SideBAR

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Message from the Chair

John G. McCarthy

While it is difficult for me to fathom, more than a fifth of my term as the Chair of your Section is already over. That realization caused me to consider what has transpired since October 1.

During those five months, a lot has happened in this country that highlights the importance of being actively involved in organizations like the Federal Bar Association and particularly this Section. I also took this opportunity to look forward toward the remainder of my term. When it ends on September 30, 2018, this country will be involved in mid-term Congressional elections. Regardless of political affiliation, I am sure that we can all agree that the months between then and now will be interesting ones in our capital, and possibly in federal courts throughout this nation.

During my time in this organization I have repeatedly witnessed members with different views working together to further our Association's mission – to strengthen the federal legal system and administration of justice. We are frequently asked to analyze and comment on proposed legislation and rules impacting the federal legal system. We sponsor or co-sponsor programs throughout the United States that educate members and non-members thereby improving the administration of justice. This newsletter gives our members an opportunity to be heard by thousands of fellow practitioners on significant developments affecting the federal legal system. Active involvement in the work of this Section allows each of us to contribute to the future of that system. Thus far in my term many of you have stepped forward and offered to help and I thank each of you that have done so. As my mother used to say, many hands make light work. We need as many hands as possible to continue the important work of this Section.

Finally, it is my great pleasure to inform you that for the first time in our Section's history we have liaisons from the Law Student Division participating in our leadership. Ashley Akers, Chair of the Law Student Division, has appointed two liaisons to our Section from her Division. James Kelly from the University of Mississippi School of Law and Royal Newman II from the University of Miami School of Law are the inaugural liaisons to our Section. They have already participated in a Section Board meeting and we all look forward to working with them to coordinate activities between our Section and the Law Student Division. **SB**

About the Chair • *John McCarthy is a trial attorney and partner in the New York City office of Smith, Gambrell & Russell, LLP, where he leads the litigation practice and is a member of the firm's Intellectual Property Law Group and its Commercial and Bankruptcy Law Practice. John is a former FBA Circuit Vice President and past Chapter President of the S.D.N.Y. Chapter; John most recently served as Vice Chair of the FBA Federal Litigation Section. He can be reached at jmccarthy@sgrlaw.com or (212) 907-9703.*

Inside this Issue

Federal Litigation Section News

[11]*Gleason v. Scoppetta*, 566 F. App'x 65, 68 (2d Cir. 2014) *on remand Gleason v. Scoppetta*, No. 12 CV 4123 RJD RLM, 2014 WL 5780729, at *4 (E.D.N.Y. Nov. 5, 2014) (granting leave to file ADA confidentiality claim where plaintiff alleged use of "false logins" to obtain electronically stored medical information); *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 120 F. Supp. 3d 942, 952-953 (D. Minn. 2015) (noting that most, but not all, ADA confidentiality cases are asserted in the context of a discrimination claim and holding that the ADA does not provide an absolute shield to discovery in civil actions and ordering disclosure of certain ESI with protections to "account for the highly sensitive and confidential nature of the information.").

[12]*See* Note 2, *supra*, and www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html?language=es

[13]*See* Note 3, *supra*.

[14]While HIPAA does not provide for a private right of action, the ADA, with reference to HIPAA, does. *See* Note 3. Interestingly, drug testing is not a medical inquiry but alcohol testing is. *See* 29 C.F.R. § 1630.16(c)(1). Nevertheless, any information that may relate to a disability must be treated as confidential and best practices require erring on the side of caution.

[15]*Marshall v. Town of Merrillville*, No. 2:14-CV-50-TLS, 2015 WL 4232426, at *5 (N.D. Ind. July 13, 2015).

[16]*Perez v. Denver Fire Dep't*, No. 15-CV-00457-CBS, 2016 WL 379571, at *3 (D. Colo. Feb. 1, 2016).

[17]*Lewis v. Baltimore City Bd. of Sch. Commissioners*, 187 F. Supp. 3d 588 (D. Md. 2016).

[18]*Deravin v. Kerik,* 335 F.3d 195, 201 (2d Cir. 2003).

[19]*Lawson v. Avis Budget Car Rental, LLC*, No. 15-CV-01510 (GBD), 2016 WL 3919653, at *7 (S.D.N.Y. July 12, 2016), *reconsideration denied sub nom.* 2016 WL 5867444 (S.D.N.Y. Oct. 4, 2016).

Amending Rule 23: Modernizing Class Notice and Debunking Bad-Faith Objectors

Lance Harke and Barbara Lewis

Proposed amendments to Rule 23 of the Federal Rules of Civil Procedure target class action settlements. The amendments, which were drafted by the Federal Rules Advisory Committee, were approved for public comment in August 2016 by the Standing Committee on Rules of Practice and Procedure and if approved, would likely not take effect until Dec. 1, 2018. Unlike the changes to the discovery rules, the Rule 23 proposals are modest and have not triggered significant opposition. The proposals primarily address the notice to class members, the procedures relating to settlement approval, and class member objections.

Several of the amendments warranting discussion include changes made to the class notice form and an attempt to address "bad faith" objectors.[1] The proposed amendment to class notice now makes it clear that "best notice" may be by electronic means. An essential part of every class action is determining who the class members are. Because class notice plays a significant role in alerting consumers whose rights may be affected by a class action lawsuit, the standard under Rule 23(c)(2)(B) is "the best notice that is practicable under the circumstances." Until recently, only direct notice via first-class mail met this requirement. Though the rules make no mention of a particular method for notice, the Supreme Court found in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) that notice should be via first-class mail and since then, courts have generally been reluctant to endorse electronic notice as a substitute for first-class mail.

But forty years have passed since *Eisen* and advancements in technology have drastically changed the way people communicate. People are increasingly relying on electronic forms of communication. Not surprisingly, some courts have begun to take baby steps towards allowing electronic or digital notice (albeit these are usually allowed in conjunction with traditional forms of media).[2] Thus, the proposal finally updates the rule to reflect the reality of today's society.

And, the flexibility in the proposed language ("or other appropriate means") reminds courts to consider a wide variety of options when choosing the form for notice—including new technology that may develop in the future.

Of course, electronic notice is not appropriate in every case. There continues to be a segment of the U.S. population that do not regularly use, or even have access to the internet.[3] Those opposing the proposal fear that this group of people will get neglected as electronic alternatives replace first-class mail. But, the proposal does not change the "best notice" standard (and expressly includes "U.S. mail" as an option) so in deciding which form to select for notice, courts will continue to look at the particular circumstances of a case to select the notice that will most effectively and efficiently target potential class members—no matter how traditional the form may be.

The proposed amendment regarding class action objectors introduces a way to scrutinize "bad-faith" objectors in an effort to deter frivolous objections that are a detriment to the settlement process. Class members who are unhappy with the terms of a settlement have a right to object under Rule 23(e)(5). "Bad-faith" objectors, also called "professional" or "serial" objectors, have tainted this process by using their objections for personal gain rather than assisting in the settlement review process.[4] These objectors submit vague and baseless objections, rarely attend the fairness hearings, and then appeal when the settlement is approved with the intention of delaying the settlement process until they can extort a side payment (known as a "greenmail" payment). Objectors like this can cause significant

delay to class members seeking any recovery from the suit. It has become a very serious problem in the class action settlement process as there are more professional objectors today than ever before.

To be sure, plaintiff attorneys and defense counsel have tried to stop professional objectors, with various tactics, such as seeking limited discovery into the arrangement between the objectors and their attorneys to expose the motivation behind the objection.[5] One firm has even gone so far as to file a racketeering and abuse of process lawsuit against the lawyers representing these objectors (who tend to be the ones who actually draft and prepare the objections).[6] The changes in the proposed amendments aim to deter bad-faith objectors from presenting baseless claims to obtain payoffs. One change requires objectors to state the grounds for their objection "with specificity" and indicate whether the objection applies to the objector, a subset of the class, or the entire class, since objections that apply to the entire class are more likely to be meritorious. Another change requires a court to approve any payment to an objector or an objector's counsel for withdrawing an objection or appeal. The amendment would dissuade objectors from demanding greenmail payments if they know those payments are subject to judicial scrutiny and could potentially result in sanctions.

Do the proposed amendments go far enough to stop these objectors? Only time will tell. In theory, the new requirements in the proposed amendments should dissuade serial objectors from filing meritless objections. Requiring specificity and support for objections and adding barriers to withdrawal may lead to a decrease in frivolous objections. These amendments may pressure the parties to settle objections before they are filed to avoid any delay in the settlement approval process. Professor Brian T. Fitzpatrick, who studies the challenges posed by objectors, believes banning side payments to objectors would eliminate bad-faith objectors without discouraging good faith objectors who are not in it for the money.[7] Up until now, attempts to screen out and deter bad-faith objectors have focused on the objection after it has already been presented to the court. With these proposed amendments, efforts should now focus on addressing the problem before it becomes a very expensive and time consuming proposition. **SB**

Lance Harke is a founding partner of Harke Clasby & Bushman LLP in Miami, Florida, where he concentrates his practice on multi-state consumer class action litigation, insurance litigation, employment matters, business torts, products liability defense, and general and complex commercial litigation. He may be reached at lharke@harkeclasby.com. Barbara Lewis is an attorney with Harke Clasby & Bushman LLP in Miami, Florida, where she concentrates her practice in the areas of complex commercial litigation, general civil litigation, and class action litigation. She may be reached at blewis@harkeclasby.com.

Endnotes

[1]The other amendments are mostly either stylistic changes or proposals that simply codify what has been common practice for the courts and parties in class action litigation. For example, one of the changes amends Rule 23(e)(2) identifies factors that a court must consider in its determination. However, circuit courts have developed their own set of approval factors and are not bound by any of the factors listed in the amendment. Rule 23(e)(1) mandates that notice of a proposed settlement be given to class members. The new rules require the parties to provide the court with "sufficient" information to decide whether to order class notice, and require the court to determine that a proposed settlement is likely to earn final approval before it sends notice to the class. Experienced class action attorneys already follow this practice when presenting a proposed settlement. The changes also clarify that appeals from an order directing notice are not appealable even if the class is certified as part of the settlement approval process—something that is already understood amongst class action practitioners.

[2]The class notices approved by these courts often incorporate either email, social media, or both. *See e.g. In Re Nat. Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 385 (E.D. Pa. 2015) (notice included advertisements on popular sites such as CNN.com, Facebook.com, Weather.com, and Yahoo!); *Cooper v. E. Coast Assemblers, Inc.*, No. 12-80995- CIV, 2013 WL 308880, at *4 (S.D. Fla. 2013) (court allowed Plaintiff's counsel to email the Notice to class members); *Mark v. Gawker Media LLC*, No. 13-cv-4347 (AJN), 2015 WL 2330274 (S.D.N.Y. 2015) (notice included the use of social media such as Twitter).

[3]Monica Anderson and Andrew Perrin, "13% o f Americans don't use t he internet. W ho are they?," Pew Research Center (September 7, 2016) (www.pewresearch.org/fact-tank/2016/09/07/some-americans-dont-use-the-internet-who-are-they/).

[4]*See e.g. In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635, 639 (N.D. Ohio 2016) ("The serial objector's ultimate goal is extortion."); *In re Initial Pub. Offering Sec. Litig.*, 728 F.Supp.2d 289, 295 (S.D.N.Y.2010) ("[P]rofessional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011) ("professional objectors [] whose sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch onto").

[5]*See e.g.* Plaintiff's Motion for Leave to Conduct Limited Discovery, *Wright v. Nationstar Mortgage LLC*, No. 14-cv-10457 (N.D. Ill, May 12, 1998).

[6]Complaint, *Edelson, PC v. The Bandas Law Firm, PC, et al.*, No. 1:16-cv-11057 (N.D. Ill, December 05, 2016).

[7]Perry Cooper, "Solutions Afoot for Curbing Class Action Gadflies," Bloomberg BNA (June 24, 2016) (www.bna.com/solutions-afoot-curbing-n57982074748/).

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