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Class Action Legal Update

Proposed Amendments to Connecticut Superior Court Rules Governing Class Actions

The Rules Committee of the Connecticut Superior Court recently proposed significant amendments to the Connecticut Practice Book provisions governing class actions. If adopted, these changes, while intended to make the Connecticut rules more closely track Federal Rule of Civil Procedure 23, would significantly expand the types of class actions that currently can be certified in the Connecticut Superior Court.

Section 9-8 of the Connecticut Practice Book governs the types of class actions that are maintainable. Currently, the only type of class action that can be certified in Connecticut is a predominance class, equivalent to Federal Rule 23(b)(3), where common questions of law or fact predominate over individual issues and a class action is superior to other available methods of adjudication. The proposed amendments to Section 9-8 would add, for the first time in Connecticut, provisions that closely track Federal Rules 23(b)(1)(A) (providing for certification where individual adjudications would establish incompatible standards of conduct for the opposing party), (b)(1)(B) (providing for certification where individual adjudications would, as a practical matter, be dispositive of other putative class members' claims), and (b)(2) (providing for certification of classes seeking injunctive or declaratory relief). While these revisions would bring the Connecticut state court rules in line with Federal Rule 23, they would also significantly expand the scope of class actions that currently can be certified in Connecticut. While Federal Rules 23(b)(1)(A), (b)(1)(B), and (b)(2) apply only in limited circumstances, it can sometimes be easier for a plaintiff to obtain certification under those rules than under Rule 23(b)(3). Proposed Practice Book § 9-8(3) also would add a list of superiority factors, which are not currently contained in the Connecticut rules, that closely track Rule 23(b)(3).

Proposed Practice Book § 9-9 would add a number of new provisions regarding class notice, judgments in certified class actions, conduct of class actions, class settlements, appointment of class counsel, and awards of attorneys' fees and costs. This section in large part closely tracks Federal Rule 23(e). The new Practice Book rule would formally provide, for the first time in Connecticut, that individual notice must be given to a predominance class, with a right to opt out of the class. The new rule would also allow classes to be certified with respect to particular issues, and would provide for subclasses. Proposed Section 9-9(c) contains provisions not included in the prior rules governing notice to the class and requiring a fairness hearing with respect to approval of proposed class settlements, with a right for class members to object. The new Practice Book rule states, more clearly than the federal rule, that court approval is *not* required for the settlement, withdrawal, or compromise of a case in which a class has been alleged but not yet certified. The new rule also provides, for the first time in Connecticut, for a formal process of appointment of class counsel.

Assuming these proposed changes are adopted, some significant differences will remain between the Connecticut rules and the federal rules. Proposed Practice Book § 9-9(a)(2)(A) would require that class notice be given for non-opt out classes certified under §§ 9-8(1) and (2) (equivalent to Federal Rule 23(b)(1) and (b)(2)). The Federal Rules, in contrast, provide only that the court *may* direct that notice be given to a (b)(1) or (b)(2) class. The Rules Committee also has not proposed any revisions to Practice Book § 9-10, which contains some unique provisions not found in the Federal Rules. Section 9-10 allows for the court to require security to ensure that the class is adequately represented, which is not provided for in the Federal Rules. Section 9-10 also provides for "notice to absent persons that they may come in and present claims and defenses if they so desire." The Federal Rules, in contrast, do not allow unnamed class members to participate in a class action other than through representation by class counsel; absent class members have only limited rights to opt out of a (b)(3) class and to object to a proposed settlement. Section 9-10 also allows a Connecticut Superior Court to strike the class allegations
"[w]henever the representation appears to the judicial authority inadequate fairly to protect the

interests of absent parties who may be bound by the judgment . . . ."

Another important difference between the federal and Connecticut rules is that the Connecticut rules do not provide for interlocutory appeals of decisions on class certification. By statute, the legislature has provided for interlocutory appeals of orders on class certification only with respect to putative class actions brought under the Connecticut Unfair Trade Practices Act (CUTPA). *See* Conn. Gen. Stat. § 42-110h. In 2008, the Connecticut Supreme Court held that there is no right to an interlocutory appeal of a decision denying class certification where the case does not include a claim under CUTPA. *Palmer v. Friendly Ice Cream Corp.*, 285 Conn. 462 (2008). The Rules Committee of the Superior Court has not proposed a rule similar to Federal Rule 23(f), likely because the scope of appellate jurisdiction in Connecticut is governed by statute, and thus, as the Connecticut Supreme Court noted in *Palmer*, the issue is "more appropriate for legislative determination." *Id*. at 472 n.9. Legislative action is likely necessary to provide for interlocutory appeals of decisions on class certification in cases not involving a claim under CUTPA. Where there is a CUTPA claim, the Connecticut Supreme Court has not limited its review to the CUPTA claim if "the non CUTPA counts are inextricably intertwined with the CUTPA count . . . ." *Macomber v. Travelers Prop. & Cas. Corp.*, 277 Conn. 617, 619 (2006).

The Rules Committee's proposed revisions to the Practice Book, including the amendments to Sections 9-8 and 9-9, were discussed at a public hearing on June 1, 2009. It is not currently known when proposed revisions will be submitted to a vote of the judges of the Superior Court for approval.

For further information, please contact Wystan M. Ackerman (wackerman@rc.com), John M. Tanski (jtanski@rc.com), or another member of Robinson & Cole's Class Action Team.

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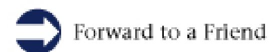

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