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PROPOSED CHANGES TO CIVIL RULE 23

Committee Members:

I am submitting these comments on the proposals to amend FRCP Rule 23. I support most of the proposed changes, but have some concerns about others. I also have several additions to the comments.

I currently teach civil procedure and constitutional law at George Washington University Law School. For most of my career, I was the director of the Public Citizen Litigation Group, where I was involved in scores of class actions in the federal courts, mainly as counsel on behalf of objecting class members or as amicus supporting objections by others. When I first began representing objectors, federal judges were decidedly uninterested in hearing from objectors at all, and there were many procedural and practical barriers to their making meaningful objections. I am happy to say that these proposals continue the trend that has improved the situation considerably over the years.[1]

Additional Information Upfront

Rule 23(e)(1)(A) would require the parties to submit sufficient information to enable the judge to determine whether notice of a proposed settlement should be sent to the class. This change would be a positive development that would aid both district judges and class members.

[1] Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot,* 79 George Washington Law Review 428 (2011).

One of the major impediments to class members making intelligent evaluations of a settlement, which in this context includes certification of the class for settlement, is that in far too many cases, the evidence that the settling parties intend to offer to support the settlement is not filed or otherwise made available until after class members must object or opt out. For example, in the NFL Concussion class action, class counsel and the defendants submitted over 1000 pages of affidavits and documents to support the settlement a month after objections were due and only seven days before the scheduled fairness hearing. They also submitted several hundred pages of legal memoranda at that time. Although the general outlines of the legal arguments in support of the settlement are usually made in a memorandum of law when the parties ask the court to issue notice, those arguments are inevitably general and hence difficult to evaluate, absent the factual support for them, which typically comes much later. As the comments to this proposed change make clear, all of the material to be submitted in support of the settlement and class certification should "ordinarily" be submitted prior to approval of the notice (p. 221). This is a very important and positive change. I suggest that the comments make clear that the submission should be in time to give the court and other interested persons a reasonable opportunity to review those materials and the settlement proposal to ensure that the decision to send the notice is an informed one.

There is one question on these submissions and that relates to attorneys' fees. It is common practice today for class counsel to include in the notice to the class the maximum amount of the fees that they will seek, and the position of the defendant on that request. In a number of cases (and I have no data on the proportion or significance of the cases), class counsel asks the judge to postpone consideration of the fee request until the judge approves the class certification and the settlement, which is what happened in the NFL case. Some objectors there

argued that the judge was required by Rule 23(e) to decide the fee request when she approved the settlement. I do not believe that is required by current law or that it would desirable to impose an inflexible rule to that effect.

There is a half-way position that I do support: class counsel should be required, no later than a reasonable time, *e.g.*, 21 days, before any objections and opt outs are due, to file a fee application that explains the basis on which fees will be sought. Fee applications are often quite lengthy, and there is no reason why a judge or counsel for absent class members would need to see the application before deciding on notice. But when the issue is the reasonableness of the settlement, the amount of fees sought, and what work class counsel performed to obtain that result, may sometimes suggest an imbalance that casts doubt on the fairness of the settlement in ways that the terms alone do not. Comparing the proposed relief to the requested fees (including the effort that went into obtaining it) can be particularly revealing when all or a substantial part of the proposed relief is an injunction, whose value is often difficult to determine. For these reasons, I urge the committee to add a requirement that fee applications must be submitted a reasonable time before objections and opt outs are due. At a minimum the fee application should state the maximum fee to be sought, over what time the fees will be paid, out of what fund, and from whom the fee is to be paid. The comments should also clarify whether the discussion of attorneys' fees in proposed **Rule 23(e)(2)(C)(iii)** requires the judge to decide the fee request when the settlement is approved or whether that decision can be postponed. The proposed change also supports the current desirable practice under which the *payment* of fees can, at least in part, be postponed until the actual results of delivering benefits to the class is known. The timing of payment, however, is a separate matter from when the approval should take place.

I have one other suggestion for the comments to this provision. It is a truism that a district judge asked to approve notice of a settlement often has no one to point out its weaknesses. Experienced judges can catch some problems, but especially in cases in which the judge has not been heavily involved before a settlement is reached, the judge may not be aware of the impact of the settlement on absent class members. In short, just as they do at the fairness hearing, judges need someone besides the parties to point out problems in the settlement, the notice, and/or the proposed schedule for the Rule 23(e) hearing. My views on the benefits of bringing in outsiders at an early stage were shaped by the efforts on Judge Sam Pointer who did that in the silicone gel breast implant settlement. He held a series of informal meetings with interested persons and made drafts of the official notice and of a more understandable set of questions and answers for class members available for debate and suggestions. As I recall, there were a number of matters that were clarified and lesser problems eliminated *before* the notice was sent, which is by far the best time to deal with those issues. To be sure, the settlement collapsed because of the large number of opt outs and the many claimants who filed for damages, but by the time of the Rule 23(e) hearing, the court was able to focus on the objections that went to the heart of the settlement and not on peripheral issues.[2]

In the past, when I have suggested that judges should seek outside assistance at the pre-notice stage, one response has been that there is no way, short of giving notice to the entire class, to obtain such assistance. That is not a valid objection for several reasons. First, many class settlements arise out of MDL proceedings in which there are many other lawyers besides lead or

[2] Other examples of cases in which preliminary proceedings involving persons besides counsel for the settling parties are described in Brian Wolfman and Alan B. Morrison, *Representing the Unrepresented in Class Actions*, 71 NYU Law Rev. 439, 480-485 (1996). Those pages also contain additional suggestions for how outside parties can be used effectively at the pre-notice stage.

class counsel who are able to advise the court of potential problems with the notice and/or the settlement. The court simply has to send out an electronic announcement seeking comments, with or without holding an informal hearing, and the advice will coming pouring in. Second, many if not most class settlements today establish a website where a notice could be placed. It may be that no one will be interested, but the ease of providing such notice on the website and the benefits of broader early participation are worth the modest effort. Indeed, in corporate reorganizations under Chapter 11 of the Bankruptcy Code, including those such as the many asbestos cases and that of Dow Corning where tort claimants were a major reason for the proceeding, there is a comparable and inclusive process by which the plan and the notice to claimants are fully vetted in advance before notice is sent to all the claimants. Third, 28 U.S.C. § 1715(b) requires defendants in class actions in federal court to provide the notice of the settlement (and supporting documents specified therein) to the appropriate Federal and State officials no later than ten days after a proposed settlement is filed. Congress has, in effect, made them interested persons to proposed class settlements, which would include participation at this phase of the proceedings.

Other Concerns & Suggestions

Notice under Rule 23(c) currently applies to classes that have been certified for all purposes. The proposal would extend the best notice practicable requirement in **Rule 23(c)(2)(B),** which now applies only to (b)(3) certified classes, to class settlements under (b)(3). But settlements also occur in (b)(1) and (b)(2) classes. Because these class members will also be bound by the settlement (and may not even have an opt-out right), they should receive comparable notice. For example, suppose a company seeks to settle an employment discrimination case relating to its seniority practices by agreeing to make significant prospective

changes that are supposed to benefit the entire class in an equitable manner. Class members should also receive the best practicable notice of that settlement because it will affect their rights at least as much as (and perhaps much more than) (b)(3) class members who have only modest claims for monetary damages. That members of (b)(2) classes have no right to opt out is an additional reason for ensuring that they have proper notice so that they can be heard on the proposal, not a reason for avoiding any meaningful notice. My view is that due process requires some notice in non-opt-out cases, but the committee need only agree that such notice is desirable, not that it is constitutionally mandated. In this connection, I note that **Rule 23(e)(1)** currently requires notice in a reasonable manner for all settlements under Rule 23(e), and there is no reason to cut back on this requirement in the amendment to **Rule 23(c)(2)(B).** This change can be accomplished by simply deleting "under Rule 23(b)(3)" in line 12 on page 211.

I have two suggestions regarding the proposed changes to **Rule 23(e)(1)(B).** The committee wisely rejects the practice of treating the notice as a preliminary approval. However, the language in this proposed amendment – "if giving notice is *justified* by the parties showing that the court will *likely* be able to *approve*" the class certification and the settlement – seems to keep, if not strengthen, the notion that the court will be giving preliminary approval to class certification and the substance of the settlement. The emphasized words, in particular, are very troubling.

I propose instead that Rule 23(e)(1)(B) be amended to read as follows: "*Before holding a hearing under Rule 23(e) on whether to approve a proposed class certification and settlement,* the court must *(i) find that there is a sufficient possibility that the proposal will warrant approval, and, if so, (ii)* direct notice in a reasonable manner to all class members who would be

bound by the proposal." (new language in italics). If adopted, subparagraphs (B)(i) and (B)(ii) would be deleted.

If this change to Rule 23(e)(1)(B) is adopted, I suggest that the comments to that Rule be amended to include the following explanation:

"New Rule 23(e)(1)(B) clarifies the duties of the court in deciding to direct notice to absent class members. First, the court must ensure that the settling parties have provided the factual material to the court that will be used to support the motion for class certification and approval of the settlement. Second, the court must ensure that all such materials, along with the settlement documents, are reasonably available to absent class members so that they can raise concerns to the court before notice is sent to the class. Third, the court must review the settlement and the supporting materials, taking into account any comments from absent class members and others, for any obvious problems that would preclude either class certification or approval of the settlement, with particular focus on subparagraphs (A) [adequate representation] and (D) [equitable treatment among class members].

"Fourth, the court should consider objections to specific provisions of the settlement of the kind that are more easily remedied before notice is given. For example, the court could ask the parties to simplify the claim form or eliminate the need for one entirely by crediting the class member's recovery directly to that person's account. Last, the court must review any proposed schedule to ensure that class members are provided a reasonable opportunity to submit objections or opt out after any additional submissions are made by the settling parties, including class counsel's fee application (even if the court does not propose to hear the merits of the fee application at the time of the settlement hearing). The phrase "*there is a sufficient possibility that the proposal will warrant approval,"* is intended to reflect the concept that the court has

concluded that there are no obvious flaws in the settlement and that there is a reasonable possibility, based on the information currently available, that the class could be certified for settlement purposes and that the settlement could be approved. It is not the equivalent of preliminary approval."

Second, as the above suggestion indicates, subparagraphs (B)(i) and (ii) are not necessary. If they are nonetheless retained, I urge the committee to reverse their order for two reasons. Logically, class certification always proceeds settlement; if the class cannot be certified, even for settlement purposes, the quality of the settlement is irrelevant. Second, putting settlement before certification could re-enforce a tendency that I have observed in some judges to conclude that a settlement is fair in the aggregate (class counsel obtained a large dollar recovery) and then give short shrift to the issues of fairness among class members – whether they concern unequal distribution of class benefits (see proposed Rule 23(e)(2)(D)) or broader structural conflicts within the class -- which is the essence of the certification requirements in Rules 23(a)(2), (3), & (4). This is not simply a matter of style, but of being sure that the cart is not put before the horse and that class members receive the protections to which they are entitled under Rule 23(a).

Rule 23(e)(2), line 45 page 213, adds the phrase "under Rule 23(c)(3)**"** which seems unnecessary and is possibly confusing. That Rule makes judgments binding for all Rule 23 classes, albeit with somewhat different requirements. If this phrase is being added for emphasis, it may actually confuse many readers who may think it refers only to classes under Rule 23(b)(3), which is not correct. The phrase should be deleted.

Rule 23(e)(2)(A) requires the court to consider whether the class representatives and class counsel "have" adequately represented the class. That is fine as far as it goes, but the work

of both the class representatives and their counsel is not over if the court approves the settlement because implementation is vital to ensuring that class members actually receive their benefits. I would add, after "have," the phrase, "and will continue to," and change "represented" to "represent" as a matter of grammar.

In the comment to **paragraphs (C) & (D), Rule 23(e)(2),** second full paragraph on page 227, the reporting back of claims experience is supported there on the basis that it may be useful in assessing the reasonableness of the attorneys' fee award. I would also add to the comments the observation that claims experience in one case may be useful to judges in future similar cases in deciding whether to approve a settlement. That experience may also be useful in broader assessments of Rule 23, not tied to a particular class action, which would support a general rule requiring reporting of actual claims results in all class actions.

I do not have any objection to the addition to **Rule 23(e)(5)(A)** which requires objectors to state the basis of their objection as well providing other information. The committee has made it clear that the process of objecting should not be burdensome, but in the NFL Concussion case, the parties required that all objections be personally signed by the class members and not just their lawyers, who in that case had filed complaints on their behalf that were part of the MDL proceeding that led to the class settlement. Aside from the fact that the signature requirement is inconsistent with 28 U.S.C. § 1654 allowing parties to appear through their attorneys,[3] the requirement was burdensome when a lawyer had more than one or two clients who lived around the country. As a result, some objections were filed on behalf of fewer than all of the lawyer's

[3] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

clients, which cut down the objection rate. That enabled class counsel to say that "only" this lesser number had objected and to argue that the class viewed the settlement favorably. I urge the committee to include a comment disapproving the practice of requiring class members who are represented by counsel to sign an objection.

In the second paragraph of the comments to **Rule 23(e)(5)(B)** (page 229), the committee correctly observes that class counsel may believe that avoiding delay is worth the price of paying off objectors. In my experience, that incentive is not limited to the plaintiffs' side; defendants want peace, they do not want to spend more money defending a settlement on appeal, and they do not want the risk of having a settlement overturned. In at least one case, I believe that the payment on appeal was made by the defendant, although objectors were denied discovery to determine who made a payment and how much was paid. In addition, defendants may, at least subconsciously, agree to a larger fee for class counsel, in the anticipation of counsel having to buy off objectors to eliminate an appeal. I suggest adding something along these lines at the end of that paragraph: "In some cases, defendants have similar incentives to pay off objectors."

I strongly support the proposed addition of **Rule 23(e)(5)(B)** which would prohibit the payment to objectors and /or their counsel absent court approval. Requiring court approval will eliminate the practice of buying off objectors who have the leverage of an appeal, but who have done nothing to justify a payment. A similar situation may arise when a case is filed as a class action, and a settlement is reached with the defendant before a motion for class certification has been filed. Under the current version of Rule 23(e), court approval is not required to dismiss the case, which makes it possible for putative class counsel to use the leverage of the class allegations to obtain an unjustified payment for counsel and, to a lesser extent, the named plaintiffs. I support extending the approach in Rule 23(e)(5)(B) to pre-certification settlements

with payments to named plaintiffs and/or their counsel, although I recognize that it may be somewhat late in the process to make such an addition, which might not fit easily into Rule 23(e)(5)(B).