VOLUME 102 NUMBER 3 FALL/WINTER 2018
JUDICATURE
Published by the Duke Law Center for Judicial Studies. Reprinted with permission. © 2018 Duke University School of Law. All rights reserved. **JUDICIALSTUDIES.DUKE.EDU/JUDICATURE**

Guidance on new Rule 23 class action settlement provisions

Executive Summary

Developed and published by the Bolch Judicial Institute of Duke Law School
November 2018

ON DEC. 1, 2018, AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 23 TAKE EFFECT. The amendments require lawyers to provide additional information up front for the court to preliminarily approve settlements ("frontloading"), permit notice by electronic means, impose limitations on compensating objectors, and clarify final-settlement criteria. Many of the amendments codify best practices of courts.

Under the auspices of the Bolch Judicial Institute of Duke Law School, 38 prominent defense and plaintiff practitioners and experts well experienced in class action litigation have worked together in four teams for the past 20 months to develop guidelines and best practices for implementing the amendments.

The draft guidelines and best practices went through a thorough vetting process that included significant input and comment from six federal and state court judges. Multiple iterations were circulated for comment and edit among the teams. A later draft was forwarded for comment to a larger group of 125 practitioners and judges, who attended an earlier Institute Class Action Settlement Conference. A near-final version was posted for public comment for a six-week period.

The *Guidelines and Best Practices Implementing 2018 Amendments to Rule 23 – Class Action Settlement Provision* are intended to help the bench and bar comply with the 2018 amendments to Rule 23. They add significant detail to the general guidance provided in the amended rule and committee note.

Because many in the bench and bar had already adopted several of the new provisions in the amended rule in their practice, the recommendations in the *Guidelines and Best Practices* are based on a solid foundation. These guidelines and best practices have proven useful across cases and have been adopted by multiple courts.

An executive summary of the *Guidelines and Best Practices* follows, along with brief section introductions from the team leaders who led the drafting effort. The entire document is posted on the Bolch Judicial Institute website at **judicialstudies.duke.edu/publications/**.

Guidelines and Best Practices Implementing 2018 Amendments to Rule 23 Class Action Settlement Provisions

GUIDELINES 1-5: Providing Information to the Court to Decide Whether to Send Notice to Class Members and Approve Settlement ("Front-Loading")

"Front-Loading" Information

COMMENTS FROM TEAM LEADERS AARON VAN OORT (FAEGRE BAKER DANIELS LLP) AND ADAM MOSKOWITZ (THE MOSKOWITZ LAW FIRM)

Before notice of a proposed settlement is approved, the amendments require the parties to provide information sufficient for the judge to decide preliminarily whether the proposed settlement will be approved. But that does not mean that every proposed settlement requires the same amount of extensive information. In deciding whether to approve notice of a proposed settlement, the court should exercise its discretion in appropriate cases to require less information from the parties if there are no indications that the settlement is unfair, unreasonable, or inadequate. A court should rely on certain indicators that strengthen the showing that the proposed settlement is fair, reasonable, and adequate. If indicia of fairness are apparent and protections for the class are in place, the court should lighten the burden on counsel at the fairness hearing and place heavier reliance on the representations of counsel as to the settlement's fairness, adequacy, and reasonableness.

In assessing the adequacy of the proposed settlement, the relief provided to class members by the settlement should be compared with assessments of the range and likelihood of possible classwide recoveries from litigated outcomes. The assessments may include best-case, worst-case, and likely case results, along with estimates of the likelihood that each type of result will be realized. At both the notice and approval stages, the parties should provide the court with information sufficient for it to decide that the proposed settlement is fair, reasonable, and adequate, in accordance with the topics enumerated in Rule 23(e)(2). Amended Rule 23(e)(2) sets out broad topics to help the court determine whether a proposed settlement is fair, reasonable, and adequate.

GUIDELINE 1: Parties should request a court to approve sending notice to class members of a proposed settlement only if the court is likely to be able to: (1) approve the settlement after a hearing and a finding that it is fair, reasonable, and adequate under Rule 23(e)(2); and (2) certify the class.

Best Practice 1A: At both the notice and approval stages, the parties should provide the court with information sufficient for it to decide that the proposed settlement is fair, reasonable, and adequate, in accordance with the topics enumerated in Rule 23(e)(2).

GUIDELINE 2: At both the notice and approval stages, a court has wide discretion in determining how much information is sufficient to determine that a proposed settlement is fair, reasonable, and adequate.

Best Practice 2A: In general, if a settlement proposal lacks any indicia of collusion, conflict, or lack of fairness to the class members, a court should not require an exhaustive study and extensive information to make its findings that the proposal is fair, reasonable, and adequate. Conversely, if doubts arise about the fairness of the proposed settlement, the court should require additional information in making its determinations.

Best Practice 2B: Parties should provide information to the court showing that class representatives and counsel have adequately represented the class.

GUIDELINE 3: Parties should provide information to the court showing that the settlement was negotiated at arm's length.

Best Practice 3A: Parties should provide information to the court showing that the expected relief of the proposed settlement to class members is adequate.

Best Practice 3A(i): The parties should provide information to the court on costs, risks, and delay of trial and appeal in assessing whether relief provided for the class is adequate.

Best Practice 3A(ii): The parties should provide information on the effectiveness of the proposed method of distributing relief to class members when assessing whether relief provided for the class is adequate.

Best Practice 3B: The parties should consider using a professional claims administrator to send notice and claim forms and distribute benefits.

Best Practice 3C: In determining whether the proposed method of distributing relief is effective, a court should not assume that automatically distributing benefits to all class members is superior to distributing benefits based on submitted claims.

GUIDELINE 4: The parties should provide information on the proposed attorney's fees, including timing of payments, in assessing whether relief provided for the class is adequate.

GUIDELINE 5: At the final approval stage, the court should consider relief delivered to class members in determining the appropriate award of attorney's fees in accordance with Rule 23(h). In appropriate cases, a court may consider non-monetary benefits as part of the total relief in relation to the proposed award of attorney's fees in evaluating whether the proposed settlement is fair, reasonable, and adequate.

Best Practice 5A: In an appropriate case, a court may consider awarding attorney's fees in a class action settlement based on a percentage of the total monetary awards made available to the class, as opposed to the actual claimed value of the settlement.

Best Practice 5B: The parties should provide information on any agreement made in connection with the proposed settlement in accordance with Rule 23(e)(3).

Best Practice 5C: The parties should provide information on how the proposed settlement treats class members relative to each other, particularly if the proposed settlement addresses subclasses or other special categories of class members.

Best Practice 5C(i): If the differences in the treatment between class members are material or the conflicts of interest are real, a court should consider whether certain safeguards protect the class members and whether the benefits of having a classwide settlement otherwise outweigh the risks.

Best Practice 5C(ii): In assessing the equitable treatment of class members relative to each other under Rule 23(e)(2)(D), a court should give due regard to the advantages of simplifying the treatment of claims to achieve efficiency and finality.

Best Practice 5D: Although not required by Rule 23(e)(1), a court should consider holding a hearing on whether to direct notice to the class of a proposed settlement in an appropriate case if the court has questions or concerns about whether the information presented by the parties is sufficient under the multiple Rule 23(e)(2) factors for it to decide that settlement approval at a later stage is likely.

GUIDELINES 6-9: Procedures and Standards for Objections and Resolution of Objections Under Rule 23(e)(5)

Safeguarding Good-Faith Objectors

COMMENTS FROM TEAM LEADERS MELISSA HOLYOAK (COMPETITIVE ENTERPRISE INSTITUTE) AND ZAVAREEI HASSAN (TYCKO & ZAVAREEI LLP)

Courts recognize that objectors can sometimes play a critical role in class actions by flagging weaknesses in proposed settlements. Some objectors, however, bring objections in bad faith with the sole purpose of seeking side payments in exchange for dismissing an appeal. This tactic often causes great delay in administering the benefits of a settlement to the class.

These *Guidelines and Best Practices* discuss how the 2018 amendments can be applied to deter bad-faith objections while not interfering with good-faith objections that may advance the interests of the class. First, new Rule 23(e)(5)(A) requires greater specificity of objections. Many bad-faith objectors file general objections to simply preserve their ability to proceed on appeal. Although the amendments discourage bad-faith objectors by requiring careful analysis of the settlement and specific grounds for the objection, the amendments should not be applied so strictly as to unduly burden good-faith, including *pro se*, class member objections.

Second, new Rule 23(e)(5)(B) and (C) require district court approval, after a hearing, of any "payment or other consideration" provided for "forgoing or withdrawing an objection" or "forgoing, dismissing, or abandoning an appeal." These amendments will dissuade improper objections if courts reject agreements that pay objectors for simply "getting out of the way" of the settlement. If objectors are compensated only when they bring value or a benefit to the class, objectors will be discouraged from bringing bad-faith objections. ▸

GUIDELINE 6: A court should interpret the language of Rule 23(e)(5) broadly and liberally to accomplish its stated intent to avoid perpetuating a system that facilitates objections advanced for improper purposes.

Best Practice 6A: A court may consider any objection raised by a class member, even if the objector has nothing personally at stake in regard to the matter raised by the objection.

GUIDELINE 7: A class member objecting to a proposed settlement must state with specificity the grounds for objection sufficient to enable the parties to respond to them and the court to evaluate them.

Best Practice 7A: An objection should identify the specific settlement term or structure that is being challenged and the reasons for such challenge.

GUIDELINE 8: No payment or other consideration for forgoing or withdrawing an objection or forgoing, dismissing, or abandoning an appeal can be provided unless a court approves payment after holding a hearing.

Best Practice 8A: The parties must disclose the terms of all agreements between objector and the parties. What constitutes payment or other consideration to an objector for forgoing or withdrawing an objection or forgoing, dismissing, or abandoning an appeal should be broadly construed.

Best Practice 8B: A court should inquire into communications that class counsel may have had with individuals who decided not to pursue (forgo) objections.

Best Practice 8C: If the consideration involves a payment to counsel for an objector, the proper procedure to obtain a payment is by motion under Rule 23(h). The court should evaluate whether the objection added value to the class and therefore justifies the proposed payment.

GUIDELINE 9: If approval to forgo or withdraw an objection has not been obtained before an appeal is docketed in the court of appeals, Appellate Rule 12.1 and Civil Rule 62.1 indicative-ruling procedures apply while the appeal is pending.

Best Practice 9A: If the parties intend to settle with an objector, they should seek approval of the objection settlement prior to the filing of the appeal to avoid the delay of appeal.

Best Practice 9B: A court should hold a hearing and issue an indicative ruling once an appeal is filed and Rule 62.1 is in effect.

Best Practice 9C: If the objector has filed a motion for attorney's fees, the district court may inquire into settlement discussions between the objector and the parties regarding the fee motion.

GUIDELINES 10-11: The Role of Court-Appointed Lead Counsel Vis-á-Vis Others

Complex-Litigation Managers

COMMENTS FROM TEAM LEADERS JOHN BEISNER (SKADDEN ARPS SLATE MEAGHER & FLOM LLP) AND STEVE HERMAN (HERMAN HERMAN & KATZ LLC) . THE TEAM LEADERS GRATEFULLY ACKNOWLEDGE THE SUBSTANTIAL ASSISTANCE PROVIDED BY ELIZABETH CABRASER (LIEFF CABRASER HEIMANN & BERNSTEIN LLP).

This section addresses selection of lead counsel in multiple contexts: standalone class actions, MDLs comprised entirely of putative class actions, and "hybrid" MDLs comprised of both putative class actions and individual tort claims. The Rule 23(g)(1)-(3) factors that guide class counsel appointments have been adopted by courts in other MDL contexts to inform the courts' broad discretion to select lead counsel who will, individually or collectively, have the financial and human resources, expertise, and experience to lead the prosecution of all forms of complex litigation. But effective leadership does not end with appointment. To lead effectively, appointed counsel must work well with others.

Lead counsel selection is a judicial talent search for counsel with the resources and expertise, as well as the management and administrative skills, to advance the case. The human factors in lead counsel selection are as critical to successful case management as are the express Rule 23(g) criteria. Lead counsel have administrative, managerial, and diplomatic roles to play. Lead counsel

must advance substantial costs, and devote considerable time and energy, to prosecuting the case for plaintiffs as a whole. But they must also work with the court and other counsel in a cooperative manner, as Fed. R. Civ. P. 1 directs, toward the "just, speedy, and inexpensive" determination of the case. Chambers conferences with lead counsel from both sides help implement Rule 1's cooperation imperative in a more candid atmosphere than would be practicable in open court. This places a premium on the trustworthiness and professionalism of lead counsel on both sides. Lead counsel selection that takes into account all these traits is more art than science. Personality traits of candor, accountability, credibility – and ability to listen – are as important as technical skills. Experience and reputation matter; courts should strive to provide opportunities to the next generation of leaders to develop these qualities.

Those appointed to leadership positions can provide such opportunities by assigning common benefit tasks among, and beyond, the appointed leadership structure. Appointment to a lead role does not guarantee popularity. Lead counsel take on roles and responsibilities that others might wish to preserve for themselves. It is important for leads to provide information and assign work where appropriate (under a court order that authorizes this process) so that counsel remain informed participants in the litigation.

GUIDELINE 10: In an MDL action consisting of multiple putative class actions, the court should, in connection with an early and prompt initial conference with the parties, prescribe an application process for appointment of one or more firms, as appropriate, to serve as Interim Class Counsel under Rule 23(g)(3), upon considering factors pertinent to the case, including those specified in Rule 23(g)(1).

Best Practice 10A: In an MDL proceeding involving multiple actions that include putative class actions, the court should determine, in connection with an early and prompt initial conference with the parties, the nature and scope of the leadership structure it intends to appoint, including whether the appointment of Interim Class Counsel under Rule 23(g) is necessary or appropriate, and should specify and delineate with appropriate precision the roles and responsibilities of the counsel it appoints to leadership positions.

GUIDELINE 11: A court should, at an early point in its management of the proceedings before it, schedule pretrial proceedings (including class certification briefing and hearing dates, and, as early as practicable, a trial date on class claims); obtain information and establish procedures for coordination with any related putative class action litigation pending in other courts; designate counsel with responsibility to coordinate with counterparts in related litigation; and remind all parties and counsel of their duty to timely update the court and each other on developments in related actions pending in other courts.

Best Practice 11A: To assure that all tracks are managed effectively, a transferee court in a hybrid MDL should typically appoint different counsel to take primary responsibility for personal injury claims on the one hand, and economic loss claims on the other.

Best Practice 11B: An MDL transferee judge who is appointed to manage individual and class claims concurrently should prioritize his or her judicial resources in assuring that both types of claims move forward appropriately, through discovery, pretrial disposition, settlement where appropriate, and trial, either in the MDL transferee court, through bellwether trials, or upon remand to districts of origin.

Best Practice 11C: In a "hybrid" MDL, the court's order appointing a leadership structure should clearly delineate the roles and responsibilities for the class lead counsel and tort lead counsel and their respective committees. ▸

GUIDELINES 12-18: Means, Format, and Contents of Settlement Notice

Death of the Mailman?

COMMENTS FROM TEAM LEADERS MARY MASSARON (PLUNKETT COONEY PC) AND CALEB MARKER (ZIMMERMAN REED LLP)

The gold standard for notice under Rule 23 has been first-class mail for more than 50 years. The introduction of email, the internet, and social media, and the explosion of mobile devices have changed the ways we communicate. First-class mail volume peaked in 2003 and is now down to 1979 levels, when 100 million fewer people lived in the United States. The 2018 amendments recognize these seismic changes in communication and now expressly permit class notice by electronic means.

These best practices will help you determine the best notice under the circumstances, in part, by helping you ask the right questions. Electronic means may not always be the best form of notice. There is still a role for U.S. mail in class action notice.

The benefits of electronic notice should be obvious. Electronic notice is generally less expensive. Clicks often cost less than stamps. Lower costs often mean better notice. First, the notice can be broader, or have a better reach. Second, instead of sending a single postcard, electronic notice can result in notice being seen by a class member many times across many devices, resulting in a higher frequency. Reach and frequency are two key components of any notice plan.

Electronic notice also offers interactive and instant ways for class members to participate. Instead of filling out claim forms by hand and returning them by mail, class members can now quickly click their way through auto-populated forms that calculate claims and check for errors along the way. The result is a faster and better claims process that is far less expensive than that of the old days.

Attorneys should reach out to notice experts and claims administrators as appropriate. Such professionals can offer a wealth of knowledge in devising, implementing, and executing any notice program.

Lastly, these best practices remind practitioners to remember the basics. Regardless of whether notice is displayed on a letter, postcard, email, or social media advertisement, the form and content of the notice is important. If you want class members to participate, the notice should be bold, eye-catching, and easy to understand.

GUIDELINE 12: In determining whether the "best practicable notice" can be sent in a reasonable manner, the court should focus on the means or combination of means most likely to be effective in the case.

Best Practice 12A: In assessing whether the particular means of sending notice is most effective, a court should take into account the following general considerations: (1) will the notice effectively reach the class; (2) will the notice actually come to the attention of the class; (3) are the notices informative and easy to understand; and (4) are all class members' rights and options easy to act upon?

Best Practice 12B: When selecting a means of giving notice, the parties and court should begin by assessing the reliability of the method of communication typically used by the defendant in its regular business to notify its customers or clients.

GUIDELINE 13: Best notice practicable includes individual notice to all members who can be identified through reasonable efforts. First-class U.S. mail may often be the preferred primary method of notice.

Best Practice 13A: Individual notice to class members often is practicable when the defendant communicates directly with class members as part of its regular business, either relying on U.S. mail postal addresses or email addresses.

Best Practice 13B: The deliverability rate of communications with customers can offer a useful indicator of the effectiveness of the means of communication.

Best Practice 13C: The parties and court should be skeptical about contact information that is compiled from free offerings, promotional sign-ups, or promotions.

GUIDELINE 14: Notice by email communication may be the best individual notice practicable under the circumstances if shown to be reliable. It may also be a low-cost supplemental means of notice.

Best Practice 14A: The effectiveness of a notice sent by email can be assessed using available metrics. Among the metrics, the *read rate* is the most reliable.

Best Practice 14B: The parties and court should consider the capacity and limits of email technology when evaluating its effectiveness for notice purposes.

Best Practice 14C: If individual notice is not practicable or effective, the parties and court should consider notice by digital media to provide the most effective notice under the circumstances, either to supplement other means of notice or as a standalone means.

Best Practice 14D: The parties and court should consider whether the notice program is using an appropriate media mix that will reach the target population.

GUIDELINE 15: Notice using social media, a subset of digital media, may be effective.

GUIDELINE 16: A court must evaluate the effectiveness of a notice program that relies on digital media, including social media, as a means to send notice.

Best Practice 16A: If notice is sent by digital media, the parties should evaluate and quantify the percentage of class members that the notice will reach.

Best Practice 16B: A low *lifetime frequency cap* (three or fewer) is ordinarily an insufficient level at which to expose a target audience sufficiently to the message.

Best Practice 16C: The parties should provide the court with an analysis of the metrics that the parties rely on to determine the effectiveness of the means of class notice. If a notice program is reporting reach, it must be supported and validated in a transparent manner.

Best Practice 16D: Social media metrics, such as *clicks*, should not be used as a substitute for a validated reach statistic.

Best Practice 16E: The parties and court should monitor the effectiveness of class notice sent by digital media throughout the notice period.

GUIDELINE 17: A class-notice expert or professional claims administrator can assist the parties and court in ascertaining the effectiveness of using digital media to send notice.

Best Practice 17A: The parties and court should ensure that the class notice expert or claims administrator is competent to assist them in evaluating the effectiveness of notice by digital media.

Best Practice 17B: The parties and court should carefully review the class-notice expert's or administrator's methodology in concluding that notice sent by an electronic means is most effective.

GUIDELINE 18: Language text and formatting may appear differently, depending on the medium it is viewed on. The differences can be sufficiently substantial to degrade the effectiveness of the communication.

Best Practice 18A: Notices sent by digital media should be formatted appropriately for maximum effectiveness that is consistent with the FJC guidance.

Find the complete Guidelines and Best Practices Implementing 2018 Amendments to Rule 23, *as well as other guidelines and best practices produced by the Bolch Judicial Institute, at*

judicialstudies.duke.edu/publications