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Getting Class-Action Settlement Approval in California

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Presenters

Erin Meyer
emeyer@keker.com

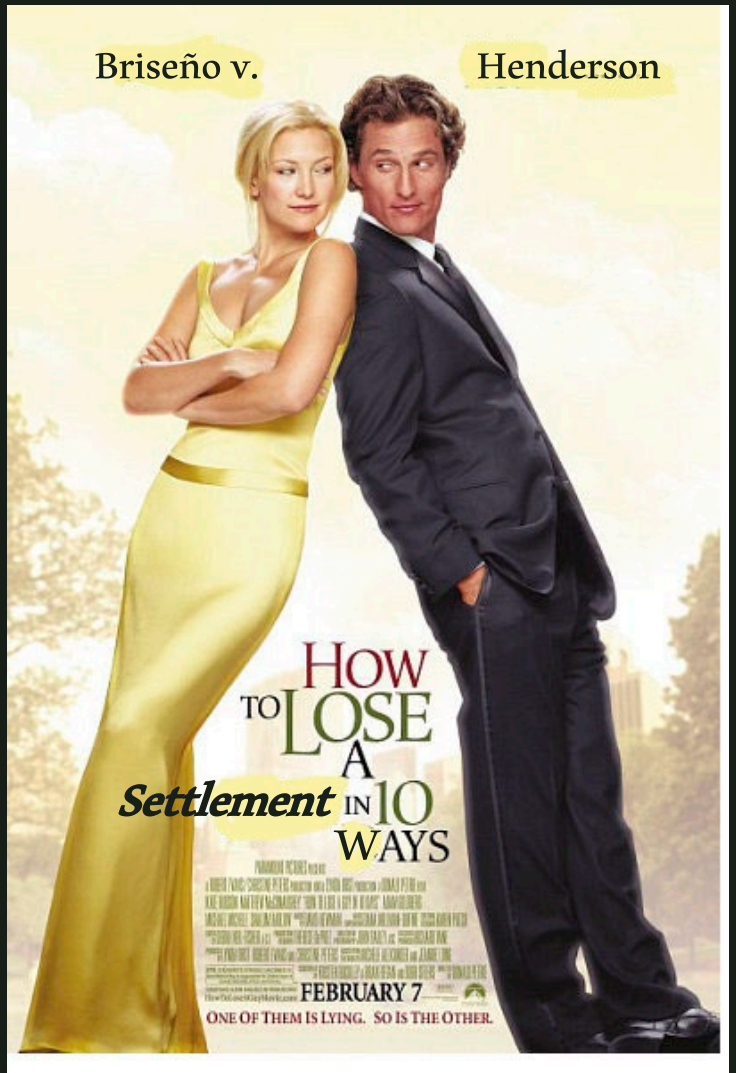
Julia Allen
jallen@keker.com

Morgan Sharma
msharma@keker.com

Agenda

- **Recent Developments & Important Cases**
- **Best Practices in Class-Action Settlements**
- **Tips & Tricks for Non-Traditional Settlements**

Recent Developments & Important Cases


Briseño v.
Henderson
HOW TO LOSE A Settlement IN 10 WAYS
FEBRUARY 7
ONE OF THEM IS LYING. SO IS THE OTHER.

Briseño v. Henderson, 998 F.3d 1014 (9th Cir. 2021)

- ***"We can perhaps sum up this case as 'How to Lose a Class Action Settlement in 10 Ways.'"***
- ***"While courts should not casually second-guess class settlements brokered by the parties, they should not greenlight them, either, just because the parties profess that their dubious deal is 'all right, all right, all right.'"***
  - "The parties crammed into their settlement agreement a bevy of questionable provisions that reeks of collusion at the expense of the class members: Class counsel will receive seven times more money than the class members; an injunction touted by an expert as worth tens of millions of dollars appears worthless; the defendant agrees not to challenge the plaintiffs' attorneys' fees amount; any reduction in those fees by the court reverts to the defendant; and on and on."

Courts are increasingly scrutinizing the specifics of class-action settlement agreements

- ***See, e.g., Gonzalez v. Nci Grp., Inc.*, 2022 WL 3156509 (E.D. Cal. Aug. 8, 2022)**
  - *Court originally denied final approval of employment class-action settlement because:*
    - Class rep failed to describe how he adequately represented the class, especially in view of the fact that the complaint alleged three subclasses based on varying shift lengths and hourly wages.
    - Proposed settlement failed to demonstrate that it was fair and reasonable to ALL class members because proposed allocations did not recognize differences in the way class members worked or what wage-and-hour violations they suffered.
  - *The parties were able to obtain final approval (two years later) by amending their settlement agreement:*
    - Class rep analyzed work habits of the absent class members and explained how his work history was similar, such that he could serve as an adequate class rep.
    - Amended settlement agreement allocated funds differently based on three subclasses to address the court's fairness concerns.

Courts are increasingly scrutinizing the specifics of class-action settlement agreements

- ***See, e.g., Joh v. Am. Income Life Ins. Co.*, 2021 WL 66305 (N.D. Cal. Jan. 7, 2021)**
  - *Court originally denied final approval of employment class-action settlement because:*
    - Settlement fund was allocated based on number of workweeks for each employee. Objectors argued that 50% of exposure in the case was based on waiting-time penalties, which accrue once per employee, and therefore allocating settlement funds based on number of workweeks was unfair to class members.
  - *The parties were able to obtain final approval by amending their settlement agreement:*
    - The revised agreement contained two sub-funds: one to address waiting-time penalties to be distributed on a per person basis, and one to address other alleged Labor Code violations to be distributed pro rata based on number of workweeks.

Courts want class members to receive real relief.

- ***See, e.g., Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017)**
  - FDCPA class action settlement where lower court approved a settlement consisting of $1,000 incentive payment to named plaintiff, injunctive relief, no damages award to class, $35,000 cy pres award, and $67,500 attorneys' fees award.
  - Ninth Circuit reversed and remanded, finding that *"[t]here is no evidence that the relief afforded by the settlement has any value to the class members, yet to obtain it they had to relinquish their right to seek damages in any other class action."*

Courts want class members to receive real relief.

- ***See, e.g., In re MyFord Touch Consumer Litig.*, 2018 WL 10539266 (N.D. Cal. June 14, 2018)**

  - Consumer class action claiming Ford sold faulty touchscreens. Settlement provided free upgrade to the updated touchscreen operating system, a claims made settlement for monetary damages of "up to" $55 million.

  - Court rejected the settlement, in part because:
    - The free upgrade was not worth any monetary value, as it ws unclear if the upgrade solved the problem.
    - The claims-made settlement was inappropriate because Ford had a method to identify class members. Claims-made process may be justified when it is the best or only option available, and since Ford had a method to identify class members, a claims-made process was inappropriate.

  - The settlement likely to be closer to $5 million in class benefit (not $55 million valuation), and thus attorneys' fees award of $22 million was "grossly disproportionate."

A few notes on PAGA cases…

Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022)

- ***In the recent Viking River decision, SCOTUS held:***

  - The FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.

  - "[A]s we see it, PAGA provides no mechanism to enable a court to adjudicate nonindividual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit. As a result, [plaintiff] lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims."

Adolph v. Uber Techs., Inc., No. S274671 (Cal. Supreme Court)

- **Petition for Review Granted. Question briefed is:**
  - "Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are 'premised on Labor Code violations actually sustained by' the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* (2022)) maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' (*id*.) in court or in any other forum the parties agree is suitable."

Turrieta v. Lyft, Inc. – 69 Cal. App. 5th 955 (2021)

- **In case involving PAGA-only settlement, Court of Appeal affirmed trial court order denying motion to intervene by drivers with competing PAGA claims, and also denying motion to vacate judgment for lack of standing.**
  - "Consequently, appellants' ability to file PAGA claims on behalf of the state does not convert the state's interest into their own or render them real parties in interest. . . . Because it is the state's rights, and not appellants', that are affected by a parallel PAGA settlement, appellants are not aggrieved parties with standing to seek to vacate the judgment or appeal."
  - "As with standing, appellants have no personal interest in the PAGA claims and any individual rights they have would not be precluded under the PAGA settlement. Thus, the trial court did not err in denying appellants' motions to intervene."
- **California Supreme Court granted review and case has been depublished.**

Uribe v. Crown Bldg. Maintenance Co. – 70 Cal. App. 5th 986 (2021)

- **In case involving class+PAGA settlement, Court of Appeal affirmed trial court order *granting* motion to intervene by plaintiff with competing PAGA claims, and remanded for further consideration of the settlement.**

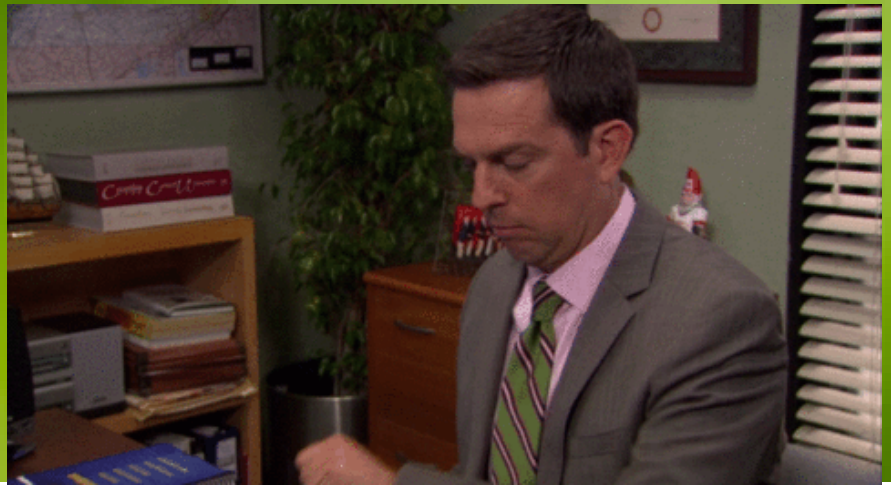
  - "Under these circumstances, Garibay has standing to appeal because, having intervened and yet unable to opt out of the other parties' settlement of Uribe's PAGA claim, Garibay's PAGA cause of action in this same lawsuit was resolved against her by the trial court's entry of judgment on its final approval of the settlement. She is therefore a party 'aggrieved' by the judgment. As one court has explained, the 'prejudice' giving rise to standing arises when 'the settlement strips the party of a legal claim or cause of action.'"

Moniz v. Adecco USA, Inc. – 72 Cal. App. 5th 56 (2021)

- **In case involving PAGA-only settlement, Court of Appeal *sua* sponte considered whether individual with competing PAGA claim was "aggrieved" by the order approving the PAGA settlement and disagreed with the *Turrieta* court.**

  - "Accepting the premise that PAGA allows concurrent PAGA suits as *Turrieta* did where two PAGA actions involve overlapping PAGA claims and a settlement of one is purportedly unfair, it follows that the PAGA representative in the separate action may seek to become a party to the settling action and appeal the fairness of the settlement as part of his or her role as an effective advocate for the state. Correa has done just this. Thus, she represents interests that are sufficiently aggrieved to satisfy Code of Civil Procedure section 902, a remedial statute to be liberally construed in favor of the right to appeal."

Securing Approval - Best Practices in Class Action Settlements



Courts want to see increased claims rates.

In 2019, the Federal Trade Commission reported that the median claims rate for consumer class action settlements was 9%, and that the weighted mean — weighted by the size of the class — was only 4%

In 2018, the Northern District of California issued guidance that specifically instructs parties to include information on claims rates in both preliminary and final approval motions.

Courts may reject settlements with low claims rates.

- ***In re ConAgra Foods, Inc., No. 11-cv-5379,* MDL No. 2291 (C.D. Cal. Dec. 22, 2021) (Order Denying Final Approval); Dkt. 795, *In re ConAgra Foods* (Feb. 22, 2022) (Order Denying Plaintiffs' Mot. for Reconsideration)**

  - U.S. District Judge Cormac J. Carney denied final approval for the second time in *In re: ConAgra Foods Inc.* — a decade-old deceptive marketing class action — based on the disproportionate allocation of the $8 million settlement — nearly $7 million to class counsel but less than $1 million to the class. The court found "excessive self-interest" based on the facts that "the parties ... knew the claims rate would be extremely low, [2%-3%]," and that class counsel even had an "incentive to make sure claims did not get too high."

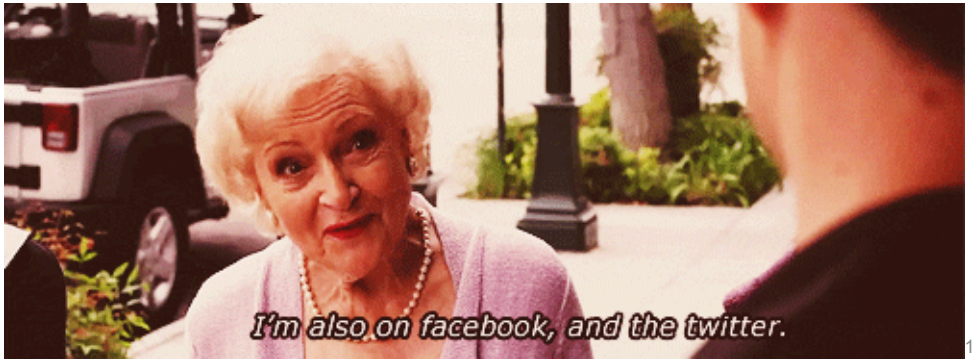
Courts may reject settlements with low claims rates.

- ***Powers v. Filters Fast, LLC* , No. 20-CV-982-JDP, 2022 WL 461996, at *1 (W.D. Wis. Feb. 15, 2022).**

  - U.S. District Judge James D. Peterson has twice denied final approval to a data breach class settlement in *Powers v. Filters Fast LLC*, noting specifically that "the total number of claims represents a little more than one percent of the class members," and that the plaintiffs "offer no explanation for what appears to be a low response rate in a context where there was little downside to submitting a claim."

Ways to Increase Claims Rates

- Use Simple Plain Language in the Notice Documents and Claim Forms
- In-App Notifications
- Reminders to Class Members
- Provide Payment Options (Zelle, Venmo, Check, etc.)



Ethical Considerations In Settlement Negotiations

- Fee Negotiations During The Settlement Process
- Incentive Payments to Class Representatives
- *Cy Pres* payments

Negotiation of Attorneys Fees - Timing

- It's imperative to avoid simultaneous negotiation of (a) a common fund or other benefit to the class and (b) attorneys' fees. Courts have rejected settlements where attorneys' fees are negotiated as part of the package deal.

- In *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 398 (C.D. Cal. 2007), the district court refused to approve the settlement in a consumer credit reporting case in part because of class counsel's willingness to simultaneously negotiate attorney fees with class relief.

Methods for Calculating Attorneys Fees

- Determining the method for calculating attorneys' fees is an integral part of many class action settlements. There are two generally acceptable methods:
  - The percentage of recovery method.
  - The lodestar method.

- District courts generally have discretion to use either method, so long as the resulting award is reasonable. However, some circuit courts have recognized that one method may be more appropriate than the other in certain types of cases. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-43 (9th Cir. 2011) (observing that the lodestar method "is appropriate in class actions brought under fee-shifting statutes … where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized");

- On the other hand, the U.S. Courts of Appeals for the Eleventh and DC Circuits **require** district courts to use the percentage of recovery method in common fund cases (*see Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993)).

25% is the benchmark for attorneys' fees

- The Ninth Circuit has repeatedly stated that 25% is the benchmark for percentage-of-the-fund attorneys' fee awards. *See, e.g., Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1029 (9th Cir. 1998).
- This is consistent with precedent nationwide, including in the First, Sixth, Tenth, and Eleventh Circuits.
- Courts often "cross-check" percentage-of-fund awards against a lodestar, and consider benefit achieved for the class.

Ninth Circuit looks for indicia of collusion.

- **In *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 (9th Cir. 2019), the Ninth Circuit identified "subtle signs" of collusion which district courts are *required* to look for:**

  (1) When counsel receive a disproportionate distribution of the settlement

  (2) When the parties negotiate a "clear sailing' arrangement" (i.e., an arrangement where defendant will not object to a certain fee request by class counsel)

  (3) When the parties create a reverter that returns unclaimed [funds] to the defendant.

Best practices to obtain approval on fees

- Cross-check fee award calculations under the lodestar and percentage recovery methods
- Utilize experts to value the settlement
- Compare awards in similar cases
- Negotiate fees after merits
- Highlight counsel's skill and innovative terms of the settlement
- Utilize a third-party neutral

Circuit Split - Incentive payments to class representatives

- ***Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020) (cert. petition filed – distributed for conference on 2/17/23)**

  - Incentive award sought by representative of class of telephone consumers in settlement of class action against medical debt collector under Telephone Consumer Protection Act (TCPA) was akin to a salary and a bounty, and was thus precluded by Supreme Court precedent disallowing salary and expense reimbursements in class actions.

  - ***"Incentive awards do seem to be "fairly typical in class action cases"….But, so far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law. The uncomfortable fact is that "[t]he judiciary has created these awards out of whole cloth," and "few courts have paused to consider the legal authority for incentive awards."***

Circuit Split - Incentive payments to class representatives

- **The Ninth Circuit has rejected the reasoning in *Johnson*, upholding longstanding precedent that district courts are permitted to approve "reasonable incentive awards." *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 n.12 (9th Cir. 2022).**

- **However, the court has held that "[e]xcessive payments to named class members can be an indication that the agreement was reached through fraud or collusion. Indeed, if class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1057 (9th Cir. 2019).**

Best practices in negotiating incentive fees

- Avoid provisions in the settlement agreement that tether support for the settlement to payment of an incentive award.
- Ensure the award is proportional to amounts received by class members.

Cy Pres – Best Practices

- Ensure that the *cy pres* recipient selected is related to the alleged harm at issue in the case.
    - Practice note: It is acceptable to choose a *cy pres* recipient who does work related to the area of law at issue, but who does not bring affirmative litigation against companies like the defendant.
- Ensure that any *cy pres* allocation does not greatly outweigh the distribution to the class.
- Ensure that parties and attorneys are not affiliated with the *cy pres* recipient.

Parting Thoughts on Non-Traditional Settlements

Types of Non-Traditional Class-Action Settlements

- **Coupon Settlements**
- **Account Credit Settlements**
- **Injunctions/Non-Monetary Relief**
- **Claims-Made and/or Reversionary Settlements**

Coupon Settlements

- **A coupon settlement is one where the class receives "a discount on another product or service offered by the defendant in the lawsuit.'" *Fleury v. Richemont N. Am., Inc.,* 2008 WL 3287154, at *10 (N.D. Cal. Aug. 6, 2008).**

  - "In a pure coupon settlement, the class members would receive a coupon, voucher, or discount that would *partly defray* the cost of making a new purchase of goods or services from the defendant. In many cases, the coupon might induce the member to make a purchase he or she would not otherwise have made, which may actually produce a net benefit for the defendant." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 53 (2008) (emphasis added).

Coupon Settlements

- **CAFA (28 U.S.C. § 1712) requires courts:**
  - To apply "heightened scrutiny" to settlements that award "coupons" to class members, and
  - To base fee awards on the redemption value of the coupons, rather than on their face value.

- **Why are coupon settlement subject to heightened scrutiny?**
  - "Congress targeted such settlements for heightened scrutiny out of a concern that the full value of coupons was being used to support large awards of attorney's fees regardless of whether class members had any interest in using the coupons." *In re EasySaver Rewards Litig.*, 906 F.3d 747, 755 (9th Cir. 2018).
  - By requiring courts to use the redemption-rate value of the coupons instead of the face value, CAFA "ensures that class counsel benefit[s] only from coupons that provide actual relief to the class." *Id.*

Coupon Settlements

- **The Ninth Circuit recently weighed in on what constitutes a coupon settlement (and therefore is subject to greater scrutiny). *See McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021).**
  - Do class members have to hand over more of their own money to take advantage of a credit?
  - Is the credit valid for only select products and services?
  - Is the credit stackable or transferable?
  - Does the credit expire?
  - Can coupons be used in more than one transaction?

Coupon Settlements

- **If you're considering a coupon settlement, you can maximize your chances of approval by:**
  - Making sure the coupon or voucher is large enough to cover the purchase of products or services WITHOUT requiring class members to pay additional money (incl. for shipping/handling)
  - Structuring the coupons so they do not expire (or are valid for several years), can be transferred, aggregated, and used in multiple transactions.
  - Avoiding "clear sailing" and "reverter" clauses for attorneys' fees, especially in coupon settlements.
  - Considering combining coupons with cash settlement fund or allowing coupons to be redeemed for cash.

Account Credit Settlements

- **Account Credit settlements provide benefits to class members in the form of a credit to their account with the defendant. Several factors affect whether courts approve or disapprove of these settlements:**
  - Are claim forms required? Or is credit automatically applied to the account?
  - What happens if credit is not used by class members after some period of time passes? Is there an attempt to provide a credit to the form of payment on file (e.g., credit card, PayPal?).
  - Is there a provision to send checks to class members who have closed their accounts?
  - Do class members have the option to request a cash payment?
    - *See, e.g.*, *Tadepalli v. Uber Techs., Inc.*, 2016 WL 1622881 (N.D. Cal. Apr. 25, 2016); *Keirsey v. eBay, Inc.*, 2013 WL 5755047 (N.D. Cal. Oct. 23, 2013) (expressing preference for account credit in light of small individual settlement amounts).

Injunctions/Non-Monetary Relief

- **In some class-action settlement, defendants agree to change their business practices in order to provide a benefit to class members. Courts considering settlements with injunctive relief provisions often ask these questions:**
  - Is the injunctive relief the only benefit to class members? Or is it combined with a cash payment?
  - Does the injunctive relief provide a real, meaningful benefit to class members or is it illusory?
    - *See, e.g., In re MyFord Touch Consumer Litig.*, 2018 WL 10539266 (N.D. Cal. June 14, 2018) (rejecting settlement where class counsel could not confirm that injunctive relief would address the issue the litigation sought to address).
  - How is injunctive relief valued? Is the value supported by expert analysis?
  - Are attorneys' fees tied to the value of injunctive relief?

“Claims Made” and Reversionary Settlements

- **Courts often disfavor “claims made” and reversionary settlements, especially in cases involving statutes with the goals of deterrence.**
  - Courts have called out, for example, PAGA and the FLSA as statutes having objectives that include deterrence, and have rejected claims-made settlements in cases involving those statutes. *See, e.g. Ferrell v. Buckingham Prop. Mgmt.*, 2021 WL 3562427 (E.D. Cal. Aug. 12, 2021) (collecting cases).
  - Some courts will preliminarily approve claims-made settlements and assess whether a sizeable portion of the class submits claims before granting final approval. *See, e.g.*, *Lemus v. H&R Block Enters. LLC*, 2012 WL 3638550 (N.D. Cal. Aug. 22, 2012).
  - In evaluating claims-made or reversionary settlements, courts are particularly skeptical of combining those features with other provisions that suggest collusion (e.g. clear sailing provisions).

Questions?