15-CV-Y

August 28, 2015

From: Alan B. Morrison

To: Attendees at Dallas Rule 23 Mini-Conference

Re: Preliminary Thoughts on Rule 23 Proposals

I have set forth below my reactions to the tentative proposals to be discussed at the September 11 mini-conference. Before turning to the specifics, I had one overall reaction that is not just directed at these proposals. Every time there is a proposal to amend the civil rules, the proposal adds, but never subtracts. As a proposer of rule changes, I stand guilty as charged. Maybe in our increasingly complex world, keeping the rules at the level of detail in 1938 or 1966 is impossible, but I wonder whether addition is always the answer. This has prompted me to think about writing something on the overall subject while hoping to keep in mind the idea that, while a change might help clarify a rule, perhaps it should be left alone, unless there is a serious problem. This admonition may be most applicable to the standards for approvals of settlements under Rule 23(e). Now to the specifics, which in some cases are at a high level of generality. I will reserve my detailed comments for the meeting or, if we do not reach all the topics, a post-meeting memorandum.

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(1) Disclosures regarding proposed settlements

In my view, there appear to be several major issues under this heading. (1) How much information should the judge receive before approving notice; (2) Should there be any effort made to bring in known class members (their counsel) who can assist the process and help catch serious problems at the outset; and (3) When should the moving parties have to submit all their supporting material in relation to when objections are due and the hearing is to take place? I will illustrate what I consider to be problems in all three areas by reciting the facts concerning the timing issues in the NFL concussion class action case, which is now pending on appeal in the Third Circuit, and in which I have filed an amicus brief on behalf of Public Citizen arguing that class counsel did not adequately represent the class under Rule 23(a)(4). I have tried to stay away from any arguments on the merits.

Unlike many, but not all settlement class actions, this one was the subject of some 300 individual personal injury cases that had been sent as an MDL to Philadelphia. Lead counsel and a steering committee were appointed, and with the encouragement of the judge and her appointment of a mediator, the parties undertook settlement discussions. They led to an agreement on a detailed term sheet in late August 2013, that was promptly made public, with a complete settlement agreement and class complaint filed in early January, with a request to provide notice to the class etc. Shortly thereafter, with no outside input from counsel for plaintiffs in cases subject to the MDL (or anyone else), the judge declined to approve the notice because she concluded that the cap on the settlement amount was unreasonable and she would

not approve the settlement with it. Thereafter, various lawyers for putative class members sought to intervene and/or obtain discovery, but those requests were not granted.

Ultimately, in late June 2014, the parties returned with an amended settlement that removed the cap, made a few other modest changes, but in all other respects, it was the same. This time, objections were promptly filed, mainly arguing that the class could not be properly certified for a variety of specific reasons (mainly relating to the exclusions from the monetary benefits in the settlement and offsets to the numbers provided on the settlement grid). The judge quite quickly approved the notice in early July, and an interlocutory appeal was filed under Rule 23(f) by one group of objectors (I supported them as an amicus). The court of appeals declined to rule on those objections, with some judges concluding that Rule 23(f) did not allow appellate review of the order approving notice etc, while one judge concluded that this was not a case in which he would exercise his discretion to review that order.

Under the district judge's order, objections to the class certification and settlement were due on October 14, 2014 (same date as opt outs), responses from the settling parties were due on November 12th, and a one day hearing scheduled for November 19th. Other than the formal settlement documents and a short declaration from the court-appointed mediator, that was filed with the original settlement agreement, the settling parties made no additional submissions before November 12th. There was also no discovery allowed, except that in September 2014 the judge ordered class counsel to file the report from their expert (that was dated February 2014) showing the numbers of class members likely to benefit from the settlement etc. Objections from 200 class members were filed, most through counsel, but some pro se, were filed by October 14th.

On November 12th, class counsel and the NFL each made their submissions. This is how the appellate brief of the Alexander objectors (at 14) described those submissions:

> One week before the Fairness Hearing, Class Counsel filed a 2 ½ page motion seeking final class certification and approval of the Settlement (*See* ECF 6423). Filed therewith were, *inter alia*, a 103-page memorandum and fourteen declarations, including six expert declarations, collectively totaling almost 1000 pages. On the same day, the NFL filed, *inter alia*, a 162-page memorandum and five expert declarations totaling (with Exhibits) almost 600 pages (ECF 6422).

As scheduled, the court heard oral argument, but no live witnesses on November 19th, but then allowed a brief period within which objectors could make further submissions and the settling parties could respond.

Although I am counsel for an amicus-objector, I believe that these facts are not disputed, although my conclusions from them almost certainly will be. Let me start with what should be the least controversial recommendation: the settling parties, who are the moving parties on the motion to approve under Rule 23(e), should have submitted all of their declarations, exhibits etc, well before objectors had to file their objections. They should also have been required to submit their legal memoranda at the same time, with their subsequent submissions being only replies. That was what I thought the ALI had proposed and that no one seemed to suggest was not the

burden of moving parties under the current rules on all motions, but perhaps I am mistaken. In any event, the settling parties both control the schedule that is proposed to the judge and have in their possession all of the legal and factual bases to support their approval motion. Thus, there is no reason why they should not have to make their submissions before objections are due. My appellate amicus make extensive use of the class counsel's November 12th submissions, but they should have been available for all objectors before any objection had to be filed.

That leaves the question of whether the district judge should make a more extensive inquiry before approving notice and whether she should do that essentially on her own or with input from counsel for other class members (and perhaps amici). My view is that the judge should reach out to other class members, both with respect to the notice and to other aspects of the settlement, ranging from class certification issues to the merits, before approving notice because that is the best way to cure problems before too much is invested in the approval process. But I would oppose the judge making a more detailed inquiry unless there were outside input, because that will only worsen the pre-judgment problem that is known to exist, whatever label the rules attach to the decision to authorize the sending of notice. The need for early outside input is especially significant when there is not a previously certified litigation class (where there was a contested proceeding and the possibility of Rule 23(f) review) and where there is any real possibility that class certification will be an issue. I note that in the silicone gel breast implant cases before Judge Pointer, there were extensive pre-notice proceedings, with significant outside input from class members (counsel) and amici, which significantly improved the settlement & the notice. The settlement imploded because there were too many opt outs, after which Dow Corning went into Chapter 11 (and used the settlement as a basis for its plan that was ultimately approved) and the other defendants set up a voluntary settlement system, also using the plan.

As to the specifics of the subcommittee's proposal, my comments on them are entirely dependent on the choices on the options discussed above.

(2) Expanded treatment of settlement criteria

My first question on this topic is whether the proposed changed would make these criteria exclusive, which might be a good idea, but hard to police. My second question is, would the change alter the outcome of many (any) cases, and if not, I would think it is not worth doing.

(3) Cy pres provisions in settlements

Although I have not read all the recent cases on this subject, my impression is that the courts are finally getting it right, at least in most cases in the federal courts. In addition, I do not think that the details here are necessary to correct the few erroneous decisions.

(4) Objectors

Because of the way that the courts of appeals (mainly in the John Hancock case from the First Circuit) have narrowly viewed their ability to police side deals on appeal, there is a need to fix that problem by requiring some court (I prefer the district court, absent some special

circumstances where the objector has provided useful input on the appeal) to approve any payment to an objector or her/his counsel.

I do not support requiring additional information with objections, even to the point of proof that the objector is a class member. At worst, an objection could still be viewed as an amicus, and it is much simpler to deal with it on its merits than spend time deciding if the objector is actually a class member. In this connection, the NFL settlement required that each objector sign the objection personally, even if the objector was represented by counsel and had filed a lawsuit. For lawyers with many clients, that imposed a burden and so some lawyers got only a few signatures to make the identical point. This also enabled the settling parties to say that there were fewer objections than there probably were in fact, although I have never thought that the number of objectors (either way) should matter.

(5) Class Definition & Ascertainability

My inclination is that these changes (p. 30) are not necessary. But the Tyson's Food issue (p, 32) is troublesome if carried too far. I agree that in general, individuals who have suffered no harm should not receive compensation under a settlement or a judgment. But that principle should not be carried too far so that, for example, a settlement cannot include some individuals who might lose a case on state law statute of limitations grounds, even though the costs of deciding each claim would be so prohibitive that it is less expensive to allow a few "undeserving" claimants to be paid, even at the expense of others, in order to deliver more net benefits to the class. Thus, it is important to distinguish between ascertaining a claimant's right to recover at the merits stage from doing that at class certification for each individual

Second (and this applies to efforts to narrow commonality and typicality, and probably predominance) in ways that not only limit litigation classes, but also settlement classes. Assume that the NFL concussion case could not be certified as a litigation class under Rule 23(b)(3), but the defendant wishes to settle it. The other Rule 23 requirements (and perhaps ascertainability) might make that impossible (how could you ascertain at the time of certification exactly who had suffered a concussion that entitled him to recover when the case has just begun), and I doubt that is good for claimants, defendants, or the courts.

Third, there is some tension on the defense side between wanting broad res judicata on the one hand, and insisting on narrow class definitions on the other. Also, it is important to assure that defendant does not pay more than it owes in total, while allowing the class to distribute the amount paid in a fair and inexpensive manner, even if it means paying some claimants who might not be legally entitled to a payment, in the interest in efficiency and overall fairness.

(6) Settlement Class Certification

My reaction to this depends in large part on how the other issues are resolved. My basic view is that the real problem with settlement classes is assuring adequate representation when different parts of the class are treated differently, as in Amchem, but not in securities classes. I

think the courts already relax the rules for settlement classes, which is OK if everyone is adequately represented.

(7) Issue Class Certification

I am not prepared to take a position on this without some concrete examples of how a case could qualify for issue class treatment, but not full class treatment at least for settlement purposes.

As for interlocutory appellate review on issue classes, I would have to see how that question is resolved before commenting on this proposal.

Although this is not directly raised in the memo, as noted above on proposal (1), if the district judge conducts a significant proceeding before sending out the notice, I would favor making it clear that Rule 23(f) interlocutory appeals are available as a matter of the discretion of the court of appeals. If there are big class certification issues regarding a settlement class, the rationale of Rule 23(f) applies to that situation as well, and immediate review should be available.

(8) Notice

I agree that this is a worthy topic, both for reducing the burden in (b)(3) cases and for providing notice of some kind in (b)(1) & (b)(2) cases, even though there is no right to opt out. Whether this is the right time to undertake such an effort is not something on which I have no strong view.

(9) Pick Off and Rule 68

I would wait and see what the Court does in Campbell-Ewald and perhaps the Spokeo case before tackling this one. I also do not think in the real world it affects that many cases, but I could be mistaken.