FINANCIAL RECOVERY STRATEGIES

CLASS ACTION 101

What every potential claimant needs to know

THE PLAYERS | CLAIMS ADMINISTRATORS

HOW ARE THEY SELECTED?

When class actions or certain actions prosecuted by federal and state governments and governmental agencies are resolved through the establishment of a common fund to be distributed to those injured people or entities on whose behalf the actions were prosecuted, the recovery must be administered. That administration – which people and entities should receive a distribution and the amount of it – often occurs under the direction of the court that is overseeing the action so that all of those injured persons and entities properly are made aware of the action, of its resolution and of their rights in connection with the resolution and with any recovery to which they may be entitled. While counsel may administer the resolution itself, most often a claims administrator with specific administration experience and expertise is retained by counsel, often subject to the approval of the court, to perform the administration under counsel's supervision. Once the court approves the selection of the administrator, it is that administrator's responsibility to handle all aspects of the administration.

WHAT DO THEY DO?

Notice

One of the first things the administrator is likely to do is assist class counsel in effecting the plan – often called the "Notice Plan" – that the court has approved for providing to injured persons or entities notice of the pendency of the action and of its settlement. The administrator may perform the following tasks, among others:

- Disseminating to putative class members any notice – sometimes called a "long form notice," "detailed notice" or "mailed notice" – that is mailed;
- Disseminating to those persons or entities any proof of claim form that will be required to be submitted to apply for a recovery from the fund;
- Arranging for the publication, whether on the Internet, in publications or in other media, of a short form notice, also called a "summary notice" or "publication notice";
- Establishing a dedicated email account and a dedicated website on which case- and settlement-specific documents may be available, and on which important information about the case and settlement, such as deadlines for submitting objections, exclusion requests (in class actions) and proofs of claim, and the dates for hearings, will be provided;
- Establishing a toll-free telephone line, which may involve an interactive voice response, or "IVR," system or live customer service representatives, for providing notice and information;
- Opening one or more post office boxes for the receipt of exclusion requests (where appropriate), of completed proofs of claim and other case- or settlement-specific correspondence; and
- Providing a report in which the administrator confirms its compliance with the provisions of the Notice Plan, and provides information and documentation relevant to that compliance, and lists and provides all documentation concerning each request for exclusion.

Claims Processing

In addition to administering the Notice Plan, the administrator also will receive each proof of claim submitted, and then evaluate and process those proofs of claim in accordance with the provisions agreed to among the parties and approved by the court. The administrator may perform the following tasks, among others:

- Providing to claimants confirmation that a proof of claim has been received;
- Reviewing and verifying claims, and entering into a database the information provided;
- Communicating with claimants in connection with claim audits and in the event that the administrator determines that a proof of claim is deficient or defective;
- Providing a report that summarizes and provides information concerning the results of the claims processing; and
- Disseminating to those claimants with approved claims checks that constitute those claimants' recoveries, and, when required, disseminating tax reporting documentation.

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THE PLAYERS | CLAIMS ADMINISTRATORS

HOW ARE THEY PAID?

In most cases – those in which the defendants do not agree to shoulder the costs of administration – claims administrators are paid by the class, which, for practical purposes, means by approved claimants, i.e., those who receive a recovery from the settlement fund. Importantly, those approved claimants will not "come out of pocket" to pay the administrator in the same way that in most instances a consumer pays for goods or services. But the entirety of all approved claimants will pay the administrator by deducting from the settlement fund (also referred to as the "gross settlement fund"), before any recoveries are sent to claimants, the amount that the court or counsel approves. In other words, although no claimant is writing a check, swiping a credit card or having his, her or its recovery check specifically reduced by that claimant's pro rata portion of the administrator's fee, the administrator's fee is deducted from the amount of the fund available to be distributed to claimants, with the net balance – often referred to, after this and all similar reductions are made, as a "net settlement fund" – allocated among claimants. So, while there is no direct cost assessed to class members for seeking the assistance of the claims administrator, there certainly is an indirect cost assessed against all claimants alike – even those who did not seek any assistance – for the total fees incurred by all class members who sought the claims administrator's assistance.

"Do Claims Administrators Advocate On Behalf of the Interests of Individual Claimants?"

Not in my experience... Most claims administrators will provide to class members at no direct cost to them assistance concerning basic inquiries that concern most claimants, such as advising them of due dates for filing proofs of claim and providing directions about how to complete a proof of claim and what supporting documentation will be accepted. In my experience, the most common assistance is provided based on scripted responses that counsel has previously approved. Often, those answers are based on the answers to Frequently Asked Questions, or "FAQs," that appear on the court-approved website or on an Integrated Voice Response telephone system. In some cases, when the inquiries fall well-outside the parameters of the approved responses, questions may be elevated to more senior personnel for individualized attention.

However, as far as advocacy is concerned, and by "advocacy" I mean the act of pleading or arguing in favor of a claimant's position even if doing so would conflict with the interests of the class as a whole, it must be understood that claims administrators, as explained previously, are selected by the parties – most often by the plaintiffs through class counsel – and, when necessary or required by law, regulation or rule, approved by the court to perform certain tasks for the benefit of the class as a whole. As concerns advocating for the individualized interests of any particular class member or claimant, therefore, settlement administrators must be neutral, and, as such, usually do not advocate on behalf of individual class members so as to maximize a particular claimant's recovery.

The following fact pattern is not unusual, in my experience, and is instructive on this point:

> The claims administrator evaluates the sufficiency both of the information included on a proof of claim and of the documentation submitted in support of it. If the administrator rejects all or a portion of a claim, that administrator cannot very well then take the opposite position on the claimant's behalf.

And as the court-appointed administrator for the entire settlement, the administrator most often is not equipped, and is not being compensated, to advocate concerning matters idiosyncratic to any particular claimant's circumstances. In my experience, claims administrators often will not, for example, research a claimant's corporate and merger and acquisition history to determine whether all of a claimant's subsidiaries, divisions and locations, as well as all divested or acquired interests, are included in the claim, or develop individualized alternatives to prescribed methods for determining claim values.

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THE PLAYERS | CLASS COUNSEL

"Does Class Counsel Advocate On Behalf of the Interests of Individual Claimants?"

It is my experience, and, indeed, I believe that it is well-settled, that class counsel, although they may represent certain particular class members, such as the named plaintiffs, to whom they owe a fiduciary duty, have been appointed by the court to represent, and also owe a fiduciary duty to, "the class as a whole." As such, and as many courts have held, "class counsel must act in a way which best represents the interests of 'the entire class and is not dependent on the special desires of the named plaintiffs'" or of any other class member. In fact, because class counsel is required to represent the interests of the entire class as a whole, courts also have held that class counsel may not represent "the potentially conflicting interests of individual class members." As another court stated differently:

> *"[A]ppointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it."*

As a result, class counsel may not, for example, both continue as class counsel and represent class members who object to a settlement. Courts have noted that the interests of the class members often diverge during the "relief stage." And that "[s]uch a divergence presents special problems because the class attorney's duty does not run just to the plaintiffs named in the caption of the case; it runs to all of the members of the class. … In such a situation, the attorney's duty to the class requires him to point out conflicts to the court so that the court may take appropriate steps to protect the interests of absentee class members."

This is consistent with my experience: While class counsel will provide assistance to claimants, that assistance often will be the same as the assistance counsel provides to any class member, such as providing relevant information, like important dates and deadlines, identifying where certain information and case- or settlement-specific documents, like proof of claim forms, notices, court orders and other court documents, may be located, and other basic or general information and advice. But, importantly, once class counsel determines that any claimant's interests may conflict with those of the class as a whole, such as when a class member brings before the court a challenge to the denial or reduction of a claim, class counsel cannot, and, in my experience, will not, represent or advocate on behalf of the particular interests of individual class.

HOW ARE THEY PAID?

In most cases – those in which the defendants are not legally compelled to pay legal fees or do not agree to shoulder those costs – class counsel is paid by the class, which, for practical purposes, means claimants who receive a recovery from the settlement fund, referred to as "authorized claimants." As with the fees of the claims administrator, authorized claimants will not "come out of pocket" to pay class counsel in the same way that in most instances a consumer pays for goods or services. But every authorized claimant will pay class counsel by deducting from the gross settlement fund, before any recoveries are sent to authorized claimants, the amount that the court approves. A common disclosure concerning counsel fees will include a statement similar to the following:

You do not have to pay Class Counsel separately. The attorneys will seek compensation by asking the Court for a share of the settlement proceeds. If you want to be represented by your own lawyer, and have that lawyer appear in court for you in this case, you may hire one at your own expense.

Class Counsel will ask the Court for attorneys' fees and reimbursement of expenses on behalf of all Plaintiffs' counsel who worked on this case. … Any payment to the attorneys will be subject to Court approval, …. Any award of attorneys' fees, litigation expenses and awards that the Court orders, plus the costs to administer the Settlements, will come out of the Settlement Fund and is subject to Court approval.

In other words, although no authorized claimant is writing a check, swiping a credit card or having its recovery check specifically reduced by that authorized claimant's pro rata portion of class counsel's fee, the total of that fee together with legal expenses approved by the court is deducted from the gross settlement fund, with the net balance – often referred to, after this and all similar reductions are made, as the "net settlement fund" – allocated among authorized claimants. So, while there is no direct cost assessed to class members to pay for the services provided by class counsel, there is an indirect cost assessed against all authorized claimants alike.

FINANCIAL RECOVERY STRATEGIES

CLASS ACTION 101

What every potential claimant needs to know

THE PLAYERS | THE COURT

It has been pretty much universally established that, in connection with class action settlements, the court has "the responsibility of ensuring fairness to all members of the class," and "for ensuring that a satisfactory and equitable distribution plan is implemented" with respect to all class members that are entitled to recover from the fund. In that connection, courts have oversight over class counsel and the claims administrator.

FINANCIAL RECOVERY STRATEGIES

CLASS ACTION 101

What every potential claimant needs to know

THE PLAYERS | CLASS ACTION CLAIMS MANAGEMENT CONSULTANTS

WHO ARE THEY & WHAT DO THEY DO?

Before describing who class action claims management consultants are, it is paramount to note what they are not:

- ***They are not counsel;***
- ***They are not a claims administrator;***
- ***They are not appointed by any court; and***
- ***Class members may file their own claims and do not have to retain them to recover from any class action settlement***.

Any class member that wishes to avail itself of the services provided by a class action claims management consultant must retain that consultant and agree upon the terms of the relationship, including, among others:

- ***What services the class action claims management consultant will provide;***
- ***How and when the consultant will be paid;***
- ***Whether the class member will be responsible for any expenses that the consultant may incur in connection with its performance of the agreed upon services;***
- ***What assistance is required by the client;***
- ***Whether the relationship is exclusive; and***
- ***Specifically, what class actions or other cases are covered by the contract.***

It also is very important for a client to understand whether, and if so, on what terms, it may terminate its contract with a class action claims management consultant. It is FRS's policy, for example, to permit a client to terminate a contract if the client determines that the document and data collection process is too burdensome, and FRS also generally permits a client to withdraw at any time up to the point – usually when the claim and substantially all supporting information has been submitted to the claims administrator – that FRS has substantially completed its work, and thus, has earned its fee.

As for what class action claims management consultants do, the services they perform vary widely, but what pretty much all of them do is submit on behalf of their clients claims for those clients to recover from class action and other similar settlements and case resolutions.

FRS FINANCIAL RECOVERY STRATEGIES

CLASS ACTION 101

What every potential claimant needs to know

THE PLAYERS | CLASS ACTION CLAIMS MANAGEMENT CONSULTANTS

HOW ARE THEY PAID?

The most prevalent payment arrangement between class action claims management consultants and their clients requires a client to pay a contingent fee. In other words, payment of the fee is required only when a claim filed by the consultant results in a recovery for the client. Related terms that may vary among consultants include:

- ***Whether the fee is a sum certain – i.e., an agreed upon dollar amount – versus a percentage of the recovery;***
- ***Whether the claims administrator sends the distribution payment to the consultant, who will then deduct its fee and remit the balance to the client, or to the client, who will then remit the fee to the consultant;***
- ***Whether expenses incurred by the consultant are borne by the client or by the consultant; and***
- ***How long a client must wait, assuming the consultant receives the distribution, before the balance of the recovery is remitted to the client.***

And, of course, the amount of the fee varies considerably among consultants. Class members must be cognizant of the services included in the relationship. After all, as Nobel Prize-winning economist Milton Friedman first demonstrated over 40 years ago, "there is no such thing as a free lunch." A class member cannot get "something for nothing": Even if a service appears to be free, there is always a cost; whatever services are provided, they must be paid for. Accordingly, when comparing payment terms among competing class action claims management consultants, what may seem to be a bargain may not be a bargain at all.

FRS believes that the key determinant in price comparisons among class action claims consultants is not the stated fee percentage—that is, a lower percentage represents a better deal; but, rather, the key determinant is a client's net recovery: paying a higher percentage is in a client's best interests if, as is the case for FRS's clients, the enhanced services FRS provides have historically resulted recoveries for clients that are higher, net of fees, than clients likely would have obtained without retaining FRS.

FRS's standard payment terms, as reflected in its contracts, are as follows:

- ***The contingent fee is stated as a percentage of the client's recovery;***
- ***FRS receives the payment from the claims administrator, deducts its contractually agreed upon contingent fee, and then remits to the client the balance, together with a photocopy of the documentation FRS receives from the claims administrator;***
- ***FRS absorbs all expenses it incurs in connection with obtaining each client's recovery;***
- ***FRS performs audits on all distributions that it receives to assure that claims have not been under calculated, and pays all clients not more than 30 days after FRS receives the distribution.***