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2014

## Updating Ohio's Class Action Rules After More than Forty Years

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### Recommended Citation

Essay, Updating Ohio's Class Action Rules After More than Forty Years, 62 Clev. St. L. Rev. 189

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# UPDATING OHIO'S CLASS ACTION RULES AFTER MORE THAN FORTY YEARS

GEOFFREY J. RITTS\*

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In 1970, the Ohio Rules of Civil Procedure made their debut.<sup>1</sup> The new set of rules included Civil Rule 23, governing procedure in class actions.<sup>2</sup> Like most of the new Ohio civil rules, Rule 23 closely tracked its federal counterpart, Federal Rule of Civil Procedure 23, which itself was then relatively new, having been adopted in 1966.<sup>3</sup>

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<sup>1</sup> OHIO R. CIV. P. 86.

<sup>2</sup> *Id.* 23.

<sup>3</sup> *Compare id.*, with FED. R. CIV. P. 23 (1966 revision).

Since 1970, Ohio's Rule 23 has sat untouched. In the meantime, the Ohio Supreme Court has amended other civil rules more than thirty times.<sup>4</sup> During the more than forty years since Ohio Rule 23 was adopted, there have been significant changes in class-action practice and in the language of federal Rule 23. In 2003, the federal rule was substantially revised and improved to address a number of important issues not covered in the 1966 version of the rule.<sup>5</sup> It is now time to update Ohio's Rule 23 to better conform to the current federal rule and to address the realities of class actions today.

Specifically, Ohio's Rule 23 should be amended to incorporate the amendments to federal Rule 23 relating to the timing of the class certification decision, appointment of class counsel, notices to class members, and approval of proposed settlements. Those topics either are not treated at all in the current Ohio rule or are treated inadequately. Judges and litigants in Ohio courts deserve better guidance on the difficult procedural questions that can arise in class actions, and that guidance can come from sprucing up Ohio Rule 23 after more than forty years of benign neglect.

### I. THE ADOPTION OF OHIO RULE 23

Before the Ohio Rules of Civil Procedure (including Rule 23) were adopted in 1970, class action practice—like all procedure in Ohio courts—was governed by statute.<sup>6</sup> Although the language of the class-action statute was expansive, seemingly permitting class treatment upon a showing of nothing more than common questions *or* impracticability of joinder, Ohio courts interpreted it to require that class members' claims arise from an identical set of facts, which sharply limited the occasions when the statute could be applied.<sup>7</sup> Accordingly, there were few reported cases under the class-action statute.<sup>8</sup> The class-action statute did not track the original federal Rule 23 that was adopted with the rest of the Federal Rules of Civil Procedure in 1938.<sup>9</sup>

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<sup>4</sup> See OHIO R. CIV. P. 86 (listing effective dates of post-1970 amendments to the Ohio Rules of Civil Procedure).

<sup>5</sup> FED. R. CIV. P. 23 (2003 revision).

<sup>6</sup> Former OHIO REV. CODE § 2307.21 provided that “[w]hen the question is one of a common or general interest of many persons, or the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” OHIO REV. CODE § 2307.21 (repealed 1971).

<sup>7</sup> See 1 JAMES M. KLEIN & STANTON G. DARLING II, *BALDWIN'S OHIO PRACTICE: CIVIL PRACTICE* § 23.1 (2d ed. 2004); *Colbert v. Coney Island, Inc.*, 121 N.E.2d 911, 917 (Ohio Ct. App. 1954).

<sup>8</sup> Westlaw lists only twelve Ohio cases citing the statute before its 1971 repeal.

<sup>9</sup> The relevant sections of the 1938 version of Federal Rule of Civil Procedure 23 provided as follows:

a. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

Ohio voters approved the Modern Courts Amendment to the Ohio Constitution in 1968. The amendment gave the Supreme Court of Ohio the power to “prescribe rules governing practice and procedure in all courts of the state,” subject to a legislative veto.<sup>10</sup> Ohio procedure at the time was still governed by a statutory variant of the Field Code that had first been enacted by the Ohio Legislature in 1853 and had “become overly complicated and disorganized.”<sup>11</sup> After voters adopted the Modern Courts Amendment, the Ohio Supreme Court moved to implement rules of procedure modeled on the federal rules. One argument in favor of using the federal rules as a model was that there was already “a wealth of experience in working with them and . . . a body of decisional law interpreting them.”<sup>12</sup> By 1968, about forty other states had adopted civil procedure rules based on the Federal Rules of Civil Procedure.<sup>13</sup>

Like most of the other rules in the 1970 Ohio Rules of Civil Procedure, Rule 23 closely followed the then-current language of its federal counterpart.<sup>14</sup> As the 1970 staff notes to Ohio Rule 23 explained, “[Ohio] Rule 23, with the exception of subdivision (F), is the unchanged language of [the 1966 version of] Federal Rule 23.”<sup>15</sup> The drafters predicted that Ohio Rule 23 would “represent[] a significant broadening of the scope of class actions in this state,” compared to class actions under the former statutory rule.<sup>16</sup>

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(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

...  
 c. Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

FED. R. CIV. P. 23 (1938).

<sup>10</sup> OHIO CONST. art. IV, § 5(B). *See generally* Wm. W. Milligan & James E. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811 (1968) (describing background and purposes of amendment).

<sup>11</sup> 51 Ohio Laws 57 (1853); Milligan & Pohlman, *supra* note 10, at 829.

<sup>12</sup> Milligan & Pohlman, *supra* note 10, at 831.

<sup>13</sup> *Id.* at 830.

<sup>14</sup> OHIO R. CIV. P. 23, Staff Notes.

<sup>15</sup> *Id.* Ohio Rule 23(F) allows the claims of class members to be aggregated for purposes of satisfying the amount in controversy requirement for common pleas court jurisdiction. *Id.* 23(F).

<sup>16</sup> *Id.* 23, Staff Notes.

## II. APPLICATION OF OHIO RULE 23

Although Ohio Rule 23 has been on the books for over forty years, the body of Ohio Supreme Court case law interpreting it is not large—only about twenty cases. One reason for the limited volume of Supreme Court law is that before 1998, no statute specifically addressed whether orders granting or denying class certification were immediately appealable.<sup>17</sup> Before 1998, the appealability of orders granting class certification was hotly contested, with the law shifting between appealability and non-appealability at different times.<sup>18</sup> Because interlocutory appeal of class certification orders often was not available, many class actions never reached a procedural posture where appellate or Supreme Court review were realistically available.

Because Rule 23 was expressly based on its federal counterpart, and because of the relatively thin body of Ohio Supreme Court case law applying the rule, Ohio courts have repeatedly looked to cases interpreting the federal rule for guidance in applying Ohio Rule 23.<sup>19</sup> Similarly, in the context of other Ohio procedure rules, courts from the Ohio Supreme Court on down have held that federal cases applying similar federal rules should be looked to for guidance.<sup>20</sup>

Making use of federal cases to address class action questions worked well enough for Ohio courts during the period from 1970 to 2003, when Ohio Rule 23 generally mirrored the federal rule. But federal Rule 23 is now significantly different from the Ohio rule, after substantial amendments to the federal rule in 2003.

## III. THE 2003 AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 23

Federal Rule 23 has been amended five times since 1966, with the most important changes being implemented in 2003, when the rule was substantially rewritten.<sup>21</sup>

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<sup>17</sup> See OHIO REV. CODE § 2505.02(B)(5) (enacted 1998) (providing that “[a]n order that determines that an action may or may not be maintained as a class action” is a final appealable order).

<sup>18</sup> Compare *Roemisch v. Mutual of Omaha Ins. Co.*, 314 N.E.2d 386, 386 syl. (Ohio 1974) (denial of class certification is a final appealable order), with *Polimeros v. National Acct. Sys., Inc.*, 343 N.E.2d 138, 140 (Ohio Ct. App. 1975) (grant of class certification is not an appealable order), and *Amato v. General Motors Corp.*, 423 N.E.2d 452, 456 (Ohio 1981) (order granting class certification is appealable), overruled by *Polikoff v. Adam*, 616 N.E.2d 213, 218 (Ohio 1993), and *Blumenthal v. Medina Supply Co.*, 654 N.E.2d 368, 370 (Ohio Ct. App. 1995) (concluding that, under *Polikoff*, order granting class certification was not appealable).

<sup>19</sup> *Stammco, L.L.C., v. United Tel. Co.*, 994 N.E.2d 408, 413 (Ohio 2013); *Marks v. C.P. Chem. Co.*, 509 N.E.2d 1249, 1251-52 (Ohio 1987).

<sup>20</sup> See, e.g., *Myers v. Toledo*, 852 N.E.2d 1176, 1178 (Ohio 2006) (The Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, which were adopted in 1938 and have been amended several times. Consequently, federal law interpreting a federal rule, while not controlling, is persuasive authority in interpreting a similar Ohio rule.).

<sup>21</sup> See FED. R. CIV. P. 23 (noting amendments effective in 1987, 1998, 2003, 2007 and 2009). See generally John K. Rabiej, *The Making of Class Action Rule 23*, 24 MISS. C. L. REV. 323, 368-83 (2005) (describing history and background of 2003 amendments to federal Rule 23).

The 2003 amendments to federal Rule 23 rewrote several sections of the rule and added several entirely new sections addressing important topics that were not covered in the 1966 version of the rule. According to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, which drafted the revisions, the revisions “focuse[d] on the persistent problem areas in the conduct of class suits.”<sup>22</sup> The most important aspects of the 2003 amendments dealt with the timing of the class certification decision, the content of class notices, appointment of class counsel, and settlement approval procedures.

#### *A. Timing of the Class Certification Decision*

The 2003 revisions to federal Rule 23 included a change to Rule 23(c)(1) to provide that a court should decide “[a]t an early practicable time” whether an action may proceed as a class action. Previously, the rule had stated that class certification should be decided “[a]s soon as practicable.”

The Advisory Committee notes explained that “[t]he ‘as soon as practicable’ exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision.”<sup>23</sup> The “as soon as practicable” language sometimes had been interpreted to permit determination of class certification on the pleadings alone, or to prevent discovery into whether the prerequisites for certification under Rule 23(a)-(b) were satisfied.<sup>24</sup> By 2003, however, there was an emerging consensus in the federal courts, reflected in the Manual for Complex Litigation, that in most cases at least some factual development was required before a court could decide whether the requirements for class treatment had been satisfied.<sup>25</sup> Federal courts and commentators had also come to recognize that the class certification decision is often case dispositive as a practical matter, and that a quick certification decision on a thin or non-existent record frequently would be the only time a court would address certification, even if the certification decision was accompanied by caveats that it was open to being reconsidered later in the case.<sup>26</sup>

The Advisory Committee noted that “[t]ime may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification process”—in other

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<sup>22</sup> United States Courts, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, (Sept. 2002), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST9-2002.pdf>. Professor McGovern characterized the 2003 amendments as “directed toward the undemocratic empowerment of lead counsel, problems in the award of attorney fees and difficulties in coping with objections.” Francis E. McGovern, *Common Themes and Unintended Consequences in Class Action Reform*, 83 WASH. U.L.Q. 1107, 1108 (2005).

<sup>23</sup> FED. R. CIV. P. 23, Advisory Comm. Notes to 2003 Amendments.

<sup>24</sup> *Wal-Mart Stores, Inc. v. Dukes*, S. Ct. 2541, 2551 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

<sup>25</sup> See MANUAL FOR COMPLEX LITIGATION §§ 21.213, 30.11, 30.12 (3d ed. 1995).

<sup>26</sup> See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 188-90 (3d Cir. 2001); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995).

words, whether a plaintiff has a winning claim is not relevant to whether a class may be certified—“discovery in aid of the certification decision often includes information required to identify the nature of the issue that actually will be presented at trial. In this sense, it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis.”<sup>27</sup> The United States Supreme Court adopted this reasoning in its recent important class certification decisions in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*.<sup>28</sup>

The 2003 revisions also did away with language in Rule 23(c)(1) permitting “conditional” certification of a class action.<sup>29</sup> The 1966 rule allowed a court to certify a class conditionally: “[T]he court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type.”<sup>30</sup> The 2003 revision omits the concept of conditional certification, with the Advisory Committee explaining, “[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”<sup>31</sup>

### B. Contents of Class Notice

The 1966 version of federal Rule 23 had little to say about the contents of a class notice. All it required was that the notice in a (b)(3) opt-out class action advise class members that

(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.<sup>32</sup>

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<sup>27</sup> FED. R. CIV. P. 23, Advisory Comm. Notes to 2003 Amendments; *see also, e.g.*, MANUAL FOR COMPLEX LITIGATION § 21.133 (4th ed. 2004) (“Precertification discovery may be necessary.”); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) (“[D]iscovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23.”).

<sup>28</sup> *See Wal-Mart*, 131 S. Ct. at 2550-52 (“Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”); *Comcast*, 133 S. Ct. at 1432 (“Repeatedly, we have emphasized that it ‘may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,’ and that certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’” (quoting *Dukes*, 131 S. Ct. at 2551-52)).

<sup>29</sup> FED. R. CIV. P. 23(c)(1) (1966 revision) (“An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.” (emphasis added)).

<sup>30</sup> *Id.* 23, Advisory Comm. Notes to 1966 Amendments.

<sup>31</sup> *Id.* 23, Advisory Comm. Notes to 2003 Amendments; *cf. In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 319-21 (3d Cir. 2008) (commenting on implications of removal of concept of “conditional certification” from Rule 23).

<sup>32</sup> FED. R. CIV. P. 23(c)(2) (1966 revision).

By 2003, there was widespread criticism that class notices did not consistently convey in an intelligible fashion the information class members needed to decide whether to opt out or to object to a proposed settlement.<sup>33</sup> In particular, commentators criticized class notices as typically using dense legal language that lay people could not reasonably be expected to understand.<sup>34</sup> They also noted that Rule 23 did not specify that basic information about the case and the claims must be provided to class members.<sup>35</sup> Testing by the Federal Judicial Center using pre-2003 class notices “found, for example, that nonlawyers were often confused at the outset by use of the terms ‘class’ and ‘class action’” and that most test subjects “perceived both the [full-length] notice as well as the summary [notice] to be ‘long’ or ‘complicated’ and wanted to set them aside to read later.”<sup>36</sup>

The 2003 revision of federal Rule 23 addressed these criticisms by setting forth a longer list of mandatory contents for a class notice, and by requiring that the notice

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<sup>33</sup> See generally Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 693-94 (1994) (“The usual notices . . . fall substantially short of providing sufficient or accurate information to render rational decisionmaking possible.”); Darren Carter, *Notice and the Protection of Class Members’ Interests*, 69 S. CAL. L. REV. 1121, 1139 (1996) (arguing that then-current notice practice “makes it virtually impossible for class members to obtain all relevant information and make an informed decision regarding the proposed settlement”); Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More Than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359 (2005) (“Nobody truly opposed the adoption of the new [notice] provision in Rule 23—the amendment was vital. Before the current Rule 23 revision, the procedural rules that govern class action notice practice, whether federal or state rules, did not mandate understandable and plain language notice, and courts had been largely silent on this issue.”); Symposium, *Clear Notices, Claims Administrators and Market Makers*, 18 GEO. J. LEGAL ETHICS 1223, 1228 (2005) (“[N]otices are all alike. They get slugged in the back of the paper. Somebody slugs it in the *USA Today* and lets the judge think that, hey, you know, this is a national paper. It’s out there for all the world to see. Surely, it’s good enough notice. But you can crunch the numbers and it’s pretty easy to see that that’s going to reach about 3 percent of your class and 97 percent will have had no opportunity at all, let alone come in at the end and file a claim from that.” (remarks of T. Hilsee)).

<sup>34</sup> See Hilsee, Wheatman & Intrepido, *supra* note 33, at 1367 (“Examples of persistent and common notice content problems include: Ignores plain language guidelines—we often see an endless chain of defined terms that are likely indecipherable to, and ignored by, the average reader. The explanation of terms should not be written as a run-on sentence with legal terminology that very few people, except legal practitioners, could possibly understand.”); Rabiej, *supra* note 21, at 374 (“Notices advising putative class members of their rights are notoriously difficult to comprehend. At best, the dense language and fine print in some notices reflect counsel’s anxiety that no important item be omitted for fear of a malfeasance challenge; at worst, the language may reflect a tactical decision to befuddle putative class members.”).

<sup>35</sup> See Todd B. Hilsee & Terri R. LeClerq, *The Federal Judicial Center’s Model Plain Language Class Action Notices*, 4 BNA CLASS ACTION REP. 182, 183-84 (2003); Natalie C. Scott, *Don’t Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 565-66 (2002).

<sup>36</sup> *Class Action Notices Page*, FEDERAL JUDICIAL CENTER (Jan. 31, 2014), <http://www.fjc.gov/public/home.nsf/pages/816>.



“clearly and concisely” provide the requisite information “in plain, easily understood language.”<sup>37</sup> The mandatory contents for a (b)(3) notice now include:

- (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(b)(3).<sup>38</sup>

The Advisory Committee explained the amendment of the notice provisions of Rule 23 as “a reminder of the need to work unrelentingly at the difficult task of communicating with class members” in a way that is both “accurate and easily understood by class members who are not themselves lawyers.”<sup>39</sup> The Committee pointed to a set of sample plain language notices created by the Federal Judicial Center as a “helpful starting point” for lawyers drafting notices.<sup>40</sup>

### *C. Appointment of Class Counsel*

The 2003 amendments to federal Rule 23 introduced an entirely new Rule 23(g), concerning class counsel.<sup>41</sup> The new subsection required that a court appoint class counsel whenever it certifies a class, and listed factors for a court to consider in deciding whom to appoint as class counsel. A court now must consider “the work counsel has done in identifying or investigating potential claims,” “counsel’s experience in handling class actions,” “counsel’s knowledge of the applicable law,” and “the resources counsel will commit to” the case; the court also may consider “any other matter pertinent to counsel’s ability to fairly and adequately represent” the class.<sup>42</sup> Among the matters a court may weigh in appointing class counsel are the fees the lawyer will charge to the class: The amendments expressly permit a court to “order potential class counsel . . . to propose terms for attorney’s fees and nontaxable

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<sup>37</sup> FED. R. CIV. P. 23(c)(2)(B).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* 23, Advisory Comm. Notes to 2003 Amendments.

<sup>40</sup> *Id.* The sample notices can be found on the “Class Action Notices Page” of the Federal Judicial Center’s website at <http://www.fjc.gov>. They include notices for securities, products liability and employment discrimination class actions, as well as sample publication notices and suggested language for the envelope used to mail a class notice. *Id.* The Federal Judicial Center developed the sample notices “at the request of the Subcommittee on Class Actions of the U.S. judicial branch’s Advisory Committee on the Federal Rules of Civil Procedure,” according to the FJC website. *Id.* The methodology for preparing the notices included “empirical research and commentary on the plain language drafting of legal documents,” testing of notices on nonlawyers, and application of “principles gleaned from psycholinguistic research.” *Id.* A fuller description of the project methodology, which began several years before the 2003 amendments to federal Rule 23, is located on the Federal Judicial Center’s website at <http://www.fjc.gov/public/home.nsf/pages/816>.

<sup>41</sup> FED. R. CIV. P. 23 (2003 revision).

<sup>42</sup> *Id.* 23(g)(1)(A)-(B).

costs,”<sup>43</sup> and the rule authorizes the court to “include in the appointing order provisions about the award of attorney’s fees and nontaxable costs.”<sup>44</sup>

Under the 2003 amendments, class counsel cannot be appointed by default—even if only one lawyer seeks appointment as class counsel, that lawyer may be appointed only if she is “adequate” under the criteria listed in Rule 23(g)(1) and only if she will “fairly and adequately represent the interests of the class.”<sup>45</sup> The 2003 amendments also permit a court to designate “interim counsel to act on act on behalf of a putative class before determining whether to certify the action as a class action.”<sup>46</sup> The 2003 amendments also expressly provided, for the first time, that the “duty of class counsel” is to “fairly and adequately represent the interests of the class,” as opposed to the interests of the class representatives or individual members of the class.<sup>47</sup>

The Advisory Committee justified subsection (g) on the grounds that “[i]t responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action.”<sup>48</sup> The Committee recognized that the prior version of the rule provided no guidance on appointment of class counsel; instead, courts generally addressed class counsel selection, if at all, only under the general rubric of the Rule 23(a)(4) requirement that the class representative “fairly and adequately protect the interests of the class.”<sup>49</sup> The Advisory Committee also thought it important that the rule specifically “recognize[] that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class . . . an obligation that may be different from the customary obligations of counsel to individual clients.”<sup>50</sup>

#### *D. Settlement Approval Procedures*

The 2003 amendments significantly clarified the procedures to be followed and standards to be applied by a trial court when it considers a proposed class-action

<sup>43</sup> *Id.* 23(g)(1)(C).

<sup>44</sup> *Id.* 23(g)(1)(D).

<sup>45</sup> *Id.* 23(g)(1), (2), (4).

<sup>46</sup> *Id.* 23(g)(3).

<sup>47</sup> *Id.* 23(g)(4).

<sup>48</sup> *Id.* 23, Advisory Comm. Notes to 2003 Amendments.

<sup>49</sup> *Id.* (“Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4).”); *see also* McGovern, *supra* note 22, at 1108 (“One major concern about the class action device has been the control exercised by lead counsel without adequate governance by the clients. The 2003 amendments to Rule 23 address this issue by separating the Rule 23(a)(4) consideration of adequacy of representation from the Rule 23(g) selection of lead counsel.”).

One scholar who surveyed class certification decisions issued before the 2003 amendments became effective found that courts had been “rubber stamping the proposed representatives and class counsel” and that “the vast majority of courts conduct virtually no gate-keeping function and approve class representatives and class counsel with little or no analysis.” Robert H. Klonoff, *The Judiciary’s Flawed Application of Rule 23’s “Adequacy of Representation” Requirement*, 2004 MICH. ST. L. REV. 671, 673 (2004).

<sup>50</sup> FED. R. CIV. P. 23, Advisory Comm. Notes to 2003 Amendments.

settlement, with the goal of “strengthen[ing] the process of reviewing proposed class-action settlements.”<sup>51</sup> The updated Rule 23(e) now provides that court approval is required only when a settlement or dismissal would affect the claims of a “certified class.”<sup>52</sup> The prior version did not state whether court approval was required for a settlement or dismissal in the pre-certification stage of a case, or for a settlement or dismissal that affected the named plaintiff only.<sup>53</sup> The revised Rule 23(e) also articulates the standard a trial judge must apply in reviewing a proposed settlement.<sup>54</sup> For a settlement to merit approval, the court must make a “finding that [the settlement] is fair, reasonable and adequate.”<sup>55</sup> The previous version of the rule did not provide a standard.

The updated rule requires the court to conduct a hearing before approving a settlement (“the court may approve [a settlement] only after a hearing”), which was not required under the former rule.<sup>56</sup> Combined with the new requirement for express findings that the settlement be fair, reasonable, and adequate, the requirement for a hearing aims to focus judges on scrutinizing proposed settlements more closely.<sup>57</sup> As many commentators and appellate courts have noted, judicial scrutiny of settlements is critical to protecting class-member interests, in light of the fact that the adversary nature of the proceedings is attenuated when a class action moves into the settlement phase.<sup>58</sup> Once the defendants and plaintiffs have reached a proposed settlement, they share an interest in obtaining approval of their deal; therefore, a trial court cannot rely on the plaintiff and defendant for a vigorous adversary presentation to identify potential problems with the settlement.<sup>59</sup>

Other changes to federal Rule 23(e) likewise aim to protect class-member interests and prevent collusion between defendants and class counsel at the expense

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* 23(e).

<sup>53</sup> *Id.* 23, Advisory Comm. Notes to 2003 Amendments.

<sup>54</sup> *Id.* 23(e)(2).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* 23, Advisory Comm. Notes to 2003 Amendments (“[C]ourt review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.”).

<sup>58</sup> *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999) (“When a district court, as here, certifies for class action settlement only, the moment of certification requires ‘heightened attention’ to the justifications for binding the class members.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“[O]ther specifications of the Rule . . . demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”); Rabiej, *supra* note 21, at 375 (“The 2003 amendments to Rule 23(e) focused on strengthening the provisions governing the process of reviewing and approving proposed class settlements in a setting that often lacks the light brought by an adversary process, because both parties are in agreement when presenting the settlement to the court.”).

<sup>59</sup> *See Ortiz*, 527 U.S. at 852 (“[N]o such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees.”).

of the class. Under the 2003 amendments to the federal rule, the parties to a proposed settlement must identify to the court any side agreements they have entered into incident to the settlement.<sup>60</sup> And if a class member objects to a proposed settlement, that objection may be withdrawn only with the court's approval, to prevent settling parties from "buying off" a meritorious objection at the expense of absent class members.<sup>61</sup>

#### *E. Reaction to the 2003 Amendments*

Reaction to the 2003 amendments by courts, commentators, and practitioners generally has been positive.<sup>62</sup> Wright and Miller characterize the amendments as "codifying in many instances what might be termed 'best practices' and clarifying some ambiguities."<sup>63</sup>

### IV. THE CASE FOR UPDATING OHIO RULE 23

Updating Ohio Rule 23 to conform to the current version of the federal rule would fill important gaps in the Ohio rule, would make federal case law a more reliable guide for Ohio judges, and would protect the interests of class members and the integrity of the judicial process.

#### *A. Filling Gaps in the Ohio Rule*

The current Ohio Rule 23 has several important gaps, corresponding to the gaps in federal Rule 23 that were filled by its 2003 amendments. First, the current Ohio rule does not sufficiently specify the contents of class-action notices. The same problems that motivated the changes to federal Rule 23(c) in 2003 are present in the current Ohio rule: There is no requirement that class notices employ plain language

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<sup>60</sup> FED. R. CIV. P. 23(e)(3) ("The parties seeking approval must file a statement identifying any agreement made in connection with the proposal."). Cf. *Ortiz*, 527 U.S. at 852-53 (describing side deal settling plaintiffs' counsel's existing "inventory" of individual cases, contingent on court approval of proposed class settlement of "future" claims; side agreement gave counsel "great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the . . . class").

<sup>61</sup> FED. R. CIV. P. 23(e)(5) ("Any class member may object [to a proposed settlement]; the objection may be withdrawn only with the court's approval.").

<sup>62</sup> See, e.g., McGovern, *supra* note 22, at 1107-11; Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 CHAPMAN L. REV. 201, 207 (2004) ("[T]he changes to Rule 23 are a step towards curbing what has become a system highly susceptible to abuse."); David R. Clay, *Federal Attraction for the Interstate Class Action*, 52 EMORY L.J. 1877, 1880 (2003) ("[T]he [2003] amendments to Rule 23, particularly with respect to subsection (e), evidence a concern for proper class action results. Under the amendments, current Rule 23(e) is completely rewritten to emphasize the important role that courts and unnamed class members play in the fair resolution of a settled class action suit.").

<sup>63</sup> 7A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1753.1 (3d ed. 2009). The reporter for the Advisory Committee at the time of the amendments wrote that they "represent the surest form of rulemaking by adopting—and perhaps clarifying and regulating—the best current practices." Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next?*, 69 DEF. COUNSEL J. 432, 435 (2002).

and no requirement that a notice specify the nature of the action, the definition of the class, or the class's claims or issues. Nor does the existing Ohio case law adequately address the sufficiency of class notice, either in terms of the contents of a notice or its distribution.<sup>64</sup> In the absence of express provisions requiring the use of plain language and the inclusion of specific items of information about the class action, notices in Ohio class actions continue, in many instances, to be less than a model of clarity. Current Ohio practice does not appear to embrace the plain-language policy of the 2003 amendments to federal Rule 23. For example, the Federal Judicial Center model notices do not appear to be regularly used in Ohio class actions.

A second significant gap in the current Ohio rule is its lack of guidance to trial courts on the appointment of class counsel. The current rule does not even mention class counsel, much less specify class counsel's obligations or the criteria a trial judge should consider in determining whom to appoint as class counsel. Indeed, the current rule does not require the court to formally appoint counsel for the class.

Third, the current Ohio rule does not cover procedures for court review of proposed class-action settlements, including the handling of objections. Rule 23(E) states only that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." No mention is made of the right to object to a proposed dismissal or compromise, the procedures for raising objections, or the standards a trial court should apply to decide whether to uphold or overrule an objection.

A fourth important gap is that the current Ohio rule does not adequately address the timing of the class-certification decision. The current rule retains the original language that class certification should be decided "[a]s soon as practicable after the commencement of an action,"<sup>65</sup> which could be read to authorize class certification on the pleadings or without meaningful discovery.<sup>66</sup> The Ohio Supreme Court, however, recently has clarified that class certification must be based on a "rigorous analysis, which may include probing the underlying merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of [Rule] 23,"<sup>67</sup> thus strongly suggesting that a trial court may seldom, if ever, grant class certification without permitting discovery by a defendant who opposes certification. The tension between the language of Ohio Rule 23 on the

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<sup>64</sup> Only two reported cases address the notice provisions of Ohio Rule 23(C) in any detail. One appeals court found it improper for class counsel to issue a class notice unilaterally, without an order approving the notice and directing that it be sent. *Meek v. Gem Boat Serv., Inc.*, 590 N.E.2d 1296, 1300 (Ohio Ct. App. 1990). One trial court decision addressed the extent of the efforts a plaintiff must make to identify class members to receive mail notice. *Toledo Fair Housing Ctr. v. Nationwide Mut. Ins. Co.*, 94 Ohio Misc. 2d 127, 131 (Comm. Pl. 1996) ("It is not enough that the plaintiffs send mail notice only to those whose names and addresses are currently known to them; they must make a reasonable effort to determine the addresses of other class members.").

<sup>65</sup> OHIO R. CIV. P. 23(C)(1).

<sup>66</sup> See *Blumenthal v. Medina Supply Co.*, 743 N.E.2d 923, 925 (Ohio Ct. App. 2000) (noting that trial court conditionally certified class twelve days after complaint was filed and "prior to the commencement of discovery and without the presentation of any evidence").

<sup>67</sup> *Stammco, L.L.C., v. United Tel. Co.*, 994 N.E.2d 408 (Ohio 2013).

timing of certification and the rule laid out by the Ohio Supreme Court in *Stammco* should be addressed.

*B. Making Federal Case Law a Better Guide for Class-Action Practice in Ohio Courts*

Ohio courts have long recognized that cases applying the Federal Rules of Civil Procedure provide a useful guide in construing similar Ohio rules.<sup>68</sup> Federal cases can serve as an especially helpful resource in class actions, in light of the relatively sparse Ohio Supreme Court case law under Rule 23, and the near-total lack of Ohio Supreme Court authority in some important areas of class-action practice, such as notice requirements, objectors, and criteria for appointment of class counsel.<sup>69</sup>

There is, however, a growing tension in using federal cases as a guide, as the language of Ohio Rule 23 has diverged from that of federal Rule 23. The Ohio rule now bears a number of important dissimilarities to federal Rule 23; indeed, several sections of the current federal Rule 23 have no counterpart in the Ohio rule. In those areas where the federal rule no longer looks like the Ohio rule, it may be questioned whether federal cases applying different language—sometimes very different language—should guide application of the Ohio rule. To the extent the two rules diverge, the utility of federal precedent may be diminished, thus depriving Ohio practitioners and judges of useful guideposts in litigating and judging class actions.

All else being equal, uniformity between the state and federal rules is desirable: it is easier for practitioners, it enhances predictability for parties, it helps judges by giving them a broader array of judicial learning to draw upon, and is one less thing that can drive forum shopping.

*C. Protecting the Interests of Class Members and the Integrity of the Class-Action Process*

Several of the 2003 changes to federal Rule 23 responded to concerns that the former rule did not provide sufficient protections for class members. For example, the addition of a new federal Rule 23(g) on class counsel addressed concerns that courts were not sufficiently active in policing class counsel. The new Rule 23(g) now requires district judges to consider the class's interests in a formal and express way when appointing class counsel, and it gives judges new tools (such as the ability to “include in the appointing order provisions about the award of attorney's fees or nontaxable costs”) to protect those interests.<sup>70</sup> Another example was the addition of significant new provisions on class notices. Yet another example was new language in Rule 23(e)(3) and (5) requiring settling parties to disclose to the court any “side agreements” made in connection with a proposed settlement and requiring court approval before the withdrawal of an objection to a class-action settlement (to prevent the settling parties from “buying off” a meritorious objection at the expense

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<sup>68</sup> See *Myers v. Toledo*, 852 N.E.2d 1176, 1178 (Ohio 2006) (The Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, which were adopted in 1938 and have been amended several times. Consequently, federal law interpreting a federal rule, while not controlling, is persuasive authority in interpreting a similar Ohio rule.).

<sup>69</sup> Other significant areas of class-action practice where there is little or no Ohio Supreme Court precedent include defendant class actions, issue classes, and non-opt-out classes.

<sup>70</sup> FED. R. CIV. P. 23(g).

of the interests of absent class members).<sup>71</sup> In these and several other areas, the current federal Rule 23 sets up guardrails to protect the interests of absent class members.

There is no apparent reason why the Ohio rule should not include the same guardrails to protect the integrity of the class-action process. The same gaps in the pre-2003 federal rule that prompted those revisions are present in the Ohio rule today. Thus, there is no express language in Ohio Rule 23 to guarantee that notices will be useful to class members or will provide them with adequate information to protect their rights. There is nothing in the current Ohio rule to ensure that class counsel are appointed under procedures that will protect class members' rights and interests. There is nothing in the current Ohio rule to ensure that objections are treated properly and in an upright fashion. For the same reasons it was important to address these lacunae in the federal rule in 2003, it is important to do the same with the Ohio rule today.

Arguably, amending Rule 23 to add guardrails to protect the integrity of the class-action process is especially important to provide guidance to Ohio trial court judges. State-court judges in Ohio handle a diverse docket, tend to carry heavier caseloads than their federal counterparts, and do not have the same degree of support from law clerks and judicial assistants that federal judges do.<sup>72</sup> Many state judges come from practice backgrounds (such a county prosecutors' offices) where they had little or no experience with class actions.<sup>73</sup> Most Ohio state-court judges, moreover, do not have regular exposure to class actions.<sup>74</sup> A revised Ohio Rule 23, containing all the guardrails and protections now present in the federal rule, would particularly help a state-court judge who may be faced with a class action for the first time or who has not seen a class action in years. Federal judges who continually deal with class actions on their dockets may be expected to be conversant with "best practices" for judicial management of class actions, but there is no reason to expect the same of state-court judges, and thus good reason to make explicit in Ohio's rule the important protections embodied by the 2003 amendments to the federal rule.

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<sup>71</sup> *Id.* 23(e)(3), (5).

<sup>72</sup> Compare Court Statistics Project, *State Court Caseload Statistics* (Jan. 31, 2014), [http://www.courtstatistics.org/OtherPages/~media/Microsites/Files/CSP/SCCS/2010/Total\\_Civil\\_Caseloads.ashx](http://www.courtstatistics.org/OtherPages/~media/Microsites/Files/CSP/SCCS/2010/Total_Civil_Caseloads.ashx), with United States Courts, *Federal Judicial Caseload Statistics* (Jan. 31, 2014), <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C03Mar13.pdf>.

<sup>73</sup> See Catherine R. Borden & Emery G. Lee III, *Beyond Transfer: Coordination of Complex Litigation in State and Federal Courts in the Twenty-First Century*, 31 REV. LITIG. 997, 1034 n.53 (2012).

<sup>74</sup> Statistical reports issued by the Supreme Court of Ohio suggest that most common pleas judges seldom, if ever, encounter class actions. At year-end 2012, for example, there were 63 cases pending in common pleas courts that had been designated as "complex litigation," out of a total of 78,819 civil cases. Supreme Court of Ohio, 2012 OHIO COURTS STATISTICAL REPORT at 23, 51. Only 23 of 88 common pleas courts had cases designated as complex litigation pending at the end of 2012. *Id.* at 50-51. A common pleas judge may designate a case as complex litigation if, among other things, it is a class action, and cases designated as complex litigation are subject to extended time limits for disposition. OHIO SUPERINTENDENCE CT. R. 42(A), (C).

*D. The Substantive Standards for Class Certification would be Unchanged*

It should be noted that revising Ohio Rule 23 to reflect the 2003 amendments to federal Rule 23 would not change the standards to be applied to class certification in Ohio courts, because the 2003 revisions to the federal rule did not alter the class-certification standards under federal Rule 23(a) and (b). Nor have any of the other post-1966 revisions to federal Rule 23 changed those standards; the current federal Rule 23(a)-(b) is substantially similar to the 1966 federal rule and to Ohio Rule 23(A)-(B).<sup>75</sup> The familiar class certification prerequisites of numerosity, commonality, typicality, and adequacy of representation are embodied in the current federal rule, and, if the Ohio rule were updated to conform to the federal rule, those same prerequisites would still apply in Ohio cases. Similarly, the standards for certifying a limited fund class or an incompatible standards class under Ohio Rule 23(B)(1), an injunctive relief class under Rule 23(B)(2), or an opt-out class where common issues “predominate” under Rule 23(B)(3) would not change, because the 2003 amendments to the federal rule did not affect those subsections.<sup>76</sup>

V. CONCLUSION

There is no good reason not to update Ohio's Civil Rule 23 to conform to the current language of the federal rule, and several persuasive reasons to do so. The 2003 amendments to the federal rule addressed a number of substantive deficiencies in the rule's treatment of class notices, appointment of class counsel, the timing of the class certification decision, and review of proposed settlements of class actions. The same deficiencies that motivated the changes to the federal rule are still present in Ohio's Rule 23, and adopting the federal revisions would enhance protections for class members and protect the integrity of the class action process. Maintaining uniformity between the Ohio rule and the federal rule would also provide Ohio courts and litigants with improved guidance in managing class actions and would facilitate reliance on federal case law that interprets the same rule language. The substantive standards for class certification would not change, but procedures in class actions would be meaningfully clarified and improved.

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<sup>75</sup> The only post-1966 changes to federal Rule 23(a) and (b) occurred in 2007, as part of a general project to restyle the Federal Rules of Civil Procedure to make them more readable. No substantive changes were enacted. *See* FED. R. CIV. P. 23, Advisory Comm. Notes to 2007 Amendments (“The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.”).

<sup>76</sup> Whether Ohio's Rule 23 should incorporate some of the measures in the federal Class Action Fairness Act (CAFA), Pub. L. 109-2, 119 Stat. 4 (2005), is an interesting question, but one beyond the scope of this article. While the greater part of CAFA addressed issues of federal jurisdiction over class actions, the statute also implemented reforms to federal class-action practice relating to settlements and attorneys' fees. In particular, CAFA imposed limitations on so-called “coupon settlements,” regulated the attorneys' fees a court may award under a coupon settlement, and restricted so-called “negative-value settlements,” in which class members are required to make payments as part of a settlement that exceed their monetary recovery. *See* 28 U.S.C. § 1712 (coupon settlements), § 1713 (negative-value settlements) (2006). Because CAFA applies only in federal courts, 28 U.S.C. § 1711(2) (2006), it does not affect coupon settlements or negative-value settlements in Ohio state court class actions, and there are no provisions of current Ohio law that specifically address those situations.



## APPENDIX: PROPOSED AMENDED OHIO RULES OF CIVIL PROCEDURE 23 &amp; 52

*Rule 23. Class Actions*

**(A) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

**(B) Types of Class Actions.** A class action may be maintained if Rule 23(A) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
  - (a) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
  - (b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
  - (a) the class members' interests in individually controlling the prosecution or defense of separate actions;
  - (b) the extent and nature of any litigation concerning the controversy already begun by or against class members;

- (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (d) the likely difficulties in managing a class action.

**(C) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**

(1) Certification Order.

- (a) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.
- (b) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(F).
- (c) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

- (a) *For (B)(1) or (B)(2) Classes.* For any class certified under Rule 23(B)(1) or (B)(2), the court may direct appropriate notice to the class.
- (b) *For (B)(3) Classes.* For any class certified under Rule 23(B)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
  - (i) the nature of the action;
  - (ii) the definition of the class certified;
  - (iii) the class claims, issues, or defenses;
  - (iv) that a class member may enter an appearance through an attorney if the member so desires;
  - (v) that the court will exclude from the class any member who requests exclusion;
  - (vi) the time and manner for requesting exclusion; and

- (vii) the binding effect of a class judgment on members under Rule 23(C)(3).
- (4) Judgment. Whether or not favorable to the class, the judgment in a class action must:
- (a) for any class certified under Rule 23(B)(1) or (B)(2), include and describe those whom the court finds to be class members; and
  - (b) for any class certified under Rule 23(B)(3), include and specify or describe those to whom the Rule 23(C)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.
- (5) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.
- (6) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

**(D) Conducting the Action.**

- (1) In General. In conducting an action under this rule, the court may issue orders that:
- (a) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
  - (b) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:
    - (i) any step in the action;
    - (ii) the proposed extent of the judgment; or
    - (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;
  - (c) impose conditions on the representative parties or on intervenors;
  - (d) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(e) deal with similar procedural matters.

- (2) Combining and Amending Orders. An order under Rule 23(D)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

**(E) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) If the class action was previously certified under Rule 23(B)(3), the court may refuse to approve 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.
- (5) Any class member may object to the proposal if it requires court approval under this subdivision (E); the objection may be withdrawn only with the court's approval.

**(F) Class Counsel.**

- (1) Appointing Class Counsel. A court that certifies a class must appoint class counsel. In appointing class counsel, the court:
  - (a) must consider:
    - (i) the work counsel has done in identifying or investigating potential claims in the action;
    - (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
    - (iii) counsel's knowledge of the applicable law; and
    - (iv) the resources that counsel will commit to representing the class;

- (b) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
  - (c) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
  - (d) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(G); and
  - (e) may make further orders in connection with the appointment.
- (2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(F)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
- (3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
- (4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

**(G) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

- (1) A claim for an award must be made by motion, subject to the provisions of this subdivision (G), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
- (2) A class member, or a party from whom payment is sought, may object to the motion.
- (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52.
- (4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 53.

**(H) Aggregation of Claims.** The claims of the class shall be aggregated in determining the jurisdiction of the court.

*Rule 52. Findings by the Court*

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.

Findings of fact and conclusions of law required by this rule and by Rule 23(G)(3) or Rule 41(B)(2) are unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56.

An opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule and Rule 41(B)(2).

