

Potential Changes to Rule 23 and Class Actions: Frontloading and Class Definition/Ascertainability ACC Docket.com

By Amy P. Lally, Rachael A. Rezabek and Chad Wiegand
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This article is a continuation of a three-part series covering “conceptual sketches” of possible amendments to Federal Rule of Civil Procedure 23, recently offered by the Rule 23 Subcommittee of the Civil Rules Advisory Committee on the Federal Rules of Civil Procedure (“Subcommittee”). As set forth in [Part I](#) of this series, these conceptual sketches “are not intended as initial drafts of actual rule change proposals, and should not be taken as such,” but the Subcommittee has determined that “[t]he time has come for moving beyond purely topical discussion.” [Thus, while the Subcommittee may ultimately decide not to recommend any Rule 23 amendment(s) on the basis of these sketches, it has nevertheless determined that these sketches identify issues that currently “warrant serious examination.”]

The Subcommittee has documented its sketches in two sets of comments. The first can be found [here](#) and covers seven conceptual sketches: (1) Settlement Approval Criteria; (2) Settlement Class Certification; (3) Cy Pres Treatment; (4) Dealing with Objectors; (5) Rule 68 Offers and Mootness; (6) Issue Classes; and (7) Notice. The second is a memorandum of Introductory Materials “designed to introduce issues” that the Subcommittee planned to explore at a mini-conference held on September 11, 2015, and can be found [here](#). The Introductory Materials memorandum added two additional topics: “Frontloading of presentation to the court of specifics about proposed class-action settlements,” (or “Disclosures regarding proposed settlements”) and “Addressing class definition and ascertainability more explicitly.” This article addresses these two additional conceptual sketches.

If adopted, the Subcommittee's proposals may take effect as early as 2018, making it important to understand the potential effects of the conceptual sketches as possible precursors to the anticipated Rule change proposals. The first three articles, which covered the original conceptual sketches, are available [here](#), [here](#), and [here](#).

Conceptual Sketch #1: Frontloading

The Subcommittee's “Frontloading” sketch attempts to provide guidance to courts regarding factors to be considered in approving a proposed settlement before ordering notice to the settlement class. Specifically, under the proposed Rules 23(e)(1)(A)(i)-(xiv), parties would be required to present the following information to the court: (i) grounds for class certification; (ii) details of all provisions of proposed notice; (iii) details regarding insurance agreements; (iv) details of discovery undertaken; (v) a description of other relevant litigation; (vi) identification of any side agreements; (vii) details of the claims process; (viii) information regarding the anticipated claims rate; (ix) plans for disposition of leftover settlement funds; (x) a plan for reporting the actual claims rate to the court; (xi) anticipated attorneys' fees; (xii) any provision for payment deferral; (xiii) the proposed form of notice; and (xiv) any other matter relevant for approval.

In addition to the above, a court may “refuse to direct notice to the class until the parties supply additional information.” Moreover, under proposed alternatives to Rule 23(e)(1)(C), a court would be prohibited from directing notice to the class if it has “identified significant potential problems with either class certification or approval of the proposal”, or, alternatively until it concludes that

prospects for class certification and approval of the settlement proposal are “sufficiently strong to support giving notice to the class”. Importantly, the Subcommittee's comments to the proposal make clear that an order to give notice of a proposed settlement is neither “preliminary approval” of the proposed settlement nor “preliminary certification” of a proposed class.

Critics of the proposal argue that mandating a “laundry list” of information is impractical, as it is unlikely that all of the listed information will be relevant in every case. Instead, the proposed catch-all provision will suffice to ensure that courts can request any and all information needed to make informed decisions about proposed settlements. Others are concerned that it will be difficult, if not impossible, to provide certain categories of information — for instance, the anticipated claims rate and attorneys' fees — at the proposed settlement stage of litigation. Moreover, detractors are concerned that the phrases “sufficiently strong” and “significant potential problems” are too broad, and are likely open to varying interpretations. Finally, some critics are concerned that the Subcommittee's note clarifying that an order to give notice of a proposed settlement is not the same as preliminary certification may raise due process concerns, as it forces class members to choose whether to opt out before class certification has been granted or denied.

Conceptual Sketch #5: Class Definition/Ascertainability

Ascertainability has long been recognized as an implicit requirement for class certification under Rule 23(b)(3). However, courts are increasingly split regarding the standard used to determine ascertainability. In its landmark decision, *Carrera v. Bayer Corp.*, 727 F.3d 300 (2013), the Third Circuit adopted an ascertainability standard, requiring plaintiffs to show that a purported class is ascertainable in an “economical and administratively feasible manner.” In contrast, the Seventh Circuit recently rejected *Carrera* in *Mullins v. Direct Digital, LLC*, ___ F.3d ___, Case No. 15-1776 (July 28, 2015), opting instead for a version of ascertainability which permits class certification where a class is “defined clearly” by “objective criteria.”

In an attempt to resolve this acknowledged “circuit conflict,” the Subcommittee has proposed an amendment to Rule 23(c)(1)(B) which seems to adopt an ascertainability standard less stringent than *Carrera*, but more stringent than the traditional objective criteria standard. The amendment sketch states:

“Defining the Class: An order that certifies a class action must define the class so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.”

The Subcommittee's memorandum indicates that it intends this proposal to signify that Rule 23 “calls for a pragmatic approach to class definition at the certification stage,” but acknowledges that courts need not “achieve certainty” about class member identification at the certification stage, if at all.

Critics of this proposal suggest that it provides no real direction to courts, as it fails to expressly acknowledge an ascertainability requirement and provides no guidance as to what might constitute “reasonably feasible means.” If the rule is to be revised, the defense bar has suggested including a provision barring individual testimony from putative class members and prohibiting any identification requiring “substantial administrative burden.” Meanwhile, the plaintiffs' bar is concerned that the proposed revision will effectively wipe out class actions involving small, low-cost goods, as parties are unlikely to retain proof of purchase (and will therefore be unable to identify

class members in an “administratively feasible manner”). Detractors are also critical of the Subcommittee's failure to include the more traditional “objective criteria” standard used by many courts. Others question whether the proposal's placement in 23(c)(1) signifies that the ascertainability requirement should apply to both 23(b)(2) and 23(b)(3) certifications. Finally, given that the courts' analysis of ascertainability is in a “state of rapid evolution,” some critics suggest that the split may well be resolved by judicial decisionmaking long before the proposed rule would take effect.

About the Authors

Amy P. Lally is a partner in the Los Angeles office of Sidley Austin LLP. She is a trial lawyer who practices in all areas of litigation, including class actions, contract dispute litigation, and real estate litigation. Amy has represented numerous consumer goods manufacturers and retailers, including vitamin and dietary supplement companies, pharmaceutical companies, apparel, furniture and home goods companies, and e-commerce companies. Amy litigates cases in federal and state courts throughout California, including in the counties of Alameda, Los Angeles, Orange, Riverside, Sacramento, San Diego, San Francisco, and San Mateo.

Rachael A. Rezabek is an associate in Sidley's Los Angeles office and practices in the Litigation group. Rachael participated in Sidley's 2013 Summer Associate Program, as well as Sidley's Pro Bono Fellowship Program working for the Los Angeles Center for Law and Justice. She earned her J.D. from the University of Southern California Gould School of Law.

Chad Wiegand is the senior vice president and general counsel & secretary of Schwabe North America, Inc. / Nature's Way, a multinational life sciences company. Previously, he served as general counsel of ImaRx Therapeutics, Inc., a publically traded biopharmaceutical company focused on in vitro and in vivo diagnostics and thrombolytic treatments. Prior to this, Chad was a corporate attorney for a multinational law firm, where he advised clients in business and life science matters.

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