9th Circ. Courts Should Ditch Obsolete Class Notice Standard

By Thomas Waskom
Published in Law360 | December 8, 2020

Many more putative class actions are filed than ever reach the class certification stage. One reason is that named plaintiffs not infrequently settle their individual claims with the defendants and then voluntarily dismiss their cases under Rule 41(a). That can be an optimal outcome for both an individual plaintiff, who gets relief, and defendants, who avoid protracted class litigation.

Yet two recent cases, In re: Outlaw Laboratory LP Litigation[1] and Carroll v. Dick's Sporting Goods Inc.,[2] illustrate that some district courts in the Ninth Circuit place a hurdle in front of these deals: requiring the parties to explain why they should not have to provide notice to absent putative class members, even though no class has been certified.

The threat of providing notice to absent — and often unknown — class members acts as a significant drag on the efficient resolution of cases.

In September, a federal judge in the U.S. District Court for the Southern District of California ordered the defendant and individual plaintiff in the Outlaw case to produce a copy of their settlement agreement to allow the court to determine if the terms warranted providing notice to putative class members.

That same month, in the U.S. District Court for the Eastern District of California, the settling parties in Carroll v. Dick's Sporting Goods were ordered to produce supplemental information so the court could decide whether notice to putative class members was required.

This practice is rooted in a 1989 opinion from the U.S. Court of Appeals for the Ninth Circuit: Diaz v. Trust Territory of Pacific Islands.[3] But Diaz is based on an outdated version of Federal Rule of Civil Procedure 23. Arguably, then, the district courts' application of Diaz no longer has a basis in law. Yet it continues, largely unabated.

Before 2003, Rule 23(e) provided in full:

> 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.

In Diaz, the Ninth Circuit interpreted the term "class action" in Rule 23(e) to include putative class actions, thus "during the interim between filing and certification, a court must assume for purposes of dismissal or compromise that an action containing class allegations really is a class action."[4] So the Ninth Circuit held that even individual dismissals or settlements of putative class actions required court approval.[5]

The Ninth Circuit also held that in some circumstances, district courts should require parties settling on an

individual basis to provide notice to the putative class members, even before certification.

According to the court, the precertification notice requirement can serve three purposes:

- Creating a disincentive for plaintiffs to "append[] class allegations to [their] complaint in order to extract a more favorable settlement";
- Limiting individual settlements that "deplet[e] limited funds available to pay the class" if one is later certified; and
- Protecting "the class from prejudice it would otherwise suffer if class members have refrained from filing suit because of knowledge of the pending class action."[6]

Several other circuits adopted the same reading of Rule 23(e), although one circuit came out the other way.[7]

In 2003, Rule 23(e) changed. The Advisory Committee on Rules of Civil Procedure expressly stated that the purpose of the change was to clarify that Rule 23(e)'s approval requirement does not apply to the dismissal or settlement of precertification individual claims.[8] Instead:

> Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court approval of settlements with putative class representatives that resolved only individual claims. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

The current version of Rule 23(e), reflecting those 2003 changes, provides that "[t]he 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."[9]

The rule goes on to state that "[t]he following procedures apply to a proposed settlement, voluntary dismissal, or compromise" — and then sets out requirements for notice to the class, court approval of proposed settlements, disclosure of side agreements, opt-out procedures and class member objections.[10]

The most likely reading of the rule is that these requirements apply only to classes that the district court already certified, or settlement classes that the district court is likely to certify. [11]

The 2003 amendment to Rule 23(e) arguably responded to cases like Diaz, and superseded the Diaz rule. Most courts took the amendment in that spirit. For example, the U.S. Court of Appeals for the Third Circuit, which like the Ninth Circuit had required class notice of individual, precertification settlements, conceded that its approach "arguably had been superseded by the 2003 Amendments." [12]

But several district courts in the Ninth Circuit have continued to apply Diaz, even while acknowledging that its status as good law is unclear. [13]

For instance, in Lyons v. Bank of America in 2012, [14] following a precertification individual settlement of putative class claims, the U.S. District Court for the Northern District of California undertook the Diaz

analysis to determine whether notice was appropriate.

The court acknowledged that "[c]ourts in this district have expressed some uncertainty about whether Rule 23(e) still applies to pre-certification settlement proposals in the wake of the 2003 amendments to the rule but have generally assumed that it does," citing two of its previous cases, Mahan v. Trex Co. and Houston v. Cintas Corp. [15]

These courts have articulated a policy justification — but not a textual basis — for continued application of Diaz.

In Diva Limousine Ltd. v. Uber Technologies Inc. in 2019,[16] the Northern District of California held that "[p]re-certification review [of the individual settlement] is appropriate because it affords a safeguard against any significant reliance interest of putative class members who received notice of this action but not its dismissal" and "also safeguards against any potential abuse of the class action procedure." [17]

So "[f]ollowing the general practice of this district," the court applied Diaz, but ultimately found notice was unnecessary.

That is the typical result. In Diva Limousine, Lyons, Mahan and Houston, the courts ultimately found that the facts did not require the court to order notice, even if the law would permit the court to order notice. That may provide little comfort to litigants.

Even if, in every case, district courts ultimately do not require notice, Diaz's gravity will exert a pull on early settlement discussions in the Northern District of California. Class discovery and certification proceedings impose significant costs even in meritless cases.

And even if a plaintiff's merits arguments are weak, he might be able to satisfy Rule 23's requirements for certification — meaning the risk posed by his weak claim would be multiplied thousands of time over. In other words, early, individual settlement of a putative class action can be a rational response to some putative class actions.

But under Diaz, the defendant also has to account for the risk that a district court would require it to provide notice of the individual settlement to hundreds or thousands of putative class members, multiplying both costs and the likelihood of more litigation. Even if that risk is low, based on these courts' past practices, counsel still must acknowledge the danger and account for it in settlement recommendations.

Until a district court actually requires notice under Diaz, it is not susceptible to appellate review, and even then, taking an appeal might be difficult. In practical terms, if Diaz is to be phased out, the task falls to the district courts considering whether to assume it is still good law. From both a textual and a pragmatic view, the courts should hold that Diaz was superseded by the amendment to Rule 23(e).

9th Circ. Courts Should Ditch Obsolete Class Notice Standard
By Thomas Waskom
Law360 | December 8, 2020

Notes

1. 2018 U.S. Dist. LEXIS 195370, at *20-21 (S.D. Cal. Sept. 15, 2020).

2. 2020 U.S. Dist. LEXIS 167754, at * (E.D. Cal. Sept. 11, 2020).

3. 876 F.2d 1401 (9th Cir. 1989).

4. Id. at 1408.

5. Id.

6. Id. at 1409.

7. See, e.g., Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970) ("a suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper"); Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 625-28 (7th Cir. 1986) (Rule 23(e) governs dismissal of pre-certification putative class actions); Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 764 (8th Cir. 2001). But see Shelton v. Pargo, 582 F.2d 1298, 1303 (4th Cir. 1978) (holding that Rule 23(e) does not apply prior to class certification).

8. Fed. R. Civ. P. 23(e) advisory committee's note to 2003 amendment.

9. Fed. R. Civ. P. 23(e).

10. Fed. R. Civ. P. 23(e)(1)-(5).

11. E.g., Fed. R. Civ. P. 23(e)(1)(B) (requiring district court to "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" approve the settlement and certify the settlement class.

12. Weiss v. Regal Collections, 385 F.3d 337, 349 n.21 (3d Cir. 2004). See also, e.g., Adams v. USAA Cas. Ins. Co., 863 F.3d 1069, 1083 (8th Cir. 2017) (noting that after the 2003 amendment, "the overwhelming majority of courts have held that when no class has been certified, voluntary dismissal of a putative class action is governed not by Rule 23 but by Rule 41"); Kurz v. Fid. Mgmt. & Research Co., 2007 U.S. Dist. LEXIS 74267, at *3-4 (S.D. Ill. Oct. 4, 2007) (while "[a]t one time it was the law of this Circuit that voluntary dismissal of a class action, including a putative class action, is governed by Rule 23," the 2003 amendment to 23(e) "make[s] clear" that pre-certification individual settlements are not subject to 23(e)'s notice provision") (citations omitted); Hinds Cty., Miss. v. Wachovia Bank N.A., 790 F. Supp. 2d 125, 132-33 (S.D.N.Y. 2011) (same).

13. Not all district courts in the Ninth Circuit still follow Diaz. E.g., Del Rio v. CreditAnswers, LLC, 2011 U.S. Dist. LEXIS 52022 (S.D. Cal. 2011) ("Because no class has been certified in this case, the requirements of Rule 23(e), as amended in 2003, do not apply to the Joint Motion to Dismiss the class claims without prejudice.").

14. 2012 U.S. Dist. LEXIS 168230 (N.D. Cal. Nov. 27, 2012).

9th Circ. Courts Should Ditch Obsolete Class Notice Standard
By Thomas Waskom
Law360 | December 8, 2020

15. Id. at *3-4 n.1 (citing Mahan v. Trex Co., Inc., 2010 U.S. Dist. LEXIS 130160, 2010 WL 4916417, at *3 (N.D. Cal. Nov. 22, 2007); Houston v. Cintas Corp., 2009 U.S. Dist. LEXIS 33704, 2009 WL 921627, at *1-*2 (N.D. Cal. Apr. 3, 2009).

16. 2019 U.S. Dist. LEXIS 184458 (N.D. Cal. Oct. 23, 2019).

17. Id. at *3-4.

Thomas R. Waskom *is a partner in the firm's Products and Mass Tort Litigation group in the firm's Richmond office. Tom's practice focuses on class action, mass tort and environmental litigation. He can be reached at +1 (804) 788-8403 or twaskom@HuntonAK.com.*