No. 23-3550

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN AKINS, et al.,

Plaintiffs-Appellees,
v.

SARAH FELDMAN and JILL MAHANEY,

Objectors-Appellants,
v.

FACEBOOK, INC.,

Defendant-Appellee.

On Appeal from the Northern District of California
Civil Action No. 5:18-md-02843-VC

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This class action was filed in 2018 on behalf of 253 million Facebook users alleging that Facebook allowed its partners and advertisers to access private information users had shared with their friends over Facebook, including via Facebook Messenger. Most Facebook users believed information shared in this way was purely private and could not be accessed by third parties. Prior to 2010, Facebook did not disclose to users that it would share information communicated with friends over Facebook. In their operative complaint, plaintiffs state *prioritized claims* for violations of the federal Stored Communications Act ("SCA") and Video Privacy Protection Act ("VPPA"), which provide for minimum statutory damages of *not less than* $1,000 and $2,500 per class member, respectively.

The district court approved a settlement in the amount of $725 million, or $2.87 per class member, a recovery of less than 0.3% of minimum statutory damages under the SCA and only 0.1% of minimum statutory damages under the VPPA. There is no basis in Ninth Circuit law for approving such a radical discount of the Class's potential recovery, unless the case has no more than a 0.3% likelihood of success on the merits. But a recovery of less than one percent of available damages suggests the case lacked merit, which is

inconsistent with the district court's determinations regarding concrete injury and available causes of action.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction in this matter pursuant to 28 U.S.C. §1331 because plaintiffs alleged defendant Facebook violated the Stored Communications Act, 18 U.S.C. § 2701, *et seq.*, and the Video Privacy Protection Act, 18 U.S.C. § 2710, *et seq*. The district court also had diversity jurisdiction over the state claims alleged in this action under 28 U.S.C. §1332(d) because the suit is a class action in which the citizenship of one or more plaintiffs differs from that of the defendant and the aggregate amount in controversy exceeds $5,000,000.

This Court has appellate jurisdiction because this is an appeal following entry of a final judgment. 28 U.S.C. § 1291. The district court's Order Granting Final Approval of Class Action Settlement, Order Awarding Attorneys' Fees, Expenses and Service Awards, and Final Judgment were entered on October 23, 2023. ER-3–14, 15–20, and 21–23, respectively. Appellants Sarah Feldman and Jill Mahaney, objectors below, timely filed their Notice of Appeal on November 9, 2023. ER-24.

STATEMENT OF ISSUES

1. Did the district court abuse its discretion by failing to adequately consider each of the *Hanlon* factors prior to granting approval of the proposed settlement?

2. Did the district court abuse its discretion by approving a settlement that compromises statutory damages by over 99.7% without first considering gross statutory damages and likelihood of success?

3. Did the district court abuse its discretion by finding that objectors did not concede that there are some risks associated with the class-wide minimum statutory damages claims?

4. Did the district court abuse its discretion by approving a plan of allocation that fails to recognize that Class members who joined Facebook before 2010 have stronger claims?

5. Did the district court abuse its discretion by awarding an attorney's fee of 25% of a megafund recovery, for which a market rate fee is closer to 11%?

STATUTORY AND REGULATORY AUTHORITIES

Statutes and Rules are set forth in an Addendum following the brief.

STATEMENT OF THE CASE

This case was transferred to the Northern District of California by the Judicial Panel on Multidistrict Litigation on June 6, 2018. ER-27. The transferred cases stated causes of action for violations of the Video Privacy Protection Act and the Stored Communication Act, along with various state consumer protection and common law counts. Document 148.

Plaintiffs sued Facebook for permitting app developers to collect Class member information that had been shared with friends via Facebook, which information was intended only for private viewing and thought not to be available to third parties or the general public. Facebook, however, permitted its partners and advertisers to have access to this information, and in some cases to monetize that information. Document 298 at p.p. 6-7. This case largely turns on whether Facebook adequately disclosed to Class members what information it would make available to third-parties. While Facebook's user agreement after 2009 contained a provision in which users consented to the information sharing with app developers, its user agreement prior to 2010 did not. Document 298 at p. 27. Thus, Facebook users who signed up prior to 2010 have valid claims against Facebook that are not subject to a consent defense. *Id*.

Plaintiffs further alleged that despite Facebook's public announcement in 2014 that it would no longer make a user's friends' data available to app developers, Facebook nonetheless continued to permit certain "whitelisted" app developers to access the friends' information. Document 298 at pp. 7-8.

Plaintiffs further alleged that no users, including after 2009, consented to Facebook's practice of allowing companies to sell and misuse their sensitive data, since Facebook had represented that it would restrict third-party use of the sensitive information to what was necessary in order to enhance the Facebook experience. Document 298 at p. 9.

On September 9, 2019, the district court issued an order granting in part and denying in part Facebook's motion to dismiss this action. Document 298. Importantly, the court found that "from roughly 2009 to 2015, Facebook disclosed its practice of allowing app developers to obtain, through a user's Facebook friends, any information about the user that the friends had access to." Document 298 at p. 2. "[U]sers who established their Facebook accounts prior to roughly 2009 never consented to this practice." *Id*. Only after 2009 did "Facebook [begin] to disclose [the] practice of giving app developers access to friends' information." Accordingly, "users who established Facebook accounts before this time did not, at least based on the allegations in the complaint, agree to these terms when they signed up." Document 298

at p. 26. "This means that any plaintiff who signed up before roughly 2009 may pursue claims based on this conduct…" Document 298 at p. 27.

Both Appellants signed up as Facebook users during or before 2009.[1] Document 1147.

As consideration for the settlement, Facebook agreed to pay a gross amount of $725 million which – net of fees and costs – will be allocated among all Class members who file a claim based on the number of months each such Class member had a Facebook account. ER-7.

The district court granted preliminary approval of the settlement, and ordered notice consistent with the Notice Plan, on February 10, 2023. Document 1105. Appellants timely filed their objection on July 19, 2023. Document 1147. The district court held a final approval hearing on September 7, 2023. The district court's Order Granting Final Approval of Class Action Settlement, Order Awarding Attorneys' Fees, Expenses and Service Awards, and Final Judgment were entered on October 23, 2023. ER-3–14, 15–20, and 21–23, respectively. Appellants Sarah Feldman and Jill Mahaney, objectors below, timely filed their Notice of Appeal on November 9, 2023. ER-24.

[1] Appellant Feldman has been a Facebook user since 2009, and Mahaney since 2007.

SUMMARY OF ARGUMENT

Class members have been harmed by the absence in this Circuit of any guidance for application of the *Hanlon* factors in the context of a proposed compromise of aggregated statutory claims. This is a recurring problem. Here, the district court approved an objectively large settlement number without meaningfully analyzing the settlement amount in terms of gross calculable damages, litigation risk, and due process limitations, resulting in the aggregated statutory claims of 253 million Class members being discounted by over 99.7% without adequate justification. This case requires that the Court address this issue.

The district court abused its discretion by approving a settlement that represents less than 0.3% of minimum statutory damages, without examining or explaining how litigation risks associated with Facebook's defenses and the possibility of due process adjustment can justify such a drastic discount.

The procedural guidelines of the Northern District of California obligate Class Counsel to provide the district court with "the potential class recovery if plaintiffs had fully prevailed on each of their claims, claim by claim, and a justification of the discount applied to the claims."[2] *Procedural*

[2] This procedural guideline is consistent with both *Hanlon* and the Rule 23, Notes of Advisory Committee-2009 Amendment, Subdivision (e)(1), which provide that at the preliminary approval stage "[t]he parties should also supply

Guidance for Class Action Settlements, Addendum, p. A-10. Nowhere in their motions for preliminary or final approval did Class Counsel comply with their obligations under the Northern District's published guidelines. Class Counsel did not state the potential recovery if plaintiffs had fully prevailed on their claims under either the SCA or the VPPA, depriving the court of information essential to a meaningful examination of the proposed settlement consistent with Circuit standards set forth in *Hanlon v. Chrysler Corp.* 150 F.3d 1011 (9th Cir. 1998). Nowhere in its order does the district court state the potential recovery for *any* claim, let alone each one, were the Class to prevail on each of Facebook's defenses. Neither does the court justify the settlement's discount against each claim according to Facebook's alleged defenses and other risks attendant to the case. There is no discussion of how the $725 million settlement figure adequately compensates Class claims in view of Facebook's potential defenses. A recovery of $2.87 per Class member for a violation that Congress has valued at a minimum of $1,000 per plaintiff is simply not adequate, even in light of Facebook's consent and other defenses.

For Class members who joined Facebook during or prior to 2009, a recovery of a pro rata $2.87 is clearly inequitable, given the district court's

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the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation."

holding that Facebook does not possess a defense of consent against these Class members. Even if $725 million were adequate as a gross figure, the settlement must be reallocated to pay a greater portion to the pre-2009 subclass that possesses far stronger claims than the rest of the class.

The award of a 25% attorney's fee is nearly fourteen percentage points higher than the market rate fee for recoveries over $500 million. The district court abused its discretion by awarding a benchmark percentage fee in a megafund case that benefited from economies of scale and resulted in an extremely low percentage recovery of potential damages. Class Counsel should have received a fee lower than the market rate, not grossly higher.

STANDARD OF REVIEW

Standard of review – settlement approval: A district court's decision to approve a class action settlement is reviewed for abuse of discretion. *See Saucillo v. Peck*, 25 4th 1118, 1129 (9th Cir. 2022). *In re Bluetooth Prod. Liab. Litig.*, 654 F 3d 935, 940 (9th Cir. 2011). The award of statutory damages is likewise reviewed for an abuse of discretion. *See Six Mexican Workers v. Arizona Citrus Growers*, 697 F.2d 1333, 1339-40 (9th Cir. 1990). Whether the district court applied the correct legal standard is reviewed *de novo*. *See Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010). Because this case involves the novel application of *Wakefield*'s

new due process standards, this issue is before the Court *de novo*. "Settlements that take place prior to formal class certification require a higher standard of fairness." *In re Mego Financial Corp. Securities Litig.*, 213 F.3d 454, 458 (9th Cir. 2000), *citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

Standard of review – attorneys' fees: A district court's "award of fees and costs to class counsel, and its method of calculation," is reviewed for abuse of discretion. *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 656 (9th Cir. 2020), *quoting In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177 (9th Cir. 2013). "We review *de novo* the 'legal bases' of a fee award." *Chambers*, *quoting Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 956 (9th Cir. 2002). "A court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (internal citations omitted).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY APPROVING A SETTLEMENT OF LESS THAN 0.3% OF MINIMUM STATUTORY DAMAGES WITHOUT EXAMINATION OF GROSS DAMAGES, LITIGATION RISK, AND DUE PROCESS FACTORS

In their Motion for Preliminary Approval, Class Counsel promise to "provide an estimate of maximum recovery on each claim and explain the discount they have applied to that recovery for settlement purposes." Document 1096, p. 31. They never do. Consequently, the district court was deprived of information necessary to complete the work required of it by *Hanlon*.[3]

The Northern District instructs Class Counsel to provide a description of "potential class recovery if plaintiffs had fully prevailed on each of their claims, claim by claim, and a justification of the discount applied to the claims." *Procedural Guidance for Class Action Settlements*, Addendum p. A-10. This requirement addresses *Hanlon*'s first, second, and fourth settlement

[3] *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("Assessing a settlement proposal requires the district court to balance a number of factors:" strength of the case; risk, expense, complexity, and likely duration of further litigation; risk of maintaining class action status through trial; amount offered in settlement; status of discovery and stage of proceedings; experience and view of counsel; presence of governmental participant; and reaction of the class.).

evaluation factors – strength of case, litigation risk, and the amount offered in settlement – in a way that permits meaningful application of those factors. Here, Class Counsel spent several pages in their motion for preliminary approval artfully circumventing the need to calculate gross statutory damages and justify any discount of the resulting number. Class Counsel never provided the potential class recovery under, or a justification of the discount applied to, either the SCA or the VPPA minimum compensatory[4] statutory damage claims. Due to Class Counsel's inadequate analysis, the district court lacked a sufficient basis for its finding that the proposed settlement "provides excellent relief to the Settlement Class given the range of reasonable possible recoveries by the Settlement Class members, especially since further litigation would likely be complex, expensive and lengthy." ER-7 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 820 (9th Cir. 2012)).[5] Remarkably, in its

[4] Where "Congress [provides] for punitive damages in addition to any actual or statutory damages … suggests that the statutory damages provision has a compensatory, not punitive, purpose." *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010). There is no punitive component to the VPPA's described "actual damages [of] not less than $2,500" per aggrieved person. *See* 18 U.S.C. § 2710(c)(2)(A). Rather, punitive damages are separately available under 18 U.S.C. § 2710(c)(2)(B). Likewise there is no punitive aspect to the SCA's mandatory "actual damages" of $1,000 per plaintiff. *See* 18 U.S.C. § 2707(c).

[5] The complexity, expense, and length of continued litigation are not "risks" but rather the burdens of continued litigation and are separately mentioned in

description of "excellent relief" the district court entirely neglects the essential issue of *litigation risk.*

The district court goes on to assert "the $725 million Settlement provides substantial benefits for the Class in light of the strengths and weaknesses of the claims asserted. Class Counsel and the Court have carefully evaluated those strengths and weaknesses." ER-7 (citing Document 1096 at 19-36). However, in the cited Motion to Grant Preliminary Approval, Class Counsel *never* address class-wide statutory damages under the SCA[6] or the VPPA,[7] and never apply a litigation-risk adjustment to any such numbers. In their Motion for Final Settlement Approval Class Counsel again effectively side-stepped any description of aggregated statutory damages or any litigation risk adjustment to those damages. *See* Document 1145. Thus, the court was left without an adequate foundation for its finding that the proposed settlement is actually the *excellent relief* it describes.

Instead, regarding collective damages under the VPPA's provision for $2,500 per Class member, Class Counsel simply state "the maximum recovery

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the second *Hanlon* factor. These items are rightfully factored into a present value analysis, but should not count as litigation risks.

[6] Document 1096, p. 39.

[7] Document 1096, p. 37.

would be astronomical. That figure cannot be used to estimate what Plaintiffs, if successful, could actually collect, however." Document 1096 at p. 25. "Given the strong possibility of a large due process damages reduction on this record, it makes sense to factor it into the maximum possible recovery. In addition, a further discount is appropriate to reflect the risks that the VPPA claim faces on the merits" and "[b]ecause the SCA provides for $1,000 in statutory damages … the maximum recovery under this claim would be in the hundreds of billions – a figure that could be reduced for due-process reasons as discussed above." "Plaintiffs believe that a severe discount is also required due to Facebook's consent defense." Document 1096 at p. 26.

While Class Counsel pay lip service to the concepts of maximum recovery, litigation risk, and due process concerns, they never actually calculate aggregated statutory damages, provide a range of litigation risk, or discuss due process in the context of a class action settlement. Without this work, the district court is deprived of the ability to explore "comprehensively all [*Hanlon*] factors." *See Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Consequently, the district court failed to consider the essential analytical components that in combination satisfy the first, second, and fourth *Hanlon* factors and ignored the need for finding the "likely rewards of

litigation" for comparison to the proposed settlement consistent with *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson* 390 U.S. 414, 424-25 (1968).

II. *WAKEFIELD*'S VERDICT AMOUNT DOES NOT ESTABLISH A DUE PROCESS YARDSTICK FOR THIS CASE

Class Counsel disregard the importance of statutory damages – individual and aggregated – as the starting place for analyzing the proposed settlement; they assert statutory damages are "astronomical" and "could be reduced for due-process reasons," and ultimately fail to assign any dollar value to the SCA and VPPA claims.

Class Counsel's primary focus on due process limitations evaded their duty to estimate maximum recovery on each of the statutory damage claims and to provide an explanation of proposed discounts. In their preliminary approval motion, Class Counsel erroneously argued to the district court that the $925,000,000 verdict at issue in *Wakefield v. ViSalus*, 51 F.4th 1109 (9th Cir. 2022), somehow establishes a yardstick for due process limitations in this case. Document 1096 at p. 37 ("If, as *Wakefield* suggests, due-process problems are created by total liability of $925 million, it is unrealistic to expect this Court, the Ninth Circuit, or the Supreme Court to allow liability of hundreds of times more given the volume of users in this case."). The *amount* of the jury verdict award challenged in *Wakefield* is entirely irrelevant to the

analysis of statutory damages in the instant case. *Wakefield* involved a $925 million jury award for 1,850,440 robocalls made in violation of the TCPA, which may indeed have been an oppressive and severe award that exceeded due process limitations, especially when the harm caused to each plaintiff was measured in seconds. *See e.g. Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 963 (8th Cir. 2019) (harm to recipients was "not severe," only 7% of calls made it to third question).

Here, in contrast, the plaintiffs suffered harm to their "interest in controlling their personal information," something that this Court has held is a substantial harm conferring standing. *In re Facebook Internet Tracking Litig.*, 956 F.3d 589, 599 (9th Cir. 2020). Certainly, a settlement that requires Facebook to pay $10 per Class member would not trigger any of *Wakefield*'s due process concerns.[8] *Wakefield, supra*, 51 F.4th at 1124 ("Constitutional limits on aggregate statutory damages awards therefore must be reserved for circumstances in which a largely punitive per-violation amount results in an aggregate that is gravely disproportionate to and unreasonably related to the legal violations committed") and 1122 (an aggregated award must "be

[8] $10 per Class member is the figure Appellants suggested to the district court as an appropriate discount of statutory damages based upon the consent and other defenses, and a 99% discount of mandatory-minimum $1,000 SCA damages.

wholly disproportioned to the prohibited conduct and greatly exceed any reasonable deterrence value" to trigger due process concerns).[9] *See also Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 955 (8th Cir. 2019) (reducing damages to $10 per robocall from statutory amount of $500).

In the context of a proposed settlement of class-wide statutory damages, the settlement amount must be compared to a likely recovery on those claims if they were tried, which is determined by adjusting gross statutory damages according to litigation risk and, if applicable, due process concerns. Given the significant harm to Class members' privacy caused by Facebook's alleged actions, the maximum damages under the SCA, once discounted for litigation risk, are highly unlikely to trigger a *Wakefield* review. This is not a TCPA case.

In *Wakefield* this Circuit remanded to allow for assessment of "whether the aggregate award of $925,220,000 [was] so severe and oppressive that it [violated] Visalus's due process rights and, if so, by how much the cumulative award should be reduced." *Wakefield v. Visalus, Inc.*, 51 F.4th 1109, 1125 (9th Cir. 2002). The same question should be asked here regarding Class

[9] The district court never measured the settlement against the important privacy interests sought to be protected by either the SCA or the VPPA and never considered whether the settlement would have even a modest deterrent effect.

Counsel's agreement with Facebook, *i.e.*, when considering the reasonableness of the proposed class-action settlement, by how much should risk-adjusted cumulative statutory damages be reduced, *if at all*, to conform with *Wakefield*'s due process standard of severity and oppressiveness? Neither Class Counsel nor the district court ever addressed this basic question.

Unless the district court first made a finding that the $1,000 statutory damages provided by the SCA are wholly disproportionate or obviously unreasonable in light of the statute's purpose, it was bound to use the $1,000 per plaintiff amount when beginning its evaluation of the proposed settlement. *See St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). The district court never made such a finding. The next step – likewise ignored by Class Counsel and the district court – should have been to calculate gross aggregate statutory damages. After which, the court should have adjusted gross damages according to litigation-risk, and then – if necessary – analyzed that number according to due process standards. Then, consistent with *Hanlon*, those likely results of litigation should have been compared to the proposed settlement.

In this case, the district court – by failing to consider aggregated statutory damages, make a litigation risk adjustment, and perform a *Wakefield* due process analysis, in that order – did not perform a mandatory *Hanlon*

analysis and never examined the settlement amount in context. *See Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012) ("A court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact." (Internal citations omitted)).

III. THE DISTRICT COURT MISCONTRUED APPELLANTS' OBJECTION

The district court misconstrued Appellants' objection when it found that "Objectors do not discuss any of the risks involved in proceeding with the claim, aside from potential due-process issues [and] do not account at all for the risk presented by the VPPA claims, other than due-process risks…" ER 8-9. This is clearly incorrect.

To the contrary, Appellants in their objection acknowledged that Plaintiffs' case was not a slam dunk, and for the purpose of analyzing the reasonableness of the proposed settlement used a very low 1% as the likelihood of success. Document 1147 at p. 7 ("As an illustration, assume the VPPA claim, having survived a motion to dismiss, has at least a 1% chance of success at trial."). Appellants employed a 1% likelihood to demonstrate that, even were the case so weak as to border on being frivolous, it would still have a risk-adjusted value of $6.25 billion under the VPPA and $2.53 billion

under the SCA.[10] The use of 1% as the litigation-risk multiplier *was* an acknowledgment of risks associated with the statutory claims. Appellants *did not* argue that the settlement must be at least $253 billion to be adequate.

A class action settlement amount must be reasonable as a function of the relationship between maximum potential recovery and a discount according to the risk of continued litigation and, when appropriate, a *Wakefield* due process adjustment. As explained by the Seventh Circuit, a judge must "quantify the net expected value of continued litigation to the class, *since a settlement for less than that value would not be adequate*. Determining that value would require estimating the range of possible outcomes and ascribing a probability to each point on the range." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-285 (7th Cir. 2002) (emphasis added).

> Some arbitrary figures will indicate the nature of the analysis that we are envisaging. Suppose a high recovery were estimated at $5 billion, medium at $200 million, low at $10 million. Suppose the midpoint of the percentage estimates for the probability of victory at trial was .5 percent for the high, 20 percent for the medium, and 30 percent for the low… Then the net expected

[10] 253 million Class members multiplied by statutory damages of $1,000 each yields a potential recovery of $253 billion. If the case has a 1% chance of success at trial, then a reasonable settlement amount for the SCA claim would be $2.53 billion, or just $10 per Class member. This relatively modest litigation-risk-adjusted number – one intended for use as a settlement standard against which the proposed settlement should be measured – does not in these circumstances implicate *Wakefield* due process standard of oppressiveness.

> value of the litigation, before discounting, would be $68 million… [O]ur point is that the judge made no effort to translate his intuitions about the strength of the plaintiffs' case, the range of possible damages, and the likely duration of the litigation if it was not settled now into numbers that would permit a responsible evaluation of the reasonableness of the settlement.

Id. at 285.

If the SCA claim, having survived a motion to dismiss, has at least a 1% chance of success at trial, then $2.53 billion becomes the measure of fairness, reasonableness, and adequacy to which the proposed settlement must be compared. This is required by the first and second *Hanlon* factors. Any downward adjustments from that number need to be justified, both by Class Counsel and findings of the district court. This is true for every Circuit in the country. No Circuit, including the Ninth, permits a case to be settled for less than its likely litigation value, which is calculated by multiplying potential damages by the likelihood of success. "[I]n every instance [the court must] compare the terms of the compromise with the likely rewards of litigation." *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson* 390 U.S. 414, 424-25 (1968); *Acosta v. Trans Union, LLC*, 240 F.R.D. 564 (CD CA 2007) ("court must apprise itself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated") (*quoting Weinberger v. Kendrick*, 698 F.2d 61,

74 (2d Cir. 1982). By this measure, the settlement approved by the district court is about $1.8 billion short.

Acosta was a class action for violation of the Fair Credit Reporting Act ("FCRA"), with potential statutory damages of $2 billion. After finding that the settlement represented "not even one-fifth of one percent of the litigation value of these claims" the court denied approval of the settlement. *Acosta,* 240 F.R.D. at 578. "Were Plaintiffs' claims against Trans Union and Equifax grounded in such a tenuous basis that they were hopelessly doomed to fail in court, such a colossal discrepancy between their apparent litigation value and the value of the Settlement may be acceptable. That is not true here." *Id*. The same could be said of this case. Class Counsel has failed to demonstrate the Class's statutory damage claims are "hopelessly doomed to fail in court." Absent such a showing, approval of the proposed settlement, with its draconian 99.7% compromise of Class claims, is impermissible.

The district court's finding that Appellants' objection does "not account at all for the risks presented by the VPPA claims, other than the due-process risks," misstates the fundamentals of the objection. See ER-8–9. A court must set forth a reasoned response to all non-frivolous objections in its approval decision. *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 836 (9th Cir. 1976). Here, the district court misconstrued Appellants'

objection and abused its discretion by failing to address the fundamental issues raised in the objection. In order to fulfill the mandate of *Mandujano*, the district court was required to directly confront the Appellants' objection and explain why a recovery of 1% of aggregated damages is not a proper valuation of the statutory claims.

IV. THE SETTLEMENT MUST ALLOCATE A GREATER RECOVERY TO THOSE CLASS MEMBERS WITH THE STRONGEST CLAIMS

The district court clearly held that Facebook's primary defense to this lawsuit – consent – was not available against Class members who first signed up for Facebook before or during 2009. Document 298, p. 27. Both of the Appellants fall into this category. Because the language Facebook employed in its user agreements prior to 2010 failed to disclose that private, friend-only information would be shared with app developers, neither of the Appellants consented to Facebook's sharing of information with anyone. While Class members who signed up after 2009 may have claims based upon Facebook sharing that information with its partners, or not restricting the use of that information, the uniquely strong claim possessed by pre-2010 users is that Facebook shared their private information with app developers. The district court held Class members who signed up after 2009 waived that particular claim by agreeing to their user agreements. Document 298, p. 2.

Class members with stronger claims must receive a greater share of a settlement recovery. Class settlements that propose to treat differently situated class members the same are improper. In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court affirmed "the requirement of equity among members of the class" in class action settlements. *Id*. at 854. This is relevant not only in the context of Rule 23(e)(2)(D)'s requirement that "the proposal treats class members equitably relative to each other," but also to the antecedent question of whether the class may be certified for settlement. In *Ortiz*, the Supreme Court held that settlement certification was deficient based, in part, upon the unfairness of the distribution of the settlement fund among class members. *Id*. at 855.

> Fair treatment in the older cases was characteristically assured by straightforward pro rata distribution of the limited fund.... [A] settlement must seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness among themselves.
>
> ....
>
> [T]he class included those exposed to Fibreboard's asbestos products both before and after 1959. The date is significant, for that year saw the expiration of Fibreboard's insurance policy with Continental, the one which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, the consequence being a second instance of disparate interests within the certified class.... It is no answer to say ... that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes.... ***The very decision***

> ***to treat them all the same is itself an allocation with results almost certainly different from the results that those with immediate injuries or indemnified liability would have chosen.***

Id. at 855-857 (emphasis added).

"Significant differences in contested claims or defenses have the potential to cause significant differences in claim value, which should be reflected in any fair settlement. … 'An agreement that gives the same monetary remedy to all members of the class, despite significant differences in the nature of their claims … may not be fair and reasonable.'" *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340,346 (1st Cir. 2022).

Like the date of the expiration of the insurance policy in *Ortiz*, the date that separates Class members here is the year the language of Facebook's user agreement changed to explicitly authorize sharing friends-only information with app developers. To treat Class members who signed up prior to 2010 the same way as Class members who signed up in 2010 and later fails to treat Class members equitably relative to each other, in violation of both Rule 23(e)(2)(D) and *Ortiz*.

Remedying this defect would be relatively straightforward, based upon the Settlement's current per-month allocation of settlement proceeds. As presently proposed, Class members are to receive a "point" for each month they were Facebook users, and the Settlement will be allocated to each Class

member based upon his or her number of points. The Settlement could simply be amended to provide that months prior to 2010 be counted as 2 points, to reflect the fact that Facebook users who signed up prior to 2010 retain the full range of claims against Facebook, not just the ones for Facebook's failure to restrict the use of data and sharing with partners and white-listed apps. The district court abused its discretion by finding the proposed settlement treats Class members equitably relative to each other.

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY AWARDING AN ATTORNEY'S FEE AWARD 123% HIGHER THAN THE MARKET RATE

A $725 million class action settlement clearly falls into the megafund category that requires the fee in this case be *substantially* less than 25%. Further, this case settled for less than three-tenths of one percent of available statutory damages, and *Vizcaino*'s primary *results achieved* factor requires a significant downward fee adjustment. *See In re Online DVD-Rental Antitrust Litigation* 779 F.3d 934, 954 (9th Cir. 2015) *citing Vizcaino v. Microsoft Corp.*, 290 F.3d1043, 1047-50 (9th Cir. 2002) (Discussing factors to be considered in the grant of fees in a megafund setting, "[t]hese factors include the extent to which class counsel 'achieved exceptional results for the class'…").

The district court found "[t]he $725 million Settlement Fund is a substantial portion of the maximum monetary relief that the Class could realistically recover after a trial, post-trial motions and an appeal." ER-16. As above discussed, neither Class Counsel nor the district court ever performed a meaningful analysis of "maximum monetary relief" recoverable by the Class. The finding thus lacks a reasonable basis in fact and is an abuse of discretion. *See Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012).

The Ninth Circuit has recognized "[w]here awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead." *In re Bluetooth Headset Products Liability Litigation*, 654 F. 3d 939, 942-943 (9th Cir. 2011). Several Northern District judges have "look[ed] to empirical research on megafund cases," as Judge Chen did in *Alexander v. FedEx Ground Package Sys.*, 2016 WL 3351017, at *2-3 (N.D. Cal. June 15, 2016).[11] Judge Chen ultimately awarded fees of

[11] Judge Chen relied on Eisenberg & Miller's study reviewing 68 "megafund" cases settled over a 16 year period, which found the median attorney fee award in megafund cases was 10.2% of the fund and the mean was 12%. Judge Chen favored Eisenberg & Miller's study as it covered a longer period of time and more cases than Brian Fitzpatrick's frequently cited study *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 Journal of Empirical Legal Studies (2010) at p. 839 (mean percentage fee for settlements between $250 million and $500 million is 17.8%)

16.4% of the $226,500,000 common fund, citing to *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509, 2015 WL 5158730, at *13 (N.D. Cal. Sept. 2, 2015), in which Judge Koh awarded fees of 10.5% of a $435 million settlement. The $725 million Settlement fund in this case is significantly higher than these two Northern District megafund cases, suggesting a reasonable fee would be no more than a figure in the 10.5% – 16.4% range.

Consistent with empirical research and the two California megafund cases referenced above, fees well below the 25% benchmark are warranted in this case. Indeed, a percentage fee at the lower end of the megafund range for settlements above $500 million is warranted.

Class Counsel's fee should not exceed 11.2%, which is just below the market rate for a settlement of this size, according to Brian Fitzpatrick's 2010 article. *See An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 Journal of Empirical Legal Studies (2010) at p. 839 (mean percentage fee for settlements between $500 million and $1 billion is 12.9). In its fee order, the district court cited the Declaration of Brian T. Fitzpatrick in which Fitzpatrick purports to elaborate on his earlier empirical study. Because his study contained just "two data points" between $500 million and $1 billion, he is "reluctant to put much stock in my own study on this point." Document 1140-7 at p. 14. After noting two studies by other sources resulting

in average percentages of 16% and 17% for cases in the $500 million to $1 billion range, he compiles his own list of non-securities cases that have settled in that range and finds a mean of 20%. Document 1140-7 at pp. 15-17. He also compiles a table of data privacy class actions that settled for more than $100 million, and derives an average fee of 22% for those. Document 1140-7 at p. 18. However, only one of those cases settled for more than $500 million, and the fee in that case was just 15%.[12] *Id*.

Therefore, even based on Professor Fitzpatrick's most recent numbers, the fee award here is at least 5 percentage points too high, and at least 10 percentage points too high based upon the other two studies and the one data privacy case within $350 million of this one.[13]

The $725 million settlement here is actually closer to billion dollar settlements than to the far smaller settlements contained in Fitzpatrick's data privacy table. In these larger cases, the mean fee award is just over 7%, as shown below:

Case	**Settlement Amount**	**Fee %**
Enron[14]	$7.27 billion	9.52
World Com[15]	$6.13 billion	5.48

[12] *In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617 (N.D. Cal. 2021)
[13] The next highest case in Fitzpatrick's chart settled for $380 million.
[14] *Newby v. Enron*, 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008).
[15] *In re Worldcom, Inc. Sec. Litig.*, 388 F.Supp.2d 319 (S.D.N.Y.2005).

Vioxx[16]	$4.85 billion	6.49
Cobell[17]	$3.40 billion	3.40
Tyco[18]	$3.20 billion	14.50
Cendant[19]	$3.16 billion	1.73
AOL Time Warner[20]	$2.50 billion	5.90
Visa[21]	$3.30 billion	6.50
Nortel I[22]	$1.14 billion	3.00
Royal Ahold[23]	$1.10 billion	11.88
Nortel II[24]	$1.07 billion	7.74
McKesson[25]	$1.04 billion	7.64
Petrobras[26]	$3 billion	6.20
In re Payment Card[27]	$5.6 billion	9.31
In re Foreign Exch. Benchmark[28]	$2.3 billion	13.00
	Average	**7.4**

[16] *In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640 (E.D. La. 2010).
[17] *Cobell v. Salazar*, 2011 U.S. Dist. LEXIS 157393 (D.D.C., July 27, 2011).
[18] *In re Tyco Int'l Ltd. MDL Litig.*, 535 F. Supp. 2d 249 (D. NH 2007).
[19] *In re Cendant Corp.*, 243 F. Supp. 2d 166 (D. NJ 2003).
[20] *In re AOL Time Warner, Inc. Sec. and 'ERISA' Litig.*, 2006 U.S. Dist. LEXIS 78035 (SDNY 2006).
[21] *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503 (EDNY 2003).
[22] *See In re Nortel Networks Corp. Sec. Litig.*, 2010 U.S. Dist. LEXIS 87447 (SDNY 2010).
[23] *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383 (D. Md. 2006).
[24] *In re Nortel Networks Corp. Sec. Litig.*, No. 05-MD-1659 (LAP) (S.D.N.Y. Dec. 26, 2006).
[25] *In re McKesson HBOC Inc. Sec. Litig.*, No. 99-CV-20743 (N.D. CA, Feb. 24, 2006).
[26] *In re Petrobras Securities Litig.*, No. 1:14-cv-9662, SDNY, Document 834 (6/25/18).
[27] *In re Payment Card*, No, 05-md-1720, EDNY, Document 7822 (12/19/19).
[28] *Kornell v. Haverhill Ret. Sys.*, 790 Fed. Appx. 296 (2nd Cir. 2019).

The $725 million settlement here is far closer to the billion-dollar settlements listed above than to the settlements listed in Fitzpatrick's Table 2 on page 18 of his Declaration. If the average fee percentage for a billion-dollar settlement is 7.4, then it stands to reason that the fee award in this case should fall somewhere between the 15% awarded in the $650 million settlement in *In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617 (N.D. Cal. 2021)[29] and the average 7.4% awarded in billion-dollar settlements. A fee award of 11.2 % falls right in the middle between these two brackets. By ignoring the market rate for settlements just above the level of this one, the district court grossly distorted the market rate, and awarded practically the same fee given in a $115 million case. Ignoring billion-dollar settlements obscures the fact that fee percentages continue to fall as settlements exceed $500 million, and that the fee percentage in a $725 million case should be less than one awarded in a $650 million case, not 65% more.

The district court committed clear error in finding that Fitzpatrick's "research indicates that a 25% fee is within the range of awards made in class-action settlement of comparable size and type." ER-17. Of the cases that are

[29] In *Facebook Biometric* class counsel achieved a recovery of $650 million for a class of 9.4 million individuals on statutory damages claims of $1,000 per class member. There, the recovery was a far greater share of available individual and aggregated statutory damages than is proposed in the instant case.

the same type as this one – data privacy class actions – the only one of comparable size is *Facebook Biometric*, which resulted in a 15% fee.

An 11.2 % fee here results in a fee of $81.2 million, which represents a generous fee for a recovery of less than one-third of one percent of client damages.

The district court abused its discretion by awarding a 25% fee in a $725 million megafund case that obtained less than a 0.3% recovery.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's approval of the settlement and remand to the district court with guidance as to how the district court should analyze the settlement in the context of the litigation value of the case – and, if appropriate, in the light of *Wakefield*'s due process concerns. The Court should further instruct the district court to adjust the allocation of settlement proceeds to reflect the greater strength of the claims of Class members who signed up for Facebook prior to 2010.

In the alternative, if the Court affirms the district court's settlement approval, it should reverse and remand for reduction of the attorney's fee award to 11.2%.

Respectfully submitted,

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by their attorneys,

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STATEMENT OF RELATED CASES
(CIRCUIT RULE 28-2.6)

9th Cir. Case No: 23-3550

The undersigned attorney or self-represented party states the following:

The parties to earlier **related case 23-3623** joined in a stipulated motion to voluntarily dismiss the appeal in that case, which motion was filed with this Court on May 2, 2024.

Signature: s/John Pentz Date: 05/04/2024

CERTIFICATE OF COMPLIANCE

9th Cir. Case No: 23-3550

I am the attorney or self-represented party.

This brief contains 7,140 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). (Note: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.)

I certify this brief complies with the length limit set forth in Cir. R. 32-1(a).

Signature: s/John Pentz Date: 05/04/2024

CERTIFICATE OF SERVICE

9th Cir. Case No: 23-3550

I hereby certify that I electronically filed the foregoing and attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Description of Documents:

OPENING BRIEF OF APPELLANTS FELDMAN & MAHANEY

ADDENDUM TO APPELLANTS' OPENING BRIEF

Signature: s/John Pentz Date: 05/04/2024

Steven Akins, et al. v. Sarah Feldman and Jill Mahaney v. Facebook, Inc.
Case No. 22-3550

ADDENDUM TO APPELLANTS' OPENING BRIEF

Statutes and Rules

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 121. Stored Wire and Electronic Communications and Transactional Records Access (Refs & Annos)

18 U.S.C.A. § 2707

§ 2707. Civil action

Effective: March 23, 2018
Currentness

(a) Cause of action.--Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief.--In a civil action under this section, appropriate relief includes--

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Damages.--The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

(d) Administrative discipline.--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(e) Defense.--A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization (including a request of a governmental entity under section 2703(f) of this title);

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3), section 2702(b)(9), or section 2702(c)(7) of this title permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this chapter or any other law.

(f) Limitation.--A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

(g) Improper disclosure.--Any willful disclosure of a "record", as that term is defined in section 552a(a) of title 5, United States Code, obtained by an investigative or law enforcement officer, or a governmental entity, pursuant to section 2703 of this title, or from a device installed pursuant to section 3123 or 3125 of this title, that is not a disclosure made in the proper performance of the official functions of the officer or governmental entity making the disclosure, is a violation of this chapter. This provision shall not apply to information previously lawfully disclosed (prior to

the commencement of any civil or administrative proceeding under this chapter) to the public by a Federal, State, or local governmental entity or by the plaintiff in a civil action under this chapter.

CREDIT(S)

(Added Pub.L. 99-508, Title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1866; amended Pub.L. 104-293, Title VI, § 601(c), Oct. 11, 1996, 110 Stat. 3469; Pub.L. 107-56, Title II, § 223(b), Title VIII, § 815, Oct. 26, 2001, 115 Stat. 293, 384; Pub.L. 107-273, Div. B, Title IV, § 4005(f)(2), Nov. 2, 2002, 116 Stat. 1813; Pub.L. 115-141, Div. V, § 104(2)(B), Mar. 23, 2018, 132 Stat. 1216.)

18 U.S.C.A. § 2707, 18 USCA § 2707
Current through P.L. 118-41. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 121. Stored Wire and Electronic Communications and Transactional Records Access (Refs & Annos)

18 U.S.C.A. § 2710

§ 2710. Wrongful disclosure of video tape rental or sale records

Effective: January 10, 2013
Currentness

(a) Definitions.--For purposes of this section--

(1) the term "consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

(2) the term "ordinary course of business" means only debt collection activities, order fulfillment, request processing, and the transfer of ownership;

(3) the term "personally identifiable information" includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and

(4) the term "video tape service provider" means any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

(b) Video tape rental and sale records.--(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).

(2) A video tape service provider may disclose personally identifiable information concerning any consumer--

(A) to the consumer;

(B) to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer that--

(i) is in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer;

(ii) at the election of the consumer--

(I) is given at the time the disclosure is sought; or

(II) is given in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner; and

(iii) the video tape service provider has provided an opportunity, in a clear and conspicuous manner, for the consumer to withdraw on a case-by- case basis or to withdraw from ongoing disclosures, at the consumer's election;

(C) to a law enforcement agency pursuant to a warrant issued under the Federal Rules of Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order;

(D) to any person if the disclosure is solely of the names and addresses of consumers and if--

(i) the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and

(ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer;

(E) to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or

(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if--

(i) the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and

(ii) the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

(3) Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry. In the case of a State government authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the video tape service provider, may quash or modify such order if the information or records requested are unreasonably voluminous in nature or if compliance with such order otherwise would cause an unreasonable burden on such provider.

(c) Civil action.--(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

(2) The court may award--

(A) actual damages but not less than liquidated damages in an amount of $2,500;

(B) punitive damages;

(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(D) such other preliminary and equitable relief as the court determines to be appropriate.

(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

(4) No liability shall result from lawful disclosure permitted by this section.

(d) Personally identifiable information.--Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

(e) Destruction of old records.--A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (b)(2) or (c)(2) or pursuant to a court order.

(f) Preemption.--The provisions of this section preempt only the provisions of State or local law that require disclosure prohibited by this section.

CREDIT(S)

(Added Pub.L. 100-618, § 2(a)(2), Nov. 5, 1988, 102 Stat. 3195; amended Pub.L. 112-258, § 2, Jan. 10, 2013, 126 Stat. 2414.)

18 U.S.C.A. § 2710, 18 USCA § 2710
Current through P.L. 118-41. Some statute sections may be more current, see credits for details.

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Procedural Guidance for Class Action Settlements

Published November 1, 2018; modified December 5, 2018 and August 4, 2022

> *NOTE: Even though the guidance is highly recommended, the parties must comply in the first instance with the specific orders of the presiding judge.*

Parties submitting class action settlements for preliminary and final approval in the Northern District of California should review and follow these guidelines to the extent they do not conflict with a specific judicial order in an individual case. Failure to address the issues discussed below may result in unnecessary delay or denial of approval. Parties and mediators should consider this guidance during settlement negotiations and when drafting settlement agreements and exhibits, including class notices. In cases litigated under the Private Securities Litigation Reform Act of 1995 and the Fair Labor Standards Act, follow the statute and case law requirements that apply to such cases, such as regarding reasonable costs and expenses awards to representative plaintiffs, and this procedural guidance to the extent applicable.

Preliminary Approval

1) INFORMATION ABOUT THE SETTLEMENT—The motion for preliminary approval should state, where applicable:

a. Any differences between the settlement class and the class proposed in the operative complaint (or, if a class has been certified, the certified class) and an explanation as to why the differences are appropriate.

b. Any differences between the claims to be released and the claims in the operative complaint (or, if a class has been certified, the claims certified for class treatment) and an explanation as to why the differences are appropriate.

c. The class recovery under the settlement (including details about and the value of injunctive relief), the potential class recovery if plaintiffs had fully prevailed on each of their claims, claim by claim, and a justification of the discount applied to the claims.

d. Any other cases that will be affected by the settlement, an explanation of what claims will be released in those cases if the settlement is approved, the class definitions in those cases, their procedural posture, whether plaintiffs' counsel in those cases participated in the settlement negotiations, a brief history of plaintiffs' counsel's discussions with counsel for plaintiffs in those other cases before and during the settlement negotiations, an explanation of the level of coordination between the two groups of plaintiffs' counsel, and an explanation of the significance of those factors on settlement approval. If there are no such cases, counsel should so state.

e. The proposed allocation plan for the settlement fund.

f. If there is a claim form, an estimate of the expected claim rate in light of the experience of the selected claims administrator and/or counsel based on comparable settlements, the identity of the examples used for the estimate, and the reason for the selection of those examples.

g. In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the expected and potential amount of any such reversion, and an explanation as to why a reversion is appropriate.

2) SETTLEMENT ADMINISTRATION—The parties are expected to get multiple competing bids from potential settlement administrators. In the motion for preliminary approval, the parties should:

a. Identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years.

b. Address the settlement administrator's procedures for securely handling class member data (including technical, administrative, and physical controls; retention; destruction; audits; crisis response; etc.), the settlement administrator's acceptance of responsibility and maintenance of insurance in case of errors, the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs.

The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing. The Court encourages the parties to address the items listed in the checklist linked here in formulating their response.

3) NOTICE—The parties should ensure that the class notice is easily understandable, in light of the class members' communication patterns, education levels, and language needs. The notice should include the following information:

a. Contact information for class counsel to answer questions.

b. The address for a website, maintained by the claims administrator or class counsel, that lists key deadlines and has links to the notice, claim form (if any), preliminary approval order, motions for preliminary and final approval and for attorneys' fees, and any other important documents in the case.

c. Instructions on how to access the case docket via PACER or in person at any of the court's locations.

d. The date and time of the final approval hearing, clearly stating that the date may change without further notice to the class.

e. A note to advise class members to check the settlement website or the Court's PACER site to confirm that the date has not been changed.

The parties should explain how the notice distribution plan is effective. Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of text messages and social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.

The notice distribution plan should rely on U.S. mail, email, and/or social media as appropriate to achieve the best notice that is practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c)(2). If U.S. mail is part of the notice distribution plan, the notice envelope should be designed to enhance the chance that it will be opened.

Below is suggested language for inclusion in class notices:

This notice summarizes the proposed settlement. For the precise terms of the settlement, please see the settlement agreement available at www._____.com, by contacting class counsel at _____, by accessing the Court docket in this case, for a fee, through the Court's Public Access to Court Electronic Records (PACER) system at https://ecf.cand.uscourts.gov, or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, [insert appropriate Court location here], between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.

PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.

4) OPT-OUTS—The notice should instruct class members who wish to opt out of the settlement to send a letter, setting forth their name and information needed to be properly identified and to opt out of the settlement, to the settlement administrator and/or the person or entity designated to receive opt outs. It should require only the information needed to opt out of the settlement and no extraneous information or hurdles. The notice should clearly advise class members of the deadline, methods to opt out, and the consequences of opting out.

5) OBJECTIONS—Objections must comply with Federal Rule of Civil Procedure 23(e)(5). The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket, and the parties will receive electronic notices of filings. The notice should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement. The notice should clearly advise class members of the deadline for submission of any objections.

Below is suggested language for inclusion in class notices:

"You can ask the Court to deny approval by filing an objection. You can't ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval, no settlement payments will be sent out, and the lawsuit will continue. If that is what you want to happen, you should object.

Any objection to the proposed settlement must be in writing. If you file a timely written objection, you may, but are not required to, appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for hiring and paying that attorney. All written objections and supporting papers must (a) clearly identify the case name and number (_____ v. _____, Case No. _____), (b) be submitted to the Court either by filing them electronically or in person at any location of the United States District Court for the Northern District of California or by mailing them to the Class Action Clerk, United States District Court for the Northern District of California, [insert appropriate Court location here], and (c) be filed or postmarked on or before _____."

6) ATTORNEYS' FEES AND COSTS—Although attorneys' fee requests will not be approved until the final approval hearing, class counsel should include information about the fees and costs (including expert fees) they intend to request, their lodestar calculation (including total hours), and resulting multiplier in the motion for preliminary approval. In a common fund case, the parties should include information about the relationship between the amount of the common fund, the requested fee, and the lodestar. To the extent counsel base their fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class.

7) SERVICE AWARDS—Judges in this district have different perspectives on extra payments to named plaintiffs or class representatives that are not made available to other class members. Counsel seeking approval of service awards should consult relevant prior orders by the judge reviewing the request. Although service award requests will not be approved until the final approval hearing, the parties should include information about the service awards they intend to request as well as a summary of the evidence supporting the awards in the motion for preliminary approval. The parties should ensure that neither the size nor any conditions placed on the incentive awards undermine the adequacy of the named plaintiffs or class representatives. In general, unused funds allocated to incentive awards should be distributed to the class pro rata or awarded to cy pres recipients.

8) CY PRES AWARDEES—If the settlement contemplates a cy pres award, the parties should identify their chosen cy pres recipients, if any, and how those recipients are related to the subject matter of the lawsuit and the class members' claims. The parties should also identify any relationship they or their counsel have with the proposed cy pres recipients. In general, unused funds allocated to attorneys' fees, service awards, settlement administration costs, and class member payments should be distributed to the class pro rata if feasible, or else awarded to cy pres recipients or to the relevant government authorities.

9) TIMELINE—The parties should ensure that class members have at least thirty-five days to opt out or object to the settlement and the motion for attorney's fees and costs.

10) CLASS ACTION FAIRNESS ACT (CAFA) AND SIMILAR REQUIREMENTS—The parties should address whether CAFA notice is required and, if so, when it will be given. In addition, the parties should address substantive compliance with CAFA. For example, if the settlement includes coupons, the parties should explain how the settlement complies with 28 U.S.C. § 1712. In addition, the parties should address whether any other required notices to government entities or others have been provided, such as notice to the Labor & Workforce Development Agency (LWDA) pursuant to the Private Attorneys General Act (PAGA).

11) COMPARABLE OUTCOMES—Lead class counsel should provide information about comparable cases, including settlements and litigation outcomes. Lead class counsel should provide the following information for as many as feasible (and at least one) comparable class settlements (i.e., settlements involving the same or similar claims, parties, issues):

a. The claims being released, the total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to cy pres recipients, the administrative costs, the attorneys' fees and costs, the total exposure if the plaintiffs had prevailed on every claim.

b. Where class members are entitled to non-monetary relief, such as discount coupons or debit cards or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests.

c. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in easy-to-read charts that allow for quick comparisons with other cases, supported by analysis in the text of the motion.

12) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or WordPerfect) of all proposed orders and notices should be submitted to the presiding judge's Proposed Order (PO) email address when filed. Most judges in this district use Microsoft Word, but counsel should check with the individual judge's Courtroom Deputy.

13) OVERLAPPING CASES—Within one day of filing of the preliminary approval motion, the defendants should serve a copy on counsel for any plaintiffs with pending litigation, whether at the trial court or appellate court level, whether active or stayed, asserting claims on a representative (e.g., class, collective, PAGA, etc.) basis that defendants believe may be released by virtue of the settlement.

Final Approval

1) CLASS MEMBERS' RESPONSE—The motion for final approval briefing should include information about the number of undeliverable class notices and claim packets, the number of class members who submitted valid claims, the number of class members who opted out, and the number of class members who objected to or commented on the settlement. In addition, the motion for final approval should respond to any objections.

2) ATTORNEYS' FEES—All requests for approval of attorneys' fees must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. Counsel should be prepared to submit copies of detailed billing records if the court orders.

Regardless of when they are filed, requests for attorneys' fees must be noticed for the same date as the final approval hearing. If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions. The motion for attorneys' fees should refer to the history and facts set out in the motion for final approval.

3) SERVICE AWARDS—All requests for service awards must be supported by evidence of the value provided by the proposed awardees, the risks they undertook in participating, the time they spent on the litigation, and any other justifications for the awards.

4) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or Word Perfect) of all proposed orders and judgments should be submitted to the presiding judge's Proposed Order (PO) email address at the time they are filed.

Post-Distribution Accounting

1) Within 21 days after the settlement checks become stale (or, if no checks are issued, all funds have been paid to class members, cy pres beneficiaries, and others pursuant to the settlement agreement), the parties should file a Post-Distribution Accounting (and post it on the settlement website), which provides the following information:

a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average, median, maximum, and minimum recovery per claimant, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, plaintiffs' counsel's updated lodestar total, and the lodestar multiplier.

b. Where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests.

c. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in an easy-to-read chart that allows for quick comparisons with other cases.

3) The Court may hold a hearing following submission of the parties' Post-Distribution Accounting.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions [Rule Text & Notes of Decisions subdivisions I to VII]

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 23 are displayed in multiple documents. >

(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(g).

(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)--or upon ordering notice

under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement 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 may be by one or more of the following: United States mail, electronic means, or other appropriate means. 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).

(3) ***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.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***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--or a class proposed to be certified for purposes of settlement--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) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to be Excluded.*** 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) ***Class-Member Objections.***

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, 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(h); 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(g)(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.

(h) 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 under Rule 54(d)(2), subject to the provisions of this subdivision (h), 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(a).

(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 54(d)(2)(D).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 26, 2018, effective December 1, 2018.)

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., FRCP Rule 23
Including Amendments Received Through 4-1-23