ARTICLES

# Settlement Scrutiny in the Wake of 2018 Amendments to Rule 23(e): Appellate Decisions in Review

By Jessica Lynn Lewis, Christopher Johnstone, Michele Cusi, and Maxwell Atkins – July 14, 2026

In 2018, Congress passed a set of amendments to Rule 23(e) of the Federal Rules of Civil Procedure that established a set of standards to be used by courts in analyzing whether a class action settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Those standards require that courts consider whether (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief is adequate in light of litigation risks, distribution methods, attorney fees, and any side agreements; and (D) the proposal treats class members equitably. *Id.* According to the advisory committee notes, the 2018 amendments recognized that, while circuit courts across the country had tended to apply "factors [that] focus[ed] on comparable considerations," "each circuit has developed its own vocabulary for expressing these concerns." Fed. R. Civ. P. 23(e)(2) advisory committee's notes to 2018 amendments.

To that end, the 2018 amendments were intended "to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Id.* A survey of appellate decisions interpreting the amendments, many of which have reached decision only in the last year, indicates that the amendments have largely achieved their goal of generating more consistency in evaluating the fairness of class action settlements. Appellate courts that previously applied customized considerations have, in turn, refined those tests to better align with the core concerns reflected in the 2018 amendments. But in addition to uniformity, and of most interest to class action practitioners, our review of post-amendment appellate decisions revealed an increased willingness by appellate courts to reverse settlement approvals when they viewed the lower courts as having left unfulfilled their "fiduciary obligations" to absent class members.

Below we set forth key appellate decisions that demonstrate courts' increased willingness to apply more rigor to their assessment of proposed settlements, particularly when it comes to whether fee proportionality or claims rates support a "fair, reasonable, and adequate" settlement.

## Fee Proportionality

Perhaps the most significant settlement consideration receiving heightened scrutiny following the 2018 amendments is attorney fees. In *Briseño v. Henderson*, the Ninth Circuit reinforced that Rule 23(e) requires courts to scrutinize attorney fee arrangements and assess them in relation to the relief provided to the class. 998 F.3d 1014, 1022–23 (9th Cir. 2021). The court warned that settlements require heightened scrutiny where counsel receives a disproportionately large share of the recovery, identifying such an imbalance as a key indicator of potential collusion. *Id.* at 1022–24. The court further identified three "signs" that suggested class counsel may have bargained away class benefits in exchange for their own interests: (1) when counsel receives a disproportionate share of the settlement, (2) when the parties agree to a clear sailing arrangement under which the defendant agrees not to oppose a specified fee request, and (3) when the agreement includes a reversion provision returning unawarded fees to the defendant rather than the class. *Id.* at 1024. Prior to the 2018 amendments, these factors were typically considered when reviewing pre-certification settlements. *Briseño* extended this framework to post-certification settlements and reversed approval of the settlement in question, finding that the presence of all three red flags required heightened scrutiny of the settlement's fairness and the allocation of value between the class and counsel.

The Ninth Circuit emphasized that Rule 23(e)(2) requires careful scrutiny of fee arrangements for potential unfairness in the allocation of settlement value between the class and counsel. Applying these principles, the court rejected a settlement in which "the lion's share of the money" went to attorneys while the class received only "relative scraps." *Id.* at 1026. The court explained that this "gross disparity in distribution" raises a "red flag demanding more attention and scrutiny." *Id.* The court emphasized that "nothing in [its] opinion suggest[ed] that courts should unnecessarily meddle in class settlements negotiated by the parties or that courts have a duty to maximize the settlement fund for class members." Rather, the court said it was compelled by "the rules of our involvement in the class action process as set by Congress," including under the 2018 amendments.

Recently, the Second Circuit joined the Ninth Circuit in holding that "Rule 23(e) directs courts to compare the proportion of the total recovery going to attorney's fees with the proportion going to the class, and to consider whether that comparison reveals a sufficient imbalance as to cast doubt on the settlement's fairness." *Kurtz v. Kimberly-Clark Corp.*, 142 F.4th 112, 118–19 (2d Cir. 2025). In *Kurtz*, the court vacated a settlement approval order and remanded the case with instructions to directly compare the "allocation of the total recovery between the class and class counsel" before approving a settlement. *Id.* at 119. The court cited the proportionality analysis under the 2018 amendments as requiring a comparison of attorney fees to class recovery, which can be defined as (1) a "hypothetical maximum recovery to the class (the upper-limit amount a defendant agrees to pay to class members)"; (2) "the actual class recovery (the amount ultimately paid out to class members)"; or (3) the "predicted class recovery, which parties will sometimes offer in place of an actual class recovery." *Id.* Which benchmark is appropriate for a given class action settlement is a "fact-bound question that is best left to the district court's discretion." *Id.* In its decision, the court noted that the 2018 amendments had "abrogated the presumption of fairness we previously applied to those class action settlements that were negotiated at arm's length" and "mandate[d] courts to evaluate factors that may not have been highlighted in our prior case law." *Id.* at 118.

Taken together, these appellate decisions make clear that proportionality between attorney fees and class recovery is a central pillar of the Rule 23(e) adequacy inquiry, often serving as a litmus test for settlement fairness.

# Low Claims Rates

After the 2018 amendments, low claims rates have triggered increased scrutiny as courts have treated low participation as evidence that a settlement may not deliver meaningful relief and thus may not be "fair." While a low claims rate alone does not automatically doom a settlement, appellate decisions across multiple circuits have established that low claims rates, particularly when combined with structural features such as reversionary clauses, clear-sailing agreements, or disproportionate attorney fee requests, trigger heightened judicial scrutiny under Rule 23(e). For example, in the Ninth Circuit, in *In re California Pizza Kitchen Data Breach Litigation*, the court reversed a fee award where a 1.8 percent claims rate yielded approximately $950,000 against $800,000 in attorney fees, holding that courts must assess actual settlement value before awarding fees. 129 F.4th 667, 670 (9th Cir. 2025).

Further, in *Drazen v. Pinto*, the Eleventh Circuit vacated approval of a class settlement in a case with a claims rate that fell below 2 percent. 106 F.4th 1302, 1329–32 (11th Cir. 2024). *Drazen* involved a consumer suit under the Telephone Consumer Protection Act, alleging that GoDaddy.com used a prohibited automatic telephone dialing system to make promotional calls and send text messages attempting to sell additional or more expensive services and products or to contact individuals who were no longer customers. The settlement class included about 1.237 million class members, of whom only 24,059 (1.9 percent) submitted claims. *Id.* at 1321. The court vacated both the settlement approval and the fee award based in part on the lower court's failure to consider the 2018 amendments. Applying the Rule 23(e) factors, the court held that the district court abused its discretion by treating the settlement as a common fund when it was actually claims-made, meaning GoDaddy's exposure depended entirely on claims filed, while the district court calculated fees based on the settlement's theoretical maximum value rather than the amount actually recovered by the class. *Id.* at 1339–42.

*Drazen* shows how courts are increasing their scrutiny of proposed settlements and treating claims rates as evidence of whether a settlement delivers meaningful relief to the class. After the 2018 amendments, the question is not simply what class members could have claimed; it is whether the settlement's structure, notice plan, and timeline gave them a meaningful opportunity to do so.

# Conclusion

These decisions show that appellate courts now subject class action settlements to heightened scrutiny, reflecting a reorientation in how such settlements are evaluated. Where courts once presumed that arm's-length negotiation produced fair outcomes, they now demand more evidence that the settlement actually delivers meaningful value to the class. Fee proportionality is now a core component of the fairness inquiry, and low claims rates are treated as potential evidence that a settlement was never designed to benefit the class. Settlements that were once routine now carry a meaningful risk of reversal.

*The views and opinions expressed in this article are those of the authors alone and not attributable to their employer.*

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