

**REPORT OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES
ON
CLASS ACTION SETTLEMENTS**

February 2006

Submitted to Committees on the Judiciary of the Senate and House of Representatives
in accordance with
Class Action Fairness Act of 2005 (Pub. Law No. 109-2).

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INTRODUCTION

This report is transmitted to the Committees on the Judiciary of the Senate and House of Representatives in accordance with § 6 of the Class Action Fairness Act of 2005 (Pub. Law No. 109-2). Section 6 directs the Conference to report no later than February 18, 2006, on (1) “the best practices that courts can use to ensure that proposed class action settlements are fair to the class members”; (2) “the best practices courts can use to ensure that” awards of attorney fees and expenses are appropriate; and (3) “the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.”

RULES ENABLING ACT

The Judicial Conference’s Committee on Rules of Practice and Procedure and Advisory Committee on the Federal Rules of Civil Procedure engaged in an intensive study of Federal Rule of Civil Procedure 23, governing class actions, from 1991 to 2003. The rules committees initiated this study consistent with their duty under 28 U.S.C. § 331 to monitor the Civil Rules and to recommend changes and additions to promote simplicity and fairness and to reduce expense and delay. During the study’s last four years the committees focused attention on the problems associated with settlements and attorney fee awards and carefully examined the courts’ “best practices” in handling these matters — the same subjects that Congress targeted in § 6 of the Class Action Fairness Act. The amendments to Rule 23 that eventually resulted from the committees’ parallel study were intended to accomplish the tasks set out in § 6 of the Act.

In March 2003, the Supreme Court, acting under the Rules Enabling Act, 28 U.S.C. § 2072, approved and transmitted to Congress amendments to Federal Rule of Civil Procedure 23 that took effect on December 1, 2003. The amendments to Rule 23 were largely based on the “best practices” of courts used to ensure the fairness of class action settlements and attorney fee awards in these actions. The amendments add requirements to Rule 23(e) governing settlement review and establish new rule provisions, Rule 23(g) and (h), governing the standards and criteria for appointing class counsel and approving attorney fee awards.

The amendments to Rule 23 were prescribed by the Supreme Court only after extensive scrutiny by the public, bench, and bar. The rulemaking process provided ample opportunity to comment on the proposed Rule 23 amendments. Many individuals and groups representing diverse viewpoints provided oral testimony at public hearings and written comments that resulted

in many improvements. The painstaking process was laborious, but it ensured that the problems associated with class action settlements and attorney fee awards and the best practices employed by courts to address them were raised and fully analyzed. Amended Rule 23 incorporated the best practices identified in this process, in the most helpful and effective way. The Judicial Conference approved these amendments to implement the courts' best practices on these matters and transmitted them to the Supreme Court in September 2003. Congress reviewed amended Rule 23 and allowed it to become effective on the schedule set by the Rules Enabling Act process.

Amended Rule 23 provides courts with rules-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The Committee Notes accompanying the amendments provide expansive guidance to the bench and bar in addressing these issues and focus on the best practices courts use to make sure settlements and attorney fees awards are fair. Copies of the amended rule and the Committee Notes are enclosed. The rules committees will continue to examine class action settlements and determine whether additional changes may be useful.

CLASS ACTION SETTLEMENTS

Rule 23(e) was substantially revised to strengthen the process governing the court's review of proposed class action settlements to assure fairness. The amended rule makes the standard for approving a settlement explicit: the settlement must be "fair, reasonable, and adequate." Specific factors to be considered by the court in its determination are referenced in case law cited in the Committee Notes and in the recently revised *Manual for Complex Litigation*. Before a court can approve a settlement, it must hold a hearing and it must make specific findings explaining why the settlement is fair, reasonable, and adequate.

Other amendments to Rule 23 were added to assure that class action settlements are fair. At the beginning of a class action, Rule 23(g) authorizes the court to appoint interim counsel to represent the putative class during the period before class certification. The Committee Note points out that interim counsel must represent the class's best interests, particularly in connection with pre-certification efforts to settle the action. If a settlement is proposed, class members must be notified in a reasonable manner of the terms, which may involve individual notices. Another amendment, to Rule 23(c), requires that the certification notice, which often includes notice of a proposed settlement, must be concise, clear, and in "plain, easily understood language." The Advisory Committee on Civil Rules worked with the Federal Judicial Center on developing model clear-notice forms, which can be found at the Center's web site <www.fjc.gov>. To enable the court to fully understand the terms of a settlement, the rule was amended to require that any "side agreements" made in connection with the settlement must be identified. Side agreements can be important to understand the terms parties and counsel have agreed to, but sometimes fail to disclose to the court. Some side agreements may influence the terms of settlement by trading away possible advantages for some members of the class in return for advantages for other class members.

The amended rule also provides guidance on handling objections, which has proven a difficult part of class action practice. Any class member may object to a proposed settlement.

Once a class member has objected to the fairness of the settlement, the member may not withdraw that objection without the court's approval, allowing the court to review any agreements made by the objectors with the parties and counsel.

Class members in a Rule 23(b)(3) action (class actions primarily involving money damages) have always been given an opportunity to opt out of a class action at the time the class action is certified. But when a class action has been certified before a settlement has been reached, the decision whether to opt out is often made well before the nature and scope of liability and damages are understood. In many of these class actions, a member has no opportunity to reject a settlement after the initial opportunity to opt out of the class has expired (when, for example, the member becomes aware for the first time that only coupons or small awards are being offered). A great many changes in class members' circumstances and other aspects of the litigation may have occurred after certification but before the terms of the settlement were sent to the class members.

Amended Rule 23(e) authorizes a court to refuse to approve a settlement unless the settlement affords class members a new opportunity to be excluded from the class action at a time when class members can make an informed decision based on the actual proposed settlement terms. The second opt-out opportunity introduces a measure of class-member control that is consistent with traditional litigation. At a basic level, the second opt-out opportunity gives class members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits. It provides added assurances that the settlement terms are fair by giving class members an opportunity to examine them and decide for themselves whether to accept them. The number of opt-outs also sets up a good check on the fairness of the settlement and can alert the reviewing court of a possible unfair settlement when the number of rejections is high.

ATTORNEY FEE AWARDS

Courts are responsible for approving requests for attorney fee awards in class action settlements. Before the 2003 amendments, Rule 23 was not especially helpful in setting out procedures that would provide judges with information adequate to discharge their responsibilities. The attorney fee provisions in new Rule 23(h) provide the needed guidance. They contain five main features dealing with: scope; procedure governing the fee motion; factors to be considered in awarding reasonable fees; objections to the fee request; and court findings and award of fees.

New Rule 23(g) and (h) set up guideposts for judges in appointing class counsel and setting attorney fee awards in class actions. The amended rule emphasizes counsel's duty to represent the class's interests and the court's duty to attend to the relationship between the fee award and the actual value of the benefit in fact received by class members. Rule 23(g) authorizes the court to include fee provisions in the order appointing class counsel. Rule 23(h) for the first time sets out the specific criterion that an attorney fee request be "reasonable." Greater detail in the governing standard was eschewed to permit flexibility to handle the immense range of class actions, which span minuscule individual consumer claims, small to large commercial claims in such areas as antitrust law, and enormous individual mass tort claims. Prescribing detailed rigid standards governing attorney fees in all class actions would also be counterproductive, because it would stifle the continued development of case law in this area. The Committee Notes set out the

analytical framework for fee-award determinations, recognizing that the case law will continue to develop and that subtle variations from circuit to circuit will contribute to better understanding of the nuances these issues can present.

The Committee Notes provide extensive guidance on the “best practices” used by courts in setting fee awards, including details on the factors that courts have recently, and consistently, found important when considering whether the fees sought are justified and “reasonable.” The Notes emphasize the importance of the reviewing court’s focus on realistically assessing the value of what class members actually receive in the settlement in setting the fee award for class counsel. The Notes suggest that in some cases a court should delay setting the fee award until the benefits class members actually receive in the settlement have become clear. The Notes also suggest that in some cases, the court should consider fees paid counsel by individual class members in accordance with retainer agreements.

Rule 23(h) works in tandem with new Rule 23(g), which requires the court to select and appoint class counsel. Prior to the 2003 amendment, Rule 23 did not address the selection or responsibilities of class counsel. The adequacy of counsel had been considered only indirectly as part of the Rule 23(a)(4) determination whether the named class representatives would fairly and adequately protect the interests of the class. Amended Rule 23(g)(1)(A) explicitly recognizes the requirement that the court must appoint class counsel for each certified class, unless a statute such as the Private Securities Litigation Reform Act establishes different requirements. The amended rule provides a court with the opportunity to seize control of the class counsel designation at the outset of litigation. Specifically, a court may include provisions on the award of attorney fees as part of its order appointing counsel. By doing so the court can exercise better control over the expenses throughout the litigation. For example, the court may require that class counsel provide interim fee reports as the case progresses. These periodic reports may require counsel to set up specific record keeping of time and costs incurred in the representation.

Amended Rule 23(g)(1)(B) states that class counsel “must fairly and adequately represent the interests of the class.” Under the amended rule, a court may direct potential class counsel to provide additional information to assist it in making the appointment decision, including the express proposed terms of an attorney fee award. When there are multiple applicants, this authority will be a particularly effective safeguard, encouraging counsel and the court to reach an early shared understanding about the basis on which fees will be sought. The provision has been used by judges to emphasize the importance of judicial control over attorney fee awards. This feature of the amended rule may forestall later objections to the fee request, serve as a more productive way for the court to deal in advance with fee award requests that seem to defy regulation after the fact, and accommodate competing applications or innovative approaches when appropriate.

To further ensure the fairness of the fee award, new Rule 23(h) requires that class members be notified of an attorney fee motion by class counsel and be given an opportunity to object to it. If anyone objects, the court may authorize the objector to investigate the proposed fee award through discovery — although broad discovery is not ordinarily appropriate in regard to fee

motions because it may lead to abuse. The amendments also require a court to make findings supporting its fee award, holding a hearing if appropriate.

CONCLUSIONS

The amendments to Rule 23 that took effect in December 2003 represent the collaborative product of a comprehensive rulemaking process that relied on extensive input from experienced judges, plaintiff and defense lawyers, corporate counsel, public interest lawyers, government lawyers, and leading law professors. The amendments were intended in many respects to codify and amplify the “best practices” that courts had developed effectively and fairly to supervise class action litigation. The amendments reflect the judiciary’s current best judgment on the standards to be used in awarding attorney fees and evaluating the fairness of settlements in class actions. The Judicial Conference took action to implement these best practices by approving the amendments to Rule 23 and transmitting them to the Supreme Court, where they were ultimately prescribed and took effect in December 2003.

The 2003 Rule 23 amendments establish a framework within which best practices will continue to evolve. Case law has already emerged applying the 2003 amendments. Developing practices will be studied by the Rules Committees, carrying forward the duty to study the Civil Rules. The empirical research services of the Federal Judicial Center may be enlisted to monitor developing practices and as appropriate to include them in revisions to the *Manual for Complex Litigation* and other Federal Judicial Center publications intended to provide continuing education for judges. Further amendments to Rule 23 itself will be considered if new problems arise, or if evolving practice suggests that best practices would be advanced by new rule provisions.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE***

Rule 23. Class Actions

* * * * *

1 **(c) Determining by Order Whether to Certify a**
2 **Class Action to Be Maintained; Appointing Class**
3 **Counsel; Notice and Membership in Class; Judgment;**
4 **Actions Conducted Partially as Class Actions Multiple**
5 **Classes and Subclasses.**

6 **(1) (A) As soon as practicable after the commencement**
7 **of an action brought as a class action, the court**
8 **shall determine by order whether it is to be so**

*New material is underlined; matter to be omitted is lined through.

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9 ~~maintained.~~ When a person sues or is sued as
10 a representative of a class, the court must —
11 at an early practicable time — determine by
12 order whether to certify the action as a class
13 action.

14 (B) An order certifying a class action must define
15 the class and the class claims, issues, or defenses,
16 and must appoint class counsel under Rule 23(g).

17 (C) An order under ~~this subdivision~~ Rule 23(c)(1)
18 may be conditional, and may be altered or amended
19 before the decision on the merits final judgment.

20 (2) (A) For any class certified under Rule 23(b)(1) or
21 (2), the court may direct appropriate notice to the
22 class.

23 **(B)** For ~~In~~ any class action ~~maintained~~ certified
24 under ~~subdivision~~ Rule 23(b)(3), the court ~~shall~~
25 must direct to class ~~the~~ members ~~of the class~~ the
26 best notice practicable under the circumstances,
27 including individual notice to all members who can
28 be identified through reasonable effort. The notice
29 must concisely and clearly state in plain, easily
30 understood language:

- 31 • the nature of the action,
- 32 • the definition of the class certified,
- 33 • the class claims, issues, or defenses,
- 34 • that a class member may enter an
35 appearance through counsel if the member
36 so desires,

- 37 • that the court will exclude from the class
38 any member who requests exclusion,
39 stating when and how members may elect
40 to be excluded, and
- 41 • the binding effect of a class judgment on
42 class members under Rule 23(c)(3).
- 43 ~~(ii) For any class certified under Rule 23 (b)(1)~~
44 ~~or (2), the court must direct notice by means~~
45 ~~calculated to reach a reasonable number of~~
46 ~~class members.~~
- 47 ~~(iii) In any class action maintained under~~
48 ~~subdivision (b)(3), the court shall direct to the~~
49 ~~members of the class the best notice practicable~~
50 ~~under the circumstances, including individual~~
51 ~~notice to all members who can be identified~~

52 ~~through reasonable effort. The notice shall~~
53 ~~advise each member that (A) the court will~~
54 ~~exclude the member from the class if the~~
55 ~~member so requests by a specified date; (B) the~~
56 ~~judgment, whether favorable or not, will~~
57 ~~include all members who do not request~~
58 ~~exclusion; and (C) any member who does not~~
59 ~~request exclusion may, if the member desires,~~
60 ~~enter an appearance through counsel.~~

61 (3) The judgment in an action maintained as a class
62 action under subdivision (b)(1) or (b)(2), whether or not
63 favorable to the class, shall include and describe those
64 whom the court finds to be members of the class. The
65 judgment in an action maintained as a class action under
66 subdivision (b)(3), whether or not favorable to the class,
67 shall include and specify or describe those to whom the

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68 notice provided in subdivision (c)(2) was directed, and
69 who have not requested exclusion, and whom the court
70 finds to be members of the class.

71 (4) When appropriate (A) an action may be brought or
72 maintained as a class action with respect to particular
73 issues, or (B) a class may be divided into subclasses and
74 each subclass treated as a class, and the provisions of this
75 rule shall then be construed and applied accordingly.

76 * * * * *

77 (e) Settlement, Voluntary Dismissal, or Compromise. A
78 ~~class action shall not be dismissed or compromised without~~
79 ~~the approval of the court, and notice of the proposed dismissal~~
80 ~~or compromise shall be given to all members of the class in~~
81 ~~such manner as the court directs.~~

82 (1) (A) The court must approve any settlement,
83 voluntary dismissal, or compromise of the claims,
84 issues, or defenses of a certified class.

85 (B) The court must direct notice in a reasonable
86 manner to all class members who would be bound
87 by a proposed settlement, voluntary dismissal, or
88 compromise.

89 (C) The court may approve a settlement, voluntary
90 dismissal, or compromise that would bind class
91 members only after a hearing and on finding that the
92 settlement, voluntary dismissal, or compromise is
93 fair, reasonable, and adequate.

94 (2) The parties seeking approval of a settlement,
95 voluntary dismissal, or compromise under Rule 23(e)(1)
96 must file a statement identifying any agreement made in

97 connection with the proposed settlement, voluntary
98 dismissal, or compromise.

99 (3) In an action previously certified as a class action
100 under Rule 23(b)(3), the court may refuse to approve a
101 settlement unless it affords a new opportunity to request
102 exclusion to individual class members who had an earlier
103 opportunity to request exclusion but did not do so.

104 (4) (A) Any class member may object to a proposed
105 settlement, voluntary dismissal, or compromise that
106 requires court approval under Rule 23(e)(1)(A).

107 (B) An objection made under Rule 23(e)(4)(A)
108 may be withdrawn only with the court's approval.

109 * * * * *

110 (g) Class Counsel.

111 (1) Appointing Class Counsel.

112 (A) Unless a statute provides otherwise, a court that
113 certifies a class must appoint class counsel.

114 (B) An attorney appointed to serve as class counsel
115 must fairly and adequately represent the interests of
116 the class.

117 (C) In appointing class counsel, the court

118 (i) must consider:

119 • the work counsel has done in identifying
120 or investigating potential claims in the
121 action.

122 • counsel's experience in handling class
123 actions, other complex litigation, and
124 claims of the type asserted in the action.

125 • counsel's knowledge of the applicable
126 law, and

127 • the resources counsel will commit to
128 representing the class;

129 (ii) may consider any other matter pertinent to
130 counsel's ability to fairly and adequately
131 represent the interests of the class;

132 (iii) may direct potential class counsel to
133 provide information on any subject pertinent to
134 the appointment and to propose terms for
135 attorney fees and nontaxable costs; and

136 (iv) may make further orders in connection
137 with the appointment.

138 **(2) Appointment Procedure.**

139 (A) The court may designate interim counsel to act
140 on behalf of the putative class before determining
141 whether to certify the action as a class action.

142 (B) When there is one applicant for appointment as
143 class counsel, the court may appoint that applicant
144 only if the applicant is adequate under Rule
145 23(g)(1)(B) and (C). If more than one adequate
146 applicant seeks appointment as class counsel, the
147 court must appoint the applicant best able to
148 represent the interests of the class.

149 (C) The order appointing class counsel may include
150 provisions about the award of attorney fees or
151 nontaxable costs under Rule 23(h).

152 **(h) Attorney Fees Award.** In an action certified as a class
153 action, the court may award reasonable attorney fees and
154 nontaxable costs authorized by law or by agreement of the
155 parties as follows:

156 **(1) Motion for Award of Attorney Fees.** A claim for
157 an award of attorney fees and nontaxable costs must be
158 made by motion under Rule 54(d)(2), subject to the
159 provisions of this subdivision, at a time set by the court.
160 Notice of the motion must be served on all parties and,
161 for motions by class counsel, directed to class members
162 in a reasonable manner.

163 **(2) Objections to Motion.** A class member, or a party
164 from whom payment is sought, may object to the motion.

165 **(3) Hearing and Findings.** The court may hold a
166 hearing and must find the facts and state its conclusions
167 of law on the motion under Rule 52(a).

168 **(4) Reference to Special Master or Magistrate Judge.**
169 The court may refer issues related to the amount of the

170 award to a special master or to a magistrate judge as
171 provided in Rule 54(d)(2)(D).

Committee Note

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class “as soon as practicable after commencement of an action” is replaced by requiring determination “at an early practicable time.” The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made “at an early practicable time.” The “as soon as practicable” exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. 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).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the “merits,” limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification

determination without forcing an artificial and ultimately wasteful division between “certification discovery” and “merits discovery.” A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a “trial plan” that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See *Manual For Complex Litigation Third*, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification “may be conditional” is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than “the decision on the merits.” This change avoids the possible ambiguity in referring to “the decision on the merits.” Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment

concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of “one-way intervention” that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice — including an opportunity to request exclusion — must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is 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. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action — such as filing claims — to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single

notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take

advantage of the district court's familiarity with the action and settlement.

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes,

including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if “a statute provides otherwise.” This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to “fire” class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court’s approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court’s duty, the listing also informs counsel seeking appointment about the topics that

should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint “class counsel.” In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an

attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class “at an early practicable time,” and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation — that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards,

under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to “an action certified as a class action.” This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel’s fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of “reasonable” attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the “common fund” theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in “common fund” cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court’s responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a “reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class”). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is

worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated

to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties — for example, nonsettling defendants — may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the

motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.
