Rule 23 Subcommittee Narrows Possible Rules Changes

Andrew J. McGuinness, Esq. – October 30, 2015

In its recent submission as part of the agenda book for the upcoming November 5–6 meeting in Salt Lake City of the Advisory Committee on Civil Rules of the Judicial Conference, the Rule 23 Subcommittee has announced that after more than three years of study and one of the most energetic efforts in recent history to solicit input from the bar and other interested stakeholders, it is narrowing the scope of possible proposed amendments to Federal Rule 23 and associated rules. Before we look at what's still in, let's look at what's out.

What's Out

The Rule 23 Committee Subcommittee most visibly began its campaign to solicit input from the class action bar on possible rule changes at the October 2014 ABA National Institute on Class Actions in Chicago, where the full subcommittee, chaired by Judge Robert Dow, of the U.S. District Court for the Northern District of Illinois, appeared. Other members of the subcommittee include Professor Roger Marcus (reporter) of the University of Hastings Law School in San Francisco; Professor Robert Klonoff of Lewis and Clark Law School in Portland, Oregon; Elizabeth Cabraser of Lieff, Cabraser, Heimann & Bernstein in San Francisco; and John Barkett of Shook Hardy & Bacon's Miami office.

Over the next eleven months, the subcommittee solicited input at numerous meetings, including the Impact Fund class action conference in Berkeley, California, in February 2015 and the ABA Section of Litigation CADS Regional Meeting in San Francisco in June 2015. The subcommittee's process of gathering input from academics, class action attorneys, and consumer and business groups culminated in a "mini-conference" in Dallas in September 2015. They have now decided to not pursue rules changes at present in the following areas:

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- Issue classes
- Ascertainability
- "Pick-off" settlement offers (e.g., Rule 68)
- Cy pres

The Subcommittee has concluded that these topics "no longer seem to support immediate activity." The reasons articulated for dropping these topics for continued consideration in the current review cycle are set forth in the subcommittee's November agenda book report. In this writer's interpretation, they include:

Issue classes. With the Fifth Circuit's recent backing away from language in its earlier *Castano v. Amer. Tobacco Co.,* 84 F.3d 734 (5th Cir. 1996), decision that a Rule 23(c)(4) issues class could not "create" the predominance that a full-fledged Rule 23(b)(3) damages case otherwise lacks by isolating a given issue—even one that would "materially advance the resolution of multiple civil claims" as identified by the 2010 ALI Principles of the Law of Aggregate Litigation (*see* §§ 2.02 & 2.03)—and the pronouncements of several other Circuit Courts of Appeal that indicate that *Castano* is not the law—there appears to be an evolving consensus on this topic, such that further subcommittee work is not warranted at present.

Ascertainability. This, along with the Rule 68 "pick-off" settlement offers topic, are described as being placed "on hold." The Third Circuit has recently appeared to soften the strictness with which the implied ascertainability requirement set forth in its earlier *Carrera vs. Bayer* decision is applied. Perhaps more importantly, other Circuit Court of Appeals (including the Seventh Circuit) have rejected an extension of the traditional ascertainability test (i.e., that the class be defined by objective criteria that does not include a conclusion of liability) beyond the confines of Rule 23(b)(3)'s express manageability test, see [], the subcommittee appears to have concluded that further work on a proposed rule change on this issue may be either premature or unnecessary.

Rule 68 "pick-off" settlement offers. This issue, too, has been placed on hold, in light of its pendency before the Supreme Court in *Campbell-Ewald v. Gomez,* which was argued October 7, 2015.

Cy pres. This has been a hot topic since Chief Judge Roberts issued an opinion in connection with the Court's decision not to grant certiorari in [case]. Public interest organizations, in particular (who sometimes benefit from cy pres awards) have a keen interest in the topic, as do plaintiffs lawyers who recognize that there are frequently valid class claims (meaning a claim that the defendant violated a legal standard for which a private right of action is provided and profited thereby) for which it will be difficult or impossible to distribute a judgment or settlement to individual class members in a cost-effective manner. While the subcommittee's comment in the November agenda book report is somewhat vague, the best guess may be that it concluded this is an

area already on the Supreme Court's radar with which the lower courts, academics, and other interested stakeholders are already grappling, such that any rules change ought to wait. Alternatively, one could make the argument that this is a substantive issue more than a procedural one properly within the scope of the civil rules.

What's Still in Play

To emphasize a point that the subcommittee repeats often: One should *not* presume that it will recommend *any* proposed rule change. Nonetheless, predicting (or at least reading the tea leaves) is good sport. With appropriate caveats (insert your favorite Yogi Berra quote here), it looks like a relatively safe bet that the subcommittee will develop one or more proposed rules changes in one area in particular: settlement classes.

Beyond the observation that this topic has received a lot of attention in the past few years, this is the safest bet out there for two reasons: (a) this has been an area in which both the plaintiff and defense bar have been vocal in clamoring for change; and (b) of the specifically identified topics (arguably, sub-topics) that the subcommittee lists in its November agenda submission as still on the front burner, no fewer than *five* relate to class settlements:

1. Elaborating the information that the parties must submit to the district court with a settlement proposal (so-called, "frontloading");

2. Elaborating the information that class members must be given in connection with a proposed class settlement;

3. Addressing bad-faith objections to class action settlements—and especially "payoffs" to objectors;

4. Settlement approval criteria; and

5. Clarifying that preliminary approval of a settlement class is not immediately appealable under Rule 23(f) (an issue that split a Third Circuit panel).

Additionally, the subcommittee considered a separate category for settlement classes (with their own criteria), e.g., Rule 23(b)(4) classes. However, there appears to be marked ambivalence among the subcommittee as a whole on this topic. The report notes: "After the [September 11 Dallas] mini-conference, the Subcommittee initially decided that the potential difficulties of proceeding with a new Rule 23(b)(4) on settlement class certification outweighed any benefits in doing so. . . . Further reflection prompts the Subcommittee to bring this question before the full Committee." Interesting. The topic of settlement classes is being presented to the full Advisory Committee "without recommendation" by the subcommittee, whose report mentions as a possible alternative to a new sub-rule that discrete changes to Rule 23(b)(3) could be proposed.

However, the tweaking of Rule 23 regarding settlements in the bullet points listed above are moving forward, largely to be routed

though possible proposed changes to Rules 23(e) and (f). The report extensively deals with the issue of objectors, and the other items. If these topics are important to your practice, the subcommittee's November agenda book report is worth a read.

Additionally, the subcommittee is moving forward on separate possible rule change: electronic notice.

Thankfully, the subcommittee appears prepared to proffer a proposed rule amendment to Rule 23(c)(3), Notice, regarding the district court's discretion to determine the form of notice under the circumstances of each case. The effect of the proposal (if approved), would be explicitly to give the district court discretion to order notice through means other than first-class mail (i.e., even if addresses are known). The language contained in the report reads as follows:

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) *Notice*

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(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort.

* * * * *

This is a welcome proposal. It would constitute a modest rule change and restore the discretion that the rule's language originally gave the district court over the method of notice. Postage costs far exceed electronic notice in almost all instances. And while nothing in the current rule explicitly requires first-class mail notice, the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974), that the rule's requirement for the "best notice practicable" (clearly a flexible formulation) mandates notice by first-class mail if addresses are known, effectively stunted that discretion. (*Eisen* relied on prior Supreme Court precedent that, like *Eisen* itself, involved substitution of publication notice for individual mailed notice.)

It is obvious that the technology of communication has changed drastically in the Internet age; we are living in a post-*Eisen* world. A number of courts have authorized email-only notice in appropriate cases, but they have done so in the teeth of *Eisen's* language (stating that Rule 23(c)(2)'s admonition of "best notice" was "mandatory"). No doubt other district courts have been reluctant to do so. One can easily imagine cases where their

reluctance is correct, e.g., cases were class member's claims have significant monetary or non-monetary value in relation to postage costs. But it is just as easy to imagine cases where the opposite is true (e.g., modest per-member claims against a defendant whose communications with its customers have been exclusively online or by email). The variables are limitless. The subcommittee's preference for restoring the district court's discretion in this area holds out the promise of saving class members and defendants (collectively) millions of dollars in large class actions—and many times this amount in the aggregate—in unnecessary notice costs.

One wonders whether the proposed rule change goes far enough. While the draft change calls out "electronic notice" as an acceptable alternative and introduces the concept of "most appropriate means," it maintains and does not directly resolve the tension between "best notice" and "practicable" that the Court resolved in *Eisen* in favor of "best" (rejecting an interpretation of "practicable" urged by plaintiffs in that case as meaning "economically justified.") But the draft advisory committee notes (see report) go a distance toward closing the gap.

Timeline

According to its recent report, "The Subcommittee is still contemplating a schedule that would permit publication of preliminary drafts of rule amendments in August, 2016."

Concluding Observation

As someone who has witnessed (and provided input at) several of the subcommittee's public presentations and read several of its reports, I feel compelled to call attention to the impressive effort by all subcommittee members, under the leadership of Judge Dow and the tireless and seemingly unbounded historical perspective and insights of Professor Marcus, to thoroughly beat the bush and vet the issues. Even if no proposed rules changes are ultimately proffered, the process will have confirmed an observation recently made by subcommittee member Professor Klonoff in an article published October 7, 2015, in the Emory Law Review: that most practitioners and courts feel that Rule 23 is structurally sound and working well in its essential elements. All of us in the bar—especially class action practitioners such as members of the Section of Litigation's CADS Committee—owe them a debt of gratitude for their tireless, possibly otherwise thankless, efforts. (NB: I says this with some personal knowledge, as I witnessed Judge Dow catching the redeye back to Chicago last June the same day he had flown to San Francisco for our regional class action conference.)

Kudos!

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