

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
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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.

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