Rule 23 Proposed Changes *En Route*

Andrew J. McGuinness – February 29, 2016

In early January 2016 at its meeting in Phoenix, the Standing Committee on Rules of Practice and Procedure received a progress report from the Hon. John D. Bates, chair of the Advisory Committee on Civil Rules, regarding the work of the Civil Rule 23 Subcommittee, which has been mulling possible class action rule changes since roughly 2011. The December 11, 2015,written report is part of the agenda book for the January 7–8, 2016, meeting (see pages 189–310 of the agenda book).

Based on review of the materials and recent conversations with members of the subcommittee and others familiar with its work, it now appears likely that the subcommittee will be in a position to deliver a proposed set of rule changes sometime this summer—possibly as early as mid- to late June 2016. As articulated by Judge Bates in the December 11, 2015, report to the standing committee, the possible subjects for rule changes actively under consideration are the following:

> 1. "frontloading" in Rule 23(e)(1), requiring information relating to the decision whether to send notice to the class of a proposed settlement;
>
> 2. making clear that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f);
>
> 3. making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice does trigger the opt-out period in Rule 23(b)(3) class actions;
>
> 4. updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions;

News & Analysis

- Practice Points
- Articles
- Audio
- About
- Announcements
- Programs & Materials

Newsletter

» Summer 2018

Read More CADS Newsletters

Section Publishing

Section of Litigation Publications

Section of Litigation Books

CLE & Events

Aug. 07 **Deposition Bullies: Tips for Spotting Them and Stopping Them** Web

Aug. 14 **The Roberts Court 2017-18** Web

Aug. 22 **While You Were Sleeping: Ever-Changing Cybersecurity Threats and What You Need to Know Now**

> 5. addressing issues raised by "bad faith" class action objectors; and
>
> 6. refining standards for the approval of proposed class action settlements under Rule 23(e)(2).

As of this writing, there are several relatively "safe" bets as to what the proposal will contain, and two more or less open issues. Here's the scoop.

What's (Probably) "In"

> **Settlement class procedures rule changes.** This topic has received a lot of attention in the past few years and is a safe bet for proposed rule changes. This has been an area in which both the plaintiff and defense bar have been vocal in calls for change, and it includes topics previously identified by the subcommittee back in November as still on the front burner, to wit:
>
> • elaborating the information that the parties must submit to the district court with a settlement proposal (so-called frontloading),
>
> • articulating more uniform settlement approval standards, and
>
> • clarifying that preliminary approval of a settlement class is not immediately appealable under Rule 23(f) (an issue that split a Third Circuit panel).

With respect to frontloading, the "sketch" of a newly revised Rule 23(e) includes a new subdivision (1)(A) as follows:

> The parties must provide the court with sufficient information to enable it to determine whether to give notice to the class of the settlement proposal. December 11, 2015, Advisory Committee Report at 5 (January 7–8, 2016, agenda book at 193).

This makes explicit what most practitioners and judges have understood for many years, that in order to achieve "preliminary approval" (a phrase not found in Rule 23 and disapproved in the draft advisory committee note) of a settlement class, the court needs "sufficient information." That information must include a showing that the requirements for certification of a settlement class can be met, as well as "the extent and nature of benefits that the settlement will confer on the members of the class." In addition, it will often be appropriate to provide "details on the

Web

More Section Events

Committee Leadership

Cochairs
Jennifer Bechet
Fabrice Vincent
Louis F. Burke

Emerging Issues Web Editors
Robert J. Herrington
Manfred Muecke
E. Colin Thompson
Teresa Michaud
Jeffrey Mandell
David D. Garner

Webpage Editor
Jennifer L. Mesko

Newsletter Editors
Ben Seesell
Matthew Stein
Ashley Trehan
Joshua Levy
Jonathan D. Uslaner

Committee Membership

Membership Roster

How-to Guide: Sorting Committee Membership Roster by Geography

nature of the claims process that is contemplated." A discussion of the possible range of litigated outcomes, the scope of the release, and other litigation by class members are additional topics identified in the draft advisory committee note. It is difficult to discern how this updated rule will not simply reflect current practice. Of course, this is a worthwhile change just the same. The proposed rules will also likely attempt to make more uniform the various articulations of what the overarching "fair, reasonable, and adequate" standard of Rule 23(e)(2) means. For those of us with a national practice, this is particularly welcome, given that the various circuit courts of appeals have generated divergent lists of criteria. The current sketch of a modified Rule 23(e)(2) reads as follows:

> If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the settlement was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required;
>
> (iii) the terms, including timing of payment, of any proposed attorney fee award; and
>
> (iv) any agreement made in connection with the settlement proposal;
>
> and
>
> (D) class members are treated equitably relative to each other.

December 11, 2015, Advisory Committee Report at 16–17 (January 7–8, 2016, agenda book at 204–5).

Other likely changes relating to settlement are more technical. A revision to Rule 23(f) is likely to clarify that a decision to send notice of a proposed class settlement under Rule 23(e)(1) does not authorize an interlocutory appeal (because, by definition, no

decision whether or not to certify will have been made at that point).

> **Electronic notice.** A proposed change to Rule 23(c)(3), Notice—which applies both to trial classes and settlement classes—would clarify the district court's discretion to determine the appropriate form of notice under the circumstances of each case. The proposal, if approved, would explicitly give the district court discretion to order notice through means other than first-class mail, even if addresses are known. The following language is suggested by the subcommittee:
>
> **(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses**
>
> * * * * *
>
> **(2)** ***Notice***
>
> * * * * *
>
> **(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 United States mail, electronic means or other appropriate means—to all members who can be identified through reasonable effort. * * * * *

December 11, 2015, Advisory Committee Report at 9 (January 7–8, 2016, agenda book at 197).

This welcome proposal would constitute a modest rule change, yet 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 held in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974), that the rule's requirement for the "best notice practicable" mandates notice by first-class mail if addresses are known, effectively restricting that discretion. 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 in which their

reluctance is correct, e.g., cases in which class members' claims have significant monetary or non-monetary value in relation to postage costs. But it is just as easy to imagine cases in which 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 prospect of 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 means" as an acceptable alternative and introduces the concept of "other 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 the plaintiffs in that case as meaning "economically justified"). But the draft advisory committee notes (see pages 9–10 of the report (pages 197–98 of the agenda book)) go a fair distance toward closing the gap.

Definite "Maybes"

There are two areas of possible rule changes that are up in the air (for different reasons) as of this writing: "pick-off" settlement offers to namd representatives (e.g., Rule 68) and rules governing objectors.

> **Pick-off settlement offers.** This topic had been placed "on hold" by the advisory committee in November in view of a case pending before the Supreme Court, *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015). However, on January 20, 2016, the Supreme Court issued its ruling in *Gomez*, holding that an unaccepted Rule 68 offer could not deprive the district court of jurisdiction under the Article III mootness doctrine. However, the Court expressly stopped short of resolving the case—not presented in *Gomez*—where a defendant was somehow to "tender" full payment to the plaintiff (e.g., through the court clerk) and the district court had entered judgment upon that payment.
>
> This limitation in the scope of the decision—amplified by the dissenting opinion—has lead a number of class action defense blogs to counsel or predict a different outcome based on a "tender" strategy. If this advice is followed, district courts will soon be faced with the

issue left open by *Gomez*. Moreover, the advice itself will likely spur plaintiffs' counsel to again file so-called *Damasco* motions for class certification on the heels of their class complaints—leading to further disarray. (*Damasco* motions are so-called after the Seventh Circuit's opinion in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), which recommended filing class certification motions with the complaint to avoid pick-off settlement offers.)

With the original reason for the advisory committee's withdrawal of the "pick-off" issue from the agenda now having evaporated, there is a basis and perhaps even a need for the subcommittee to revisit this issue—notwithstanding the reluctance of rule drafters to step in quickly after a major Supreme Court decision (*cf. Amchem*). Given this turn of events, the status of the pick-off issue appears up in the air, at least for moment.

Rules governing objectors. You might wonder why this topic is in the "maybe" category. After all, Judge Bates identified it in the advisory committee's December 11 report as a likely topic for a rule change. According to one attendee at the Phoenix meeting in January, however, of all of the potential rule change topics, this one drew the most attention from the standing committee members. Given the standing committee's disproportionate interest in this issue, the tea leaves are somewhat murky.

The advisory committee (based on the subcommittee's recommendation) favors the "simple" rule change of two alternative possible rule changes to address so-called "bad faith" objectors, in the form of a revised Rule 23(e)(5):

(A) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and state with specificity the grounds [for the objection].

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an

objector or objector's counsel in connection with:(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal [despite the objection].

Essentially, this is a minimal daylight provision. The longer alternative—available in the January agenda book—involves coordinate changes in implicated Federal Rules of Appellate Procedure. While the sketch quoted here is still on track, given the intense interest of many members in this topic, its path seems less certain. Will the advisory committee (or the standing committee) eventually move toward more aggressive rule changes? And if this occurs, will a push-back drive the committees to delay consideration of *any* rule change on this point until a future date?

What's (Still) Out

At its November 2015 hearing, the advisory committee approved the subcommittee's decision to "remove" the following items from consideration for rule changes: issue classes, ascertainability, and cy pres.

The reasons articulated for dropping these topics from continued consideration in the current review cycle are set forth in the subcommittee's report in the November 5–6, 2015, agenda book (see Rule 23 Subcommittee Report at 3–5, (agenda book at 89–91)). In a nutshell, the reasons are as follows:

Issue classes. There appears to be an evolving consensus on this topic, such that further subcommittee work is not warranted at present, with the Fifth Circuit's recent retreat from its statement in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), that 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 appeals that indicate that *Castano* is not the law.

Ascertainability. This topic is described as being placed "on hold." In *Byrd v. Aaron's, Inc.*, 784 F.3d

184 (3d Cir. 2015), the Third Circuit recently appeared to soften the strictness with which the implied ascertainability requirement set forth in its controversial decision in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013),is applied. As importantly, other circuit courts of appeals have rejected *Carrera*'s extension of the traditional ascertainability test (i.e., that the class be defined by objective criteria that do not include a conclusion of liability) beyond the confines of Rule 23(b)(3)'s express manageability test. *See, e.g.*, *Rikos v. P&G*, 799 F.3d 497 (6th Cir. 2015) ("We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts.") (citing *Mullins v. Direct Dig.*, 795 F.3d 654 (7th Cir. 2015)). In light of this state of affairs, the advisory committee appears to agree that further work on a proposed rule change on this issue may be either premature or unnecessary.

Cy pres. This has been a hot topic since Chief Justice Roberts issued an opinion in connection with the Court's decision not to grant certiorari in *Marek v. Lane*, 134 S. Ct. 8 (2013). Public interest organizations (which sometimes benefit from *cy pres* awards) in particular 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. The advisory committee noted that certiorari petitions continue to be filed on *cy pres* issues but seemed to put more weight on a possible evolving consensus based on the ALI's *Principles of Aggregate Litigation*, in section 3.07, regarding appropriate conditions for provision of a *cy pres* award. The advisory committee noted:

One question is whether there is any need for a rule in light of the widespread adoption of the ALI approach. It is not clear that any circuit has rejected the ALI approach, and it is clear that several have adopted it.

December 11, 2015, Advisory Committee Report at 25 (January 7–8, 2016, agenda book at 213).

Obligatory Disclaimer

To emphasize a point that the advisory committee repeats often, one should *not* presume that it will recommend *any* proposed rule change.

Timeline

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

Subcommittee Members

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules is chaired by Judge Robert Dow of the U.S. District Court for the Northern District of Illinois. Its other members include Judge Gene Pratter of the U.S. District Court for the Eastern District of Pennsylvania, 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. Professor Richard Marcus of the University of California Hastings College of the Law in San Francisco is the subcommittee's reporter.

Concluding Observation

As we cheer them on to the finish line, all of us in the bar—especially class action practitioners such as members of the Class Actions and Derivative Suits Committee—owe the subcommittee and other advisory committee members and reporters a debt of gratitude for their tireless efforts. The focus and hard work of academics, judges, and practitioners like them over the past 50 years of modern Rule 23's history (since the 1966 adoption of Rule 23(b)(3)) have been essential to the rule's continued vitality. Godspeed!

Keywords: litigation, class actions, derivative suits, Rule 23, rules changes

Andrew J. McGuinness is an attorney in Ann Arbor, Michigan.