Revised Rule 23 streamlines class action settlement process

'Professional objectors' put to the test in federal court

By: Pat Murphy January 3, 2019

Amendments to the federal rule on class actions promise to make the settlement process more efficient with the adoption of uniform factors for court approval of agreements and provisions discouraging bothersome "professional objectors," experts say.

The changes to Federal Rule of Civil Procedure 23 went into effect Dec. 1 after adoption by the U.S. Supreme Court earlier in the year along with several other rule changes. In addition to identifying core factors for settlement approval and adding stricter procedures for objectors, the new rule features an express recognition that electronic notice may be an acceptable means of communicating with class members.

Class action lawyer Stuart T. Rossman sees the revised rule as a step in the right direction, a positive for both plaintiffs' lawyers and defense counsel.

"It ensures that everyone has a level playing field and that everyone is playing by the same rules," said Rossman, director of litigation at the National Consumer Law Center in Boston. Rossman testified before the Supreme Court advisory committee that drafted the rule changes.

The updates to Rule 23 to a large degree reflect the best practices already employed by experienced class action attorneys, according to Nicole J. Benjamin, a complex litigation attorney in Providence.

"They don't dramatically change the way we practice," the defense attorney said. "Rather, they codify our existing practice."

Linda Sandstrom Simard, a professor at Suffolk University Law School, likewise views the amendments as simply improving the process for all as opposed to comprehensively overhauling class action practice.

"The amendments will make the procedure for settlements more efficient," she said.

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>
> *— Nicole J. Benjamin, Providence*

Core standards

The most substantive change to Rule 23 is the identification of the key factors for courts to consider in deciding whether to approve a proposed class action settlement.

Like the old rule, new Rule 23(e)(2) provides that a court may approve a settlement only after finding that it is fair, reasonable and adequate.

However, the new rule specifies core factors for courts to consider in making that determination. Those factors include whether class representatives and class counsel have adequately represented the class, whether the

proposal was negotiated at arm's length, and whether the proposal "treats class members equitably relative to each other."

In determining the "adequacy" of relief afforded class members, the new rule directs courts to weigh: (1) the costs, risks, and delay of trial and appeal; (2) the effectiveness of any proposed method of distributing relief to the class and processing class member claims; (3) the terms and timing of any proposed award of attorneys' fees; and (4) any agreements made in connection with the proposal.

Though those factors appear to make common sense, Rossman pointed out that, up until now, each of the Circuit Courts of Appeals have formulated their own standards for approving class action settlements. Those tests often include lengthy lists of factors for trial judges to consider.

According to Rossman, the 1st Circuit has given judges broad discretion in terms of factors to consider.

"By articulating what may even appear to be somewhat obvious factors, the rule encourages courts to look particularly at those questions," Simard said.

The advisory committee's comments to the rule explain that the problem is that the "sheer number" of factors tends to distract both the court and the parties from the central concerns that bear on settlement review. Accordingly, the committee states that the new rule "directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal."

Though the rule identifies core concerns, the committee notes that the amendment is not intended to "displace any factor" previously considered by the courts.

Benjamin observed that the new rule does not include consideration of the "reaction" of class members to the proposed settlement, a factor that courts in the 1st Circuit have sometimes included in their analysis. Because Rhode Island state courts generally follow federal practice, Benjamin said the reaction of class members to a proposed settlement has also been an issue in state court.

Benjamin said she is nonetheless encouraged by the prospect of greater uniformity.

"The rule streamlines things to the extent that now it very clearly defines what the factors are the court should be looking at in evaluating a class action settlement," she said.

> *The new federal class action rule "ensures that everyone has a level playing field and that everyone is playing by the same rules."*
>
> *— Stuart T. Rossman, National Consumer Law Center*

'Professional objectors' on the spot

For Michael C. Forrest, the most significant feature of new Rule 23 is its "crackdown" on professional objectors, who he said "gum up" the process of resolving class actions.

Professional objectors are defined as those who file what are viewed as baseless objections to proposed class action settlements in the hopes of extracting payment from the parties. Payment is leveraged by the objector's threat to hold up cases through the filing of frivolous challenges.

"Now they can't just 'throw up' an objection," said Forrest, managing partner of a class action litigation firm in Salem, Massachusetts, and San Francisco.

There are two significant changes to Rule 23 with respect to objections raised to a proposed settlement. First, Rule 23(e)(5)(A) now requires that any objection to a settlement by a class member must state with particularity whether the objection applies "only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection."

"It doesn't mean that an objection pertaining to only one individual is bad faith," Simard said. "But this amendment is aimed at giving information to the court so that the court can evaluate the objection more thoroughly."

Perhaps more importantly, unlike the previous rule, Rule 23(e)(5)(B) now requires court approval when there is any "payment or other consideration" in connection with the "forgoing or withdrawing" of an objection, or the abandoning of an appeal from a judgment approving a settlement proposal.

Simard said lawyers need to take note of the precise language in the rule.

"The rule specifically applies to any 'payment or other consideration,' so it's not just limited to financial payment; it applies to any sort of quid pro quo," she said.

Rossman said that under the previous rule, court approval was unnecessary for the withdrawal of objection. He hopes the greater scrutiny contemplated by the new rule will discourage professional objectors, whom he sees as a bane to both plaintiffs' attorneys and defense counsel who work to resolve class actions.

He pointed out that good-faith objectors are often useful in improving the final terms of settlements, so the rule needed to strike a balance.

"You don't want to restrict or prevent [legitimate] objectors from participating in the process," he said. "You just want to eliminate the people who have ulterior motives."

He said the new rule strikes that balance.

"At least on paper, it appears to be a very promising way of eliminating the bad objectors without chilling the good objections," he said.

Benjamin said she is not certain the new rule will actually discourage bad-faith objectors, but she is hopeful.

"Some of those objections are very transparent, but it's particularly helpful to the court to know when there is money being paid to these objectors," she said. "That really helps demonstrate to the court what the motivation is for the objection."

Common sense improvements

Rossman noted two other common sense changes in the Rule 23 amendments.

Rule 23(e)(1)(A) now requires the parties to provide the court with "information sufficient to enable it to determine whether to give notice of the proposal to the class."

Forrest said that tracks what is a regular practice at his firm.

"We always try to run through the certification standards for motions for preliminary approval," Forrest said. "It is nice to see it codified in the rule. The court should be looking at that before directing notice."

Rule 23(c)(2)(B) has also been amended to clearly authorize electronic notice to class members under appropriate circumstances.

Rossman said the electronic notice provision is a much-needed modernization of Rule 23.

"By looking at the committee notes, it's clear that they're looking for the courts to have some flexibility in putting together a program that is most effective for the kind of settlement you're engaged in so that you can reach the largest number of class members," he said. "That may be varied depending on both the nature of the claim as well as the nature of the class itself."

Simard characterized the rule as "permissive," saying it anticipates that lawyers will need to weigh whether notice to class members via email, texts, social media or some other electronic means is appropriate in a given case.

"If you're trying to notify a class of people who don't or are unlikely to have access to the internet, the advisory committee is aware of that constraint," she said.

Benjamin pointed out that the availability of electronic notice can represent a significant cost savings to defendants who typically bear the expense of providing notice to class members.

"For some classes, it may make more sense to continue to provide notice by mail or by publication, and in other classes electronic means like email may be more appropriate," Benjamin said.

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