

GUIDELINES AND BEST PRACTICES

IMPLEMENTING 2018 AMENDMENTS TO

RULE 23 CLASS ACTION SETTLEMENT PROVISIONS

BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

EXECUTIVE SUMMARY

DUKE LAW SCHOOL
AUGUST 2018

PROVIDING INFORMATION TO THE COURT TO DECIDE WHETHER TO SEND NOTICE TO CLASS MEMBERS AND APPROVE SETTLEMENT (“FRONT-LOADING”)

GUIDELINE 1: Parties should request a court to approve sending notice to class members of a proposed settlement only if the court is likely to be able to: (1) approve the settlement after a hearing and a finding that it is fair, reasonable, and adequate under Rule 23(e)(2); and (2) certify the class.

BEST PRACTICE 1A: At both the notice and approval stages, the parties should provide the court with information sufficient for it to decide that the proposed settlement is fair, reasonable, and adequate, in accordance with the topics enumerated in Rule 23(e)(2).

GUIDELINE 2: At both the notice and approval stages, a court has wide discretion in determining how much information is sufficient to determine that a proposed settlement is fair, reasonable, and adequate.

BEST PRACTICE 2A: In general, if a settlement proposal lacks any indicia of collusion, conflict, or lack of fairness to the class members, a court should not require an exhaustive study and extensive information to make its findings that the proposal is fair, reasonable, and adequate. Conversely, if doubts arise about the fairness of the proposed settlement, the court should require additional information in making its determinations.

BEST PRACTICE 2B: Parties should provide information to the court showing that class representatives and counsel have adequately represented the class.

GUIDELINE 3: Parties should provide information to the court showing that the settlement was negotiated at arm’s length.

BEST PRACTICE 3A: Parties should provide information to the court showing that the expected relief of the proposed settlement to class members is adequate.

BEST PRACTICE 3A(i): The parties should provide information to the court on costs, risks, and delay of trial and appeal in assessing whether relief provided for the class is adequate.

BEST PRACTICE 3A(ii): The parties should provide information on the effectiveness of the proposed method of distributing relief to class members in assessing whether relief provided for the class is adequate.

BEST PRACTICE 3B: The parties should consider using a professional claims administrator to send notice and claim forms and distribute benefits.

BEST PRACTICE 3C: In determining whether the proposed method of distributing relief is effective, a court should not assume that automatically distributing benefits to all class members is superior to distributing benefits based on submitted claims.

GUIDELINE 4: The parties should provide information on the proposed attorney’s fees, including timing of payments, in assessing whether relief provided for the class is adequate.

GUIDELINE 5: At the final approval stage, the court should consider relief delivered to class members in determining the appropriate award of attorney’s fees in accordance with Rule 23(h). In appropriate cases, a court may consider non-monetary benefits as part of the total relief in relation to the proposed award of attorney’s fees in evaluating whether the proposed settlement is fair, reasonable, and adequate.

BEST PRACTICE 5A: In an appropriate case, a court may consider awarding attorney’s fees in a class action settlement based on a percentage of the total monetary awards made available to the class, as opposed to the actual claimed value of the settlement.

BEST PRACTICE 5B: The parties should provide information on any agreement made in connection with the proposed settlement in accordance with Rule 23(e)(3).

BEST PRACTICE 5C: The parties should provide information on how the proposed settlement treats class members relative to each other, particularly if the proposed settlement addresses subclasses or other special categories of class members.

BEST PRACTICE 5C(i): If the differences in the treatment between class members are material or the conflicts of interest are real, a court should consider whether certain safeguards protect the class members and whether the benefits of having a class-wide settlement otherwise outweigh the risks.

BEST PRACTICE 5C(ii): In assessing the equitable treatment of class members relative to each other under Rule 23(e)(2)(D), a court should give due regard to the advantages of simplifying the treatment of claims to achieve efficiency and finality.

BEST PRACTICE 5D: Although not required by Rule 23(e)(1), a court should consider holding a hearing on whether to direct notice to the class of a proposed settlement in an appropriate case if the court has questions or concerns about whether the information presented by the parties is sufficient under the multiple Rule 23(e)(2) factors for it to decide that settlement approval at a later stage is likely.

**PROCEDURES AND STANDARDS FOR OBJECTIONS AND RESOLUTION OF OBJECTIONS UNDER
RULE 23(e)(5)**

GUIDELINE 6: A court should interpret the language of Rule 23(e)(5) broadly and liberally to accomplish its stated intent to avoid perpetuating a system that facilitates objections advanced for improper purposes.

BEST PRACTICE 6A: A court may consider any objection raised by a class member, even if the objector has nothing personally at stake in regard to the matter raised by the objection.

GUIDELINE 7: A class member objecting to a proposed settlement must state with specificity the grounds for objection sufficient to enable the parties to respond to them and the court to evaluate them.

BEST PRACTICE 7A: An objection should identify the specific settlement term or structure that is being challenged and the reasons for such challenge.

GUIDELINE 8: No payment or other consideration for forgoing or withdrawing an objection or forgoing, dismissing, or abandoning an appeal can be provided unless a court approves payment after holding a hearing.

BEST PRACTICE 8A: The parties must disclose the terms of all agreements between objector and the parties. What constitutes payment or other consideration to an objector for forgoing or withdrawing an objection or forgoing, dismissing, or abandoning an appeal should be broadly construed.

BEST PRACTICE 8B: A court should inquire into communications that class counsel may have had with individuals who decided not to pursue (forgo) objections.

BEST PRACTICE 8C: If the consideration involves a payment to counsel for an objector, the proper procedure to obtain a payment is by motion under Rule 23(h). The court should evaluate whether the objection added value to the class and therefore justifies the proposed payment.

GUIDELINE 9. If approval to forgo or withdraw an objection has not been obtained before an appeal is docketed in the court of appeals, Appellate Rule 12.1 and Civil Rule 62.1 indicative-ruling procedures apply while the appeal is pending.

BEST PRACTICE 9A: If the parties intend to settle with an objector, they should seek approval of the objection settlement prior to the filing of the appeal to avoid the delay of appeal.

BEST PRACTICE 9B: A court should hold a hearing and issue an indicative ruling once an appeal is filed and Rule 62.1 is in effect.

BEST PRACTICE 9C: If the objector has filed a motion for attorney's fees, the district court may inquire into settlement discussions between the objector and the parties regarding the fee motion.

THE ROLE OF COURT-APPOINTED LEAD COUNSEL VIS-À-VIS OTHERS

GUIDELINE 10: In an MDL action comprised of multiple putative class actions, the court should, in connection with an early and prompt initial conference with the parties, prescribe an application process for appointment of one or more firms, as appropriate, to serve as Interim Class Counsel under Rule 23(g)(3), upon considering factors pertinent to the case, including those specified in Rule 23(g)(1).

BEST PRACTICE 10A: In an MDL proceeding involving multiple actions that include putative class actions, the court should determine, in connection with an early and prompt initial conference with the parties, the nature and scope of the leadership structure it intends to appoint, including whether

the appointment of Interim Class Counsel under Rule 23(g) is necessary or appropriate, and should specify and delineate with appropriate precision the roles and responsibilities of the counsel it appoints to leadership positions.

GUIDELINE 11: A court should, at an early point in its management of the proceedings before it, schedule pretrial proceedings (including class certification briefing and hearing dates, and, as early as practicable, a trial date on class claims); obtain information and establish procedures for coordination with any related putative class action litigation pending in other courts, designate counsel with responsibility to coordinate with counterparts in related litigation; and remind all parties and counsel of their duty to timely update the court and each other on developments in related actions pending in other courts.

BEST PRACTICE 11A: To assure that all tracks are managed effectively, a transferee court in a hybrid MDL should typically appoint different counsel to take primary responsibility for personal injury claims on the one hand, and economic loss claims on the other.

BEST PRACTICE 11B: An MDL transferee judge who is appointed to manage individual and class claims concurrently should prioritize their judicial resources in assuring that both types of claims move forward appropriately, through discovery, pretrial disposition, settlement where appropriate, and trial, either in the MDL transferee court, through bellwether trials, or upon remand to districts of origin.

BEST PRACTICE 11C: In a “hybrid” MDL, the court’s order appointing a leadership structure should clearly delineate the roles and responsibilities for the class lead counsel and tort lead counsel and their respective committees.

MEANS, FORMAT, AND CONTENTS OF SETTLEMENT NOTICE

GUIDELINE 12: In determining whether the “best practicable notice” can be sent in a reasonable manner, the court should focus on the means or combination of means most likely to be effective in the case.

BEST PRACTICE 12A: In assessing whether the particular means of sending notice is most effective, a court should take into account the following general considerations: (1) will the notice effectively reach the class; (2) will the notice actually come to the attention of the class; (3) are the notices informative and easy to understand; and (4) are all class members’ rights and options easy to act upon?

BEST PRACTICE 12B: When selecting a means of giving notice, the parties and court should begin by assessing the reliability of the method of communication typically used by the defendant in its regular business to notify its customers or clients.

GUIDELINE 13: Best notice practicable includes individual notice to all members who can be identified through reasonable efforts. First-class U.S. mail may often be the preferred primary method of notice.

BEST PRACTICE 13A: Individual notice to class members often is practicable when the defendant communicates directly with class members as part of its regular business, either relying on U.S. mail postal addresses or email addresses.

BEST PRACTICE 13B: The deliverability rate of communications with customers can offer a useful indicator of the effectiveness of the means of communication.

BEST PRACTICE 13C: The parties and court should be skeptical about contact information that is compiled from free offerings, promotional sign-ups, or promotions.

GUIDELINE 14: Notice by email communication may be the best individual notice practicable under the circumstances if shown to be reliable. It may also be a low-cost supplemental means of notice.

BEST PRACTICE 14A: The effectiveness of a notice sent by email can be assessed using available metrics. Among the metrics, the *read rate* is the most reliable.

BEST PRACTICE 14B: The parties and court should consider the capacity and limits of email technology when evaluating its effectiveness for notice purposes.

BEST PRACTICE 14C: If individual notice is not practicable or effective, the parties and court should consider notice by digital media to provide the most effective notice under the circumstances, either to supplement other means of notice or as a standalone means.

BEST PRACTICE 14D: The parties and court should consider whether the notice program is using an appropriate media mix that will reach the target population.

GUIDELINE 15: Notice using social media, a subset of digital media, may be effective.

GUIDELINE 16: A court must evaluate the effectiveness of a notice program that relies on digital media, including social media, as a means to send notice.

BEST PRACTICE 16A: If notice is sent by digital media, the parties should evaluate and quantify the percentage of class members that the notice will reach.

BEST PRACTICE 16B: A low *lifetime frequency cap* (three or fewer) is ordinarily an insufficient level at which to expose a target audience sufficiently to the message.

BEST PRACTICE 16C: The parties should provide the court with an analysis of the metrics that the parties rely on to determine the effectiveness of the means of class notice. If a notice program is reporting reach, it must be supported and validated in a transparent manner.

BEST PRACTICE 16D: Social media metrics, such as *clicks*, should not be used as a substitute for a validated reach statistic.

BEST PRACTICE 16E: The parties and court should monitor the effectiveness of class notice sent by digital media throughout the notice period.

GUIDELINE 17: A class-notice expert or professional claims administrator can assist the parties and court in ascertaining the effectiveness of using digital media to send notice.

BEST PRACTICE 17A: The parties and court should ensure that the class notice expert or claims administrator is competent to assist them in evaluating the effectiveness of notice by digital media.

BEST PRACTICE 17B: The parties and court should carefully review the class-notice expert's or administrator's methodology in concluding that notice sent by an electronic means is most effective.

GUIDELINE 18: Language text and formatting may appear differently, depending on the medium it is viewed on. The differences can be sufficiently substantial to degrade the effectiveness of the communication.

BEST PRACTICE 18A: Notices sent by digital media should be formatted appropriately for maximum effectiveness that is consistent with the FJC guidance.