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MAPPING THE NEW CLASS ACTION FRONTIER--A PRIMER ON THE CLASS ACTION FAIRNESS ACT AND AMENDED FEDERAL RULE 23

I. Introduction

The Class Action Fairness Act of 2005 (effective February 18, 2005) and amendments to Federal Rule 23 (effective December 2003) have reshaped the class action landscape so quickly and dramatically that it may now be virtually unrecognizable to experienced practitioners. It will take years for counsel and the courts to understand, much less develop new strategies for managing, these wholesale changes and their ramifications. These new provisions, constituting the most sweeping changes to class action practice in a generation, make obsolete many familiar existing class action tactics, practices, and standards. This uncertain world poses immediate opportunities for those pioneers who learn how to safely maneuver across the foreign terrain, and dangerous traps for those who do not.

On February 18, 2005, following a seven year journey through Congress, President Bush signed into law the Class Action Fairness Act of 2005 (CAFA). The House and Senate rapidly passed CAFA without amendment following President Bush's reelection, after the bill had been blocked by Senate filibuster in July 2004. This landmark tort reform legislation "federalizes" most interstate class actions now in the state courts through its new "minimal diversity" jurisdiction provisions, and its new standards liberalizing removal of class actions. In addition, CAFA enacts a "Consumers' Class Action Bill of Rights" that significantly alters class action settlement practices.

Adding to the great uncertainties in class action practice occasioned by adoption of CAFA, several far-reaching amendments to Federal Rule of Civil Procedure 23 took effect on December 1, 2003. The 2003 amendments were the most significant changes to Rule 23 since 1966. While the changes are primarily procedural in nature, and generally do not alter the substantive requirements for deciding whether and when class action status is proper, they substantially impact the course and conduct of class action settlement practice. The amendments further affect class notice requirements, the selection and qualifications of class counsel, and class action attorney fee awards.

This article plots a roadmap through both CAFA and the Rule 23 amendments, analyzes their effects on class action practice and strategies, and marks for class action practitioners some of the opportunities and pitfalls along the trail.

II. The Class Action Fairness Act

A. Introduction

President Bush touted CAFA--the first law of his second term--as a "critical step toward ending the lawsuit culture in our country." The class action ***12** reforms enacted by CAFA had languished in Congress in one form or another since 1998. Nonetheless, President Bush was able to garner significant bipartisan support for the bill this session, as eighteen

Democrats and one Independent were among the seventy-two Senators who voted in its favor, and fifty Democrats sided with the Republican majority in the House of Representatives.

Congress enacted CAFA after concluding that abuses of the class action device have harmed both class members with legitimate claims, and defendants who have acted responsibly; [1] adversely affected interstate commerce; [2] and undermined public respect for the judicial system. [3] In its preamble to CAFA, Congress stated that class members receive little or no benefit from class actions--and sometimes are harmed--when class counsel are awarded large attorney's fees with class members receiving only coupons or other awards of little or no value, or when confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights. [4] Moreover, Congress found that class action abuses undermined the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the Constitution. [5]

Among the various Congressional concerns was that state courts kept cases of national importance out of federal court, sometimes acting in ways demonstrating bias against out of state defendants, and making judgments that imposed their view of the law on other states, and binding the rights of residents of those states. [6] As a result, Congress passed CAFA to assure fair and prompt recoveries for class members, provide for federal judicial consideration of interstate cases of national importance under diversity jurisdiction, and benefit society by encouraging innovation and lowering consumer prices. [7]

CAFA took effect immediately on February 18, 2005, and applies "to any civil action commenced on or after the date of enactment." [8] It is debatable whether any part of CAFA--including its purely procedural components arguably capable of retroactive application without constitutional infirmity--will apply to any civil action filed prior to February 18, 2005. [9] As a result, practitioners and the courts in the years ahead will need to operate under dual sets of standards, practices, and jurisprudence in federal court class actions, with the "rules of the road" depending on whether the class action was filed before, or on or after, February 18, 2005. [10]

CAFA primarily focuses on two areas--diversity jurisdiction and settlement. First, CAFA amends the diversity jurisdiction and removal requirements for class actions. Specifically, CAFA dramatically expands the original diversity jurisdiction of federal courts over class action cases, and in turn, liberalizes the class action removal rules. Second, CAFA imposes new standards for class action settlements by codifying procedural requirements and rules to better protect class members through heightened judicial and regulatory scrutiny and a "Consumers' Class Action Bill of Rights."

CAFA does not change the existing statutory requirements relating to federal question jurisdiction (28 U.S.C. section 1331), but as discussed below, CAFA implicitly seems to allow parties to appeal the granting or denial of a motion to remand following removal on federal question grounds, a right expressly granted by CAFA in the diversity context. Moreover, Congress's stated preference of having more interstate class actions heard in federal court may arguably make it easier to succeed in removing class actions on federal question jurisdiction grounds in close cases. Finally, it is unclear whether CAFA's new settlement requirements apply to all post-CAFA class actions settled in federal court, including in bankruptcy court, regardless whether jurisdiction is based on the new CAFA diversity rules, or the existing federal question or bankruptcy rules.

As practitioners and the courts will rapidly learn, many of CAFA's statutory provisions as phrased by Congress are unclear and ambiguous, and will lead to creative applications and, perhaps, manipulation. Due to the great sums of money at issue in a typical class action case, some of CAFA's murkier provisions are expected to generate an enormous volume of satellite litigation over what those provisions really mean.

Fortunately, however, Congressman Sensenbrenner inserted a "Sponsors' Statement" into the official House record on February 17, 2005 to guide the courts and parties on how the law is supposed to work, as intended by its Sponsors. [11] Significantly, the Sponsors' Statement "deserves to be accorded substantial weight in interpreting" CAFA. [12] As a result, wise class action practitioners will ***13** carefully study the Sponsors' Statement, along with CAFA's other legislative history, as those materials may determine the outcome of many CAFA interpretation disputes.

B. CAFA's "Federalization" of Class Action Cases

CAFA "federalizes" most class actions now filed in state courts by considerably increasing the original diversity jurisdiction of federal courts over interstate class actions. In addition, CAFA's amendments to the removal statutes make it much easier for defendants to remove class actions filed in state courts. Together, this expansion of federal jurisdiction should also help eliminate many problems resulting from "dueling" federal and state class actions, as more of those dueling state cases will be removed to federal courts where the federal multidistrict litigation process can be used more frequently.

CAFA supporters argued that expanding federal jurisdiction over class actions was necessary to address the perception (and in some cases, the reality) that plaintiffs' counsel persistently engage in forum shopping by filing class actions in state courts where huge plaintiff's verdicts are the norm, even though the forum state has little or no connection to the parties or the transaction at issue. Proponents maintained that this forum shopping is further accomplished by naming additional local defendants to defeat complete diversity and prevent removal to federal courts, placing the defense burden on small local businesses who can ill afford the legal costs associated with defending a class action suit. To this end, President Bush stated that CAFA "will keep out-of-state businesses, workers, and shareholders from being dragged before unfriendly, local juries, or forced into unfair settlement."

CAFA critics claimed that requiring most class actions to be heard in federal court will deprive many class members of their "day in court." They argued that federal courts are more reluctant to certify class actions than their state counterparts, which is generally true in the context of multistate consumer fraud class actions seeking to apply the laws of multiple states, [13] and that class actions are the only economical means for these persons to seek redress for their injuries. CAFA opponents also asserted that the federal court system is already overworked, citing concerns expressed by Chief Justice William Rehnquist and Circuit Judge Richard Posner. According to some critics, CAFA would further exacerbate this problem by increasing not only the number of cases on the federal docket, but also the complexity of such cases and the requisite money and attention associated with each case.

1. CAFA's New "Minimal Diversity" Jurisdictional Standard

CAFA's jurisdictional centerpiece is its new "minimal diversity" standard for interstate class actions. CAFA amends the diversity jurisdiction statute (28 U.S.C. section 1332) by adding provisions which give federal courts original jurisdiction in class actions that involve at least $5 million in dispute, where any one class member is diverse from any one defendant. [14] Further, class members' claims can, for the first time, be aggregated for purposes of satisfying the $5 million amount in controversy requirement. [15]

While some of its provisions are ambiguous, one of CAFA's fundamental tenets is crystal clear--Congress expressed a "strong preference" that class actions be heard in federal court, with all doubts to be decided in favor of class actions staying in federal courts. This "strong preference" unmistakably permeates all of CAFA's jurisdictional and removal provisions, as well as the Sponsors' Statement interpreting those provisions.

For example, the Sponsors' Statement provides that CAFA's "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant," and that following removal, the named plaintiffs "should bear the burden of demonstrating that the removal was improper." [16] Further, according to the Sponsors' Statement, if the "court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction over the case." [17] Significantly, in cases seeking injunctive relief, a class action is subject to federal jurisdiction if the value of the matter in litigation exceeds $5 million "either from the viewpoint of the plaintiff or the defendant." [18] Similarly, in valuing the amount in dispute in cases seeking declaratory relief, the Sponsors' Statement provides that a federal court should include in this calculation the "value of all relief and benefits that would logically flow from granting the declaratory relief sought by the claimants." [19] The Sponsors' Statement adds that adeclaration that a defendant's conduct is unlawful "carries certain consequences, such as the need to cease and desist from that conduct," and this will often "'cost' the defendant in excess of $5 million." [20]

CAFA's "minimal diversity" jurisdictional standard eliminates the existing "complete diversity" requirement for class actions meeting certain requirements. [21] Prior to CAFA's enactment, federal courts did not have diversity jurisdiction over class actions if any named plaintiff and any named defendant were ***14** citizens of the same state. [22] This is no longer the case under CAFA.

Instead, as long as any one named plaintiff or putative class member is a citizen of a different state from any one defendant, and the $5 million jurisdictional amount is satisfied, then diversity jurisdiction exists, and the class action can properly be filed in or removed to federal court. By allowing aggregation of class member claims, CAFA's "minimal diversity" standard statutorily overrules existing jurisprudence that requires either that each plaintiff in a class action independently satisfy the $75,000 amount in controversy requirement, or that at least one named plaintiff satisfy this requirement.

In addition to allowing aggregation of class member claims and eliminating the complete diversity requirement for class actions, CAFA's new definition of "class action" encompasses "mass actions" that have more than 100 persons. [23] The inclusion of "mass actions" in the definition of "class action" was a Congressional attempt to address notorious joinder abuses at the state level in Mississippi and other states. CAFA's rules governing when federal jurisdiction exists over mass actions are quite complex, but they likely will not be often used since plaintiffs' counsel can simply bunch clients into separate lawsuits which have less than 100 plaintiffs to avoid CAFA removal.

CAFA's new jurisdictional grant does not apply to all interstate class action cases, however. Specifically, CAFA's minimal diversity jurisdiction provisions do not apply to: (1) cases where the primary defendants are States or government entities; (2) cases where the aggregate number of class members is less than 100; (3) cases involving certain covered securities under the federal securities laws; and (4) cases relating to the internal affairs or governance of a corporation arising under the law of the state in which the corporation is incorporated. [24]

2. CAFA's Second-Level "Abstention" Analysis

Once CAFA's minimal diversity jurisdiction is established over a class action at the threshold, the federal court may proceed with the case. In certain circumstances, however, CAFA then permits a party to ask the court to "decline to exercise" that subject matter jurisdiction. CAFA is unclear about the nature of this process, or when this procedure is supposed to take place, or how it is supposed to work. What is clear is that this new stage of class action litigation will be complex and expensive.

Under a fair reading of CAFA, it appears that once minimal diversity jurisdiction has been established, and upon motion of a party, the court is to engage in a second-level analysis, apply various factors listed by CAFA, and decide

whether to "exercise" its jurisdiction. The court's second-level analysis involves what would ordinarily be considered "abstention" principles and issues, which presuppose the existence of subject matter jurisdiction, as opposed to threshold "jurisdictional" principles and issues. How this analysis is ultimately characterized has significant ramifications. For purposes of this discussion, the court's second-level analysis will be referenced as the "abstention" analysis or procedure.

A careful examination of CAFA indicates that this "abstention" procedure is not available to a party seeking an exit from federal court where there is no defendant who is a citizen of the forum state, and similarly is not available in any case where one-third or less of the putative class members are citizens of the forum state. When the "abstention" procedure is available, the movant who asks the court not to exercise its jurisdiction will bear the burden of establishing that all of the CAFA "abstention" factors have been satisfied.

CAFA has three separate provisions that allow the Court to decline to exercise its minimal diversity jurisdiction, one involving discretionary "abstention," two involving mandatory "abstention." [25] The "abstention" factors to be applied are both complex and ambiguous. All three of CAFA's "abstention" provisions turn, in part, on a "body count" of putative class members in all classes and subclasses in the case.

Under CAFA's discretionary "abstention" provision, "in the interests of justice and looking at the totality of the circumstances, a court may decline to exercise jurisdiction" in cases where a movant can show that between one-third and two-thirds of the class members, and the "primary defendants," are citizens of the forum state, after considering the following factors:

- whether the claims asserted involve matters of national or interstate interest;
- whether the claims asserted will be governed by the laws of the state in which the action was originally filed;
- whether the class action has been artfully pleaded to avoid federal jurisdiction;
- whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
- whether the number of citizens of the forum state in all proposed plaintiff classes is substantially larger than the number of citizens from any other state, and the citizenship of the other class members is dispersed among a substantial number of other states; and

***15** • whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed. [26]

Under CAFA's two mandatory "abstention" provisions, a court "shall decline to exercise" its minimal diversity jurisdiction in cases where a movant can show that either: (1) more than two-thirds of the class members and the "primary

defendants" are citizens of the forum state, [27] or (2) more than two-thirds of the class members are forum state citizens, at least one defendant from whom "significant relief is sought" and whose conduct forms a "significant basis" of the claims is a forum state citizen, the "principal injuries" occurred in the forum state, and no other similar class actions asserting the same claims were filed within the previous three year time period. [28]

Countless procedural and interpretive questions will arise in connection with the court's second-level "abstention" analysis. For example, where will this analysis take place? Arguably, this process should occur only after conclusion of any threshold jurisdictional remand proceedings, and in connection with class certification proceedings in light of the "body count" issues involved. Also, how will the courts define the terms and the factors listed by CAFA, such as who are the defendants from whom "significant relief is sought" when there are multiple defendants, what are "principal injuries," and who are the "principal defendants?"

Practitioners may look for guidance, in part, from the federal Multiparty, Multiforum, Trial Jurisdiction Act (the MMTJA), [29] enacted in November 2002. The MMTJA is an analogous federal statute because it, too, creates a type of "minimal diversity" jurisdiction, allows a court in a second-level analysis to abstain from exercising its "minimal diversity" jurisdiction in certain circumstances, and identifies as factors considered in its abstention analysis a plaintiff "head count" and the citizenship of the "primary defendants."

The MMTJA generally creates original federal jurisdiction over cases where minimal diversity exists between adverse parties, that involve an accident when at least 75 people have been killed and certain other factors are satisfied. [30] Under the MMJTA, the court must abstain from exercising its minimal diversity jurisdiction if, among other things, considerations in any requested second-level abstention procedure show that a "substantial majority of all plaintiffs" and the "primary defendants" are citizens of the same state. [31]

One federal decision [32] has interpreted some of the MMJTA's minimal diversity jurisdiction provisions, discussed the proper characterization of the second-level abstention analysis, and addressed the meaning of the phrase "primary defendants." At the threshold, the court considered whether the purpose of any second-level analysis was to determine if minimal diversity jurisdiction existed in the first instance, or if the court should abstain from exercising its minimal diversity jurisdiction that had already been established. The *Passa* court found that this secondary analysis under the MMTJA involved "mandatory abstention" that presumed the existence of minimal diversity jurisdiction. [33] The court also concluded that the most appropriate definition of "primary defendants" includes "those parties facing direct liability in the instant litigation." [34]

Again, the proper characterization of CAFA's second-level "abstention" analysis has broad strategic implications. [35] For example, if these CAFA provisions involve "abstention" principles as opposed to subject matter jurisdiction principles, a removal notice under CAFA may arguably need allege only that there is more than $5 million in dispute, and involves more than 100 class members with at least one plaintiff and one defendant from different states. Similarly, if this is really an abstention analysis, then that procedure should not occur until after a remand motion is denied. Also, once a court has addressed abstention and declined to abstain, it generally may not revisit that issue at a later point as it could for a subject matter jurisdiction question, which can be addressed at any time. [36] In addition, while CAFA allows remand decisions--which involve subject matter jurisdiction--to be appealed at the court's discretion, a decision on CAFA's second-level analysis, if it involves abstention, may be subject to appeal standards governing abstention rulings.

Some plaintiffs' counsel have commented that they plan to take extensive discovery regarding the factors to be considered under CAFA's "abstention" analysis. The Sponsors' Statement specifically recognizes that in assessing the complex criteria for CAFA's new jurisdictional and "abstention" provisions, the federal courts might have to "engage in some fact finding, not unlike what is necessitated by the existing jurisprudential statutes," and "that in some instances,

limited discovery may be necessary to make these determinations." [37] However, the Sponsors' Statement cautions that "these jurisdictional determinations should be made largely on the basis of readily available information. Allowing ***16** substantial, burdensome discovery on jurisdictional issues would be contrary to the intent of these provisions to encourage the exercise of Federal jurisdiction over class actions." [38] Thus, the courts should not permit plaintiffs to use this second-level analysis--regardless whether characterized as involving jurisdiction or abstention--as a means to improperly and prematurely attempt to take class discovery or obtain class members lists.

3. CAFA'S New Removal Provisions

In addition to greatly expanding the federal courts' original jurisdiction over class actions, CAFA drastically liberalizes existing removal practice under the new "minimal diversity" standard. CAFA amends the removal statutes (28 U.S.C. section 1441 *et seq*.) to add new removal rules for class actions, now codified at new 28 U.S.C. section 1453. These new removal rules appear intended to mirror CAFA's expanded original minimal diversity jurisdiction. According to the Sponsors' Statement, these removal standards are designed to "put an end to the type of gaming engaged by plaintiffs' lawyers to keep cases in state courts. They should thus be interpreted with this intent in mind." [39]

Under CAFA, a class action may now be removed to federal court on minimal diversity grounds regardless whether any defendant is a citizen of the forum state (unlike the prior rule), and may be removed by any defendant without the consent of the other defendants (unlike the prior rule). [40] Further, the one-year time limitation for diversity removal under 28 U.S.C. section 1446(b) no longer applies to class actions removed under CAFA. [41] These new standards significantly differ from the removal requirements governing removal of cases that are not class actions, which remain unchanged. [42]

Note, however, that pre-CAFA diversity removal rules may arguably still apply to allow removal of class actions commenced post-CAFA, if CAFA's minimal diversity jurisdiction standards cannot be met but pre-CAFA diversity jurisdiction rules can. This might occur in a number of circumstances. For example, where a named plaintiff has a claim exceeding $75,000, but the total class amount in dispute is less than $5 million, and diversity of citizenship otherwise exists under the pre-CAFA diversity removal standard, then it appears that the case may still be removed on pre-CAFA diversity grounds. [43]

Another significant change from prior law is that CAFA now permits discretionary appeals of orders denying or granting motions to remand class actions removed on minimal diversity grounds, [44] as long as the appeal application is made to the circuit court within seven days from the entry of the order. [45] Moreover, while unclear, orders granting or denying remands of class actions removed on federal question or even bankruptcy grounds may also be immediately appealable under this provision. If the Circuit Court accepts an appeal, that court shall complete all action, including rendering judgment, within sixty days, except in circumstances where extensions are granted. [46] If a final judgment on the appeal is not issued within this timeframe, the appeal is deemed denied. [47]

This means that Circuit Courts will have frequent opportunities to provide the much-needed interpretation of any ambiguous CAFA provisions. The Sponsors stated that this appeal vehicle would create a "body of clear and consistent guidance for district courts that will be interpreting this legislation and would particularly encourage appellate courts to review cases that raise jurisdictional issues likely to arise in future cases." [48]

C. CAFA's New Settlement Provisions

In addition to overhauling the diversity jurisdiction and removal statutes, CAFA creates new rules governing class action settlements. While some of these standards were already otherwise in place under the 2003 amendments to Rule

23 (discussed below), CAFA imposes some new requirements on parties settling class action litigation. While unclear, these CAFA provisions apparently do not apply to post-CAFA settlements of class actions that were filed pre-CAFA. Moreover, for class actions filed post-CAFA that are in district court or bankruptcy court under federal question or bankruptcy jurisdiction (as opposed to minimal diversity jurisdiction), CAFA's settlement requirements may apply to those cases as well.

CAFA enacts a "Consumers' Class Action Bill of Rights," which puts into place certain limitations for coupon settlements, imposes an onerous notification requirement on defendants in class action settlements, and provides other protections for class members bound by a settlement. The provisions in CAFA's "Consumers' Class Action Bill of Rights" are codified at 28 U.S.C. section 1711 *et seq*. CAFA also requires the Judicial Conference of the United States to submit a report on class action settlement ***17** practices within twelve months of CAFA's enactment, which could possibly lead to further reform legislation down the road.

1. "Consumers' Class Action Bill of Rights"

CAFA, in addressing coupon settlements, provides that in cases where a proposed settlement awards coupons to class members, "the portion of any attorney's fees award to class counsel that is attributable to the award of coupons shall be based on the value to class coupons of coupons that are redeemed." [49] This is significant because class counsel will no longer be able to base their fees on a settlement value that assumes a 100 percent redemption rate, or be paid their attorney's fees until the completion of the coupon redemption process. To the contrary, attorney's fees may be premised only on the value of the coupons actually redeemed. [50]

In addition, if a proposed settlement awards coupons to class members, but further grants injunctive or equitable relief, the attorney's fees attributable to the coupons must be based on the value of the coupons actually redeemed. [51] Any attorney's fees attributable to the injunctive and/or equitable relief is valued by the time class counsel spent working on the case. [52] CAFA allows the method of applying a lodestar with a multiplier to ascertain the proper amount of attorney's fees in the latter scenario. [53]

CAFA also requires a court to hold a hearing to determine whether the proposed coupon settlement is fair, reasonable, and adequate to class members, and the court must issue written findings setting out its reasons. [54] This requirement merely codifies prior prevailing practice, which was incorporated into revised Federal Rule 23, effective on December 1, 2003. CAFA also permits the court to receive expert testimony on the value to class members of the coupons actually redeemed at the settlement fairness hearing. [55] Again, this does not change prevailing practice, as courts routinely permit experts to testify at class action settlement fairness hearings. Finally, CAFA expressly grants a court discretion to require that the settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to charitable or governmental organizations, as agreed to by the parties. [56]

Perhaps the most far-reaching aspect of CAFA's "Consumers' Class Action Bill of Rights" from the defense perspective is its new onerous notification duty in class action settlements. Specifically, CAFA now requires each defendant to serve an appropriate government official of each state in which a class member resides, in addition to an appropriate federal official, with notice of the proposed settlement and certain specified settlement-related papers, within ten days of the settlement being filed with the federal court. [57] As drafted, these notice requirements are not entirely clear.

The "appropriate state official," depending on the type or legal status of the defendant entity and the issues in the case, may be the primary state licensing or regulatory body, or the state Attorney General. The "appropriate federal official" may be the U.S. Attorney General or, in the case of a depository institution or affiliate, that institution's primary supervisory agency when the issues in the case are subject to that agency's regulation or supervision. CAFA does not

require those authorities receiving this new deluge of settlement papers to do anything in response, and specifically provides that the defendant's notice requirement does not expand the authority of those federal and state officials.

This notification must include a copy of the complaint, notice of any scheduled judicial hearing, any proposed or final notice mailed to class members, any proposed final judgment or notice of dismissal, "any settlement or other agreement contemporaneously made" by the parties, any "proposed or final class action settlement," any written judicial opinion relating to these items, and "if feasible," the names of class members, their respective states, and their estimated proportionate share of the entire settlement, or if not feasible, a "reasonable estimate" of this data. [58]

Any failure to comply with this notification requirement will have significant ramifications, because class members may refuse to be bound by a settlement agreement or consent decree under *res judicata* principles if the notice has not been properly provided. [59] In some instances, it will be unclear who the "appropriate state official" will be, likely leading to notice being sent to multiple offices to ensure compliance. Moreover, final settlement approval cannot occur until at least 90 days after service of the notice on officials. [60] Aside from the additional paperwork burden associated with compliance, this new notice requirement will inject greater uncertainty into every class action settlement, particularly since there is possible oversight or involvement by as many as 51 different federal and state attorneys general and/or agencies per defendant.

The effect of CAFA's notice requirement is clear: class action settlements will be more difficult to conclude. Ambitious state Attorneys General, or consumer advocates acting pursuant to arrangements with state officials, may now attempt to scrutinize most federal class ***18** action settlements. Class actions requiring notices to dozens of regulatory officials may as a matter of course lead to so many questions, objections, burdens, increased costs and other risks that, under the "law of unintended consequences," both class counsel and defense counsel might attempt to avoid the federal courts altogether.

Finally, CAFA's Consumer Class Action Bill of Rights grants class members a few other protections. CAFA specifically addresses settlements where a class member must pay sums to class counsel so that the class member suffers a net loss. Courts can approve such a settlement only if it makes a written finding that the non-monetary benefits to class members outweigh the amount of the loss. [61] Similarly, CAFA provides that courts may not approve a settlement that provides greater sums to some class members solely on the basis that those class members are in closer geographic proximity to the court. [62] For practical purposes, these protections likely will not be triggered often. There are few settlements resulting in a net loss to class members, and any settlements providing greater sums to class members based on their geographic location would likely not pass muster under existing jurisprudential rules or under amended Rule 23. Nonetheless, the media attention associated with several "poster child" examples of notorious settlements prompted Congress to include these new provisions.

Supporters of CAFA argued that the Consumers' Class Action Bill of Rights is necessary to ensure that the true beneficiaries of class action settlements are the class members, not class counsel. Critics, on the other hand, argued that the lodestar method of calculating attorneys fees will not prevent abuse or overcompensation in class action settlements. They further asserted that potential plaintiffs do not benefit overall, because even with the settlement protections and restrained attorney fees awards, the general reluctance of federal courts to certify class actions inhibit their recovery.

2. Report on Class Action Settlement Practices

In addition to the Consumers' Class Action Bill of Rights, CAFA requires the Judicial Conference of the United States to prepare and transmit to the Judiciary Committees of the House and Senate a report on class action settlements within twelve months of enactment. [63] This report must set forth: (1) recommendations on the best practices courts can use

to ensure that settlements are fair to class members; (2) recommendations on the best practices that courts can use to ensure that attorney fee awards appropriately reflect the extent to which counsel succeeded in obtaining redress for the alleged injuries, and that class members are the primary beneficiaries of the settlement; and (3) actions that the Judicial Conference has taken toward having the Federal judiciary implement any of those recommendations. [64]

CAFA does not state whether Congress will rely on the Judicial Conference's report to pass additional class action reform legislation. Notably, CAFA does not require the Judicial Conference to provide a report on the impact of CAFA's most drastic changes involving the expansion of federal courts' original jurisdiction over class action cases and the accompanying liberalization of the removal rules.

III. Amendments to Rule 23

A. Introduction

Following a ten-year study by the Advisory Committee on Civil Rules, a series of amendments to Rule 23 took effect on December 1, 2003. Previously, on April 1, 2003, the United States Supreme Court entered an order adopting the changes after the United States Judicial Conference unanimously accepted the proposed amendments on September 24, 2002. The changes in Rule 23 apply to all cases filed on or after December 1, 2003, as well as to cases filed before that date to the extent "just and practicable" if no party is prejudiced. Although none of these revisions change the substantive requirements under Rules 23(a) and 23(b) for certifying class actions, there were several important changes to the rule's procedural requirements.

The amendments to Rule 23 involve four main sets of issues: (1) judicial oversight of class action settlements; (2) class certification and notice requirements; (3) appointment and qualifications of class counsel; and (4) attorney fee awards. The amendments create entirely new provisions, and codify certain common prevailing practices and jurisprudential standards.

B. Heightened Judicial Oversight of Class Action Settlements

The most significant changes to prior practice are found in Rule 23(e), concerning class action settlements. These amendments have the objective of increasing judicial oversight of class action settlements, and are expected to engender new uncertainties and novel risks in the class action settlement context.

1. "Second Chance" Opt-Outs--A New Creature

In a major change, Rule 23(e)(3) now provides that in cases previously certified under Rule 23(b)(3), the court may, in its discretion, refuse to approve a settlement, unless it affords a new opportunity to request exclusion from the class for class members who previously had the opportunity to opt-out but did not do so. [65] In other words, in cases certified following a contested motion under Rule 23(b)(3), class members may be given a ***19** "second chance" to opt-out of a later settlement at the discretion of the court. This new provision marks a major change in class action procedure, and is the subject of some controversy. This new rule, however, does not apply to "settlement classes."

The rationale for the second chance opt-out is that "a decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known." [66] Class members may be in a better position to evaluate their individual claims compared to the class claims after the case has proceeded beyond the contested certification stage, or have a better understanding of the strengths and weaknesses of the case.

Under old Rule 23, a class member who did not opt-out by the deadline in a contested certification proceeding was forced to remain in the class even if any later settlement was deemed undesirable (although that person still had the right to object to the settlement). The second chance opt-out amendment applies only in cases where a settlement is reached after a class has been certified, and the original opt-out period has lapsed. The amendment will not impact cases where certification is uncontested and granted in connection with a proposed negotiated settlement. Moreover, according to the Advisory Committee, under Rule 23(e)(3), "[e]xclusion 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." [67]

In connection with a decision to allow second chance opt-outs, the court may address the possible misuse of such a right by class members by fashioning limitations and terms that are equitable under the circumstances, such as a ruling that persons opting out on the second chance are bound by prior merits rulings. [68]

Although the 2003 amendments have been in effect for little over a year, several federal courts have had the opportunity to address various second chance opt-out arguments. One court has confirmed the notion that the opportunity to allow class members a second chance to opt-out is completely within the court's discretion. [69] Unless the settlement objectors can provide a reason to allow a second chance to opt-out, the court is within its discretion to refuse such an opportunity. [70] "Rule 23(e)(3) was not meant to require an automatic second opt-out whenever a proposed settlement is amended after the close of the first opt-out period." [71]

2. Mandatory Disclosure of Side Agreements

New Rule 23(e)(2) also represents a significant change in class action settlement practice, as parties seeking approval of a class action settlement must now "file a statement identifying any agreement made in connection with the proposed settlement." [72] This disclosure requirement is in addition to the previously existing duty to inform the court of the settlement's terms and conditions.

The new rule seeks disclosure of "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." [73] The scope of this new requirement is unclear, and will likely be the subject of future litigation. For example, there is no requirement that these side agreements be material or in writing.

Side agreements generally include agreements concerning a class representative's compensation, agreements pertaining to concurrent settlements or the future conduct of related litigation in other jurisdictions, agreements that allow the defendant to withdraw from the settlement if a certain percentage of class members opt-out, and agreements concerning the allocation of work and attorney's fees among plaintiffs' counsel. Under amended Rule 23(e)(2), the identity of these "side agreements" must now be disclosed to the court, and in some instances the terms of the agreement or the actual agreements must be provided. [74] The Advisory Committee recognizes that the identification of some types of agreements, such as plaintiffs counsels' agreements regarding sharing of work and fees, or agreements setting out the number of opt-outs needed to trigger a defendant's right to walk away from the deal, implicate confidentiality or work product concerns, and preserves the rights of the parties to assert those privileges and positions. [75]

The new provision may help limit some possible existing potential abuses or improper collusion. However, it also creates numerous difficulties and questions in actual practice for both plaintiffs and defendants, due to its all-inclusive language requiring identification of any agreements "in connection with" the settlement. While the Advisory Committee warns that disclosure of these side agreements should not serve as a basis for ancillary discovery by settlement objectors or others, most practitioners expect that attempts at such discovery will result.

One federal court was recently confronted with this very situation in connection with a proposed settlement of a ***20** securities fraud class action. [76] The defendant issuers of the securities disclosed and provided to the court for an *in camera* inspection various "side agreements" with the issuers' insurers concerning their insurance policies. [77] A group of underwriter objectors argued that they should be permitted to take documentary and deposition discovery of the side agreements. [78] Citing the Advisory Committee Notes to the 2003 amendments, the court rejected the objectors' arguments, holding that the side agreements did not "affect the rights of, or consideration to, the proposed settlement classes" and thus there was no need for any discovery relating to those agreements. [79] This will not be the last case addressing this issue.

3. No Court Approval Needed for Class Representative Settlements

Revised Rule 23(e) also resolves an ambiguity in the prior rule, which was sometimes interpreted as requiring court approval of pre-certification settlements or dismissals that compromised or affected only the individual claims of the class representatives. New Rule 23(e) makes it clear that court approval is required only for the settlement, dismissal, or compromise of claims, issues, or defenses of a *certified class*. [80] A settlement does not need court approval, if class allegations are dismissed as part of a settlement prior to certification. Thus, the amount a defendant decides to "pay off" a class representative prior to class certification will not need court approval. Rule 23(e)(1)(B) now requires that the court direct notice to all class members who would be bound by a proposed settlement, dismissal, or compromise, a continuation of the current practice.

4. Fairness Hearings Required

Amended Rule 23(e) also codifies the current practice under the Manual for Complex Litigation and the case law regarding conducting a hearing to determine the fairness of a proposed settlement. [81] In addition, the court must enter findings that the settlement is fair, reasonable, and adequate. [82]

5. Court Approval Needed for Withdrawing Objections

Finally, new Rule 23(e) confirms that class members have the right to object to a proposed settlement, voluntary dismissal, or compromise which requires court approval, and further provides that such an objection may be withdrawn only with the court's approval. [83]

This last provision--allowing withdrawal of objections to settlements only if approved by the court--appears to be directed at minimizing abuses involving groups of objectors who hold out unless and until the defendant, desiring settlement approval, agrees to pay the objectors a settlement premium over the terms offered to the class to "go away." This new provision should make it more difficult for the "settlement objector" plaintiffs' bar to extract higher amounts than those garnered by the class as a whole, while requiring defendants to address more objections head-on.

It is unclear what standards the courts will apply in granting approval when reviewing the negotiated terms of objection withdrawals. It also appears that Rule 23(e)(2)'s new requirement for disclosure of side agreements "made in connection with" class settlements would separately obligate the parties to disclose the terms of any objector settlement to the court.

C. Timing of Class Certification and Notice Requirements

1. Introduction

The 2003 amendments also changed some procedural rules governing the timing for class certification and the substance of required notice to class members. The new rules more closely resemble the practices set out in the Manual for Complex Litigation.

2. When to Move for Certification

Amended Rule 23(c) now requires the trial court to decide whether to certify a class action "at an early practicable time." [84] This new standard should now allow more time to obtain the information needed for the court's certification inquiry, and on balance, may favor plaintiffs. The amendment deletes the "as soon as practicable" language from the prior rule, recognizing that, in many instances there are valid justifications for deferring the class certification decision.

There are cases where a defendant may wish to dispose of the individual plaintiff's claims through summary judgment or motion to dismiss prior to addressing class certification. The parties may also need to engage in "controlled discovery" into the merits for the purpose of identifying the issues to be presented at trial and developing a "trial plan," so that the court can properly determine whether certification is appropriate. [85] Appropriate discovery at that stage may involve the nature of the issues to be tried, ascertaining whether the issues are subject to class-wide proof, and exploration of anticipated trial management problems. At the same time, the Advisory Committee notes that "certification discovery need not concern the weight ***21** of the merits or the strength of the evidence." [86]

3. Class Notice Issues

Rule 23(c), as revised, also changes the notice requirements in cases certified as class actions to conform to what were prevailing standard practices. For classes certified under Rules 23(b)(1) or 23(b)(2), the court now has discretionary authority under the rule to direct appropriate notice to the class. [87]

However, as before, it is mandatory that the court provide notice in Rule 23(b)(3) classes. [88] In cases certified under Rule 23(b)(3), the court must direct to class members the best notice practicable. [89] The notice must concisely and clearly state in "plain, easily understood language:"

- the nature of action;
- the definition of the class certified;
- the class claims, issues and defenses;
- that class members may enter an appearance through counsel if the member so desires;
- that the court will exclude from the class any member who requests exclusion, stating when and how members can be excluded; and

- the binding effect of the class judgment under Rule 23(c)(3). [90]

The first three listed items are new requirements. The requirement that the notice be in "plain, easily understood language" was also added by the 2003 amendments.

The 2003 amendments deleted the provision in the prior rule that allowed class certification to be "conditional." As a result, the courts must now reject class certification until all Rule 23 conditions have been fully met. Rule 23(c) also provides that the certification order may be altered or amended before final judgment as conditions warrant. [91]

D. Appointment of Class Counsel

The old version of Rule 23 was silent regarding the selection or duties of class counsel, although a large body of jurisprudential standards had developed over time. New Rule 23(g) concerning the appointment of class counsel is an entirely new subdivision added by the 2003 amendments. Under Rule 23(g), a court that certifies a class must appoint class counsel. [92] An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class. [93] Rule 23(g) makes it clear that class counsel's duty is owed to the class as a whole, not just to the class representatives or a select group of plaintiffs.

Rule 23(g) lists certain factors the court must consider in appointing class counsel:

- the work counsel performed in identifying or investigating potential claims in the action;

- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;

- counsel's knowledge of the applicable law; and

- the resources counsel will commit to representing the class. [94]

Some or all of these factors were regularly considered by courts in connection with the adequacy of representation requirement under Rule 23(a)(4).

The court may consider other pertinent matters relating to class counsel's ability to fairly and adequately represent the class, [95] and may direct potential class counsel to provide information on any subject pertinent to their appointment and to propose terms for attorney's fees and non-taxable costs. [96]

Rule 23(g) further provides that the court may designate interim counsel to act on behalf of the putative class before determining whether to certify the case as a class action. [97] The new rule envisions the possibility of more than one applicant for class counsel, and in those situations, the court must appoint the applicant best able to represent the interests of the class. [98]

E. Attorney's Fee Awards

Old Rule 23 provided no guidance on how or when attorney fee awards should be made, and over time, the prevailing rules were crafted jurisprudentially on a case-by-case basis. The revisions add Rule 23(h), specifically governing attorney fee awards.

The new rule does not create an additional basis for attorney's fees where those fees were not otherwise available under statute, case law, or agreement. Instead, under Rule 23(h), the court may award attorney's fees and non-taxable costs when authorized by law or by agreement of the parties upon motion under Rule 54(d)(2). [99] The motion must be served on all parties and directed to all ***22** class members. [100] The court may hold a hearing on the motion and must state its conclusions of law and facts regarding the motion. [101] The court also may refer the attorney's fees issue to a special master or magistrate judge. [102]

According to the Advisory Committee, Rule 23(h) was added because:

> 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 eventual fee award, or for monitoring the work of class counsel during the tendency of the action. [103]

The new rule authorizes the award of attorney's fees to others in addition to class counsel, including those who worked on the case prior to certification or represented objectors to proposed settlements. The rule does not state a preference whether the courts should apply a lodestar approach or a percentage of recovery approach, in calculating attorney's fees in the common fund context.

IV. Conclusion

With the passage of CAFA, class action lawyers will see major changes in class action strategies and practices. CAFA's new “minimal diversity” standard and liberal removal rules will make it much easier for defendants to have most class actions litigated in federal court. CAFA will also cause changes in the method that class action practitioners approach and deal with class action settlements.

While the 2003 amendments to Rule 23 will not change the substantive requirements for certifying class actions, the revisions have a far-ranging impact on class action procedure and practice, particularly in the manner in which courts approve class action settlements, notify class members of a certification, appoint and select class counsel, and approve attorney fee awards.

Footnotes

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1 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(2)(A) (codified as note to 28 U.S.C. § 1711). CAFA's provisions amend or enact new provisions of the U.S. Code, and thus citations herein will reference the appropriate section of the Public Law and the part of the U.S. Code where the relevant provision will be codified.

2 Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(2)(B) (codified as note to 28 U.S.C. § 1711).

3 *Id.* § 2(a)(2)(C) (codified as note to 28 U.S.C. § 1711).

4 *Id.* § 2(a)(3) (codified as note to 28 U.S.C. § 1711).

5 *Id.* § 2(a)(4) (codified as note to 28 U.S.C. § 1711).

6 *Id.*

7 *Id.* § 2(b) (codified as note to 28 U.S.C. § 1711).

8 *Id.* § 9 (codified as note to 28 U.S.C. § 1711). As noted by President Bush at CAFA's signing ceremony, there was a surge of class action filings in state courts in the days leading up to February 18, 2005, apparently in anticipation of CAFA's passage, to avoid its scope.

9 One Circuit court has held in a class action that was filed in state court before CAFA's effective date, but removed to federal court after that date, that the action was "commenced" for CAFA purposes when it was filed in state court, not when it was removed. Pritchett v. Office Depot, Inc., 2005 No. 05-0501, 2005 WL 827158 (10th Cir. April 11, 2005).

10 Moreover, it is unclear whether CAFA will apply to actions filed as single plaintiff cases prior to February 18, 2005, that are amended after that date to add class action claims or additional class plaintiffs.

11 On February 17, 2005, the day CAFA (Senate Bill 5) was passed by the House. Congressman Sensenbrenner read into the House record a statement "relative to the intent of the managers of the bill" (herein referred to as the "Sponsors' Statement"),"
151 Cong. Rec. H723-01, at H727 - H729 (daily ed. Fed. 17, 2005) (statement of Rep. Sensenbrenner).

12 *See* Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1979) (citing Nat'l Woodwork Mfrs. Assn. v. NLRB, 368 U.S. 612, 640 (1967); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951)).

13 In the days leading up to CAFA's passage, an amendment was offered that would have limited a federal court's ability to deny class certification in nationwide cases on the grounds of variations in applicable state law. This proposed amendment, however, did not make it into the final bill.

14 Pub. L. No. 109-2, 119 Stat. 4, § 4(a)(2) (codified as 28 U.S.C. § 1332(d)(2)).

15 *Id.* (codified as 28 U.S.C. § 1332(d)(6)).

16 151 Cong. Rec. H723-01, at H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at H727 - H728.

21 Cases that are not class actions will remain subject to the "complete diversity" rules. Moreover, class actions that do not meet CAFA's "minimal diversity" rules arguably are still eligible for federal court if they otherwise meet the "complete diversity" rules.

22 *See* Strawbridge v. Curtiss, 7 U.S. 267 (1806).

23 Pub. L. No. 109-2, 119 Stat. 4, § 4(a)(2)(codified as 28 U.S.C. § 1332(d)(1)).

24 *Id.* (codified as 28 U.S.C. §§ 1332(d)(5) and (9)).

25 Assuming these provisions are in the nature of abstention provisions, existing Supreme Court jurisprudence governing abstention principles may serve as guidelines for the courts. *See, e.g.*, Moses H. Cone Memorial Hospital v. Mercury Constr. Co., 460 U.S. 1 (1983).

26 Pub. L. No. 109-2, 119 Stat. 4, § 4(a)(2) (codified as 28 U.S.C. § 1332(d)(3)).

27 *Id.* (codified as 28 U.S.C. § 1332(d)(4)(B)).

28 *Id.* (codified as 28 U.S.C. § 1332(d)(4)(A)).

29 28 U.S.C. § 1369(a).

30 *Id.*

31 28 U.S.C. § 1369(b)

32 *Passa v. Derderian*, 308 F. Supp. 2d 43 (D.R.I. 2004).

33 *Id.* at 55-57. The *Passa* court referenced another analogous jurisdiction statute for bankruptcy cases (28 U.S.C. § 1334), and cited case law interpreting the bankruptcy jurisdiction provision as containing both mandatory and discretionary abstention provisions. *Id.* at 57, n. 12 (citing *In re* Middlesex Power Equipment & Marine, Inc., 292 F.3d 61,67 (1st Cir. 2002)).

34 *Passa*, 308 F. Supp. 2d, at 62-63.

35 *Id.* at 55.

36 *Id.*

37 151 Cong. Rec. H723-01, at H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

38 *Id.*

39 *Id.*

40 Pub. L. No. 109-2, 119 Stat. 4, § 5(a) (codified as 28 U.S.C. § 1453(b)).

41 *Id.*

42 Interestingly, a version of CAFA that the House passed in 2003, but was never passed by the Senate, contained a provision allowing putative plaintiff class members to remove class actions to federal court, even where their class representative commenced the case in state court, following certification. This provision was not, however, included in the final bill signed by President Bush.

43 28 U.S.C.§ 1332(a) (district courts have original jurisdiction where amount in controversy exceeds $75,000 and there is diversity of citizenship).

44 It is worth noting that the 2003 class action bill that passed the House included a provision allowing immediate appeals of all decisions on motions for class certification, irrespective of whether the motion was granted or denied.

45 Pub. L. No. 109-2, 119 Stat. 4, § 5(a) (codified as 28 U.S.C. § 1453(c)(1)).

46 *Id.* (codified as 28 U.S.C. 1453 (c)(2) - (3)). These extensions will be for a period of ten days, or for any period of time if all parties agree to the extension.

47 *Id.* (codified 28 U.S.C.§ 1453(c)(4)).

48 151 Cong. Rec. H723-01, at H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

49 Pub. L. No. 109-2, 119 Stat. 4, § 3(a) (codified as 28 U.S.C. § 1712(a)).

50 While CAFA specifically addresses this concern for "coupon" settlements. CAFA does not address this issue in the context of valuing settlements to fix the attorney's fee amount in "claims made" or similar settlements that do not involve "coupons." The definition of "coupons" is unclear, although it appears that CAFA contemplates a coupon as something capable of being "redeemable."

51 Pub. L. No. 109-2, 119 Stat. 4, § 3(a) (codified as 28 U.S.C. § 1712(c)).

52 *Id.* (codified as 28 U.S.C. § 1712(c)(1)).

53 *Id.* (codified as 28 U.S.C. § 1712(b)).

54 *Id.* (codified as 28 U.S.C. § 1712(e)).

55 *Id.* (codified as 28 U.S.C. § 1712(d)).

56 *Id.* (codified as 28 U.S.C. § 1712(e)).

57 *Id.* (codified as 28 U.S.C. § 1715(b)).

58 *Id.*

59 *Id.* (codified as 28 U.S.C. § 1715(e)(1) - (2)).

60 *Id.* (codified as 28 U.S.C. § 1715(d)).

61 *Id.* (codified as 28 U.S.C. § 1713).

62 *Id.* (codified as 28 U.S.C. § 1714).

63 *Id.* § 6(a).

64 *Id.* § 6(b).

65 Fed. R. Civ. P. 23(e)(3).

66 Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

67 *Id.*

68 *Id.*

69 *See* Denney v. Jenkens & Gilchrist, No. 03 Civ. 5460 (SAS), 2005 WL 388562, at *21 (S.D.N.Y. Feb. 18, 2005).

70 *Id.*

71 *See id.* at *22; *see also In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 518 n. 18 (E.D.N.Y. 2003) (holding that whether to allow second opportunity to opt-out is within discretion of court and declining to exercise that option "in light of the infinitesimal number of objections").

72 Fed. R. Civ. P. 23(e)(2).

73 Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

74 *Id.*

75 *Id.*

76 *See In Re* Initial Public Offering Secur. Litig., No. 21 MC 92 (SAS), 2005 WL 356961, at *15-16 (S.D.N.Y. Feb. 15, 2005).

77 *Id.*

78 *Id.*

79 *Id.* at *16.

80 Fed. R. Civ. P. 23(e)(1)(A) (emphasis added).

81 Fed. R. Civ. P. 23(e)(1)(C).

82 Fed. R. Civ. P. 23(e)(1)(B).

83 Fed. R. Civ. P. 23(e)(4).

84 Fed. R. Civ. P. 23(c)(1)(A).

85 Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

86 *Id.*

87 Fed. R. Civ. P. 23(c)(2)(A).

88 Fed. R. Civ. P. 23(c)(2)(B).

89 *Id.*

90 *Id.*

91 Fed. R. Civ. P. 23(c)(1)(C).

92 Fed. R. Civ. P. 23(g)(1)(A).

93 Fed. R. Civ. P. 23(g)(1)(B) (emphasis added).

94 Fed. R. Civ. P. 23(g)(1)(C)(i).

95 Fed. R. Civ. P. 23(g)(1)(C)(ii).

96 Fed. R. Civ. P. 23(g)(1)(C)(iii).

97 Fed. R. Civ. P. 23(g)(2)(A).

98 Fed. R. Civ. P. 23(g)(2)(B).

99 Fed. R. Civ. P. 23(h)(1).

100 *Id.*

101 Fed. R. Civ. P. 23(h)(3).

102 Fed. R. Civ. P. 23(h)(4).

103 Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

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