American Law Institute – American Bar Association
Scottsdale, Arizona
March 6, 2009

Ethical Considerations in Class Actions

by

Richard T. Seymour*

* Law Office of Richard T. Seymour, P.L.L.C., 1150 Connecticut Avenue N.W., Suite 900, Washington, D.C. 20036-4129. Telephone: 202-862-4320. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net. My web site, www.rickseymourlaw.com, has downloadable CLE papers.

Table of Contents

A. Can Settlements Give More Relief to Plaintiffs than Class Members?

1. Excerpt from Plaintiffs' Memorandum in Support of Preliminary Approval of the Settlement in *Dowdell v. Ona Corp.* (N.D. Ala. 1997)

* * *

While some courts have disapproved any differential in relief between the named plaintiffs and class members,[1] and while other courts have expressed disapproval of such a differential only as part of a broader attack on the limitations of relief to class members,[2] the better rule is that expressed in *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983), which noted that the "inference of unfairness" from a disparate allocation "may be

[1] *E.g.*, *Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 571–72 (7th Cir. 1992) (rejecting any additional payment to an investor plaintiff in securities litigation, but stating that it might be proper to pay such an investor the compensation necessary to induce him to participate in the suit, unless there were "plenty of others to take his place without demanding compensation"); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1176 (4th Cir. 1975) (rejecting the appeal of the three named plaintiffs, who had retained new counsel to object to a settlement that did not provide them with more relief than class members), *cert. denied*, 424 U.S. 967 (1976).

[2] *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 428 (6th Cir. 1974) (Phillips, C.J., dissenting and stating that any "reward" should not be at the expense of other victims, because he believed that the effective date for seniority relief for all class members should be the date on which the drivers qualified for over-the-road positions, not the date they requested a transfer or filed an EEOC charge); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 64 (5th Cir. 1974) (stating that any "reward" should not be at the expense of other victims, reaffirming the qualification-date formula for seniority relief, and objecting to the limitation of seniority relief in *Thornton*), *vacated on other grounds*, 431 U.S. 395 (1977).

rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations."[3]

"Differentials are not necessarily improper, but call for judicial scrutiny." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) (1995) § 30.42 at p. 239 n.763. The MANUAL goes on to state: "Compensation for class representatives may sometimes be merited for time spent meeting with class members or responding to discovery." *Id.*

In *Holmes*, the court disapproved a settlement in which the eight named plaintiffs took half of the back pay award, leaving $22,755 to be divided among 118 class members. 706 F.2d at 1146. The allocation here is a far smaller portion of the total award (12.8% plus the plaintiffs' formula payments here, as compared to 50% of the total in *Holmes*), and that portion benefits a much higher proportion of the class (22.7% of the 141 class members are named plaintiffs here, compared to 6.3% of the 126 class members in *Holmes*). Stated differently, the class here is only 15 persons fewer than the class in *Holmes*, but is sharing $2,180,000 under the formula, an amount 95.7 times higher than the amount for the remaining members of the class in *Holmes*.

Holmes presented another problem not present in this case. The allocation there was of back pay, an amount that while sometimes difficult to quantify is nevertheless much easier to quantify than compensatory damages for stress and humiliation. It was therefore easier for the court in *Holmes* to be able to examine the disparate recoveries and pronounce them unjustified.

Here, plaintiffs have presented substantial information showing the rational basis for the proposed allocation, meeting the standard of *Holmes*. In addition to these factors, there is the intangible factor that no class member could recover anything if some persons had not conquered their reluctance and fear of retaliation to step forward and take action on behalf of all.

Consistent with *Holmes*' recognition that there can be rational explanations legitimately supporting a greater share of relief for the named plaintiffs than for class members, several courts have approved such relief. *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974), approved a litigated order providing more extensive seniority relief "'for those drivers who actively sought an end to the company's no-transfer policy'" than for "'those who were merely passive'" and took no personal steps to bring the discriminatory policy to an end. The court of appeals stated:

> We also think there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been the victims of discrimination. Such a decision by the District Court can hardly be considered an abuse of discretion, which must be shown before remedial relief of a court can be overturned.

---

[3] *Accord*, *Plummer v. Chemical Bank*, 668 F.2d 654, 660 (2d Cir. 1982) (affirming the district court's order denying final approval of a class settlement where the named plaintiffs received the lion's share of the relief, *id.* at 656, but remanding the case to provide plaintiffs with a better opportunity to justify the disparities in relief).

Id. *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 709–10 (E.D. Mich. 1985), followed *Thornton* in approving a settlement of a prisoners' rights case that provided $2,000 to each prisoner who filed a case prior to December 31, 1983, is represented by counsel, and filed an amended complaint; $500 to each prisoner who filed a case after December 31, 1983; no specific payments to any other class members, and the creation of two funds, a $20,000 fund for seriously injured prisoners and a $50,000 fund to be used for the general benefit of prisoners. *Id.* at 706. The court rejected an objection that explained that the objector "did not file until there was a strong indication of monetary damages because of fear of retaliatory practices of the MCO union and its representatives."

A number of courts have followed this approach in approving a stronger remedy for the named plaintiffs than for class members. *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (noting that the settlement provided significant benefits to the class); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 138 (W.D. Ky. 1992) (approving without discussion a one-time payment of $5,000 to each plaintiff as part of the class settlement); *Enterprise Energy v. Columbia Gas Transmission*, 137 F.R.D. 240, 250–51 (S.D. Ohio 1991) (approving $50,000 incentive payments to each of six class representatives, where the settlement provided substantial economic and non-economic benefits to class members); *Huguley v. General Motors Corp.*, 128 F.R.D. 81, 85 (E.D. Mich. 1989) (approving a one-time distribution of $322,496 to "eighty-eight named potential and anecdotal witnesses and named plaintiffs" where there was no objection that the amount was too large, and stating: "Named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation that they have borne. I find this to be entirely fair."), *aff'd*, 925 F.2d 1464 (6th Cir. 1991) (table), *cert. denied*, 502 U.S. 909 (1991); *Johnson v. Montgomery County Sheriff's Department*, 604 F. Supp. 1346, 1348 (M.D. Ala. 1985) (approving a class settlement in which the named plaintiff received a promotion and back pay based on her individual promotional claim, an amount "significantly greater" than a share of the class fund, and only one other class member received a promotion, where no one objected to her recovery and where counsel calculated Johnson's back pay on her own); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1024 (E.D. Wis. 1984) (approving class settlement in which a named plaintiff was given priority for promotion, recognizing that allocation of relief among class members is a difficult task, and stating: "Yet it is not uncommon for class members with prior charges of discrimination to receive special relief in settlement."); *Lo Re v. Chase Manhattan Corp.*, 19 FEP Cases (BNA) 1366, 1371 (S.D. N.Y. 1979) (approving class settlement in which the named plaintiffs received $229,000 in settlement of their individual claims where there is equitable relief for the class and some class members will receive Promotion Incentive Payments); *Women's Committee v. National Broadcasting Co.*, 76 F.R.D. 173, 180–82 (S.D. N.Y. 1977) (approving a settlement with a fund of $200,000 for the named plaintiffs where the class is receiving significant monetary and injunctive relief, where the EEOC has participated in the settlement negotiations and has approved the settlement, where no objections to this additional payment were filed, where the settlement did not foreclose the individual claim of women with pending charges as of March 28, 1977, where the plaintiffs "instituted significant measures and undertook significant obligations, perhaps at some risk to job security and good will with coworkers, resulting in broad-ranging benefits to the class," and in light of the policy favoring voluntary settlement in Title VII cases); *Bryan v. Pittsburgh Plate Glass Co.*, 59 F.R.D. 616, 617 (W.D. Pa. 1973) (approving "special awards in the aggregate amount of $17,500 to those members of the plaintiff class who were most active in the

prosecution of this case and who devoted substantial time and expense on behalf of the class"), *aff'd*, 494 F.2d 799 (3d Cir. 1974), *cert. denied*, 419 U.S. 900 (1975).

One of the most extensive discussions of this issue occurred in *Luevano v. Campbell*, 93 F.R.D. 68, 89-90 (D.D.C. 1981). There, the court approved a settlement in which four named plaintiffs received an aggregate amount of $35,000 in back pay, while class members who had active EEO charges involving the use of the challenged test for hiring received $3,000 each and other class members did not receive any back pay. The court relied on four factors to justify the differential.

> (a) *First*, it was clear to the court that there was no improper collusion in the case. *Id.* at 90. The size of the aggregate recovery here, coupled with the length and intensity of the negotiations, provides this Court with the same assurance.
>
> (b) *Second*, very few objections were filed, and very few of the objectors complained of the additional relief for the named plaintiffs. *Id.* The only way to determine if that rationale applies to this case is for the Court to grant preliminary approval to the settlement and reserve this issue until the objections are filed. Further, subject to the company's reserved right to withdraw from the settlement, the fact that class members have the right to opt out of the settlement provides further assurance that those who do not opt out believe they are being treated fairly.
>
> (c) *Third*, the plaintiffs had negotiated some monetary relief for the class, as described above. *Id.* Here, the amount to be distributed under the general formula is $2,180,000, constituting the vast bulk of the monetary relief in this case.
>
> (d) "*Fourth*, since the relief for the class is fair and adequate taken apart from the relief for the named plaintiffs, and since the relief for the named plaintiffs is a reasonable compromise of their claims when considered apart from the relief for the class, a settlement combining both reasonable compromises is undeniably reasonable." *Id.* at 90. The court pointed out that the plaintiffs could have reached individual settlements much more quickly than it took to obtain the class settlement, "and a class representative's willingness to delay individual relief in order to obtain relief for the class should not be made the occasion for requiring the representative to waive individual consideration of his or her claims." *Id.* This rationale applies fully to the case at bar. If they had litigated their cases as individual cases, all of the named plaintiffs would have had the opportunity to persuade a jury that their injuries—and thus their individual recoveries—are for far larger amounts. No one can predict what any jury's reaction would be to the evidence concerning this plaintiff or that plaintiff, but the awards they are receiving in this case may well be smaller than the awards they might have received if they had litigated their own cases.

A recurrent theme in some of these cases is that the named plaintiffs undertook some personal risks. The plaintiffs here agreed to take responsibility for the payment of the costs and expenses of this litigation, although in light of the limited resources of its clients the Lawyers' Committee often does not actually ask for reimbursement. More significantly, the plaintiffs here could reasonably fear retaliation from the anonymous persons who had placed the racially hostile

graffiti on the stalls and walls of the restrooms. No such consideration is present in investor cases like *Matter of Continental Illinois Securities Litigation*. Even more significantly, the governmental approval of the settlement through the EEOC conciliation agreement provides additional evidence of fairness. Finally, the ability of class members to file an objection, or to opt out of the class, provides further assurance of fairness to those remaining.

We submit that the additional payment to the named plaintiffs here is justified by law and equity. As counsel for the class as well as for the named plaintiffs, we support this amount. We would not support a higher amount.

2. How Not to Do It: *Staton v. Boeing Co.*

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003), reversed the grant of final approval to a settlement for several reasons. An important reason for the court's concern was that there was inadequate explanation of the disparities in monetary relief among class members, and between named plaintiffs and class members:

> The class receives a total monetary award of $7.3 million. Out of the approximately 15,000-member class, a group of 264 individuals—less than two percent of the class—made up of the named plaintiffs and other class members identified by class counsel as having actively participated in the litigation (together, the "individually identified recipients" or "IIRs") is to receive $3.77 million, more than half the monetary award. The $3.77 million will be distributed among the IIRs in amounts established by class counsel, who credit the assistance of an independent claims adjuster for consultation on many, but not all, of the claims. There is ample evidence in the record that before retaining this claims adjuster class counsel extensively discussed specific award amounts with some IIRs. Moreover, the record indicates that class counsel made the final decisions concerning many of these designated payments.
>
> The individual awards for the IIRs range from $5,000 to $50,000, with most of the class representatives receiving higher awards than the other IIRs, and average approximately $16,500. Based on our examination of records relating to the Wichita-based IIRs, the individuals singled out for IIR settlement payments are for the most part the same people who signed individual retainers with class counsel that obligated them to pay monthly fees.
>
> The remaining $3.53 million of monetary relief is to be distributed to the rest of the class (the "unnamed class members"). To receive an award, unnamed class members must submit a claim form to an independent claims arbitrator (hired by class counsel and approved by the district court), who will verify the validity of the claims against Boeing's records and designate awards according to a detailed point system laid out in the decree and applicable only to the unnamed class members. Some 3,400 class members filed claims, so the average payment each unnamed class member would receive is approximately $1,000.

Id. at 948 (footnote omitted). The court summarized this part of its holding, *id.* at 946:

> Finally, the decree sets up a two-tiered structure for the distribution of monetary damages, awarding each class representative and certain other identified class members an amount of damages on average sixteen times greater than the amount each unnamed class member would receive. At least one person not a member of the class was provided a damages award. The record before us does not reveal sufficient justification either for the large differential in the amounts of damage awards or for the payment of damages to a nonmember of the class. On this ground as well, the district court abused its discretion in approving the settlement.

Judge Trott dissented. *Id.* at 979.

B. Releasing Too Many Claims

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003), reversed the grant of final approval to a settlement for several reasons. One reason, that would probably not have been enough by itself but in combination with other factors tipped the balance, was the court's concern about the breadth of releases. "In this case, we are somewhat uneasy, reading the settlement as a whole, about whether in reaching the settlement, class counsel adequately pursued the interests of the class as a whole. Provisions giving rise to this unease include the extent of Boeing's release from liability, which includes any breach of contract action by any class member . . . ."

C. Misdirecting the Money

Molski v. Gleich, 318 F.3d 937, 953–55 (9th Cir. 2003), reversed the grant of final approval to a settlement of class claims under the ADA and California law. The court stated: "Here, the class members lost their rights to pursue any claims (excepting those for physical injury); the class representative received monetary relief of $5,000; and the class counsel was paid $50,000. The corporation was required to make tax-deductible donations to third parties and simply meet its legal obligations (or perhaps even less than that required) under the ADA." The court held that the use of cy pres awards to third parties in lieu of damages was inappropriate, but did not hold that such awards could never be made. "In this case, there is no evidence that proof of individual claims would be burdensome or that distribution of damages would be costly. Moreover, the cy pres award circumvents individualized proof requirements and alters the substantive rights at issue in this case. Thus, the use of the cy pres award was inappropriate." *Id.* at 955. The court held that plaintiff and class counsel did not adequately represent the class, and reversed the certification. *Id.* at 955–56.

D. Adequacy of Injunctive Relief

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003), reversed the grant of final approval to a settlement for several reasons. One reason, that would probably not have been enough by itself but in combination with other factors tipped the balance, was the court's concern about the adequacy of injunctive relief:

> In this case, we are somewhat uneasy, reading the settlement as a whole, about whether in reaching the settlement, class counsel adequately pursued the interests of the class as a whole. Provisions giving rise to this unease include . . . ; the stipulation that the prohibition on race discrimination cannot be enforced in individual cases; the

> numerous instances in which Boeing is permitted to develop its own remedial schemes (and, in some instances, unilaterally to abandon such schemes as infeasible), with an obligation only to consult with class counsel but with no obligation to submit to any enforcement or dispute resolution mechanism if the schemes are unsatisfactory; the limited role for the consultant Boeing is required to hire; and the incorporation in the agreement of promotion and complaint programs Boeing had already developed and implemented, with no obligation on the part of the Company to continue those programs in their present form or alternatively to substitute programs of the same efficacy.

Id. at 961 (footnote omitted). The court held that these problems would not be enough, by themselves, to reject the settlement. *Id.* at 962. "At the same time, the questionable factors we have noted do suggest the possibility that class counsel and the IIRs *could* have agreed to relatively weak prospective relief because of other inducements offered to them in the course of the negotiations. We therefore scrutinize with particular care the aspects of the proposed settlement that provide monetary benefits directly to class counsel and to the IIRs: the attorneys' fees and damages distribution provisions." *Id.* at 963 (footnote omitted).

E. Settlement Despite Objections by Plaintiffs and Class Members

Ayers v. Thompson, 358 F.3d 356 (**5th Cir.** 2004), affirmed the grant of final approval to a settlement of class claims involving removal of the vestiges of racial segregation of Mississippi's institutions of higher education. The court rejected objectors' argument that final approval could not be granted if a substantial proportion of the class members and of the named plaintiffs opposed the settlement. It found that the record did not support the argument, and stated: "Our jurisprudence, however, makes clear that a settlement can be approved despite opposition from class members, including named plaintiffs." *Id.* at 373 (citations omitted). The court rejected the objection that $2.5 million in attorneys' fees were negotiated simultaneously with the settlement. *Id.* at 374–75. The court affirmed the lower court's refusal to allow some of the objecting class members to opt out of the Rule 23(b)(2) settlement, pointing out that the case had sought only injunctive and declaratory relief. *Id.* at 375–76.

F. Defendants Asking Plaintiffs to Allege or Expand a Class

In the course of resolving a class action, a defendant may suggest to counsel for the plaintiff class that the class to be covered by the settlement be expanded and the claims of the larger group resolved in the settlement. In the course of resolving even an individual action, a defendant may suggest to counsel for the plaintiff that the case be made a class action and resolved on a class basis.

There seems to me nothing inherently improper about such requests, if the claims of the expanded class or new class are resolved fairly, and if the court is informed that the new or expanded class came about as a result of defendant's suggestion. If the defendant wants to pay the same consideration and simply bind more people with it, however, the arrangement has aspects of a "reverse auction" and should not be tolerated by plaintiffs' counsel or by the court. The most exacting possible scrutiny should be applied to any settlements involving any defendant-initiated new or expanded class.

Wilfong v. Rent-A-Center, Inc., 2001 WL 1795093 (S.D. Ill. Dec. 27, 2001) (No. 00-CV-680-DRH), certified a class despite the court's recognition that defendant had agreed to largely co-extensive certified classes in two other cases, and had settled them for much less relief. The court stated at p. 1 n.1:

> The Court finds it interesting and significant that in responding to the motion for class certification, Rent-A-Center did not distinguish this case from Bunch v. Rent--A-Center, Inc, 00-0364-CV-W-3 or Levings v. Rent-A-Center, 00-0596-CV-W-3, class actions filed in the Western District of Missouri, let alone mention the existence of these cases. Both cases are based on Title VII for gender discrimination. The Court notes that Rent-A-Center and counsel for the putative class of Plaintiffs in Western District of Missouri cases entered into a stipulation and settlement agreement in which Rent-A-Center stipulated and agreed that all of the requirements of FEDERAL RULE OF CIVIL PROCEDURE 23 were met. (Doc. 172, Exhibit 45, p. 12).

G. <u>Required Steps to Protect the Class After Decertification</u>

Birmingham Steel Corp. v. Tennessee Valley Authority, 353 F.3d 1331, 1339–40 (11th Cir. 2003), involved a class of industrial consumers of TVA electricity who were suing because of alleged overcharges. When the steel company went bankrupt, TVA obtained the decertification of the class because of inadequate representation. Relying on *Culver v. City of Milwaukee*, 277 F.3d 908, 914–15, 87 FEP Cases 1464 (7th Cir. 2002), the court described the steps required to protect the class:

> A district court that is about to decertify a class on the ground of inadequate representation by the named plaintiff will, except in extraordinary circumstances, not be required to take on itself the responsibility of notifying the class members of the imminent decertification in order to allow these members an opportunity to intervene or substitute themselves as the class representative; this is the job of class counsel or the class representative. Accordingly, on remand, the district court will not be required to notify the class of its impending decertification. Yet, we are also persuaded by the reasoning in *Culver* that, once a district court has decertified a class, it must ensure that notification of this action be sent to the class members, in order that the latter can be alerted that the statute of limitations has begun to run again on their individual claims.

Id. at 1339. The court also held that the lower court abused its discretion in failing to allow a reasonable time for class counsel to find a substitute class representative, despite class counsel's pessimism that he would be able to do so. *Id.* at 1142. The court vacated the decertification of the class, ordered that class counsel be given a reasonable time to locate a new class representative, and spelled out the action that must be taken if that effort failed and the class was again decertified: "If the court eventually decertifies the action, however, it must cause notice to be sent to the class in order that the latter will be made aware that the statute of limitations, tolled during the class action, has begun running upon the decertification of the class." *Id.* at 1143 n.12 (citation omitted).

H. Re-Inventing Adequate Provisions

I represented a plaintiff who objected to the settlement of the African-American farmers' Equal Credit Opportunity Act racial discrimination claims against the Department of Agriculture because numerous terms of the Consent Decree spelled trouble to us. In a masterful tour de force, the D.C. Circuit rejected all of our objections by construing the decree in a way that prevented many of the dangers we feared. *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000).

I. Remedies Against Defendant Because of Failures by Class Counsel

Pigford v. Veneman, 292 F.3d 918 (D.C. Cir. 2002), reversed the modification of the Consent Decree settling African-American farmers' Equal Credit Opportunity Act racial discrimination claims against the Department of Agriculture as exceeding the powers of a court overseeing a consent decree, held that the failure of class counsel to meet critical deadlines was an "'unforeseen obstacle'" making the decree "'unworkable,'" *id.* at 927, held that this made modification under Rule 60(b)(5) appropriate, held that the modification ordered below was broader than allowed under the rule, and remanded the case. Despite receiving fee advances totaling $8 million to cover implementation, and despite receiving an ultimate total of $14.9 million in fees, class counsel failed to provide timely assistance to the vast majority of farmers needing to file petitions for relief in the individual relief proceedings. "Counsel revealed that they had filed only a small fraction of the total petitions requested by the farmers. Concerned that 'counsel's failings . . . not be visited on their clients' . . . and relying on 'explicit assurances' by counsel as to the work load they could realistically shoulder into the future . . . the district court permitted counsel to file pro forma petitions by the original deadline and then to either file supporting materials or to withdraw the petitions at the rate of at least 400 petitions per month." *Id.* at 921. The court continued:

> A few months later, the district court observed "a very disturbing trend": class counsel had failed to meet their monthly quota "even once." . . . Worse still, counsel had "drastically cut [their] staff, bring[ing] Class Counsel's ability to represent the [farmers] into serious question." *Id.* "[A]larmed by Class Counsel's consistent failure" to meet decree timelines, the district court noted counsel's "remarkable admission that they never had a realistic expectation of meeting" agreed-upon or court-ordered deadlines for the monitor review process. . . . The court described counsel's performance as "dismal"—"border[ing] on legal malpractice"—and "wonder[ed]" whether class counsel would have been in such a predicament had they not filed "three new sister class actions" against the Department. . . .
>
> The district court eventually imposed a series of escalating daily fines on class counsel for untimely monitor review filings. . . . Instead of simply submitting materials in support of their clients' petitions in a more timely fashion, however, counsel drastically increased the rate at which they *withdrew* petitions for monitor review—from 19% to 48%—"once again" leading the district court to "question Class Counsel's fidelity to their clients."

Id. at 921–22 (emphasis in original). The lower court ordered that arbitrators had discretion to extend deadlines when strict compliance with the original scheduling framework would defeat the Decree's remedial purposes. *Id.* at 922. The court of appeals stated: "District courts possess two types of authority over consent decrees. First, they may interpret and enforce a decree to the extent authorized either by the decree or by the related order. . . . Second, they may modify a

decree pursuant to Federal Rule of Civil Procedure 60(b)(5). . . . These two sources of authority reflect a consent decree's hybrid character, having qualities of both contracts and court orders." *Id.* at 923 (citations omitted). The court held that ¶ 13 of the Consent Decree, allows enforcement of the decree where there are alleged violations, and that the motion for relief neither sought enforcement nor alleged a violation. Relying by analogy on *Kokkonen*, the court held that district courts do not have wide-ranging ancillary jurisdiction to enforce consent decrees but are constrained by the terms of the decree and the related order. *Id.* at 923–24. The court rejected plaintiffs' argument that the lower court had broader authority to interpret than to enforce the decree. "If the district court lacks paragraph 13 enforcement authority (because the farmers alleged no violation), then the farmers gain nothing from an interpretation that arbitrators may adjust paragraph 13 deadlines." *Id.* at 924. Defendant informed the court that it bargained for the deadlines in order to limit the number of class members who would participate and to enhance its defenses, and bargained to limit the scope of the enforcement provision. The court stated:

> To hold now that the district court, through either some "ancillary" authority to enforce the decree absent a violation or some "inherent" authority to interpret it, may permit extensions of Track B deadlines would not only deny the Department the benefit of its bargain, but would also discourage settlements. Who would sign a consent decree if district courts had free-ranging interpretive or enforcement authority untethered from the decree's negotiated terms?

Id. at 925. Turning to Rule 60(b)(5) modification, the court noted defendant's agreement that some counsel "committed 'what appears to be malpractice,'" and that this is a "'relevant new fact,'" and its argument that class members' remedy lay in malpractice litigation against class counsel. *Id.* The court stated "[a]s a general matter, the Department is correct," but observed that none of its authorities was a class action, and that none of the class members except for the three plaintiffs had selected class counsel to represent them. *Id.* at 926. "Quite to the contrary, by certifying the class, the district court effectively appointed counsel for the farmers. Under Rule 23(a)(4), moreover, the district court, as a condition of class certification, had to find that class counsel would 'adequately protect the interests of the class.'" *Id.* (citation omitted). The court stated it was not suggesting any lack of accountability to clients in the context of class actions, and that the Rule 23(a)(4) determination of adequacy of counsel establishes at most a rebuttable presumption that the determination may substitute in part for the choice of counsel in non-class litigation. *Id.* The court rejected defendant's argument that class members had anything other than a nominal right to select their own counsel for the claims proceeding:

> Although the decree technically permits class members to retain other lawyers, we think the circumstances of this case, together with the terms of the decree itself, make such choices unlikely. For one thing, the decree prohibits lawyers from charging for their work in claims proceedings, see Consent Decree 5(e), so lawyers desiring payment must seek fees pursuant to the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d). Class counsel, however, received an advance fee award to provide such services. Class counsel also benefit from the district court's Rule 23 seal of approval. No wonder Earl Kitchen (the only claimant for whom the record contains relevant information) was represented by Jesse Kearney, a member of one of the firms that shared in the fee advance and ultimately the $14.9 million settlement. Because Kitchen did not "voluntarily cho[o]se" Kearney in the usual sense, we see no basis for holding Kitchen responsible for Kearney's failure to file direct testimony on time.

Id. at 926–27. The court held that providing some relief for class counsel's derelictions did nothing to upset the bargain for which defendant contracted:

> Contrary to the Department's argument, we see nothing unfair about this result. Although we have no doubt that the Department expected Track B's tight deadlines to discourage claims—even to make them less winnable—the Department never counted on class counsel's virtual malpractice. Indeed, the decree itself assumes competent representation for the farmers. The decree's express purpose is to "ensur[e] that in their dealings with USDA, all class members receive full and fair treatment," Consent Decree at 2, and its "main accomplishment was the *establishment of a process* to adjudicate individual claims." Opinion and Order of the United States District Court for the District of Columbia at 8 (Mar. 8, 2001) (No. 97cv01978) (emphasis added). Unless the farmers have competent counsel, we cannot imagine how they could ever obtain "full and fair treatment" in a claims process where (as in Kitchen's case) missing a single deadline could be fatal.

Id. at 927 (emphasis in original). The court held that the grant of "generic authority to revise deadlines 'so long as justice requires' . . . is far too broad" because it could effectively dispose of all Track B deadlines. *Id.* The court stated that the goal of a modification was to restore both parties to the situation in which they would have been, but for counsel's failures. It gave an example: "In Kitchen's case, a properly 'tailored' remedy would, for example, reset the Track B clock at the point in the process where Kearney dropped the ball, establishing a new deadline for submitting direct testimony and leaving subsequent deadlines unchanged." *Id.*

J. Malpractice Claims by Class Members

Janik v. Rudy, Exelrod & Zieff, 119 Cal.App. 4th 930, 934, 14 Cal. Rptr.3d 751 (Calif. App. 1st Dist. 2005), *review denied*, reversed the dismissal of plaintiff's class malpractice and breach of fiduciary duty claims and required that the claims be tried. The malpractice plaintiff was a class member in the enforcement class action, *Bell v. Farmers Insurance Exchange*, which involved the denial of overtime to insurance claims adjusters. The court summarized the case:

> Plaintiff seeks to impose liability on attorneys who produced a class action recovery of some $90 million, claiming they were negligent because they failed to obtain a still larger recovery. While we may share the attorneys' dismay that their efforts have been rewarded with this lawsuit rather than with the kudos they no doubt expected, and perhaps deserve, we are nonetheless constrained to hold that plaintiff's claim cannot be rejected out of hand. While it may well be that the attorneys did not breach their duty of care in failing to proceed under an alternative theory that would have produced a greater recovery, we cannot say, as did the trial court, that there simply was no duty for the attorneys to breach.
>
> Plaintiff Stanley Janik brought this purported class action for legal malpractice against defendants Steven Zieff and the law firm of Rudy, Exelrod & Zieff, LLP (collectively defendants or the attorneys), alleging that the attorneys mishandled a prior class action against Farmers Insurance Exchange (Farmers). While having secured recovery for a large class of claims representatives who were not paid overtime compensation on the ground that they were administrators to whom the applicable regulations under the Labor Code assertedly did not apply, the attorneys are faulted for

> not having sought recovery under the Unfair Competition Law, Business and Professions Code section 17200 (UCL). Under the UCL, the statute of limitations would have permitted recovery for overtime wages earned but unpaid during the four-year period preceding the filing of the complaint, rather than for only the three-year period available under the Labor Code. The trial court sustained defendants' demurrer without leave to amend on the ground that the attorneys had no duty to class members with respect to claims that were not specified in the order certifying a class. Although there is little precedent to guide us, we do not believe that the obligations of class counsel can be so narrowly circumscribed. While the scope of the duty of class counsel must be determined with reference to the certification order, we conclude that the attorneys' obligations may extend beyond the claims as certified to related claims arising out of the same facts that class members reasonably would expect to be asserted in conjunction with the certified claims. Accordingly, we must reverse the judgment and require the attorneys to establish that they did not breach the applicable standard of care before they may be exonerated.

Id. at 934. The malpractice plaintiff and other class members had been notified of the class certification and of the opportunity to opt out, but had not done so. The enforcement plaintiffs were granted summary adjudication as to all their claims in April 1999. That determination was affirmed on appeal. Subsequently, the California Supreme Court held that the Unfair Competition Law ("UCL") could be used to challenge violations of the Labor Code, and that back pay was an appropriate remedy. The malpractice class plaintiffs alleged that plaintiffs should have included in their Complaint, or amended their Complaint to include, a claim under the UCL allowing an additional year's liability. The enforcement class certification order did not include that claim. The court held that enforcement class counsel's duty to the class was not limited to the claims on which the lower court had granted certification, but extends to related claims. While class counsel are not required to bring all such claims, they are required to consider such claims and discuss them with the class representatives. The court explained:

> The reasoning that precludes limiting an attorneys duty to the literal terms of the retention agreement applies as well in the context of a class action. In the former situation, the client reasonably expects the attorney at least to call attention to alternative or additional avenues of relief that might be pursued to obtain full redress for the circumstances giving rise to the retention. The attorney has the duty "to use such skill, prudence and diligence as other members of the profession commonly possess and exercise" in identifying and bringing to the clients attention other courses of action that warrant consideration. . . . If prudence dictates that a claim beyond the scope of the retention agreement be pursued, the client can then consider whether to expand the retention or pursue the additional claim in some other manner. In the context of a class action, both the representative plaintiffs and the absent class members similarly are entitled to assume that their attorneys will consider and bring to the attention of at least the class representatives additional or greater claims that may exist arising out of the circumstances underlying the certified claims that class members will be unable to raise if not asserted in the pending action. The class members are entitled to assume that their attorneys are attempting to maximize their recovery for the conduct they are challenging and that they are not, without good reason, failing to assert those claims that will do so.

> This is not to say that there may not be good reasons for failing to assert a particular claim or make a particular motion or argument, even if doing so would have the potential of increasing recovery. (*Davis v. Damrell* (1981) 119 Cal. App. 3d 883, 889, 174 Cal. Rptr. 257; see also 2 Newberg on Class Actions (4th ed. 2002) § 6.5, p. 503 ["One also must consider whether to join additional claims for different theories of liability leading to approximately the same relief. Often this joinder may be advantageous when the precise theory of liability that may be applicable is subject to uncertainty or when the class possesses several related claims. On the other hand, sometimes the more prolix the complaint, the more difficult it is to sustain the class action. A longer complaint may afford additional opportunities for challenge by the defendants concerning the impropriety of certifying a class action and may also give rise to feelings by the court of management difficulties. Thus, it would appear that a straightforward, more limited complaint would enjoy a greater likelihood of success for class certification than a prolix complaint."].) Defendants argue that there were good reasons for initially having failed to assert a cause of action under the UCL, and for not moving to amend the complaint when *Cortez*, *supra*, 23 Cal. 4th 163, 96 Cal. Rptr.2d 518, 999 P.2d 706 was decided—after they had already obtained a favorable ruling on the summary adjudication motion and were scheduled to try the issue of damages. Defendants may well be right, but these contentions do not relate to the existence of a duty on the part of the attorneys. They go to whether the attorneys breached or fulfilled their duty. . . .
>
> Here, a cause of action under the UCL would have been based on precisely the same practice, and subject to much the same legal analysis, as the certified cause of action under the Labor Code. As explained in *Cortez*, supra, 23 Cal. 4th at page 178, 96 Cal. Rptr.2d 518, 999 P.2d 706, the UCL permits restitution of unpaid wages upon a showing that the employer's failure to pay the wages was an unfair business practice under Labor Code section 1194. "[A]ny business act or practice that violates the Labor Code through failure to pay wages is, by definition . . . an unfair business practice. It follows that an action to recover wages that might be barred if brought pursuant to Labor Code section 1194 still may be pursued as a UCL action seeking restitution pursuant to [Business and Professions Code] section 17203 if the failure to pay constitutes a business practice." (*Cortez*, *supra*, at pp. 178}–179, 96 Cal. Rptr.2d 518, 999 P.2d 706.) If not included as part of the *Bell* action, the claim for an additional year of recovery was lost. . . . Class counsel therefore were obliged to consider the advantages and disadvantages to the class of seeking to add a UCL cause of action to their complaint, to bring these considerations to the attention of the class representatives, and to take or recommend such action (including of course the possibility of doing nothing with respect to such an additional claim) as would an attorney using the "skill, prudence and diligence" commonly exercised by attorneys handling such litigation. . . . We do not in any way imply that defendants failed to do so here, but having undertaken to represent the class in prosecuting the claim to recover unpaid overtime compensation, they were duty bound to use reasonable care to fully protect the interests of the class in obtaining such recovery. Whether they did so is a question of fact that cannot be disposed of on this demurrer.

Id. at 941–43. The court rejected the malpractice defendants' argument that their adequacy had already been determined in the class certification decision, holding that the initial determination

is not dispositive of how well class counsel performed their duties after the entry of the certification order. It similarly rejected their argument that their adequacy could only be challenged in the class action. *Id.* at 943–46. The court described the resulting duty of care:

> We disagree with defendants that recognizing the duty underlying plaintiff's complaint will "invite bedlam to ensue in the class action arena." Contrary to defendants' argument, we do not suggest that class counsel are "required to raise each and every claim that the facts of a case possibly support." . . . If a related claim is one that class members reasonably would expect to be asserted, class counsel must respond to the situation in a manner that meets the necessary standard of care. Depending on a great many variables, class counsel may discharge their responsibility by asserting the claim or by bringing the claim to the attention of class members or of the class representatives and deciding that there are good reasons not to assert the additional claim. If class counsel have any question concerning the course that is required by the duty they owe absent class members, the attorneys may seek guidance from the court. It is only if class counsel overlook or mishandle a claim in a manner that competent counsel would not do that they may incur liability to members of the class they have undertaken to represent. Nor do we agree that permitting the enforcement of such a duty will undermine the finality of class action judgments, discourage future class action settlements, or promote forum shopping. Defendants' concern that dissatisfied class plaintiffs will attempt to avoid the jurisdiction of the class action court by filing malpractice actions in a different forum is unwarranted. If the issue on which a malpractice complaint is based has been considered and determined in the class action proceedings, the rulings of the class action court will be binding on members of the class and preclude reconsideration of those matters in another forum. . . . If the issue was not and reasonably should not have been raised in the class action proceedings, however, there is no reason to preclude its assertion in a subsequent action.

Id. at 945–46 (citations omitted). The court rejected the malpractice defendants' argument that a class certification order cannot be amended after a decision on the merits. *Id.* at 946–48. "There may well have been good reasons for proceeding to trial on the existing pleadings rather than attempting to reopen the scope of the complaint, but this is a question that cannot be decided on the present demurrer. We are in no position to decide as a matter of law that class counsel fulfilled their duties to the class by forgoing its claim for an additional year of recovery." *Id.* at 948.