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# Emerging Toxic Torts

## Planning For Life After Settlement: Advice For Defendants Settling Mass Actions

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# Commentary

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## Planning For Life After Settlement: Advice For Defendants Settling Mass Actions

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*[Mark G. Boyko and John J. Baroni are attorneys at Sandberg, Phoenix and von Gontard, P.C., in St. Louis. Mr. Boyko is deputy reporter for the CPR: International Institute for Conflict Prevention and Resolution's Commission on Facilities for the Resolution of Mass Claims. The commission, headed by Kenneth Feinberg and Deborah Greenspan, is charged with creating a guide for designing claims administration procedures in mass tort and other large scale litigation. SPvG represented Shelter Life Insurance Co. in Massey v. Shelter Life Ins. Co., discussed in this article. Mr. Baroni was one of the principal defense attorneys in the post CAFA settlement of that class action. This is the third in a series of columns by Mr. Boyko for Mealey's Emerging Toxic Torts. Copyright 2007 by the authors. Responses welcome.]*

Once the decision to pursue settlement of mass litigation has been made, defendants continue to face a number of questions and challenges. Many of these can be addressed in the settlement agreement itself, while others may require continued vigilance as claims are processed for months and years to come. In addition to the global questions which must be addressed by all mass settlements, the Class Action Fairness Act (CAFA) and Fed.R.Civ.P. 23 create added hurdles for defendants to overcome. Part I of this commentary addresses just a few of the general considerations defendants must address. In Part II, we specifically recommend strategies for obtaining final approval of federal class actions since passage of the CAFA.

### Part I — Settlement Considerations Claims Criteria

A critical decision, which is increasingly being memorialized in the terms of the settlement agreement, is exactly how to define who is an eligible claimant. Basic criteria in class actions are often memorialized ahead of serious settlement discussions when the plaintiff first seeks to certify a class. Although changes may be made as the case progresses, these settlements may benefit because whoever administers the claims process can be 'up and running' as soon as the settlement receives final approval.

However, pre-defining potential claimants can be wasteful if settlement does not result or if pre-trial decisions, such as partial summary judgment on certain claims, alter the strength of different plaintiffs' claims. More importantly, pre-defining claimants can be troublesome where the injury is unprecedented in nature, such as with the Agent Orange and the September 11th Victims' Compensation Funds. By waiting to define the criteria until settlement is finalized, these facilities, supervised by Special Master Kenneth Feinberg, a CPR neutral, were better able to adjust for unexpected changes in circumstances.

### Hard Cap v. Soft Cap

From a defense prospective, a critical distinction in any mass settlement is whether to limit plaintiff recoveries with a 'hard-cap,' a 'soft-cap,' or some hybrid of the two. Under a 'hard-cap' system, the absolute maximum amount of money the defendant

will pay is negotiated as part of the settlement and is not changed based on the number of claimants or the extent of their damages. There are obvious benefits to using a hard-cap in that liability is limited upfront. Additionally, hard-caps give meritorious claimants an incentive to police other claims and, therefore, may reduce the number of invalid claims awarded.

Despite these advantages, hard-caps are not without their problems. Occasionally, the 'hard-cap' is none-the-less adjusted based on changes in circumstances. Meanwhile, claimants often associate a defendant with the claims facility even when it is administered by a third-party, and, therefore, the defendant is likely to encounter additional bad publicity if claimant awards are unexpectedly small or unreasonably delayed. Finally, litigation between potential claimants policing, or over-policing, the fund from potentially invalid claims may threaten the finality of the settlement.

Soft-caps, meanwhile, provide for an initial amount determined as a condition of settlement but allow defendants the right to opt to provide additional funding or walk away if the funds are exhausted before all eligible payments are paid. If the defendant does not 'pony-up' the additional funds, class members receiving less-than-full relief could continue to pursue claims against the defendant. Thus, just as hard-caps give claimants' an incentive to monitor the fund, soft-caps give the defendant the incentive to ensure the facility operates efficiently and effectively.

In the event claims fail to reach the levels expected, some account must be made for what to do with the excess. Often, any excess funds revert back to the defendant. Occasionally, such as in the case of the German Holocaust litigation, excess funds designated for a particular class of claimants can be reassigned to another class or to general public policy initiatives, such as *cy pres* payments or payments which are otherwise related to the litigation. For example, excess money in a fund for smokers could go to lung-cancer research or stop-smoking initiatives.

The polybutylene pipe litigation is a good example of a hybrid fund. In that case, a \$950 million soft-capped fund was established to pay for repair and replacement of property damages, and a \$75 million hard-capped fund paid for past expenses related to

the allegedly defective piping. This illustrates how defendants should consider creating 'sub-classes' and treating them differently in the global settlement.

Each of these examples will be covered in depth in an upcoming publication by the CPR International Institute for Dispute Resolution's Commission of Facilities for the Resolution of Mass Claims, to be published in 2007.

### **Third-Party Administrators**

Settling defendants should also consider whether and in what capacity to bring in outside help to administer the settlement fund. Where the eligibility criteria are straightforward and factual disputes are rare, defendants may consider administering the settlement themselves. More often, however, this is neither practical nor favored by any of the parties.

In these situations, the claims process itself may be better directed by a third-party administrator. Various private third-party administrators, including Garden City, are experienced in administering settlements, and may be a sound option. However, such experience comes at a price. Therefore, defendants should also consider utilizing existing facilities and organizations, as was done in the Johns Manville asbestos cases, polybutylene pipe litigation and for the administration of numerous holocaust-related settlements. If available, existing organizations willing to administer claims can provide settling parties with a more effective and less costly method of providing notice, handling claims and distributing funds to eligible claimants.

In addition to the practical concerns of administering claims, mass settlements must also provide for some method of resolving disputes and making ongoing decisions regarding the administration of the fund and distribution of the fund. In some cases, the final arbitrator may be a magistrate judge or other judicial officer. Typically, however, even where a magistrate is appointed in the settlement agreement to resolve disputes, the parties themselves organize an informal dispute resolution mechanism within the fund itself in order to handle debated claims.

Special masters (appointed by the Court pursuant to Rule 53), and claims administrators (appointed by the parties, much like a mediator) are, at best, expe-

rienced neutrals with the ability to resolve disputes as they arise. Most large-scale mass tort settlements use one or both of these individuals in some capacity.

However, these individuals can be vested with considerable discretion, which may result in uncertainty in outcome. As a result, settling parties should consider the use of a panel of trustees as a substitute or as oversight for an individual head administrator. When serving as oversight, these trustees act much like corporate boards of directors, with one or more claims administrators acting like chief executives responsible for the day-to-day operation of the Fund. Although these committees are usually kept small for efficiency purposes, the German Foundation, which administers a settlement of over \$5 billion for the role of German industry in the Holocaust, is led by 27 trustees.

## Part II — CAFA And Rule 23 Considerations

Among other things, the Class Action Fairness Act of 2005<sup>1</sup> (CAFA) has assigned new responsibilities to federal judges that relate to class action settlements. In the section titled “Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions<sup>2</sup>, CAFA specifically regulates certain types of settlements Congress found to be abusive and also mandates certain notice requirements for the settlement of all class actions. Specifically, CAFA requires the defendants to notify specific state and federal officials of the proposed settlement and imposes strict timelines for notice provision. And CAFA also describes what information must be included with the notice.

### Notice To Government Officials

CAFA imposes various notice burdens on settling defendants. Under U.S.C. § 1715 *et seq.*, “not later than 10 days after a proposed settlement of a class action is filed in court,” defendants must “serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official” a notice of the proposed settlement. Typically the appropriate federal official will be the Attorney General of the United States. The appropriate State official requires some analysis and strategy. The appropriate State official will be either the State attorney general or the person in the State who has the primary regulatory or supervisory authority with respect to the defendant.

In a recent CAFA settlement, Massey v. Shelter Life Ins. Co.<sup>3</sup>, after analysis and consideration, the defendant sent the notifications to the commissioners of insurance in each of the States where class members resided, as well as the U.S. Attorney General. Once the appropriate notifications have been served, we recommend defendants file an affidavit with the court specifically describing exactly how defendants complied with U.S.C. § 1715 *et seq.* and include a description of exactly what defendants sent to those various officials. This affidavit will become an integral part of the briefing on the fairness of the settlement. Assuming defendants receive no objections to the settlement from the appropriate officials, defendants can use that fact as a potent argument in favor of the fairness of the settlement.

The volume of information defendants must send to these officials is quite large and must include, among other things, all the proposed settlement documents and all iterations of the complaint and attachments. We recommend sending an electronic copy of the required documents to the appropriate officials. Counsel may get calls from some of these officials inquiring about the U.S.C. § 1715 *et seq.* notice, particularly from states such as Illinois, Nevada, New Mexico and New York, which have processes in place for reviewing class action settlements.<sup>4</sup> Although states rarely, if ever, file formal objections to class settlements, some have informally contacted the attorneys and secured changes to settlements before they were finalized.<sup>5</sup> It is important to inform these officials that U.S.C. § 1715 *et seq.* does not require any action on their part. Of course, if they raise an objection, counsel must deal with it and make sure the court is aware of any such objection. If the notice is not properly sent, a class member may refuse to be bound by the settlement agreement.

### Fairness Hearing

There will be two (2) “fairness” hearings. The first hearing will seek preliminary approval from the court to proceed with the proposed settlement. At this preliminary hearing, the parties will submit their settlement agreement to the court, a proposed motion for conditional class certification, motion for preliminary approval of the proposed settlement, proposed class notice, and any other settlement documents, such as proposed proof of claim forms.

Assuming preliminary approval is granted, the parties will proceed according to the settlement agreement and provide the class notice and notice to the appropriate Federal and State official. As described above, CAFA requires that the U.S.C. § 1715 *et seq.* notice be given, “not later than 10 days after a proposed settlement of a class action is filed in court.” In addition, CAFA requires that an order giving final approval to the proposed settlement may not be issued earlier than 90 days after the date on which the appropriate federal and state officials are notified.<sup>6</sup>

Hopefully, the final hearing will be ministerial. The parties will have completed the pre-approval terms of the settlement agreement, including notice, claims and class-member exclusion processing, dispute resolution and the provisions for filing objections to the settlement. The parties may submit additional briefing in advance of the final hearing. Assuming the court grants final approval, any payouts to class members should not take place until after any appellate time has run.

### Conclusion

The challenges of mass settlement do not necessarily end once the defendants have decided to cut checks. Securing global peace requires an understanding of

the tools available for distributing settlement funds, as well as the requirements imposed by Rule 23 and CAFA. An understanding of these challenges is an important asset for defendants, who would do well to gain this expertise, or hire counsel, or a third-party administrator, competent in overseeing the end-game of mass litigation.

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### Endnotes

1. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).
2. *Id.* at § 3, 119 Stat. 4, 5 (codified at 28 U.S.C. §§ 1711-1715).
3. No. 05-4106-CV-NKL (W.D. Mo. 2006).
4. Peter Geier, State AGs Eschew CAFA Review, The National Law Journal, Oct. 23, 2006.
5. *Id.*
6. 28 U.S.C. § 1715(d). ■



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