees, a supporting lodestar calculation, the amount of any expected incentive award request, and the chosen cy pres recipients if applicable.

At the final approval stage, class counsel should include declarations detailing the lodestar, be prepared to submit copies of billing records if the court orders, and submit evidence demonstrating the awardees’ involvement in the case supporting any requested incentive awards. The fee application should be noticed for the same date as the final approval hearing.

### **What Is the Settlement Timeline and Applicability of CAFA?**

Consistent with current practice and case law in the jurisdiction, the guidance recommends that the parties ensure there is a notice period of at least 35 days, i.e., 35 days from the initial notice date to the deadline for opting out of the settlement class or objecting to any part of the settlement. The parties should also address the applicability of the Class Action Fairness Act of 2005, or CAFA, whether notice is required under CAFA, and how the settlement complies with CAFA if coupons are included in the recovery.

### **What Information Should Be Provided to the Court After Final Approval?**

Courts have traditionally varied on what information, if any, they require the parties or the settlement administrator to provide after the settlement and attorneys' fees have been approved. Courts are increasingly interested in what happens afterward. The guidance provides that at that stage, within 21 days after the distribution of the settlement fund and payment of attorneys' fees, the parties should file a post-distribution accounting and add information on the settlement website providing detailed data in chart format about how the settlement was actually implemented and the funds dispersed.

## **Conclusion**

The newly updated guidance is consistent with, and expands upon, the proposed amendments to Federal Rule of Civil Procedure 23 scheduled to go into effect Dec. 1, 2018. Although this guidance is directed specifically at parties litigating in federal court in the Northern District of California, the guidance should be considered by parties litigating in other jurisdictions, as courts are increasingly raising questions and requiring additional information in support of class action settlement approval.

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[1] <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>