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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

New Amendments to the Federal Rules of Civil Procedure

THE LATEST round of amendments to the Federal Rules of Civil Procedure went into effect on Dec. 1, 2003. These amendments include extensive revisions to Rule 23 governing class actions, as well as modifications to the procedures in Rule 51 for submitting and objecting to jury instructions and to Rule 53 regulating the use of Special Masters. The amendments govern all federal civil proceedings commenced after Dec. 1, 2003, and all other currently pending proceedings "insofar as just and practicable."[1]

Rule 23: Class Actions

The amendments to Rule 23 are the product of a decade of study by the Advisory Committee on Civil Rules, which was informed by studies conducted by other bodies such as the Federal Judicial Center and the RAND Institute for Civil Justice, as well as by public comments generated by previously proposed amendments to Rule 23 that were not enacted. The resulting amendments effectively overhaul the rules governing appointment and payment of attorneys, timing and notice of the certification decision, and judicial oversight of settlements.

Appointment of Class Counsel and Awards of Attorney's Fees. The amendments add to Rule 23 two completely new sections governing appointment of class

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counsel and attorney's fee awards — matters which, until now, have not been specifically addressed in the rules.

Under the previous version of the rule, courts considered the adequacy of class counsel as part of the inquiry into the adequacy of the class representative required by Rule 23(a)(4). Newly added Rule 23(g) now provides a separate subdivision devoted entirely and expressly to the considerations for approval of class counsel. It requires that unless otherwise provided by statute (such as the Private Securities Litigation Reform Act[2]) counsel must be appointed when a class is certified and sets forth the class attorney's obligation to serve the interests of the class. The remainder of Rule 23(g) is devoted to the factors the court should take into account in appointing class counsel, and the procedures for making that appointment. Rule 23(g)(1)(C)(i) sets forth several criteria the court must consider in appointing class counsel, including: the work the attorney has done in identifying and investigating potential claims in the action; counsel's experience in handling both complex litigation and the type of claims asserted in the particular action, as well as his or her knowledge of the applicable law; and the resources that counsel will commit to representing the class. The rule further provides that the court may consider any other pertinent information and may direct putative class counsel to provide additional information, including proposed terms for the award of attorney's fees and costs. The Advisory Committee notes clarify that if the court concludes that no applicant would be a satisfactory class counsel, it may deny certification, recommend modification of an existing application, invite new applications, or make any other appropriate order regarding appointment of counsel.[3]

Rule 23(g)(2) governs the procedure the court must follow in making the appointment of class counsel. It authorizes the court to appoint interim counsel pending class certification. This rule also recognizes that different considerations come into play depending on whether there is a single applicant for the position of class counsel, as opposed to multiple, competing applications. Rule 23(g)(2)(B) provides that where there is more than one applicant, the court should appoint the applicant who is best able to represent the interests of the class. The Advisory Committee explains that this requires the court to go beyond merely assessing adequacy and requires a comparison of the relative strengths of the various applicants. Rule 23(g)(2)(C) specifically authorizes the court to include provisions regarding attorney's fees in the order of appointment, but the rule is silent on the practice of attorney's fee auctions or other ways in which the court might foster competition among potential applicants regarding attorney's fees.

In its report on the proposed rules, the

Judicial Conference Committee noted that "[t]he award of large attorney fees in the absence of meaningful recoveries by class members in some class actions brings the civil justice system into disrepute."[4] It went on to observe that although courts have taken it upon themselves to scrutinize even those fee arrangements that have been agreed to by the parties, up until now, the rules have offered little guidance in this area, resulting in some degree of inconsistency. New Rule 23(h) is designed to fill this void.

Reasonable Attorney's Fee

That rule provides that, where otherwise authorized by law, the court may order payment of reasonable attorney's fees in a class action after notice to all affected parties. Class members and any party from whom payment is sought may object to the proposed fee award, and, while a hearing is optional, the court must make findings of fact and state the legal conclusions upon which it bases any award. Rule 23(h) does not specify what factors the court should consider in determining the reasonableness of an award, but the Advisory Committee notes offer some guidance on this question. The notes explain first that the rule expresses no preference between the lodestar or percentage methods for determining fees and goes on to list a number of the factors that courts have considered in arriving at a reasonable fee award. Those factors include the result achieved for class members (although the committee, citing *Blanchard v. Bergeron*,[5] warns against placing undue emphasis on monetary recovery where other forms of relief are obtained or undue value on projected future recoveries); directions or orders made by the court in connection with the appointment of class counsel; and agreements between the parties concerning attorney's fees.

The prior version of Rule 23(c)(1) directed the court to render a decision on certification of the proposed class "[a]s soon as practicable after the commencement of an action. ..." Concerned that the "emphasis on dispatch" in this rule has in some circumstances made courts feel overly constrained in the period before certification, the amendment to Rule 23(c)(1) now provides for certification at an "early practicable time." The Advisory Committee notes explain that this amendment is designed to permit limited discovery on questions relevant to certification and how the case will be tried, as well as to permit consideration of certain dispositive motions and exploration of issues related to designation of class counsel. The revised Rule 23(c)(1) also emphasizes the flexible nature of certification, providing that an order granting or denying certification can be amended anytime up to a final judgment. This modifies the previous language permitting modification of a certification order up to a decision on the merits — which did not appear to authorize changes in class definition when such need only became clear in proceedings defining remedies after liability had been determined.

Rule 23(c)(2) has also been amended to clarify certain aspects of court ordered notice to class members. New language in Rule 23(c)(2)(A) makes explicit that the court has the discretion to direct "appropriate" notice to the class in an action certified under either 23(b)(1) or (2), under which there is no right to request exclusion, while 23(c)(2)(B) retains the previous requirement that the court must order notice to members of a 23(b)(3) class, in which class members have the right to opt out.[6] The Advisory Committee notes caution that the authority to direct notice to (b)(1) and (b)(2) class members should be "exercised with care" because, among other reasons, "[t]he cost of providing notice ... could easily cripple actions that do not seek damages." It further stresses that "appropriate" notice in such cases requires a flexible approach, observing that "[n]otice calculated to reach a significant number of class members often will protect the interests of all ... [and that] [i]nformal methods may prove effective." It instructs courts to consider the costs of notice in relation to the probable reach of inexpensive methods.

A key aspect of revised Rule 23 is its encouraging that, in certain cases, members of a 23(b)(3) class get a second chance to opt out of the class.

Settlement of Class Claims. The amendments to Rule 23(e) governing settlement or compromise of class claims reflect the growing awareness of the need for judicial oversight at this stage of class action proceedings. The former single-sentence rule governing settlement, which required court approval and notice to class members of any compromise of class claims, has been replaced by an extensive rule with seven separate subparts. In addition to requiring court approval, the new rule requires notice in a reasonable manner to all class members who would be bound, and makes mandatory the current practice that the court hold a hearing and make explicit findings that the settlement is "fair, reasonable, and adequate" before approval.[7] The Advisory Committee notes recognize that settlement review may require redefinition of the original class or designation of a new subclass, if the terms of or objections to the settlement "reveal divergent interests." In such cases, notice to new class members may be required under Rule 23(c). New Rule 23(e)(2) now requires disclosure of any side agreements that the parties have entered into and that may have influenced the terms of the settlement. Despite the increased emphasis on judicial supervision of settlements, the new rule contains no requirement for approval of settlements prior to certification — a requirement that the Committee considered, but ultimately rejected as unnecessary.

One of the most significant aspects of the revised Rule 23 is its encouragement that, in certain circumstances, members of a 23(b)(3) class be given a second opportunity to opt out of the class before a settlement is approved. Rule 23(e)(3) vests discretion with the court to reject a settlement "unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." This new rule recognizes that class members may be able to make a more informed and considered decision about remaining in, or opting out of a class if they know the terms of the settlement. The Judicial Conference Committee characterizes

this proposal as "introduc[ing] a measure of class-member self-determination and control that best harmonizes the class action with traditional litigation."

As a practical matter, separate notice to class members of the right to opt out at the settlement stage will only be necessary if the proposed settlement is reached after the class is certified and class members have already received notice of the certification and the right to opt out of the class. As the Advisory Committee notes point out, class actions are often settled early enough in the process that notice of class certification can be effectively combined with notice of the proposed settlement, requiring that class members be given only one opportunity to elect exclusion from the class. It notes that where settlement appears imminent at the time a class is certified, it may even be appropriate to delay notice of certification and the right to opt out of a 23(b)(3) class until settlement is reached and the specific terms are set.

This rule is clearly aimed at encouraging litigants to incorporate a second opt-out opportunity in agreements to compromise class actions. In those cases that do not provide a second opportunity to elect exclusion, the Advisory Committee suggests that the court's decision to approve or reject the settlement may be guided by factors such as the nature of the individual class members' claims or whether there have been changes in the information available to the class since expiration of the first opportunity to opt out of the class.

The final subparts of new Rule 23(e) confirm the right of any class member to object to a proposed compromise, and further require court approval if any such objection is withdrawn or abandoned. The Advisory Committee notes clarify that the inquiry required for such approval varies according to the nature of the objection and the circumstances of its withdrawal. For example, if an objection is withdrawn on terms that lead to a modification of the settlement, approval of the objection will follow automatically from consideration of the settlement itself. In addition, little inquiry may be required concerning withdrawal of an objection that a settlement is unfair to a particular class member "because of factors that distinguish the objector from other class members." The Advisory Committee also notes that objections that claim that a settlement is not fair, reasonable or adequate on grounds that apply to the class as a whole "may augment the opportunity for obstruction or delay." It advises that when such objections are withdrawn on terms that do not affect the settlement or the objector's participation in the class, extended inquiry may not be necessary.

Rule 51: Jury Instructions

The amendments also modify Rule 51, governing jury instructions, in several distinct ways. First, Rule 51(a) now expressly authorizes district courts to require submission of jury instructions prior to trial, replacing language in the previous version of that rule directing that requests to charge be submitted "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs." The new rule also permits a party to submit later requests on issues that could not reasonably have been anticipated at the earlier time set by the court for submission of proposed instructions. Under the amended Rule, the court must inform the parties not just of the action it intends to take (as required under the former rule), but also of all proposed instructions.

In addition, the rule modifies how objections to failure to give instructions may be lodged in order to preserve an objection for appeal. Previously, a party could assign error to an instruction only if it made a timely request for an instruction and then objected to the instruction given by the court. New Rule 51(d)(1)(B) dispenses with the requirement for an objection to the court's failure to give an instruction if the party made a proper request for that instruction, and the court made a definitive ruling rejecting that request. In all other cases, both a request and an objection are still required in order to preserve the issue for appeal, unless, as now explicitly provided by Rule 51(d)(2), the instruction constitutes plain error affecting a party's substantial rights.

Rule 53: Special Masters

Finally, the amended rules contain substantial revisions to Rule 53 governing appointment and use of special masters. The rule for the first time recognizes the growing practice of using masters for matters other than conducting trial (such as for managing complex pretrial litigation or in framing or enforcing a complex decree). At the same time, it also underscores that special masters should be used sparingly, and only with the consent of parties or in exceptional circumstances that specifically take into consideration the fairness of imposing on the parties the costs of paying the master. Rule 53(a)(1) abolishes the use of special masters for trial purposes for matters to be decided by a jury, unless the parties consent. In nonjury matters, the court may appoint a special master only if there is an "exceptional condition" or "the need to perform an accounting or resolve a difficult computation of damages." The rule goes on to detail the procedures for appointing special masters; the scope of their authority; how a party may object to a master's order, report, or recommendation; and how the master's compensation should be determined.

(1) March 27, 2003 Order of the United States Supreme Court amending the Federal Rules effective Dec. 1, 2003, 215 FRD 161 (2003).

(2) This language is designed to prevent a conflict between the general provisions for appointment of class counsel in Rule 23, and the specific procedures incorporated in the PSLRA which provide for the early appointment of lead plaintiff in securities class actions and, subject to approval by the court, vest in the lead plaintiff authority to retain lead counsel for the class. 15 USC §§77z-1(a)(3)(B), 78u-4(a)(3)(B).

(3) Civil Rules Advisory Committee Notes, reprinted in 215 FRD 158 (2003).

(4) Report of Judicial Conference Committee on Rules of Practice and Procedure, excerpts reprinted in 215 FRD 158 (2003).

(5) 489 US 87 (1989).

(6) Although the substance of the rule requiring notice to members of a 23(b)(3) class is effectively unchanged, the amended Rule contains an express directive that "notice must concisely and clearly state in plain, easily understood language" the nature and implications of the class action. The remainder of the amended Rule 23(c)(2)(B) is reorganized to emphasize the critical components of such notice, including the definition of the class; the class claims, issues or defenses; that a class member may enter an appearance through counsel; that a class member may opt out of the class; and that the class judgment will have a binding effect on the class members.

(7) Rule 23(e)(1)(A), (B) & (C).

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