



Rule 23 Amendments

Research Report

Rule 23 Amendments Draw Rave Reviews

Survey of class action attorneys, judges and administrators finds strong approval for 2018 procedural changes.

Notice by electronic means and preliminary approval guidelines considered most beneficial.

Professional objectors remain a problem.

The 2018 amendments to Federal Rule of Civil Procedure 23 have made the class action litigation process more consistent, efficient and effective, with superior outcomes for class members and defendants.

That's according to the attorneys, judges and settlement administrators surveyed by a third-party research firm on behalf of Western Alliance Bank in early 2020. Each of those key cohorts expressed resounding approval of the changes wrought by Rule 23, and while 76 percent of survey participants said they approved of the amendments from the beginning, a full 81 percent expressed approval one year after the changes took effect.

The amendments drew similar endorsement in the focus group following the survey, and among attendees at the Class Action Law Forum (CALF 2020), organized and hosted by Western Alliance Bank, at the University of San Diego Law School in March.

Survey participants said the amendment enabling notice by electronic means had the most beneficial impact on the class action settlement process, though a resounding majority also said that the amendments had changed the process for the better. And at CALF 2020 and in interviews, attorneys and judges emphasized that the new, more robust preliminary approval process had forced parties to address flaws and disagreements in settlement proposals early, smoothing the way to final approval.

"Final approval has become more of an area for resolving objections, and less for design of the settlement altogether – which does make it a more manageable process," said Tom Loeser, a partner at Hagans Berman Sobol Shapiro, in a discussion.

The amendments haven't fixed every bug in the class action process, however. In discussions and at CALF 2020, attorneys and judges broadly agreed that bad-faith objectors remain a problem, and particularly the "professional objectors" who **file frivolous objections to settlements** in order to extract payouts.

"Rule 23 includes an important mechanism for good faith objections to class settlements. Unfortunately, there are some serial, professional objectors who abuse the procedure for their own personal gain or agenda; some are even extortionists or hold-up artists or both," said plaintiffs' attorney Ariana Tadler, founder and managing partner at Tadler Law. "They hold up class recovery, tax the district courts' resources, and then tax the appellate courts' resources."

Still, more than half of survey participants said the Rule 23 amendments aimed at discouraging bad-faith objectors had a net-positive impact on the settlement process, indicating that even in areas where improvements are still needed, the amendments were a step in the right direction.

The survey sheds further light on the perceptions of the class action bar, judiciary and settlement-administration profession, breaking down those perceptions for each individual amendment. Taken together with the virtual discussions and CALF 2020, the survey results shed light on what worked in the Rule 23 changes, and where more work remains to be done, providing policymakers and class action professionals alike with invaluable feedback as they seek to continue refining and evolving class action litigation for the benefit of class members, defendants and the legal system.

Rule 23 Amendments Overwhelmingly Viewed as Positive

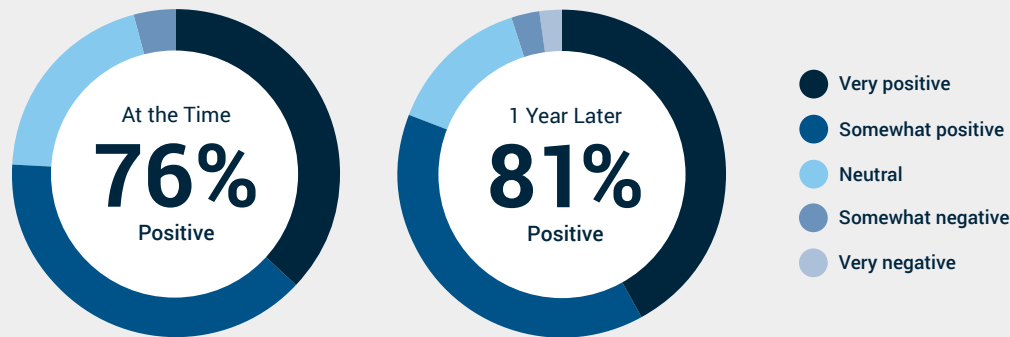
The survey findings show 76 percent of attorneys, judges and administrators initially viewed the Rule 23 amendments positively, which indicates that the rule changes were well chosen and focused on real pain points in class action litigation. Positive perceptions grew to 81 percent the year after the amendments took effect – and the percentage viewing them as “Very Positive” jumped from 37 percent to 42 percent – which indicates that they were as effective as they were well-considered.

The greatest jump in positive perceptions occurred among the defense bar; many defense attorneys who had been neutral on the amendments initially reported positive perceptions a year later, pushing the overall percentage in that cohort to 80 percent.

In March, during a CALF 2020 panel focused on the Rule 23 changes, a judge who served on the Rules Committee that wrote the amendments noted the committee spent three years examining Rule 23 and the class action litigation process to determine what changes would deliver the greatest benefits. The judge also noted that, while the amendments were necessary, they were incremental – and that the committee’s three-year study made it clear that over its 50-year lifespan, Rule 23 had held up extraordinarily well.

However, while 60 percent of survey participants said the Rule 23 amendment discouraging bad-faith objectors had a positive impact on the settlement process, in discussions a widespread consensus emerged: more should be done to combat this stubborn challenge. Several attorneys said they could see little impact on professional objectors, in particular.

Perceptions Toward Rule 23



Positive Perceptions Toward Rule 23, By Segment (Very Positive + Somewhat Positive Selections)



Notice by Electronic Means has Greatest Impact – and Consumer Fraud Cases Benefit Most

The amendments' explicit permission to deliver settlement notice electronically had the greatest impact of the Rule 23 amendments, according to survey participants. This could be because it addressed a growing frustration that certain aspects of class action procedure hadn't caught up to modern communication methods. But electronic notice has also proven effective in raising response rates and it's far less expensive than direct-mail methods, leaving more funds available for the class.

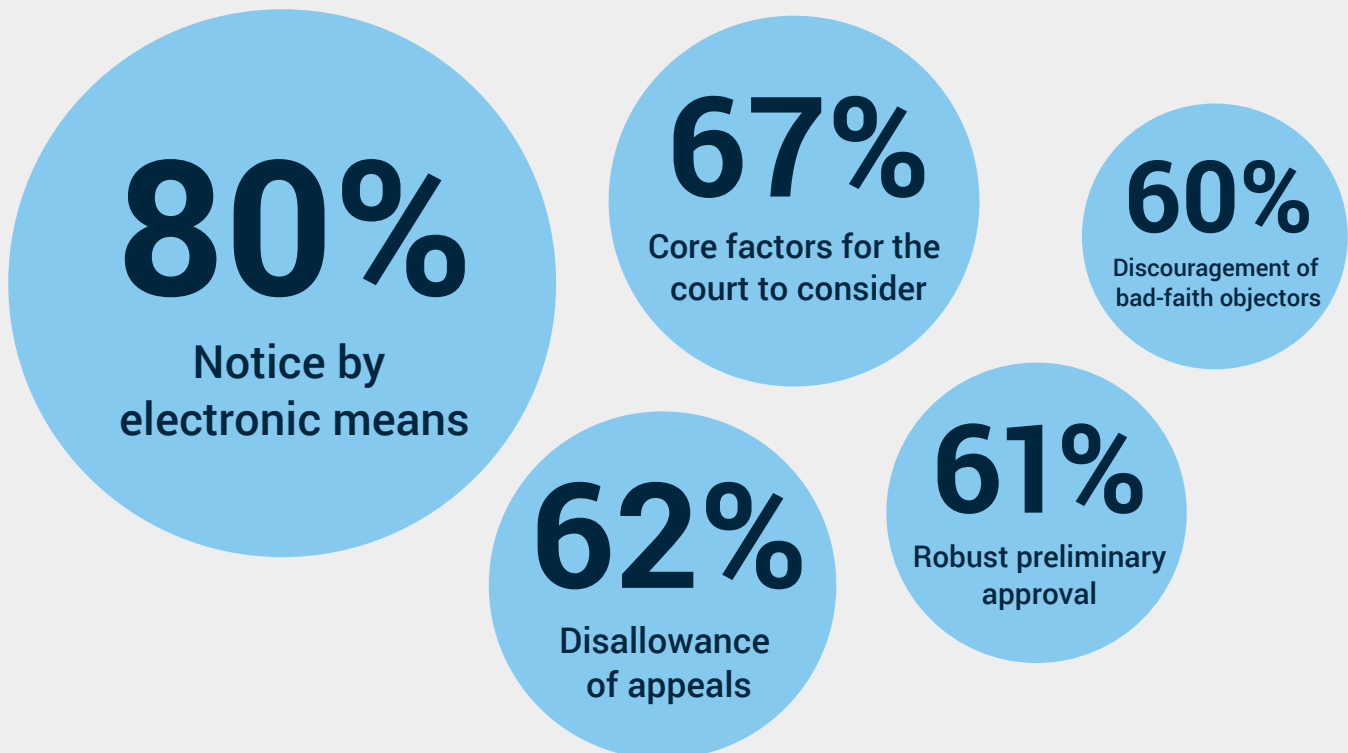
In discussions and at CALF 2020, claims administrators and others said there have been indications that electronic notice increased

response rates – though judges may need further evidence that emails aren't being ignored, or going into junk-mail folders.

“We will have to see the data to know whether claims increase and thus whether class members are taking the electronic notice seriously,” the Hon. Judge Beth Freeman, a United States District Judge in the Northern District of California, said in a discussion after the survey. “It certainly is cheaper and looks like it has a greater reach.”

Interestingly, compared to attorneys and judges, fewer claims administrators initially felt that electronic notice would have the greatest impact.

Percent Viewing Each as Having a Positive Impact on the Settlement Process



That might reflect the reality that, while adding electronic notice to the notice-of-settlement toolbox makes sense in a modern context, it is far from a solution. In many cases, electronic means remain insufficient for reaching class members. For example, in class action settlements involving food manufacturers, contact information for the eligible class – including their email addresses – resides with retailers who aren't party to the litigation. And in other cases, demographics – such as a large proportion of elderly plaintiffs – may make a class more reachable by mail.

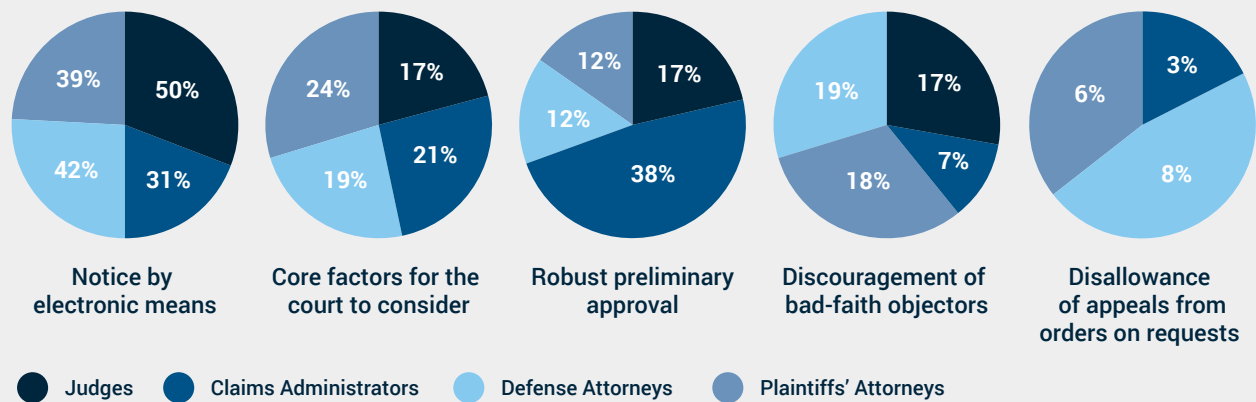
That said, consumer fraud cases have benefited more from the Rule 23 amendments than other types of cases, according to survey participants. In many of those cases, notice by electronic means can enable

administrators to reach far more class members than more traditional methods. And the front-loading of the approval process has brought heightened efficiencies to consumer fraud cases in particular.

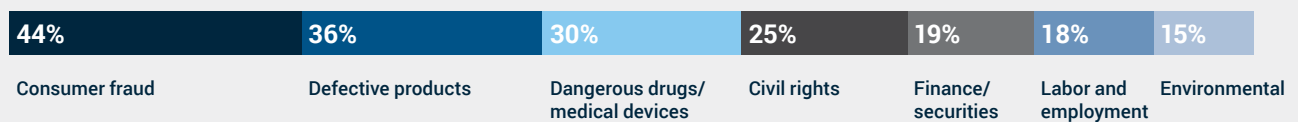
During discussions with the focus group, it was the opinion of some attorneys that judges have very diverse views of what qualifies as an appropriate resolution of consumer cases, meaning that these cases benefit from the improved notice provisions, as well as judges' early views on approvals of cases.

Also of note, more than half of all survey participants felt that each of the five amendments has positively impacted the settlement process – a reflection of the widespread perception that the changes have been for the good.

Change Having the Greatest Initial Impact on Rule 23 Perceptions, By Segment



Types of Cases Benefiting Most From Rule 23 Amendments



Front-Loading Settlement Approvals Lead to More Uniform Settlements

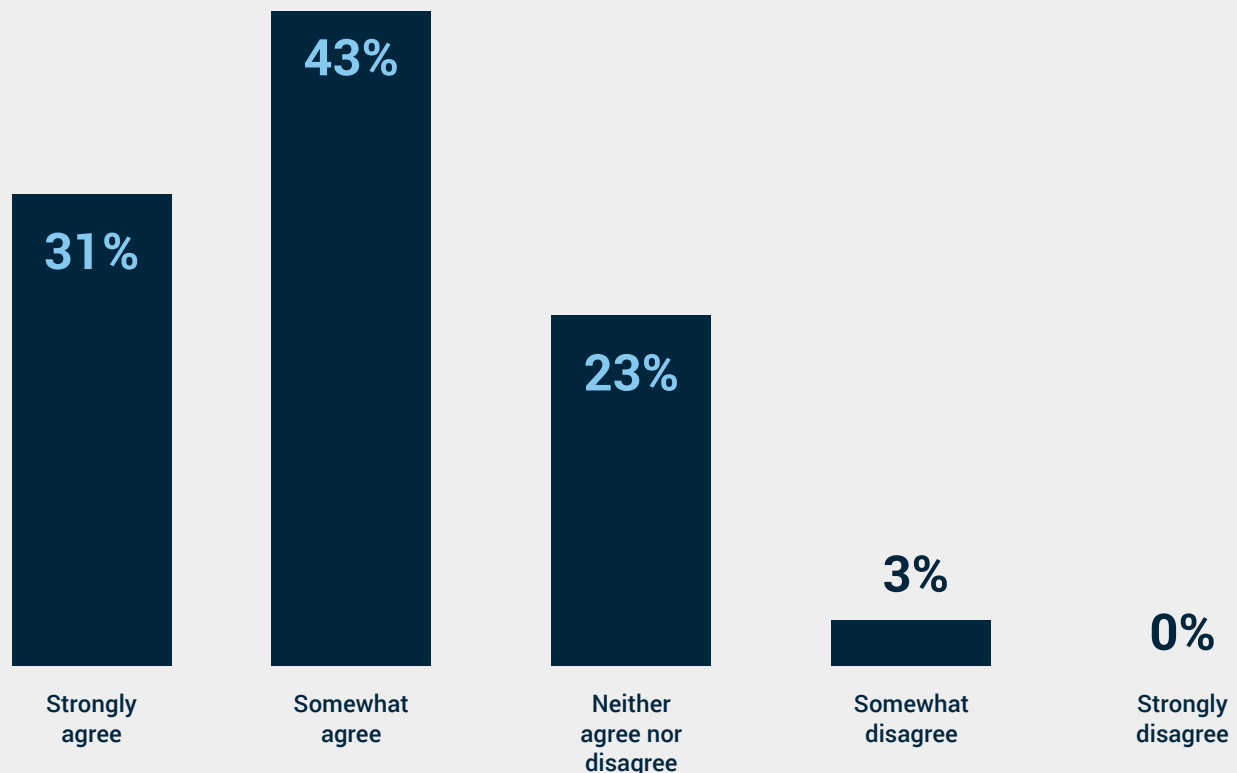
The Rule 23 amendments that created a more robust preliminary approval process and laid out four factors for courts to consider in evaluating settlements have combined to create a more uniform approval process, survey participants said.

At CALF 2020, judges voiced strong support for front-loading the process at the preliminary approval stage – and 71 percent of the judges we surveyed viewed the change favorably. In the past, many judges felt parties to settlement agreements were too often failing to give the courts the information needed to make determinations. And once settlements are reached, the judges said plaintiffs’ and defense counsel often unite behind the agreements, leaving judges feeling like the lone advocates for class members.

The Rule 23 amendments help guide the parties toward settlement agreements that provide far more clarity about how settlements will be distributed and how class members will be notified, among other key questions that make it far easier for judges to assess the agreements. It also makes the process more efficient – a key consideration for plaintiffs’ firms that are funding cases themselves.

“Front-loading has forced lawyers to prepare for the hard questions from the judges and has prompted judges to ask them in close cases,” said Hon. Judge Robert M. Dow, Jr., US District Court Judge in the Northern District of Illinois, in the discussion.

Agreement That Amendments Have Improved Uniformity in the Settlement Approval Process





What's Next for Rule 23?

The 2018 amendments to Rule 23 will help shape the evolution of class action litigation in the coming years. Preliminary approvals will likely get even more efficient as lawyers become more familiar with the more robust requirements in the new amendments.

Meanwhile, Federal Rules of Civil Procedure officials will continue to evaluate the impact of the new rules, and seek adjustments that lead to better outcomes for all parties.

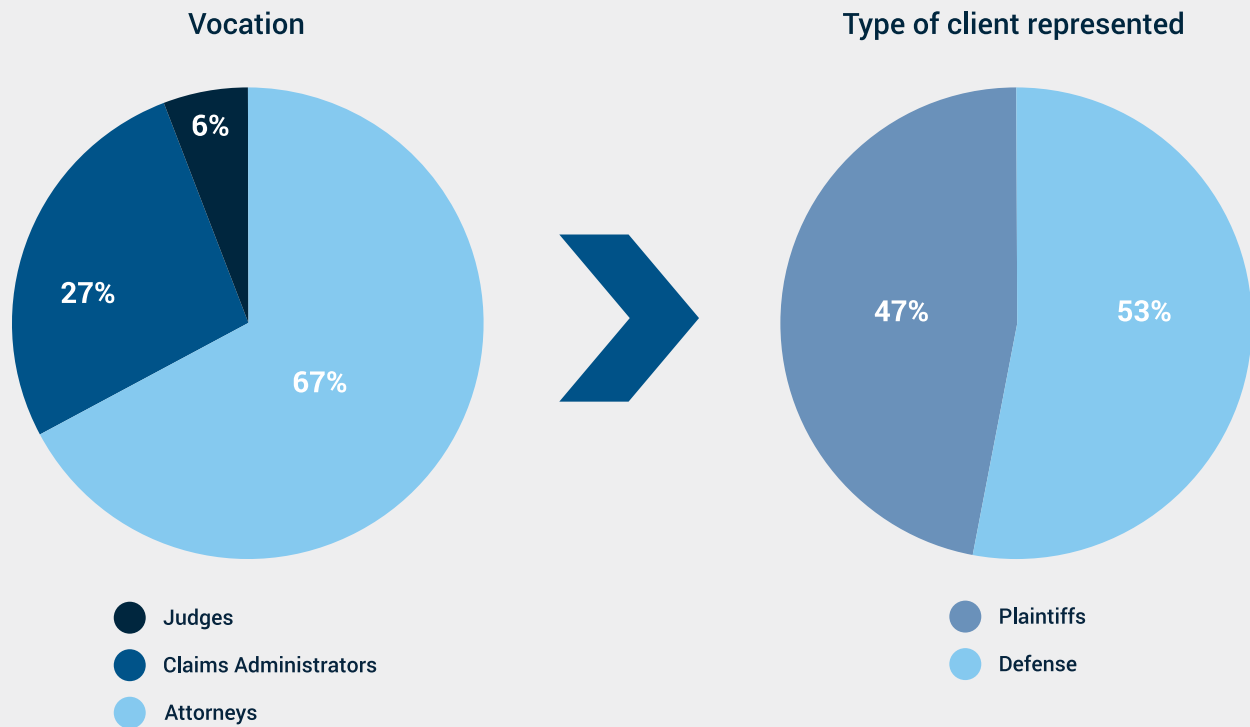
Based on our findings from the focus group, survey and discussions at the Class Action Law Forum, rulemakers should focus early on addressing the challenges posed by professional objectors. Ridding the system of bad-faith actors who intervene in class action litigation for the sole purpose of extracting payouts is not only inconsistent with the principles of the legal system but deeply unfair to class members.

Finally, it remains to be seen whether or how the COVID-19 pandemic will impact the class action litigation and settlement processes over the long term. The shift to virtual courtroom procedures has for the most part gone smoothly, potentially opening the door to greater use of technology at every stage of litigation.

Ultimately, however, the fundamental settlement framework created by Rule 23 is likely to remain intact. It established a system that has persevered for more than five decades, holding together even as changes to American society produced ever-more complex class actions and ever-growing settlements. The new amendments were meant to upgrade that system, not overhaul it. According to the practitioners and professionals who work in the system every day, the amendments have so far done exactly that.

Online Survey

In February 2020, Western Alliance Bank engaged a third-party research firm to survey 117 attorneys, claims administrators and judges regarding their perceptions toward the December 2018 amendments to Federal Rule of Civil Procedure 23, as well as their opinions on settlement funding and the role of banks in the settlement process. More than half of those surveyed (58%) claimed high familiarity with the Rule 23 amendments. Approximately 32% of the group reported double-digit numbers in cases litigated, handled or heard in 2019. Respondent breakdown was as follows:



Class Action Law Forum

The Western Alliance Bank second annual Class Action Law Forum was held at the University of San Diego Law School on March 4-5, 2020. Practitioners from both the plaintiffs' and defense bars joined 12 sitting federal and state judges, along with claims administrators and other professionals engaged in the class litigation process, for two full days of panel discussions and featured speakers addressing the full spectrum of class action topics and issues.

Focus Group

In June 2020, Western Alliance Bank conducted an online focus group with 10 participants over the course of one week. The focus group saw national participation and included attorneys, settlement administrators and the judiciary.



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