

Class Action Recovery Firms: A Note Of Caution

I have written previously about the numerous opportunities that exist for companies willing to explore revenue-enhancing litigation, including opt-out class action cases. Because of the potentially lucrative nature of these opportunities, companies holding themselves out as class action recovery specialists have emerged and interjected themselves into the class action settlement process. This article

JAMES A. MORSCH

explores the pros and cons of using a recovery firm to represent your corporation and cautions inside counsel that turning to such a firm is not a substitute for independent, legal advice.

Class Action Recovery Firms:

The class action recovery firms in this market are entrepreneurs looking to cash in on the fact that many putative class members either do not know that they are members of a class for which settlement funds may be available or feel overwhelmed by the idea of having to prepare claim forms or to interact with a settlement administrator. The firms send out email blasts to thousands of class members offering to assist them in filing claim forms in connection with any settlement of the action. Typically, the email blasts contain representations about who will qualify for recoveries under a settlement, what transactions will count in calculating a class member's share of the settlement, and the information a class member will need to provide to the settlement administrator in order to recover settlement proceeds. The class action recovery firm proposes that it be paid for its services out of whatever monies the class member ultimately recovers, emphasizing that, by outsourcing the claims process to them, customers will save time, money and effort without having to advance any costs.

Another tactic of these firms is to send out a solicitation to class members between the time claim forms are filed and settlement proceeds are paid out, offering cash in exchange for the class member's agreement to assign its settlement proceeds to the class action recovery firm. This second solicitation typically will point out that it will

take many months, if not years, for settlement proceeds to be paid out to participating class members and that the exact date when settlement proceeds will be distributed and the exact amount of settlement proceeds awarded to each class member will be unknown until all claim forms have been processed by the settlement claims administrator. The recovery firm will emphasize that, by agreeing to assign its claims, a participating class member will enjoy the benefit of some portion of its settlement proceeds upon execution of the assignment and not have to wait for the claims process to conclude. The recovery firm's fee for this service is generated by paying the class member less than 100% of its expected settlement payout and pocketing the remainder.

The Legality of Using a Class Action Recovery Firm:

It is permissible for a class action member to utilize the services of a recovery firm to assist it in the preparation and filing of settlement claim forms. It is also generally permissible for a class action member to assign its claims and proceeds to a third party like a recovery firm. As the use of such firms becomes more widespread, however, you can expect efforts to be made by class action lawyers and settling defendants to limit the influence and role of class action recovery firms in the settlement process. A corporation considering using the services of a class action recovery firm would therefore be well advised to have legal counsel conduct an independent review of the underlying class action and of the settlement agreement reached between class counsel and the defendants to insure that retaining a recovery firm will not adversely impact the corporation's recovery of settlement proceeds.

The Benefits of Using a Class Action Recovery Firm:

As at least one court has found, class action recovery firms can play a useful role in class action settlements. The most obvious benefit to using a class action recovery firm is the potential for reducing the amount of internal

resources spent on preparing claim forms. Corporations may also benefit in the sense that a settlement administrator may be more likely to grant their claims if they are prepared by a company that represents a large number of class members and presumably is able to leverage its expertise to insure that its customers' claim forms are filed in not only a timely fashion but in a form acceptable to the claims administrator. If it is able to sign up a large number of class members, a recovery firm also may be in a position to negotiate with the settlement administrator and parties for extensions of the claim form deadline, resolve objections to certain claim forms, and pressure the settlement administrator to speed up class action payouts. The benefit of assigning one's claims to a recovery firm is the assurance of having settlement monies in hand before they otherwise would be available to class members.

The Downsides of Using Class Recovery Firms:

In this author's opinion, there are significant downsides associated with outsourcing the claims process or proceeds to a class action recovery firm. First, these firms are not lawyers and therefore are not in a position to represent your corporation in the underlying litigation.

Second, class action lawyers and defense lawyers increasingly are attacking the activities of class action recovery firms, leading to satellite litigation that can only delay the ultimate payment of settlement proceeds to class members. The last thing a class member who has decided not to opt-out of a case is to find itself embroiled in litigation over its class action share.

Third, while the idea that of outsourcing the claims process is certainly attractive, the reality is that only your corporate employees will have the requisite knowledge to pull the documents and data that need to be included in your claim forms. For that reason, class action recovery firms will include in their retainer letters a provision requiring the corporation to "cooperate" in the claims process even in the event you decide to assign your claims to them. Moreover, given the availability in many companies of electronic transactional data, it may take relatively little effort to prepare claim forms without the assistance of a third party like a class action recovery firm.

Fourth, in the author's experience, the fees charged by recovery firms for their services are unreasonably

high. For example, in a recent class action in the financial services industry involving billions of dollars, class recovery firms offering to assist corporations with filing claim forms charged their customers a fee based on upwards of 25% of settlement proceeds when the typical fee charged by a law firm either on an hourly or contingent fee basis for such services would have been considerably smaller. In that same class action, recovery firms offered class members an upfront payment of less than 100% of their class settlement proceeds when the payout of those proceeds is expected to occur in less than nine months. Moreover, as is the case of many class settlements, class members' actual shares of the settlement undoubtedly will increase in value beyond original estimates due to the fact that some class members will opt-out of the class action or fail to file claim forms while others may have their claims invalidated. By convincing a class member to assign its ultimate settlement proceeds, a class action recovery firm will enjoy the benefit of any increase in the class member's share of the settlement. In this author's experience, it is not out of the ordinary for a class member's payout to increase two-fold in value. In those instances, the recovery firm will end up pocketing 110% more than the class member received in consideration for its agreement to assign its settlement proceeds.

In conclusion, there are serious drawbacks to using class action recovery firms to represent your interests as a class member. At a minimum, companies should seek independent legal advice of a lawyer or law firm experienced in class action settlements before engaging the services of such a firm.

James A. Morsch is a partner at Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. He concentrates his practice in counseling companies and litigating antitrust and other competition law matters and regularly advises clients on distribution issues. The views expressed in this article are personal to the author.



BUTLER RUBIN
excellence in litigation™