Connecticut Embraces Federal Class Action Model

By Shaun S. Sullivan, Kim E. Rinehart, and Rachel Lebejko Priester

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On June 22, 2009, the Connecticut Superior Court judges, at their Annual Meeting, approved the recommendation of the Connecticut Superior Court Rules Committee to substantially revamp the Practice Book rules for class actions to align them more closely with Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). The new rules went into effect on January 1, 2010, replacing the regime that has been in effect in Connecticut since 1975. This article walks through the numerous changes and discusses the rationale behind the shift, the remaining differences between Connecticut's new rules and the federal rules, and some implications for Connecticut state court class action practitioners.

I. The Old Rules

Connecticut's previous rules, currently codified as Practice Book Sections 9–7 and through 9–10, were enacted in 1975.[1] Section 9–7 provides that,

> One or more members of a class may sue or be sued as representative parties on behalf of all 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.

This language is virtually identical to Rule 23(a),[2] and sets forth the four requirements applicable to all class actions, known in practice as numerosity (of members), commonality (of issues), typicality (of claims), and adequacy (of representation). Connecticut's state courts have considered these factors over the years, and federal courts have developed a robust jurisprudence interpreting and applying these rules.

Practice Book Section 9-8 used to read:

> An action may be maintained as a class action if the prerequisites of Section 9-7 are satisfied and if the judicial authority finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

This language—the so-called "predominance" and "superiority" tests—tracks the language of a portion of Rule 23(b)(3). But the "predominance" class action, the only one specifically contemplated by the Connecticut Practice Book, is just one of three kinds of class actions Rule 23 long has allowed.[3]

Practice Book Section 9-9 provided only that:

> A class action shall not be withdrawn or compromised without the approval of the judicial authority. The judicial authority may require notice of such proposed dismissal or compromise to be given in such manner as it directs.

By contrast, Federal Rule 23(e), which also requires a court to approve dismissal or compromise of a class action, describes at length the procedures required for approving the compromise. For example, under Rule 23(e)(1), the court "must" direct notice to class members of the compromise—a mandate not present in Section 9–9's permissive language. Rule 23(e) also requires the court to hold a hearing to determine whether the proposed settlement is fair,[4] provides members of a "predominance" class with rights to opt out of the settlement,[5] and affords class members who would be bound by the prospective compromise the right to object to the proposal.[6] Other than allowing "notice," Section 9–9 did not address the rights (if any) the class members had with respect to settlements.

Practice Book Section 9-10, entitled "Orders to Ensure Adequate Representation," roughly tracked Federal Rule 23(d). While not identical, each provision generally empowered the court to make orders during the course of the action to protect the interests of the class, including direction of notice or amendment of pleadings.

Notably, several provisions of Federal Rule 23 had no analogue in the Practice Book at all. For example, Rule 23(c), a procedural kitchen sink, describes at length requirements relating to the certification order, the notice that must be sent to putative class members, and the class judgment. It also authorizes classes with respect to less than all of an action (i.e., as to a particular issue or as to a subclass). The Practice Book was silent on all of these issues. The Practice Book also did not address appointment of class counsel[7] or procedures for determining and awarding attorneys' fees, when available by law.[8]

II. The New Rules: Modeling Connecticut's Rules on the Federal Rules

The Connecticut Supreme Court has emphasized that, given the relative dearth of Connecticut class action jurisprudence, "our class action requirements…are similar to those applied in the federal courts….thus, we look to federal case law in construing our class certification requirements."[9] Second Circuit decisions are considered particularly persuasive.[10] But given the evolving nature of Rule 23 and attendant jurisprudence in the federal courts, it seemed that Connecticut was (procedurally) being left behind.

To bring Connecticut's rules more in line with Rule 23, and to make the best use of the rich federal jurisprudence on heavily litigated Rule 23, the Rules Committee substantially revised Connecticut's rules. Because Section 9–7 already mirrored Federal Rule 23(a), it remains unchanged. Section 9–10 escaped amendment as well, although new Section 9–9 adopts many of the specific provisions of Federal Rule 23(d).[11] But Sections 9–8 and 9–9 received a complete overhaul, incorporating much of Federal Rule 23(b)-(h). We review these changes in detail.

Section 9–8. The substantial and important amendments to Section 9–8 align Connecticut procedure with Federal Rule 23(b). New Section 9–8 reads,

> Sec. 9–8. ——Class Actions Maintainable.
>
> An action may be maintained as a class action if the prerequisites of Section 9-7 are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of: (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the part[y] opposing the class; or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, or

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(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of the class action.

Other than a "which" here and a "that" there, the new rule tracks Rule 23(b) verbatim.

As a result of these amendments, the "predominance" class is no longer the only tool available for aggregating claims in Connecticut. New Section 9–8(1) is the parallel to Rule 23(b)(1), which—while relatively lightly litigated—affords an avenue for class treatment of claims that create a significant risk of inconsistent obligations on the defendant if litigated individually, or where one plaintiff's action will practically decide the rights of others.[12] Except for "limited fund" class actions, where the number of individual claims may swamp the available pool of recovery, this type of class action typically focuses on injunctive and declaratory relief.

New Section 9–8(2) incorporates Rule 23(b)(2)'s structure for "injunctive relief" class actions, a tool previously unavailable in Connecticut but sometimes invoked in civil rights or discrimination cases in federal courts where the defendant's conduct allegedly affects the entire class in the same manner[13] and the focus of the action is injunctive or declaratory relief. Where money damages are the primary relief requested, many courts do not allow a Rule 23(b)(2) "injunctive relief" class, and instead require plaintiffs to meet the Rule 23(b)(3) "predominance" factors and to provide notice, and opt-out rights.[14] The federal circuits have taken differing approaches to assessing whether money damages play a sufficiently significant role in a given case to preclude certification of an injunctive relief class.[15] Connecticut courts will have to grapple with this issue going forward.

Finally, new Section 9–8(3) retains the "predominance" formulation but adds the federal rule's four additional factors to consider whether the "predominance" class requirements have been met.

Section 9–9**.** The revamped Section 9–9 adopts the substance of Rule 23(c), (d), (e), (g), and (h). Its new title, "Procedure for Class Certification and Management of Class," reflects its new scope, broader than its previous focus on "Dismissal or Compromise of Class Action."

- Section 9–9(a), incorporates the concepts of Federal Rule 23(c), and requires the court to issue its certification decision "at an early practicable time,"[16] in an order "defin[ing] the class and the class claims, issues or defenses, and… appoint[ing] class counsel."[17] This revision underscores the need to make the class determination sooner rather than later in the litigation, but affords courts discretion to determine the appropriate timing. Thus, if significant discovery is necessary before a proper certification can be made, the rule allows courts the latitude to accommodate this need. court also must specify the class, claims, and defenses in a certification order. While some judges were, as a practical matter, following both paths, this revision formalizes the practice.

Notice of the certification decision is now required,[18] with "the best notice practicable under the circumstances, including individual notice" where reasonable to members of "predominance" classes.[19] The notice must address several issues, including, for "predominance" classes, the binding effect of a judgment on class members in a Section 9–8(3) class.[20]

- Section 9–9(a)(3) addresses the form and content of a class action judgment. Section 9–9(a)(4) enables courts to certify classes "with respect to particular issues"[21] and to create subclasses where appropriate.[22] However, certifying less than a whole cause of action as a class does not reduce the otherwise-applicable burdens; plaintiffs still must demonstrate that the requirements for class treatment have been met with respect to the issues or subclasses.[23]

- Section 9–9(b), like Rule 23(d), now expressly authorizes the court to make orders to conduct the proceedings and prevent "undue repetition or complication in the presentation of evidence or argument."[24] The notice provisions of Section 9–10 are expanded and clarified here,[25] and the court now may impose conditions on the parties,[26] require amendment to the pleadings to deal with the progress of the litigation,[27] or "deal[]

with similar procedural matters."[28] These revisions reflect a recognition of the litigation management challenges presented by class actions.

• Section 9–9(c) expands the court's and the parties' obligations in the event of any contemplated settlement. Now, for a *certified* class,[29] the court not only must approve the settlement, but must follow specific steps to do so, including requiring reasonable notice,[30] holding a hearing and making findings from that hearing that the settlement is fair,[31] and, for "predominance" classes, ensuring that absent class members have the opportunity to opt out of the proposed settlement.[32]

The parties now must file a disclosure "identifying any agreement made in connection with the proposed settlement, withdrawal or compromise."[33] Absent class members are specifically authorized to object to proposed settlements.[34]

• Sections 9–9(d) and (e) incorporate much of Rule 23(g), dealing with the appointment of class counsel. "Class counsel must fairly and adequately represent the interests of the class."[35] To ensure this, the court must delve into prospective class counsel's work on the case, knowledge of the law, experience in other class actions and complex litigation matters, as well as the resources counsel will dedicate to the action.[36] The court may also consider any other matter it deems relevant to the decision whether to appoint a particular lawyer or law firm as class counsel.[37] Section 9–9(e) provides a procedure for appointing interim counsel[38] or choosing among multiple applicants for class counsel.[39]

• Section 9–9(f), like its federal counterpart, does not create a right to attorneys' fees or costs. It merely outlines a procedure for determining fees or costs where already "authorized by law or by consent of the parties."[40] Under Section 9–9(f), the party seeking fees or costs must submit its request by timely motion with notice to all parties.[41] Class members and the party from whom payment is sought may object to the motion,[42] and the court must hold a hearing and issue a decision with its findings of fact and conclusions of law.[43]

III. Remaining Differences between Connecticut's New Rules and Rule 23

While the new Connecticut rules largely parallel Rule 23, there are still some differences for the practitioner to keep in mind.

First, Section 9–10, regarding orders in connection with a class action, remained untouched. That section overlaps, in part, new Section 9–9(b), but has some unique provisions. For example, Section 9–10 allows the court to require security, a provision not found in the federal rules. Section 9–10 also specifies that, "[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, it may at any time prior to the judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and it shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented."[44] This power, while implicitly available under Rule 23(d) as substantially enacted in Section 9–9(b), is explicitly discussed only in Section 9–10.

Second, because of ongoing confusion among some courts as to the status of a case filed as a putative class action, but not yet certified, new Connecticut Section 9(c)(1)(A) specifies that "Court approval is not required for a settlement, withdrawal or compromise of a claim in which a class has been alleged but no class has been certified."[45] This language resolves any uncertainty regarding whether and how to allow an action to be settled or withdrawn prior to (or in the absence of) a certification order. This language also underscores the importance of the certification decision, particularly for notice requirements to absent, putative class members: unless and until the class is certified, the case may be treated as an ordinary, individual action.

Finally, Rule 23(f) allows an immediate appeal of a class certification decision by permission of the court of appeals, in the reviewing court's discretion. The new Connecticut rules provide no similar procedural mechanism for appealing a class certification decision, although specific statutory mechanisms may be available for certain types of class actions, such as those under the Connecticut Unfair Trade Practices Act.[46]

IV. Implications

In some respects, the amendments appear to expand the availability of class actions in Connecticut courts. Certainly, the revisions of Section 9–8 to allow for "injunctive relief" classes and for classes where courts are concerned about potentially unfair inconsistent obligations that might be imposed in multiple individual actions allow for classes to be certified where none could before. But the adoption of these two new class action vehicles may have less impact than one might expect.

Given that Rule 23(b)(1) receives considerably less attention than its companion provisions, it is reasonable to assume that Section 9–8(1), modeled on that section, also will apply in limited cases. While Section 9–8(2) may see more action, the requirements for such a class generally force plaintiffs to choose between damages and injunctive/declaratory relief as the primary remedy. If damages are the focus of the action, the plaintiff still must satisfy the more demanding "predominance" inquiry and provide mandatory notice and opt-out rights to absent class members. If a plaintiff seeks to avoid the "predominance" class's strictures in favor of injunctive relief, he may be unable to vigorously pursue claims for money damages, reducing the appeal of class treatment for some plaintiffs.

Other aspects of the new Rules may raise the hurdle for certification. For example, elucidation of additional considerations "pertinent" to the "predominance" class, which was already extant in Connecticut, may raise the threshold for certification of such classes. Additionally, federal appellate courts have made very clear that trial courts must delve into the facts and even decide class-related factual issues that overlap with the merits, when these issues are relevant to the certification decision.[47] Connecticut's adoption of the federal framework may result in more emphasis on this issue in the Connecticut courts.

Finally, Connecticut's adoption of various "housekeeping" provisions from Rule 23 should not expand or abridge substantive rights. However, these rules will provide needed guidance to courts and parties with respect to managing sometimes unwieldy class actions. **CL**