

Negotiating Class Action Settlements: How to Achieve the Best Possible Outcome

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Why Should Companies Worry About Class Action False Advertising Suits

- Advertisers have no control over where claims are challenged
- The most common venues for advertising challenges
 - Lanham Act suits
 - NAD
 - Suits by federal and state regulators
 - Consumer class actions
- Trends
 -

Understanding the Arc of a Class Action Case is Key to Achieving the Best Possible Settlement

- Comparing Lanham Act suits and class actions
- Lanham Act
 - Complaint/preliminary injunction motion
 - Expedited discovery
 - Preliminary injunction evidentiary hearing or oral argument
 - PI decision
 - ENE/private settlement discussions
 - Merits discovery
 - Eve of trial settlement discussions
 - Trial
 - Impact of bifurcation

Arc of a Class Action Case, cont.

- Class Action Cases
 - Pre-suit notice (in some jurisdictions)/first settlement chance
 - Complaint
 - Motion to dismiss/second settlement chance
 - MTD decision/ENE/third settlement chance
 - Class certification discovery
 - Class cert. and summary judgment motions/fourth chance
 - Class certification granted
 - Fifth settlement chance – advertiser behind the “8 ball”

Major Settlements and Verdicts in the Last Year

- *Overstock*, false discount price advertising, \$7 million
- *Millennium Products*, false antioxidant claim, \$8.25 million
- *Uber*, TCPA claim, \$20 million
- *Trump University*, fraudulent RE seminar ads, \$25 million
- *Procter & Gamble*, false probiotic claims, \$30 million
- *Blue Buffalo*, false pet food claims, \$32 million
- *Safeway*, online overcharges, \$43 million
- *Caribbean Cruise Line*, TCPA claim, \$76 million, + \$15 million in fees

Major Settlements and Verdicts, cont.

- Dish TV, TCPA claim, \$280 million
- Kimberly-Clark, false hospital gown safety claims, \$454 million jury award
- Bumble Bee Tuna, false canned tuna labeling claims, defense verdict following jury trial.
- Lessons Learned?

Tips for Negotiating Class Action Settlements

- What's the best way to avoid a huge class action settlement?
- Hint: It's not that complicated

Tips, continued

- **DON'T GET SUED!!**
- Not entirely under the advertiser's control, but here are some tips
 - When clearing advertisements, don't forget class action risk
 - Know (or ask outside counsel):
 - Whether the advertised product category is a target of the plaintiff's class action bar
 - Whether the proposed claim is a target
 - Whether your company (or any of your competitors) is a target
 - Whether the nature of the claim (comparative vs. monadic, core vs. peripheral) increases or decreases chance of suit

What if a Class Action Suit is Brought or Threatened?

- Basic Questions:
- Is there a bad time to talk settlement?
- Should the Defendant wait for the Plaintiff to raise settlement?
- When is the best time to talk settlement?
- Should the case be settled on an individual or class wide basis?
- Are ENE mediations useful?
- Should an outside mediator be used, and if so, who?

Class Action Settlement Tips, cont.

- Is there a bad time to talk settlement?
- Some think broaching settlement will be perceived as a sign of weakness.
- I don't think so.
- The facts
 - Virtually all class action cases settle.
 - Virtually all plaintiff's lawyers know this.
 - If the defendant refuses to talk settlement before a motion to dismiss is decided, the defendant can lose leverage.

Class Action Settlement Tips, cont.

- When are the best times to discuss settlement?
- Question can't be answered without knowing the client's goals
- Those goals can be impacted by:
 - The merits of the suit
 - Results of similar suits
 - Client's aversion to legal fees
 - Client's need/desire to take a stand
 - Client's willingness to enter into a class-wide settlement
 - Experience with or knowledge of plaintiff's counsel

Class Action Settlement Tips, cont.

- Settlement Opportunities
- **The First Opportunity:** before the lawsuit is filed
 - Upon receipt of a cease & desist letter
 - Upon receipt of notice of intended lawsuit (required under certain statutes in certain states)
- Advantages: Plaintiff will not yet have incurred most of the costs of litigating
- This is a good time to “smoke out” if Plaintiff’s counsel is interested in an individual settlement.

Class Action Settlement Tips, cont.

- The Second Opportunity: After the filing of the MTD
- Motions to dismiss are a vital part of class action defense.
- Sometimes they are granted with prejudice and end the case.
- Sometimes they are granted with leave to amend, which at a minimum requires plaintiff's counsel to do more work
- Sometimes they give plaintiff's counsel an early look at weaknesses in plaintiff's case and can lead to settlement.
- Never miss an opportunity to file a motion to dismiss

Class Action Settlement Tips, cont.

- **The Third Opportunity:** After an MTD is denied
- ENE mediations
- Private mediations
- Reduced leverage, but how much does it matter?

Individual vs. Class-wide Settlements

- Two ways a class action may be settled: individual and class-wide
- “Class Action” is somewhat of a deceptive term: although a complaint characterizes a suit as a class action, it does not become a class action until the court certifies a class, which typically only happens after discovery and a class certification motion and hearing
- From the defendant’s perspective, there are advantages and disadvantages to both individual and class-wide settlements

Individual vs. Class-wide Settlements, cont.

- An individual settlement is a settlement with the named plaintiff(s) only: no payments to would be class members
- Principal advantages to individual settlements
- Settlement payment typically is a tiny fraction of a class-wide payment
- Same for attorney's fees to Plaintiff's counsel
- Court approval not required

Individual vs. Class-wide Settlement, cont.

- Principal Disadvantage to Individual Settlement
- Potentially a big one – it doesn't stop additional suits, **EVEN BY THE SAME LAW FIRM**
- So why would a company ever settle individually?
- Factors to consider
 - Cost savings
 - Risk of future suits/buying time to change advertising
 - Know your adversary
 - “Popularity” of the Key Claims

Later Stage Settlements

- Fourth (and Fifth and Sixth) Opportunity: Before the Class Certification Hearing/Class Certification Decision/Summary Judgment Motion
- When do these milestones take place?
- Leverage considerations

Negotiating Class-wide Settlements

- Timing: Often does not take place until a class is certified, but can occur at any time
- Class-wide settlements require court approval, so defendants, be careful what you wish for

Negotiating Class-wide Settlements, cont.

- Under Fed. R. Civ. P. 23(e), a class-wide settlement cannot be approved without court's determination, after a hearing, that the settlement is fair, reasonable and adequate.
- State with the largest number of false advertising class actions, by far, is California this is a two step process.
- First, court determines whether or not to give preliminary approval.
- If granted, then after notice to class members and opportunity to object, court holds hearing and decides the issue of final approval.

The “Fair, Reasonable and Adequate” Factors

- Factors are generally the same from circuit to circuit – focus here is California because it is the most common venue
- Multi-factor balancing test (typically used in both phases):
 - Strength of Plaintiff’s case
 - Risk either that Plaintiff will not prevail on merits or that a class will not be certified (or would be decertified)
 - Expense, complexity and likely duration of further litigation
 - Amount offered in settlement
 - Stage of the proceeding
 - Experience and views of counsel
 - Reaction of class members

Application of the Balancing Test

- Fairness to class members is most important factor.
- What is relevant is not the total \$ amount of the settlement, but rather what the typical class member would receive in relation to the amount she would likely receive if case went to verdict.
- This in turn calls for court to consider the parties' (and the court's) view of the likely outcome (both of class certification and liability).
- Courts typically analyze the fairness issue more closely in settlements prior to certification based on a concern about heightened risk of collusion.

Application of Factors, cont.

- Defendants willing to enter into a class-wide settlement often prefer nationwide settlements for risk minimization.
- But, nationwide classes can present an added barrier to final approval because of different liability and damages rules
- Some judges are resistant to coupon settlements, but they are often the best way of balancing fairness to class members and the risk of plaintiff not prevailing or a class not being certified.

Conclusions

- Think of class actions as a book, and read the last page first.
- The last page is: how does a class action end?
- Possibilities
 - Motion to dismiss granted
 - Summary judgment granted
 - Class certification denied (ends case as a practical matter)
 - Settlement
 - Trial
- The implications of those possibilities

Our Blog

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- We would love to have you read it. Contact me at lweinstein@proskauer.com to join our blog mailing list.

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