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# New Amendments to Federal Rule 23: Impact on Class Action Practice

Revisions to Preliminary Approval, Notice Requirements, Settlement Approval,  
Class-Member Objections, and Appeals

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WEDNESDAY, FEBRUARY 13, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Wystan M. Ackerman, Partner, **Robinson & Cole**, Hartford, Conn.

John M. Barkett, Partner, **Shook Hardy & Bacon**, Miami

Alexandra S. (Xan) Bernay, Partner, **Robbins Geller Rudman & Dowd**, San Diego

Gary E. Mason, Founding Partner, **Whitfield Bryson & Mason**, Washington, D.C.

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# The 2018 Amendments to Rule 23

Wystan M. Ackerman

John M. Barkett

Alexandra S. (Xan) Bernay

Gary E. Mason

# RULEMAKING PROCESS

- Amendments adopted in April 2017 by the Advisory Committee on Civil Rules and approved by the Standing Committee on Rules in June 2017.
- In September 2017, the proposed amendments were approved by the Judicial Conference of the United States, and on April 26, 2018, by the the Supreme Court.
- Congress took no action on the amendments.
- Thus, under the Rules Enabling Act, they went into effect on December 1, 2018.

# Giving Notice Under Rule 23(c)(2)(B)

**(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)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:...

# Giving Notice Under Rule 23(c)(2)(B)

## **Advisory Committee Note:**

- First class mail may often be the preferred primary method of giving notice.
- However, courts and counsel have begun to employ new technology to make notice more effective.
- When selecting a method or methods of giving notice,” courts should “consider the capacity and limits of current technology, including class members’ likely access to such technology.”
- “[I]t is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.”

# Settlements Under Rule 23(e)

## **(e) Settlement, Voluntary Dismissal, or Compromise.**

The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

# Settlements Under Rule 23(e)

## (1) Notice to the Class

### (A) Information That Parties Must Provide to the Court.

The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

# Settlements Under Rule 23(e)

**(B) Grounds for a Decision to Give Notice.** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

- (i) approve the proposal under Rule 23(e)(2); and
- (ii) certify the class for purposes of judgment on the proposal.

# Settlements Under Rule 23(e)

**(2) Approval of the Proposal.** 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 proposal was negotiated at arm's length;**

# Settlements Under Rule 23(e)

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

# Settlements Under Rule 23(e)

(D) the proposal treats class members are treated equitably relative to each other.

**(3) Identifying Agreements.** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

**(4) New Opportunity to Be Excluded.** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve 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.

# Settlements Under Rule 23(e)

## **Advisory Committee Note:**

“The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object.”

What if the settlement is not approved? Is there any prejudicial impact on a defendant? The Advisory Committee explains in the Note: “If the settlement is not approved, the parties’ positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.”

# Objectors: Amended Rule 23(e)(5)

## **(5) Class-Member Objections.**

**(A) In General.** 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 also state with specificity the grounds for the objection.

# Objectors: Amended Rule 23(e)(5)

**(B) Court Approval Required for Payment In Connection With an Objection.** Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

- (i) forgoing or withdrawing an objection, or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

# Objectors: Amended Rule 23(e)(5)

**(C) Procedure for Approval After an Appeal.** If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(Under Rule 62.1, where a court lacks authority to grant a motion for relief because an appeal is pending, the court may render an “indicative” ruling that it would grant the motion or that the motion raises a substantial issue. The movant must then promptly notify the court of appeals of the indicative ruling which then may remand the matter to allow the court to decide the motion.)

# Rule 23(f): No Appeal From Preliminary Approval

**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.



# Questions?

wackerman@rc.com  
jbarkett@shb.com

xanb@rgrdlaw.com  
gmason@wbmlp.com