Sixth Circuit Rejects Certification of Novel "Negotiation Class"

The United States Court of Appeals for the Sixth Circuit has reversed a district court order certifying a novel "negotiation class" under Federal Rule of Civil Procedure 23 in the multi-district litigation addressing opioid-related claims brought by municipalities across the country against some of the largest drug distributors and pharmacies. *In Re: National Prescription Opiate Litigation*, ---F.3d----, 2020 WL 5701916 (September 24, 2020).[1] The Sixth Circuit held that a negotiation class was outside the bounds of and "not authorized by the structure, framework or language" of Rule 23.

A "negotiation class" is a class certified to negotiate a settlement only: generally, (1) class members are given notice of a negotiation class, including the formula for allocation of any settlement reached, (2) class members are given their only opportunity to opt out before the certification, and (3) if a settlement is reached, all class members are given the chance to vote on the final settlement amount, which can only be accepted by a supermajority. The District Court in the opioids litigation was the first court in the country to use the procedure. Previously, courts have certified only settlement classes and litigation classes under Rule 23.

I. Background on the Opiate Litigation

In 2017, the Judicial Panel on Multidistrict Litigation transferred all opioid-related litigation pending in federal courts to the Northern District of Ohio, encompassing over 2,000 individual actions, primarily filed by cities and counties, into a single multi-district litigation. *See In Re: National Prescription Opiate Litigation*, 332 F.R.D. 532, 536 (N.D. Ohio 2019). The plaintiffs allege that defendant opioid manufacturers, distributors, and pharmacies acted in concert to mislead medical professionals into prescribing opioids and mislead millions of Americans into becoming addicted to opioids. Claims brought against defendants include alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") for causing plaintiffs to divert funding from emergency public health and safety responses to the opioid crisis. *Id.* From the outset of the multi-district litigation, the District Court encouraged settlement between the parties.

A. The Framework for the Negotiation Class

Professor Francis E. McGovern, a special master appointed by the District Court in the opioids litigation to oversee settlement, initially proposed the concept of a negotiation class to facilitate settlement discussions as part of his academic work. Professor McGovern proposed using the novel concept in the opioids litigation to address concerns raised by defendants that they needed a "global settlement" and were reluctant to incur substantial costs in negotiating or entering into a settlement without knowing whether plaintiffs with high-value claims would opt out until after the settlement had been finalized. McGovern explained that the mechanism of a negotiation class would be particularly valuable for heterogeneous classes, where some class members have higher value claims and could wield considerable leverage as opt-out plaintiffs. *See* Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Large Claim Class Actions* (Duke Law Sch. Pub. Law & Legal Theory Series, Paper No. 2019-41, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834.

In addition to addressing questions such as certifiability and adequacy at the outset of settlement negotiations, the negotiation class fixes a class size to give the defendants a sense of the scope of the group with which they are negotiating. *Id.* at 2. For the plaintiffs, as McGovern explains, "if the class members could unite, they might increase their leverage and extract a premium from a defendant eager to settle the whole package of claims." *Id.* Additional protections for plaintiffs include the up-front knowledge of the formula for allocation of

[1] Unless otherwise noted, all further quotations and citations in this memorandum are taken from or refer to this decision.

eventual settlements, so counties could determine what percentage of a settlement they could expect to receive, and the requirement that a proposed settlement would need to be accepted by a supermajority vote of the class, which the District Court in the opioids litigation set at 75% of six categories of voting members, including by allocation and by population. As an additional fairness check, the district court also retains the authority to approve or reject any settlement.

B. The District Court's Decision Certifying a Negotiation Class

In 2019, plaintiffs from 51 counties and cities moved to certify a negotiation class under Federal Rule of Civil Procedure 23(b)(e). *National Prescription Opiate Litigation*, 332 F.R.D at 537. Many defendants opposed the motion, as did 37 state Attorneys General.[2] In September 2019, the District Court certified the negotiation class over the objections, finding that the class was "a powerful, creative, and helpful" tool that would help effect a global settlement that resolved most of the lawsuits involved. *Id*.[3]

Specifically, the District Court found that the negotiation class satisfied Rule 23(a) and (b)(3), including that common issues of law and fact predominated over individual issues and that the class representatives were typical and adequate. *Id*. at 541-552. The District Court also addressed whether a settlement was likely to be approved under Rule 23(e)(1)(B), stating that it would be most efficient if the court ruled *before* certification on whether the proposed class "treats class members equitably relative to each other." *Id*. at 552. To that end, the District Court asked a special master to assess the fairness of the allocation scheme and adopted the 17-page report, finding that "nothing in the allocation model appears to skew toward any group other than those hardest hit by the opioid epidemic." *Id*. at 553.

II. The Sixth Circuit's Decision

Applying an abuse of discretion standard, the Sixth Circuit reversed the District Court's decision to certify the negotiation class, determining that the class did not fall into the "narrow textual confines of Rule 23." The Court cited Supreme Court precedent warning that courts are not free to invent procedures not grounded in the text of the Rules. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). The Court observed that Rule 23 is "replete with references to litigation and settlement classes," but does not mention certification for negotiation. The Court rejected the plaintiffs' argument that Rule 23 is open-ended and does not explicitly prohibit negotiation classes. Instead, the Court criticized the plaintiffs for suggesting the Court create a new form of class action, wholly untethered from the Rule, based on a negative inference.

The Sixth Circuit also rejected the plaintiffs' claim that negotiation classes were analogous to settlement classes, which plaintiffs argued had not been expressly added to the text of Rule 23 until 2018, years after the settlement class had been routinely employed by courts. The Sixth Circuit explained that the prior version of Rule 23 could be interpreted to permit settlement classes, as the text contemplated courts overseeing "compromised" class actions, meaning actions that had been settled and presented to the court. That language, according to the Court, gave implicit authority to certify a class for settlement purposes, but did not have a parallel for negotiation purposes.

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[2] Overall, the negotiation class consisted of more than 35,000 municipalities. Roughly 50 potential class members objected, and fewer than 400 opted out.

[3] The District Court did not impose a stay on the proceedings during the pendency of any negotiations, as the negotiation class was "designed to attempt to reach a settlement while the individual multi-district litigation cases continue along their respective litigation paths."

The Sixth Circuit also determined that the structure of Rule 23 permits only settlement classes or litigation classes, and a negotiation class does not fall within the parameters of either. For example, the Court observed that the use of the past tense in Rule 23(e) allows for certification of a class for settlement purposes only *after* a settlement has been proposed, which does not include a negotiation class. Thus, the Court stated that the "speculative possibility that this negotiation class would settle a broad swath" of the multi-district litigation, was not sufficient to bring it within the text of Rule 23.

The Sixth Circuit also separately criticized the District Court's predominance analysis under Rule 23(b): the negotiation class was certified to resolve issues relating to RICO claims that were common across most or all of the plaintiffs, as well as claims "rising out of a common factual predicate," that included disparate state law claims. The Sixth Circuit found that the District Court "evade[d] a proper [Rule 23](b)(3) analysis," by certifying a negotiation class based on a handful of common issues but empowering the class to negotiate other claims as well. Thus, "even if not unauthorized, it is unlikely that the problems presented by the negotiation class, as conceived by the district court, can be overcome."

In a spirited dissent, Judge Moore wrote that the District Court "breathed life into a novel concept" to manage an unwieldy multi-district litigation, and criticized the Sixth Circuit panel for preventing courts from "innovating within the Rules' textual borders." Because the Supreme Court promulgates and implements the Rules, traditional concerns surrounding statutory interpretation and deference to Congress should not be at issue in interpreting the Rules. Judge Moore also pointed to many powers provided for in the Rules that are not provided for in the text, including the power to rescind a jury discharge order, to hear a motion *in limine*, or to dismiss cases for *forum non conveniens*. Judge Moore further observed that neither the terms "litigation class" or "settlement class" appear in the text of Rule 23, and yet are accepted by the Court. In Judge Moore's view, the courts ultimately "should be in the business of encouraging, not exterminating, such resourcefulness" employed by the district courts to secure the just, speedy, and inexpensive resolution of a complex litigation.

III. Implications

The Sixth Circuit's decision nips in the bud a new use of Rule 23 to attempt to resolve an extremely complex matter with an enormous number of plaintiffs. The Sixth Circuit's decision also implicates the long-running issue of how much leeway district courts have to interpret the Federal Rules of Civil Procedure creatively, and the decision may act to dissuade such creative solutions in future matters.

For the opioids litigation, the Sixth Circuit's decision, at least for now, lessens the possibility of a global settlement being reached and increases the probability that individual cases will drag on. Lead counsel for the purported class have filed a petition seeking an *en banc* rehearing. Given the amounts at stake,[4] it seems likely that they will seek review by the Supreme Court if unsuccessful.

In the meantime, the idea behind the negotiation class — disparate plaintiffs agreeing up front to an allocation and supermajority vote on a settlement — can still be employed in non-class contexts. Finally, it is, of course, uncertain if other circuits will agree with the Sixth Circuit's rejection of negotiation classes. Particularly where the parties are in agreement to proceed with a negotiation class, courts outside the Sixth Circuit may still be able to find a procedural mechanism to help the parties implement it.

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[4] Twenty one states have already rejected an $18 billion settlement proposal from three of the drug distributor defendants.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Joel Kurtzberg at 212.701.3120 or jkurtzberg@cahill.com; Lauren Perlgut at 212.701.3558 or lperlgut@cahill.com; or Anna Wittman at 212.701.3446 or awittman@cahill.com; or email publications@cahill.com.