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The Hershey-Pinnacle Merger and the Road Ahead: Guidance Needed in a Changing Healthcare Landscape

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I. Introduction

Following a number of recent losses and abandoned challenges in the area of hospital mergers,[1] the Federal Trade Commission ("FTC") scored a big win when the U.S. Court of Appeals for the Third Circuit handed down a ruling mandating the entry of a preliminary injunction blocking the proposed merger of Penn State Hershey Medical Center ("Hershey") and PinnacleHealth System ("Pinnacle").[2] Given the stark differences between the district court's opinion (which denied the preliminary injunction) and the Third Circuit's opinion, the ruling generates more questions than it answers, especially in light of the FTC's recent promises to vigorously enforce the antitrust laws.[3] In order to maximize efficiencies in an evolving healthcare landscape, it is likely that hospitals and healthcare systems will continue to seek mergers in growing numbers. Without clear legislative, regulatory, and judicial guidance in this area, confusion and costly litigation will be the rule, not the exception.

[1] *See* Lisa Schencker, *FTC Drops Its Challenge of W. Virginia Hospital Merger*, MODERN HEALTHCARE (July 9, 2016), http://www.modernhealthcare.com/article/20160709/MAGAZINE/307099924 (describing the FTC's decision to drop its challenge of a West Virginia hospital merger); Lisa Schencker, *FTC Loss in Chicago Could Spur More Hospital Deals*, MODERN HEALTHCARE (June 14, 2016), http://www.modernhealthcare.com/article/20160614/NEWS/160619951 (describing a Chicago judge's rejection of FTC's request for a preliminary injunction to block a proposed merger between Advocate Health Care and NorthShore University HealthSystem as "the second loss in a row for the FTC, after years of scoring victories in cases involving mergers and acquisitions among hospitals, health systems and physician groups"); Jeff Zalesin, *FTC, Pa. Can't Block Hospital Merger*, LAW360 (May 9, 2016), http://www.law360.com/articles/794237/ftc-pa-can-t-block-hospital-merger (describing district court's denial of FTC's request for a preliminary injunction to block the Hershey-Pinnacle merger).

[2] *See generally FTC v. Penn State Hershey Med. Ctr.* (*Hershey II*), No. 16-2365, 2016 BL 317602 (3d Cir. Sept. 27, 2016); Eric Kroh, LAW360 (Sept. 27, 2016), https://www.law360.com/articles/845047/ftc-loss-on-pa-hospital-merger-reversed-by-3rd-circ-.

[3] *See* Howard Morse, *et al.*, *Federal Antitrust Authorities Step Up Merger Enforcement – Recent Victories Buoy Enforcers*, COOLEY (Oct. 12, 2016), https://www.cooley.com/news/insight/2016/2016-10-11-federal-antitrust-authorities-step-up-merger-enforcement.

II. Factual Background

A. The Proposed Merger and the FTC's Challenge

Located in Hershey, Pennsylvania, Hershey is a 551-bed hospital and the leading academic medical center in central Pennsylvania, serving as the primary teaching hospital of the Penn State College of Medicine.[4] Hershey "offers a broad array of high-acuity services, and tertiary and quaternary care, including bone-marrow transplants, neurosurgery, and specialized oncologic surgery. Hershey operates central Pennsylvania's only specialty children's hospital, and the only heart-transplant center outside Philadelphia and Pittsburgh."[5]

Pinnacle, also located in central Pennsylvania, maintains three campuses with a total of 646 beds: Harrisburg Hospital and Community General Osteopathic Hospital, both in Harrisburg, and West Shore Hospital in Cumberland County, Pennsylvania.[6] Pinnacle offers some advanced services, including open-heart surgery, kidney transplants, chemotherapy, and radiation oncology, but its primary focus is on cost-effective acute care.[7]

Hershey and Pinnacle signed a letter of intent of their proposed merger in June 2014 and received final board approval in March 2015.[8] In April 2015, they notified the FTC of their proposed merger and the FTC undertook an investigation, after which it initiated a formal challenge of the merger in the FTC's administrative court on December 7, 2015, alleging that the hospitals' proposed merger would violate Section 7 of the Clayton Act and Section 5 of the FTC Act.[9] On December 9, 2015, the FTC, joined by the Pennsylvania Office of Attorney General, filed a complaint in the U.S. District Court for the Middle District of Pennsylvania, and filed a motion for a preliminary injunction on March 7, 2016.[10] At a five-day evidentiary hearing in April 2016, the district court admitted thousands of pages of evidence and heard testimony from 16 witnesses, including two economists.[11] Subsequently, the parties filed post-hearing briefs.[12]

B. The District Court's Opinion

On May 9, 2016, Judge John E. Jones III handed down an opinion denying the FTC's request for a preliminary injunction blocking the proposed merger. Judge Jones's opinion immediately drew attention from the press for its characterization of the merger "as not only legal but also beneficial and logical[,]" citing "'an evolving landscape of health care,' changed by factors including the Affordable Care Act ["ACA"], and fluctuations in reimbursement from Medicare and Medicaid and a move toward risk-based contracting[.]"[13]

The dispositive issue that the district court ultimately deemed fatal to the preliminary injunction was the FTC's proposed relevant geographic market of

[4] *FTC v. Penn State Hershey Med. Ctr.* (*Hershey I*), No. 1:15-cv-2362, 2016 BL 147000, at *1 (M.D. Pa. May 9, 2016).
[5] *Id.* (footnote omitted).
[6] *Id.*
[7] *Id.* at *1-2.
[8] *Id.* at *2.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Zalesin, *supra* note 1.

the "Harrisburg Area." The first step of the Clayton Act analysis is the determination of the relevant market, which is composed of a relevant product market and a relevant geographic market.[14] The relevant product market in *Hershey* was undisputed and stipulated to by the parties: general acuity services ("GAC") sold to commercial payors.[15] The determination of the relevant geographic market is a highly fact-sensitive inquiry into the commercial realities faced by consumers.[16] The relevant geographic market "is the area in which a potential buyer may rationally look for the goods or services he or she seeks."[17] Further elaborating, Judge Jones stated that "[t]he end goal in [the relevant geographic market] analysis is to delineate a geographic area where, in the medical setting, few patients leave . . . and few patients enter."[18] The district court, the hospitals, and the FTC all agreed that the "hypothetical monopolist test" applied, which "defines a relevant geographic market as the smallest area in which a hypothetical monopolist could profitably raise prices by a small but significant amount for a meaningful period of time."[19]

The FTC defined its proposed relevant geographic market as "roughly equivalent to the Harrisburg Metropolitan Statistical Area (Dauphin, Cumberland and Perry Counties) and Lebanon County."[20] Citing the "commercial realities facing patients and payors[,]" the district court rejected this proposed relevant geographic market. In 2014, 43.5 percent of Hershey's patients (*i.e.*, 11,260 people) traveled to Hershey from outside of the "Harrisburg Area," and several thousand of Pinnacle's patients traveled to Pinnacle from outside of the "Harrisburg Area" as well.[21] The district court further noted that "half of Hershey's patients travel at least thirty minutes for care, and 20% travel over an hour to reach Hershey, resulting in over half of Hershey's revenue originating outside of the Harrisburg area."[22] Contrary to the FTC's assertions, Judge Jones determined that GAC services are not inherently local, and that the FTC's proposed relevant geographic market was too narrowly drawn.[23]

In applying the hypothetical monopolist test, the district court noted that the hospitals entered into agreements with central Pennsylvania's two largest payors, who represent 75-80% of the hospitals' commercial patients, to maintain existing rate structures for five and ten years, respectively.[24] These contracts constrained the hospitals' ability to impose a small but significant and non-transitory increase in price ("SSNIP"). Again referencing the practical realities of the healthcare market as it currently exists, Judge Jones wrote:

> [T]he FTC is essentially asking the Court [to] prevent this merger based on a prediction of what might happen to negotiating position and rates in 5 years. In the rapidly-changing arena of healthcare and health

[14] *Hershey I*, 2016 BL 147000, at *3.
[15] *Id*.
[16] *Id*.
[17] *Id*. (citations omitted) (internal quotation marks omitted).
[18] *Id*. at *4 (citations omitted) (internal quotation marks omitted).
[19] *Id*. at *3 (citation omitted) (internal quotation marks omitted).
[20] *Id*.
[21] *Id*. at *4.
[22] *Id*.
[23] *Id*.
[24] *Id*. at *5.

> insurance, to make such a prediction would be imprudent, and as such, we do not find that the outcome of the hypothetical monopolist test aids the FTC in this matter.[25]

Although the district court's conclusion that the FTC did not establish a proper relevant geographic market was dispositive to its decision that the preliminary injunction should not issue, the district court nevertheless analyzed several equitable considerations that tipped the ruling further in the hospitals' favor. First, the district court noted Hershey's capacity constraints; Hershey faced ongoing overcrowding problems and presented testimony that it would be forced to undergo an expansion at the cost of $277 million (at least some of which would be passed on to patients) to keep up with the demand for care if the merger did not go forward.[26] By contrast, the merger would immediately expand Hershey's capacity without requiring a significant capital investment.[27]

Second, the district court found that competition has been growing in the market in which Hershey and Pinnacle exist, and that other hospitals in the region have already been repositioning to achieve growth.[28] As a result, the merger would be unlikely to generate substantial price increases due to the presence of meaningful competition.[29] Third, the district court determined that the merger would better position the hospitals for the shift to risk-based contracting,[30] a shift that the government encourages.[31] Finally, the district court admitted that the main consideration in the balancing of the equities is the public interest in the effective enforcement of antitrust laws, but nonetheless found that the majority of the equity factors weighed in favor of the merger.[32]

In concluding his opinion, Judge Jones wrote these memorable words, reemphasizing his holistic view of the merger within the broader healthcare context:

> Our determination reflects the healthcare world as it is, and not as the FTC wishes it to be. We find it no small irony that the same federal government under which the FTC operates has created a climate that virtually compels institutions to seek alliances such as the Hospitals intend here. Like the corner store, the community medical center is a

[25] *Id.*
[26] *Id.* at *7.
[27] *Id.* at *8. The district court also found it compelling that, in the event of the merger, Hershey would be able to transfer many of its lower-acuity patients to Pinnacle, and thus would be in a position "to admit more high-acuity patients who will benefit from Hershey's greater offering of complex treatments and procedures." *Id.* The district court viewed this as an immediate benefit to consumers.
[28] *Id.* at *9-10.
[29] *Id.*
[30] The Third Circuit described risk-based contracting as a means by which:

> [H]ealthcare providers bear some financial risk and share in the financial upside based on the quality and value of the services they provide. Consider the following hypothetical example: A payor would pay the hospital $300 per member per month to care for a member. If the patient is generally in good health and goes to the doctor once per year, the hospital still receives the $300/month payment and can keep the excess. But if the patient is sick and requires much more expensive treatment, the hospital still receives only $300/month and must bear the excess cost.

Hershey II, 2016 BL 317602, at *19 n.10.
[31] *Hershey I*, 2016 BL 147000, at *10-11.
[32] *Id.* at *11.

charming but increasingly antiquated concept. It is better for the people they treat that such hospitals unite and survive rather than remain divided and wither.[33]

C. The Third Circuit's Opinion

The Third Circuit came to a starkly different conclusion in a unanimous opinion: it reversed the district court's opinion on the basis of fundamental legal errors in its formulation and application of the hypothetical monopolist test, and remanded with instructions to enter the preliminary injunction requested by the FTC.[34] As to the formulation of the applicable test to determine the relevant geographic market, the circuit court found that the district court actually applied a test used in non-healthcare markets, known as the Elzinga-Hogarty test, although it purported to apply the hypothetical monopolist test.[35] According to the Third Circuit, in applying the Elzinga-Hogarty test, the district court improperly relied on patient flow data, which the circuit court said results in overbroad markets in the context of hospitals.[36] In other words, the circuit court disagreed with the district court's characterization of the relevant geographic market as "an area where few patients leave and few patients enter" as inappropriate in the context of the hypothetical monopolist test.[37]

In addition to its improper formulation of the hypothetical monopolist test, the Third Circuit found that the district court improperly applied the test. First, the circuit court stated that "the District Court failed to properly account for the likely response of insurers in the face of a SSNIP" by focusing on patient response.[38] Unlike other single-stage product markets, the healthcare market has two stages of competition: hospitals compete to be included in a payor's network, and then hospitals compete to attract individual patients who belong to that payor's health plan.[39] As such, insurers bear the immediate impact of price increases, which may then be passed onto patients via higher premiums, but which will be spread among all patients in the health plan.[40] According to the Third Circuit, "*[t]his* is the commercial reality of the healthcare market as it exists today[,]" and the district court failed to take into account this added complexity in finding that patients would bear the primary brunt of increased prices.[41]

The circuit court identified another error in the district court's application of the hypothetical monopolist test: it improperly considered the private agreements between the hospitals and the two predominant insurers in central Pennsylvania that would maintain existing rate structures for five and ten years, respectively.[42] The hypothetical monopolist test is called that for a

[33] *Id.*
[34] *Hershey II*, 2016 BL 317602, at *2, *6-7.
[35] *Id.* at *8.
[36] *Id.* In addition to an improper reliance on patient inflow data, the Third Circuit also found that the district court improperly failed to consider patient outflow data, which showed that 91 percent of patients who live in Harrisburg receive GAC services in the Harrisburg area, and in doing so created a "misleading picture" of the relevant geographic market. *Id.* at *10.
[37] *Id.* at *8-9; *see also supra* note 18 and accompanying text.
[38] *Id.* at *10.
[39] *Id.*
[40] *Id.* at *10-11.
[41] *Id.* at *11 (emphasis added).
[42] *Id.* at *12; *see also supra* notes 24-25 and accompanying text.

reason—it requires courts to consider "whether a *hypothetical* monopolist could profitably impose a SSNIP."[43] If parties considering a merger could simply enter into private agreements (which may or may not ultimately be enforceable) to broaden the relevant geographic market, they would be able to evade enforcement of the antitrust laws.[44]

Importantly, the Third Circuit emphasized the narrowness of its holding:

> We are not suggesting that the hypothetical monopolist is the only test that the district courts may use in determining whether the Government has met its burden to properly define the relevant geographic market. In our case, the District Court, the Hospitals, and the Government all agreed that the hypothetical monopolist test was the proper standard to apply. The District Court identified the standard and purported to apply it. But in doing so, it incorrectly defined and misapplied that standard. This was error.[45]

The circuit court did not, however, identify which other test would apply if the hypothetical monopolist test did not. Applying its proper formulation of the hypothetical monopolist test, the Third Circuit concluded that the merger would increase the hospitals' bargaining leverage such that the merged Hershey-Pinnacle entity could profitably impose a SSNIP on payors, and thus that the four-county Harrisburg area was the proper geographic market.[46]

The circuit court also evaluated the same efficiencies considerations as the district court but came to the opposite conclusion: the hospitals' claimed efficiencies were insufficient to rebut the presumption of anticompetitiveness.[47] First, the Third Circuit found that the evidence was "ambiguous at best" that Hershey needed to engage in a $277 million expansion project to address its claimed capacity constraints.[48] Second, the circuit court found that the hospitals could effectively engage in risk-based contracting as independent entities.[49] Finally, the Third Circuit found that the ability of other hospitals in the region to reposition and grow is not so great that these other hospitals would be able to constrain post-merger prices.[50] Most importantly, the Third Circuit concluded that none of these purported efficiencies could overcome the public's interest in the vigorous enforcement of antitrust laws.[51] In an apparent rebuke of Judge Jones's attention to contextual factors, such as the ACA and Medicare and Medicaid reimbursement, the circuit court recognized that mergers may be beneficial to the success of some hospital systems, but stated that "[o]pining on the soundness of any legislative policy that may have compelled the Hospitals to undertake this merger is not within our purview."[52]

[43] *Hershey II*, 2016 BL 317602, at *12 (emphasis added).
[44] *Id*. at *12-13.
[45] *Id*. at *13.
[46] *Id*. at *13-15.
[47] This presumption of anticompetitiveness was established by an undisputed post-merger Herfindahl-Hirschman Index ("HHI") of 5,984—"more than twice that of a highly concentrated market." *Id*. at *15-16. HHI measures market concentration, and the government can establish a prima facie case based solely on high HHI numbers. *Id.* at *15.
[48] *Id*. at *19.
[49] *Id*. at *19-20.
[50] *Id*. at *20-21.
[51] *Id*. at *22.
[52] *Id*.

III. Conclusion and Looking Forward

In reviewing the district court's opinion and the subsequent Third Circuit opinion reversing it, one might conclude that the two courts were evaluating entirely different proposed mergers in entirely different geographic markets. While the district court described a market in which patients were willing to travel, prices were guaranteed to remain stable, and efficiencies from the hospital merger would be substantial, the circuit court described a local market in which a merger would spike prices without an increase in quality. These divergent opinions raise more questions than they answer: What test applies to determine the relevant geographic market? If not the hypothetical monopolist test, then what test applies? How much should contextual factors bear on the court's determination of whether a merger violates the antitrust laws? How relevant is the financial impact on patients, the ultimate consumers of hospital services, as compared to the financial impact on health insurers? Without further legislative, judicial, and administrative guidance, the answers to these questions remain unclear.

What is clear is that hospitals considering mergers cannot properly evaluate their next steps without this much-needed guidance. Following the Third Circuit's mandate that a preliminary injunction blocking the proposed Hershey-Pinnacle merger be entered, the hospitals "decided to end their integration efforts, citing 'the time and cost associated with continuing litigation'" over two years after they first signed the letter of intent.[53] Administrative and judicial review of proposed mergers will always be a necessary part of the pre-merger process, but with clearer guidance from Supreme Court, Congress, and the relevant administrative bodies, hospitals would be in a better position to avoid the massive cost and burden associated with years-long investigations into and litigations of considered mergers that may ultimately have to be abandoned (not to mention the third parties, particularly health insurers, who often get swept into costly and lengthy investigations into and litigations of proposed hospital mergers). In the continuously evolving healthcare landscape, merger-seeking hospitals would benefit from such guidance.

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[53] Alex Wolf, *Pa. Hospital Systems End Merger Plan After 3rd Circ. Defeat*, LAW360 (Oct. 14, 2016), http://www.law360.com/articles/851930/print?section=competition.

Towards A More Transparent Class Settlement: The Proposed Amendments To Rule 23 And The Effect Of Sealed Court Filings On Class Settlements

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In August 2016, the Judicial Conference Committee on Rules of Practice and Procedure (known as the "Standing Committee") published for public comment proposed amendments to a slate of federal rules, including significant amendments to Rule 23 of the Federal Rules of Civil Procedure.[1] Many of the proposed amendments to Rule 23 would make the class action process more transparent to absent class members, including the processes applicable to settlement, notice, and approval.

That push toward transparency is timely. Earlier this summer, the Sixth Circuit reminded the antitrust bar of one potential consequence of inadequate transparency in class settlements, when it vacated the district court's approval of a class settlement in which many of the key documents had been sealed in the district court proceedings. Specifically, in *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*,[2] the Sixth Circuit vacated the district court's approval of the settlement in that case, as well as all of its orders sealing documents in the record, and remanded the case to the district court to begin the Rule 23(e) process anew.

Although the issues surrounding the sealing of court records in a class action (such as those present in *Shane Group*) are not directly at issue in the proposed amendments to Rule 23, both the proposed amendments and the *Shane Group* decision suggest that courts will increasingly focus on making the class settlement process as transparent as reasonably possible to absent class members and other members of the public. This article discusses how the proposed amendments to Rule 23 and the Sixth Circuit's treatment of sealed filings in *Shane Group* facilitate transparency in settling class actions.

I. Proposed Amendments to Rule 23

A. Rules Amendment Process

In 2011, the Advisory Committee on Civil Rules ("Civil Rules Committee") formed a Rule 23 Subcommittee to discuss potential amendments to that rule. Since

[1] *See generally* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure (hereinafter, "Proposed Rules Package"), August 2016, *available at* http://www.uscourts.gov/file/20163/download. The Standing Committee also published proposed amendments to Rules 5, 62, and 65.1 of the Federal Rules of Civil Procedure, as well as various amendments to portions of the appellate rules, rules of evidence, and criminal rules. *Id*.

[2] 825 F.3d 299 (6th Cir. 2016).

then, the Rule 23 Subcommittee has considered a number of potential areas of revision—rejecting some, tabling others, and, for those topics it decided warranted continued assessment, evaluating alternative strategies for addressing emerging procedural issues. The Rule 23 Subcommittee then submitted its proposals to the Advisory Committee on Rules of Civil Procedure, which considered the proposals, made slight modifications, and recommended the resulting proposals to the Standing Committee for publication.

Now that the proposals have been published, the public may submit written comments on them through February 15, 2017. During the comment period, the Civil Rules Committee will hold three public hearings in locations around the country.

Following the public comment period, the Civil Rules Committee will decide whether to submit the proposed amendments to the Standing Committee for consideration. The Standing Committee would then independently review the proposals and decide whether to recommend them (with or without any changes) to the Judicial Conference, which may in turn recommend the proposals to the Supreme Court. If the Supreme Court concurs with the proposed amendments, it will promulgate them before May 1, to take effect no earlier than December 1 of that same year, unless Congress intervenes. Thus, the proposed Rule 23 amendments would take effect—whether with or without revision—no earlier than December 1, 2018.[3]

B. Matters Not Included In The Rule 23 Proposals

The Rule 23 Subcommittee considered, but abandoned, amendments concerning the topics of cy pres awards and the certification of "issue classes" under Rule 23(c)(4). And it has, at least for now, placed on hold consideration of amendments concerning "picking off" named plaintiffs through Rule 68 offers of judgment and the ascertainability of the proposed class. Because case law in those areas continues to develop, the Rule 23 Subcommittee deferred consideration of amendments on those subjects, although it may revisit those topics in the future.

C. Proposals Open For Comment

The proposed amendments to Rule 23 promote a goal of transparency of class settlements in several important ways, including a requirement that the parties provide more information to the court at an earlier point in time, as well as additional measures to improve notice to class members and to deter extortionate objection practices.

1. Clarifying Class Notice Requirements Under Rule 23(c)(2)(B)

The current Rule 23(c)(2)(B) governs notice to a class certified under Rule 23(b)(3). Under the proposal, Rule 23(c)(2)(B) would be amended in two ways.

The first proposed amendment would expressly provide that the Rule 23(c)(2)(B) notice provision, including the requirement that the notice

[3] *See* Memorandum dated Aug. 12, 2016 from The Hon. Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure to The Bench, Bar, and Public, Re: Request for Comments on Proposed Rules Amendments, published in Proposed Rules Package at *4.

describe the deadline and process for opting out, also applies when the court directs notice under Rule 23(e)(1) to a proposed Rule 23(b)(3) settlement class.[4] The practice of sending notice simultaneously under Rules 23(c)(2)(B) and 23(e)(1) is already common, but the Rule 23 Subcommittee expressed a concern that, "without the amendment, [it] may seem to be unauthorized" because while Rule 23(c)(2) applies to classes that have been certified, the so-called "preliminary certification" courts make before sending notice to a proposed settlement class under Rule 23(e)(1) "is not really certification."[5] To the extent the current Rule 23(c)(2)(B) does not explicitly authorize sending combined notice and setting an opt-out date in the notice disseminated under Rule 23(e)(1), this proposed amendment would recognize the propriety of that practice. The draft Committee Note explains that requiring successive notices to the class can be costly, wasteful, and confusing to class members. Sending combined notice would avoid those problems and would make the processes of settlement approval, as well as opportunities for objection and exclusion, more transparent to class members.[6] That is particularly true when considered in connection with the proposed amendments to Rule 23(e) discussed below, which require the parties to a proposed settlement to provide the court with sufficient information to conclude that the proposed settlement likely will win final approval.

The second proposed amendment to Rule 23(c)(2) would confirm that notice may be sent by means other than U.S. mail, including by electronic means, where "appropriate." The draft Committee Note makes clear that the rule's standard of requiring "the best notice practicable under the circumstances" remains unchanged, and that courts must exercise their discretion to determine what constitutes an appropriate form of notice in a particular case.[7] Some courts already have demonstrated a level of comfort with electronic or other more contemporary methods of notice, which may be more effective and are often less costly than notice by mail. But other courts have interpreted the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*,[8] to require that individual notice always be sent by first class mail.[9] The proposed amendment would provide courts flexibility to account for any relevant factors in determining what form notice should take, including technological developments, class members' access to those technologies, anticipated rates of actual delivery, and the likelihood that class members will pay attention to a particular form of communication. The draft Committee Note also stresses that in determining the "best notice that is practicable," the court should scrutinize the content and format of the notice as well as the means of dissemination.[10] This emphasis on how to most effectively communicate with class members reflects that "[t]he ultimate goal of giving notice is to enable class members to make informed decisions about whether to

[4] Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23, published in Proposed Rules Package, at 211 (hereinafter "Draft Rule 23").
[5] Draft Minutes of the Civil Rules Advisory Committee, Apr. 14, 2016, at 8, available at http://www.uscourts.gov/file/19871/download at *496.
[6] Rule 23 draft advisory committee note, published in Proposed Rules Package at 218 (hereinafter "Draft Advisory Committee Note").
[7] *Id*. at 219.
[8] 417 U.S. 156 (1974).
[9] Draft Advisory Committee Note at 218.
[10] *Id*. at 219-20.

opt out or, in instances where a proposed settlement is involved, to object or to make claims."[11]

2. Frontloading Information About Proposed Settlements Under Rules 23(e)(1) and (e)(2)

A set of proposed amendments to Rule 23(e) are aimed at "frontloading" the parties' provision of information to the court, and subsequently to the class, about a proposed settlement. The introductory paragraph would be amended to make clear that Rule 23(e) applies not only where a class previously has been certified, but also where the court has not yet certified a class at the time a proposed settlement is presented to the court. A new subsection (e)(1)(A) would require the parties to "provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class."[12] And a new subsection (e)(1)(B) would require the court to direct notice to the class only if "justified by the parties' 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."[13]

The draft Committee Note explains that ordinarily, proponents of the settlement should provide the court "with all available materials they intend to submit in support of approval under Rule 23(e)(2). That would give the court a full picture and make this information available to the members of the class."[14] Earlier drafts of subsection (e)(1) listed 14 specific categories of information parties should provide in support of a motion to give notice to the class, but this approach was abandoned due to commenters' "constant fear that an official list of factors will be diluted in practice to become a simple check-list that routinely checks off each factor without distinguishing those that are important to the specific case from those that are not."[15] Instead, the proposed amendments simply direct the parties to provide "sufficient" information, and the draft committee note lists potential categories of information, noting that although "a great variety of types of information might appropriately be" submitted to the court, "[a] basic focus is the extent and type of benefits that the settlement will confer on the members of the class."[16] In practice, this amendment is unlikely to significantly alter submissions from sophisticated counsel, who commonly already include the level of detail called for by the amendments; rather the amendment is directed toward "less sophisticated practitioners" who "need more guidance in the rule."[17]

The current Rule 23(e)(2) provides that the court may approve a proposed settlement that would bind class members only upon a finding that the settlement "is fair, reasonable, and adequate." Proposed amendments to

[11] *Id*. at 220.
[12] Draft Rule 23 at 212.
[13] *Id*. at 213.
[14] Draft Advisory Committee Note at 221.
[15] Minutes, Civil Rules Advisory Committee, Nov. 5, 2015, at 7, available at http://www.uscourts.gov/file/19844/download ("November Minutes").
[16] Draft Advisory Committee Note at 222.
[17] November Minutes at 7 (internal quotation omitted); *see also id*. at 8 ("A Committee member said that the draft rule reflects what has become 'procedural common law.' Judges created this procedure. The Manual for Complex Litigation adopts it. . . . The proposal is to have the rule say what many think it says now" because "too often, in the hands of those who are not familiar with Rule 23 practice, the important information comes out too late.") (internal quotations omitted).

subsection (e)(2) would not alter that standard, but would list factors the court must consider in making that determination.[18] Those criteria—the adequacy of the class representatives and class counsel; whether the proposal was negotiated at arm's length; whether the relief is adequate given the risks of continued litigation, the effectiveness of distributing relief to the class, the terms of any approved attorneys' fees, and any side agreement that exists; and whether class members are treated equitably relative to one another—are not intended to displace the lists of factors developed by the various circuit courts, "but rather 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."[19]

3. Deterring Bad-Faith Objectors Under Rule 23(e)(5)

A number of amendments to Rule 23(e)(5) have been proposed to deter bad-faith objectors to class settlements. The draft comment to the rule describes the problem to be remedied:

> [S]ome objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to exact tribute to withdraw their objections or dismiss appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors.[20]

Under the proposed amendments, an objection would be required to state whether it applies only to the objector, a subset of the class, or to the class as a whole, and also to "state with specificity the grounds for the objection."[21] This detail would "enable the parties to respond to [objections] and the court to evaluate them."[22] Failure to provide needed specificity "may be a basis for the court to reject an objection."[23] Furthermore, the amendments would prohibit the practice of giving payment or other consideration to an objector or objector's counsel for withdrawing an objection or dropping an appeal from a judgment approving the settlement, unless the arrangement is approved by the court following a hearing.[24] Because the court of appeals has jurisdiction over an objector's appeal from the time it is docketed in the court of appeals, the proposed Rule 23(e)(5)(C) would permit the district court to make an indicative ruling under Rule 62.1 on whether to permit the payment of consideration to an objector.[25] The requirement of court approval for withdrawal of any objection would be deleted,[26] in recognition that "an objector should be free to withdraw on concluding that an objection is not justified."[27]

[18] Draft Rule 23 at 213-14. The proposed amendment also would make clear that approval under subsection (e)(2) is required only when class members would be bound under Rule 23(c)(3). *See id*. at 213; Draft Advisory Committee Note at 225.
[19] Draft Advisory Committee Note at 224.
[20] *Id*. at 229.
[21] Draft Rule 23 at 216.
[22] Draft Advisory Committee Note at 228.
[23] Draft Advisory Committee Note at 229.
[24] Draft Rule 23 at 216.
[25] *Id*. at 216-17.
[26] *Id*. at 215.
[27] Draft Advisory Committee Note at 228.

4. Class Notice Not Subject To Appeal Under Rule 23(f)

Consistent with the proposed amendments to Rule 23(e)(1), which make clear that the decision to send notice of a proposed settlement to a class that has not yet been certified is not itself a grant or denial of class certification, proposed amendments to Rule 23(f) clarify that the decision to send notice is not subject to appeal.[28] That proposal is consistent with the Third Circuit's conclusion in *In re National Football League Players Concussion Injury Litigation* that it lacked jurisdiction over such an attempted appeal by objectors,[29] and seems to reflect a desire to guard against the possibility that other litigants may seek multiple bites at the apple by attempting a similar maneuver in other cases.[30]

This proposed amendment has two primary implications for transparency to the class. First, it avoids the potential for unnecessary delay in disseminating class notice, and all the detail that notice would include[31]—including, for notice given simultaneously under Rule 23(e)(1) and Rule 23(c)(2)(B), a proposed claim form.[32] Particularly when claimants must provide proof of purchase or detailed transactional information, undue delay in disseminating notice and claim forms can hinder class members' ability to effectively submit claims, as records are lost or memories fade. Second, the proposed amendment would cut off one potential avenue for frivolous appeals by objectors, allowing class members who wish to monitor the status of the litigation to focus on substantive matters.

II. Judicial Sealing Of Class Settlement Documents

Like many of the proposed amendments to Rule 23, which would make the class-settlement process more transparent to absent class members, the Sixth Circuit's recent decision in *Shane Group* highlights the importance of ensuring that absent class members have access to information that will help them "make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims."[33] In that case, the district court sealed most of the substantive filings in the case,[34] including the class certification motion and the report of the plaintiffs' expert.[35] Objectors argued, among other things, that their lack of access to these documents impaired their ability to assess the fairness of the settlement.[36] The district court approved the settlement despite those objections.[37] On appeal, the Sixth Circuit criticized what it believed was the over-sealing of the district court record and vacated the approval of the settlement as well as all of the district court's orders sealing documents in the record.[38]

The Sixth Circuit distinguished between the wide latitude parties generally enjoy during discovery to maintain the secrecy of certain documents, versus the

[28] Draft Rule 23 at 217; Draft Advisory Committee Note at 231.
[29] 775 F.3d 570, 588 (3d Cir. 2014).
[30] November Minutes at 9.
[31] *See supra* notes 10-11 and associated discussion.
[32] Draft Advisory Committee Note at 220.
[33] Draft Advisory Committee Note at 220.
[34] *Shane Group*, 825 F.3d at 302.
[35] *Id*. at 304, 306.
[36] *Id*. at 304.
[37] *Id*. at 304.
[38] *Id*. at 309, 311.

public's strong interest in obtaining access to those same documents once they are filed with the court.[39] In antitrust cases, the public has an interest not only in the result of the litigation, but also the conduct giving rise to the case;[40] in such cases, "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption."[41] And in a class action—"where by definition some of the members of the public are also parties to the case—the standards for denying public access to the record should be applied with particular strictness."[42] Given the particular importance of open judicial records in antitrust class actions, the Sixth Circuit concluded that "[c]lass members cannot participate meaningfully in the process contemplated by Federal Rules of Civil Procedure 23(e) unless they can review the bases of the proposed settlement and other documents in the court record. . . . The Rule 23(e) objection process seriously malfunctioned in this case, and that is reason enough to vacate the district court's approval of the settlement."[43]

As is commonly the case in antitrust cases, it seems that the district court filings were sealed largely as a downstream effect of defendants and third parties broadly designating documents and depositions as confidential during discovery.[44] When facts developed in those materials inevitably make their way into briefs, exhibits, and expert analyses, plaintiffs often defer to defendants' designations and seek to seal their filings rather than spend time and goodwill disputing them, even if they do not agree with the confidentiality designation in the first instance. There is no doubt that the result in *Shane Group* will discourage such deference, particularly in the context of class settlements, as it shifts the focus from whether a party would prefer to maintain the secrecy of certain information, and to the interest of the public—including absent class members—in understanding and evaluating the basis of the settlement.

III. Conclusion

The proposed amendments to Rule 23 have not yet been adopted, and if they are, they would not take effect until December 2018. But they, like the Sixth Circuit's decision in *Shane Group*, suggest a keen focus on making the process of class settlement as transparent as possible for absent class members.

[39] *Id*. at 305.
[40] *Id*. at 305.
[41] *Id*. (internal quotation omitted).
[42] *Id*. (internal quotation and ellipsis omitted).
[43] *Id*. at 309.
[44] *Id*. at 306.