Settling Wage and Hour Class Actions in Light of Recent Legal Developments

By Michael D. Singer

Introduction

Introducing a 1987 decision reviewing a class action settlement, Judge Richard Posner observed that "[c]lass actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest. This fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems. . . ."[1] The bourgeoning field of wage and hour class actions took off a decade or so following Judge Posner's comments. By some estimates, California has seen the filing of over 10,000 such cases. Of these, just 25 or so are thought to have proceeded to trial—one-quarter of one percent. The remaining 99.75 percent are resolved largely through class settlements, with some portion dismissed through individual settlements following denial of certification, summary judgment, decertification, precertification settlements with class representatives, or simply dismissal without settlement.

Problems persist in reaching a "fair, reasonable, and adequate"[2] class settlement that will survive the scrutiny of the courts and objectors. This is particularly evident with the recent upsurge of overlapping class wage and hour cases, which pit putative class counsel in competition with one another. Unless they are able to resolve their differences, a settlement excluding one or the other often results in objection and appeal. The perils of objections from absent class member employees asserting the settlement is inadequate or unfair also loom along the approval pathway. The resolution of these issues rests in the idiosyncratic discretion of the trial court, vested with the responsibility to adjudicate the fairness of these settlements for the primary benefit of the class.

Standards for Approving Class Action Settlements

Whether in state or federal court, settlement of wage and hour class actions requires that the court find the terms of the settlement to be provisionally "fair, reasonable, and adequate." If the class has not yet been certified, conditional certification is necessary for the result to bind the class members for purposes of *res judicata*. After notifying class members of the terms of the settlement and providing them with the opportunity to opt-out, the court must conduct an inquiry into the fairness of the settlement before granting final approval of the settlement, typically in conjunction with an award of attorneys' fees, litigation and administrative costs, and class representative enhancements.[3]

Settlement approvals rest within the broad discretion of the trial court, which sits in the role of fiduciary representing the interests of absent class members.[4] Settlements are to be regarded as fair, and "[d]ue regard should be given to what is otherwise a private consensual agreement between the parties. The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.' "[5] A presumption of fairness exists where (1) the settlement is reached through arm's-length bargaining, (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3) counsel is experienced in similar litigation, and (4) the percentage of objectors is small.[6] An appellate court reviewing a challenge to a class action settlement does not make an independent determination whether the settlement terms are 'fair, adequate and reasonable,' but only determines whether the trial court acted within its discretion.[7]

The objective of any class settlement is to obtain final approval and distribute the funds. At the mediation

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1 Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co., 834 F.2d 677, 678 (7th Cir. 1987).

2 *See* Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1801 (1996).

3 Cal. R. of Court, Rule 3.769; Fed. R. Civ. P. 23(e).

4 Kullar v. Foot Locker Retail, Inc., 168 Cal. App. 4th 116, 128–29 (2008).

5 *Dunk*, 48 Cal. App. 4th at 1801 (citing Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625 (9th Cir. 1982)).

6 *Id*.

7 *Kullar*, 168 Cal. App. 4th at 127–28.

table, parties must make a conscious effort to negotiate for adequate compensation and a properly circumscribed release of claims that will satisfy the court, be accepted by class members, and protect against objectors and their counsel. Awareness is required of the assigned judge's predilections in approving or disapproving key settlement terms, such as releases encompassing claims not pled in the operative complaint (permissible under *Officers for Justice v. Civil Service Commission*[8]), reversions of unclaimed funds to the defendant (found not violative of California Code of Civil Procedure section 384[9]), and the amount of attorneys' fees and class representative incentive awards.

The court has discretion to award fees, which may be awarded either as a percentage of the common fund created or based on counsel's lodestar and a multiplier, if appropriate.[10] Discretionary incentive awards to class representatives have long been customary to compensate them for work done on behalf of the class, to make up for financial or reputational risks undertaken in bringing the action, and in observance of notoriety or personal difficulties encountered. Such awards typically range from $5,000 to $50,000.[11]

[8] *See In re* Microsoft I-V Cases, 688 F.2d 615, 632, n.18 (9th Cir. 1982).

[9] 135 Cal. App. 4th 706, 721 (2006).

[10] *See, e.g.*, Bell v. Farmers Ins. Exchange, 115 Cal. App. 4th 715, 726, 765 (2004) (awarded 25 percent of the common fund of over $120,000,000 unpaid overtime); Lealao v. Beneficial California, Inc., 82 Cal. App. 4th 19, 27 (2000) (describing considerations for lodestar awards and requiring a cross check against the percentage fees awarded under a common fund); Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002) (noting Ninth Circuit benchmark rate of 25 percent as the starting point for common fund fee analysis, with 20–30 percent the usual range, and lodestar multipliers typically ranging from 1.0–4.0).

[11] *See, e.g.*, Hopson v. Hanesbrands Inc., No. CV-08-0844, 2009 U.S. Dist. LEXIS 33900 (N.D. Cal. Apr. 3, 2009) ($5,000 payment presumptively reasonable); Navarro v. Servisair, No. C 08-02716, 2010 U.S. Dist. LEXIS 41081 (N.D. Cal. Apr. 27, 2010) ($10,000 award, 17.6 times the average recovery of $567.00); Singer v. Becton Dickinson & Co., No. 08-CV-821, 2010 U.S. Dist. LEXIS 53416 (S.D. Cal. June 1, 2010) ($25,000 award, 10 times the average award); Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 299–300 (N.D. Cal. 1995) ($50,000 award); *cf.* Clark v. American Residential Services LLC, 175 Cal. App. 4th 785, 806–07 (2009) (vacating awards of $25,000 that were 44 times the average recovery because evidence was insufficient to support enhanced award, and giving no deference to district court decisions awarding similar amounts).

Recent Wage and Hour Class Action Settlement Decisions

Until recently, no published California state appellate court decision specifically set forth evidentiary guidelines for parties and courts for court approval of wage and hour class action settlements. However, three recently published decisions, *Kullar v. Foot Locker Retail, Inc.*,[12] *Clark v. American Residential Services LLC*[13] and *Munoz v BCI Coca-Cola Bottling Company*,[14] have changed the landscape of class action settlements by enunciating new requirements that impact both judicial approval and settlement negotiations.

Kullar v. Foot Locker Retail, Inc.

Kullar began as a uniform expense reimbursement class action in San Francisco Superior Court against Foot Locker Retail, Inc. ("Foot Locker") on behalf of non-exempt retail employees allegedly required to purchase and wear shoes of a distinctive design or color. The plaintiff later amended the complaint to include minimum wage, contract wage, and overtime claims for uncompensated time, and claims for failure to provide rest and meal periods under Labor Code section 226.7, as well as related record-keeping and waiting time penalties. The parties engaged in minimal formal discovery, not uncharacteristic of wage and hour settlements, including one set of written discovery requests directed to the initial complaint and limited to the uniform reimbursement claim. Defense counsel took the plaintiff's deposition and served written discovery pertaining to all claims. The parties also exchanged informal damage modeling information, showing approximately 16,900 class members having worked some 12,485,000 hours.

With the assistance of an established mediator, the parties settled the case for $2,000,000 on a partially reversionary basis, including $500,000 in attorneys' fees and a $5,000 incentive award to the plaintiff.

After the mediation, but before preliminary approval of the *Kullar* settlement, Foot Locker employee Crystal Echeverria filed an identical class action in Alameda Superior Court. Echeverria then appeared at the preliminary approval hearing for the *Kullar* settlement and objected to the settlement, claiming it was not fair, adequate and reasonable because it failed to provide adequate compensation for the claims and was reached prior to sufficient discovery or investigation

[12] 168 Cal. App. 4th 116 (2008).

[13] 175 Cal. App. 4th 785 (2009).

[14] 186 Cal. App. 4th 399 (2010).

by class counsel. The trial court overruled the objection, confirmed the settlement, and granted final approval of the settlement.

The court of appeal reversed the settlement approval, finding that the trial court had neglected to conduct the required independent assessment of the adequacy of the settlement terms. The appellate court remanded the case for submission of further evidence as to the settlement's adequacy and authorized discovery by the objector, limited to the specific matters challenged.

Setting forth language that has been picked up by the courts, the *Kullar* Court required the settlement to be backed by the submission of sufficient evidence to "enable the court to make an independent assessment of the adequacy of the settlement terms" and "ensure that the recovery represents a reasonable compromise" by providing "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation."[15] The court rejected the notion that the mediation privilege obviated the need for a sufficient record to support the settlement and noted that underlying data, such as payroll records that might assist quantification of the claims, would not be protected. Borrowing from the standard for good faith settlement determinations effectuating dismissal of indemnity cross-complaints pursuant to Code of Civil Procedure section 877.6, *Kullar* stated "the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness," including an assessment that the consideration given for the release is reasonable in light of the strengths and weaknesses of the claims and the risks of litigation.[16]

The effect of *Kullar* has been to change the landscape of settlement approvals in California Superior Courts. Counsel can now expect courts to require satisfaction of the "*Kullar*" requirements prior to preliminary or final approval.

Clark v. American Residential Services LLC

On the heels of *Kullar*, *Clark* involved claims by service technicians, customer service representatives and dispatchers who were paid hourly or on commission, against American Residential Services ("ARS"), a plumbing services company, for overtime, minimum wages, denied rest and meal period compensation, expense reimbursement, and related penalties. After a year of litigation, the parties settled the matter for $2,000,000. This amount broke down to $6.43 per week for each claiming employee, up to $600,000 for attorneys' fees, and $25,000 each for two class representative enhancements. ARS had removed the matter to federal court under the Class Action Fairness Act,[17] estimating damages at between $21.7 million and $32.8 million. Plaintiffs had the matter remanded on the basis that the calculations were unsupported.

The Los Angeles Superior Court granted preliminary approval of the settlement, and notice went out to the class members. Plaintiffs thereafter moved for final approval. Prior to the hearing, objecting class members entered the proceedings, claiming never to have been paid overtime for at least two hours of overtime worked every day, as well as for many times when they worked for more than 12 consecutive hours. The objectors contended the settlement was "a near-total loss for class members," estimated at just one percent of the total value of the claims.[18] They claimed the settlement proponents had failed to present any evidence regarding the likelihood of success of the claims, the number of unpaid overtime hours worked, rates of pay, denied meal and rest periods, or minimum wage claim valuation.

In opposition, ARS submitted extensive evidence supporting its pay policies and practices as to overtime, meal periods, rest breaks and tool reimbursement. ARS also refuted objectors' claims of non-payment of overtime with evidence it had paid both daily and weekly overtime.

Class counsel submitted a detailed supplemental declaration specifically valuing each claim based on annual compensation, timesheet data, legal analysis, and discounting for risks of certification and litigation. Objectors took issue with counsel's method of assessing the overtime claims, calling it a "staggering mistake of law" and "voo-doo economics."[19]

The trial court granted final approval, and the objectors appealed. The Second District Court of Appeal sided with the objectors, reversing the approval and remanding for more evidence to support the settlement, fees and enhancements. The court disregarded the evidence submitted and found, based on the dispute between the parties as to the proper legal method for calculating overtime, that the trial court record did not contain the information required for "an understanding

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15 *Kullar*, 168 Cal. App. 4th at 120, 129.

16 *Id.* at 129, 133.

17 Pub. L. No. 109-2, 119 Stat. 4 (Feb. 18, 2005).

18 *Clark*, 175 Cal. App. 4th at 793.

19 *Id.* at 797, n.6.

of the amount that is in controversy and the realistic range of outcomes of the litigation."[20] The court determined that final approval granted in the face of this dispute established that the trial court "made no independent assessment of the strength of plaintiffs' case, simply accepting class counsel's assessment of value."[21] The court found that the trial court's failure to make an independent legal evaluation of a potentially "legitimate dispute" on overtime calculation precluded it from being able to assess the reasonableness of the settlement.[22] *Clark* held there is a reversible abuse of discretion unless the trial court determines whether a "legitimate" controversy exists as to legal points affecting valuation of the settlement.[23]

Clark also took issue with approving $25,000 class representative enhancements, some 44 times the average $500 recovery. The court was unimpressed with claims of the stigma of being a named plaintiff in a class action, the risks of litigation, and the "countless hours" spent on the case.[24] "Significantly more specificity, in the form of quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is required in order for the trial court to conclude that an enhancement was 'necessary to induce [the named plaintiff] to participate in the suit. . . .' "[25]

Clark has raised some eyebrows. One jurist, commenting at a continuing education presentation on *Clark's* rejection of evidence before the trial court, observed "if the standard is abuse of discretion, *Clark* is flat out wrong."[26] However, more ominous is the language indicating that the parties' legal theories and confidential settlement positions asserted for purposes of negotiations must be disclosed to the trial court and the class in the approval process to ensure they are "legitimate" if they affected the valuation. Taken too far, such a requirement invades too deeply into the realm of confidential mediation caucuses and could have a chilling effect on freely negotiated class action settlements. Only by limiting this requirement to the facts of this case—involving a settlement supported by a specifically articulated alleged error of law—can such a standard avoid such a chilling effect.[27]

Munoz v BCI Coca-Cola Bottling Company

Clark's ostensible expansion of *Kullar* has seemingly been scaled back with the subsequent publication of *Munoz*. In *Munoz*, a class of 188 production and merchandising supervisors settled a misclassification action alleging overtime, rest and meal period, and unfair competition law violations of $1.1 million. The application for preliminary approval cited that the parties supported the settlement with written discovery conducted prior to mediation, 30 defense declarations describing job duties, and evidence reflecting the amounts of time employees spent performing various duties, authority to hire, fire, or discipline, overtime hours, meal and rest break history, and payroll data for the class for the entire period.

After preliminary approval and notice to the class, objector's counsel filed an identical action for production supervisors and opposed final approval. The objector argued that (1) the compensation awarded was "relatively low," (2) the release was overly broad by virtue of its inclusion of claims by class members in *any* position held within the company during the class period, (3) discovery was insufficient to assess the aggregate value of the claims and compare it to the settlement amount, (4) the notice was insufficient to allow class members to calculate what they would receive, and (5) the opt-out procedure required class members to mail their own letter rather than being provided a request for exclusion form.[28] Addressing *Kullar*, the objector also claimed the settlement should not be approved because the parties had not informed the court of the total potential value of the claims being released.

In opposition, class counsel asserted the record sufficiently set forth the claim values and risks. Counsel also addressed the claim of insufficient preparation by explaining it had conducted discovery into the production

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20 *Id.* at 801 (citing *Kullar*, 168 Cal. App. 4th at 120).

21 *Id.* at 802.

22 *Id.*

23 *Id.* at 803.

24 *Id.* at 806–07.

25 *Id.* at 807 (citing *In re* Continental Illinois Sec. Litigation, 962 F.2d 566, 571 (7th Cir. 1992)).

26 Panel Discussion: Class Action Settlement Pitfalls and Objectors, Consumer Attorneys of San Diego Second Annual Class Action Symposium (Oct. 2009).

27 *Cf.* Nordstrom Commission Cases, 186 Cal. App. 4th 576 (2010) (finding no abuse of discretion in approval over objection of settlement releasing Labor Code section 203 waiting time penalties and Private Attorney General Act ("PAGA"), Cal. Lab. Code § 2699 et seq. penalties, based on evidence before trial court that such claims were pled, argued, evaluated and resolved as part of settlement, despite PAGA claims being allocated $0 value).

28 *Munoz*, 186 Cal. App. 4th at 404.

supervisors and merchandising in a prior settled case, *Costanza v. BCI Coca Cola Bottling Company*,[29] in which the class had ultimately been narrowed to exclude these positions.[30]

The trial court found the settlement to be "as good a deal as you can get," overruled the objection, and granted final approval.[31] The objector appealed.

The court of appeal affirmed. In response to the objector's primary argument that the lack of information on the total damage exposure precluded a fairness finding under *Kullar*, the court stated that *Kullar* does not demand an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims. Rather, it requires a trial record that allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation."[32] The court found the record before the trial court sufficient because it included the number of class members, payroll data, declarations describing hours and overtime worked, as well as variances in duties and rest and meal period experience and evidence from a related action alleging less than $5,000,000 in damages. This information constituted "an adequate basis from which to garner a reasonably adequate 'understanding of the amount that is in controversy' within the meaning of *Kullar*."[33]

The court further found that the trial record also distinguished *Munoz* from *Kullar* and *Clark*. The *Munoz* Court noted that *Kullar* involved the addition of a meal period claim in an amended complaint on which there had been no discovery, and the parties presented nothing to the court, "no discovery, no declarations, no time records, no payroll data, nothing," to allow the court to evaluate the claim.[34] Nor, according to the court, did the record suffer from the problem present in *Clark*, in which the trial court could not assess the reasonableness of the settlement terms because it was not given sufficient information on a core legal issue affecting the strength of the plaintiffs' case on the merits.[35]

The *Munoz* Court found no reason to disturb the broad discretion of the trial court in approving the settlement by re-examining the evidence. "[O]ur role is not to determine independently whether the settlement terms are fair and reasonable, but only to determine whether the trial judge, whose views are to be accorded " '[g]reat weight,' " acted within its discretion."[36] The court also rejected the remaining objections as to the scope of the release, opt-out procedure, form of notice and enhancement awards.

The decision in *Munoz* underscores the trial court's broad discretion in approving class action settlements. The absence of a hard and fast requirement that an understanding of the amount in controversy requires the parties to submit dollar value estimates of the outer reaches of exposure were the class to prevail on all claims at trial—an unworkable requirement in light of the realities of negotiations at the bargaining table—promotes settlements.

Settlement Approvals After *Kullar, Clark* and *Munoz*

Despite the fiduciary role exercised by the courts in approving settlements as set forth in these cases, it remains the dominion of counsel in class action cases to negotiate the appropriate settlement in the best interests of the class. In appropriate cases, settlements representing a small proportion of full trial exposure are in the best interests of all parties involved, particularly when approved by hundreds or thousands of class members through the notice and claims process.[37]

The question remaining for practitioners following *Kullar*, *Clark* and *Munoz* is the level of disclosure necessary to support approval, respecting the realities and risks of wage and hour class action litigation and the arguments that lead to negotiated settlements. Wage

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29 Los Angeles County Superior Court, filed April 2006.

30 *See Munoz*, 186 Cal. App. 4th at 402–03.

31 *Id.* at 406.

32 *Id.* at 409.

33 *Id.*

34 *Id.* at 410.

35 *Id.*

36 *Id.* (citing *Kullar*, 168 Cal. App. 4th at 127–28).

37 Wershba v. Apple Computers, Inc., 91 Cal. App. 4th 224, 246, 250 (2001) ("Compromise is inherent and necessary in the settlement process . . . even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation."); *Officers for Justice*, 688 F.2d at 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair."); *see also*, *In re* Omnivision Technologies, Inc., 559 F. Supp. 2d 1036,1042 (N.D. Cal. 2007) (noting that certainty of recovery in settlement of 6 percent of maximum potential recovery after reduction for attorneys' fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2 percent to 3 percent from 2002 through 2006).

and hour cases commonly include valid causes of action, particularly those associated with enormous claims for various Labor Code penalties that have no record of being awarded in any previous case. Neither ''soaking wet'' predictions nor selectively ''dehydrated'' estimates are particularly accurate yardsticks for assessing true settlement adequacy.

The cases now confirm that there is no requirement to present evidence of full trial exposure, consisting of an arbitrary exposition of a dream day in court obtaining 100 percent recovery with no assessment of risk for the strengths and weaknesses of the individual claims. Such a showing would be inconsistent with the long-accepted factors set forth in *Dunk*, in which the trial court considers ''the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, [and] the risk of maintaining class action status through trial,'' among other factors.[38]

A Rational Approach to Evidentiary Support for Settlements

A rational approach is to submit to the court the evidence utilized in damage modeling. For example, overtime misclassification mediations are often supported by evidence as to the average salary and aggregate workweeks to calculate the value of each hour of overtime, sometimes along with surveys or declarations as to the number of daily or weekly hours worked. Meal period claim calculations are often based on a sampling of time punch detail to assess short, late or untaken meal breaks. Off-the-clock claims may similarly be based on time data, point of sale records or other corporate documents, supported by anecdotal class member evidence as to the amount of uncompensated time. Expense reimbursement claims are often negotiated using records as to reimbursement policies, amounts reimbursed and surveys of expense amounts incurred.

Presentation of such underlying data, similar to that found sufficient in *Munoz*, without tabulating arbitrary numbers, permits the court, the class and the public to adequately assess settlements. The impact will be to avoid the inherent problems in settling class wage and hour cases, rather than to create more impediments to approval by the courts and acceptance by the class.

Michael D. Singer is the managing partner of Cohelan Khoury & Singer in San Diego. Among his many accomplishments, he has briefed and argued as amicus curiae *in* National Steel and Shipbuilding Company v. Superior Court, *135 Cal. App. 4th 1072 (2006) (finding Labor Code section 226.7 pay constitutes compensation) and argued for plaintiffs in* Brinker International Inc. v. Superior Court *on rehearing before the Fourth District Court of Appeal (supporting class certification of meal, rest and off the clock compensation claims). He also serves as wage and hour* amicus *liaison for the California Employment Lawyers Association. With Cohelan, Khoury & Singer, Mr. Singer has reached settlements in over 100 wage and hour class cases.*

[38] *Dunk*, 48 Cal. App. 4th at 1801.