

# Fourth Circ.'s Allen Trust Opinion: A New Class Action Primer

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On March 15, the U.S. Court of Appeals for the Fourth Circuit issued what is likely to become an oft-cited instruction manual for Rule 23(b)(3) class action certification and settlement in the circuit.

In *1988 Trust for Allen Children Dated 8/8/88 v. Banner Life Insurance Co.*, the court affirmed U.S. District Court for the District of Maryland Judge Richard D. Bennett, in a three-part treatise covering (1) the burden of proof faced by objecting class members; (2) class certification; and (3) class action settlement approval.

The panel comprised Judges Diana Gribbon Motz, Allison Jones Rushing, and Henry Floyd. Judge Motz wrote the opinion.

The case was filed in 2016 by a proposed class of life insurance policyholders who sued Banner Life Insurance Co. and the William Penn Life Insurance Co. of New York, alleging that the insurance companies “dramatically” — and fraudulently — increased cost-of-insurance, or COI, charges in an attempt to alleviate their own liquidity issues.

Banner denied the allegations. After three years of litigation and protracted discovery, the parties agreed to a class settlement, which the district court preliminarily approved on Oct. 17, 2019.

Of over 10,000 class members, the Allen Trust was the only policyholder that objected to the class settlement. The Allen Trust alleged that it bought the same kind of life insurance policy as the other class members, but that its agreement with Banner differed.

Specifically, the Allen Trust's agreement would cause its COI increase in one huge spike after 20 years of unchanged payments, whereas the class representatives' unlawfully high COI charges had occurred on a rolling basis. The Allen Trust — which previously filed a separate putative class action against Banner in the U.S. District Court for the Northern District of California — objected to the settlement agreement's release of claims against Banner, arguing that the “deficit account harm” it experienced would not manifest until its forthcoming balloon payment in year 21.

The Allen Trust's objection did not fall on deaf ears at the district court. Indeed, the district court took the unusual step of permitting discovery into whether the parties' settlement agreement actually contemplated the alleged

deficit account harm.

Notwithstanding four interrogatories and a deposition, however, the district court ultimately approved the class settlement agreement over the Allen Trust's objection.

On appeal, the Fourth Circuit confronted three distinct inquiries: (1) the applicable burden of proof governing objections under Rule 23(e)(5); (2) whether the district court abused its discretion when it certified the settlement class; and (3) whether the district court abused its discretion when it approved the class settlement agreement.

### **Burden of Proof**

On appeal, the Allen Trust added an argument that the district court “improperly placed upon it the burden of overcoming the settlement.” After acknowledging that the Fourth Circuit had “never clearly described who bears what burdens when a class member objects to a proposed settlement,” the court outlined the roles and responsibilities of the objector, the settling parties, and the district court.

First, an objecting class member “must state the basis for its objection with enough specificity to allow the parties to respond and the court to evaluate the issues at hand;” a requirement that it said is “somewhat analogous” to pleading requirements under Rule 8.

Second, the settling parties not only bear the initial burden of proving that their agreement is “fair, reasonable, and adequate,” as Rule 23(a) requires, but they must also refute a sufficiently specific objection. The court asserted that “[t]he showing necessary to prevent an objection from derailing a settlement will, of course, vary with the strength of the objection itself; frivolous objections may need very little to overcome them, while weightier objections will require more.”

Third, the district court remains a fiduciary of the class, protecting its interests against “parties and counsel overeager to settle” on one hand, and against frivolous objectors on the other.

With this framework in mind, the court concluded that the district court did not do “anything different from what [the court] just outlined,” when it “required the Allen Trust to specify and support its objection while keeping the ultimate burden on the proponents of the settlement to demonstrate its fairness.”

### **Class Certification**

The Fourth Circuit's class certification analysis tracked Rule 23(a)'s well-known prerequisites — numerosity (which was undisputed), commonality, typicality, and adequacy. But the court also reiterated that, in the Rule 23(b)(3) context, commonality is “subsumed under, or superseded by, the more stringent ... requirement that questions common to the class predominate over other questions.”

Putting it differently, the court asserted that, “in a Rule 23(b)(3) case, the predominance inquiry focuses not only on the existence of common questions, but also on how those questions relate to the controversy at the heart of the litigation.”

Next, satisfied that common issues of law and fact did predominate, the court tersely resolved the typicality prong in a single paragraph, noting that “the commonality and typicality requirements of Rule 23(a) tend to merge.”

Finally, with regard to adequacy, the court emphasized that class counsel’s competence is a necessary component of its inquiry, but that attorney competence alone is not sufficient. A district court must also determine whether any conflicts of interest exist “between named parties and the class they seek to represent.” A conflict of interest that is “merely speculative or hypothetical” does not suffice.

The court’s salient determination was that, because their COI charges were of the same magnitude, even if accrued differently, the Allen Trust’s claims were similar enough to the other class members’ that common questions predominated.

And, in finding that class counsel met Rule 23(a)(4)’s adequacy requirement, the court found that any alleged conflict of interest was “entirely speculative,” because the Allen Trust’s balloon payment would occur in the future, and only if (a) it chooses to keep the policy in effect, and (b) its insured “survive to age of 96.” (The court expressed its “hope that the insured enjoys a long life.”)

Notably, unlike the rest of the opinion, the adequacy analysis was not unanimous — Judge Rushing wrote separately to note her view that the Allen Trust forfeited its adequacy challenge and, therefore, that the court should not have reached the merits.

### **Class Settlement Agreement Approval**

The court confirmed that the district court “acts as a fiduciary for the class” when it reviews a class action settlement, and that approval is only warranted if a settlement agreement is “fair, reasonable, and adequate.” The court addressed each element distinctly.

First, determining whether a class action settlement is fair requires a four-part inquiry into “(1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of the class action litigation.”

Next, reasonableness, unlike fairness, is not subject to enumerated factors, but instead “involves examining the amount of the settlement,” to determine whether it “at least ensures that the amount on offer is commensurate with the scale of the litigation and the plaintiffs’ chances of success at trial.”

Finally, adequacy involves: (1) the relative strength of the plaintiffs’ case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendant and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement.

Moreover, the court held, “as a general matter, a settlement agreement may be inadequate if it forces class members to release valuable claims for nothing in return.”

The court affirmed the district court's settlement agreement approval rather summarily in comparison to its extended analysis of class certification issues. The court found the class settlement agreement was fair because it "resulted from non-collusive arm's-length negotiations conducted in good faith by [experienced] counsel."

It was reasonable based on the \$40 million settlement fund as a whole, not whether the \$100 minimum payment to each class member was satisfactory on an individual basis — including with regard to the Allen Trust. Finally, it was adequate because the Allen Trust did not "give up something for nothing" — that is, at the time of approval, "the Allen Trust did not have a claim at all, and so was not really giving up very much."

## Going Forward

For the foreseeable future, *Allen Trust* should govern class certification in the Fourth Circuit, at least for Rule 23(b)(3) classes. The panel seems to have purposefully crafted a comprehensive class action reference guide.

Not only does *Allen Trust* consolidate the court's prior class action opinions into one place, it repeatedly cites the fifth edition of the treatise "Newburg on Class Actions" — and, in doing so, converts portions of this secondary source into binding precedent within the circuit.

*Allen Trust* addresses each of the three major issues that dominate class action litigation.

First and foremost, the court identifies the standards governing class action settlement objections. This is a welcome development, as objections, and objectors, have become increasingly routine and sophisticated. The court's guidance will help parties navigate the class action settlement process with an eye toward how the district court will review potential objections.

Next, *Allen Trust* adds to a growing body of case law over the past 10 to 15 years in which the judiciary has emphasized that all aspects of class certification are important, even when classes are certified solely for the purpose of settlement, and subject to the rigorous analysis required by [Wal-Mart Stores Inc. v. Dukes](#).

Finally, district courts have closely scrutinized class action settlements over the past decade, and *Allen Trust* underscores that class settlement approval is not a slam dunk. Courts will look for collusion, and for settlements that are not in the best interests of class members — and litigants should expect their agreement to be held to a demanding standard.

In the end, district courts and practitioners alike should benefit from having the Fourth Circuit's class action standards clearly articulated and in one place, even if they never see eye-to-eye on how the standards apply.

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