

APRIL RULES DAY – CLASS ACTION BASICS AND FRCP 23 AMENDMENTS

Brown Bag Lunch Series
April 11, 2019
United States District Court
Camden, New Jersey

Hon. Joseph H. Rodriguez, U.S.D.J.
Hon. Jerome Simandle, U.S.D.J.
Hon. Robert B. Kugler, U.S.D.J.
Hon. Noel L. Hillman, U.S.D.J.
Hon. Renée Bumb, U.S.D.J.
John B. Kearney, Esquire

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RULE 23(a) - PREREQUISITES

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members 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.

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RULE 23(b)(1)

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

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RULE 23(b)(2)

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

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RULE 23(b)(3)

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

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RULE 23(c)(1)(A)

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

(1) Certification Order.

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

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RULES 23(c)(1)(B) AND (c)(1)(C)

(B) ***Defining the Class; Appointing Class Counsel.*** An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) ***Altering or Amending the Order.*** An order that grants or denies class certification may be altered or amended before final judgment.

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RULE 23(c)(2)(A)

(2) ***Notice.***

(A) ***For (b)(1) or (b)(2) Classes.*** For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

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RULE 23(c)(2)(B) (AS AMENDED)

(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:

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RULE 23(c)(2)(B) (AS AMENDED)

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3)

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RULES 23(c)(3) (A) and (B)

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

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RULES 23(c)(4) AND (c)(5)

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

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RULE 23(d)(1) (A-E)

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

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RULE 23(d)(2)

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

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RULE 23(e)(1-4)(AS AMENDED)

(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:

(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.
- (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.

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RULE 23(e)(1-4)(AS AMENDED)

(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;
- (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
- (D) the proposal treats class members equitably relative to each other,

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RULE 23(e)(1-4)(AS AMENDED)

(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.

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RULE 23(e)(5)(AS AMENDED)

(5) Class Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision. The objection must state whether it applies only to the objector, to a specific subset of the class, or the entire class, and also state with specificity the grounds for the objection.

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RULE 23(e)(5)(AS AMENDED)

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

(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.

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RULE 23(f) (AS AMENDED)

(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). 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.

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RULE 23(g)(1)(A)(i-iv)

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- (iii) counsel's knowledge of the applicable law; and
- (iv) the resources that counsel will commit to representing the class;

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RULE 23(g)(1)(B)-(E)

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

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RULE 23(g)(2)-(4)

(2) **Standard for Appointing Class Counsel.** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) **Interim Counsel.** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) **Duty of Class Counsel.** Class counsel must fairly and adequately represent the interests of the class.

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RULE 23(h)(1)-(4)

(h) **Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

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OTHER RECENT AMENDMENTS TO FRCP

- Rule 5(d)(1)
- Rule 5(d)(3)(c)
- Rules 62 and 65.1

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OTHER RECENT AMENDMENTS

Rule 5(d)(1)

- Certificates of service
- E-filing system consent requirement
- Mandated filings by represented parties and exceptions per local rule or good cause
- Use of e-filing by pro se litigants

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OTHER RECENT AMENDMENTS

Rule 5(d)(3)(c)

- National signature provision for papers filed using e-filing system

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OTHER RECENT AMENDMENTS

Rules 62 and 65.1

- Supersedes bond is now “bond or other security”
- Automatic stay to enforce judgment extended to 30 days

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PANEL DISCUSSION
AND
QUESTIONS

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