

**GUIDELINES FOR MOTIONS RELATING TO PRELIMINARY AND FINAL
APPROVAL OF CLASS ACTIONS**

DEPARTMENTS 1 AND 3 – COMPLEX CIVIL LITIGATION

I. PRELIMINARY APPROVAL

Parties submitting class action settlements for preliminary approval should be certain that the following procedures are followed and that all of the following issues are addressed. Failure to do so may well result in unnecessary delay of approval. It is also strongly suggested that these guidelines should be considered during settlement negotiations and the drafting of settlement agreements.

Overall, please remember that trial judges are fiduciaries for absent class members. (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 555.) Therefore, parties seeking to settle class actions must provide a trial judge with “sufficient information to determine if the settlement was fair, adequate, and reasonable.” (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151.) This standard also applies to attorney fees and costs.

In addition to the considerations discussed in these Guidelines, please also look at the Los Angeles County’s Checklist for Preliminary Approval of Class Action Settlements for relevant considerations:

<http://www.lacourt.org/division/civil/pdf/PreliminaryApprovalOfClassActionSettlement.pdf>

- A. NOTICED MOTION – Pursuant to California Rule of Court (“CRC”) 3.769(c), preliminary approval of a class action settlement must be obtained by way of regularly noticed motion. The hearing date must be reserved through the Complex Coordinator at (408) 882-2286 before filing. Doing so will ensure proper handling in the Court’s calendaring system and provide the mechanism for the issuance of a tentative ruling.
- B. CLAIMS MADE VS. CHECKS-MAILED SETTLEMENT – The Court typically finds that settlement distribution procedures that do not require the submission of claim forms, but rather provide for settlement checks to be automatically mailed to qualified recipients, result in greater benefit to the class members of most settlement classes. If a claims-made procedure is proposed to be used, the settling parties must be prepared to explain why that form is superior to a checks-mailed approach.
- C. EXPERIENCE/QUALIFICATIONS OF CLASS COUNSEL – Make sure to include a summary of class counsel’s experience and a listing of all prior cases on which class counsel has acted as lead or co-counsel.

- D.** REASONABLENESS OF SETTLEMENT AMOUNT – Admissible evidence, typically in the form of declaration(s) of plaintiffs’ counsel, must be presented to address the potential value of each claim that is being settled, as well as the value of other forms of relief, such as interest, penalties and injunctive relief. Counsel must break out their potential recovery by claims, injuries and recoverable costs and attorneys’ fees so the Court can evaluate the value of the claims and discern the potential cash value of the claims and how much the case was discounted for settlement purposes. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116.) Where the operative complaint seeks injunctive relief, the value of prospective injunctive relief, if any, should be included in the *Kullar* analysis.
- E.** ALLOCATION FOR TAX PURPOSES – In employment cases, if the settlement payments are divided between taxable and non-taxable amounts, a rationale should be provided consistent with counsel’s *Kullar* analysis. The agreement and notice should clearly indicate whether there will be withholdings from the distribution checks, and who is paying the employers’ share of any payroll tax.
- F.** RELEASE – The release should be fairly tailored to the claims that were or could be asserted in the lawsuit based upon the facts alleged in the complaint. Releases that are overbroad will not be approved. Furthermore, although the Court will not necessarily withhold approval on this basis, it generally considers a plain language summary of the release to be better than a verbatim rendition in the proposed class notice.
- G.** SETTLEMENT ADMINISTRATION – The proposed Settlement Administrator must be identified, including basic information regarding its level of experience. Where calculation of an individual’s award is subject to possible dispute, a dispute resolution process should be specified. The Court will not approve the amount of the costs award to the Settlement Administrator until the final approval hearing, at which time admissible evidence to support the request must be provided. The Court also generally prefers to see a settlement term that funds allocated but not paid to the Settlement Administrator will be distributed to the class pro rata.
- H.** NOTICE PROCEDURE – The procedure of notice by first-class mail followed by re-sending any returned mail after a skip trace is usually acceptable. A 60-day notice period is usually adequate.
- I.** NOTICE CONTENT – The Court understands that there can be a trade-off between precise and comprehensive disclosures and easily understandable disclosures and is willing to err on the side of making the disclosures understandable. By way of illustration, parties should either follow, or at least become familiar with the formatting and content of The Federal Judicial Center’s “Illustrative” Forms of Class Action Notices at <http://www.fjc.gov/>, which

conveys important information to class members in a manner that complies with the standards in the S.E.C.'s plain English rules. (17 C.F.R. § 230.421.)

Notices should always provide: (1) contact information for class counsel to answer questions; (2) a URL to a web site, maintained by the claims administrator or plaintiffs' counsel, that has links to the notice and the most important documents in the case; (3) for persons who wish to review the Court's docket in this case, the URL for the Court's electronic filing and service website at www.scefiling.org and www.scscourt.org. Further information and suggested language to be included in class notices is set forth below in section II of these Guidelines.

In addition, counsel should consider whether an English-only notice is sufficient.

- J.** CLAIM FORM – If a claim form is used, it should not repeat voluminous information from the notice, such as the entire release. It should only contain that which is necessary to elicit the information necessary to administer the settlement.
- K.** EXCLUSION FORM – The notice need only instruct class members who wish to exclude themselves to send a letter to the settlement administrator setting forth their name and a statement that they request exclusion from the class and do not wish to participate in the settlement. It should not include or solicit extraneous information not needed to effect an exclusion.
- L.** INCENTIVE AWARDS – Evidence regarding the nature of the plaintiff's participation in the action, including specifics of actions taken, time committed and risks faced, if any, must be presented. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.) Plaintiff's counsel should provide a declaration from plaintiff concerning these issues at the same time counsel seeks preliminary approval.
- M.** ATTORNEYS' FEES – The Court will not approve the amount of attorneys' fees until final approval hearing, at which time sufficient evidence generally must be presented for a lodestar analysis, even if the fee is based on a percentage of recovery and even if the parties have agreed to the fees. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].). This "sufficient evidence" generally is information about counsel's hourly rate and the time spent on the case. (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 450-451.) Further information regarding fee approval is set forth below in section III of these Guidelines.

In addition, the Court will review the cost request and may ask for further information supporting the cost request. That additional information will need to be submitted before final approval is granted.

- N. PROPOSED ORDER GRANTING PRELIMINARY APPROVAL – All proposed orders should include the requisite “recital,” “finding,” and “order” language, including adequate information to provide clear instruction to the settlement administrator. The proposed order should also attach the proposed notice and any associated forms as exhibits. The proposed order also should contain proposed dates for class notice, objections, opt-outs, claim submission, filing papers for final approval, hearing on motion for final approval and attorney fees, incentive payments.
- O. CY PRES – The parties must explain why a cy pres recipient is needed (i.e. why the funds cannot be re-distributed to class members) and why the cy pres distribution meets the purposes of the suit or is otherwise appropriate. (C.C.P. § 384). The parties also must disclose interests or involvement by any counsel or party in the governance or work of the cy pres recipient, and discuss how the parties will handle uncashed checks.

II. RECOMMENDED COURT CONTACT INFORMATION LANGUAGE TO INCLUDE IN CLASS NOTICES

All Notices to Class Members should include information regarding the Superior Court of California, County of Santa Clara’s website(s): www.scscourt.org and www.scefiling.org. Settlement class notices should also provide the Court’s mailing address for sending objections and notices to appear: Superior Court of California, County of Santa Clara, 191 N. 1st Street, San Jose, California 95113.

POST CERTIFICATION NOTICES:

“The pleadings and other records in this litigation, including the Settlement Agreement, may be examined (a) online on the Superior Court of California, County of Santa Clara’s Electronic Filing and Service Website at www.scefiling.org, or (b) in person at Records, Superior Court of California, County of Santa Clara, 191 N. 1st Street, San Jose, California 95113, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays and closures.”

SETTLEMENT CLASS NOTICES:

Further information ---

“The above is a summary of the basic terms of the Settlement. For the precise terms and conditions of the Settlement, you are referred to the detailed Settlement Agreement, which is on file with the Clerk of the Court. The pleadings and other records in this litigation, including the Settlement Agreement, may be examined (a) online on the Superior Court of California, County of Santa Clara’s Electronic Filing and Service Website at www.scefiling.org, or (b) in person at Records, Superior Court of California, County of Santa Clara, 191 N. 1st Street, San Jose, California 95113, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday,

excluding Court holidays and closures, or you may contact Class Counsel or the Settlement Administrator.

PLEASE DO NOT TELEPHONE THE COURT OR DEFENDANT’S COUNSEL FOR INFORMATION REGARDING THIS SETTLEMENT OR THE CLAIM PROCESS.”

Objections and/or Notices of Intention to Appear –

“You may object to the proposed settlement in writing. You may also appear at the Final Approval Hearing at your expense, either in person, telephonically, or through an attorney, provided you notify the Court of your intention to do so. All written objections, supporting papers and/or notices of intent to appear at the Final Approval Hearing must (a) clearly identify the case name and number ([*** v. ***], Case Number [1-**-CV-*****]), (b) be submitted to the Court either by mailing the objection to: Clerk of the Court, Superior Court of California, County of Santa Clara, 191 N. 1st Street, San Jose, California 95113, or by filing in person at the same location; (c) also be mailed to the law firms identified [*****] and (d) be filed or postmarked on or before _____, 20**.”

III. FINAL APPROVAL

Parties submitting class action settlements for final approval should be certain that the following procedures are followed and that all of the following issues are addressed. Failure to do so may well result in unnecessary delay of final approval.

In addition to the considerations discussed in these Guidelines, please also review Los Angeles County Superior Court’s Checklist for Final Approval of Class Action Settlements for other potentially-relevant considerations:

<http://www.lacourt.org/division/civil/pdf/FinalApprovalofClassActionSettlement.pdf>

- A.** Since the date and place of final approval hearings are set by the preliminary approval order, notice of which is typically included in the notice to class members of the settlement itself (CRC 3.769(e) and (f)), the final approval hearing is outside the scope of Code of Civil Procedure § 1005. Nevertheless, settling parties should caption their papers submitted in support of final approval as a “Motion for Final Approval” and should obtain a motion hearing date from the Complex Coordinator before filing. Doing so will ensure proper handling in the Court’s calendaring system and provide the mechanism for the issuance of a tentative ruling.
- B.** With rare exceptions, the Court will expect all issues related to final approval to be heard at the same time, including, without limitation, (a) final approval of the settlement itself, (b) approval of any attorneys’ fees request, (c) approval of incentive awards to class representatives, and (d) approval of expense reimbursements and costs of administration. If the settling parties elect to file

separate motions for any of these categories, separate reservations for hearings may be obtained, but the motions must be set to be heard concurrently.

- C.** All requests for approval of attorneys' fees awards, whether included in a Motion for Final Approval or made by way of a separate motion, must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. The Court generally finds the declarations of class counsel as to hours spent on various categories of activities related to the action, together with hourly billing rate information, to be sufficient, provided that it is adequately detailed. It is generally not necessary to submit copies of billing records themselves with the moving papers, but counsel should be prepared to submit such records at the Court's request.
- D.** Requests for approval of enhancement/incentive payments to class representatives must include evidentiary support consistent with the parameters outlined in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807. The Court will not approve incentive payments until it receives such evidentiary support (e.g., a declaration from a class representative).
- E.** A compliance hearing will be set when final approval is granted, so the moving papers should include a suggested range of dates for this purpose. The compliance status report must generally be filed at least 10 court days prior to the compliance hearing.
- F.** In light of the requirements of CRC 3.769(h), all final approvals must result in the entry of judgment, and the words "dismissal" and "dismissed" should be avoided not only in proposed orders and judgments but also in any settlement agreements.
- G.** To assure appropriate handling by the Court clerk, the Court prefers the use of a combined "order and judgment," clearly captioned as such (e.g., "Order of Final Approval and Judgment" or "Order and Judgment of Final Approval"). The body of the proposed order and judgment must also incorporate the appropriate "judgment is hereby entered" language and otherwise fully comply with CRC 3.769(h), including express reference to that rule as the authority for the Court's continuing jurisdiction. The proposed order and judgment should also include the attorneys' fees holdback provision and compliance hearing provision (with date and time to be filled in by the Court) discussed, above. No proposed order and judgment should be submitted until after review by senior class counsel and counsel for all settling defendants.
- H.** If the actions that are being settled are included in a Judicial Council Coordinated Proceedings ("JCCP"), termination of each included action by entry of judgment is also subject to CRC 3.545(b) & (c), and proposed orders and judgments must so reflect. Language must also be included to the effect that compliance with CRC 3.545(b) (1 & 2) shall be undertaken by class counsel and that a declaration shall be filed confirming such compliance.