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CLASS ACTIONS

Following A Ten-Year Study By The United States Judicial Conference Advisory Committee On Civil Rules, A Series Of Amendments To Federal Rule Of Civil Procedure 23, Which Governs Class Actions, Were Adopted.

The objective of the Rule 23 amendments adopted by the United States Supreme Court and which have been in effect for a year, was “to provide the district courts with the tools, authority, and discretion to closely supervise class-action litigation.”¹ The amendments made several significant procedural changes to the previously existing Rule,² some of which have been interpreted by the courts.

Timing of Certification. Revised Rule 23(c)(1)(A) provides that the decision as to whether to grant class certification must be made “at an early practicable time,” as opposed to “[as] soon as practicable” under the prior rule. The amendment relaxes the sense of urgency surrounding the certification process and conforms the rule to the realities of existing practice in class action litigation.

As the Advisory Committee noted, “[t]ime may be needed to gather information necessary to make the certification decision.” Since the amended Rule came into effect, courts have referred to this amendment and the corresponding Advisory

Committee notes in allowing discovery to proceed prior to determining the certification issue.³

Conditional Certification. The revised Rule does away with the provision that permitted conditional certification. The Committee notes state that a court “not satisfied that the requirements of Rule 23 have been met” simply should “refuse certification until they have been met.” Nevertheless, under revised Rule 23(c)(1)(C), a certification “may be altered or amended before final judgment.” Previously, the Rule provided that the certification order could be amended “before a *decision on the merits*.” The amended Rule clarifies the ambiguity caused by this phrase, making clear that the amendment may take place at any time prior to entry of final judgment.

Invoking Rule 23(c)(1)(C), one court has held that de-certification was appropriate more than seven years after the original certification order was entered due to “new developments in the litigation.”⁴ Plaintiff had conceded that the number of class members was no greater than ten and that most of these class members already had filed individual actions. The court, therefore, held that the class was not large enough to warrant certification under Rule 23(a)(1)⁵ and there was no evidence that the class members were so geographically dispersed that joinder, rather than class certification, was impractical.

Discretionary Notice to Classes Certified under Rule 23(b)(1) and (2). Rule 23(b)(1) and (2),

respectively, address the creation of two types of classes: (1) where the “prosecution of separate actions by individual members of the class would create a risk of” “inconsistent or varying adjudications with respect to individual members of the class,” or “adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;” and (2) where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”

Revised Rule 23(c)(2)(A) states that the “court may direct appropriate notice to” Rule 23(b)(1) and (b)(2) classes, thereby establishing the court’s discretionary authority to do so. The prior Rule did not specifically address the notice requirement with respect to Rule 23(b)(1) or (2) classes. The Committee recognized in its notes that courts should exercise care in determining whether notice should be provided because the cost of notice “could easily cripple actions that do not seek damages.” Accordingly, the “court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.”

Appointment of Class Counsel. Unlike prior Rule 23, the amended Rule specifically addresses the appointment of class counsel. The amended Rule creates new subsection 23(g), which sets forth the procedure the court must follow in selecting counsel and the substantive criteria courts are to consider. The Committee notes explain that subsection (g) “responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action.” Appointment of class counsel is similar to the procedure that has been in effect for a number of years whereby liaison counsel are appointed in multidistrict litigation proceedings.⁶

Rule 23(g)(1)(C)(i) provides that the court must consider several factors in appointing class counsel: (1) the work counsel has done in

identifying or investigating potential claims in the action, (2) counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (3) counsel’s knowledge of the applicable law, and (4) the resources counsel will commit to representing the class. The court also may consider “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class” and “may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs.”⁷

In applying these factors, courts welcome submissions by counsel seeking appointment as class counsel, including briefs, declarations and other documentation establishing their ability to effectively represent the class.⁸ Of particular importance to courts in appointing class counsel is counsel’s experience with and knowledge of the law applicable to the action, and counsel’s financial resources to prosecute the case. Large scale class actions often require class counsel to invest significant sums of money prosecuting the case before reaching a verdict or, more typically, a settlement.⁹

Award of Attorney Fees. The amendments create new subsection 23(h), which governs the award of attorney fees and expressly provides the court with authority to “award *reasonable* attorney fees and nontaxable costs that are authorized by law or by agreement of the parties.” The new subsection provides that a “class member, or a party from whom payment is sought, may object” to a motion for fees and that the “court may hold a hearing and must find the facts and state its conclusions of law on the motion.” The Rule, however, does not set forth a specific method for calculating the fee, stating simply that the fee must be “reasonable.” Both the lodestar method (number of hours billed multiplied by appropriate hourly rate) and the percentage method (fee calculated as a percentage of the recovery in the class action) are deemed appropriate methods to calculate attorney fees under subsection 23(h).¹⁰

Second Chance to Opt Out of Settlement. Subsection (e)(3) of the amended Rule authorizes the court to decline approval of a settlement unless a new opportunity to request exclusion is provided

to “individual class members who had an earlier opportunity to request exclusion but did not do so.” According to the Committee notes, the court may consider numerous factors in making its determination, including “changes in the information available to the class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members’ claims.” One of the concerns raised by this amendment is the increased uncertainty that a large number of class members will opt out after discovery is completed, causing defendants to reduce their settlement offers to account for claims that may not be resolved as a result of the second opportunity to opt out. At least one court has declined to exercise its option to direct a second opt out opportunity under the amended Rule.¹¹

Settlement of Pre-Certification Actions. Amended Rule 23(e)(1)(A) provides that “[t]he court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a *certified class*,” as opposed to the prior Rule, which provided that a “*class action* shall not be dismissed or compromised without the approval of the court.” Under the prior rule, the reference to “a class action” was interpreted by some courts to require court approval of all settlements where class allegations were present, even pre-certification.¹² The amended Rule makes clear that a settlement must not be approved by the court if the class allegations are withdrawn as a result of a pre-certification settlement that resolves only individual claims. This is because the pre-certification settlement does not bind the putative class members that have not agreed to the settlement.

Applying Rule 23(e)(1)(A), one court denied a non-settling putative class member’s request that the court disallow settlement of the named plaintiffs’ individual claims prior to certification.¹³ The court reasoned that the amended rule “makes it clear that the Rule’s requirement of court approval applies only to settlements ‘of the claims, issues, or defenses of a *certified class*,’” and noted that the remaining putative class members because each was “perfectly free to file his or her own lawsuit, unimpaired in any way by the settlement of the individual claims of the named plaintiffs.” “Moreover, because the statute of limitations is

tolled for absent class members while a case is pending . . . the claims of the absent class members will not be impaired in any way by the settlement or by the passage of time between the filing of the case and its disposition.”

Agreements Made in Connection with Settlement.

New subsection (e)(2) of the Rule requires the parties to a settlement to “file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.” The committee notes state that the purpose of the amendment is to notify the court of any “related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others.”

In sum, overall, amended Rule 23 is viewed as beneficial to the administration of class actions and potential class actions.

Second Circuit Holds That District Court’s Creation Of “Opt in” Class Oversteps Bounds Of Rule 23 In *Kern v. Siemens Corp. et al*, No. 04-0957, __ F.3d __ (2d Cir. Nov. 2, 2004).

The Court of Appeals for the Second Circuit recently declined to sanction a lower court’s attempt to create a so-called “opt in” class of heirs, beneficiaries, and personal representatives of individuals killed in a ski train fire in Kaprun, Austria.

On November 11, 2000, a ski train caught fire inside a tunnel near Kaprun Austria and caused the death of 155 passengers and crew members. The victims included ninety-two Austrians, thirty-seven Germans, ten Japanese, eight Americans, four Slovenians, two Dutchmen, a Briton and a Czech. The family members of the American victims filed lawsuits in the United States, which ultimately were transferred by the Judicial Panel on Multidistrict Litigation to the Southern District of New York “for coordinated or consolidated pretrial proceedings.”¹⁴

Plaintiffs’ amended complaint alleged that the train and tunnel were improperly designed, constructed, maintained and negligently operated and promoted. The amended complaint also alleged

that certain defendants fraudulently misrepresented the safety of the train and of the tunnel, and intentionally inflicted emotional distress.

As relevant to the class action issue, plaintiffs brought their claims “on their own behalf, and on behalf of a class of heirs and representatives of victims” of the tragedy “who consent in being included as members of the class.” This class was intended to include the heirs and beneficiaries of foreign victims. Plaintiffs moved the district court to certify this class pursuant to Rules 23(b)(2) and 23(b)(3).

The district court certified the class to resolve “liability issues only” and stated that the class would consist of “all heirs, beneficiaries and personal representatives of all individuals who died in the fire who consent to inclusion.”¹⁵ The district court stated that it certified “an ‘opt in’ class, as opposed to the traditional Rule 23(b)(3) ‘opt-out’ class,” “because participation in the class requires prospective members to take affirmative action” by consenting “to be bound by the judgment.”

Defendants appealed, arguing that Rule 23 does not permit certification of a class with an “opt in” provision. The Court of Appeals agreed, reversed and instructed the district court to deny plaintiffs’ motion for class certification.

The Court of Appeals noted that, while Rule 23 contains an “opt-out” provision requiring courts to provide members of a class with the opportunity to be excluded from a class, it does not contain a provision that requires a class member to opt into membership. The Court further noted that the 1996 Advisory Committee on Civil Rules rejected the notion of an “opt in” provision because of the fear that it would result in under-inclusion in the class.¹⁶ The Court also noted that courts generally have held that “opt in” provisions are contrary to Rule 23¹⁷ and have even rejected the use of class member questionnaires, “precisely because they may constitute a de facto ‘opt in’ provision.”¹⁸

The Court expressly rejected the district court’s attempt to analogize the procedures contained in Rule 23 with those of the Fair Labor Standards Act (FLSA),¹⁹ which provides that

judgments arising out of FLSA actions are binding only upon those that affirmatively assent to class membership. The Court reasoned that application of FLSA standards was inappropriate because the district court was “asked to certify a class under Rule 23, not under the FLSA.” Equally inappropriate was the district court’s reference to its “equitable powers” to certify an “opt in” class. The Court of Appeals held that the court’s ability to certify a class is limited to those cases in which *all* of the requirements of Rule 23 are met. Plaintiffs did not demonstrate that the facts of the case warranted class certification under Rule 23. The Court of Appeals, therefore, held that the lower court exceeded its discretion by creating a “new rule of civil procedure” that far exceeded the confines of Rule 23, the “exclusive route to forming a class action.”

Artful pleading on the part of plaintiffs’ counsel cannot supplant the express requirements of Rule 23.

Endnotes

¹ Memorandum from Judge Anthony J. Scirica, Chair of the Judicial Conference’s Committee on Practice and Procedure, to the Chief Justice and Associate Justices of the United States Supreme Court (Nov. 18, 2002).

² In full, Fed. Rule Civ. P. 23 (a) and (b) state:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (b) adjudications with respect to individual members of the class which

would as a practical matter be dispositive of the interests of the other members not parties to the to the adjudication or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

³ See, e.g., *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004) (allowing controlled discovery and directing district court to look beyond the pleadings in making certification decision).

⁴ *Barner v. City of Harvey*, 2004 WL 2092009 (N.D. Ill. Sep. 15, 2004).

⁵ Rule 23(a)(1) provides in pertinent part that a class must be “so numerous that joinder is impracticable.”

⁶ See 28 U.S.C. 1407.

⁷ Fed. Rule Civ. P. 23(g)(C)(ii) and (iii).

⁸ See *Kerr v. Holsinger*, 2004 WL 882201 (E.D. Ky. Mar. 25, 2004).

⁹ See *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672 (S.D. Fla. 2004); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

¹⁰ See, e.g., *In re Worldcom, Inc. ERISA Litig.*, 2004 WL 2338151 (S.D.N.Y. Oct. 18, 2004).

¹¹ See *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp.2d 503 (E.D.N.Y. 2003).

¹² See *Held v. Missouri Pac. R.R. Co.*, 64 F.R.D. 346 (S.D. Tex. 1974).

¹³ *Daniels v. Burse*, 2004 WL 2358291 (N.D.Ill. Oct. 21,

2004).

¹⁴ *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 175 F. Supp. 2d 1379 (J.P.M.L. 2001).

¹⁵ *In re SkiTrain Fire in Kaprun, Austria on November 11, 2000*, 220 F.R.D. 195 (S.D.N.Y. 2003).

¹⁶ Citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1996 Amendment of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356 (1967).

¹⁷ Citing *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974); *Enterprise Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325 (S.D.N.Y. 1980).

¹⁸ Citing *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986); *McCarthy v. Paine Webber Group, Inc.*, 164 F.R.D. 309 (D.Conn. 1995).

¹⁹ Right of Action under FLSA is set forth at 26 U.S.C. 216.

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