



RISK SETTLEMENTS

Consumer Products Manufacturer Ends Litigation in Multiple Jurisdictions

Company combines federal and state plaintiffs under one uniform settlement to prevent exposure to future liability

” As part of the overall settlement solution, Risk Settlements provided a strategy for the company to leverage full risk transfer of the underlying settlement using Class Action Settlement Insurance (“CASI”).



Case Status When Risk Settlements Was Engaged:

In 2016, a class action lawsuit was filed in state court against a consumer products manufacturer. The class plaintiff was alleging that the defendant had deceptively labeled, advertised, marketed, and sold its products by including certain representations that were neither accurate nor truthful. Defendant removed that suit to federal court and, subsequently, an additional federal class action was filed and, ultimately, consolidated with it.

Defense counsel vigorously defended the consolidated action and prepared the case for trial with a full defense that the defendant’s products were labeled, advertised, marketed, and sold accurately and truthfully and, further, that no harm or injury had been suffered by any of its consumers. After conclusion of discovery, the federal court partially granted the defendant’s motion for summary judgment; however, it left certain implied representation claims for the jury to decide.

Armed with the partial victory, plaintiffs pressed on, and after two additional years of litigation, the federal court certified the state class. As a result, multiple class action lawsuits in other states were immediately filed, each alleging the same allegations as the federal consolidated case and all seeking reimbursement for the “price premium” paid by the class as well as injunctive relief, prohibiting the defendant company from continuing its then-marketing campaign. Defendant continued to maintain that its labeling, advertising, and marketing claims were accurate and that consumers suffered no harm or injury from their purchases of the same.

Defendant now feared a nationwide class certification would be possible in one of the companion state class actions.



Obstacles to Resolution:

When considering settlement, the defendant knew that it could cap its maximum liability. However, the company was very concerned as to whether this case would go viral like so many others have done and that the actual payout would be far greater than its budget and reserves, creating financial uncertainty and intolerable risk.

In cases using a robust publication notice plan, the company’s concerns that the settlement would go viral were both valid and well-founded based upon the current environment. Today, scores of websites and social media groups exist for two key purposes: (a) notifying the public of available class action settlement payouts; and (b) providing a quick and easy portal for filing claims. The impact of these sites is undeniable. For example, in one recent case against a supplement manufacturer, 90% of consumers who filed a claim came directly from class action promotion websites.

Free Money = Heavy Traffic

The reality of class action promotion sites is that they wouldn’t exist if they weren’t a successful revenue stream for their owners. And successful they are. **The model is simple: the sites advertise “free money” promises to generate huge online traffic. This induces advertisers to pay top dollar for ad placements guaranteed to reach big audiences.** While many of them also claim to be promoting the common good by protecting consumers, they are undeniably generating income through advertising.

Indeed, one need look no further than the “**Advertise with us**” page of one of the top class action promotion sites. It boasts:

Top Class Actions is the #1 source of class action news online. Harness the power of our 5 million+ monthly page views and 705,000+ newsletter subscribers to drive up the number of Class Members who submit settlement claims or potential clients who are looking to participate in a consumer class action lawsuit or mass tort case. (Emphasis in the original.)

Other sites refer to class action payouts as “rebates” and advertise settlement funds on their homepage so they look like **coupons that would be clipped from a newspaper**. Still other sites purport to advertise class action settlement funds as part of the site owner’s “**passion for finding the best deals**, bank promotions, credit card offers, cash back, points & miles, and everything in between.”

■ **Claim Veracity is Almost an Afterthought**

In fact, a Google search for “free money class action” yields dozens of results with site taglines like “Class Action Lawsuit Settlements — Claim Free Cash,” “No Proof Required Class Action Settlement,” and “Do You Like Free Rebates? File a Claim for a Class Action Settlement.” If there is one commonality amongst these class action promotion sites, it is that they’re very good at communicating that many class payouts do not require proof of purchase. For example, on the “**Frequently Asked Questions**” page of one popular site, the following questions and answers are presented:

Do I need to prove I purchased these products?

Many settlements require no proof of purchase whatsoever.

Why don’t you need a receipt? Couldn’t anyone file a claim?

This trust-based system does open them up to abuse, by people filing fraudulent claims. The legal philosophy that underpins the system is that as the party that wronged consumers, it is better the company bear the cost of these fraudulent claims than to deny the victims their just compensation.

Given this “free money, low risk” atmosphere, it’s no wonder that so many settlement claims go viral.

■ **Social Media Expands Reach**

It’s probably safe to say, of course, that the majority of Americans are not searching for the types of websites discussed above. The purveyors of these websites know this, and that’s why instead of waiting for consumers to come to them, they are going directly to consumers. They do this through one principle channel — social media.

According to the **Pew Research Center**, nearly seven in ten Americans use Facebook, and 73% use YouTube. It’s no wonder, then, that class action settlement announcements are abundant on those sites.

In fact, a review of the Facebook pages for the websites cited in this article alone reveals a collective Facebook following of nearly 170,000 individuals. That means that every time a class action settlement opens for claims, 170,000 people are alerted to the potential for recovery — regardless of whether those people were harmed in a manner similar to class plaintiffs.

For its part, YouTube offers scores of videos on how one can collect cash from submitting class action claims. The videos have titles like “**An Easy Way to Collect Cash: Joining Settlements on Class Action Lawsuits**” and “**Rake in Money with Class Actions.**”

Given that Facebook and YouTube both use algorithms to present relevant content to users who have expressed a prior interest in a particular subject, it’s not a stretch to imagine that those seeking to improperly profit from class action settlements will be the first to have these posts appear in their social media feeds.

■ **Internet News Creates Immediate Impact**

Finally, the impact and immediacy of internet news sources cannot be overstated. On the date of this writing, for example, a Google search for news from the last 24 hours concerning “class action lawsuits” produced 916,000 results, including articles about a class action suit against the Department of Veterans Affairs, securities-related class action suits, and pharmaceutical class litigation.

Today, many people receive up-to-the-minute news alerts on their cell phones and other mobile devices. This ensures that the potential for class action recovery is never far from the minds of consumers. This may be particularly true when the news involves a class action suit against a popular brand. News of these lawsuits (and resultant claims against settlement funds) can quickly go viral as consumers clamor to take down “giant” corporations perceived as having deep pockets.

Risk of Free Media

In addition to claims promotion sites, settlements can go viral as a result of free media. At times, the news picks up the story organically. Oftentimes, the promoter sites generate the media's interest in a particular settlement. Once free media picks up a story, the claims promotion sites and broader consumer awareness drive the submission of both legitimate and fraudulent claims. The following are some examples of cases where free media exploded the claims rate:

Consumer product case – footwear. This case also involved allegations of deceptive advertising. The parties' settlement agreement called for a \$3.75 million settlement fund, which the parties estimated would yield a payout of \$20 to \$50 per pair of shoes to aggrieved claimants. After free media reached a nationwide audience, claims skyrocketed such that the actual refund to each claimant was just \$8.44 per pair. It is estimated that there were more claims submitted than products sold during the class period.

Consumer product case – juice drink. News outlets, including ABC news, Fox and Huffington Post, reported that consumers could be eligible for up to \$75 as compensation for a product alleged to be improperly labeled as "all natural." The stories went viral, which caused 1.4 million consumers to visit class action promotion sites and the claim site. Eventually, 634,278 claims were submitted, which collectively sought nearly \$32 million in benefits.

Consumer product case – energy drink. News outlets reported that consumers could be eligible for up to \$10 cash or a \$15 voucher for the labeling settlement. The stories went viral, which caused 2.5 million consumers to file claims.



Solution:

Because the company was vigorously defending multiple class actions in varying jurisdictions, its time, energy, and efforts were focused on keeping its head above the litigation tide rather than attempting to effectuate settlement terms with the many plaintiffs and dozens of plaintiffs' attorneys. Due to the number of lawsuits, the company had multiple plaintiff attorneys with whom to coordinate settlement talks and, so, the possibility of the plaintiff side coming to any sort of consensus seemed unlikely.

Furthermore, one of the actions was nearing its trial date, and with class certification already being granted in that action, certain plaintiffs were not as amenable to settlement discussions. Trial for the defendant company could not only mean a loss; it could mean risking a massive onset of media coverage, which, in turn, would draw the attention of millions of consumers, all wanting to file claims.

The company retained Risk Settlements to provide innovative strategies to structure settlements in different jurisdictions which combined a single notice plan, a combined settlement website, and administration plan. Using this approach, the company benefited from the cost efficiencies created by using one notice and administrative approach across multiple settlements.

The notice and media plans were effected by a nationally-recognized class action administrator who designed a constitutional notice campaign that would not only achieve full and final approval but also ensure the risk transfer options to remove the uncertainty and financial implications of settlement.

Even with all of the structural efficiencies of creating two separate settlements in two different courts, which would provide for a nationwide release using combined notice and administration, the settlements did not answer the penultimate question: how much will this actually cost the company? As part of the overall settlement solution, Risk Settlements included a strategy to get full risk transfer of the underlying settlement using Class Action Settlement Insurance ("CASI"). This way, the company could evaluate not only the merits of settlement but also the actual cost and mitigate all financial risk.



Results:

Risk Settlements designed an optimal solution to achieve final approval of multiple class actions in dual jurisdictions — one federal, one state. By consolidating the notice campaign and the claims administration process, the two final settlements were able to wind down in a more cost-effective and streamlined manner. Since both settlements called for the same notice, payout structure, and administration procedures, the third party administrator was alleviated of duplicative work, which, as explained by the president of the company who created the campaign:

“This was a brilliant strategy combining two settlements which involved the same company and brand pending in different jurisdictions. We developed a notice plan which was brand-safe, provided due process, and we were able to streamline significant costs with a combined notice and administration process. From our experience, this model was the intersection of efficiency and effectiveness.”

Class members nationwide were able to receive monetary redress for their claims. By choosing a claims-made settlement over the “common fund” structure, the parties were able to avoid the unfair scenario in which a small number of claimants receive a disproportionately large pro-rata share of an immovable fund; rather, each claimant was compensated for his or her grievances in an amount that exceeded the actual harm plaintiff’s expert claimed was proper at trial, and which defendant vigorously disputed and countered with evidence of no price premium.

Further, class members have the added benefit of the injunctive relief, which, for defendant, also alleviates the threat of repeated actions in the future for the same claims as the settled actions.

Two separate courts in two very different venues considered both economic and non-economic benefits to these classes and determined that these claims-made settlements were fair, reasonable and in the best interest of the classes. The federal court approved the settlement over the concerns of one objector who was concerned about the “money left over from the settlement.” In overruling that objection, the court noted, “[t]he Settlement does not create a settlement fund; rather, Defendants agreed to pay out individual claims subject to a cap on total claims.”

This settlement demonstrates an efficient and effective model to resolve materially similar class actions pending in multiple jurisdictions. The risk transfer costs were reduced as the company adopted recommendations and strategies to reduce waste, fraud, and abuse.

ⁱ <https://www.pewresearch.org/fact-tank/2019/05/16/facts-about-americans-and-facebook/>

ⁱⁱ <https://www.youtube.com/watch?v=7wJE4X89NUo>

ⁱⁱⁱ <https://www.youtube.com/watch?v=Ep0egQQTfTA>

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