Navigating Class Actions After Papa John's Settlement Denial

By **William Reiss, Ellen Jalkut and Laura Song** (January 3, 2024)

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In a surprising decision, the U.S. District Court for the Western District of Kentucky declined to preliminarily approve a $5 million settlement in an antitrust class action seeking to resolve the In Re: Papa John's Employee and Franchisee Employee Antitrust Litigation no-poach case alleging that Papa John's and its franchises agreed not to solicit each other's employees.[1]

In doing so, the court, on Sept. 15, 2023, found that the named plaintiff likely established that the settlement was fair, reasonable and adequate, but declined to grant preliminary approval, because the named plaintiff did not provide sufficient information to determine whether the settlement class should be certified.[2]

This article explores developments in the case law regarding the level of scrutiny courts apply in certifying a settlement class and focuses on the potential detrimental effects associated with courts evaluating the propriety of certifying a settlement class without considering the context.

We conclude by providing takeaways for practitioners to help them navigate potential pitfalls and secure approval of class action settlements.

Class Settlement Approval

Under Federal Rule of Civil Procedure 23(e)(2), a court may approve a proposed class action settlement if it is "fair, reasonable, and adequate."[3]

To obtain approval of a proposed class settlement, a plaintiff must first file a motion containing sufficient information to enable the district court to evaluate whether the attendant costs and burdens associated with providing notice to the proposed class are justified.[4]

In conducting this analysis, a court considers whether notice is justified based on a "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."[5] Class certification requires satisfaction of each of the elements of Rule 23(a): numerosity, commonality, typicality, and adequacy as well as satisfaction of one of the elements of Rule 23(b).

While courts consistently require plaintiffs to make a showing that the requirements of Rule 23(a) and (b) will likely be met at the preliminary approval stage, the Papa John's court appeared to go further by delving into the merits of the plaintiff's claims and requiring the plaintiff to provide additional arguments and information on the merits to support certification of the settlement class. In conducting this analysis, the court arguably ran afoul of the maxim that settlements should be encouraged.[6]

Development of the Case Law Regarding Certification of a Settlement Class

In the landmark 1997 Amchem Products Inc. v. Windsor decision, the U.S. Supreme Court rejected the U.S. Court of Appeals for the Third Circuit's ruling that each of the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement."[7]

To the contrary, the high court found that "[s]ettlement is relevant to a class certification."[8] In particular, the court held that when conducting the superiority analysis under Rule 23(b)(3) in the settlement context, a court need not consider the likely difficulties in managing a class action because manageability concerns only apply in the trial setting.[9]

When considering a proposed settlement class, the trial court should focus on protecting absent class members by "blocking unwarranted or overbroad class definitions."[10] Protection of absent class members is heightened at the settlement stage because a court has no subsequent opportunity to modify the class definition as it does in the litigation context.[11]

Since Amchem, courts have frequently applied a less rigorous standard when assessing class certification in the settlement context, particularly at the preliminary approval stage.[12]

This is so because imposing a heightened burden on plaintiffs could chill settlements, which are often reached precisely because of the risks associated with certifying a litigation class.

Moreover, unlike the certification of litigation classes, which are often subject to vigorous opposition by defendants, settling defendants share plaintiffs' interest in seeing the settlement class certified so that the settlement is binding on all class members who elect to remain in the settlement class.

Nonsettling defendants, on the other hand, often have no interest in challenging the settlement class because the proposed approval orders almost always contain language that the certification of a settlement class is without prejudice to non-settling defendants' ability to challenge a litigation class.

Given this context, at least one court — the U.S. District Court for the Eastern District of California in the 2016 Dearaujo v. Regis Corp. decision — noted that the Supreme Court cautioned in Amchem that a settlement does not mean certification should be more readily granted than in the litigation context, yet "a cursory approach appears the norm [when assessing preliminary approval]."[13]

In examining precedent, a second court — the U.S. District Court for the District of New Hampshire — observed in the 2020 Rapuano v. Trustees of Dartmouth College decision that "most courts applied a less stringent or more lax standard at the preliminary approval stage regarding the requirements for class certification and approval of the proposed settlement."[14]

Indeed, at the preliminary approval stage, some courts inquired only "whether the proposed settlement fell within the range of possible final approval."[15]

2018 Amendment to the Evaluation of Class Action Settlements Under Rule 23

The 2018 amendment to Rule 23(e) enumerates factors a court must consider in granting final approval of a class action settlement and the standard applicable at preliminary approval.[16] The amended rule specifies that preliminary approval may only be granted if final approval is likely. In adding this language, the Advisory Committee noted that the "standards for certification differ for settlement and litigation purposes."[17]

Following the 2018 amendment, with few exceptions, courts continue to apply a less rigorous analysis in certifying a settlement class at the preliminary approval stage and have not required additional rigor at the final approval stage absent objections.

For example, two courts preliminarily approved settlement in no-poach cases with one paragraph recitations of the Rule 23(a) and (b) factors — the 2022 Hunter v. Booz Allen Hamilton decision in the U.S. District Court for the Southern District of Ohio, and the 2020 decision in In re: Railway Industry Employee No-Poach Antitrust Litigation in the U.S. District Court for the Western District of Pennsylvania.[18]

In the 2021 Binotti v. Duke University decision, another no-poach case, the U.S. District Court for the Middle District of North Carolina summarily addressed the requirements of numerosity, commonality and typicality before focusing on the requirement of adequacy.

The court considered the possibility of intraclass conflicts where some of the claims were potentially time-barred and concluded that no conflict was fundamental.[19]

Nonetheless, some courts have interpreted the likelihood standard set forth in the 2018 amendment as "'more exacting' than the relaxed standard courts applied prior to the amendment."[20] Summarizing recent case law on preliminary approval, a district court in New Hampshire held in the 2020 Rapuano v. Trustees of Dartmouth College decision that courts should carefully review the proposal to ensure that no serious flaws are found after incurring the expense of notice.[21]

Nonetheless, the court recognized the applicability of the Rule 23(a) and (b) criteria differ depending on the circumstances of whether the plaintiff is seeking certification for settlement or litigation.[22] In the settlement context, the New Hampshire court held that a court should focus on aspects of Rule 23 related to the class definition to ensure protection of absent class members, consistent with Amchem's teachings.[23]

Papa John's Decision

In the recent Papa John's decision, the court began its preliminary approval analysis by conceding that it "will likely be able to approve the proposal under Rule 23(e)(2)."[24]

Specifically, the court observed that class counsel appeared adequate and had expended considerable resources on the case. The court was "unaware of any risk of collusion," and noted the uncertainty of success of the claims. After looking favorably upon the merits of the settlement, the bulk of the opinion focused on the propriety of certifying the settlement class.

Perhaps animated by concerns of novelty, the court observed that "no court in the country has yet approved a nationwide no-poach settlement in the restaurant context."[25] The Papa John's court cited two district court opinions within the Seventh Circuit that rejected certification of similarly-defined classes, but mistakenly characterized those opinions as

within the settlement context when in fact they were limited to litigation classes.[26]

Relying on the two district court cases, the Papa John's court scrutinized the adequacy of the sole class representative. The court requested additional information regarding the tension it perceived between managers and nonmanagers at Papa John's given that managers allegedly enforced the challenged.

The court also expressed skepticism as to whether the named plaintiff could adequately represent a class that includes members subject to arbitration agreements. Additionally, the court questioned whether typicality could be satisfied without an evidentiary showing that the named plaintiff attempted to move from one Papa John's franchise to another.

Finally, the court sought additional information supporting the merits of the plaintiffs' claims as part of its analysis of Rule 23(b)(3)'s predominance factor. The court questioned whether the plaintiff's claims should be evaluated under the per se or rule of reason standard.

A rule of reason standard often requires the plaintiff to define the relevant market and demonstrate a defendant's market power within that market, which the court found the plaintiff failed to do.

Addressing the court's concerns about the market definition at the preliminary approval hearing, the plaintiff argued that economic analysis would demonstrate that the no-poach agreement suppressed wages even factoring in the geographic and demographic differences across the country. The court concluded that without evaluation of the data and econometric analysis, it lacked sufficient information "to reach a predominance finding at the preliminary-certification phase."[27]

Recently, the named plaintiff in Papa John's filed an amended motion seeking to address the court's concerns. The papers are notable for the level of factual detail the plaintiff presents on the merits.

Effects of Applying a More Stringent Standard for Class Certification in the Settlement Context

The Papa John's court appeared to apply a more demanding class certification standard, which is typically reserved for contested motions in the litigation context.

As explained above, the court's conclusion that the named plaintiff failed to satisfy Rule 23(a) and (b)(3) requirements did not center on whether the class definition unfairly affected absent class members; rather it was largely based on the court's assessment of the risks and weaknesses associated with the case.

Yet it was precisely these risks and perceived weaknesses that led the plaintiff to settle in the first place.

As one district court in the Sixth Circuit, U.S. District Court for the Eastern District of Michigan, acknowledged in the 2017 decision in In re: Packaged Ice Antitrust Litigation, "an antitrust action is arguably the most complex action to prosecute," and the "complexity and undeniable inherent risks, such as whether the classes will be certified ... whether Plaintiffs will be able to demonstrate class wide antitrust impact and ultimately whether Plaintiffs will be able to prove damages" all weigh in favor of settlement.[28]

Conditioning approval of a class action settlement on a plaintiff's ability to demonstrate it

has a strong case would likely have a chilling effect on settlements.[29] This is particularly true given that it is not uncommon for class actions to settle prior to a decision on class certification.[30]

In reaching a settlement prior to a decision on class certification, litigants frequently consider the risks and likelihood of certifying a litigation class. Indeed, the risks and attendant consequences of a decision granting or denying certification is often an impetus for settlement.

Following the reasoning of the Papa John's court to its logical conclusion, a class action settlement would only be approved when a plaintiff persuasively addresses underlying merits questions to demonstrate that a litigation class would be certified. If this were the rule, early settlements would be a rarity and judicial resources, not to mention those of the parties, would be burdened by increased litigation.[31]

Takeaways

While we don't know yet whether the Papa John's decision is an outlier, class plaintiffs should consider including more than boilerplate class certification allegations in their preliminary approval papers.

Specifically, class plaintiffs should endeavor to supply the court with the requisite factual information: (1) demonstrating that the Rule 23 factors have been met; and (2) enabling the court to weigh the benefits and risks of settlement vs. continued litigation.

Perhaps most importantly, class plaintiffs should take all necessary steps to ensure that the class definition is clear and concise, utilizing subclasses where appropriate.

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[1] The court invited the plaintiff to file an amended motion for preliminary approval addressing its concerns within 30 days of its order.

[2] In re Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-CV-825-BJB, 2023 WL 5997294 ("Papa John's"), at *1 (W.D. Ky. Sept. 15, 2023).

[3] To make this determination, the court must consider (1) the adequacy of representation by class counsel and class representatives; (2) arm's-length negotiation of the proposal; and (3) the adequacy of the class relief and the equity of distribution across the class. Fed. R. Civ. P. 23(e)(2).

[4] Fed. R. Civ. P. 23(e)(1)(A).

[5] Fed. R. Civ. P. 23(e)(1)(B)(ii).

[6] Clark Equip. Co. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO, 803 F.2d 878, 880 (6th Cir. 1986) (noting that there is a "strong policy favoring settlement agreements."); see also Doe v. Delie, 257 F.3d 309, 322 (3d Cir. 2001) ("The law favors settlement, particularly in class actions and other complex cases, to conserve judicial resources and reduce parties' costs.") (internal citations omitted).

[7] 521 U.S. 591, 619 (1997).

[8] Id.

[9] Id. at 620.

[10] Id.

[11] Id.

[12] See § 13:18. Preliminary determination regarding class certification—Standard, 4 Newberg and Rubenstein on Class Actions § 13:18 (6th ed.) (collecting cases).

[13] Dearaujo v. Regis Corp., No. 2:14-CV-01408-KJM-AC, 2016 WL 3549473, at *6 (E.D. Cal. June 30, 2016) (cleaned up).

[14] Rapuano v. Trustees of Dartmouth Coll., 334 F.R.D. 637, 642 (D.N.H. 2020) (internal quotations omitted).

[15] In re Nasdaq Mkt.-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

[16] See § 13:10. Preliminary approval—Generally, 4 Newberg and Rubenstein on Class Actions § 13:10 (6th ed.).

[17] Fed. R. Civ. P. 23(e)(1) advisory committee note to 2018 amendment.

[18] See Hunter v. Booz Allen Hamilton, Case 2:19-cv-00411-ALM-CMV, at 2 (S.D. Oh. Dec. 19, 2022), Dkt. 257 (stating that the proposed class meets the requirements for certification without providing details); In re Ry. Indus. Emp. No-Poach Antitrust Litig., No. 2:18-mc-00798, at 5 (W.D. Pa. March 19, 2020), Dkt. 262 (same).

[19] Binotti v. Duke Univ., No. 1:20-cv-00470-CCE-JLW, at 3-6 (M.D.N.C. April 22, 2021), Dkt. 55.

[20] Rapuano, 334 F.R.D. at 643 (collecting cases).

[21] Id.

[22] Id.

[23] Id. at 643-44.

[24] Papa John's, 2023 WL 5997294, at *3.

[25] Id. at *4.

[26] Id. (citing Deslandes v. McDonald's USA, LLC, No. 17-cv-4857, 2021 WL 3187668

(N.D. Ill. July 28, 2021)) and Conrad v. Jimmy Johns, No. 18-cv-133, 2021 WL 3268339 (S.D. Ill. July 30, 2021)). The Seventh Circuit in Deslandes expressly reversed and remanded the district court's opinion granting summary judgment in favor of the defendants and suggested that the District Court should reconsider its denial of class certification. Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 705 (7th Cir. 2023).

[27] Id. at *6.

[28] In re Packaged Ice Antitrust Litig., 322 F.R.D. 276, 292 (E.D. Mich. 2017) (cleaned up) (granting final approval of settlement).

[29] See e.g., In re Pork Antitrust Litig., No. CV 18-1776 (JRT/JFD), 2022 WL 4238416, at *5 (D. Minn. Sept. 14, 2022) (finding that it would "defeat Rule 23(c)(1)(A)'s command [to] determine class certification at an 'early practicable time,'" and "drive up the cost of litigation, increase burdens on courts, and run counter to the purpose of the Rules of Civil Procedure and the policy of favoring settlements" if courts required plaintiffs seeking to certify a settlement class to file "affidavits, expert testimony, deposition testimony, or other materials alongside their motions for class certification.").

[30] See e.g., Binotti, No. 1:20-cv-00470-CCE-JLW, at 2; In re Ry. Indus. Emp., No. 2:18-mc-00798, at 4-5; Hunter, No. 2:19-cv-00411-ALM-CMV, at 2.

[31] In re Pork Antitrust Litig., 2022 WL 4238416, at *5.