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ARTICLES

Class Action Settlements: Navigating the New Rule 23 Amendments

By Hon. George H. King (Ret.) and Hon. Jay C. Gandhi (Ret.) – August 1, 2018

The class action settlement approval process is changing course come December 1, 2018. New amendments to Federal Rule of Civil Procedure 23 effect at least three chief changes. Counsel would be wise to take heed and plan ahead—if they desire court approval without too many detours.

Frontloading Proof

First, counsel sometimes viewed preliminary approval as pro forma, citing platitudes for granting preliminary approval and urging the court to refrain from a "deep dive" until the final approval hearing. No longer. As the Advisory Committee on Civil Rules noted, "[t]he decision to give notice of a proposed settlement to the class is an important event" and "[i]t should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object." *See Report of the Advisory Committee on Civil Rules* (May 18, 2018).

The new amendments thus authorize class notice only *after* the court determines that the prospects of class certification and final approval justify giving notice to the class. The changes to Rule 23(e)(1)(A) will require parties to provide the court with sufficient information to "enable it to determine whether to give notice of the proposal to the class." The revisions to Rule 23(e)(1)(B) further provide that class notice will be given if "justified by the parties' showing that the court will likely be able to approve" the settlement proposal and "certify the class for purposes of judgment."

These standards up the ante at the preliminary approval stage. For instance, the court should ordinarily wrestle with, among other things, the core concern of whether the proposed settlement is fair, reasonable, and adequate. Unifying central themes, the new amendments articulate a discrete number of factors to be used in adjudicating whether the proposed settlement satisfies such criteria: whether (1) the class representatives and counsel adequately represented the class, (2) the settlement was negotiated at arm's length, (3) the class members were treated equitably relative to each other, and (4) the class relief was adequate considering four subfactors: (a) the costs, risks, and delay of trial or appeal; (b) the effectiveness of the proposed method of class settlement distributions; (c) the terms and timing of proposed attorney fees; and (d) identification of any side agreements.

In sum, courts should be hungry for, and counsel should supply, not only a more rigorous analysis but a more robust showing, not a rote recitation, of why preliminary approval is warranted. Counsel should perhaps draft the stipulation of settlement parallel to these criteria.

Contemporary Class Notice

Counsel often viscerally submitted, and courts often reflexively approved, notice plans that consisted of direct notice via first-class mail (where class members are identifiable and contact information is available), combined with publication notice disseminated through traditional forms of media (e.g., newspaper, magazine, television, or radio). *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (mailing of individual notice). Yet, many perceive these traditional forms of notice as antiquated or outdated, and certainly not inexpensive or ultimately "the best notice that is practicable under the circumstances." Indeed, today millions of Americans communicate and consume media through digital or electronic methods. The proposed amendments recognize this reality. The proposed amendments revise Rule 23(c)(2)(B) to permit class notice to be given by mail, electronic, "or other appropriate means." Courts will use their discretion to determine "the best notice that is practicable under the circumstances" in a particular case.

In sum, class notice moves into the twenty-first century. This allows a degree of flexibility and invites the parties and courts to entertain outside-the-box approaches that still achieve their communicative goals but cost-effectively. Counsel should bear in mind a hybrid-type of notice plan at a minimum.

Handling Class Objectors

Courts and counsel have long struggled with objectors, especially given the rise and litigiousness of professional objectors. Policy arguments abound. *See, e.g.*, *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) ("Federal courts are increasingly weary of professional objectors[.]"). But the new amendments are here now. For instance, to address allegedly baseless objections, the new amendments will require an objector to state "with specificity the grounds for the objection." They will also require an objector to state whether the objection applies only to the objector, a subset of the class, or the entire class. The new amendments will also require court approval for payment to an objector or objector's counsel in connection with "forgoing or withdrawing an objection" or "forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal."

In sum, the new amendments aim to add a level of transparency to an otherwise historically opaque aspect of the settlement regime. When counsel hear "objector" now, they may want to think the "*d*words": dismissal and discovery.

Conclusion

The class action settlement approval process is not an easy terrain to traverse. At best, it is time-intensive, expensive, and uncertain. Its challenges are about to become more pronounced. Accordingly, counsel and their clients may be better served by investing early and aiming to obtain approval on the first go-round. In fact, counsel may want to enlist a truly experienced guide familiar with the geography to accompany them on this demanding journey.

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