HILSOFT NOTIFICATIONS

FRCP 23 AMENDMENTS: TWICE THE NOTICE OR NO SETTLEMENT

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A linchpin of the class action mechanism is the right of individual class members to opt out of a certified class, maintaining the right to pursue a separate cause of action. Pending final Congressional approval December 1, 2003, the opt-out provisions of Federal Rule of Civil Procedure 23 will undergo the **most significant changes in history.**

Currently, class members have one opportunity to request exclusion from a class action, at the time the class is certified. New Rule 23(e)(3) will allow courts to reject a settlement "unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." For class actions that certify for settlement purposes, combining notice of certification and settlement into one, 23(e)(3) will not be an issue. But how will this new opportunity affect cases that settle well after certification notice has been given? What will happen when class members opt out at certification, and then change their minds when they receive the second notice? Might others mistakenly opt out at settlement, think the separate notices are for different lawsuits?

Putting class member confusion aside, the most obvious effect of the rule change is a potential increase in the number of opt-outs. From an administration standpoint, this is not a huge concern as opt-out requests are relatively inexpensive to process. From the standpoint of the settling parties, though, increased opt-outs likely do not seem like a good thing. Too many may threaten final approval of the settlement, leaving defendants open to multiple lawsuits, the class without relief and both sides back to square one. How likely is this, however? In our experience, total opt-out requests received are usually a tiny percentage of class members notified. Two opt-out notices are going to bring more requests for exclusion, but generally not nearly enough to threaten a reasonable settlement.

All of the previous concerns can be alleviated with proper planning and by keeping the following considerations in mind:

CONSIDERATIONS:

- An opt-out form should not be used, for a first or second opt-out notice. No matter how well-marked, the form frequently is mistaken for a claim form by the average person and will often be erroneously returned by those thinking they are filing a claim. Instead, use a letter format with plain language text and require class members to submit their opt-out requests in writing. This is a common and accepted approach and, for those that really want to opt out, this is not too much to ask.
- Each notice should have identical procedures to request exclusion and the same wording to refer to the case. Failure to do so may give the impression that the notices refer to different matters.
- Both sets of opt-out requests should be directed to the same address and be processed by the same entity. The Court will likely request a final report of class members that have requested exclusion from the class. Having the requests catalogued by different sources creates the possibility for omissions when the lists are combined.

- A second notice must clearly explain why a second exclusion opportunity is provided and if those that opted out previously need to do so again. If class members are given the right to rescind an earlier opt-out, this must be spelled out in plain language. It also will be important to fully explain the ramifications of rescinding a prior opt-out. Once again, plain language is key.
- To eliminate confusion among those that opted out at the certification stage, it may be advisable to send these individuals separate correspondence explaining their rights. For most settlements, this will be a minimal expense and will go a long way toward showing the Court that best effort has been made to fully notify class members of their rights.

With careful planning and attention, Rule 23(e)(3) should not be a serious impediment to class action settlements. Every case is different, however, and will require its own particular emphasis on one or more of the generalized suggestions outlined above. If you would like to explore how this change could affect certain types of settlements, please feel free to give us a call.

ILLINOIS SUPREME COURT: NEW CLASS CERTIFICATION RULE IS CLARIFIED

In an attempt to model Illinois Court Rules more closely to Federal Rule of Civil Procedure 23, the Illinois Supreme Court recently added the right to appeal a class certification decision. The new rule is Rule 306 of the Supreme Court Rules, which states "an order of the circuit court denying or granting certification of a class action under section 2-802 [determination of class and/or subclasses] of the Code of Civil Procedure" may be appealed to the Appellate Court.

The Supreme Court did clarify that the rule is applicable only to cases filed in circuit court on or after January 1, 2002, the effective date of the amendment. Although cases continue to be filed in record numbers in Illinois state courts, rules like this one will undoubtedly slow down the process and may ultimately change the current perception of the courts as "Rocket Dockets."

Some pro-business groups hope the new right to an interlocutory appeal will allow the appellate court to decide disputes regarding class certification in what they perceive as a more neutral manner. However, placement of the rule in section 306 instead of section 307 does afford the appellate court discretion to hear the appeal, which is consistent with Federal Rule of Civil Procedure 23. For more information on this or other court rules as they apply to class action notice and administration, feel free to contact us.

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