

Revised Federal Rule Regarding Class-Wide Settlements

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By: Edward M. Koch and Michael Jervis

The United States Supreme Court recently approved and adopted amendments to Federal Rule of Civil Procedure 23 concerning class action practice as proposed by the Advisory Committee on Civil Rules. The amended rule went into effect on December 1, 2018. The amendments do not affect the core of the rule – the criteria for obtaining class certification. Instead, the changes are more subtle adjustments that update and modernize procedures and processes for notification to class members and obtaining approval of class settlements. Nonetheless, although the amendments are not breathtaking, there are important changes.

The first set of amendments apply to Rule 23(e), governing the process of settlement of a class action. First, the amendment makes explicit that the subsection applies not just to already certified classes, but also “a class proposed to be certified for purposes of settlement.” The changes also add some discretion of the court concerning when notice of a proposed settlement and settlement class should be provided. As part of the settlement approval process, the parties now are expressly required to give the court “information sufficient to enable it to determine whether to give notice of the proposal to the class.” The giving of notice is justified only if that information is sufficient to allow the court to determine it is likely to approve the proposed settlement and certify the class. Once notice is approved, the new rule recognizes modern developments by allowing that notice may be by “United States mail, electronic means, or other appropriate means.” The rule thus recognizes that in many cases traditional mail notice may still be best; in others e-mail notification might be the best way to reach class members.

With respect to overall approval of a proposed settlement that would bind class members, the rules also now include express criteria to be considered in Rule 23(e)(2). Among other things, these criteria instruct the court to consider the costs and risks of trial, the effectiveness of the proposed method for distribution of settlement proceeds, terms of an attorneys’ fees award and whether the settlement treats class members equitably towards each other. In connection with this change, the Advisory Committee explained that the decision to send notice of a proposed settlement to a class is an important and costly event in the case. Therefore, it is important to ensure full consideration of all factors before deciding to seek court approval of the settlement.

Rule 23(e) also was amended with respect to the process for making and withdrawing objections to a proposed settlement. The rule previously stated simply that any class member may object to a proposed settlement if the proposal required court approval. The rule now additionally specifies that any objection must state its applicability (i.e., to just the objector, a class subset or the entire class) and must specify the grounds. The amendments also add rules for withdrawing an objection. Previously, Rule 23(e)(5) stated simply that an “objection may be withdrawn only with the court’s approval” without further guidance. The amendments add more specific requirements concerning a withdrawal. Now, an objector may not accept any payment or consideration to forego or withdraw an objection or forego or abandon

an appeal of an approval of settlement unless the arrangement is approved by the court after a hearing. The rule also now specifies that the procedure of Rule 62.1 applies if an appeal is docketed before that approval is obtained.

Finally, the amendments make explicit that an order approving the giving of notice to the class of a proposed settlement may not be appealed. The Advisory Committee has concluded that an order approving notice of a proposed settlement is **not** an order granting or denying class certification. Therefore, no appeal under Rule 23(f) (which allows for an appeal of such an order) may be taken. Rather, parties must wait until the court actually decides whether to certify the class. One additional tweak to Rule 23(f) also extends the time for filing an appeal to 45 days when the United States is a party to the action.

In summary, the amendments to Rule 23 provide long-overdue clarity concerning certification, notice and objections surrounding proposed settlement classes.

If you have questions or would like more information, please contact Edward M. Koch (koche@whiteandwilliams.com; 215.864.6319) or Michael Jervis (jervism@whiteandwilliams.com; 215.864.7042).

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