Practice Makes Perfect

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Bolch Judicial Institute, Duke Law School, Guidelines and Best Practices Implementing 2018 Amendments to Rule 23 Class Action (2018).

Approximately four years ago, the Federal Advisory Committee on Civil Rules established a subcommittee to reform Federal Rule of Civil Procedure 23, the class action rule. The subcommittee engaged in a meticulous review of various class action practices, focusing on such controversial issues as cy pres awards, bad faith objectors, and class action settlements. The subcommittee's work resulted in the Advisory Committee adopting a package of amendments to Rule 23, which went into effect on December 1, 2018. A good overview of the amendments can be found here.

Anticipating passage of these amendments, the Bolch Judicial Institute at Duke Law School assembled an all-star team of class action practitioners and experts to draft a compilation of "guidelines and best practices." Because the amendments "codify emerging or best practices of courts," the goal of the publication is to "add detail to the general guidance provided in the amended rule." The publication has all the attributes of a great resource—it is concise while remaining crystal clear.

But what I find remarkable about the publication is how its focus on the on-the-ground experience of administering class actions sheds light the thorniest issues in class action law. Take standing, an issue the Supreme Court focused this Term in Frank v. Gaos. In 2016, the Court decided Spokeo v. Robins, concluding that to establish standing, a class representative must allege a harm that is both concrete and particularized. There is some question whether standing must be established for all class members, not just the class representative. Tyson Foods, Inc. v. Bouaphakeo addressed but did not decide whether standing can exist when there is the prospect that "uninjured" class members may recover.

This *publication* does not address this issue directly, nor does it intend to, but it does discuss some aspects of the actual administration of class actions that bear on the issue. For example, it states that, with respect to information concerning the distribution of proceeds from a settlement, "a court should not assume that automatically distributing benefits to all class members is superior to distributing benefits based on submitted claims." (Best Practice 3C). It makes the reasonable point that in some class actions, such as those involving consumer claims, a submitted-claims process can be invaluable in identifying individuals who have suffered actual harm by requiring, for example, proof of purchase to recover. This suggests that in many cases issues of class member standing can be obviated on the back end by processes ensuring that uninjured class members cannot recover. In *Tyson*, the Court hinted that such a back-end process can satisfy these standing issues. The Court admonished the *Tyson* defendants for opposing a "bifurcation" process that would have permitted the district court to determine liability in one phase and individual class members to submit claims for damages in a second phase.

Another thorny issue concerns class attorney compensation, where there is a concern that class attorneys profit at the expense of class members who receive little to nothing from the lawsuit. The publication speaks to this issue (again, not intentionally or directly) through the debate over whether the attorney's fee in a class action settlement should be based on the percentage of the total monetary awards made available to the class or the money "actually delivered" to class members. The notes to the 2018 amendments emphasize the latter, stating that "the relief actually delivered to the class can be a significant factor in determining the appropriate fee award." At first glance this make sense—why should an attorney be paid if the class members are not also actually paid?

But the publication makes an important point about the actual operation of class actions that informs the "actual value" the class members receive. In a sense, class actions arise because class members do not want to be paid, or at least do not want to go to the trouble of filing a lawsuit to recover. A class action goes to that trouble. In investigating and settling the case, class attorneys make proceeds available that otherwise would not be available through efforts of class members who otherwise would not have sued. The publication cites cases to argue that "the opportunity to recover meaningful relief by availing themselves of a claims process that is procedurally fair, even though many fail to do so, is 'actual value' to the class members."

The publication also tackles appointment of "interim class counsel" in multidistrict litigation (MDL). Although this concept was introduced in 2003 amendments to Rule 23, the publication discusses the importance of this designation and its effect on current practice. Interim class counsel corrects a "Catch 22" situation that has arisen from heightening class certification requirements, itself a response to courts' unease with the near-unilateral control of the class attorney. Class certification is now "often preceded by substantial fact and expert discovery," which requires "time and resources to develop a record in the case sufficient to enable the court to make an informed class certification decision." The availability of interim class counsel allows for the appointment of counsel with the power and incentive to perform this work for the benefit of the class.

The publication also addresses this practice in MDLs. In theory, MDLs avoid the unease that arises from counsel control by consolidating claims, because each plaintiff retains her own counsel. But class actions can arise within MDLs. And there remains great benefit in having "lead counsel" coordinate the efforts of the individual plaintiffs, even if each retains separate counsel. "Class actions and MDL have converged in recent years," with "MDL transferee judges, who must appoint plaintiff leadership at the outset of the proceedings, . . . often adopt[ing] the Rule 23(g) factors as qualifications in such leadership roles." The publication discusses guidelines and best practices for interim class counsel within MDLs. And it (again unintentionally) makes an important point about not only the persistence of the class action, but its utility. The very power of class counsel that makes courts uneasy is the same power that allows for the investment and coordination necessary to litigate the plaintiffs' claims in the first place.

There are many more gems in the publication, too many to discuss here. This is a perfect example of the kind of work I like "lots"—it looks at on-the-ground practice with a sensitivity to finding solutions. That it also speaks to important class action issues shows the importance of paying attention to the great work being done by courts and practitioners.

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