



STATE OF WISCONSIN JUDICIAL COUNCIL

Suite 822, Tenney Building, 110 East Main Street, Madison, WI 53703-3328 (608) 261-8290

August 18, 2017

Julie Anne Rich, Supreme Court Commissioner
110 East Main Street, Suite 440
Madison, Wisconsin 53703

Re: Rule Petition 17-03, In re proposed amendments to Wis. Stats. §§ 803.08 and 426.110
(Class actions)

Dear Commissioner Rich:

Please let this serve as the Judicial Council's response to your letter dated June 27, 2017, in which you inquire as to the primary concerns relating to class actions that the 2003 amendments to Rule 23 of the Federal Rules of Civil Procedure were intended to address.

The 2003 amendments to Rule 23 were the result of ten years of study and consideration by the federal advisory committee.¹ The 2003 changes focus on procedure instead of certification standards, and mark the most comprehensive amendment to Rule 23 since 1966.² According to the federal Advisory Committee, the 2003 amendments were "a balanced and neutral attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device – efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results."³

Rule 23(c)(1)(A): Timing of Certification

Prior to the 2003 amendments, Rule 23 instructed courts to make a class action certification decision "as soon as practicable." Many felt that the phrase "as soon as practicable" failed to reflect prevailing practice or valid reasons that may justify deferring the initial certification decision.⁴

¹ Agenda F-18 Rules, Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 8 (Sept. 2002) [hereafter Report of the Judicial Conference Committee], excerpts are enclosed.

² *Id.*

³ *Id.* at 9.

⁴ See Willging, Hooper & Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-36 (Federal Judicial Center 1996).

In 1996, the Advisory Committee published a package of proposed amendments to Rule 23 that would have changed that language to “when practicable.”⁵ Public comments were favorable, but the Standing Rules Committee declined to recommend the change at that time in part because the proposed language might “encourage courts to delay deciding certification motions, leading to an unwarranted increase in precertification discovery into the merits of a class suit.”⁶

For the 2003 amendment, the Advisory Committee selected the phrase “at an early practicable time,” which the committee describes as “consistent with the practice of authorizing discovery on the nature of the merits issues, which may be necessary for certification decisions, while postponing discovery pertaining to the probable outcome on the merits until after the certification decision has been made.”⁷

Rule 23(c)(1)(B): Order Certifying a Class

The 2003 amendment to Rule 23(c)(1)(B) provided that a class certification order, “must define the class and the class claims, issues or defenses.”⁸ This change was intended to facilitate Rule 23(f)’s interlocutory-appeal provision that was added to Rule 23 in 1998 to allow permissive interlocutory appellate review under a standard “akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.”⁹

Rule 23(c)(1)(C): Conditional Nature of Class Certification

There were two significant amendments to this subdivision. Prior to 2003, an order granting or denying certification could be altered or amended “before the decision on the merits.” After the 2003 amendment, such an order may be altered or amended “before final judgment.”¹⁰ This change addressed the ambiguity under the old Rule, which could apply to a decision on liability that occurred before final judgment despite the fact that a later proceeding to define the remedy may indicate that the class definition needs to be amended or the class subdivided.¹¹

The 2003 amendment also deleted the provision that allowed a conditional class to be certified.¹² As the Advisory Committee explained, this provision was deleted to “avoid the unintended suggestion, which some courts have adopted, that class certification may be

⁵ Report of the Judicial Conference Committee, *supra*, at 9.

⁶ *Id.* at 10.

⁷ *Id.* at 11.

⁸ FED. R. CIV. P. 23(c)(1)(B).

⁹ FED. R. CIV. P. 23(f) Advisory Committee notes to 1998 Amendments.

¹⁰ FED. R. CIV. P. 23(c)(1)(C).

¹¹ Report of the Judicial Conference Committee, *supra*, at 11.

¹² *Id.* at 11-12.

granted on a tentative basis, even if it is unclear that the rule requirements are satisfied.”¹³ Although courts retain the ability to alter or amend the class definition throughout the proceeding, a court that “is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”¹⁴

Rule 23(c)(2): Notice

Rule 23(c)(2) was amended “to call attention to the court’s authority--already established in part by Rule 23(d)(2)--to direct notice of certification to a Rule 23(b)(1) or (b)(2) class,” as opposed to requiring notice only to Rule 23(b)(3) classes.¹⁵ The Advisory Committee specifically recognized that “[m]embers of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.”¹⁶ The rule also requires that the class-certification notice must be in “plain, easily understood language.”¹⁷

Rule 23(e): Settlement Review

The 2003 amendments generally require courts to scrutinize settlement agreements more closely to enhance the fairness of the settlement process. However, Rule 23(e)(1)(A) clarifies that court approval is only required for settlement of “the claims, issues, or defenses of a certified class.” This change addressed the ambiguity of former Rule 23, which was sometimes interpreted as requiring court approval for settlements that resolved only the named plaintiff’s individual claims.¹⁸

New Rule 23(e)(1)(B) requires “reasonable” notice of the proposed settlement when class members would be bound by it, and subd. (e)(1)(C) requires a hearing.¹⁹ It also establishes a standard for approving a proposed settlement -- it must be fair, reasonable, and adequate.²⁰

Rule 23(e)(2) requires the parties to identify “any agreement made in connection with the proposed settlement, voluntary dismissal or compromise.”²¹ This change addresses the concern that side deals may be entered into that trade certain class benefits in exchange for advantages to the named plaintiffs or class counsel. The court can direct a party to disclose the full terms of any identified agreement.²²

New Rule 23(e)(3) permits a second opt-out opportunity for Rule 23(b)(3) classes if the settlement is proposed after the initial opt-out period has expired. This enhances judicial

¹³ *Id.* at 12.

¹⁴ FED. R. CIV. P. 23(c)(1)(C) 2003 Notes.

¹⁵ FED. R. CIV. P. 23(c)(2) 2003 Notes.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See* Manual for Complex Litigation Third, § 30.41.

¹⁹ FED. R. CIV. P. 23(e)(1) 2003 Notes.

²⁰ FED. R. CIV. P. 23(e)(1)(C).

²¹ FED. R. CIV. P. 23(e)(2).

²² FED. R. CIV. P. 23(e)(2) 2003 Notes.

discretion by allowing the court to refuse to approve the settlement if a second opt-out opportunity is not given to individual class members.²³ This change gives class members “the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits.”²⁴

Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise and requires court approval for withdrawal of objections.²⁵

Rule 23(g): Class Counsel Appointment

Prior to the 2003 amendments, courts addressed the adequacy of class counsel as part of the requirements of Rule 23(a) that the class representative “fairly and adequately protect the interests of the class.”²⁶ New Rule 23(g) fills in the many gaps that existed related to the appointment of class counsel. Paragraph (1) requires the appointment of class counsel when a class is certified and contains factors the court must consider in assessing proposed class counsel.²⁷ It also clarifies that the obligation of class counsel is to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members.²⁸

Paragraph (2) sets out a procedure for appointing class counsel and permits the designation of interim counsel during the pre-certification period.²⁹ It also permits the court to include provisions regarding the award of attorney fees and costs in the order appointing class counsel.³⁰

Rule 23(h): Attorney Fees

Prior to the 2003 amendments, attorney fee awards were handled under Rule 54.³¹ New Rule 23(h) was intended to codify current practice while addressing “the particular concerns of class actions.”³² This new subdivision specifically authorizes “an award of ‘reasonable’ attorney fees and nontaxable costs.”³³

²³ FED. R. CIV. P. 23(e)(3) 2003 Notes.

²⁴ Report of the Judicial Conference Committee, *supra*, at 13.

²⁵ FED. R. CIV. P. 23(e)(4).

²⁶ Report of the Judicial Conference Committee, *supra*, at 17; FED. R. CIV. P. 23(a)(4).

²⁷ FED. R. CIV. P. 23(g)(1) 2003 Notes.

²⁸ *Id.*

²⁹ FED. R. CIV. P. 23(g)(2)(A) 2003 Notes.

³⁰ FED. R. CIV. P. 23(g)(2)(C).

³¹ Report of the Judicial Conference Committee, *supra*, at 19; FED. R. CIV. P. 54(d)(2).

³² FED. R. CIV. P. 23(h) 2003 Notes.

³³ *Id.*

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New subd. (h) also requires that a motion for fees and costs must be served on all parties, and “notice of class counsel’s motion for attorney fees must be ‘directed to the class in a reasonable manner.’”³⁴ Additionally, a “class member and any party from whom payment is sought may object to the fee motion.”³⁵

Finally, in your June 27, 2017 letter, you requested federal Advisory Committee notes or commentary relevant to the 2003 amendments to FRCP 23. Enclosed please find an excerpt from the September 2002 Report of the Judicial Conference Committee on Rules of Practice and Procedure regarding Rule 23, as well as the Advisory Committee Notes for the 2003 amendment.

Thank you and please contact me if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "April M. Southwick". The signature is fluid and cursive, with the first name being the most prominent.

April M. Southwick, Attorney
Wisconsin Judicial Council

³⁴ *Id.*

³⁵ *Id.*