

## Best's Insurance Law Podcast



### The Insurance Impact of Class Action Settlements - Episode #156

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**Hosted by:** John Czuba, Managing Editor

**Guest Attorneys:** Matthew Berkowitz Brian O'Shea and Samantha Lewis of [Carr Maloney P.C.](#)

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**John Czuba:** Welcome to "Best's Insurance Law Podcast," the podcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

We're pleased to have with us today, attorneys Matthew Berkowitz, Brian O'Shea, and Samantha Lewis from the law firm [Carr Maloney](#) in Washington DC.

Matt is a member of the firm with significant class action experience, regularly representing national, regional, local corporations, employers, retailers, manufacturers, automobile dealerships, credit reporting agencies, financial institutions, debt collection agencies, law firms, among others, in class action under federal and state laws.

Associate attorney Brian O'Shea has successfully defended class action lawsuits involving mass torts, products liability, defective design and warranty claims, cybersecurity and data breach, and consumer protection claims.

Associate attorney Samantha Lewis focuses her practice on professional liability, directors and officers liability, and employment and labor law. We're very pleased to have you with us today.

**Matthew Berkowitz:** Thank you.

**Brian O'Shea:** Thank you.

**John:** Today's discussion is going to be on class action settlements. For our first question, are there any significant differences between class action settlements and regular settlements?

**Matt:** This is Matt. As many people know, typically settlement agreements between a standard plaintiff and defendant is very much a private contract. It's very straightforward. It's a private contract. It, generally, does not need court approval.

Class actions are a different beast because you're dealing with the public and you're also dealing with absent class members. As such, because they're absent class members, the courts take an active role in scrutinizing the settlements. In order for a settlement to occur in a class action, there needs to be court approval.

Court approval is governed by the Federal Rules of Civil Procedure 23E. Really, the question, what the court is looking for is whether the settlement, both in terms of procedure and substance, is fair, adequate, and reasonable.

That could be both in terms of monetary relief awarded, be it in the form of the attorney's fees. It certainly can be in the form of non-monetary relief. It also looks at how absent class members are getting noticed in terms of procedural mechanism.

Then, a few years ago, there were some amendments and a few years ago, there would be the enactment of the Class Action Fairness Act, also known as CAFA.

**Samantha Lewis:** With respect to the 2018 amendment to rule 23, they primarily affect noted settlement and appeal. With respect to settlement, rule 23 requires an analysis of four factors to determine whether the settlement is fair, adequate, and reasonable.

These factors include the adequacy of representation by class representatives and class counsel, whether settlement negotiations were at arm's length, the adequacy of relief provided to the class, and the equity of treatment of class members relative to one another.

With respect to CAFA, litigants are required to provide notice of class action settlements to the United States Department of Justice. The DOJ may object to settlements that they believe are unfair, inequitable to unnamed class members.

Historically, however, the DOJ has rarely intervened. Beginning in 2018, it has begun to take a more aggressive stance and issued multiple statements of interest to the presiding courts at issue.

**John:** Brian, can you discuss recent cases where the court has applied increased scrutiny to a class action settlement?

**Brian:** There were a few notable cases recently. Fairly recently, there was the Subway class action litigation over their foot-long sandwiches.

The court did not approve the settlement because, while Subway agreed to pay out some money, the fees that were going to class counsel, hundreds of thousands of dollars in fees, were not adequate when compared to the sandwich vouchers that the class plaintiffs received. The court found that that was not fair and did not approve the settlement.

Also, fairly recently, there was a notable class action case involving Yahoo dealing with a data breach involving about three billion Yahoo users. Yahoo agreed to pay out hundreds of millions of dollars to resolve the case.

However, the court initially did not approve the settlement because Yahoo did not agree to take specific steps regarding their data security and data management practices to make sure that this type of data breach does not happen again.

Then, there was *Frank v. Gaos*, as well, which was a recent case. I think Sam is going to take it.

**Samantha:** That's also known as the Google case. It was a class action settlement in the form of a cy pres settlement. Cy pres settlements in class actions are those that distribute all or part of the monetary relief to public interests or charitable recipients instead of class members.

Many have challenged the legitimacy of cy pres settlements in providing adequate relief. The Supreme Court heard the issue but they sidestepped on such questions.

**John:** Brian, can you comment a little bit on the Yahoo case?

**Brian:** There were three billion users who were affected by a data breach involving Yahoo. Yahoo agreed to pay out hundreds of millions of dollars eventually but, initially, the settlement was not approved,

As I said, because Yahoo did not agree to take specific steps regarding their data management practices and data security.

**John:** Are there any noteworthy current settlements with increased scrutiny?

**Brian:** There are. If you've been watching the news lately, anyone out there I'm sure has heard about the Equifax settlement. Equifax has agreed to pay out about \$380 million to resolve this case against them. The idea was that class plaintiffs who filed claims could get about \$125 each or elect ongoing credit monitoring for free.

However, millions of people have made claims for monetary relief. Now, the result is likely to be that class plaintiffs who made such claims will get cents on the dollar compared to the \$125 they would have gotten before.

There is a fairness hearing that is set for December in this case, so it is yet to be seen whether the court will actually approve the settlement.

**John:** You all have addressed some recent key decisions and cases. In light of these cases, what are some important considerations for our audience when entering into class action settlements?

**Matt:** This is Matt. I'll just start. It comes back to what we said at the outset. When going into a settlement, you have to be aware that you're going to need court approval. You're going to have to be aware that the court is looking to make sure that the settlement is fair, adequate, and reasonable.

That could be in terms of making sure that there's enough, you could say, money on the table to fairly compensate the plaintiffs. You also need to be aware that, in a class action settlement, people can opt-out if the money is not sufficient. You're also going to have to be aware that there are certain notice requirements and that the settlements are going to take time.

This isn't a very private agreement that could be resolved within a couple of weeks and money distributed in a couple of weeks or a settlement check in a week or two. This is something that requires a fairness hearing. It requires a hearing. It requires a briefing. It requires notice to absent class members of their rights to opt-out of the class, and certainly, the court to approve it.

As Sam mentioned earlier, the Attorney General, as well as the DOJ from different states too have the opportunity to object to it. Then, I think Brian had a couple of points as well.

**Brian:** In addition to the adequacy of the money, which is always important, as happened in the Yahoo case, it's important for anyone resolving a class action to consider agreeing to take specific steps in order to redress the claim. Yahoo needed to take specific steps regarding data security. Equifax has agreed to take similar steps. The non-monetary relief is an important consideration as well.

**Samantha:** Going off of that, it's important to ensure that the class action settlement negotiations were at arm's length. Many commentators and legal analysts out there suggest utilizing a third-party mediator to avoid any potential bias amongst the parties.

**John:** Thanks very much. What's the impact on the defendant's insurer as part of the settlement?

**Matt:** That's a good question. That goes a little bit with what we're talking about as far as court approval. Typically, the defendant and the insurance company, the goal, often, is to pay as little as possible.



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Obviously, that's still the goal as part of a class action settlement but because the court is going to be scrutinizing it, often the insurance company, as well as the defendant, is going to have to make sure the settlement is adequate.

Recently, I had a case where it was a great day for my client. They were effectively paying, I don't want to say peanuts but it was a very good settlement we entered into. We had a lot of defenses.

What happened was it went before the court and the Attorney General had intervened and called into question whether it was adequate in terms of monetary relief because it could be seen that certain plaintiffs were getting pennies on the dollar.

What could happen on a rejected settlement is you're now spending money briefing the issue, sending out notices to class members, and it gets rejected. You're, now, incurring defense costs when that could have been going to settlement. That settlement could, then, get overturned by a court. Then, you wind up having to litigate it and wind up spending more money.

The other issue is that if the money is not adequate, and that could be a long-term cost for the insurance company, but the case would continue when the hope was it was going to settle.

The other problem is that, as Brian was alluding to in the Equifax case, is that if punitive class members are seeing that they're only going to get pennies on the dollar or a very low award, they have the option of opting out of the class and bringing their own claim individually.

If the overall pool of money is low and people are aware that it's low and they can tell that their share is going to be insignificant, they may choose to opt-out and then, bring individual claims.

I think the last thing that insurance company wants is to settle a matter which is hoping to be final and resolve this in full and the next thing they know, they have 100, 200, 300 class members opting out and bringing 300 individual suites. That is not necessarily guarding against the risks that it was hoping to when it entered into a settlement.

I guess the moral of the story is, going back to that first question and the last question, bookends, that because it requires court approval, because it's got to be fair, adequate, and reasonable, you're sometimes looking to make sure that the monetary relief is not necessarily what you think it to be your best day today but what is it going to be your best day six months or a year from now in fully resolving the class action with finality.

**John:** You've just listened to attorneys Matthew Berkowitz, Brian O'Shea, and Samantha Lewis from the law firm [Carr Maloney](#) in Washington DC. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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