Proskauer

2018 Amendments to Rule 23 – Summarized

Minding Your Business Blog on **December 13, 2018**

Effective December 1 of this year, Rule 23 of the Federal Rules of Civil Procedure – governing class action lawsuits – was amended. Among other things, the amendments modernize the rule with respect to electronic communications, set forth a more unified approach to approving settlements, and discourage bad faith objectors to class action settlements.

Proper Notice to Class Members Does Not Necessarily Mean a Trip to the Post Office

Prior to the 2018 amendments, the notice requirement for Rule 23 was relatively vague – requiring the "best notice that is practicable under the circumstances." Parties therefore have historically used traditional mail to provide notice to members. This method was slow, cumbersome, less precise, and more expensive.

With the December 1 amendments, it appears that Rule 23 is being adapted to account for modern methods of communication, with the advisory committee noting that "there is no reason to expect that technological changes will cease." The rule has been amended to allow notice through "electronic means, or other appropriate means." The broad nature of this language provides flexibility in the method of notifying class action members. Given the prevalence of social media, the acceptance of alternative methods of communication has the potential of capturing class members that would otherwise not have received notice. This change should be lauded as what it really is – an embrace of modern technology that provides an improvement to the legal process.

That being said, don't expect every class action notice to come through Facebook or Snapchat anytime soon. As part of the advisory committee's notes it was made clear that counsel will need to consider that class members in certain cases "may have limited or no access to email or the Internet." Therefore, at least for the near future, electronic notice will not completely replace the need for traditional mail.

A Unified Approach for Approving Settlements

Prior to the 2018 amendments, Rule 23(e)(2) required that the court approve a class action settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." This sort of balancing test language required courts to implement their own individual tests, with some judicial circuits having a dozen or more factors to consider. The end result was unpredictable, and the outcome of the settlement approval process could depend on where a case was being tried. Rule 23, as amended, attempts to clarify this requirement while providing a simpler and more uniform approach to the process.

The new language in Rule 23(e)(2) sets forth foundational considerations that courts are now directed to utilize when considering whether a settlement can be approved. These factors include:

- Whether the class representatives and class counsel have adequately represented the class;
- The proposal was negotiated at arm's length;
- The relief provided for the class is adequate;
- The proposal treats class members equitably relative to each other.

It is important to note that these are *factors* and that each factor can be weighed against the others. According to the advisory committee notes, it was the intention of the advisory committee to focus the courts' attention on core considerations during the approval process, and not to provide an exhaustive list. As provided in the notes, courts should also be vigilant of other factors, such as the nature and scope of discovery and whether a neutral mediator was used.

Reducing Bad Faith Objectors

Proper objections to proposed settlement agreements are an important part of the class action process, and are intended to protect the interests of class members. Bad faith objectors, or "professional objectors," however often file frivolous objections in an attempt to receive compensation for the withdrawal of their objection. The 2018 Amendments to Rule 23 attempt to discourage this practice by implementing new requirements on objectors.

Objectors must now “state with specificity” the grounds for any objection and whether the objection applies “only to the objector, to a specific subset of the class, or to the entire class.” In addition, “unless approved by the court…no payment or other consideration may be provided” for withdrawing an objection. These two new requirements, taken together, are intended to ensure that good faith objections are heard while simultaneously discouraging bad faith objectors.

Conclusion

The ultimate impact of these changes is yet to be seen, but one could expect an increase in uniformity during the approval process, as well as a transition from “snail mail” to electronic notice. For the complete 2018 amendments to Rule 23 please refer to the Federal Rules of Civil Procedure.

View Original