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Susan J. Becker
Cleveland State University, s.becker@csuohio.edu

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Opposing Counsel

Pro's and Con's of Proposed Rule 23 Amendments

BY SUSAN J. BECKER
LITIGATION NEWS ASSOCIATE EDITOR

Are the proposed amendments to Rule 23 (recently approved for publication and comment by the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedure) a modest first step toward necessary class action reforms, or are they "a prescription for class action abuse?"

Your input may help decide that question.

Following more than a decade of study and debate, the Standing Committee recently approved a set of amendments that would, inter alia, establish special standards for "settlement classes," mandate a fairness hearing when a class action is being settled, and require a cost-benefit analysis to determine whether the potential relief to class members is worth the costs and burdens on the litigants and the judiciary of going forward as a class action. *See* LITIGATION NEWS, September 1996, Vol. 21:6 at 4.

The Standing Committee is now soliciting comments from academics, practitioners, and the bench to determine whether to move this set of Rule 23 amendments toward adoption, engage in some fine tuning, or return to the drawing board. In an effort to encourage participation in this process, LITIGATION NEWS invited several persons who have been active in the Rule 23 debates to express their views on the amendments.

Professor John C. Coffee, Jr., New York City, the Adolf A. Berle Professor of Law at Columbia University, articulates a position espoused by a substantial number of academics that the proposed, less-strenuous certification standards for settlement classes should be abandoned. Rather than lessening the standards, Professor Coffee urges that heightened judicial scrutiny is needed for settlement classes to offset the possibility of collusion between plaintiff and defense attorneys.

Arthur Bryant, Washington, DC, Executive Director of Trial Lawyers for Public Justice, expresses a similar sentiment, but states his position even a bit more bluntly. According to Bryant, the proposed amendments are "a prescription for class action abuse."

A contrary view is offered by Lorna G. Schofield, New York City, Co-Chair of the Section of Litigation's Class Actions and Derivative Suits Committee. Based on Schofield's extensive practice experience and study of class action issues, she concludes that the proposed amendments are modest and appropriate steps for encouraging early and efficient settlement, which in turn, furthers the interests of class members as well as the attorneys

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and the judiciary. Schofield points to the safeguards in the proposals designed to negate the possibility of collusion, such as the class notice and fairness hearing prerequisites to settlement.

The fate of the proposed Rule 23 amendments, which will be published shortly in the Federal Rules Decision and other sources, depends in significant part on the feedback received by the Standing Committee.

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Regardless of the outcome, many persons have urged that the amendments be given full and fair consideration.

"I hope that as the debate goes forward, people in academia and in practice will consider the proposed amendments against the backdrop of debate and discussion that accompanied the enactment of the new discovery rules a few years ago," says Linda S. Mullenix, a University of Texas law professor with extensive experience in mass tort and class action cases. "That debate involved a significant amount of overheated rhetoric and exaggerated claims of discovery abuse which focused on a few extreme examples. That is clearly not the best way to conduct rule reform."

Mullenix does not deny that class action reform is appropriate, but hopes the few extreme cases that are routinely cited in the popular press and legal literature will not dictate the outcome of the current proposed amendments.

"I think we all need to get our facts straight, and put everything in its proper context," Mullenix advises. "First, we need to look at how and when class action abuses exist, and then look at how these proposals will address those problems. We also need to keep in mind that the proposed reforms are not revolutionary, but are simply codifying the current practice in a lot of jurisdictions."

Comments should be directed to the Advisory Committee on Civil Rules, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

Anyone interested in reviewing the proposed amendments may access them via the Internet through either the Administrative Office of the U.S. Courts at [http://www.uscourts.gov] or the Federal Judicial Center at [http://fjc.gov].