Buckley Sandler LLP

Legal Counsel to the Financial Services Industry

2014 Class Action Developments

1. Ten Class Settlement Considerations
2. Commonality after *Wal-Mart v. Dukes and Comcast v. Behrend*

Richard E. Gottlieb

October 23, 2014

Outline

- Part I: Class Settlement considerations:
  - Ten tips for a successful class settlement
  - Case study: *Redman v. RadioShack Corp.*, -- F.3d --, 2014 WL 4654477 (7th Cir. 2014)
- Part II: Commonality under *Wal-Mart v. Dukes (2011)* and *Comcast v. Behrend* (2013)
  - Recent appellate decisions refining commonality requirements.

Ten tips for a successful class settlement

1. Study the Rule 23 approval process *before you begin*
2. Learn from comparable past settlements (approved, modified, rejected)
3. Negotiate prudently and at “arm’s length”
4. Consider “blow provisions” to address opt outs
5. Reach an objectively fair, adequate and reasonable result (avoid appearance of reverse auction)
6. Be careful with plaintiffs’ fee award
7. Avoid coupon settlements (per CAFA)
8. Avoid side agreements (FRCP 23(e)(2))
9. Develop a fair notice and claims process
10. Anticipate now the claims of objectors (private litigants, state AG’s)

1. Study Rule 23(e) and CAFA approval process *before you begin*

1. The claims, issues, or defenses of a ***certified*** class may be settled … or compromised only with the court's approval.
2. Direct notice must be sent in a reasonable manner to all class members who would be bound by the proposal.
3. If binding on class, court must hold fairness hearing, and conclude settlement is “fair, reasonable, and adequate.) FRCP 23(e)(2)
4. Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.
5. Don’t forget to send your CAFA notice packages to all affected AG’s and/or your financial client’s regulator(s) (28 USC § 1715) (just regulator for banks); class members not bound without this notice.

2. Learn from comparable past settlements (approved, modified, rejected)

- Two points here:
  - *First,* understanding these settlements and activity of potential objectors will educate you and the client on the potential risks of defending this type of litigation, and on your negotiations with opposing counsel.
  - *Second,* court will scrutinize, and objectors will pounce, if your proposed class is being awarded substantially less than similarly situated class members in comparable cases unless there are quantifiable differences in the case facts and defenses.

3. Negotiate prudently and at “arm’s length”

- Avoid collusive settlements: early settlements will be most heavily scrutinized
- Take and retain notes of all negotiation sessions
- Reach an objectively fair, adequate and reasonable result
- Avoid appearance of reverse auction (i.e., maximizing attorneys’ fees at expense of class award)

4. Consider “blow provisions” to address opt outs

- Remember to factor in opt outs, especially in higher profile settlements or where competing class counsel are likely to contest the settlement
- “Blow provision” (or “blow-up provision”) allows defendant to cancel settlement completely if more than specified number (or percentage) of class members opt out of the settlement
- Rationale: defendants are not buying their peace if large enough opt-out class is prepared to re-litigate

5. Be careful with plaintiffs' fee award

- Where settlement produces common fund for benefit of entire class, courts usually employ either the "lodestar" method (hours X reasonable hourly rate X potential multiplier) or the percentage-of-recovery method (25% as benchmark in 9th Cir. except where windfall would result).
- If fee shifting statute applies, use lodestar alone.
- "[C]ourts have an independent obligation to ensure that the [fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." Court's lodestar assessment must be adequately supported, especially if multiplier is used. *In re Bluetooth Prods. Liab. Litig.* (9th Cir. 2011)
- Scrutinize **"clear sailing"** requests (no objection to fee award up to a maximum amount). *In re HP Inkjet* (9th Cir. 2013): HP drops provision after ruling
- Unusual but risky tactic: Let court decide the fees (examples: recent Starbucks and Facebook class action settlements)

7. Avoid coupon settlements (per CAFA)

- **Coupon settlements greatly frowned upon under CAFA.**
- **28 USC § 1712(a) —** If coupon settlement, portion of any fee award to class counsel attributable to award of the coupons shall be based on value to class members of coupons that are actually *redeemed.*
- **§ 1712(b):** If any portion of recovery of coupons is ***not*** used to determine the attorney's fee to be paid to class counsel, attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action. **What does that even mean? Unclear**.
- **§ 1712(e):** court may approve a proposed coupon settlement only after finding that such settlement is fair, reasonable, and adequate; and
- (ii) court may require ***unclaimed*** coupon values distributed to charities, as agreed by parties. Such distribution/redemption cannot be used to calculate attorneys' fees.
- **CAFA in practice: *In re HP Inkjet Printer Litig.* (9th Cir. May 2013)** (disapproving coupon settlement; per § 1712, can't approve fee award until determine value of coupons actually redeemed; no lodestar until numbers known)

8. Avoid side agreements (FRCP 23(e)(3))

- FRCP 23(e)(3): The parties seeking approval must file a statement identifying any agreement made in connection with the proposal
- Any "side agreements" must be disclosed
- At issue in current *HP Inkjet* class litigation, where objectors are now claiming a secret side agreement designed to inflate attorneys' fees
  - HP pulled "clear sailing" provision after remand but…
  - HP separately agreed to retain opposing counsel to pursue a third party arising out of an unrelated derivative action against HP).

9. Develop a fair and effective notice and claims process

1. Notice must effectively reach class (issue when class members not readily ascertainable from company records)
2. Notices should command attention of class members, be informative and understandable
3. Is a claims process even necessary?
4. Avoid unnecessary hurdles to claims processing etc.
5. Strongly consider use of independent claims administrator
6. Have plan for mail forwarding to ensure class members who have moved receive notice
7. Determine whether non-English notice is necessary
8. Make sure order approving settlement makes detailed findings on adequacy of notice to inhibit appellate review or collateral attack.

10. Anticipate claims of objectors (private litigants, state AG's, regulators)

- If you've avoided the red flags for self dealing and collusion, and the settlement is objectively reasonable, no problem but some provisions may still cause issues…
- **Example: Reversion clauses** (*i.e.,* defendant retains unused settlement proceeds) will be a red flag in at least the 9th Circuit. *In re Magsafe Apple Power Litig.* (9th Cir. Apr. 24, 2014) (unpub.)
- **Even from judges**: Judge Alex Kozinski's blistering *personal* objection to the Nissan Leaf class settlement (*Klee v. Nissan*, CD Cal. Nov. 2013) (attacks early settlement with large fee award and no benefit to class)
- **Appeals:** Objectors have standing to appeal orders approving settlements. *Rodriguez v. West Publishing* (9th Cir. 2011) (abuse of discretion standard).

Case Study: *Redman v. RadioShack (7th Cir. 2014)*

- Filed in September 2011.
- FACTA class action, alleging RadioShack *willfully* printed receipts containing credit card expiration dates.
- Sought statutory damages of between $100 and $1000 per class member.
- Parties reached settlement agreement in May 2013, “before any substantive motions had been decided.”
- Class members filed timely objections to proposed settlement, but Magistrate Judge approved settlement in February 2014.
- Objecting class members appealed to 7th Circuit.
- 7th Circuit (Posner) reversed and remanded to *reallocate* settlement funds between class recovery and attorney’s fees.

Redman v. Radioshack: Settlement Terms

- "Vouchers" for class members—*more detail on this later…*
- Three named representatives receive $5,000 each.
- Class counsel to receive $1 million in fees paid out of separate fund.
  - Amount based on *Lodestar* calculation.
- "Clear sailing" clause.

Redman v. RadioShack: "Voucher" Specifics

- Each class member entitled to claim one.
- Good for up to $10 discount on purchase at RadioShack or RadioShack website.
- Expires after six months.
- Single use.
- Transferable.
- May combine with up to 2 other "vouchers" per purchase.
- If used to purchase item priced < $10, not entitled to change.

Redman v. RadioShack: Settlement Administration

- Estimated 16 million class members.
- But… Notice sent to less than 5 million.
- Approximately 83,000 responses.
- Low response rate:
  - 1.6% of class members who were sent notice.
  - 0.5% of all class members.
- Nevertheless, administrative expenditures topped $2.25 million.

Redman v. RadioShack: Lower Court Decision Approving Settlement

- $10 “vouchers” are adequate given expense, difficulty of proving willful violation of FACTA.
- Better to avoid additional risk by granting immediate benefit to class preferable, given RadioShack’s parlous financial condition.
- Lodestar calculation of attorney’s fees appropriate because award to class members came in form of “vouchers,” not coupons.
  - Not a coupon if it allows a consumer to buy an entire product.
- Fee amount reasonable: only 25% of settlement’s value!

Redman v. RadioShack: Major Mistakes

- Classification of class award: “vouchers” vs. coupons.
- No attempt to estimate actual value of settlement to class members.
- Fee amount based only on class counsel’s reported hours.
- Factored in administrative costs.
- “Clear-sailing” clause and other procedural issues.

Redman v. RadioShack: "Vouchers" vs. Coupons

- CAFA, 28 U.S.C. § 1712(a):
  - If there's a coupon recovery, fee award must be based on value to class members of the coupons that are redeemed.
- Class counsel tried to avoid this by referring to "vouchers" rather than coupons in settlement.
  - Argued they were "vouchers" because they could be used to by an *entire* product. Only call it a "coupon" if used to get a discount.
- The "idea that a coupon is not a coupon if it can ever be used to buy an entire product doesn't make any sense."
  - Most sought-after and heavily promoted RadioShack products cost more than $10, so most of the "vouchers" would be used to obtain a discount;
  - Legislative history shows interchangeable use of words "voucher" and "coupon," no wish to treat them differently.
- Because class recovery came in form of coupons, fee award should have been based on value of coupons to class members.

Redman v. RadioShack: Value of Coupons

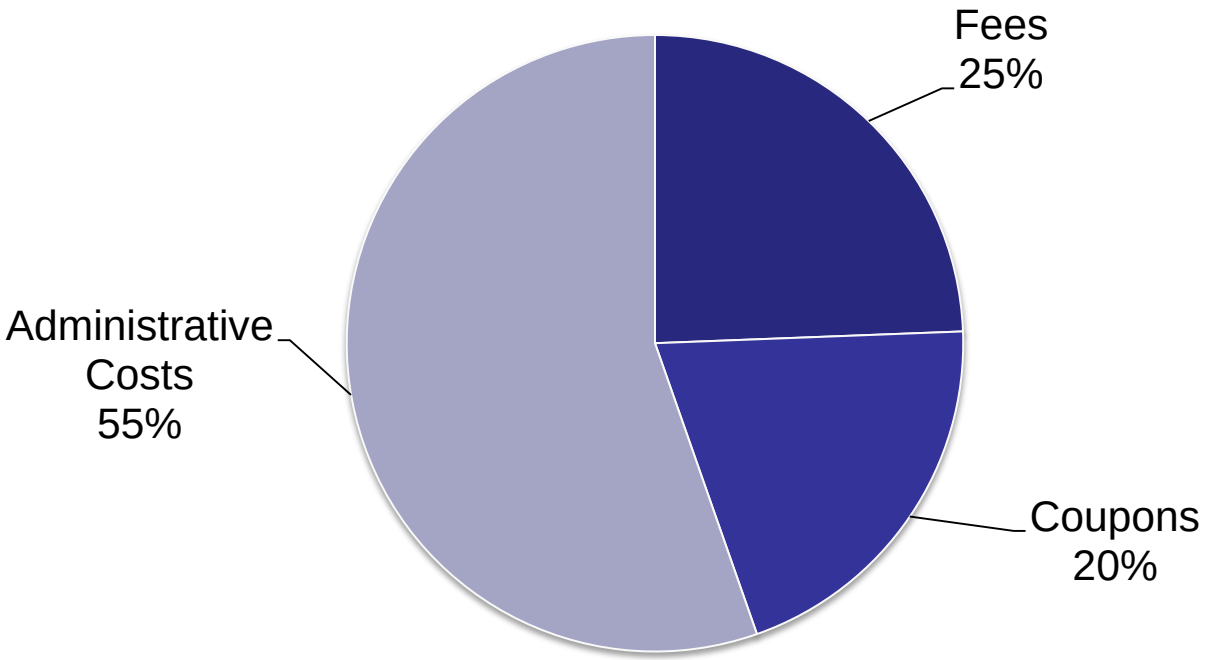
- $10 face value, 83,000 claimants, $830,000 recovery?
- No:
  - Each coupon worth less for those who use them to buy items that cost less than $10, because they won't get change…
  - Total recovery further reduced because some class members won't use them before they expire…
- Actual value to class likely much less than $830,000.
- Parties/Magistrate should have estimated actual value of the coupons to class members, preferably by way of expert testimony.

Redman v. RadioShack: Improper Fee Calculation Method

- Nature of settlement meant fees were guaranteed, while value of benefit of settlement to class members was not.
- Creates incentives that disfavor absent class members:
  - Nobody to watch out for their interests: named rep gets payment for little oversight;
  - Defendant wants to dispose of case;
  - Class counsel wants to maximize its recovery.
- In such cases, "the amount of the class settlement allocable to class counsel should depend … on the value of class counsel's work to the class."
- By calculating based on hours alone, settlement gave class counsel fee award that necessarily exceeded that value!

Was the Fee Amount Reasonable? Factoring in Administrative Costs

Settlors' Contention:
Fee was a reasonable 25% of the settlement



Buckley Sandler LLP

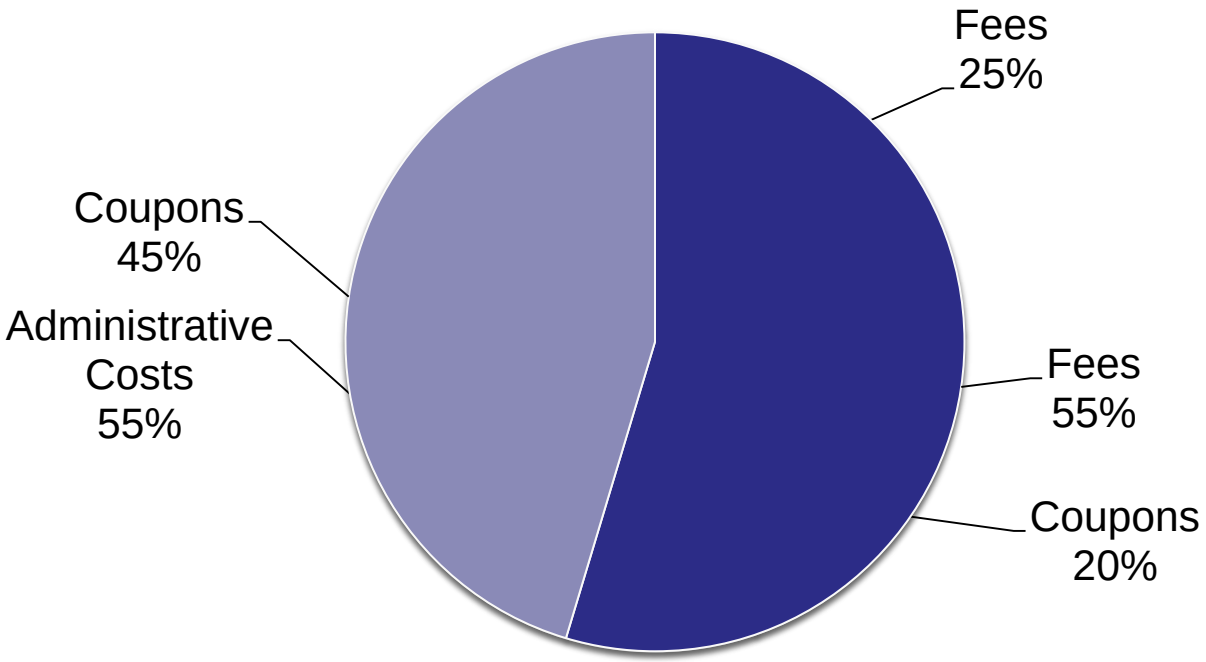
Was the Fee Amount Reasonable? Factoring in Administrative Costs

- Administrative Costs are:
  - Part of the settlement.
- Administrative Costs—except for notice costs paid by Defendant—are NOT:
  - Part of the value received by class members.
- Therefore, administrative costs "shed no light on the fairness of the division of the settlement pie between class counsel and class members."
- Formula to use when considering reasonableness:

$$\frac{\text{fee}}{\text{fee} + \text{class award}}$$

Was the Fee Amount Reasonable? Factoring in Administrative Costs

What happens when administrative costs are omitted?



Buckley Sandler LLP

Redman v. Radioshack: Additional Problems

- Clear-sailing clause:
  - Not always bad, but should be subject to intense scrutiny when dealing with non-cash settlement awards.
  - Create incentives that disfavor interests of absent class members.
- Timing: attorneys' fee motion not filed until after deadline for objections to settlement expired.
  - This handicapped objectors because they didn't have access to details of class counsel's hours and expenses.
- Lead named plaintiff worked for principal class counsel's former law firm.
  - Called into question whether there was true arm's-length relationship between class counsel and named plaintiffs.

Redman v. Radioshack: Takeaways

If dealing with non-monetary benefit to class:

- Coupons are coupons (don't try to call them by another name).
- Include estimate of settlement's value to class, based on reliable expert opinion.
- Make sure fee award is reasonable percentage of that value.
- Make sure class objectors theoretically have enough time, and enough information, to file objections before final approval of settlement.

Part II: Commonality after *Wal-Mart v. Dukes* and *Comcast v. Behrend*

- *Two topics:*

- *Comcast v. Behrend,* 133 S. Ct. 1426 (2013): impact on *Wal-Mart* – did Comcast require commonality of damages?
- Key appellate decisions on commonality in last 12 months

FRCP 23(b)(3) damages class actions

- FRCP 23(b)(3) permits courts to certify class actions seeking monetary relief where “questions of law or fact common to class members predominate over any questions affecting only individual members” and a class action would be “superior to other available methods for fairly and efficiently adjudicating the controversy.”
- Plaintiffs have long argued (and with success in the appeals courts) that class treatment is appropriate under this provision even where numerous mini-trials would be necessary to resolve damages issues.

Wal-Mart on commonality

- FRCP 23(a)(2): common question of law or fact requirement (1 of 4 threshold requirements)
- *Wal-Mart*: commonality requires affirmative evidence subject to rigorous analysis. 131 S. Ct. at 2551.
- Some merits analysis may be required. *But see Amchem v. Conn. Ret. Plans*, 133 S. Ct. 1184 (2013) (not a license to engage in merits inquiries except to determine that R. 23 elements satisfied)
- Common contention must be one that is "capable of classwide resolution." *Wal-Mart*, at 2551. That is, "what matters … is the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the proceeding." *Id.*

Comcast v. Behrend (2013)

- Did *Comcast* broaden the *Wal-Mart* commonality holding?
- Ruling (5-4 decision, Scalia, J.):
  - predominance requirement cannot be satisfied where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 133 S. Ct. at 1432-33.
  - Individualized damages issues will invariably predominate over common questions if plaintiff fails to establish that "damages are capable of measurement on a classwide basis." *Id.* at 1433.
  - Since plaintiffs' damages model fell short of meeting this standard, plaintiffs failed to satisfy predominance requirement. *Id.*
- Dissent (Ginsberg/Breyer) argued that ruling was limited to this case, and that "individual damages calculations do not preclude class certification." *Id.* at 1436-37.

Some post-*Comcast* decisions favor defendants regarding damages

- Per *Comcast*, Rule 23(b)(3)'s predominance requirement cannot be satisfied where individualized damages issues predominate over questions common to the class. *See*, *e.g.*, *Bright v. Asset Acceptance, LLC*, 292 F.R.D. 190, 202-03 (D.N.J. Aug. 1, 2013).
- "Common questions of fact cannot predominate where … no reliable means of proving classwide injury," and therefore, "[w]hen a case turns on individualized proof of injury, separate trials are in order." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

But Ninth Circuit courts take narrower view of *Comcast*

- *Comcast* "does not infringe on the long-standing principle that individual class member damage calculations are permissible in a certified class under Rule 23(b)(3)." *Munoz v. PHH Corp.*, 2013 WL 2146925, at *24 (E.D. Cal. May 15, 2013).
- Mere "viable theory of how to calculate damages" on a classwide basis is enough because, if individualized damages issues "later predominate," court can address those concerns "at that time." *Thurston v. Bear Naked, Inc.*, 2013 WL 5664985, at *10 (S.D. Cal. July 30, 2013).
- *Leyva v. Medline Industries*, 716 F.3d 510, 513 (9th Cir. 2013): allowing individualized damages determinations in context of wage-and-hour class litigation: "damages calculations alone cannot defeat class certification." (Cites and distinguishes *Comcast* facts because damages here readily calculable using Medline's data)

Also rejecting broader view of *Comcast* – *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014) [1 of 2]

- Purchasers of organic asphalt roofing shingles in many states filed suit against defendant, alleging defendant falsely told consumers that its roofing shingles met a specific industry standard. JPML consolidated all federal suits for pretrial proceedings.
- Plaintiffs sought class certification covering all sales in 8 states since 1979.
- District court denied certification.
- Citing *Wal-Mart* and *Comcast*, the court reasoned that plaintiffs had not met the commonality requirement because they could not prove that they "experience[d] a common damage and that their claimed damages are not disparate."

In re IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599 (7th Cir. 2014) [2 of 2]

- 7th Circuit vacated and remanded.
- District Court's interpretation of *Wal-Mart* would render most consumer class actions impossible.
- And *Wal-Mart* "has nothing to do with commonality of damages."
- District court was mistaken in believing that "commonality of damages" is legally indispensible, rejecting lower court's interpretation of *Comcast.*
- Instead, key issue for commonality inquiry under *Wal-Mart* is whether the *underlying* conduct differed among members of the class.

Jimenez v. Allstate Ins. Co., 765 F.3d 1161 (9th Cir. 2014) [1 of 2]

- Claims adjuster brought class action against his employer alleging it had practice or unofficial policy of requiring adjusters to work unpaid off-the-clock overtime in violation of California law.
- District court certified class.
- Employer appealed, arguing lack of commonality:
  - No allegation that employer had uniform practice limiting reporting or payment of overtime;
  - Plaintiff and putative class members admitted they hid their off-the-clock work;
  - Employer's declarants testified that plaintiff and putative class members did not work off-the-clock.

Jimenez v. Allstate Ins. Co., 765 F.3d 1161 (9th Cir. 2014) [2 of 2]

- 9th Circuit affirmed.
- Under *Wal-Mart*, commonality met when the common questions raised are "apt to drive the resolution of the litigation," no matter their number.
- Whether a question will "drive the resolution of the litigation" depends on nature of underlying claims.
- Here, plaintiff presented evidence on the 3 elements of an off-the-clock claim:
  - Class members performed uncompensated work;
  - Defendant knew or should have known about that work;
  - Defendant stood idly by.
- Thus, commonality requirement met.

Common, uniform conduct is not enough: *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014) [1 of 2]

- Actual or potential holders of rights to methane gas brought five class actions against the producers, alleging they deprived holders of royalty payments.
- District court certified five classes.
- Defendants appealed, arguing the classes were not ascertainable and that they did not comply with Rule 23's commonality requirement.

EQT Production Co. v. Adair, 764 F.3d 347 (4th Cir. 2014) [2 of 2]

- 4th Circuit vacated and remanded.
- Insufficient record to determine whether the common question identified by *plaintiffs—whether defendants underpaid royalties*—was capable of classwide determination or required mini-trials. *Id.* at 367.
- Key holding for our purposes: district court focused too much on number of common practices, and not on whether any are relevant to assessing liability. *Wal-Mart* requires common answers, not just common practices.

Conclusions and Takeaways

- Focus on those 10 class settlement tips: courts have become ever more vigilant about self-dealing and collusion
- In a post-*Wal-Mart* world, never take Rule 23(a)(2) commonality for granted. Demand rigorous analysis, and attack those common questions if they don't allow the court to reach common answers that resolve the litigation on a classwide basis.

Questions?

Richard Gottlieb

BuckleySandler LLP, Santa Monica CA

rgottlieb@buckleysandler.com

(310) 424-3985

Buckley Sandler LLP