The CELA Reverse Auctions Policy

October 8, 2020

1. What Is the Problem and Why Does It Matter? What Is a Reverse Auction?

§ 1.1. Introduction. The "reverse auction" is a significant and increasing obstacle to the vindication of workers' rights. It is a procedural gambit that defendants use to drive down case value through a "divide and conquer" strategy, pitting plaintiffs' lawyers against each other. Specifically, a reverse auction is when the defendant realizes (or fabricates) a situation of multiple overlapping class/collective/representative cases, selects the more receptive party to negotiate with, and settles with them at a reduced price. Given the multiple overlapping cases, the defendant has artificially increased bargaining power, since it always has the option of turning away from the negotiations with one plaintiff in favor of negotiating with the other plaintiff, and both plaintiffs know this, so they suffer an abnormal pressure to accept below-market settlement terms. The plaintiffs know that there is significant risk that the other plaintiff, with whom they are not coordinating, may underbid them. Knowing that half a loaf is better than none, the plaintiff is under pressure to take half a loaf. And knowing that, the other plaintiff is under pressure to take a quarter loaf. And so on.

Reverse auctions may occur even when plaintiff's counsel are unaware of other actions, as the defendant manipulates them without their appreciation of the significance of the settlement scope. Only defendants and their counsel know all the actions that have been filed against the company and the claims in each action. Defendants can use this information asymmetry to their advantage, sharing information selectively with different sets of plaintiffs' counsel to optimize their leverage to settle all claims. Employment claims can be varied and complex, and different theories can be pursued to obtain the same or similar relief under a single claim. This complexity creates opportunities for multiple theories of liability to be released via a single claim (e.g., missed meal periods and unpaid work time under Labor Code § 510).

Representative action settlements are complex, with multi-page memorandums of understanding and 30- to 50-page settlement agreements. While the major terms of the settlement are hammered out by the mediator at the mediation session, the final settlement agreement involves weeks or months of negotiations, and defendants generally try to expand the scope of the release as much as possible. But the expansion of the release is just one issue among many being negotiated (e.g., timing of payment, plan of allocation, tax treatment of awards, PAGA allocation, confidentiality issues, and various other provisions for which defendants argue that are unfavorable to workers), and subtle changes to the release language may not seem as significant as other edits during the negotiations. If plaintiffs' counsel are not aware of or attentive to the interests of class members in another class action, they can unwittingly participate in a reverse auction. Similarly, courts have a fiduciary obligation to protect the absent class members' interests, but they too may lack complete knowledge or appreciation of the significant of overlapping actions. Without full information and understanding of the dynamics, courts can (and have) approve settlements that harm workers because they include reverse auction elements.

While a reverse auction may involve collusion between a defendant and a plaintiff, such overt misconduct is extremely rare and is present in only a tiny fraction of reverse auctions. As

the commentators and caselaw recognize, collusion is not a necessary component for a reverse auction. Rather, a reverse auction results from the defendant's exploitation of the structural circumstance of overlapping cases to leverage an unreasonably cheap settlement.

§ 1.2. Where do reverse auctions occur? Reverse auctions can occur in any type of representative action (e.g., a class action, PAGA representative action, FLSA collective action, etc.) asserting any kind of right (e.g., wage and hour, discrimination, etc.). Many reverse auctions have occurred in other fields (e.g., consumer), and in recent years they have become more common in employment law, including both wage and hour and discrimination cases, particularly as more and more attorneys begin handling employment class actions and finding clients becomes easier via social media. CELA members have increasingly raised the alarm on listservs, in discussions, and at conferences that the reverse auction is proliferating a key weapon in the management lawyer "playbook," and members describe increasing conflicts with other CELA members and non-members in reverse auction scenarios that harm California's workers.

§ 1.3. What are the consequences of reverse auctions? Reverse auctions harm workers in several ways. First, they drive down settlement value. Second, they drive up litigation costs, because plaintiffs not only have to engage in the usual adversarial litigation with the defendant, but they also have to spend resources protecting against and engaging in side disputes with other plaintiffs. Third, reverse auctions harm the State by decreasing the LWDA's recovery of penalties for violations of the law. This in turn weakens the LWDA's enforcement and monitoring efforts. Fourth, reverse auctions clog the judicial system with additional case filings and increased litigation within cases, as competing plaintiffs spar with each other. Fifth, reverse auctions harm CELA members because they allow defendants to pit plaintiffs' lawyers against each other, causing a deterioration in civility and trust within the bar. This disintegration of relationships between individuals threatens to despoil the strong, collaborative spirit of CELA and the plaintiffs' bar. Sixth, reverse auctions degrade the respect that judges, mediators, other attorneys, and the public have for plaintiffs' lawyers, as they see plaintiffs' lawyers failing to cooperate, undermining each other, and squabbling over money and case control. Seventh, reverse auctions cause CELA members to lose fees and costs incurred during years of hard work, when the case is stripped away from them by a latecomer. Eighth, all of these harms together result in a destabilization and degeneration of the market for legal services by pushing competent, honorable lawyers out of the market.

2. Statement of Principles

§ 2.1. What is the purpose of this policy?

The CELA Reverse Auctions Subcommittee's goals are

1. To advance worker welfare
2. To ensure that the tools used to advance worker welfare – e.g., the class action device, PAGA, the Labor Code, etc. – are protected and robust
3. To promote civility among members of the plaintiffs' bar and within CELA
4. To protect the ability of CELA members to efficiently litigate their clients' claims and achieve the best outcomes for their clients.
5. To use the CELA platform to educate mediators, arbitrators, and judges.

In the Subcommittee's view, worker interests are paramount and that, regardless of outcome, plaintiffs' attorneys should take efforts to ensure workers' rights are best served and protected.

These guidelines attempt to achieve those goals by incentivizing respectful, collegial, cooperative, and efficient interactions between members of the plaintiffs' bar generally and within CELA specifically. In particular, these guidelines seek to limit reverse auctions and protect workers and worker advocates from this particular defense tactic.

§ 2.2. How can one tell when there is a reverse auction?

Determining what is a reverse auction is often challenging, because case valuation hinges on calculating exposure, assessing risk, and gauging bargaining power, which in turn depends on interpreting countless subjective and objective factors in the context of what is usually a fairly complex case. Factors can include:

1. **Knowledge.** Plaintiffs' counsel's efforts taken to identify overlapping cases before filing their own case and their awareness of the specific overlapping case at issue
2. **Notice.** Plaintiffs' and defendants' prompt notice to the courts, litigants, and mediators about the potential overlap
3. **Cooperation.** Plaintiffs' counsel's efforts to seek cooperation, collaboration, and coordination of cases with other plaintiffs' counsel
4. **Inclusion.** Plaintiffs', defendants', mediators', and courts' efforts to ensure that all counsel in all overlapping cases are included in settlement discussions from the beginning
5. **Work performed.** The amount and quality of work performed by plaintiffs' counsel in different cases (e.g., discovery, key motions)
6. **Timing.** The time delay between filing of the Overlapping Claims
7. **Litigation strength.** The strength of plaintiffs' litigation position in different cases (e.g., class certification denied, key motions won or lost)
8. **Eliminating overlap.** Plaintiffs', defendants', and mediators' efforts to ensure a carve-out of overlapping claims in settlement releases so that prosecution of overlapping actions may continue despite a settlement in one action
9. **Expansion of scope.** Sudden expansion of the scope of the Class definition leading up to settlement
10. **Settlement strength.** The strength of the settlement (primarily, the total exposure for all claims, including the Overlapping Claims, compared to the actual settlement recovery, as well as other relief such as injunctive relief, as well as other terms such as confidentiality, reversion, claims process, plan of allocation, etc.)
11. **Fees and costs.** Plaintiffs' counsel's agreement to a fair allocation of fees and costs among all counsel

3. Guidelines for Conduct

CELA urges that the following guidelines be followed in situations involving Representative Actions (defined below) in which there are Overlapping Claims (defined below).

As a community of workers' rights advocates that prides itself on collaborative efforts in the service of justice, CELA operates from the assumption that its members are devoted to the pursuit of justice, ethical conduct, and cooperation. CELA members respect each other's work and time invested in advocating for their clients and the cause of justice. These guidelines are designed to promote workers' rights advocates efforts to work alongside each other in a spirit of camaraderie and, specifically, to promote adoption of best practices to identify overlapping cases and resolving overlaps in a way that is in the best interests of workers.

§ 3.1. Definitions

§ 3.1.1. Definition of "Representative Action" and "Class." This Policy addresses all types of representative actions, because the nature of the reverse auction harm is that it allows for a release of claims for absent individuals (usually, individuals with whom no attorney has a signed retainer agreement) whom multiple attorneys seek to represent. Examples of such actions are class actions, FLSA collective actions, and PAGA actions. In this Policy, such actions are referred to as "Representative Actions." For ease of reference, this Policy uses the terms "Class" and "Class members" to refer to the group of individuals sought to be represented, where as a class, a collective, a group of aggrieved employees in a PAGA action, or some other situation. Similarly, the term Class definition is used to refer to the definition of the group of individuals sought to be represented, regardless of whether it is in a class action or other Representative Action context.

Representative Actions often have multiple components in a hybrid structure, such as a class action with a PAGA claim or a class action with a collective action claim, or all three together.

§ 3.1.2. Definition of "Overlapping Claims." For purposes of the Policy, an overlap is a situation where there are multiple Representative Actions, and the Class definitions overlap in a more-than-insignificant way (e.g., a 1% overlap is likely insignificant; a 10% overlap is likely not), with respect to particular claims being asserted, in a manner that the release of claims in one action could reasonably be expected to compromise claims in the other action (e.g., assertion of off-the-clock claims and rest break claims likely satisfies this element, and overtime misclassification claims under state law and federal law likely satisfy this claim, and wage statement claims and late payment claims likely satisfy this element, whereas gender discrimination and race discrimination claims likely do not). In this Policy, "Overlapping Claims" means claims on behalf of some (or all) of the same individuals in multiple cases that overlap in a more-than-insignificant way. Claims may overlap even where named defendants are not identical.

§ 3.1.3. Definition of "cases." The term "cases" in this Policy should be construed broadly to embrace all forms of seeking relief from a defendant, including not only filed court cases but also arbitrations, agency charges, PAGA letters, demand letters, prelitigation negotiations, etc.

§ 3.2. Investigation. When an attorney ("Attorney B") is considering pursuing claims on a representative basis, they should diligently search for cases involving Overlapping Claims. Sources include lists of publicly filed cases in state and federal court, the LWDA's PAGA notice database, SEC filings, etc.

§ 3.3. Response to awareness of overlap. If Attorney B learns that their case (Case B) overlaps with a case (Case A) brought by another attorney (Attorney A), Attorney B should contact Attorney A to attempt to amicably negotiate the overlap. This discussion will help both attorneys to determine whether and how to proceed with the cases.

§ 3.4. Discussion of overlap and determination of "case strength." First, the attorneys should discuss their cases to determine whether there truly are Overlapping Claims and if so, the strength of each case. "Case strength" gauges the relative strength of the two cases' litigation positions. Case strength can be determined by consideration of how long the case has

been on file, procedural posture, progress made in prosecuting the claims, work performed for the benefit of the Class members, litigation obstacles overcome, venue, the court's rulings in this and other cases, reasonable inferences regarding the court's future rulings, remaining hurdles, whether the claims have been diligently prosecuted or abandoned, and other factors. Both attorneys should describe their cases with precision, including (a) the Class definition (positions at issue, locations at issue, time period at issue) and which claims they actually intend to pursue, (b) the case strength, and (c) any other relevant factors.

To the extent that a Class definition is vague, ambiguous, facially overbroad (i.e., too broad to have any realistic chance at proceeding to judgment in adversarial litigation), otherwise ill-defined, or broader than what an attorney actually intends to pursue, the attorney has an obligation to define the Class more rigorously to identify true areas of overlap, and take reasonable steps to memorialize that Class definition in their case (e.g., by correspondence with the defendant or court filing).

Both attorneys should approach this discussion with candor, communicating in a forthcoming, honest, detailed, and cooperative manner.

§ 3.5. Resolution of overlap. Then, if there are Overlapping Claims, the attorneys should strive to resolve who will move forward in asserting which Overlapping Claims through an explicit written agreement. Options include the following:

§ 3.5.1. Cooperation. Plaintiffs' counsel in different cases asserting Overlapping Claims should cooperate and coordinate as much as reasonably possible. This may include one or more the following: formal coordination (e.g., JCCP, MDL), formal consolidation of cases, pursuit of all claims in a single case (and dismissal of the other case), sharing information, sharing discovery, serving each other with pleadings, alerting each other to important developments, maintaining open communication in a spirit of candor, etc. They may, for example, enter into an agreement that confirms allocation of work responsibilities, allocation of fees and costs, etc.

Plaintiffs' counsel's shared goal should be to exert maximum litigation pressure on the defendant to achieve the best outcome for the workers.

§ 3.5.2. Deference. Where feasible, the attorneys should agree that one case will voluntarily defer to the other case as to the Overlapping Claims, so that the overlap is eliminated or is no obstacle to both cases moving forward. To the extent that it is difficult for the attorneys to agree, the best practice is for the case in a weaker position (based on the factors listed in § 3.4) to defer to the stronger case.

Deferring generally entails voluntarily carving the Overlapping Claims out of one's case, no longer pursuing them, and not allowing the defendant to entice plaintiffs' counsel to settle the Overlapping Claims.

Deferring does not preclude an individual plaintiff from pursuing Overlapping Claims individually (since the purpose of these rules is to protect against abuses in the settlement of Representative claims).

The practical consequence of deference may be a partial or complete stay, a partial or complete dismissal of the claims in one case (i.e., there are no significant claims left to litigate because they all overlap), in which case plaintiffs' counsel in that case should offer to introduce

the client[s] to the other attorney, so that the client[s] can consider representation by the other attorney.

§ 3.5.3. Judicial resolution. Where the attorneys cannot agree on deference or cooperation, and both attorneys seek to prosecute the Overlapping Claims, the attorneys should present the question of case leadership to the court[s] (preferably jointly, but if necessary individually), so that the court can impose a leadership structure for purposes of prosecution of all Overlapping Claims (akin to an MDL or JCCP leadership determination). Where plaintiffs' counsel cannot agree, courts are encouraged to craft a leadership structure for plaintiffs' counsel at the outset of the case, consistent with the structure and principles embodied by Fed. R. Civ. P. 23(g) (empowering federal courts to designate interim class counsel before addressing class certification), in all representative actions (not just class actions), to promote coordination and cooperation and limit the danger of reverse auctions. Any such leadership decision should confer unique responsibility to represent the relevant Class, including settlement authority. In other words, where a leadership decision has been made, plaintiffs' counsel who are not deemed to be interim class counsel[1] should not act on behalf of the class. For example, they should not speak for the class in settlement negotiations.

All plaintiffs' counsel and defendants should respect these decisions regarding designation of interim class counsel, whether made by plaintiffs' counsel or a court.

§ 3.6. Memorialization of the resolution. Regardless of the resolution in § 3.5, each attorney should immediately confirm the result in writing. Failure to do so may cast doubt on whether the attorney was acting in good faith.

§ 3.7. Client notice. If deference is appropriate (per § 3.5.2), regardless of whether the attorneys agree that one should defer, the attorney for the weaker case should inform their client[s] of the pendency of the other case, describe the Overlapping Claims, provide a copy of the operative complaint, and provide the plaintiffs' counsel's contact information, so that the client[s] can make an informed decision whether to consult that attorney regarding the overlapping claims.

§ 3.8. Related case notices. If any plaintiff or defendant learns that there are any Overlapping Claims in multiple filed cases, they should immediately file a notice of related case in their case, regardless of the particular requirements of the applicable court rules.

§ 3.9. Litigation. As early as feasible, e.g., at the initial case management conference, plaintiffs and defendants should inform the court about this Policy and state that they intend to abide by it.

§ 3.10. Settlement discussions

§ 3.10.1. Participation in discussions. If interim class counsel have been designated, only they should lead settlement discussions on behalf of the workers. If interim class counsel have not been designated, when a plaintiff or defendant considers settlement discussions, they should do everything reasonably possible to ensure to include in the settlement discussions (including the choice of mediator, scheduling mediation, etc.) all plaintiffs' counsel pursuing Overlapping Claims, though plaintiffs' counsel with weaker cases (as defined in § 3.4) need not be included. If a mediation is scheduled, all plaintiffs and defendants should

[1] "Interim class counsel" includes interim PAGA counsel, interim collective counsel, or the like.

immediately inform all attorneys pursuing Overlapping Claims of the mediation date, time, and location and invite them to attend, though plaintiffs' counsel with weaker cases need not be included.

§ 3.10.2. Certifications by parties. Mediators are encouraged to require plaintiffs and defendants scheduling mediation of Representative Actions to each separately certify, at the moment they schedule the mediation, that they have invited all plaintiffs asserting Overlapping Claims to the mediation, though plaintiffs' counsel with weaker cases (as defined in § 3.4) need not be included. When scheduling mediation, the parties should agree on the general scope of the release, i.e., the list of claims, the class definition[s], and the defendant[s] to be considered for settlement discussions. This agreement need not include the specific terms or contours of the release.

§ 3.10.3. Certifications by mediators. Mediators are encouraged to confirm that they will not facilitate reverse auctions, and that if they become aware that Overlapping Claims are being negotiated, they will insist on the participation of all plaintiffs asserting such claims in any settlement discussions, though plaintiffs' counsel with weaker cases (as defined in § 3.4) need not be included. CELA will maintain a list of mediators who abide by these guidelines for the benefit of attorneys looking for mediators.

§ 3.10.4. Overbroad releases. Plaintiffs and defendants should not settle claims that are time-barred under the statute of limitations applicable in the case being settled or claims not included in the operative complaint of the case being settled, and mediators should not facilitate agreements that purport to release such claims. Releases of claims or limitations periods covered in other cases without plaintiffs' representatives involved in the settlement are particularly disfavored.

§ 3.11. Settlement agreements. Plaintiffs and defendants should not enter into settlement agreements of any kind (including informal agreements, term sheets, memorandums of understanding, etc.) that purport to release Overlapping Claims without the participation of all plaintiffs pursuing such claims in all settlement discussions, though plaintiffs' counsel with weaker cases (as defined in § 3.4) need not be included.

§ 3.12. Settlement approval

§ 3.12.1. Overlapping Claims are a factor. In settlement approval papers, Plaintiffs and defendants should describe whether there are Overlapping Claims being asserted against the defendant. The absence of such claims should be presented as a factor supporting settlement approval. The presence of such claims should be carefully addressed in detail.

§ 3.12.2. Settlement approval by motion. Representative settlements should only be approved on noticed motion (e.g., not through stipulation). Normally, where there are Overlapping Claims, neither plaintiffs nor defendants should request, and courts should not grant, requests to shorten time absent unusual circumstances or agreement of all plaintiffs' counsel, including any not included in the settlement.

§ 3.12.3. Presumption against approval where some plaintiffs' counsel not involved. If there are multiple cases involving Overlapping Claims, and some plaintiffs' counsel are not signatories to the settlement agreement (other than plaintiffs' counsel with weaker cases (as defined in § 3.4)), there should be a presumption against settlement approval. In such circumstances, because of the nature of reverse auction bargaining power disparities, it is likely

that the settlement terms are unreasonably favorable to the defendant. In such circumstances, it is likely that the result that best protects the Class members' interests is for the court to deny settlement approval motions with instructions to renegotiate the terms with all plaintiffs' counsel (other than plaintiffs' counsel with weaker cases (as defined in § 3.4)) fully participating. Alternately, in a circumstance where the settlement could be used to delay or prevent a significant event in a parallel action asserting Overlapping Claims (e.g., a motion for summary judgment, class certification, trial, etc.), the court should defer ruling on the settlement approval motion, stay the to-be-settled action, and allow the parallel action to proceed to resolution of that significant event, then rule on the settlement approval motion.

§ 3.12.4. Litigation after collapse of a settlement. If the court's caution in protecting Class members from the possibility of a reverse auction results in the settlement collapsing, the court should use its case management power and other tools to encourage plaintiffs' counsel to cooperate and collaborate. In many instances, designation of interim Class counsel (or the appropriate equivalent in a non-class context) may be necessary, possibly on contested motion. While such a step may not directly implicate the merits and may be uncomfortable, it is often necessary to ensure that the Class gets the best representation possible and the danger of a future reverse auction is averted.

4. Conclusion

In conclusion, the Subcommittee hopes that these guidelines will help facilitate cooperation among plaintiffs' counsel and minimize the occurrence of reverse auctions, thereby ensuring that the substantive laws enacted by state and federal legislators are properly enforced by plaintiffs' counsel for the benefit of workers.