ADVISORY COMMITTEE
ON
CIVIL RULES

Salt Lake City, UT
November 5-6, 2015

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November 5-6, 2015

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ADVISORY COMMITTEE ON CIVIL RULES

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Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D DC	Washington, DC	Member: Chair: 2015	---- 2018
John M. Barkett	ESQ	Florida	2012	2017
Elizabeth J. Cabraser	ESQ	California	2010	2016
Benjamin C. Mizer*	DOJ	Washington, DC	----	Open
Robert Michael Dow, Jr.	D	Illinois (Northern)	2013	2016
Joan N. Ericksen	D	Minnesota	2015	2018
Parker C. Folse	ESQ	Washington	2012	2018
Robert Klonoff	ACAD	Oregon	2011	2017
Scott M. Matheson, Jr.	C	Tenth Circuit	2012	2018
Brian Morris	D	Montana	2015	2018
David E. Nahmias	CJUST	Georgia	2012	2018
Solomon Oliver, Jr.	D	Ohio (Northern)	2011	2017
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2010	2016
Virginia A. Seitz	ESQ	District of Columbia	2014	2017
Craig B. Shaffer	M	Colorado	2014	2017
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Richard Marcus Associate Reporter	ACAD	California	1996	Open

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Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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Item 1 will be an oral report.

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 9, 2015

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on April 9, 2015. (The meeting was scheduled to carry over to April 10, but all business was concluded by the end of the day on April 9.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Judge John D. Bates, Chair-designate, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Rebecca A. Womeldorf and Julie Wilson represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq. (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Pamela Gilbert, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; William Butterfield, Esq.; Nathaniel Gryll, Esq., and Michelle Schwartz, Esq. (Alliance for Justice); Andrea B. Looney, Esq. (Lawyers for Civil Justice); Stuart Rossman, Esq. (NACA, NCLC); and Ira Rheingold (National Association of Consumer Advocates).

Judge Campbell opened the meeting by greeting newcomers Acting Assistant Attorney General Benjamin Mizer and Rebecca Womeldorf, the new Rules Committee Officer. He also noted the hope that Sheryl Walter, General Counsel of the Administrative Office, would attend parts of the meeting.

This is the last meeting for Committee members Grimm and Diamond. Deep appreciation was expressed for "both Pauls." Judge Diamond has been a direct and incisive participant in Committee discussions, and has taken on a variety of special tasks, including the task of working with the Internal Revenue Service and the Administrative Office to establish means of paying taxes on funds deposited with the courts that avoided the need to consider amending Rule 67(b). Judge Grimm chaired the Discovery Subcommittee through arduous work, especially including the revision of Rule

37(e) that we hope will take effect this December 1 and advance resolution of disputes arising from the loss of electronically stored information. His contributions in guiding this work were invaluable.

Judge Campbell further noted that Judge Bates has been named by the Chief Justice to become the next chair of this Committee. Judge Bates has recently been Director of the Administrative Office. He also has served as a member of an important parallel committee of the Judicial Conference, the Court Administration and Case Management Committee.

Judge Campbell also reported on the meeting of the Standing Committee in January. The Civil Rules Committee did not seek approval of any proposals at that meeting. But there was a stimulating discussion of pilot projects, a topic that will be explored at the end of this meeting.

Judge Sutton said that this Committee did great work on the Duke Rules package. It will be important to support educational efforts that will guide lawyers and judges toward effective implementation of the new rules. He also noted that the Standing Committee is enthusiastic about the prospect that carefully designed pilot projects will help further advance the goals of good procedure.

Judge Campbell reminded the Committee that the Supreme Court had asked whether a couple of changes might be made in the Committee Notes to the amendments now pending before the Court. The changes were approved by an e-mail vote of the Committee, and were approved by the Judicial Conference without discussion. If the Court approves the amendments and transmits them to Congress, it will be important that the Committee find ways to educate people to use the rules and to encourage all judges to engage in active case management. These efforts are not a sign that the Committee is presuming that Congress will approve the rules if transmitted by the Supreme Court. Instead they will just begin the process of preparing people to implement them effectively. Judge Fogel says that the Federal Judicial Center is ready for judicial education programs. The Committee can help to prepare educational materials that can be used in Judicial Conferences in 2016, in bar associations, Inns of Court, and other forums. The Duke Law School is planning a parallel effort. This work can be advanced by designating a Subcommittee of this Committee. Members who are interested in participating should make their interest known.

A member noted that a package of CLE materials "available for free" would be seized by many law firms for their own internal programs. Judge Fogel noted that the Federal Judicial Center

"really wants to collaborate with this Committee." The Center has two TV studios, and does many video productions. Videos, webinars, and like means can be used to get the word out.

Judge Campbell suggested that it will be good to use Committee alumni to get the word out, especially those who were involved in shaping the proposals. One important need is to say what is intended, to forestall use of the new rules in ways not intended. The Committee Notes were changed in light of the public comments to dispel several common misunderstandings, but ongoing efforts will be important.

October 2014 Minutes

The draft minute of the October 2014 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Rebecca Womeldorf provided the legislative report for the Administrative Office. Two familiar sets of bills have been introduced in this Congress.

The Lawsuit Abuse Reduction Act (LARA) would amend Rule 11 by reinstating the essential aspects of the Rule as it was before the 1993 amendments. Sanctions would be mandatory. The safe harbor would be removed. In 2013 Judge Sutton and Judge Campbell submitted a letter urging respect for the Rules Enabling Act process, rather than undertake to amend a Civil Rule directly.

H.R. 9, the Innovation Act, embodies patent reform measures like those in the bill that passed in the House last year. There are many provisions that affect the Civil Rules. Parallel bills have been introduced in the Senate, or are likely to be introduced. There are some indications that a bipartisan bill will be introduced in the Senate.

A participant observed that informal conversations suggest that some form of patent legislation will pass this year. The President agrees with the basic idea. The question for Congress is to reach agreement on the details.

Judge Campbell noted that H.R. 9 directs the Judicial Conference to prepare rules. Logically, the Conference will look to the rules committees. But the bill does not say anything of the Enabling Act process; the simple direction that the Judicial Conference act seems to eliminate the roles that the Supreme Court and Congress play in the final stages of the Enabling Act process.

Parts of H.R. 9 adopt procedure rules directly, without adding them to the Civil Rules. Discovery, for example, is initially limited to issues of claim construction in any action that presents those issues. Discovery expands beyond that only after the court has construed the claims.

Other parts of H.R. 9 direct the Judicial Conference to adopt rules that address specific points. The rules should distinguish between discovery of "core documents," which are to be produced at the expense of the party that produces them, and other documents that are to be produced only if the requester pays the costs of production and posts security or shows financial ability to pay. These rules also are to address discovery of "electronic communications," which may or may not embrace all electronically stored information. The party requesting discovery can designate 5 custodians whose electronic communications must be produced; the court can order that the number be expanded to 10, and there is a possibility for still more.

A participant suggested that Congressional interest in these matters is inspired by the Private Securities Litigation Reform Act.

Experience with the Bankruptcy Abuse Prevention and Consumer Protection Act was recalled. The Bankruptcy Rules Committee was responsible for adopting interim rules on a truly rush basis, and then for adopting final rules on a somewhat less pressed schedule. The press of work was incredible.

It was agreed that it will be important to keep close track of these bills in order to be prepared to act promptly if urgent deadlines are set.

A matter of potential interest also was noted. The Litigation Section of the American Bar Association will present a resolution on diversity jurisdiction to the House of Delegates this August. The recommendation will be to amend 28 U.S.C. § 1332 to treat any entity that can be sued in the same way as a corporation. Partnerships, limited partnerships, limited liability companies, business trusts, unions, and still other organizations would be treated as citizens of any state under which they are organized and also of the state where they have their principal place of business. The effect would be to expand access to diversity jurisdiction because present law treats such entities as citizens of any state of which any member is a citizen. The reasons for this recommendation include experience with the difficulty of ascertaining the citizenship of these organizations before filing suit, the costs of discovery on these issues if suit is filed, and the particularly onerous costs that may result when a defect in

jurisdiction is discovered only after substantial progress has been made in an action.

Discussion noted that in the Judicial Conference structure, primary responsibility for issues affecting subject-matter jurisdiction lies with the Federal-State Jurisdiction Committee. The Civil Rules Committee cannot speak to these questions as a committee.

One question was asked: How would a court determine the citizenship of a law firm — for example a nationwide, or international firm, with offices in many different places. Can a "nerve center" be identified in the way it may be identified for a corporation?

The conclusion was that if individual Committee members have thoughts about this proposal, they can be taken to the Litigation Section.

Rules Recommended for Adoption

Proposals to amend Rules 4(m), 6(d), and 82 were published for comment in August, 2014. This Committee now recommends that the Standing Committee recommend them for adoption, with a possible change in the Committee Note for Rule 6(d).

RULE 4(m)

Rule 4(m) sets a presumptive limit on the time to serve the summons and complaint. The present rule sets the limit at 120 days; the Duke Package of rule amendments now pending in the Supreme court would reduce the limit to 90 days as part of a comprehensive effort to expedite the initial phases of litigation.

It has long been recognized that more time is often needed to serve defendants in other countries. Rule 4(m) now recognizes this by stating that it does not apply to service in a foreign country under Rule 4(f) or Rule 4(j)(1). These cross-references create an ambiguity. Service on a corporation in a foreign country is made under Rule 4(h)(2). Rule 4(h)(2) in turn provides for service outside any judicial district of the United States on a corporation, partnership, or other unincorporated association "in any manner prescribed by Rule 4(f) for serving an individual," except for personal delivery. It can be argued that by invoking service "in any manner prescribed by Rule 4(f)," Rule 4(h)(2) service is made under Rule 4(f). But that is not exactly what the rule says. At the same time, it is clear that the reasons that justify exempting service under Rules 4(f) and 4(j)(1) from Rule 4(m) apply equally to service on corporations and other entities.

At least most courts manage to reach this conclusion. But many of the comments responding to the proposal to reduce the Rule 4(m) presumptive time to 90 days reflected a belief that the present 120-day limit applies to service on a corporation in a foreign country. It seems wise to amend Rule 4(m) to remove any doubt.

There were only a few comments on the proposal. All supported it.

The proposed amendment is commended to the Standing Committee with a recommendation to recommend it for adoption as published.

RULE 6(d)

Under Rule 6(d), "3 days are added" to respond after service is made in four described ways, including electronic service. The proposal published last August removes service by electronic means from this list. It also adds parenthetical descriptions of service by mail, leaving with the clerk, or other means consented to, so as to relieve readers of the need to constantly refer back to the corresponding subparagraphs of Rule 5(b)(2).

The 3-added days provision has been the subject of broader inquiry, but it has been decided that for the time being it is better to avoid eliminating the 3 added days for every means of service.

For service by electronic means, however, the conclusion has been that the original concerns with imperfections in electronic communication have greatly diminished with the rapid expansion of electronic technology and the growing numbers of people who can use it easily.

This conclusion was challenged by some of the comments. One broad theme is that the time periods allowed by the rules are too short as they are. Busy, even harassed practitioners, need every concession they can get. More specific comments repeatedly complained of "gamesmanship." Electronic filing is delayed until a time after the close of the ordinary business day and after the close of the clerk’s office. Many comments invoked the image of filings at 11:59 p.m. on a Friday, calculated to reach other parties no earlier than Monday.

A more specific concern was expressed by the Magistrate Judges Association. As published, the rule continues to add 3 days after service under Rule 5(b)(2)"(F)(other means consented to)." They fear that careless readers will look back to present Rule 5(b)(2)(E), which allows electronic service only with the consent of the person served, and conclude that 3 days are added because

service by electronic means is an "other means consented to." This is an obvious misreading of Rule 5(b)(2), since (F) embraces only means other than those previously enumerated, including (E)'s provision for service by electronic means. Nonetheless, the magistrate judges have great experience with inept misreading of the rules, and it is difficult to dismiss this prospect out of hand. At the same time, there are reasons to avoid the recommended cures. One would eliminate the parenthetical descriptions added to illuminate the cross-references to subparagraphs (C), (D), and (F). These descriptions have been blessed by the Style Consultant as a useful addition to the rule, and they seem useful. The other would expand the parenthetical to subparagraph (F) to read: "(other means consented to, except electronic service.)" One reason to resist these suggestions is that it seems unlikely that serious consequences will be imposed on a party who manages to misread the rule. A 3-day overrun in responding is likely to be treated leniently. More important is that the proposals to amend Rule 5(b)(2)(E) discussed below will eliminate the consent requirement for registered users of the court's electronic system. The Committee agreed that neither of the recommended changes should be made.

The Department of Justice has expressed concerns about the 3-added days provision, and particularly about the prospect of gamesmanship in filing just before midnight on the eve of a weekend or legal holiday. It has proposed a lengthy addition to the Committee Note to describe these concerns and to state expressly that courts should accommodate those situations and provide additional time to discourage tactical advantage or prevent prejudice. An alternative shorter version was prepared by the Reporter to illustrate possible economies of language: "The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances."

Discussion began with the statement that the Department of Justice feels strongly about adding an appropriate caution to the Committee Note. Some changes might be made in the initial Department draft — the list of examples of filing practices that may shorten the time to respond could be expanded by adding a few words to one example: "or just before or during an intervening weekend or holiday * * *." Their longer language is more helpful than the more compact version. "Our attorneys are often beset by gamesmanship."

A member asked whether there really will be difficulties in getting appropriate extensions of time. His experience is that this

is not a problem, and problems seem unlikely. In any event, the shorter version seems better. The second sentence respects what most courts do.

Another member was "not keen on adding admonitions to judges to be reasonable." This is not a general practice in Committee Notes. If we are to go down this road, it might be better to have a single general admonition in a Note attached to one rule.

A lawyer member reported that he recently had encountered a problem in delivering an electronic message. The recipient's firm had recently installed a new system and the message was sorted out by the spam filter. "Consent comforted me." It took a few days to clear up the difficulty. That leads to the question: when does the clock start? The sensible answer is not from the time of the transmission that failed, but from the time of sending a transmission that succeeded. On the broader question of gamesmanship, "I'm always served Friday afternoon at the end of the day."

A judge member "shares the ambivalence." Does a judge really need to be told to be reasonable? Should Committee Notes go on to suggest reasonable accommodations for extenuating family circumstances, or clinical depression?

Another lawyer member observed that "Judges are busy. They do not notice the abuses I see all the time." Adding to the Committee Note as the Department suggests serves a useful purpose because it implicitly condemns the abuses that judges do not — and should not — see on a regular basis.

Still another judge member suggested that the Department's draft language is opaque. The first sentence says the amended rule is not intended to discourage judges from granting additional time. The final sentence directs them that they should do so. Whatever else can be said, it needs editing.

A judge suggested that "Much of what we do here is to write rules for colleagues who do not do their jobs. Too often this is simply writing more rules for them to ignore. I do keep aware of counsel's behavior." The Duke Rules Package served the need to encourage judges to manage their cases. "We know this already."

The concern with preaching to judges in a Committee Note was addressed by suggesting that the Note could instead address advice to lawyers that they should not be diffident about seeking extensions in appropriate circumstances.

One more judge suggested that the kinds of gamesmanship feared

by the Department "is obviously bad conduct, easily brought to the court's attention." The response for the Department was that "we try not to be whiners about bad lawyers." And the reply was that it can be done without whining.

The Department renewed the suggestion of the member who thought an addition to the Note would be a reminder to lawyers to behave decently. "At least the more economical version is helpful."

Actual practice behavior was described by another member. "Whether or not it's sharp practice, the routine filing is at 11:59 p.m. on Friday, unless the court directs a different time. No one gets to go home until after midnight." It would help to amend the rule to set 6:00 p.m. as the deadline for filing.

This observation was seconded by observing that sometimes late-night filing is bad behavior. Sometimes it is routine habit, or a simple reflection of routine procrastination. Adding something to the Note may be appropriate, but it should be more neutral than the reference to "outside ordinary business hours" in the compact sketch.

Judge Campbell summarized the discussion as showing that three of four practicing lawyers on the Committee say late filing is a common event. The Department says the same. Other advisory Committees are working on the same issue. Rather than work out final Note language in this Committee, it would be good to delegate to the Chair and Reporter authority to work out common language with the other committees, as well as to resolve with them whether anything at all should be added to the Committee Note.

The Committee voted unanimously to recommend the published text of Rule 6(d) for adoption. And it agreed to delegate to the Chair and Reporter responsibility for working with the other committees to adopt a common approach to the Committee Notes.

RULE 82

The published proposal to amend Rule 82 responds to amendments of the venue statutes. It has long been understood that admiralty and maritime actions are not governed by the general provisions for civil actions. When the admiralty rules were folded into the Civil Rules, this understanding was embodied in Rule 82 by providing that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392. The recent statutory amendments repeal § 1392. They also add a new § 1390. Section 1390(b) excludes from the general venue chapter "a civil action in which the district court exercises the jurisdiction conferred by section 1333" over admiralty or maritime claims.

June 2, 2015 version

The proposed amendment provides that an admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390, and deletes the statement that the claim is "not a civil action for purposes of 28 U.S.C. §§ 1391-1392." It was not addressed in the comments after publication.

The Committee voted unanimously to recommend the published Rule 82 proposal for adoption.

Rules Recommended for Publication

The rules recommended for publication deal with aspects of electronic filing and service. Judge Solomon and Clerk Briggs were this Committee's members of the all-Committees Subcommittee for matters electronic, and have carried forward with the work after the Subcommittee suspended operations at the beginning of the year. The choice to suspend operations may have been premature. The Appellate, Bankruptcy, Civil, and Criminal Rules Committees are all working on parallel proposals. It is desirable to frame uniform rule text when there is no reason to treat common questions differently, recognizing that different sets of rules may operate in circumstances that create differences in what might have seemed to be common questions. But the process of seriatim preparation for the agendas of different committees meeting a different times has impeded the benefits of simultaneous consideration. For the Civil Rules, the result has been that worthy ideas from other Committees have had to be embraced in something of a hurry, and have been presented to the Civil Rules Committee in a posture that leaves the way open for accommodations for uniformity with the other Committees. The Committee Note language issue for Rule 6(d) is an illustration. The e-filing and e-service rules provide additional illustrations.

These proposals emerge from a process that winnowed out other possible subjects for e-rules. The Minutes for the October 2014 meeting reflect the decision to set aside rules that would equate electrons with paper. Filing, service, and certificates of service remain to be considered.

E-FILING: RULE 5(d)(3)

Rule 5(d)(3) provides that a court may allow papers to be filed, signed, or verified by electronic means. It further provides that a local rule may require e-filing only if reasonable exceptions are allowed. Great progress has been made in adopting and becoming familiar with e-filing systems since Rule 5(d)(3) was adopted. The amendment described in the original agenda materials directed that all filings must be made by electronic means, but further directed that paper filing must be allowed for good cause

and that paper filing may be required or allowed for other reasons by local rule. This approach reflected the great advantages of efficiency that e-filing can achieve for the filer, the court, and other parties. Those advantages accrue to an adept pro se party as well as to represented parties. Indeed the burdens of paper filing may weigh more heavily on a pro se party than on a represented party.

The Criminal Rules Committee considered similar questions at its meeting in mid-March. Criminal Rule 49 incorporates the Civil Rules provisions for filing. Their discussion reflected grave doubts about the problems that could arise from requiring pro se criminal defendants and prisoners to file by electronic means. Access to e-communications systems, and the ability to use them at all, are the most basic problems. In addition, training pro se litigants to use the court system could impose heavy burdens on court staff. Means must be found to exact payment for filings that require payment. There are risks of deliberate misuse if a court is unable to limit a defendant or prisoner's access by blocking access to all other cases. Constitutional concerns about access to court would arise if exceptions are not made. This array of problems could be met by adopting local rules, but the burden of adopting new local rules should not be inflicted on the many courts whose local rules do not now provide for these situations.

It was recognized that the problems facing criminal defendants and prisoners may be more severe than those facing pro se civil litigants, but questions were asked whether the differences are so great as to justify different provisions in the Criminal and Civil Rules. The Criminal Rules Committee asked that these issues be considered in addressing Civil Rule 5, and that if this Committee continues to prefer that adjustments for pro se litigants be made by local rules or on a case-by-case basis it consider deferring a recommendation to publish Rule 5 amendments while the Criminal Rules Committee further considers these issues.

A conference call was held by the Chair of the Criminal Rules Committee, the immediate past and current chairs of their subcommittee for e-issues, their Reporters, and the Civil Rules e-rules contingent. Thorough review of the Criminal Rules Committee concerns led to a revised Rule 5(d)(3) proposal. The revised proposal was circulated to the Committee as a supplement to the agenda materials, and endorsed by Judge Campbell, Judge Oliver, and Clerk Briggs.

The version of Rule 5(d)(3) presented to the Committee mandates e-filing as a general matter, except for a person proceeding without an attorney. E-filing is permitted for a person proceeding without an attorney, but only when allowed by local rule

or court order. This approach is designed to hold the way open for pro se litigants to seize the benefits of e-filing as they are competent to do so. It well may be that these advantages will become more generally available to pro se civil litigants than to criminal defendants or prisoners filing § 2254 or § 2255 proceedings, but that event will not interfere with adopting local rules that reflect the differences.

Judge Solomon endorsed the revised approach. Although the Civil Rule draft started in a different place, the Criminal Rules Committee's concerns were persuasive. The pro se problem is greater in the criminal arena, but there also are problems in the civil arena. The new approach does no harm in the short run, and it is likely that we can live with it longer than that. And it is an advantage to have rules that are as parallel as can be.

Clerk Briggs agreed. It will not be burdensome to address pro se civil filings through local rules or by court order. For now, there will not be many pro se litigants that will be trusted with e-filing. But it should be noted that the present CM/ECF system can be used to ensure that a pro se litigant is able to file and access files only in his own case. And the system screens for viruses. And yes, there is a disaster recovery plan — everything is replicated on an essentially constant basis and stored in distant facilities.

A specific drafting question was raised: is there a better way to refer to pro se parties than "a person proceeding without an attorney"? It was agreed that this language seems adequate. One advantage is that it includes an attorney who is proceeding without representation by another attorney — such an attorney party may not be a registered user of the system, and may not be admitted to practice as an attorney in the court.

Another question is whether the rule should continue to say that a paper may be signed by electronic means, or whether it is better to provide only for e-filing, adding a statement that the act of filing constitutes the signature of the person who makes the filing. The reasons for omitting a statement about signing by electronic means are reflected in the history of a Bankruptcy Rule provision that was published for comment and then withdrawn. Many filings include things that are signed by someone other than the filer. Common civil practice examples include affidavits or declarations supporting and opposing summary-judgment motions, and discovery materials. Means for verifying electronic signatures are advancing rapidly, but have not reached a point of common acceptance and practice that would support attempted rules on the issue. It was agreed that the rule text should adhere to the approach that describes only filing by e-means, and then states that the act of filing constitutes the filer's signature. But it

also was agreed that it would be better to delete the next-to-last paragraph of the draft Committee Note that discusses these possible signature issues.

Another issue was presented by the bracketed final paragraph in the Committee Note that raised the question whether anything should be said about verification. Present Rule 5(d)(3) recognizes local rules that allow a paper to be verified by electronic means. The proposed amendment omits any reference to verification. Not many rules provide for verification. Rule 23.1 provides for verification of the complaint in a derivative action. Rule 27(a) requires verification of a petition to perpetuate testimony. Rule 65(b)(1)(A) allows use of a verified complaint rather than an affidavit to support a temporary restraining order. Verification or an affidavit may be required in receivership proceedings. Verified complaints are required by Supplemental Rules B(1)(A) and C(2). Although these add up to a fair number of rules by count, they touch only a small part of the docket. It was concluded that it would be better to omit this paragraph from the recommendation to publish.

RULE 5(b)(2)(E): E-SERVICE

Rule 5(b)(2)(E) now allows service by electronic means if the person served consents in writing. Rule 5(b)(3) allows this service to be made through the court's transmission facilities if authorized by local rules. In practice consent has become a fiction as to attorneys — in almost all districts an attorney is required to become a registered user of the court's system, and access to the court's system is conditioned on consent to be served through the system. The proposed revision of Rule 5(b)(2)(E) set out in the agenda materials deletes the consent element, and simply provides that service may be made by electronic means. It further provides that a person may show good cause to be exempted from such service, and that exemptions may be provided by local rule.

This time it is preparation of the agenda materials for an Appellate Rules Committee meeting later this month that has raised complicating issues. The complications again involve pro se litigants. The concern is that many pro se litigants may not have routine, continuous access to means of electronic communication, and in any event may not be adept in its use. This has not been a problem under the present rule, since it requires consent to e-service. A pro se party need not consent, and is not subject to the fictive consent that applies to attorneys. But eliminating consent will generate substantial work in case-specific court orders or in amending local rules.

These questions were presented on the eve of this meeting.

Drafting to accommodate them can be considered, but subject to further polishing. The draft presented for consideration responded by distinguishing registered users of the court's system from others. It continues to say simply that service may be made by electronic means on a person who is a registered user of the court's system. But it requires consent for others. The consent can provide ample protection by specifying the electronic address to use, and a form of transmission that can be used by the recipient. Consent also will be available for registered users of the court's system who find it convenient to serve some papers by means other than the court's system. For civil cases, discovery requests and responses are a common example. These papers are not to be filed with the court until they are used in the case or the court orders filing. It may prove desirable to serve them by electronic means outside the court's system. Here too, consent will afford important protections by specifying the address to be used and the form of communication.

A judge observed that he encounters many pro se litigants who exchange with attorneys by e-mail.

Another judge noted that bankruptcy practice is moving to bar pro se filing, but to recognize consent to service by e-mail. "This saves costs."

It was noted that the CM/ECF system allows service without filing. One court, as an example, requires a court order after a litigant moves for permission. It would be good to have a rule that allows consent to serve this function without need for a court order.

A separate question was whether written consent should be required, as in the present rule. Why not allow consent in an e-communication? One way written consent can be accomplished would be to add consent to the check list of provisions on the pro se appearance form. Another judge suggested that it would be prudent to get written consent, but the rule should not specify it.

If the rule is framed to require consent for service outside the court's system, it was agreed that there is no need to carry forward from the agenda draft the exceptions that allow a person to be exempted for good cause or by local rule.

Further discussion reiterated the point that the revised draft distinguishes service through the court system on registered users, which would not require consent, from service by other electronic means, which would require consent. This is an advance over the original suggestion, which focused on service through the court's system. The Committee Note can address consent among the parties,

refer to a check-the-box pro se appearance form, the availability of direct e-mail service with consenting parties, and the need for court permission for consent by a person who is not a registered user to receive service through the court system.

The Committee agreed to go forward with a recommendation to publish a version of Rule 5(b)(2)(E) that distinguishes between service on registered users through the court's system and service by other e-means with consent. Precise rule language and corresponding changes in the Committee Note will be settled, if possible in ways that achieve uniformity with other advisory committees.

(An observer raised a particular question outside the agenda materials. She has twice encountered difficulties with e-filing in this circumstance: A discovery subpoena is served on a nonparty outside the district where the action is pending. A motion to compel compliance becomes necessary in the district where the discovery will be taken. There is no current docket in the district for enforcement. Two courts have refused to allow her to use electronic means to open a miscellaneous docket item. They insisted on a personal appearance. This is an unnecessary inconvenience. There is a patchwork of rules around the country.

(This problem may not be a subject for rulemaking. Certainly it is not fit for rulemaking on the spur of the moment. But the problem may be helped by proposed Rule 5(d)(3), which will allow e-filing unless a local rule requires paper filing. It might be possible to add a comment on this problem to the Committee Note for Rule 5(d)(3). That possibility was taken under advisement.)

NOTICE OF ELECTRONIC FILING AS PROOF OF SERVICE: RULE 5(d)(1)

The agenda materials include an amendment of Rule 5(d)(1) that would provide that a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. The draft includes in brackets a provision that would add a statement similar to Rule 5(b)(2)(E): the notice of electronic filing does not constitute a certificate of service if the serving party learns that the filing did not reach the party to be served.

Allowing a notice of electronic filing to constitute a certificate of service on any party served through the court's transmission facilities may not seem to do much. A party accustomed to serving through the court's system includes in the filing a certificate that says the paper was served through the court's system. Eliminating those lines is a small gain. But the amendment also protects those who do not think to add those lines, and also

avoids the instinctive reaction of cautious filers that prompts filing a separate certificate just to be sure. The amended rule text was approved as a recommendation to publish.

Brief discussion concluded that the bracketed material addressing failed delivery is not necessary. As drafted, it is limited to service through the court's facilities. Ordinarily the court system will flag a failed transmission. It may be that a party will learn that a successful transmission somehow did not come to the recipient's attention, but that situation seems too rare to require rule text. That will be deleted from the recommendation to publish.

Judge Harris, after these questions were discussed in the Bankruptcy Rules Committee, suggested that it would be useful to expand the rule by adding a statement of what should be included in a certificate of service when service is not made through the court's electronic facilities. The added language would address the elements that should be included in a certificate: the date and manner of service; the names of the persons served; and the address used for whatever form of service was made. The advantage of adding this language to the several sets of rules that address certificates of service would be to establish a uniform certificate for all federal courts. Uniformity is desirable in itself, and uniformity would protect against the need to consult local rules, or the ECF manual, for each district. Certificates now may vary. It may be as bland as "I served by mail," or "I served by mail on this date, to this address," and so on. The proposed language is taken from Appellate Rule 25(d)(1)(B) for a proof of service. The language works there, and would work elsewhere.

This proposal was countered: the courts and parties seem to be doing well without help from a detailed rule prescription. And service by these other means is likely to decline continually as electronic service takes over and provides a notice of electronic filing. Another member added that he routinely includes all of this information in the certificate of service. It was further noted that the Civil Rules did not provide for certificates of service until 1991. The present provision was added then to supersede a variety of local rules. The Committee then considered a provision that would prescribe the contents of the certificate, but feared that in some situations the party making service would not be able to provide all of the information that might be included.

Brief further discussion showed that no Committee member favored adding a provision that would define the contents of a certificate of service by means other than the court's transmission facilities.

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A style question was left for resolution by the Style Consultant. Rule 5(d)(1) now concludes with a sentence introduced by "But." A paper that is required to be served must be filed. "But" disclosure and discovery materials must not be filed except in defined circumstances. The question is whether "but" remains appropriate after lengthening the first sentence.

RULE 68

Judge Campbell summarized the discussion of Rule 68 at the October 2014 meeting. Rule 68 was the subject of two published amendment proposals in 1983 and 1984. The project was abandoned in face of fierce controversy and genuine difficulties. Rule 68 was taken up again early in the 1990s and again the project was abandoned. Multiple problems surround the rule, including the basic question whether it is wise to maintain any rule that augments natural pressures to settle. But, aside from all the discovery rules taken together, Rule 68 is the most frequent subject of public suggestions that amendments should be undertaken. Most of the suggestions seek to add "teeth" to the rule by adding more severe consequences for failing to win a judgment better than a rejected offer. The Committee decided in October that the most fruitful line of attack will be to explore practices in state courts to see whether there are rules that in fact work better than Rule 68. Jonathan Rose undertook preliminary research that produced a chart of state rules, comparing their features to Rule 68. He also provided a bibliography. It was hoped that the Supreme Court Fellow at the Administrative Office could make time to explore these materials, and perhaps to look for state-court decisions. There have been too many competing demands on his time, however, and little progress has been made. This work will be pursued, aiming at a report to the meeting next November.

DISCOVERY: "REQUESTER PAYS"

Judge Grimm opened the subject of requester-pay discovery rules by noting that these questions were opened at the fall meeting in 2013 in response to suggestions that "requester-" or "loser-pays" rules be adopted to shift the costs of responding to discovery requests in cases where the burdens of responding to discovery are disproportionate among the parties or otherwise unfair. The focus of these suggestions ordinarily is Rule 34 document production. The background is the shared assumption, not articulated in any rule but recognized in the 1978 Oppenheimer opinion in the Supreme Court, that ordinarily the responding party bears the burdens and costs of responding. The Court noted then, and it is also widely understood, that a court order can shift the costs, in whole or in part, to the requesting party.

The Rule 26(c) proposal now pending in the Supreme Court as part of the Duke Rules Package expressly confirms the common understanding that a protective order can allocate the expenses of discovery among the parties.

The House of Representatives has held hearings to examine the possibilities of requester-pay practices. Patent law reform bills recently introduced in Congress contain such provisions.

Subcommittee work on these issues was sidetracked for a year while the Subcommittee concentrated on the Rule 37(e) provisions addressing loss of electronically stored information that now are pending before the Supreme Court. The work is resuming now.

Passionate views are held on all sides of requester pays. Much of the discussion focuses on asymmetric discovery cases in which one party has little discoverable information and is able to impose heavy burdens in discovering vast deposits of information held by an adversary. The explosion of discoverable matter embodied in electronically stored information adds to the passion. And it is often suggested that a data-poor party may deliberately engage in massive discovery for tactical reasons.

The other side of the debate is framed as an issue of access to justice. Often a data-poor party is poor in other resources as well, and cannot afford to pay the expenses of sorting through information held by a data-rich party. This viewpoint was expressed in public comments on many of the discovery rules provisions in the Duke Rules Package, and particularly in the comments on proposed Rule 26(c).

A 2014 publication of the Institute for the Advancement of the American Legal System provides information about these issues. A recent law review article catalogues the current rules that allow shifting litigation costs — most of them discovery rules — and explores many of the surrounding issues, including possible due process implications. The closed-case study done by the Federal Judicial Center in conjunction with the Duke Conference shows that most cases do not generate significant discovery burdens. But it also shows that there are outliers that involve serious burdens and present serious issues for possible reform. It remains a challenge to determine whether these problems are unique to identifiable types of cases. One particular opportunity will be to explore the experience of "patent courts." Other subject-matter areas may be identifiable. Or other characteristics of litigation may be associated with disproportionate discovery, whether or not it is possible to address them in any particular way by court rules.

One line of inquiry will be to attempt to find out through the

Federal Judicial Center what kinds of cases are now associated with motions to order a requester to bear the costs of discovery.

Emery Lee reported that it is difficult to sort the cases out of general docket entries. He began an inquiry by key-citing the headnotes in the Zubulake opinions, which are prominent in addressing cost-shifting in discovery of ESI. They have not been much cited. Looking at the cases he found through Pacer, he developed search terms. Then he undertook a docket search in four districts that have high volumes of cases — S.D.N.Y., N.D.Ill, N.D.Cal., and S.D.Tex. A "fuzzy search" turned up nothing useful. There were, to be sure, "lots of hits" in the Northern District of Illinois because the e-pilot there requires the parties to discuss cost bearing. And a lot of the hits involved the costs of depositions, not documents. There were not many hits for document discovery.

Judge Grimm asked what further research might be done: law review articles? State experience? Case law? A survey or other empirical inquiry? The quest would be to refine our understanding of how often burdensome costs are encountered.

Judge Grimm further noted that England has cost shifting, but it also has broad bilateral initial disclosures.

The Subcommittee hopes to narrow what needs be considered. What guidance can be provided?

Judge Campbell reminded the Committee that the Committee Note to Rule 26(c) in the pending package of Duke Rules amendments was revised after publication to provide reassurance that it is not intended to become a general requester-pays rule. Many comments on the published proposal expressed fears on this score

A judge urged that it is not wise "to write rules for exceptional-exceptional cases. There is a cost of litigation. Part of that is the cost of discovery." It is really depositions that drive the cost of discovery in most cases. And the requesting party pays for most of the costs of a deposition. Document production does not drive discovery costs in most cases. There are not many cases where the plaintiff does not have to bear some discovery costs, especially depositions. The rules already limit the numbers of interrogatories and depositions, and proposals to tighten these limits were rejected for good reasons after publication of the Duke Rules Package. And "counsel has to invest time in depositions." It is better not to attempt to write rules for the massive document discovery cases that do come up.

Another judge asked what is the scope of the problem? We need

to know that before making a rule. Whose problem needs to be fixed? Why do we think we should redistribute the costs of discovery?

Judge Grimm responded that the Subcommittee shares these concerns. "We can understand there are problem cases without knowing what to do about them. The source of the problems remains to be determined."

A member asked what protections there are for discovery from third parties who do not have a stake in the game? Rule 45(d)(1) directs that a party or attorney responsible for issuing and serving a subpoena take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Rule 45(d)(2) further provides that a person directed to produce documents or tangible things may serve objections. An objection suspends the obligation to comply, which revives only when ordered by the court, and the order "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Perhaps that is protection enough.

One possible approach was suggested — to sample a pool of district judges to ask whether they have problems with excessive discovery that should be addressed by explicit requester-pays rules provisions. Much civil litigation now occurs in MDL proceedings; perhaps we could look there.

A different suggestion was that "this looks like a solution in search of a problem. The requester-pays proposals have the air of a strategic effort to deter access to justice in certain types of cases. District judges will have a much better sense of it — whether there are patterns of abuse that can be dealt with by rule, rather than case management. I litigate cases with massive discovery, but the pressures are to be reasonable because it's 2-way, and I have to search through what I get." Perhaps there are problems in asymmetric cases. "But the very fact that the Committee is struggling to figure out whether there is a problem suggests we pause" before plunging in.

Another member said that the mega cases tend to be MDL proceedings. The purpose of MDL is to centralize discovery, to avoid constant duplication. The management orders are for production that occurs once, and for one deposition per witness. MDL proceedings are likely to save costs, reaping the efficiency advantages of economies of scale. MDL judges seek to tailor cost sharing in ways that make sense.

Another lawyer member noted the many protective provisions built into the rules. Rule 45(c)(2)(B) expressly protects nonparties. Rule 26(b)(2)(B) regulates discovery of ESI that is not

reasonably accessible, and contemplates requester-pays solutions. Rule 26(b)(2)(C)(iii) directs the court to limit discovery on a cost-benefit analysis. Rule 26(c) is used now to invoke requester-pays protections. Rule 26(g) requires counsel to avoid unduly burdensome discovery requests. The Duke Rules package pending before the Supreme Court is designed to invigorate these principles. If the Court and Congress allow the proposed rules to take effect, we will need to find out whether they have the intended effect. Among them is the explicit recognition in Rule 26(c) of protective orders for cost-sharing. Together, these rules provide many opportunities to control unreasonable discovery.

Continuing, this member noted that something like 300,000 cases are filed in federal courts every year. Perhaps 15,000 to 30,000 of them will involve document-heavy discovery. The FJC closed-case study shows that most cases have little discovery. We need to find out whether there are types of cases that generate problems. But even that inquiry might be deferred for a while to see how the proposed amended rules will work. "I do not know that it's a big problem now in most cases." Problems are most likely to arise when discovery pairs a data-poor party against a data-rich party. Perhaps we should defer acting on requester-pays rules for a while.

It was noted that the Department of Justice has a lot of experience with discovery, both asking and responding. Further inquiry probably is warranted. The Department can undertake further internal inquiries.

A judge said that there are not many reported cases invoking Rule 45(d)(2). That may suggest there is little need for new rules to protect nonparties. More generally, the rules we have now seem adequate to address any problems. "The need may be to use them, not to add new rules."

A lawyer echoed these views, observing that a great deal of work went into shaping the Duke Rules package with the goal of advancing proportionality in discovery. We should wait to see what effect the new rules have if they are allowed to become effective.

Another judge suggested that study of initial disclosure may be a good place to start. It may be helpful to return to the original rule, requiring disclosure of what is relevant to the case as a whole, not merely "your case." The present limited disclosure rule seems to fit awkwardly with our focus on cooperation and proportionality. Initial disclosure rules, indeed, will be discussed later in this meeting as a possible subject for a pilot project.

Discussion of initial disclosure continued. The original idea was to get the core information on the table at the outset. That proved too ambitious at the time — local rule opt-outs were provided to meet resistance, and many districts opted out in part or entirely. National uniformity was attained only by narrowing disclosure to "your case." The employment protocols now adopted by 50 judges may show that broad initial disclosure can work. So it was suggested that we could look to state practices. The Institute for the Advancement of the American Legal System has generated reports. Broad initial disclosure remains a controversial idea: "You can be right, but too soon."

The final observation was that the Committee undertook to study requester-pays rules in response to a letter from members of Congress.

Appellate-Civil Rules Subcommittee

A joint subcommittee has been reconstituted to explore issues that overlap the Appellate Rules and Civil Rules. Judge Matheson chairs the Subcommittee. Virginia Seitz is the other Civil Rules member. Appellate Rules Committee members are Judge Fay, Douglas Letter, and Kevin Newsom.

The Subcommittee is exploring two sets of issues that first arose in the Appellate Rules Committee. As often happens, if it seems wise to act on these issues, the most likely means will be revisions of Civil Rules. That is why a joint Subcommittee is useful. The issues involve "manufactured finality" and post-judgment stays of execution under Civil Rule 62.

MANUFACTURED FINALITY

Judge Matheson introduced the manufactured finality issues. "This is not a new topic." An earlier subcommittee failed to reach a consensus. "Nor is consensus likely now." The Subcommittee seeks direction from the Appellate and Civil Rules Committees.

"Manufactured finality" refers to a wide variety of strategies that may be followed in an attempt to appeal an interlocutory order that does not fit any of the well-established provisions for appeal. Rule 54(b) partial finality is, for any of many possible reasons, not available. Other elaborations of the final-judgment rule, most obviously collateral-order doctrine, also fail. Avowedly interlocutory appeals under § 1292 are not available. The theoretical possibility of review by extraordinary writ remains extraordinary.

Many examples of orders that prompt a wish to appeal could be

offered. A simple example is dismissal of one claim while others remain, and a refusal to enter a Rule 54(b) judgment. Or important theories or evidence to support a single claim are rejected, leaving only weak grounds for proceeding further.

If the would-be plaintiff manages to arrange dismissal of all remaining claims among all remaining parties with prejudice, courts recognize finality. Finality is generally denied, however, if the dismissal is without prejudice. And an intermediate category of "conditional prejudice" has caused a split among the circuits. This tactic is to dismiss with prejudice all that remains open in the case after a critical interlocutory order, but on terms that allow revival of what has been dismissed if the court of appeals reverses the order that prompted the appeal. Most circuits reject this tactic, but the Second Circuit accepts it, and the Federal Circuit has entertained such appeals. There is a further nuance in cases that conclude a dismissal nominally without prejudice is de facto with prejudice because some other factor will bar initiation of new litigation — a limitations bar is the most common example.

The Subcommittee has narrowed its discussion to four options: (1) Do nothing. The courts would be left free to do whatever they have been doing. (2) Adopt a simple rule stating what is generally recognized anyway — a dismissal with prejudice achieves finality. Although this is generally recognized, an explicit rule would provide a convenient source of guidance for practitioners who are not familiar with the wrinkles of appeal jurisdiction and reassurance for those who are. But the rule might offer occasion for arguments about implied consequences for dismissals without prejudice, particularly the "de facto prejudice" and "conditional prejudice" situations. (3) Adopt a clear rule saying that only a dismissal with prejudice establishes finality. Still, that might not be as clear as it seems. Only elaborate rule text could definitively defeat arguments for de facto prejudice or conditional prejudice. Committee Note statements might lend further weight. Assuming a clear rule could be drafted to close all doors, it would remain to decide whether that is desirable. (4) A rule could directly address conditional prejudice, whether to allow it or reject it.

Rules sketches illustrating the three alternatives for rules approaches are included in the agenda materials. The Subcommittee deliberated its way to the same pattern as the earlier subcommittee. It has not been possible to reach consensus. On the conditional prejudice question, the circuit judges on the Subcommittee would not propose a rule that would manufacture finality in this way. The lawyers seemed to like the idea, and there are indications that district judges also like the idea.

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This introduction was followed by reflections on the general setting. The final-judgment rule rests on a compromise between competing values. The paradigm final judgment leaves nothing more to be done by the district court, apart from execution if there is a judgment awarding relief. Insisting on finality is a central element in allocating authority between trial courts and appellate courts. It also conduces to efficiency, both in the trial court and in the appellate court. Many issues that seem to loom large as a case progresses will be mooted by the time the case ends in the district court. Free interlocutory appeal from many orders would delay district-court proceedings and, upon affirmance, produce no offsetting benefit. Periodic interruptions by appeals could wreak havoc with effective case management.

The values of complete finality are offset by the risk that all trial-court proceedings after a critical and wrong ruling will be wasted. Some interlocutory orders, moreover, have real-world consequences or exert pressures on the parties that, if the order is wrong, are distorting pressures. These concerns underlie not only the provision for partial final judgments in Rule 54(b) but a number of elaborations of the final-judgment concept. The best known elaboration is found in collateral-order doctrine, an interpretation of the "final decision" language in § 1291 that allows appeals from orders that do not resemble a traditional final judgment. Other provisions are found in avowedly interlocutory-appeal provisions, most obviously in § 1292 and Rule 23(f) for orders granting or refusing class certification. Extraordinary writ review also provides review in compelling circumstances.

The recent process of elaborating § 1291 seems, on balance, to show continuing pressure from the Supreme Court to restrain the inventiveness shown by the courts of appeals. The courts of appeals embark on lines of decision that expand appeal opportunities, confident in their abilities to achieve a good balance among the competing forces that shape appeal jurisdiction on terms that at times seem to approach case-specific rules of jurisdiction. The Supreme Court believes that it is better to resist these temptations. The clearest illustrations are provided by the line of cases that have restricted collateral-order appeals by insisting that collateral-order appeal is proper only when all cases in a "category" of cases are appealable. Otherwise, no case in a particular "category" will support appeal.

These are the pressures that have shaped approaches to manufactured finality. A bewildering variety of circumstances have been addressed in the cases without generating clear patterns. The concept of "de facto prejudice" is an example. The seemingly clear example of dismissal nominally without prejudice in circumstances that would defeat a new action by a statute of limitations is clear

only if the limitations outcome is clear. But the limitations question may depend on fact determinations, and even choice of law, that cannot easily be made in deciding on appeal jurisdiction. Another example is found in cases that have accepted jurisdiction when a dismissal is without prejudice to bringing a new action in a state court — often with very good reason if the critical ruling by the federal court is affirmed on appeal — but the dismissal is on terms that bar filing a new action in federal court. And a particularly clear example is provided by a case in which the University of Alabama filed an action, only to have the state Attorney General appear and dismiss the action without prejudice. The University was allowed to appeal to challenge the Attorney General's authority to assume control if the action.

The Rules Committees have clear authority under § 2072(c) to adopt rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291." But regulating appeal jurisdiction is an important undertaking. There is great value in having clear rules. Attorneys who are not thoroughly familiar with appeal practice may devote countless hours to attempts to determine whether and when an appeal can be taken, and may reach wrong conclusions. Even attorneys who are familiar with these rules may seek reassurance by costly reexamination. And misguided attempts to appeal can disrupt district-court proceedings while imposing unnecessary work on the court of appeals.

Clear rules, however, may not always be the best approach. Clarity can sacrifice important nuances. The pattern of common-law elaborations of a simply worded appeal statute shows an astonishing array of subtle distinctions that may provide important protections by appeal.

The choice to proceed to recommend a clear rule, any clear rule, is beset by these competing forces.

Discussion began by recognizing that these are hard choices. Courts of appeals often believe strongly in the opportunity to shape appeal jurisdiction to achieve an optimal concept of finality. How would they react, for example, to a recommendation that adopts finality by dismissal with conditional prejudice?

A related suggestion was that it may be better to leave these issues to resolution by the Supreme Court in the ordinary course of reviewing individual cases. Circuit splits can be identified on some easily defined issues, such as conditional prejudice.

It was further suggested that the Committee does not believe that it must always act to resolve identifiable circuit splits. The conditional prejudice issue, for example, "is of first importance

to appellate judges." The Subcommittee, as the earlier subcommittee, has shown the difficulty of the question through its divided deliberations. Do we need to act to establish clarity for lawyers?

These questions are not for the Civil Rules Committee alone. The Appellate Rules Committee shares responsibility for determining what is best. So far it has happened that actual rules provisions tend to wind up in the Civil Rules, in part because many appeal-affecting provisions remained in the Civil rules when the Appellate Rules were separated out from their original home in the Civil Rules. But it is possible to imagine that new rules could be located in the Appellate Rules, or even in a new and independent Federal Rules of Appeal Jurisdiction.

Further discussion suggested that everyone agrees that a dismissal with prejudice is final. It may be useful to say that in a rule. The Committee Note can say that the rule text does not address the question whether "conditional prejudice" qualifies as "with prejudice." It may be worth doing.

A response asked what is the value of a rule that states an obvious proposition widely accepted? The reply was that people who are not familiar with appellate practice may benefit.

Judge Sutton noted that these questions first came up in 2005. "My first reaction was that this is a manufactured problem." The circuit split on conditional prejudice may be worth addressing, but either answer could prove difficult to advance through the full Enabling Act process. And any more general rule would incur the risk of negative implications. The time has come to fish or cut bait.

Judge Matheson observed that it would be useful to have the sense of the Committee to report to the Appellate Rules Committee when it meets in two weeks.

The first question put to the Committee was whether the best choice would be to do nothing. Thirteen members voted in favor of doing nothing. One vote was that it would be better to do something.

STAYS OF EXECUTION: RULE 62

Judge Matheson began by observing that the questions posed by Rule 62 and stays of execution arose in part in the Appellate Rules Committee. They have not been as much explored by the Subcommittee as the manufactured-finality issues. The focus has been on execution of money judgments, not judgments for specific relief.

The provisions for injunctions, receiverships, or directing an accounting may be relocated, but have not been considered for revision.

Rule 62(a) provides an automatic stay. Until the Time Computation Project the automatic stay provision dovetailed neatly with the Rule 62(b) provision for a court-ordered stay pending disposition of post-judgment motions under Rules 50, 52, 59, and 60. The automatic stay lasted for 10 days, and the time to make the Rule 50, 52, and 59 motions was 10 days. The Time Computation Project, however, set the automatic stay at 14 days, but extended to 28 days the time to move under Rules 50, 52, and 59. A district judge asked the Committee what to do during this apparent "gap." The Committee concluded at the time that the court has inherent authority to stay its own judgment after expiration of the automatic stay and before a post-judgment motion is made. The question of amending Rule 62 was deferred to determine whether actual difficulties arise in practice.

A separate concern arose in the Appellate Rules Committee. Members of that committee have found it useful to arrange a single bond that covers the full period between expiration of the automatic stay and final disposition on appeal. That bond encompasses the supersedeas bond taken to secure an stay pending appeal, and is already in place when an appeal is filed.

The Subcommittee has begun work focusing on Rule 62(a), (b), and (d). Other parts of Rule 62 have yet to be addressed. A detailed memorandum by Professor Struve, Reporter for the Appellate Rules Committee, addresses other issues that remain for possible consideration.

The Subcommittee brings a sketch of possible revisions to the Committee for reactions. The first question is whether in its present form Rule 62 causes uncertainties or problems.

The second of two sketches in the agenda book became the subject of discussion. This sketch rearranges subdivisions (a), (b), (c), and (d). Revised Rule 62(a) and (b) addresses "execution on a judgment to pay money, and proceedings to enforce it." It carries forward an automatic stay, extending the period to 30 days. But it also recognizes that the court can order a stay at any time after judgment is entered, setting appropriate terms for the amount and form of security or denying any security. The court also can dissolve the automatic stay and deny any further stay, subject to a question whether to allow the court to dissolve a stay obtained by posting a supersedeas bond. An order denying or dissolving a stay may be conditioned on posting security to protect against the consequences of execution. The order may designate the duration of

a stay, running as late as issuance of the mandate on appeal. That period could extend through disposition of a petition for certiorari.

The question whether a supersedeas bond should establish a right to stay execution pending appeal remains open for further consideration. Consideration of the amount also remains open — if a stay is to be a matter of right, the rule might set the amount of the bond at 125% of the amount of a money judgment.

The purpose of this sketch is to emphasize the primary authority of the district court to deny a stay, to grant a stay, and to set appropriate terms for security on granting or denying a stay. It also recognizes authority to modify or terminate a stay once granted. Appellate Rule 8 reflects the primacy of the district court. Explicit recognition of matters that should lie within the district court's inherent power to regulate execution before and during an appeal may prove useful.

Discussion began with a judge's suggestion that he had not seen any problems with Rule 62. The question whether any other judge on the Committee had encountered problems with Rule 62 was answered by silence.

The next question was whether the lack of apparent problems reflects the practice to work out these questions among the parties. A lawyer member responded that "you wind up stipulating to a stay through the decision on appeal." Another lawyer member observed, however, that "there may be power struggles."

It was noted that the "gap" between expiration of the automatic stay and the time to make post-judgment motions seems worrisome, but perhaps there are no great practical problems.

Another member said that the "more efficient" draft presented for discussion is simple, and collects things in a pattern that makes sense. Most cases are resolved without trial. Even recognizing summary judgments for plaintiffs, problems of execution may not arise often. This "little rewrite" seems useful. A judge repeated the thought — this version "makes for a cleaner rule."

Judge Matheson concluded by noting that the Subcommittee is "still in a discussion phase." Knowing that Committee members have not encountered problems with Rule 62 "makes a point. But we can address the 'gap,' and perhaps work toward a better rule."

Rule 23 Subcommittee

June 2, 2015 version

Judge Dow began the report of the Rule 23 Subcommittee by pointing to the list of events on page 243 of the agenda materials. The Subcommittee has attended or will attend many of these events; some Subcommittee members will attend others that not all members are able to attend. The events for this year will culminate in a miniconference to be held at the Dallas airport on September 11. The miniconference will be asked to discuss drafts that develop further the approaches reflected in the preliminary sketches included in the agenda materials. The most recent of these events was a roundtable discussion of settlement class actions at George Washington University Law School. It brought together a terrific group of practitioners, judges, and academics. It was very helpful.

Suggestions also are arriving from outside sources and are being posted on the Administrative Office web site. The suggestions include many matters the Subcommittee has not had on its agenda. It is important to have the Committee's guidance on just how many new topics might be added to the Rule 23 agenda. The Subcommittee's sense has been that there is no need for a fundamental rewrite of Rule 23. But some of the submissions suggest pretty aggressive reformulations of Rule 23(a) and (b) that seem to start over from scratch. These suggestions have overtones of a need to strengthen the perspective that class actions should be advanced as a means of increasing private enforcement of public policy values.

A Subcommittee member noted that several professors propose deletion of Rule 23(a)(1), (2), and (3). Adequacy of representation would remain from the present rule. And they would add a new paragraph looking to whether a class action is the best way to resolve the case as compared to other realistic alternatives. The question for the Committee is whether we should spend time on such fundamental issues.

A first reaction was that no compelling justifications have been offered for these suggestions. It was noted that in deciding to take up Rule 23, the Committee did not have a sense that a broad rewrite is needed, but instead focused on specific issues. "The burden of proof for going further has not been carried."

The next question was whether new issues should be added to the seven issues listed in the Subcommittee Report that will be brought on for discussion today.

Multidistrict proceedings were identified as a topic related to Rule 23. There was a presentation on MDL proceedings to the Judicial Conference in March. MDL proceedings overlap with Rule 23. It will be important to pay attention to developments in MDL practice. And it was noted that discussion at the George Washington Roundtable included the thought that some of the current Rule 23 sketches reflect approaches that could reduce the pressures that

mass torts exert on MDL practice. Further development of settlement-class practice might move cases into Rule 23, with the benefits of judicial review and approval of settlements, and away from widespread private settlements of aggregated cases free from any judicial review or supervision. One way of viewing these possibilities is the idea of a "quasi class action" – a sensible system for certifying settlement classes could be helpful. So a big concern is how to settle mass-tort cases after Amchem.

Another suggestion was that the "biggest topic not on our list" is the concept of "ascertainability" that has recently emerged from Third Circuit decisions.

Settlement class certification: Discussion turned to the question whether there should be an explicit rule provision for certifying settlement classes. One question will be whether the rule should prescribe the information provided to the court on a motion to certify and for preliminary "approval." Should the concept be not preliminary "approval," but instead preliminary "review"? The review could focus on whether the proposed settlement is sufficiently cogent to justify certification and notice to the class. What information does the judge need for taking these steps? Something like what Rule 16 says should be given to the judge? An explicit rule provision could guide the parties in what they present, as well as help the judge in evaluating the proposal. There was a lot of interest in this at the George Washington Roundtable.

Further discussion noted that Rule 23(e) does not say anything about the procedure for determining whether to certify a settlement class in light of a proposed settlement. At best there is an oblique implication in the Rule 23(e)(1) provision for directing notice in a reasonable manner to all class members who would be bound by the proposal.

A judge observed that once the parties agree on a settlement and take it to the judge, the judge’s reaction is likely to be that it is good to settle the action. The result may be that notice is sent to the class without a sufficiently detailed appraisal of the settlement terms. Problems may appear as class members respond to the notice, but the process generates a momentum that may lead to final approval of an undeserving settlement. Another judge observed that there are great variations in practice. Some judges scrutinize proposed settlements carefully. Some do not. It would be helpful to have criteria in the rule.

A choice was offered. The rule could call for a detailed "front load" of information to be considered before sending out notice to the class. Or instead it could follow the ALI Aggregate

Litigation Project, characterizing the pre-notice review as review, not "approval." Discussion at the George Washington Roundtable "was almost all for front-loading."

A judge said that most of the time in a "big value case" the lawyers know they should front-load the information. "But when the parties are not so sophisticated, the late information that emerges after notice to the class may lead me to blow up the settlement." And if the settlement is rejected after the first notice, a second round of notice is expensive and can "eat up most of the case value."

Another judge observed that "it gets dicey when some defendants settle and others do not." What seems fairly straightforward at the time of the early settlement may later turn out to be more complicated.

A lawyer thought that front-loading sounds like it makes sense. But the agenda materials do not include rule language for this. What factors should be addressed by the parties and considered by the court? It was suggested that the factors are likely to be much the same as the factors a court considers in determining whether to give final approval. One perspective is similar to the predictions made when considering a preliminary injunction: a "likelihood of approval" test at the first stage.

Another judge said that the Third Circuit "is pretty clear on what I should consider. Lawyers who practice class actions understand the factors." But there are many class actions — for example under the Fair Credit Reporting Act — brought by lawyers who do not understand class-action practice. Those lawyers will not be helped by a new rule. There is no problem calling for a more detailed rule. A different judge agreed that the problem lies with the less experienced lawyers.

Yet another judge expressed surprise at this discussion. "We go through pretty much the same information as needed for final approval of a settlement." It may help to say that in generic terms in rule text, but it is less clear whether detailed standards should be stated in the rule.

And another judge said "I do less work on the front end than at the back end. But the factors are the same."

The final comment was that drafting a rule provision will require careful balancing. There are impulses to make the criteria for final approval simpler and clearer, as will be discussed. But there also are impulses to demand more information up front.

June 2, 2015 version

It was agreed that the Subcommittee agenda would be expanded to include a focus on the procedure for determining whether to approve notice to the class of a settlement, looking toward final certification and approval.

Rule 23(f) Appeal of Settlement Class Certification: The question whether a Rule 23(f) appeal can be taken from preliminary approval of a settlement class has come to prominence with the Third Circuit decision in the NFL case. Given the language of Rule 23(f) as it stands, the answer seems to turn on whether preliminary approval of a settlement and sending out notice to the class involves "certification" of the settlement class. The deeper question is whether it is desirable to allow appeal at that point, remembering that appeal is by permission and that it might be hoped that a court of appeals will quickly deny permission to appeal when there are not compelling reasons to risk derailing the settlement by the delays of appeal.

The question of appeal at the preliminary review and notice stage is not academic. High profile cases are likely to draw the attention of potential objectors well before the preliminary review. They may view the opportunity to seek permission to appeal at this stage as a powerful opportunity to exert leverage.

The Third Circuit ruled that Rule 23(f) does not apply at this stage. But other courts of appeals have simply denied leave to appeal without saying whether Rule 23(f) would authorize an appeal if it seemed desirable. This issue will arise again. The Third Circuit reasoned that the record at this early stage will not be sufficient to support informed review. But if the rules are amended to require the parties to present sufficient information for a full-scale evaluation of the proposed settlement at the preliminary review stage, that problem may be reduced.

A judge observed that Rule 23(f) hangs on the seismic effect of certification or a refusal to certify. Certification of a settlement class is very important. It is rare to go to trial. Certification even for trial tends to end the case by settlement. So what, then, of certification for settlement? Will an opportunity to appeal enable objectors to derail settlements? Given the agreement of class and the opposing parties to settle, a court of appeals will be reluctant to grant permission to appeal.

Uncertainty was expressed whether the possibility of a § 1292(b) appeal with permission of the trial court as well as the court of appeals may provide a sufficient safety valve.

An observer stated that "the notice process is what brings out objectors." If Rule 23(f) appeal is available on preliminary

review, the way may be opened for a second Rule 23(f) appeal after notice has gone out.

It was agreed that seriatim Rule 23(f) appeals would be undesirable.

The discussion concluded with some sense that the Third Circuit approach seems sensible. Whether Rule 23(f) should be revised to entrench this approach may depend on the text of any rule that formalizes the process of certifying a settlement class. If the rule calls for certification only after preliminary review, notice, review of any objections, and final approval of the settlement, then there will be no room to argue that the preliminary review grants certification, nor, for that matter, that refusal to send out notice after a preliminary review denies certification.

A final Rule 23(f) question was noted later in the meeting. The Department of Justice continues to experience difficulties with the requirement that the petition for permission to appeal be filed with the circuit clerk within 14 days after the order is entered. It will explore this question further and present the issue in greater detail in time for the fall meeting.

With this, discussion turned to the seven topics listed in the agenda materials.

Criteria for Settlement Approval: Rule 23(e) was revised in the last round of amendments to adopt the "fair, reasonable, and adequate" phrase that had developed in the case law to express the multiple factors articulated in somewhat different terms by the several circuits. At first a long list of factors was included in draft rule text. The factors were then demoted to a draft Committee Note that is set out in the agenda materials. Eventually the list of factors as abandoned for fear it would become a "check list" that would promote routinized presentations on each factor, no matter how clearly irrelevant to a particular case, and divert attention from serious exploration of the factors that in fact are important in a particular case.

The question now is whether the rule text should elaborate, at least to some extent, on the bland "fair, reasonable, and adequate" phrase. The ALI Aggregate Litigation Project criticized the "grab bag" of factors to be found in the decisions, but provided a model of a more focused set of criteria requiring four findings, looking to adequate representation; evaluation of the costs, risks, probability of success, and delays of trial and appeal; equitable treatment of class members relative to each other; and arm’s-length negotiation without collusion. These factors are stated in the

agenda sketch as a new Rule 23(e)(2)(A), supplemented by a new (B) allowing a court to consider any other pertinent factor and to refuse approval on the basis of any such other factor. The goal is to focus attention on the matters that are useful. A related goal is to direct attention away from factors that have been articulated in some opinions but that do not seem useful. The common example of factors that need not be considered is the opinion of counsel who shaped the proposed settlement that the settlement is a good one.

One reaction to this approach may be "I want my Circuit factors." Another might be that the draft Committee Note touches on too many factors. And of course yet another reaction might be that these are not the right factors.

A participant recalled a remark by Judge Posner during the George Washington Roundtable discussion: "why three words? 'Reasonable' says it all" — the appropriate amendment would be to strike "fair" and adequate" from the present rule text. The response was that these three words had become widely used in the cases when Rule 23(e) was amended. They were designed to capture ongoing practice. There is little need to delete them simply to save two words in the body of all the rules.

The agenda materials include a spreadsheet comparing the lists of approval factors that have been articulated in each Circuit. It was asked whether each of these factors is addressed in the draft Committee Note. Not all are. Greater detail could be added to the Note. Some factors are addressed negatively in the note, such as support of the settlement by those who negotiated it. The formulation in rule text was built on the foundation provided by the ALI. The question is how far the Committee Note should go in highlighting things that really matter.

A judge observed that the sketch of rule text required the court to consider the four listed elements, but the text then went on to allow the court to reject a settlement by considering other matters even though the settlement had been found fair, reasonable, and adequate. Would it not be better to frame it to make it clear that these other factors bear on the determination whether the settlement is fair, reasonable, and adequate? What factors might those be?

A response was that this sketch of a Rule 23(e)(2)(B) is a catch-all for case- or settlement-specific factors. Such factors may be important. It might be used to invoke the old factors lists, but it seems more important to capture unique circumstances.

Subparagraph (B) also generated this question: Is this structure designed so that passing inspection under the required

elements of subparagraph (A) creates a presumption of fairness that shifts the burden from the proponents of the settlement to the opponents? The immediate response was that this question requires further thought, but that often it is not useful to think of sequential steps of procedure as creating a "presumption" that invokes shifting burdens.

A different approach asked what is gained by this middle ground that avoids any but a broad list of considerations without providing a detailed list of factors? So long as these open-ended considerations remain, they can be used to carry forward all of the factors that have been identified in any circuit. All of those factors were used to elaborate the capacious "fair, reasonable, and adequate" formula, and they still will be.

A response was that various circuits list 10, or 12, or 15 factors. Some are more important than others. "Distillation could help." But the reply was that "then we should make clear that these are the only factors."

The next step was agreement that if a proposal to amend Rule 23(e) emerges from this work, it should be sent out for comment without the "any other matter pertinent" provision sketched in subparagraph (B).

Turning back to subparagraph (A), it was noted that it will be difficult to implement criterion (iv), looking to arm's-length negotiation without collusion. The lawyers will always say that they negotiated at arm's length and did not collude. The response was that this element is one to be shown by objectors. If they make the showing of "collusion" – an absence of arm's length negotiation – the settlement must be disapproved. This was challenged by asking whether a court should be required to disapprove a settlement that in fact is fair, reasonable, and adequate – perhaps the best deal that can be made – simply for want of what seems an arm's-length negotiation?

A broader perspective was brought to bear. Courts commonly recognize separate components in evaluating a proposed settlement, one procedural and other substantive. There may be striking examples that combine both components, as in one case where a settlement was quickly arranged for the purpose of preempting a competing class action in a state court. It may be hoped that such examples are rare.

A twist was placed on the nature of "collusion." One dodge may be that parties who have engaged in amicable negotiations take the deal to some form of ADR – often a retired judge – for review and blessing. "If reputable counsel are involved, it's different from

a rushed settlement by an inexperienced lawyer."

Item (iv), then, might be dropped. But the focus on procedural fairness and adequacy may be important. It may be useful to highlight it in rule text.

Discussion of these issues concluded with a reminder that the federal law of attorney conduct is growing. Collusion is prohibited by state rules of attorney conduct. These rules are adopted into the local rules of federal courts. Item (iv) will become "another rule governing attorney conduct."

Settlement Class Certification: A settlement-class rule was published for comment as a new subdivision (b)(4) at virtually the same time as the Amchem decision in the Supreme Court. The Committee suspended consideration to allow time to evaluate the aftermath of the Amchem decision. The idea of reopening the question is that certification to settle is different from certification to try the case. The ALI Aggregate Litigation Project is something like this. Most participants in the George Washington Roundtable discussion were of similar views.

One common thread that distinguishes proposals to certify a settlement class from trial classes is to downplay the role of "predominance" in a (b)(3) class.

Two alternative sketches are presented in the agenda materials. The first expressly invokes Rule 23(a), and includes an optional provision invoking subdivision (b)(3). Certification focuses on the superiority of the proposed settlement and on finding that the settlement should be approved under Rule 23(e). The second includes a possible invocation of Rule 23(b)(3), but focuses on reducing the Rule 23(a) elements by looking to whether the class is "sufficiently numerous to warrant classwide treatment," and the sufficiency of the class definition to determine who is in the class.

Is either alternative a useful addition to Rule 23?

A judge offered no answers, but only questions. "It is a big step to downplay predominance." At some point a settlement class judgment where common issues do not predominate might violate Article III or due process. "Huge numbers of cases will be moved from (b)(3) to (b)(4)."

The first response was that many predominance issues are obviated by settlement. The common illustration is choice of law. By adopting common terms, the settlement avoids the difficulties that arise when litigation would require applying different bodies

of law, emphasizing different elements, to different groups within the class. But the reply was that the sketch does not refer to predominance for settlement.

The next observation was that "manageability" appears in the text of Rule 23(b)(3) now, and at the time of Amchem, but the Court ruled in Amchem that manageability concerns can be obviated by the terms of settlement. Commonality, on the other hand, provides protection to class members, even if its significance is reduced by the terms of settlement.

That observation led to the question whether, if Rule 23(a) continues to be invoked for settlement classes, the result will be to place greater weight on typicality. The first response was that "typicality is easy." But what of common causation issues, and defenses against individual claimants, that are not common? The only response was that if class treatment is not recognized, cases will settle by other aggregated means that provide no judicial review or control.

Cy pres: The agenda materials include a sketch that would add an extensive set of provisions for evaluating cy pres distributions to Rule 23(e)(1). The sketch is based on the ALI Aggregate Litigation Project, § 3.07. The value of addressing these issues in rule text turns in part on the fact that cy pres distributions seem to be rather common, and in part on the hesitations expressed by Chief Justice Roberts in addressing a denial of certiorari in a cy pres settlement case. Nothing in the federal rules addresses cy pres issues now. Some state provisions do — California, for example, has a cy pres statute.

The sketch narrowly limits cy pres recoveries. The first direction is to distribute settlement proceeds to class members when they can be identified and individual distributions are sufficiently large to be economically viable. The next step, if funds remain after distributions to individual class members, is to make a further distribution to the members that have participated in the first distribution unless the amounts are too small to be economically viable or other specific reasons make further individual distributions impossible or unfair. Finally, a cy pres approach may be employed for remaining funds if the recipient has interests that reasonably approximate the interests of class members, or, if that is not possible, to another recipient if that would serve the public interest. This cy pres provision includes a bracketed presumption that individual distributions are not viable for sums less than $100, but recent advice suggests that in fact claims administrators may be able to provide efficient distributions of considerably smaller sums.

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The opening lines of the sketch include, in brackets, a provision that touches a sensitive question. These words allow approval of a proposal that includes a cy pres remedy "if authorized by law." There is virtually no enacted authority for cy pres remedies in federal law. The laws of a few states do address the question. It may be possible to speak to the sources of authority in the general law of remedies. But the question remains: courts are approving cy pres distributions now. If the practice is legitimate, there should be authority to regulate it by court rule. If it is not legitimate, it would be unwise to attempt to legitimate it by court rule.

The value of cy pres distributions depends in large measure on how effective the claims process is in reducing the amounts left after individual claims are paid. Courts are picking up the ALI principle. It seems worthwhile to confirm it in Rule 23.

The first question was whether the rule should require the settlement agreement to address these issues. That would help to reduce the Article III concerns. This observation was developed further. Suppose the agreement does not address disposition of unclaimed funds. What then? Must there be a second (and expensive) notice to the class of any later proposal to dispose of them? The sketch Committee Note emphasizes that cy pres distribution is a matter of party agreement, not court action.

It was observed that even though a cy pre distribution is agreed to by the parties, it becomes part of the court’s judgment. It can be appealed. And there is a particular problem if cy pres distribution is the only remedy. Suppose, for example, a defendant’s wrong causes a ten-cent injury to each of a million people. Individual distributions do not seem sensible. But finding an alternative use for the $100,000 of "damages" seems to be creating a new remedy not recognized by the underlying substantive law of right and remedy.

Another judge noted that "courts have been doing this, but it’s a matter of follow-the-leader." There is not a lot of endorsement for the practice, particularly at the circuit level. Cy pres theory has its origins in trust law. Settlement class judgments ordinarily are not designed to enforce a failed trust. "What is the most thoughtful judicial discussion" that explains the justification for these practices?

The response was that cy pres recoveries have been discussed in a number of California state cases. California recognizes "fluid recovery," as illustrated by the famous case of an order reducing cab fares in Los Angeles — there was likely to be a substantial overlap between the future cab users who benefit from the period of

reduced fares and the past cab users who paid the unlawful high fares, but the overlap was not complete. The Eighth Circuit has provided a useful review this year. And cy pres distribution can be made only when the court has found the settlement to be fair, reasonable, and adequate. That determination itself requires an effort to compensate class members — by direct distribution if possible, but if that is not possible in some other way.

A judge noted a recent case in his court involving a defendant who sent out 100,000,000 spam fax messages. The records showed the number of faxes, but then the records were spoliated. There was no record of where the faxes had gone. The liability insurer agreed to settle for $300 for each of the class representatives. But what could be done with the remaining liability, which — with statutory damages — was for a staggering sum? Seven states in addition to California provide for distributing a portion of a cy pres recovery to Legal Services. That still leaves the need to dispose of the rest. Addressing these questions in rule text must rest on the premise that such distributions are proper.

It was agreed that these questions are serious. The ALI pursued them to cut back on cy pres distributions, to make it difficult to bypass class members. Perhaps a rule should say that it is unfair to have all the settlement funds distributed to recipients other than class members.

Discussion concluded on two notes: these questions cannot be resolved in a single afternoon. And although it would be possible to adopt a rule that forbids cy pres distributions, that probably is not a good idea.

Objectors: Objectors play a role that is recognized by Rule 23 and that is an important strand in reconciling class-action practice with the dictates of due process. Well-framed objections can be very valuable to the judge. At the same time, it is widely believed that there are "bad objectors" who seek only strategic personal gain, not enhancement of values for the class. On this view, some objectors may seek to exploit their ability to delay a payout to the class in order to extract tribute from class counsel that may be to the detriment of class interests. Rule 23(e)(5) was added to reflect the concern with improperly motivated objections by requiring court approval for withdrawal of an objection. This provision appears to have been "somewhat successful."

The Appellate Rules Committee is studying proposals to regulate withdrawal of objections on appeal. The Rule 23 Subcommittee is cooperating in this work.

Alternative sketches are presented at page 273 in the agenda

materials. In somewhat different formulations, each requires the parties to file a statement identifying any agreement made in connection with withdrawal of an objection. An alternative approach is illustrated by sketches at pages 274-275 of the agenda materials. The first simply incorporates a reminder of Rule 11 in rule 23(e)(5). The second creates an independent authority to impose sanctions on finding that an objection is insubstantial or not reasonably advanced for the purpose of rejecting or improving the settlement.

No rule can define who is a "good" or a "bad" objector. The idea of these sketches is to alert and arm judges to do something about bad objectors when they can be identified.

Another possibility that has been considered is to exact a "bond" from an objector who appeals. The more expansive versions of the bond would seek to cover not simply the costs of appeal — which may be considerable — but also "delay costs" reflecting the harm resulting from delay in implementing the settlement when the appeal fails.

A "good" objector who participated in the George Washington Roundtable commented extensively on the obstacles that already confront objectors.

The first comment was that sanctions on counsel "are more and more regulation of attorney conduct."

And the first question from an observer was whether discovery is appropriate to support objections. The response was that it is not likely that a rule would be written to provide automatic access to discovery. There is a nexus to opt-out rights. At most such issues might be described in a Committee Note, recognizing that at times discovery may be valuable.

The next question was whether courts now have authority under Rule 11 and 28 U.S.C. § 1927 to impose sanctions on frivolous objections or objections that multiply the proceedings unreasonably and vexatiously. The response was that the second alternative, on page 275, seems to cut free from these sources of authority, creating an independent authority for sanctions. But it remains reasonable to ask whether independent authority really is needed. One departure from Rule 11, for example, is that Rule 11 creates a safe harbor to withdraw an offending filing as a matter of right; the Rule 23 sketch does not include this.

Rule 68 Offers: The sketches in the agenda materials, beginning at page 277, provide alternative approaches to a common problem. Defendants resisting class certification often attempt to moot the

representative plaintiff by offering complete individual relief. Often the offers are made under Rule 68. Although acceptance of a Rule 68 offer leads to entry of a judgment, it is difficult to find any principled reason to suppose that a Rule 68 offer has greater potential to moot an individual claim than any other offer, particularly one that may culminate in entry of a judgment. Courts have reacted to this ploy in different ways. The Supreme Court has held that a Rule 68 offer of complete relief to the individual plaintiff in an opt-in action under the Fair Labor Standards Act moots the action. The opinion, however, simply assumed without deciding that the offer had in fact mooted the representative plaintiff's claim, and further noted that an opt-in FLSA action is different from a Rule 23 class action. Beyond that, courts seem to be increasingly reluctant to allow a defendant to "pick off" any representative plaintiff that appears, and thus forever stymie class certification. Some of the strategies are convoluted. In the Seventh Circuit, for example, a class plaintiff is forced to file a motion for class certification on filing the complaint because only a motion for certification defeats mooting the case by an offer of complete individual relief. But it also is recognized that an attempt to rule on certification at the very beginning of the action would be foolish, so the plaintiff also requests, and the courts understand, that consideration of the certification motion be deferred while the case is developed. This convoluted practice has not commended itself to judges outside the Seventh Circuit.

The first sketch attacks the question head-on. It provides that a tender of relief to a class representative can terminate the action only if the court has denied certification and the court finds that the tender affords complete individual relief. It further provides that a dismissal does not defeat the class representative's standing to appeal the order denying certification.

The second sketch simply adopts a provision that was included in Rule 68 amendments published for comment in 1983 and again in 1984. This provision would direct that Rule 68 does not apply to actions under Rules 23, 23.1, and 23.2. It did not survive withdrawal of the entire set of Rule 68 proposals.

The third sketch begins by reviving a one-time practice that was at first embraced and then abandoned in the 2003 amendments. This practice required court approval to dismiss an action brought as a class action even before class certification. The parties must identify any agreement made in connection with the proposed dismissal. The sketch also provides that after a denial of certification, the plaintiff may settle an individual claim without prejudice to seeking appellate review of the denial of certification.

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The first question was whether these proposals reflect needs that arise from limits on the ability to substitute representatives when one is mooted. The first response was that it is always safer to begin with multiple representatives. But it was suggested that the problem might be addressed by a rule permitting addition of new representatives. That approach is often taken when an initial representative plaintiff is found inadequate.

The next observation was that substituting representatives may not solve the problem. The defendant need only repeat the offer to each successive plaintiff. The approach taken in the first sketch is elegant.

Another member observed that courts allow substitution of representatives at the inadequacy stage of the certification decision. But substitution may require formal intervention. That is too late to solve the mootness problem. These issues are worth considering.

The last observation was that the Seventh Circuit work-around seems to be effective. "It's not that big a deal." But the first and second sketches are simple.

Issues Classes: The relationship of Rule 23(c)(4) issues classes to the predominance requirement in Rule 23(b)(3) has been a longstanding source of disagreement. One view is that an issue class can be certified only if common issues predominate in the claims considered as a whole. The other view is that predominance is required only as to the issues certified for class treatment. There are some signs that the courts may be converging on the view that predominance is required only as to the issues.

The first sketch in the agenda materials, page 281, simply adds a few words to Rule 23(b)(3): the court must find that "questions of law or fact common to the class predominate over any questions affecting only individual class members, subject to Rule 23(c)(4), and * * *." The "subject to Rule 23(c)(4)" phrase may seem somewhat opaque, but the meaning could be elaborated in the Committee Note.

The second sketch, at page 282, would amend Rule 23(f) to allow a petition to appeal from an order deciding an issue certified for class treatment. The rule might depart from the general approach of Rule 23(f), which requires permission only from the court of appeals, by adding a requirement that the district court certify that there is no just reason for delay. This added requirement, modeled on Rule 54(b), might be useful to avoid intrusion on further management of the case. An opportunity for immediate appeal could be helpful before addressing other matters

that remain to be resolved.

A judge asked the first question. "Every case I have seen excludes issues of damages. Does this mean that every class is a (c)(4) issues class that does not need to satisfy the predominance requirement"? That question led to a further question: What is an issue class? An action clearly is an issue class if the court certifies a single issue to be resolved on a class basis, and intends not to address any question of individual relief for any class member. The action, for example, could be limited to determining whether an identified product is defective, and perhaps also whether the defect can be a general cause of one or more types of injury. That determination would become the basis for issue preclusion in individual actions if defect, and — if included — general causation were found. Issues of specific causation, comparative responsibility, and individual injury and damages would be left for determination in other actions, often before other courts. But is it an "issue" class if the court intends to administer individual remedies to some or many or all members of the class? We have not thought of an action as an issue class if the court sets the questions of defect and general causation for initial determination, but contemplates creation of a structure for processing individual claims by class members if liability is found as a general matter.

This plaintive question prompted a response that predominance still is required for an issue class. This view was repeated. Discussion concluded at that point.

Notice: The first question of class-action notice is illustrated by a sketch at page 285 of the agenda materials. Whether or not it was wise to read Rule 23(c) to require individualized notice by postal mail in 1974 whenever possible, that view does not look as convincing today. Reality has outstripped the Postal Service. The sketch would add a few words to Rule 23(c)(2)(B), directing individual notice "by electronic or other means to all members who can be identified through reasonable effort." The Committee Note could say that means other than first class mail may suffice.

This proposal was accepted as an easy thing to do.

The Committee did not discuss a question opened in the agenda materials, but not yet much explored by the Subcommittee. It may be time to reopen the question of notice in Rule 23(b)(1) and (2) classes, even though the concern to enable opt-out decisions is not present. It is not clear whether the Subcommittee will recommend that this question be taken up.

Pilot Projects

June 2, 2015 version

Judge Campbell opened the discussion of pilot projects by describing the active panel presentation and responses at the January meeting of the Standing Committee. Panel members explored three possible subjects for pilot projects: enhanced initial disclosures, simplified tracks for some cases, and accelerated ("Rocket") dockets.

The Standing Committee would like to encourage this Committee to frame and encourage pilot projects. It likely will be useful to appoint a subcommittee to study possible projects, looking to what has been done in state courts and federal courts, and to recommend possible subjects.

One potential issue must be confronted. Implementation of a pilot project through a local district court rule must come to terms with Rule 83 and the underlying statute, 28 U.S.C. § 2071(a), which direct that local rules must be consistent with the national Enabling Act rules. The agenda materials include the history of a tentative proposal twenty years ago to amend Rule 83 to authorize local rules inconsistent with the national rules, subject to approval by the Judicial Conference and a 5-year time limit. The proposal was abandoned without publication, in part for uncertainty about the fit with § 2071(a).

The Rule 83 question will depend in part on the approach taken to determine consistency, or inconsistency, with the national rules. The current employment protocols employed by 50 district judges are a good illustration. They direct early disclosure of much information that ordinarily has been sought through discovery. But they seem to be consistent with the discovery regime established in Rule 26, recognizing the broad discretion courts have to guide discovery.

Initial Disclosures: Part of the Rule 26(a)(1) history was discussed earlier in this meeting. The rule adopted in 1993 directed disclosure of witnesses with knowledge, and documents, relevant to disputed matters alleged with particularity in the pleadings. It included a provision allowing districts to opt out by local rule; this provision was included under pressure from opponents who disliked the proposal. The rule was revised in 2000 as part of the effort to eliminate the opt-out provision of the 1993 rule, limiting disclosure to witnesses and documents the disclosing party may use. Arizona Rule 26.1 requires much broader disclosure even than the 1993 version of Rule 26(a)(1). It is clearly intended to require disclosure of unfavorable information as well as favorable information. The proposal for adoption was greeted by protests that such disclosures are inconsistent with the adversary system. The Arizona court nonetheless persisted in adoption. This broad disclosure is coupled with restrictions on

post-disclosure discovery. Permission is required, for example, to depose nonparty witnesses. Arizona lawyers were surveyed to gather reactions to this rule in 2008 and 2009. In the 2008 survey, 70% of the lawyers with experience in both state and federal courts preferred to litigate in state court. (Nationally, only 43% of lawyers with experience in both state and federal courts prefer their state courts.) The results in the 2009 survey were similar. More than 70% of the lawyers who responded said that initial disclosures help to narrow the issues more quickly. The Arizona experience could be considered in determining whether to launch a pilot project in the federal courts.

An observer from Arizona said that debate about the initial disclosure rule declines year-by-year. "It does require more work up front, but it is, on average, faster and cheaper. Unless a client wants it slow and expensive, we often recommend state court." An action can get to trial in state court in 12, or 16, months. Two years is the maximum. It takes longer in federal court. He further observed that Arizona should be considered as a district to be included in a federal pilot project because the bar, and much of the bench, understand broad initial disclosures.

The next comment observed that a really viable study should include districts where broad initial disclosure "is a complete shock to the system." There may be a problem with a project that exacts disclosures inconsistent with the limited requirements of Rule 26(a)(1). But it is refreshing to consider a dramatic departure, as compared to the usually incremental changes made in the federal rules. This comment also observed that even in districts that adhered to the 1993 national rule, lawyers often agreed among themselves to opt out.

A member asked whether comparative data on case loads were included in the study of Arizona experience. The answer was that they were not in the study. But Maricopa County has 120 judges. Their dockets show case loads per judge as heavy as the loads in federal court.

A judge observed that a mandatory initial disclosure regime that includes all relevant information would be an integral part of ensuring proportional discovery. The idea is to identify what it is most important to get first. A pilot project would generate this information as a guide to judicial management. The judge could ask: "What more do you need"? This process could be integrated with the Rule 26(f) plan. This is an extraordinarily promising prospect. There will be enormous pushback. Justice Scalia, in 1993, wondered about the consistency of initial disclosure with an adversary system. But the success in Arizona provides a good response.

June 2, 2015 version

Accelerated Dockets: This topic was introduced with a suggestion that the speedy disposition rates recently achieved in the Western District of Wisconsin appear to be fading. The Southern District of Florida has achieved quick disposition times for some case. "Costs are proportional to time." Setting a short time for discovery reflects what is generally needed. State-court models exist. The "patent courts" are experimenting with interesting possibilities. The Federal Judicial Center will report this fall on experience with the employment protocols.

These and other practices may help determine whether a pilot project on simplified procedures could be launched. Federal-court tracking systems could be studied at the beginning. State court practices can be consulted.

A member provided details on the array of cases filed in federal court. The four most common categories include prisoner actions, tort claims, civil rights actions (labor claims can be added to this category), and contract actions. Smaller numbers are found for social security cases, consumer credit cases, and intellectual property cases. Some case types lend themselves to early resolution. Early case evaluation works if information is shared. Early mediation also works, although the type of case affects how early it can be used.

One thing that would help would be to have an e-discovery neutral available on the court’s staff to help parties work through the difficulties. Many parties do not know what they’re doing with e-discovery. This member has worked as an e-discovery master. "Weekly phone calls can save the parties a lot of money." One ploy that works is to begin with a presumption that the parties will share the master’s costs equally, unless the master recommends that one party should bear a larger share. That provision, and the fact that they’re being watched, dramatically reduces costs and delay. And e-discovery mediation can help.

It also helps when the parties understand the case well enough for early mediation.

And experience as an arbitrator, where discovery is limited to what the arbitrator directs, shows that it is possible to control costs in a fair process.

Another suggestion was that a statute allows summary jury trial. If the parties agree, it can be a real help. The trial can be advisory. It may be limited, for example to 3 hours per party. Summaries of testimony, or live witnesses, may be used. Charts may be used. "Juries love it." After the jury decides, lawyers can ask the jury why they did what they did. This practice can be a big

help in conjunction with a settlement conference.

Another suggestion was that it would help to devise rules to dispose of cases that require the court to review a "record." Social Security cases, IDEA cases, and ERISA fiduciary cases are examples.

Another judge noted that the Northern District of Ohio has a differentiated case management plan. The categories of cases include standard, expedited, complex, mass tort, and administrative. There are ADR options, and summary jury trial. It would be good to study this program to see how it works out over time.

Discussion concluded with the observation that if done well, study of these many alternatives could lead to useful pilot projects.

Judge Sutton concluded the discussion of pilot projects by noting that the Standing Committee is grateful for all the work done on the Duke Rules package and on Rule 37(e). He further noted that Rule 26(a)(1) failed in its initial 1993 form because it was a great change from established habits. It may be worthwhile to restore it, or something much like it, as a pilot project in 10 or 15 districts to see how it might be made to work now.

Judge Sutton concluded the meeting by noting that Judge Campbell's term as Committee Chair will conclude on September 30. Judge Campbell will attend the November meeting, and the Standing Committee meeting in January, for proper recognition of his many contributions to the Rules Committees. "Surely 100% of Arizona lawyers would prefer David Campbell to anyone else." His stewardship of the Committee has been characterized by steadiness, even-handedness, patience, and insight. And he is always cheerful. "Thank you."

Respectfully submitted,

Edward H. Cooper
Reporter

June 2, 2015 version

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Report to the Civil Advisory Rules Committee

A subcommittee of the Civil Rules Advisory Committee ("Committee") has been created to coordinate steps to educate judges and practitioners about the pending changes to the Civil Rules that are to take effect on December 1, 2015. Members of the subcommittee are: Judge John Bates, Judge David Campbell, Judge Jeremy Fogel, Judge Paul Grimm (chair), Judge John Koeltl, Judge Gene Pratter, Judge Craig Shaffer, and John Barkett.

Since its formation, the subcommittee has held a number of conference calls to identify how best to get the word out to judges and lawyers regarding the new rules. The following measures are being pursued:

1. Letters to Chief Judges and to Judges. Once the new rules go into effect, a letter will be sent to each Chief Circuit Judge, Chief District Judge, and Chief Bankruptcy Judge informing them of the new rules and the key concepts that underlie them, as well as informing them about educational materials that have been and will be developed for use in educating judges during 2016 at judicial education seminars. The letter will encourage the Chief Judges to include instruction on the new rules at any judicial education seminars in the upcoming year. The letter will be signed jointly by Judge John Bates and Judge Jeff Sutton. In addition, a similar letter will be drafted and sent to each Circuit, District, Magistrate and Bankruptcy Judge, informing them of the new rules and the key concepts underlying them.
2. Educational Videos. Prior to the effective date of the new rules five videos will be recorded by the FJC discussing various aspects of the new rules. They include a 20 minute "stand alone" video that is an overview of all the new rules that discusses the four interrelated goals of the new rules: fostering cooperation among parties; achieving discovery that is proportional to what is at issue in the litigation; promoting active judicial management of the discovery process; and implementing a rule to address the duty to preserve electronically stored information ("ESI") and setting forth the curative and other measures that may be taken when ESI that should have been preserved in the anticipation or conduct of litigation is not, because a party failed to take reasonable measures to preserve it. This video is intended to be used as part of an educational program, augmented by written materials and/or speakers, and is short enough to be easily viewed in one session, but detailed enough to impart the critical information about the new rules. Additionally, four separate videos will be prepared regarding the areas of Cooperation, Proportionality, Active Judicial Management, and ESI preservation and the consequences for failure to preserve ESI. These videos will be more detailed than the discussion of each of these areas in the 20 minute overview, and are intended to be viewed individually or together. It is expected that the longer videos collectively will total 60-90 minutes. Scripts have been written for all five videos, and they will be recorded by the FJC in October and November so that they are available by the time the new rules take effect. It is expected that the videos will be hosted at the FJC website, and available to judges and the public for use in educational programs about the new rules.
3. Coordinating with Bar Associations: The subcommittee plans to communicate to national, regional, and specialty bar associations to inform them of the new rules,

their key concepts, and to encourage them to include articles on the new rules in their publications, and to include segments on the new rules in any educational programs they sponsor during 2016. They will be informed about educational materials that they may use as part of this effort, including the videos mentioned above.

4. Identification of written materials that discuss the new rules. Finally, the subcommittee is identifying written materials that discuss the new rules that may be of value in educational programs discussing them. A chart comparing the new rules with the old has been prepared for use as a handout, and it has been used with good results at several educational programs to date. A powerpoint presentation also is being discussed as an educational tool to be made available. It is hoped that these materials will be posted on the FJC website and available for judges and the public.

Paul W. Grimm

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RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has been quite active since the full Committee's April meeting. In total, it has attended, or at least had representatives participate in, roughly a dozen conferences since late 2014, culminating in the Subcommittee's own mini-conference at the DFW Airport on Sept. 11, 2015. Since April the Subcommittee has also held a number of conference calls and meetings.

This memorandum is designed to summarize the ideas developed during this activity and to present the six rule-amendment ideas that presently seem to hold the most promise for productive effort. In addition, it reports on a variety of other possible rule-revision ideas that the Subcommittee has discussed with the full Committee on occasion since the first full Committee discussion of these issues during the March, 2012, meeting.

Accompanying this memorandum, the agenda book should contain a variety of additional materials developed during the Subcommittee's work. These should include the issues memo for the Sept. 11 mini-conference and notes of the mini-conference. It also should include notes on Subcommittee meetings or conference calls on Sept. 25, 2015, Sept. 11, 2015, July 15, 2015, July 12, 2015, and June 26, 2015. The Subcommittee held other conference calls principally addressed to more logistical matters, and also discussed these issues during the many conferences it has attended. Notes on those events are not included.

It is also worth noting that the Subcommittee has received submissions from many individuals and groups about possible amendments to Rule 23. During 2015, approximately 25 submissions have been received. These submissions are posted at www.uscourts.gov.

Based on the input the Subcommittee has received, it has concluded that some topics that initially seemed to warrant proceeding with rule-amendment preparation no longer seem to support immediate activity. In part, that conclusion is based on relatively recent developments, including developments in the case law. In part, that conclusion recognizes that further developments in the relatively near future may cause the Subcommittee to conclude that further work on some of these topics is justified. So it is possible that some of the topics on which further action has been deferred will return to the full Committee at its Spring 2016 meeting. The Subcommittee is still contemplating a schedule that would permit publication of preliminary drafts of rule amendments in August, 2016.

The list of "front burner" topics has evolved considerably since the April full Committee meeting, which discussed a list of topics that had already evolved quite a lot since the first full

Committee discussion of these issues at the March 2012 meeting. Below are presentations on six topics the Subcommittee currently regards as most suited to immediate work. After introducing those topics, this memorandum will discuss other topics that have received considerable attention during the Subcommittee's work, including some on which it contemplates that further work may be in order.

The topics on which the Subcommittee proposes to focus its immediate attention are:

1. "Frontloading"

2. Excluding "preliminary approvals" of class certification and orders regarding notice to the class about possible settlements from immediate appeal under Rule 23(f)

3. Clarifying Rule 23(c)(2)(B) to state that Rule 23(e)(1) notice triggers the opt-out period

4. Notice to unnamed class members

5. Handling objections by class members to proposed settlements

6. Criteria for judicial approval of class-action settlements

After presenting these topics on which the Subcommittee makes recommendations, the memorandum presents a composite version of the amendment sketches so that Committee members can see how they might fit together.

This memorandum reflects the Subcommittee's present thinking, which has evolved further even since its last conference call on September 25. Thus, one topic on which the Subcommittee was uncertain about proceeding during that conference call has been restored to its list of recommendations. Besides making these recommendations, this memorandum also presents additional ideas that the Subcommittee has examined in detail and discussed with many participants in conferences and meetings it has attended. These issues are presented for discussion in order to support full discussion in Salt Lake City. That discussion will provide a basis for introducing the issues during the Standing Committee's January, 2016, meeting. Meanwhile, the Subcommittee will continue its work on Rule 23, and the rule language and Committee Note language presented in the sketches will surely be refined.

The additional issues presented for discussion can be generally separated into three categories:

Issues "on hold"

Two issues seem not suitable for current rulemaking efforts, although developments may justify reconsidering that conclusion. Fuller explanations of the current situation will be presented later in this memorandum, but it seems useful to introduce these two issues:

Ascertainability: During the full Committee's April meeting, the Subcommittee was urged to look carefully at issues of ascertainability. In part due to a series of decisions by the Third Circuit, this topic appeared to have growing importance. It is clear that the court must include a class definition when it certifies a class. Indeed, as amended in 2003, Rule 23(c)(1)(B) instructs the court to "define the class." Particularly in consumer class actions, much attention has been given recently to whether there is a workable way to identify class members and scrutinize claims submitted by class members, particularly those who do not have receipts for retail purchases of relatively small-value items that sometimes give rise to claims. A key question is the extent to which courts ought to insist, at the certification stage, on a definite game plan for possible later distribution of benefits. The Third Circuit view appears to emphasize this concern. The Seventh Circuit has issued an opinion offering distinctive views supported by provisions presently in the rule, and raising doubts about the need to inquire into the manner of distribution of benefits to the class at the certification stage. [Copies of three recent decisions -- all rendered since the full Committee's April meeting -- should be included in this agenda book, for those who wish to review them.]

Rule 68 and pick-off individual offers of judgment: This set of issues has achieved considerable prominence during recent years, in part because the Seventh Circuit took a position that enabled defendants in some class actions to pick off the class-action aspects of the case by offering the named plaintiff full relief before a motion to certify was filed. A consequence was sometimes that plaintiffs would file "out of the chute" motions to certify, which plaintiffs sometimes asked the courts to stay pending development of a record suitable to deciding class certification. The Seventh Circuit has recently changed its views on these issues, and the Supreme Court has granted certiorari in a case that appears to raise these issues, with oral argument scheduled in October.

Topic the Subcommittee brings
before the full Committee
without a recommendation

Settlement class certification: After the mini-conference, the Subcommittee initially decided that the potential

difficulties of proceeding with a new Rule 23(b)(4) on settlement class certification outweighed any benefits in doing so. Presented below is the material that relates to that conclusion. Further reflection prompts the Subcommittee to bring this question before the full Committee. As an alternative, this memorandum also introduces an idea drawn from the 1999 Report on Mass Tort Litigation for adding reference to settlement to Rule 23(b)(3). Subcommittee members can address these issues during the meeting in Salt Lake City.

Topics the Subcommittee would take off the agenda

Besides deciding that the two issues identified above should be put "on hold," the Subcommittee has also determined that the following issues that it has previously discussed with the Committee should be taken off the agenda for the present Rule 23 reform effort. The notes of the mini-conference and the various Subcommittee meetings and conference calls show the consideration given these issues. Details on what was before the mini-conference can be found in the issues memorandum submitted to participants in that event. All of these items should be included in the agenda book. These issues are:

Cy pres: In his separate statement regarding denial of certiorari in a case involving Facebook, Chief Justice Roberts expressed concern about the manner in which what have been called cy pres issues have been handled in some cases. The ALI, in § 3.07 of its Principles of Aggregate Litigation, addressed these issues, and the courts are increasingly referring to the ALI formulation in addressing these issues. The Subcommittee has concluded that a rule amendment would not be likely to improve the handling of these issues, and that it could raise the risk of undesirable side effects. One point on which many agree is that, when there are lump sum class-action settlements, there often is some residue after initial claims distribution is completed. The topics on which the Subcommittee recommends proceeding, particularly amendments to Rules 23(e)(1) and 23(e)(2), include reference in the Committee Note to the importance of addressing these eventualities in submissions to the court at the beginning of the settlement process and in the handling of final approval of a proposed settlement. The Notes also focus attention on the claims process recommended by the settlement proposal, in an effort to ensure that it is suited to the case.

Issue classes: Considerable discussion has been had of the possible tension between the predominance requirement of Rule 23(b)(3) and the invitation in Rule 23(c)(4) to certify a class with regard to particular issues. Included in this discussion was the possibility of recommending an amendment to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of such issues. Eventually, the

conclusion was reached that there is no significant need for such a rule amendment. The various circuits seem to be in accord about the propriety of such treatment "[w]hen appropriate," as Rule 23(c)(4) now says. And this treatment may sometimes be warranted in actions under Rule 23(b)(2), a practice that might be called into question under some of the amendment ideas the Subcommittee has examined. On balance, these issues appear not to warrant amendment of the rules.

1. "Frontloading"

This issue was not on the list the Subcommittee presented to the full Committee in April. It has emerged from various discussions since then, which emphasized that it is important to ensure that vital information is provided to judges asked to approve class-action settlements, and to ensure that class members can learn enough about proposed settlements to make informed decisions whether to opt out or object.

At the mini-conference, the Subcommittee presented a more elaborate sketch of a "frontloading" rule that enumerated 14 specific topics on which parties must present the court with information when asking the court to authorize notice to the class under Rule 23(e). But there was widespread unhappiness among the conferees with a "laundry list" approach to such a rule even though the idea of getting more important information on the table early in the settlement-review process received considerable support. The sketch below responds to these concerns.

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) After the parties have provided [relevant] {sufficient} information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

Sketch of Draft Committee Note

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then could also satisfy the notice requirements of Rule 23(c)(2)(B) in a class to be certified under Rule 23(b)(3), and trigger the class members' time to opt out. Information about the opt-out rate could then

be available to the court at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. If the court has not previously certified a class, this showing should also provide a basis for concluding that the court will certify a class for purposes of settlement. Although the order to send notice is often called a "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

There are many types of class actions, and class-action settlements are of many types. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each one. Instead, the subjects to be addressed depend on the specifics of the particular class action and the particular proposed settlement. General observations can be made, however.

One key element is class certification. If the court has already certified a class, the only information necessary in regard to a proposed settlement is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, the parties must ensure that the court has a basis for concluding that it will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision that the prospects for certification are warranted without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' submissions in regard to the proposed settlement should not be considered in relation to the later request for certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and nature of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details on the nature of the claims process that is contemplated [and about the take-up rate anticipated]. The possibility that the parties will report back to the court on the

take-up rate after notice to the class is completed is also often important. And because there are often funds left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is often important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal is often important.

The proposed handling of an attorney fee award under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an attorney fee award to the expected benefits to the class, and to take account of the likely take-up rate. One method of addressing this issue is to defer some or all of the attorney fee award determination until the court is advised of the actual take-up rate and results. Another topic that normally should be included in the report is identification of any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions demonstrate the likelihood that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

(2) 23(f) and the Rule 23(e)(1) order for notice to the class

Rule 23. Class Actions

* * * * *

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An order under Rule 23(e)(1) may not be appealed under Rule 23(f). An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Sketch of Draft Committee Note

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is often characterized as a "preliminary approval" of the proposed class certification. But it is not a final approval of class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that the court of appeals may not permit an appeal under this rule until the district court decides whether to certify the class. If it approves the settlement as well, that may often lead to entry of an appealable judgment. If it does not approve class certification -- thus leaving class certification for litigation purposes for possible later resolution -- there is no order subject to review under Rule 23(f).

(3) Clarifying that Rule 23(e)(1) notice triggers the opt-out period

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) *Notice.*

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances to all members who can be identified through reasonable effort. * * * * *

Sketch of Draft Committee Note

As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies the giving of notice. This decision is sometimes called a "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is commonplace that notice to the class is sent simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of that practice. Requiring repeat notices to the class can be wasteful and confusing to the class members.

(4) Notice in 23(b)(3) class actions

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) *Notice*

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort. * * * * *[1]

Sketch of Draft Committee Note

Subdivision (c)(2). Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the rule's individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted that requirement to mean that first class mail would be necessary in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. As that technological change has evolved, courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. No longer should courts assume that first class mail is the "gold standard" for notice in Rule 23(b)(3) class actions. As amended, the rule calls for giving notice "by the most appropriate means." It does not specify any particular means as preferred. Although it may often be true that online methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to the Internet.

[1] The alternative language was suggested by a Subcommittee member.

Instead of assuming one size fits all, therefore, courts and counsel should focus on the means most likely to be effective to notify class members in the case before the court. Professional claims administration firms have achieved expertise in evaluating differing methods of reaching class members. There is no requirement that such professional assistance be sought in every case, but in appropriate cases it may be important, and provide a resource for the court and counsel. In providing the court with information supporting notice to the class of a proposed class-action settlement under Rule 23(e)(1), for example, it may often be important to include a report about the proposed method of giving notice to the class, and perhaps a forecast of the anticipated take-up rate, as well as the proposed form of notice and any proposed claims form.

[Careful attention should also be given to the content and format of the notice and any claim form. The ultimate goal of giving notice is to enable class members to make decisions about whether to opt out or object, or to make claims. The rule requires that the court use the "best notice that is practicable." To achieve that goal, attention to format and content are in order. Format and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made of up of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' expectations and capabilities.

Particular attention to the method for class members to make claims is an important ingredient of the process of developing the notice and claims process. Although it is important to guard against groundless claims by purported class members, it is also important to avoid making the claims process unnecessarily burdensome, particularly when the amounts available for successful claimants are relatively small. Submissions to the court under Rule 23(e)(1) often should address the possibility that after initial submission of claims a residue of funds will be left for further distribution. In addition, it may often be desirable for the court to direct that the parties report back at the end of the claims distribution process about the actual pay-out rate. The goal of a notice and claims process in a Rule 23(b)(3) class action is to deliver relief to the class members. A claims process that maximizes delivery of relief to class members should be a primary objective of the notice program.

Attention should focus also on the method of opting out provided in the notice. As with making claims, the process of opting out should not be unduly difficult or cumbersome. At the same time, it is important to guard against the risk of unauthorized opt-out notices. As with other aspects of the notice process, there is no single method that is suitable for all cases.][2]

This amendment recognizes that technological change since 1974 calls for recalibrating methods of notice to take account of current realities. There is no reason to think that technological change will halt soon, and there is no way to forecast what further technological developments will affect the methods used to communicate. Courts seeking "the most appropriate means" of giving notice to class members under this rule should attend to existing technology, including class members' likely access to that technology, when reviewing the methods proposed in specific cases.

[2] This Note discussion draws from comments made to the Subcommittee in numerous conferences. It is supported by the rule's current reference to the "best notice that is practicable." It might be debated whether that rule language, which has long been in the rule, precisely supports this Note language, for the Note is mainly about the changes being proposed for the rule, not what has long been in it. But the amendment addresses "appropriate" notice methods, so a Note that addresses questions of format and content based on experience seems in order.

(5) Objectors

Although the Subcommittee's many conferences and meetings with experienced class-action lawyers have revealed considerable disagreement about many of the topics discussed, this topic is one on which there was widespread agreement, if not virtual unanimity. Even those who have presented objections to class-action settlements in many instances also express chagrin about the behavior of some objectors or objector counsel who exploit the objection process, and the ability to appeal from denial of an objection, to extract unjustified payments from class counsel desirous of completing the settlement and delivering the agreed relief to the members of the class.

The amendment ideas below essentially adopt two methods for dealing with these problems. First, the rule would direct objectors to state the grounds for their objections. The Subcommittee has been informed that, on occasion, objectors submit virtual one-line objections that are placeholders for appeals that in turn present the opportunity to extract tribute from class counsel. Not only does that behavior constitute a sort of a "tax" on successful class actions, it also denies the district court the benefit of a ground for evaluating the objections it receives.

The idea of objector disclosure was suggested to the Subcommittee during the conferences it attended after the full Committee's April meeting, and initially produced a detailed list of items that an objector would have to provide the court. Although a demanding list of disclosure requirements might be an inviting way of dealing with bad faith objectors, such requirements could also constitute an undue obstacle to objections by other class members not intent on extracting tribute. Accordingly, the sketch below is more general about what must be disclosed, and includes bracketed language that might strengthen this aspect of this approach.

The second feature of this amendment approach seeks to remove, or at least to regulate, the apparent inducement for bad faith objections -- the pay off. It builds on suggestions made to the Civil Rules Committee and to the Appellate Rules Committee recommending that there be a complete prohibition of any payment to objectors or objector counsel. The sketch below does not go that far. Instead, it builds on the 2003 amendments to Rule 23, which in Rule 23(e)(5) already require that an objector who wants to withdraw an objection must obtain the court's approval to do so. This approach is designed to put the court in a position to review any such payment rather than prohibit all such payments.

The appropriate court to make the approval decision is not certain. An initial reaction might be that the district court, having recently performed the review required under Rules

23(e)(1) and 23(e)(2) would be in a much better position than the court of appeals, which may be unfamiliar with the case. The Subcommittee has been told that often the "payoff" sort of situation arises shortly after the notice of appeal is filed, or even before it is filed. If that is so, it seems likely that the district court would be much better situated than the court of appeals to evaluate the matter.

On the other hand, it is possible that the question could arise much later in the process. An FJC study several years ago revealed that there is a striking divergence among circuits with regard to the resolution of objector appeals on the merits. The "hold up" paradigm for the sort of objector behavior addressed in this sketch seems to presume an early deal and no resolution on the merits. In two of the circuits studied by the FJC that was what happened in the great majority or all the objector appeals during the period studied. But in another circuit about two-thirds of the objector appeals resulted in an appellate decision on the merits of the objector's appeal. At least in that circuit, it may be that after the appeal has resulted in substantial appellate proceedings, the court of appeals is better equipped to evaluate a proposed dismissal of the appeal than the district court, which may not have seen the case for a year or two.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~,~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.]

(B) T~~t~~he objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c)[3] of the

[3] For purposes of discussion at this meeting, one possibility that has been the subject of discussions with the

Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.[4] [5]

Appellate Rules Committee is the addition of an Appellate Rule 42(c), providing as follows:

> **(c) Dismissal of Class-Action Objector's Appeal**. A motion to dismiss an appeal from an order denying an objection made to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure [must][may] be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Rule 23(e)(5)(B) [if the objector or the objector's counsel is to receive any payment or consideration in [exchange for] {connection with} dismissal of the appeal].

The use of "may" above recognizes that the court of appeals may wish to deal with the matter itself. For one thing, if no payment or consideration is to be paid to the objector or objector counsel, there may be no reason for reference to the district court. For another, there may be cases in which the court of appeals concludes that it is better situated to resolve the matter than the district court. If the motion to withdraw the appeal arises shortly after the notice of appeal is filed, and therefore also shortly after the district court has reviewed the proposed settlement and rejected the objection, it would be unlikely the court of appeals would feel itself better equipped to deal with the matter. On the other hand, if the appeal has been fully briefed and argued, the court of appeals may be more familiar with the issues than the district court, for the district court's action might be several years old by then.

[4] The sketch presents in brackets the question whether the rule should be directed only to withdrawal of an objection or dismissal of an appeal, or instead to payment to the objector or objector counsel for withdrawing the objection or appeal. Current Rule 23(e)(5) focuses only on withdrawal of the objection. That may be sufficient. But it would seem that many objections are, in effect, abandoned after the class member obtains a fuller understanding of the issues. Whether one wants to burden that withdrawal with a court-approval requirement could be debated. On the other hand, it may be that the filing of a notice of appeal shows that something more serious is going forward. Then perhaps the focus on payment should be more pronounced. This issue has been discussed by the Subcommittee and it continues to consider the right balance.

[5] Another consideration might be whether to include something like current Rule 23(e)(3), which requires

Alternative 1

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in [exchange for] {connection with} withdrawal of an objection or appeal from denial of an objection.

Alternative 2

(C) The court must approve any payment to the objector in connection with withdrawing the objection or[, if acting on referral from the court of appeals, withdrawing] an appeal from denial of an objection.[6]

[This sketch assumes collaborative work with the Appellate Rules Committee on devising a combination of Civil Rule and Appellate Rule provisions that would suitably implement the regime of judicial review of any dismissal of an appeal from denial of an objection. Communications are under way with the Appellate Rules Committee to develop a coordinated response. The content of any amendments to the Appellate Rules is committed to the Appellate Rules Committee. One possible place for an Appellate Rule would be in Rule 42, which is why that designation is used in the above sketch of a Civil Rules.]

Sketch of Draft Committee Note

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identification of "side agreements" reached in connection with proposed settlements. Perhaps requiring disclosure (not just identification) of such side agreements would be a good idea in connection with proposed withdrawal of an objection or appeal from denial of the objection. That might somewhat sidestep the question of having a rule require court approval for payments themselves, as opposed to court approval for withdrawal of the objection or dismissal of the appeal.

[6] As a matter of form of amendment, it has been suggested that the better way to present an amendment along these lines would be to retain the first portion of the rule ("Any class member may object to the proposal if it requires court approval.") as 23(e)(5), and to make the remainder of (A) new Rule 23(e)(5)(A). Then (B) and (C) might be combined. These drafting possibilities will be kept in mind as the Subcommittee moves forward.

Subdivision (e)(5). Objecting class members can play a critical role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement submitted to the court under Rule 23(e)(1), objectors can make an accurate appraisal of the merits and possible failings of a proposed settlement. By raising these matters, they can assist the court in making its decision whether to approve the settlement.

The amendment therefore directs that objections state [with specificity] the grounds on which they are made. A simple "I object" does not assist the court in evaluating the proposal. [Accordingly, the amended rule specifies that failure to state the grounds for the objection is a reason to reject the objection during the final approval process.] Care must be taken, however, to avoid unduly burdening class members who wish to object. Particularly if they are not assisted by counsel, class members cannot be expected to present objections that adhere to technical legal requirements. Instead, they should only be expected to specify what aspect of the settlement they find objectionable. [In particular, they should state whether they are objecting only for themselves, for the entire class, or for some discrete part of the class.] With these specifics, the court and the parties may suitably address the concerns raised during the final approval hearing.

The rule is also amended to require court approval of any payment to an objector or objector's counsel in exchange for withdrawing an objection or appeal from denial of an objection. Although good-faith objections have provided assistance to courts reviewing proposed settlements, the Committee has been informed that in at least some instances objectors or their counsel appear to be acting in counterproductive ways. Some may submit delphic objections that do not go much beyond "I object," and thus do not assist the court in evaluating the proposed settlement. The requirement that the objection state the grounds [and authority to reject any objection that does not] addresses this problem.

Another problem is that objectors may exploit the delay potential of an appeal to extract concessions for themselves. The 2003 amendments to Rule 23 permitted withdrawal of an objection before the district court only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. But the delay resulting from an objector appeal may enable objectors to extract special concessions in return for

dropping the appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to enable the class to receive the benefits of the settlement.

This amendment therefore extends the requirement of court approval to apply to withdrawal of an appeal as well to withdrawal of an objection before the district court whether or not the objector or objector counsel is to receive a payment or other consideration for dropping the appeal. A parallel amendment to Appellate Rule 42(c) confirms that the Court of Appeals may refer the question whether to approve the dismissal of the appeal to the district court upon receipt of a motion to dismiss the appeal. The district court is likely often to be better equipped to decide whether to approve the payment than the court of appeals because the district court is more familiar with the case and with the settlement.

[In reviewing requests for withdrawal of an appeal -- as with requests for approval of withdrawal of an objection before the district court under current Rule 23(e)(5) -- the court should adopt a standard of reasonableness. Attention should focus particularly on instances in which a payment is to be made to the objector or objector counsel in return for the withdrawal. The request for approval should include details on any agreements made in connection with the withdrawal.

When the payment recognizes that the objector is in a distinctive or unique position that warrants treatment different from the other members of the class, that would ordinarily be a ground for approving the payment. When the objection results in a change in the settlement that affords additional relief to other class members as well as the objector, that would ordinarily be a sufficient basis for approving the payment [unless the amount of the payment is disproportionate to the overall benefits for other members of the class]. Even if the objection does not result in any change to the proposal, it may be that it assisted the district court in evaluating the proposal. For example, it may be that the objection enabled more careful review of certain aspects of the proposal or the value of the entire proposal. Even if the court concluded, after that review of the adequacy of the proposal, that approval was warranted, the value of the objection to the review process may justify a reasonable payment to the objector or objector counsel.][7]

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[7] The bracketed paragraphs are largely about the standards the court might use when passing on requests to withdraw an

(6) Settlement approval criteria

The Subcommittee early focused on the diversity and divergence of settlement-approval "checklists" employed in various circuits. The ALI had expressed concern in its Aggregate Litigation Principles that existing precedent produced an unduly diffuse and unfocused settlement review process, frustrating both judges and lawyers.

In place of that existing process, the Subcommittee presented in April a sketch that emphasized four approval principles and also contained a "catch all" authorization to consider whatever else the court thought important. During the April Committee meeting, it was suggested that a revised sketch for discussion at the mini-conference omit the catch-all provision.

The issues memorandum for the Sept. 11 mini-conference included such a sketch. It produced concern that in given cases other matters not directly invoked among the four factors distilled in the Subcommittee's list could matter enough to mention the possibility that such factors supported rejection of the proposal. Accordingly, both alternatives below offer a version of a "catch all" authorization for consideration of other things. At the same time, it might be argued that the listed four factors suffice for this purpose, and that anything that might trouble a court should bear on one of those four factors. Indeed, as the brackets around factor (B) suggest, it might be that we need only three, and can trust factor (A) to cover the problems that might also be presented under factor (B).

The sketch below also includes two alternative formulations. It could be said that Alternative 2 is more focused, and potentially more confining than Alternative 1. Alternative 1 merely says that the court should consider the listed factors in deciding whether the proposed settlement is "fair, reasonable, and adequate." It may be that this phrase, in the current rule, is so elastic as to encompass virtually any factor ever mentioned by any court considering a class-action settlement. Alternative 2 may be more focused, since it says that the court must find that all four (or three) factors are met. So it could be that in a given case a judge would consider approval forbidden under Alternative 2, even though the proposed settlement would be found

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objection or dismiss an appeal. It might be argued that they go too far beyond the actual provisions of the rule. On the other hand, the rule does require court approval, so Note language about how the court should approach that duty seems legitimate. It could also be noted that the court of appeals may sometimes be able to apply these standards when the appellant moves to dismiss an appeal.

fair, reasonable, and adequate using the more expansive direction in Alternative 1, and would win approval under that alternative.

The Subcommittee is somewhat divided on whether to adopt Alternative 1 or Alternative 2. In part, this division results from debates about the extent to which a rule should constrain courts in their review of proposed settlements. It also results from uncertainty about whether any rule would really constrain courts if it turns on whether the judge thought the settlement "fair, reasonable, and adequate."

There may also be some disagreement on the Subcommittee on whether either of these formulations -- particularly with a "catch all" provision -- would actually change judicial behavior. One view is that they would not, since judges could continue to do exactly what they did before the amendment. Another view is that such a rule change would provide much-needed structure and focus for the settlement-review process. It would also provide a basis for judges in any district to look to decisions in any other district for guidance in that process, without the complication that the other district was employing a different circuit's list of factors.

The Subcommittee is presenting these two alternatives to the full Committee, along with the question whether to include a "catch all" provision. Although it has not reached consensus as between Alternative 1 and Alternative 2, it is persuaded that the choice is not of monumental importance.

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

* * * * *

Alternative 1

(2) If the proposal would bind class members, the court [may disapprove it on any ground the court deems pertinent to approval of the proposal, but] may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(A) the class representatives and class counsel have [been and currently are] adequately represented [representing] the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award [and the timing of its payment,] and any ancillary agreement made in connection with the settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; [and]

(D) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] and the proposed method of claims processing is fair [and is designed to achieve the goals of the class action]; [and]

[(E) approval is warranted in light of any other matter that the court deems pertinent.]

[For purposes of simplicity, the draft Committee Note below assumes that Alternative 1 will be adopted.]

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to clarify that the court should approve a proposed class-action settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a

"checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment is designed to provide more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement and deciding whether giving notice to the class is warranted by the prospect that the settlement will win final approval. The submissions to the court under Rule 23(e)(1), supporting notice to the class, should provide class members with more information to evaluate a proposed settlement. Objections under Rule 23(e)(5) can therefore be calibrated more carefully to the actual specifics of the proposed settlement. Rule 23(e)(5) is amended to direct objectors to state the grounds for their objections, which should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members. It focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with

what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiating the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Evaluating the proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

[**Paragraph (E)**. Rule 23(e)(5)'s distillation of core settlement-approval criteria does not prevent the court from considering any other matter that, in its discretion, appears pertinent to the overall fairness, reasonableness, or adequacy of the proposal. In order to permit effective evaluation of such matters, the court may direct the parties to provide information that will assist in its review of the settlement.]

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(e)(2) provides the focus the court should use in undertaking that analysis.

Composite of possible amendments
that might become an amendment package

In order to facilitate comprehension of the overall package of possible amendments, the following attempts to combine all six sketches above into a single presentation. Before any such package goes forward, it would certainly be modified and refined. Nonetheless, the overall composite may be helpful to Committee members.

Rule 23. Class Actions

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(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort. * * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) After the parties have provided [relevant] {sufficient} information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

Alternative 1

(2) If the proposal would bind class members, the court [may disapprove it on any ground the court deems pertinent to approval of the proposal, but] may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(A) the class representatives and class counsel have [been and currently are] adequately represented [representing] the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award [and timing of its payment,] and any ancillary agreement made in connection with the settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; and

(D) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] and the proposed method of claims processing is fair [and is designed to achieve the goals of the class action].

[(E) approval is warranted in light of any other matter that the court deems pertinent.]

* * * * *

(5) (A) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~;~~. The objection must [state whether the objection applies only to the

objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.]

(B) T~~t~~he objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c) of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.

Alternative 1

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in [exchange for] {connection with} withdrawal of an objection or appeal from denial of an objection.

Alternative 2

(C) The court must approve any payment to the objector in connection with withdrawing the objection or[, if acting on referral from the court of appeals, withdrawing] an appeal from denial of an objection.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An order under Rule 23(e)(1) may not be appealed under Rule 23(f). An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Topics on which the Subcommittee is not recommending we go forward now

Based on the input it has received, including the mini-conference, the Subcommittee is not bringing forward several topics on which it has spent considerable time. These topics fall into essentially three categories.

(1) The first includes two topics that are "on hold" -- "ascertainability" and "pick-off" offers of judgment or settlement offers. The Subcommittee has concluded that activity on these topics is not warranted at this time, but recognizes that developments in the relatively near future may mean that it may be suitable for the Subcommittee to return to one or the other of these topics in light of developments.

(2) The second category includes one topic -- settlement class certification -- which the Subcommittee initially concluded should be dropped from the agenda, but later concluded should be presented to the full Committee without a Subcommittee recommendation

(3) The third category includes another two topics -- cy pres provisions and issue class certification. The Subcommittee has concluded that these topics should be dropped from the Subcommittee's current agenda because there is no need for current rule-amendment action, or too many questions about what that action might be, to warrant further work at this time.

(1) Topics "on hold"

Ascertainability

During the April, 2015, meeting of the full Committee, the conclusion was reached that the Subcommittee should examine the question of ascertainability. Since then, it has received much advice and commentary about this subject, and it included a segment on ascertainability in the issues memo for the mini-conference that is included in this agenda book. That memorandum presented a sketch of a possible "minimalist" rule change dealing with ascertainability issues that was unfavorably received by a number of participants in the mini-conference. As reflected in the Subcommittee's post-conference meeting, the Subcommittee concluded that the state of the law on this topic was too unsettled, and that any effort to address it now by pursing rule amendments would present great difficulties. Particularly because this issue was discussed during the Committee's April meeting, a rather full discussion is presented here even though the Subcommittee does not presently recommend proceeding with rule-amendment ideas.

In order to provide some examples of ascertainability decisions, included in the agenda book should be three recent court of appeals decisions grappling with the concept: Brecher v. Republic of Argentina, ___ F.3d ___, 2015 WL 5438797 (2d Cir. No. 14-4385, Sept. 16, 2015); Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015); and Byrd v. Aaron's, Inc., 784 F.3d 184 (3d Cir. 2015). All three of these cases have been decided since the Committee's April meeting, and they illustrate the unsettled nature of the law, and the variety of issues that this general topic can encompass.

A starting point in approaching these issues is to recognize that a number of Rule 23 provisions deal with matters that relate to concerns addressed under the heading ascertainability. Thus:

> Rule 23(a) refers to a suit on behalf of "members of a class," implying that one must be able to define who is in the class.
>
> Rule 23(a)(1) says that a class action is proper only if the "class" is so numerous that joinder of all members is impracticable, implying that there must be a way to determine who is in the class.
>
> Rule 23(c)(1)(B) directs the court, upon certifying the class action to "define the class."
>
> Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must direct individual notice to "all members who can be identified through reasonable effort."

> Rule 23(c)(3)(A) says that the judgment in a (b)(1) or (b)(2) class action must "describe those whom the court finds to be class members" and that the judgment binds them.
>
> Rule 23(c)(3)(B) says that the judgment in a (b)(3) class action should specify those "whom the court finds to be class members" and that the judgment binds them.

The list goes on. For decades it is been apparent that the proponent of class treatment must provide a reasonable definition of the proposed class; "all those similarly situated" usually would not suffice.

A recurrent theme has been that the definition must be objective, and eschew reliance on potential class members' state of mind. Another concern has been the "fail safe" class defined as something like "all those injured by defendant's illegal behavior." In that situation, a defendant victory would mean that there are no members of the class.

Thus, a considerable body of case law has developed on Rule 23's expectations about class definition. Recently, in part sparked by a series of Third Circuit decisions, the "implicit" requirement of ascertainability has emerged in the decisions of some courts. In significant measure, cases have focused on problems of identifying all class members, and whether a form of self-identification (e.g., by affidavit) should suffice initially for that purpose. Some have emphasized the need to ensure at the class certification stage that no difficulties will be encountered later in the case when the proceeds of the action are to be distributed to class members. Others have regarded such efforts as premature and unnecessary at the class certification stage.

It seems widely agreed that the most significant category of cases involving ascertainability problems are consumer class actions involving low-value products purchased by retail consumers who probably do not retain receipts. Identifying all such people may prove quite difficult. Verifying that they actually made the purchases might be quite burdensome to the class opponent and the court.

Various of the submissions to the Subcommittee that are mentioned at the beginning of this memorandum illustrate ways that experienced lawyers favored rule amendments to address this issue:

No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):

> A class definition shall be stated in a manner that such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B):

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.

The case law, meanwhile, appears fluid. The three recent decisions included in this agenda book illustrate the point. In Brecher v. Republic of Argentina, ___ F.3d ___ (2d Cir. No. 14-4385, Sept. 16, 2015), the court observed (citations omitted):

> Like our sister Circuits, we have recognized an "implied requirement of ascertainability" in Rule 23 of the Federal Rules of Civil Procedure. While we have noted this requirement is distinct from predominance, we have not further defined its content. We here clarify that the touchstone of ascertainability is whether the class is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."
>
> On appeal, Appellee argues that a class defined by "reference to objective criteria . . . is all that is required" to sustain ascertainability. We are not persuaded. * * * [T]he use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.

The court found that, under the rather distinctive circumstances of the litigation before the court on behalf of those with beneficial interests in Argentinean bonds, the ascertainability requirement was not satisfied. The following discussion illustrates the difficulties that persuaded the court that the case was different from ordinary consumer class actions, such as actions on behalf of recipients of gift cards. The court's analysis of this contrast illustrates the fact-bound nature of potential ascertainability analyses:

> Appellee argued that the class here is comparable to those cases involving gift cards, which are fully transferable instruments. However, gift cards are qualitatively different: For example, they exist in a physical form and possess a unique serial number. By contrast, an individual holding a beneficial interest in Argentina's bond series possesses a right to the *benefit* of the bond but does not hold the physical bond itself. Thus, trading on the secondary market changes only to whom the benefit inures. Further, all bonds from the same series have the same trading number identifier (called a CUSIP/ISIN) making it practically impossible to trace purchases and sales of a particular beneficial interest. Thus, when it becomes necessary to determine who holds bonds that opted into (or out of) the class, it will be nearly impossible to distinguish between them once traded on the secondary market.

This analysis suggests some of the challenges that framing an ascertainability rule might present.

In Mullins v. Direct Digital, LLC, 795 F.3d 654 (2d Cir. 2015), the court cited Third Circuit precedent (including the Third Circuit's Byrd v. Aaron's decision included in the agenda materials) and referred to "doctrinal drift" toward what it described as a "heightened" ascertainability requirement that "has defeated certification, especially in consumer class actions.". It explained:

> We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes. The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3). These existing requirements already address the balance of interests that Rule 23 is designed to protect. A court must consider "the likely difficulties in managing a class action," but in doing so it must balance countervailing interests to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."

In particular, the Seventh Circuit pointed out, "some courts have used this requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims," worrying that the Third Circuit approach "effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases." It also noted, regarding the Third Circuit's cases, that "several members of the court [the Third Circuit] have expressed doubts about the expanding ascertainability doctrine," adding that "we agree in essence with Judge Rendell's concurring opinion in Byrd [v. Aaron's, Inc.], which urged "retreat from [the] heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23."

In Byrd v. Aaron's, Inc., 784 F.3d 154 (3d Cir. 2015), the court reversed a district court's denial of class certification on grounds of ascertainability. It explained that "the District Court confused ascertainability with other relevant inquiries under Rule 23." It introduced its discussion as follows (id. at 161-62):

> Before discussing these errors, however, we believe it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated. Our ascertainability decisions have been consistent and reflect a relatively simple requirement. Yet there has been apparent confusion in the invocation and

> application of ascertainability in this Circuit. (Whether that is because, for example, the courts of appeals have discussed ascertainability in varying and distinct ways, or the ascertainability requirement is implicit rather than explicit in Rule 23, we need not say.) Not surprisingly, defendants in class actions have seized upon this lack of precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification.

As noted above, Judge Rendell concurred in the holding that the district court's denial of class certification was wrong, but added the following (id. at 172):

> [T]he lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means, and to explain how this implicit requirement fits in the class certification calculus, indicate that the time has come to do away with this newly created aspect of Rule 23 in the Third Circuit. Our heightened ascertainability requirement defies clarification.

Having received much input about this issue, the Subcommittee has concluded that it is not prepared at present to advance a rule provision that would helpfully address this set of issues. As the discussion above shows, this area is still in a state of considerable flux. It might even receive Supreme Court attention in the near future. In any event, it does seem likely that the courts of appeals and district courts will continue to grapple with issues and that the "common law" of ascertainability will evolve and emerge during the coming months. Part of the reason for the gradual nature of this process is that aspects of this topic touch on very basic principles of class-action jurisprudence. Any attempt to modify the handling of those basic principles will likely produce very considerable controversy. Although that prospect is not an argument against proceeding with needed rule amendments, it is a reason for caution about proceeding before the actual state of the law has become clear enough to make the consequences of rulemaking relatively predictable.

Rule 68 and Pick-Off offers

The Subcommittee does not recommend proceeding with work on an amendment to address the problem presented by "pick off" offers of settlement of judgment or settlement that might moot the claims of proposed class representatives before class certification could be decided.

Until recently, the Seventh Circuit had held that, at least in some circumstances, such offers would moot proposed class actions. See Damasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011). In reaction, plaintiff lawyers inside and outside the Seventh Circuit filed "out of the chute" class certification motions to guard against mootness, because the Seventh Circuit regarded making such a motion as sufficient to cure the potential mootness problem. On occasion, plaintiffs would also move to stay resolution of the class-certification motion until discovery and other work had been done to support resolution of certification.

The issues memorandum for the mini-conference contained three different possible rule-amendment approaches for dealing with these problems. The memo also raised the question whether the problem warranted the effort involved in proceeding to amend the rules. After the mini-conference, the Subcommittee decided that proceeding at this time is not indicated.

In Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015), the Seventh Circuit overruled *Damasco* and a number of its cases following that decision "to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy." Judge Easterbrook noted that "Justice Kagan's dissent in Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523, 1532-37 (2013) (joined by Ginsburg, Breyer & Sotomayor, JJ.), shows that an expired (and unaccepted) offer of a judgment does not satisfy the Court's definition of mootness, because relief remains possible." He added:

> Courts of appeals that have considered this issue since Genesis Healthcare uniformly agree with Justice Kagan. See, e.g., Tanasi v. New Alliance Bank, 786 F.3d 195 (2d Cir. 2015); Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). The issue is before the Supreme Court in *Gomez*, and we think it best to clean up the law of this circuit promptly, rather than require Chapman and others in his position to wait another year for the Supreme Court's decision.

See also Hooks v. Landmark Indus. Inc., 797 F.3d 309 (5th Cir. 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action").

As noted by Judge Easterbrook, the Supreme Court has this issue before it in the *Campbell-Ewald* case. The oral argument in that case occurred on Oct. 14, 2015. It seems prudent to await the result of the Court's decision, and quite possible that the issue will recede from the scene after that decision. It could recede even if the Court did not decide the case, or the decision left some questions open.

(2) Topic which the Subcommittee presents without a recommendation -- adopting a settlement certification rule

Below is introductory material on a topic that the Subcommittee has been considering since it began its deliberations in 2011. As set forth below, the Subcommittee's initial reaction after the mini-conference was that this topic should be taken off the agenda. But some reactions since then have prompted the Subcommittee to conclude that the subject should be presented to the full Committee. Below is the sketch presented to the Dallas mini-conference, the notes on the discussion of this topic during the conference, and the notes on the Subcommittee's discussion of the issue during its meeting after the conclusion of the conference.

After the sketch presented at the mini-conference, there appears an alternative inspired by the 1999 Report on Mass Tort Litigation to the Chief Justice from the Advisory Committee and the Working Group on Mass Torts. It proposes amending Rule 23(b)(3) to authorize certification under that subdivision if "interests in settlement" predominate over individual questions. This alternative approach has emerged only recently and has not been discussed in detail by the Subcommittee.

A. Rule 23(b)(4) Authorization for Settlement Certification

Issues memo for mini-conference

(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * * *

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3)] request certification and the court finds that the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim

class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding

can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation.

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower

courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

Discussion during mini-conference

There was extensive discussion of the Rule 23(b)(4) settlement certification sketch during the mini-conference. A thorough report on that discussion appears on the notes of the mini-conference, included in this agenda book. The discussion included the question whether the Supreme Court's Amchem decision unduly limited settlement certification in practice, and whether adding a new (b)(4) might invite inappropriate class action filings.

Notes on Subcommittee discussion after conference.

The following is an excerpt from the notes of the Subcommittee's meeting after the mini-conference

Topic 6 -- settlement class certification

Initial reactions to the discussion of this topic were that parties are presently able to navigate the issues presented by settlement class certification under current precedents. Another view was that fashioning a rule would be quite difficult, and that it is not clear it is worth the effort.

Concerns include the risk that proceeding with the amendment sketch in the conference materials would encourage abuse of class actions, and invite reverse auctions to an extent not happening under current law.

Another view was that "people are satisfied with current work-arounds." In addition, we have heard concern that a rule like our sketch could lead to undisciplined gathering of claims.

On the other hand, a rule on this subject would bring some discipline to the actual resolution of related claims. One could regard MDL treatment of massed claims as the equivalent of a mandatory class action unregulated by rule. That is a particular problem in certain types of cases. And the volume of MDL actions has grown in recent years. By some calculations they constitute more than a third of all pending civil cases in the federal judicial system.

That drew a skeptical response: "Can we fix the problems with MDL handling of mass claims situations?" We have been advised to leave this problem alone. Maybe a manual of some sort would be desirable, but the Civil Rules are not a manual. A reaction to this point was that MDL proceedings are inherently unique, and that "Judges are just doing it."

The consensus was that a separate settlement class rule should not be pursued at this time.

B. Alternative proposal based on 1999 Report on Mass Tort Litigation

In 1998-99, an ad hoc Working Group on Mass Torts, chaired by Judge Anthony Scirica, studied mass tort issues. It prepared a report that the Advisory Committee submitted to the Chief Justice in 1999. See Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and the Judicial Conference of the United States (Feb. 15, 1999). Ed Cooper, who served as co-Reporter for the Working Group, developed the following possible amendment to Rule 23(b)(3) in the wake of Amchem:

> **(3)** the court finds that the questions of law or fact common to class members, or interests in settlement, predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Cooper, Aggregation and Settlement of Mass Torts, 148 U. Pa. L. Rev. 1943, 1995 (2000).

This approach may offer advantages to the 23(b)(4) approach sketched above, by introducing flexibility without creating a new species of settlement class in Rule 23(b). Indeed, it may recognize what some who have spoken with the Subcommittee have reported -- that the courts are actually taking account of settlement interests in deciding whether to certify classes for purposes of settlement. Moreover, it could involve the court at an earlier point in the negotiation, and perhaps design, of a proposed settlement. To some extent, the court may sometimes become involved when asked to designate interim class counsel under Rule 23(g)(3), but this approach would invite broader attention from the court before the settlement is reached.

This approach also takes account of the many potential benefits of settlement. As Prof. Cooper explained in 2000 (148 U. Pa. L. Rev. at 1994-95):

> There is a powerful shared interest in achieving all of the things that can be achieved only by settlement. Indeed, * * * the greatest charm of settlement is that it enables a disposition that cuts free from the shortcomings of substantive law as well as the fallibility of our procedural institutions. Neither individual litigation nor disposition of an aggregated litigation by adjudication can do as well. From this perspective we would do well to focus on crafting the best settlement procedure possible, and to put aside lingering doubts about the importance of individual opportunities to opt out, the enormous complexities that

charge the professional responsibility of class counsel with almost unendurable pressures, as well as other doubts.

Genuine questions could be raised about this approach as well. Cutting free of the shortcomings of substantive law may be questioned.[8] Here are some: (1) Is it better to have the court involved before the parties reach a settlement? The (b)(4) proposal requires the parties to reach a proposed settlement before certification for purposes of settlement can occur. (2) Should this possibility be limited to (b)(3) classes? One might urge that a similar opportunity should be available for (b)(2) classes.[9] Whether it could be justified in (b)(1) situations might raise difficult questions. (3) If this is "certification" under (b)(3), does it trigger the notice requirements and opt-out rights in Rule 23(c)(2)(B)? If the settlement is not ultimately approved under Rule 23(e), does that invalidate the opt-outs of class members who opted out? Should a second notice be sent if the case is later certified for litigation purposes? (4) Is there a risk that courts would routinely conclude that "interests in settlement" predominate over individual issues? Some with whom the Subcommittee has talked speak of "hydraulic pressure" toward settlement, and this change might increase that pressure.

As noted above, the Subcommittee has only recently given any consideration to this possible approach, and it has not had an opportunity to discuss it at any length. It invites input about this alternative approach.

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[8] For an exploration of these issues, see Marcus, They Can't Do That, Can They? Mass Tort Reform via Rule 23, 80 Cornell L. Rev. 858 (1995).

[9] Indeed, the Report on Mass Tort Litigation itself included a more aggressive idea that would have applied to all class actions, but would depend on major surgery on Rule 23:

> **(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified.** An action may be ~~maintained~~ certified as a class action fur purposes of settlement or trial if the prerequisites of subdivision (a) are satisfied and in addition * * * * *

Report on Mass Tort Litigation, Appendix F-5 (Settlement Classes). This approach seems to equate settlement and trial as co-equal possibilities, but the possibility would exist for (b)(2) and even (b)(1) classes as well as (b)(3) classes. So more aggressive approaches could be considered.

(3) Topics the Subcommittee recommends taking off the current agenda

The Subcommittee has previously brought the following issues before the full Committee, but has now concluded that further work on these issues is not warranted at this time.

Cy pres

Chief Justice Roberts articulated concerns about cy pres provisions in his separate opinion regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013). The ALI Aggregate Litigation Principles, in § 3.07, offered a series of recommendations about cy pres provisions that many courts of appeals have adopted. Indeed, this provision is the one that has been most cited and followed by the courts.

Beginning with several ideas from the ALI recommendations, the Subcommittee developed a draft provision to be added to Rule 23(e) specifically addressing use of cy pres provisions. A fairly lengthy sketch of both a possible rule amendment and a possible Committee Note were included in the issues memo for the mini-conference. That sketch has drawn very considerable attention, and also raised a wide variety of questions.

One question is whether there is any need for a rule in light of the widespread adoption of the ALI approach. It is not clear that any circuit has rejected the ALI approach, and it is clear that several have adopted it.

Another question is whether adopting such a provision would raise genuine Enabling Act concerns. The sketch the Subcommittee developed authorized the inclusion of a cy pres provision in a settlement agreement "even if such a remedy could not be ordered in a contested case." The notion is that the parties may agree to many things in a settlement that a court could not order after full litigation. Yet it might also be stressed that, from the perspective of unnamed members of the class, the binding effect of the class-action settlement depends on the court's decree, not just the parties' agreement. So it might be said that a rule under which a court could substitute a cy pres arrangement for the class members' causes of action is subject to challenge. That argument could be met, however, with the point that the court has unquestioned authority to approve a class-action settlement that implements a compromise of the amount claimed, so assent to a cy pres arrangement for the residue after claims are paid should be within the purview of Rule 23.

At the same time, some submissions to the Subcommittee articulated reasons for caution in the area. Some urged, for example, that cy pres provisions serve valuable purposes in supporting such worthy causes as providing legal representation

to low-income individuals who otherwise would not have access to legal services. Examples of other worthy causes that have benefitted from funds disbursed pursuant to cy pres arrangements have been mentioned. See, e.g., Cal. Code Civ. Pro. § 384(b) (directing that the residue left after distribution of benefits from class-action settlements should be distributed to child advocacy programs or nonprofit organizations providing civil legal services to the indigent, or to organizations supporting projects that will benefit the class).

It seems widely agreed that lump-sum settlements often produce a residue of undistributed funds after the initial claims process is completed. The ALI approach favors attempting to make a further distribution to class members who have submitted claims at that point, but it may be that the very process of trying to locate more class members or make additional distributions would use up most or all of the residue.

It is also troubling, however, that there may be cases in which very large amounts of money are unclaimed, raising questions about the purpose of such class actions. Though deterrence is often cited as a purpose beyond compensating class members, crafting a rule of procedure principally to strengthen deterrence may be questionable.

Ultimately, the Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed and (b) uneasiness about the proper limits of the rulemaking authority cautioned against adopting a freestanding provision on cy pres provisions.

At the same time, it also concluded that emphasizing the importance of considering the possibility of a residue and including attention to cy pres arrangements in the "frontloading" Committee Note would be a desirable way to call attention to the general issues.

Issue classes

The Subcommittee included several sketches of possible amendments to Rule 23(b) or (c) better to integrate Rule 23(b)(3) and 23(c)(4). For a time it appeared that there was a significant conflict among the circuits about whether these two provisions could both be effectively employed under the current rule. But it is increasingly clear that the dissonance in the courts has subsided. At the same time, there have been some intimations that changing the rule along the lines the Subcommittee has discussed might actually create rather than solve problems.

The Subcommittee also circulated a sketch of a change to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of issues on which it had based issue class certification. This sketch raised a variety of potential difficulties about whether there should be a requirement for district-court endorsement of the timing of the appeal, and whether a right to seek appellate review might lead to premature efforts to obtain review.

The Subcommittee eventually concluded that there was no significant need for rule amendments to deal with issue class issues, and that there were notable risks of adverse consequences.

TAB 6B

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Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Sept. 25, 2015

On Sept. 25, 2015, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge John Bates (Chair-designate, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Derek Webb of the Administrative Office.

The purpose of the call was to consider further the matters discussed during the Subcommittee's meeting on Sept. 11 and also review the initial draft of some portions of the Subcommittee's report to the full Committee in the agenda book for the November full Committee meeting.

Topics on which the Subcommittee does presently recommend proceeding

The discussion began with the topics that had initially been identified as not justifying further rule-amendment action now. The draft agenda memo contained only a very brief identification of those topics. The objective in the final agenda memo will be to make a fuller presentation of the issues involved with those topics, but it is likely that discussion during the full Committee meeting will pursue some of them more vigorously than others.

Ascertainability

An immediate reaction was that ascertainability is likely to draw attention at the meeting, and that the Subcommittee should expect that there will be a substantive discussion of this collection of issues.

That drew agreement. The level of interest in ascertainability issues is very high. Quite a few decisions, including decisions by members of the full Committee, have addressed these issues recently. It is not entirely clear whether these decisions are genuinely inconsistent, but it is relatively clear that they have generated much attention and concern.

The reaction was not that the Subcommittee should reconsider its conclusion that ascertainability is not a promising topic for rule amendments at this time. One way of illustrating the challenges of a rulemaking effort would be to include in the agenda book some of the leading recent decisions. The Seventh Circuit's Mullins decision seems a good candidate, and probably the Third Circuit's Bird v. Aarons, along perhaps with the recent

Second Circuit decision involving Argentinean bonds. Another idea would be to include the various submissions on the subject included as an Appendix to the issues memo for the Sept. 11 mini-conference.

The most important thing to communicate to the full Committee is probably that the Subcommittee's initial effort to draft a "minimalist" treatment of the subject prompted some at the mini-conference to react that the sketch appeared to adopt the Third Circuit's Carrera approach. The sketch's use of the phrase "when necessary" was meant to highlight the idea that it would usually not be necessary to ensure ascertainability at the class certification stage. But that phrase prompted several at the conference to conclude that it was actually meant to say affirmatively that certification ought not be granted without assurances about later ascertainability. This experience underscores the delicacy and difficulty of the project.

Subcommittee members will undertake to gather more information as the final agenda memo is completed. The goal of that memo will be to describe the basic issues and the challenges of the area. The recommendation that rulemaking on this subject not be pursued now remains the Subcommittee's consensus view.

Cy pres

It was also mentioned that the cy pres topic may receive attention during the November meeting. At least some with whom the Subcommittee has spoken will probably be disappointed that rulemaking is not going forward in this subject. In particular, those who wished to promote use of cy pres provisions to support various activities such as legal services for the poor will likely be discouraged. But it was noted that it is important to appreciate that -- even putting aside Enabling Act concerns -- there are other considerations to take into account. The whole topic of the relation between cy pres "benefits" for the class and attorney fee awards keyed to results obtained is a difficult one that can converge on these issues.

Rule 68

The other issue (besides ascertainability) that the Subcommittee is putting "on hold" rather than taking off the agenda is the pick-off problem and the role of Rule 68. It was noted that these problems may look considerably different in a few months, given the Seventh Circuit's change of position on the subject and the pendency of the Campbell-Ewald case in the Supreme Court, with argument expected in October.

Other topics identified on Sept. 11
as not warranting current rulemaking

There was no suggestion that either amendments to the issue classes provisions or providing stand-alone rule on settlement class certification should be returned to the active calendar. Discussion therefore turned to the seven issues presented as possible topics for moving forward in the draft agenda memo.

(1) Frontloading

There was general agreement that the more restrained treatment presented in the redrafted sketch was an improvement on the elaborate 14-point disclosure requirement presented in the issues memo for the mini-conference. In place of a laundry list, the draft Committee Note identifies many subjects that may often be important but also recognizes that not all subjects will be pertinent in all cases.

A more general question was raised: It seems odd for the rule to make notice to the class the vehicle for all this important activity. That may be an occasion for insisting on attention to these matters, but hardly seems as important as the decision whether to "preliminarily certify" the class. Part of the problem lies in Rule 23(e) itself, for it refers only to notice to "a certified class." So that may support the argument that notice can't be given until the class is fully certified.

A reaction was that the point is a good one about what the rule says, but that the longstanding reality of practice under the rule has been that it routinely includes exactly what the amendment sketch addresses. It was estimated that some 75% of cases in which Rule 23(e)(1) notice is sent are cases in which there has been no prior class-action certification by the court. And the actual juncture at which the court must make its first decision about these issues is when the question whether to send notice to the class.

It was suggested that this practice reality might be inserted into Rule 23(e) somewhat along the following lines:

> **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

It was cautioned, however, that it would be important to reflect on what might be the collateral consequences of such a change.

As has been noted, Rule 23 is already rather long and complicated. One of the problems with the laundry list in the mini-conference materials was simply that it was too long, although that was not the major objection. Perhaps, given the longstanding practice under the current wording of the rule, this further change is not needed.

The resolution was that "we should take a couple of days to decide how to say this." It was noted also that the rule works appropriately as presently written, and that we should be leery of unforeseen consequences of changing the rule.

An alternative approach to the risk of unforeseen consequences was "This is not a problem until it is." Waiting until that happens could cause unfortunate costs when it does happen. Maybe the risk that the current language could cause problems justifies an effort now to deal with that language, before the problems arise.

An alternative view of the current language of the rule was expressed: "It's an accurate statement, because it refers to 'a proposed settlement.'" That drew the response "That's where 'preliminary certification' came from." Another possible locution that was suggested was that the rule should say it applies to "any action sought to be settled as a class action."

Other questions were raised: How does this apply to a voluntary dismissal? How does the inclusion of "compromise" bear on these issues?

Another point that came up was that the rule should apply to the proposed voluntary dismissal of a certified class. Would changing the introductory language in Rule 23(e) raise questions about that?

The consensus was that the basic thrust of the redraft after Sept. 11 seemed sensible, but that the questions raised during the call could not be finally resolved during the call. They would have to be re-examined once a redraft of the agenda memo was completed.

That led to the question what schedule should be used. Initially, it seems that the Administrative Office would like to receive all agenda materials by October 13 or so, in order to be able to send out the agenda materials by Friday of that week. That may be a bit challenging for this agenda memo. A redraft should be available for review by the Subcommittee by Friday, Oct. 2. Then it would be best if all commentary on the redraft were received by Friday, Oct. 9. On that schedule, it may be possible to provide the Administrative Office with a final in time for the currently scheduled distribution date. But if necessary that date could be used for other materials, with the

Rule 23 agenda memo delayed until a bit later and distributed separately. Because most or all members receive and use these materials in digital form, that should not present great difficulties. And there would still be quite a lot of time for Advisory Committee members to review the agenda memo before the meeting at the end of the first week of November. This sort of schedule might be particularly important because there likely will be considerable attention outside the Committee in what the Subcommittee reports. Note that we have received more than 25 submissions about Rule 23 thus far in 2015 alone.

(2) Rule 23(f) appeals from Rule 23(e)(1) orders

An initial question was whether this is a real problem. Keeping in mind the current length of Rule 23, we should try to avoid unnecessarily lengthening the rule.

An initial response was that the NFL case showed that this can be a problem. In that case, the Third Circuit, by a 2-1 vote, held that the current rule means what the proposed amendment says. Another response was that the Ninth Circuit also recently rejected an attempted petition for a writ of mandamus or appeal from a district court's rejection of a proposed settlement. A third reaction was that the proposed changes to Rule 23(e)(1) emphasize the need to address this possible problem because they amplify the rule provisions about decisions to send notice to the class. It would be "the ultimate irony" if these changes meant to improve and streamline the settlement process also introduced a big delay due to premature efforts to obtain appellate review. Another Subcommittee member agreed: This change would not create confusion but abate it. Even the dissenting judge in the Third Circuit, who thought that the rule as written would permit immediate review, was antagonistic to that idea. And since the NFL example "led the way," others have tried the same route.

It was noted that courts of appeals are not rushing to grant Rule 23(f) motions. The court of appeals judges do not want to rush into this field. But failing to clear this up may mean a good deal of work for courts of appeals dealing with the issues that the Third Circuit had to unravel in the NFL case. In that case, the district court had made a preliminary certification decision, but the attempted appeal was almost entirely about the fairness of the settlement, not the certification issue.

The discussion returned to the reality that giving notice itself is not the focus of these disputes. Instead, it is either whether the class should be certified or whether the settlement should be approved. It's not really about whether notice should be given to the class. Yet the proposed amendment speaks of an order "directing notice to the class." Why highlight that in the amendment?

A response was that the custom that has taken hold is that the focus is on the decision whether to give notice. The reality is that all these things converge on the decision to give notice to the class.

A language simplification was suggested to address this concern, at least partially, in the new sentence proposed for Rule 23(f):

> An order ~~directing notice to the class~~ under Rule 23(e)(1) is not subject to review under Rule 23(f).

There was general agreement that this change would be a helpful clarification. More generally, the goal is to address what's really happening in the courts.

(3) Triggering the opt-out provision when notice is sent to a class proposed to be certified as part of a settlement

The draft agenda memo contained a draft provision amendment to Rule 23(c)(2)(B) as follows:

> **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances to all members who can be identified through reasonable effort. * * * * *

An initial question was "Is this how things are done?" The answer was that it is. The notice to the class of the proposed settlement of an uncertified (b)(3) class action includes a deadline for opting out. One of the things that the court should be told when final approval is before the court is the number of class members who have opted out. Since 2003, the rule has said that if notice has already been given and the opt-out date has passed, the court can insist that there be a second opportunity to opt out once the particulars of the settlement are know. And, it was noted, sometimes those who initially opted out are allowed to opt back in. That is the actual experience in the field.

But as presently written, the rule might permit an argument that, after final (b)(3) certification in conjunction with approval of a settlement, notice must again be sent to the class. That is contrary to what the practice has involved. Nobody would want to introduce that costly and time-consuming extra step.

The question was raised whether there is really any risk under the current rule that this extra step will be required.

One participant in the mini-conference raised this issue, but none on the Subcommittee was aware of any case in which the actual problem had arisen. And making this change might introduce problems that we do not foresee. Perhaps doing nothing is safer than making a rule change when there is not actual evidence that this interpretation has ever been adopted by any court.

The consensus was to drop this proposal.

(4) Binding effect of submissions in support of certification for purposes of settlement

The draft agenda memo contained a draft Rule 23(e)(6) providing as follows:

> **(6)** If the proposed class has not been certified for trial and the court does not approve the proposal, neither the court's order nor the parties submissions under Rule 23(e) [is binding] {may be considered} if certification for purposes of trial is later sought.

Again, a key question was "Is there really a problem?" A reaction was "People argue about this. It is really a problem."

But another reaction was: Could we handle this with a comment in the Note? One possible place might be in the Note to Rule 23(e)(1) in the draft agenda memo:

> One key element is class certification. If the court has already certified a class, the only information necessary in regard to a proposed settlement is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, the parties must ensure that the court has a basis for concluding that it will be able, after the final hearing, to certify the class as part of the proposed settlement. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision that the prospects for certification are warranted without a suitable basis in the record. If the court ultimately does not approve the proposed settlement including class certification, neither the court's order nor the parties' submissions under Rule 23(e) [is binding] {may be considered} if certification for purposes of trial is later sought.

This suggestion drew the response that something like this probably should be in the rule. Put differently, on occasion comments on proposed amendments urge that things in the Note are

good ideas, but that they will not be effective unless they are included in the rule.

It was explained that the ALI Aggregate Litigation Principles included a recommendation along these lines. That recommendation responded to a single Seventh Circuit decision that treated positions taken about certification for purposes of settlement as creating "judicial estoppel" when litigation certification was later before the court.

Another reaction was that parties routinely include disclaimers in their settlement agreements that ensure that if the settlement falls through nobody's position in connection with the settlement may be considered in resolving matters raised later in the litigation. That drew a response: "I've seen language like that recently. Should we be bulking up Rule 23 to address this nonproblem?"

A different question was raised: Except for the Seventh Circuit decision that prompted the ALI recommendation, have any on the call heard of another court taking this view? One response was that this does not sound like a proper use of the judicial estoppel doctrine. That should be limited to situations in which the court has relied on the assertion in making a decision. Presumably these assertions were not the basis for the court's decision because presumably the settlement was ultimately not approved.

Another reaction was that we could present this question to the full Committee to see whether any member of the Committee is aware of a case in which this caused a problem.

This drew the response that nobody had raised this issue since the 2010 publication of the ALI Principles. It may be that some who attended the DRI event in Washington in late July had this concern, but no submissions to the Subcommittee has raised it.

The consensus was to take this issue off the agenda, but to alert the full Committee that it had been taken off the agenda.

(5) Form of notice

The revised amendment approach to Rule 23(c)(2)(B) developed during the Subcommittee's Sept. 11 meeting drew continued support.

Discussion focused on the importance of making notice and claims processes work in consumer class actions. Those cases are the ones in which low response rates are most frustrating. Indeed, it may often be that the best solution is just to send checks to all class members rather than awaiting submission of

formal claims. Another member agreed that this is the "tip of the iceberg." The FJC class-action checklist focuses on the concerns with consumer class actions. Judges Posner and Hamilton of the Seventh Circuit have both discussed them in recent opinions. The case law is moving in the right direction, and an amendment like this one could helpfully nudge that process along.

The consensus was to go forward to the full Committee with a slightly revised proposal based on the one in the draft agenda memo:

> **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice by the most appropriate means, including first class mail, electronic, or other means, to all members who can be identified through reasonable effort. * * * * *

(6) Handling Objectors

The draft agenda memo contained a proposed revision of Rule 23(e)(5) as follows:

> **(5)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~,~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.] T~~t~~he objection may be withdrawn only with the court's approval. Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

This was introduced as presenting two separate sets of issues. One is disclosure, and that involves some language choices. Those language choices can be brought to the attention of the full Committee. No members expressed an interest in discussing that set of issues.

The second set of issues deal with court approval payments to objectors or objector counsel. In a sense, these issues

derive from the provision already in the rule requiring the court's approval for withdrawal of an objection. But the proposed language goes beyond that in two ways: (a) It affirmatively forbids any payment to the objector or objector counsel, and (b) it calls for the question whether to approve that payment to be made by the district court.

Somewhat separately, the Appellate Rules Committee has received and discussed proposed changes to the Appellate Rules to deal with the problem that arises when an objector notices an appeal and then strikes a deal to drop the appeal. The draft language says that district court "retains jurisdiction" to approve or disapprove such a payment. Perhaps a Civil Rule that says so can do that, but it would seem much better to rely on combined attention from the Appellate and Civil Rules Committees. Judge Colloton attended the DFW mini-conference and the Appellate Rules Committee has indicated flexibility about approaching these problems.

Under these circumstances, it seemed best to reach out to the Appellate Rules Committee about how best to proceed. That Committee will have its Fall meeting before the Civil Rules meeting. For the present, it may be that the best thing is to put the new language at the end of the rule into brackets pending efforts to design an integrated Appellate/Civil Rules solution.

At the same time, it was emphasized that we have heard from very many experienced practitioners that this is a VERY important issue.

For the present, the objective is to interact with the Appellate Rules Committee and look toward a presentation of ideas to the Standing Committee during its January meeting. The shared goal is to develop rule changes that will work in the desired way. The best way to do that remains uncertain. The question of "jurisdiction" can be a tricky one. And even though it is likely in the great majority of cases that the district court will be better situated to evaluate a proposed payment to an objector or objector counsel, that may sometimes not be true. It may be that the initial call on whether the district court should make this call belongs to the court of appeals.

The Rule 23 Subcommittee will reach out to Judge Colloton and the Appellate Rules Committee Reporter to explore the best way to proceed.

(7) Settlement approval criteria

The general view was that this draft is in good shape with some clarification for presentation to the full Committee. Clarification is called for in regard to Alternative 2 by adding something like the phrase following bracketed phrase in the draft

circulated to the Subcommittee:

> **(2)** If the proposal would bind class members, the court [may disapprove it on any ground it deems pertinent to approval of the proposal, but] may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

Somewhat similarly, new proposed (E), which goes with Alternative 1, needs change along the following lines:

> [(E) approval is warranted in light of any other matters the court deems pertinent.]

The consensus was that Professor Marcus would make adjustments to the draft along the foregoing lines.

Possible "front burner" additions

Discussion turned to four additional matters that were included in the draft agenda memo as possible topics for further work.

Forbidding reversions

Frequent discussion of the potential drawbacks of settlement provisions that permit reversions to defendant of unclaimed funds might support an effort to forbid such provisions, perhaps with an exceptional circumstances exception.

An initial reaction was that this issue reminds us of the various difficulties that persuaded us not to proceed on a cy pres rule.

Another point along these lines was that this really addresses a Rule 23(h) point because a reversion can mean that a settlement that appears to have considerable value for the class actually has no value, but the purported value is advanced as a ground for a substantial attorney fee award. The place where this issue really should be addressed is in connection with Rule 23(h), not Rule 23(e). It is horrendous to contemplate a fee award based on an arguably illusory benefit to the class. Perhaps there should be a presumption in Rule 23(h) that a cy pres fund or a reversion mean that money not paid to the class does not count for calculation of an attorney fee based on the value of the settlement.

Another reaction was that in practice there is a wide array of situations that might be affected by such a rule. The variety is so large that it would be undesirable to codify specifics into a rule. The courts need flexibility in handling these issues.

Moreover, there court be a risk of infringing on the substantive law.

Concern was expressed about changing Rule 23(h). When that was added to the rule in 2003, it was the result of a very long and laborious drafting process. It could be reexamined now, but probably the bias should be against making changes to it. It is designed to provide guidance in such a variety of situations that attempting now to make changes could open up many of the resolutions that were necessary to arrive at a rule then. Professor Marcus would look at the question, but there is not great optimism that a helpful change would emerge.

Another way of dealing with some of these issues was raised: Could this not be emphasized in the Note on settlement approval standards? Indeed, the draft Committee Note for Rule 23(e)(2) already has a paragraph stressing attention to attorney fee provisions that mentions the possibility of deferring final calculation of the fee until the court gets a report on the actual benefits received by class members. Perhaps that paragraph can be strengthened to stress the potential problems of reversion provisions.

In the same vein, it was stressed that beginning to list or emphasize criteria that bear on the "reasonable fee" authorized by Rule 23(h) could prove very challenging and divisive. Highlighting these issues in the Note to an amended Rule 23(e)(2) seems much less potentially difficult.

This reasoning was countered with the suggestion that if we want to say something about attorney fee awards we should say it in the rule provision that addresses those -- 23(h). A response was that, at least as to reversion provisions, there is a case to be made for the idea that they are really something that bear importantly on the basic settlement-approval review, not just on attorney fee awards. True, those may be separate, but if the court is unwilling to approve the reversion in the first place the fee award issues will not arise.

This view was supported as reflecting the way the rules work in the real world. Class members are given a chance to object to the entire settlement proposal, which often includes specifics on the attorney fee award. They often object to that award. They can also object to a reversion if one is included. The consideration of all these things will likely be before the court at the same time.

Further discussion focused on whether the Note to Rule 23(e)(2) ought to address cy pres provisions. It might be that this topic could be approached with a predicate like "If suggested by the parties, the court should approach cy pres provisions with caution." On the other hand, there seems

considerable value in addressing the likelihood funds will be left over in the initial settlement proposal, as suggested in the Note to the sketch of amendments to Rule 23(e)(1).

It was resolved that there was no reason for a free-standing rule provision on reversion provisions.

Requiring filings supporting the proposed settlement be on file before objection date

This topic was introduced with the idea that "all agree that this is desirable." Indeed, in many circuits it is the case law rule. "Everybody recognizes it." Under these circumstances, there seemed no reason to add such a provision to Rule 23. This idea would be dropped.

Setting a standard for approving payments to objectors

This notion was prompted in part by a comment by a judge at the mini-conference. Rule 23(e)(5) already requires court approval for withdrawing an objection. The Subcommittee is working on further rules provisions (in collaboration with the Appellate Rules Committee) that would broaden the court approval requirement to include what happens after a notice of appeal is filed. Perhaps a rule could tell the judge how to decide whether to approve.

The consensus was that this is not a real problem, and that a rule of reasonableness already applies. Moreover, some mention of the court's attitude already appears in the draft Note to the sketch of a rule provision requiring court approval. The freestanding rule provision idea would be dropped.

Rule 23(f) amendment for issue classes

The Subcommittee had already decided not to proceed with a rule amendment clarifying when issues classes are warranted. The mini-conference had also had a sketch of an addition to Rule 23(f) permitting discretionary immediate appellate review of the district court's resolution of the common issue in such situations. The ALI Principles had recommended a provision along these lines.

No member of the Subcommittee saw a benefit in pursuing this idea, so it will be dropped.

Next steps

Professor Marcus will try to circulate a draft agenda memo by Friday, Oct. 2, and the Subcommittee members will try to offer reactions by Friday, Oct. 9. If possible, the agenda memo will then be submitted to the A.O. in time for inclusion with the rest of the materials for the agenda book for the November meeting.

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Sept. 11, 2015, meeting

After the completion of the Sept. 11 Mini-conference on class actions, the Rule 23 Subcommittee held a meeting to discuss initial reactions to the very helpful insights provided by participants in the conference. Participating were Hon. Robert Dow (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Hon. John Bates (Chair-designate, Advisory Committee), Hon. Jeffrey Sutton (Chair, Standing Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf (Administrative Office).

The discussion proceeded generally from less difficult to more difficult issues. The goal was to reach initial conclusions about next steps on the issues the Subcommittee had identified.

Topic 9 -- Pick-off and Rule 68

The consensus was that this issue should be retained on the agenda but that the Subcommittee should be in a waiting mode. The Supreme Court's decision of the case in which it has granted certiorari is likely to be come out before the Advisory Committee's spring meeting, and that should cast considerable light on whether any rule change is in order. Trying to devise a suitable rule change before that decision seems risky. Moreover, the Seventh Circuit's abandonment of its former position may also have effects that bear on whether any rule change would be advisable. Even if the Supreme Court does not resolve all issues, the need for rule-amendment action may subside.

Topic 7 -- Issue classes

The consensus was that the question of amending either Rule 23(b)(3) or 23(c)(4) to clarify treatment of issue classes is not ripe for action, and this issue should be dropped from the Subcommittee's agenda for the present. Not only was there no significant support for amending the rules on this subject during the mini-conference, the DRI submission on the eve of the mini-conference was antagonistic to such changes. Moreover, recent decisions and statements by the Fifth Circuit indicate that there is no longer a serious circuit conflict problem on this subject. Under these circumstances, it does not seem that adopting rule changes like the ones in the sketches would actually make a difference.

There was little or no discussion of the possibility of amending Rule 23(f) to facilitate immediate review of the district court's resolution of the common issue when issue class certification is used.

Issue 5 -- Ascertainability and class definition

The consensus was that, for the present, it would be prudent to leave this topic to development in the case law. The Seventh Circuit decision in Mullins finds that the current rule contains all the guidance needed on the subject. So under that view, there is no need for a change in the rule. It is possible that certiorari will be sought in that case, but not possible to know whether it might be granted. If certiorari were granted, it would seem premature to embark on amendment efforts until the Supreme Court decides the case. If certiorari is not granted, the case law will likely continue to develop. Action by the Advisory Committee now does not seem likely to produce positive changes.

Discussion shifted to one possibility that was mentioned during the mini-conference -- that Rule 23(c)(1) could be amended to use a term like "objectively definable," and thereby to support a Committee Note discussing some of these issues. But the unsettled state of the law counsels against that sort of effort. Indeed, it is not impossible that the Third Circuit might look again at its handling of these issues, and might be influenced by the Seventh Circuit's Mullins decision.

Topic 8 -- Notice

The consensus was that tweaking the rule to reflect contemporary realities in electronic communication is warranted, and retiring the Eisen preference for first class mail also makes sense. For example, one suggestion during the mini-conference was "the most appropriate means under the circumstances." The concern during the mini-conference was that the wording of the sketch in the conference materials might indicate that electronic means of notice should be preferred over other means. That should be avoided, for the goal was not to state a preference. The problem could probably be avoided by using language suggested below.

Another subject that arose during the mini-conference focused more on the content of notices than on the manner of providing them. Formatting of the notice may be important. Those in the claims administration business probably have the most useful knowledge on this sort of thing. But we must have in mind that they operate competing businesses, and we can't be favoring one over another. Nonetheless, it would be desirable to say something about formatting. Perhaps the Committee Note could emphasize the need to seek plain language and consider alternative methods of presenting the information that is being sent to the class to maximize comprehension by class members.

It was noted also that the word "individual" in the current rule could present problems. That could be something to reflect on as we move forward.

As an initial starting point for a revised approach, it seemed desirable to consider something like the following:

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) *Notice*

* * * * *

> **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice by the most appropriate means, including first class mail, electronic, or other means to all members who can be identified through reasonable effort. * * * * *

This initial idea should also suffice to support a Committee Note about the importance and concerns regarding format of notice and comprehension for class members.

The concerns about manner of providing notice have focused on Rule 23(c)(2)(B). Rules 23(c)(2)(A), 23(e)(1), and 23(h)(1) direct the court to provide "appropriate notice" or "notice in a reasonable manner" to the class, and therefore do not raise the sort of problem presented by the enduring shadow of the Eisen decision.

Issues 1 and 2 -- Frontloading and Settlement Review

The mini-conference made it clear that laundry list rules like the laundry list sketch before the conferees are not favored. The approach to frontloading in the mini-conference materials therefore needs reconsideration. At the same time, there is surely support for a more flexible approach to emphasizing the need to provide the court (and the class members) with more information and more definite information earlier in the settlement-review process.

Experienced class-action lawyers have recognized the need for this sort of presentation, but that is not the only sort of lawyers who come before federal courts seeking approval of class-action settlements. Guidance will be useful for less sophisticated lawyers.

Another issue here is the "preliminary approval" question. Many favor use of a term like that, and moving beyond focusing only on the decision to give notice. That may be important to showing that this notice suffices to trigger the need to opt out, but at the same time to avoid making the decision potentially subject to immediate appeal under Rule 23(f). Those two objectives are addressed in the current sketch by (D) on p. 5 of the issues memorandum for the conference. Also in (D) is an effort to guard against estoppel on the subject of litigation certification by positions taken during settlement review.

It was suggested that, important though they may be, the three assertions in current (D) really are not related to each other, and that they should be redistributed. The first sentence probably should be added to Rule 23(f). The second should actually be in Rule 23(c)(2)(B), as in footnote 1 on p. 5 of the mini-conference materials. And the third belongs more appropriately in the treatment of settlement approval than in a provision about giving notice to the class.

The real focus, it was suggested, would be to replace current 23(e)(1) with a general directive about providing information to the court. The rule should apply to all cases. This could also use the standard set forth in Alternative 4 on p. 5 of the mini-conference materials:

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) After the parties have provided relevant information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

This sort of generalized rule directive would avoid the pitfalls of a laundry list but provide support for a Committee Note identifying many of the topics that often should be addressed in the submission to the court, while also noting that given settlements do not require attention to all of these topics. Another thing that a Committee Note could suggest is that convening a case management conference may be a useful way for the court and the parties to identify the topics on which information should be submitted. It might also be a location for recommending that the court or the parties ensure that the information submitted is made available to the class members. It may be that class action settlement web sites exist presently to do that job in many cases. But we do not know who goes to these sites; it may be that the visits are mainly from lawyers, not class members. Perhaps that difference does not matter much. If there is not such a web site in a given case, alternatives may need to be considered.

This formulation would not go back "before 2003" and treat the putative class action as a class action until the court denies class certification. That does not seem necessary, although it could (as suggested in the mini-conference materials) be a way of addressing the Rule 68 pick-off issues. But the Subcommittee is not moving forward on that subject at this time.

It was also noted that the N.D. Cal. has a model order on what should be submitted to the court. That order might be a useful referent for ideas on what should be included in the Note. Perhaps the Note could also suggest that districts could develop their own preferred lists.

The discussion emphasized that the big cases are not the ones in which frontloading direction is needed. It's the small class actions, perhaps involving inexperienced counsel, where the problems emerge.

Regarding the risk of premature efforts to obtain Rule 23(f) review (as in the NFL concussion case), below is a first effort to include that in Rule 23(f):

> **(f) Appeals**. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. <u>An order directing notice to the class under Rule 23(e)(1) is not subject to review under Rule 23(f).</u> An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The second sentence of current (D) on p. 5 of the mini-conference materials should be addressed in Rule 23(c)(2)(B) as follows:

> **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. * * * * *

The third point in current (D) could be addressed in a new Rule 23(e)(6):

> **(6)** If the proposed class has not been certified for trial and the court does not approve the proposal, neither the court's order nor the parties submissions under Rule 23(e) [is binding] {may be considered} if certification for purposes of trial is later sought.

The question whether this idea needed to be in the rules remained open.

Topic 2

Further discussion of the settlement standards topic focused on Alternative 1 and Alternative 2 on p. 9 of the conference materials.

A starting point was the suggestion that it would probably be best to avoid saying that any proposed amendment "overrules" any circuit's stated standards. Indeed, it was suggested that the Note should reassure the circuits that they can "keep their factors." The goal is consistency in achieving the shared goal of careful settlement review, not preferring one circuit's precise formulation over another. One way to guard against that would be to provide a catch-all in the rule that permits a court to reject a proposal even if all four of the listed criteria seem met. This approach can be supported by recognizing that most -- nearly all -- of the factors can be useful guides in some cases.

An argument was made in favor of Alternative 1, which is arguably more relaxed, using the general "fair, reasonable, and adequate" rubric as a general guideline informed by the listed four "considerations." Using Alternative 2, it was suggested, was not really much more focused, particularly if a catch-all fifth "whatever else you regard as important" factor is added. Adding that factor would move back toward what the Subcommittee brought to the April Advisory Committee meeting. At that meeting, the view was that leaving in the catch-all then in the rule sketch robbed the rule provision of its force since it was

something of an "anything goes" addition. The discussion after the mini-conference was whether any articulation of the "fair, reasonable, and adequate" criterion would inevitably be open-ended because the criterion is inherently open-ended.

A reaction to this argument was that there is a problem with all the lists now in use that an amendment along the lines under consideration could help solve. The current lists were articulated at different times. Having a single set of four basic concerns will promote a national pattern for the case law under the rule. It may even discourage "circuit shopping." The existing lists do not allow that, and may cut against coherent analysis in a given case. Some lists have as many as three different factors for essentially the same concern. The focus provided by the proposed amendment can be useful because it can displace the "squishy balancing process" that can result from the multi-factor activity now in place in some courts.

Another member agreed that this set of diffuse and sometimes dubious criteria harms the quality of the briefing.

A reaction to these arguments is that perhaps we should be saying we are overruling the existing lists.

The response was that the four listed factors are the "core factors." It's not so much overruling any circuit's list of factors as organizing and focusing the themes in the current case law. It was asked whether any court has approved a settlement that does not actually satisfy all four of the factors in the sketch's list.

Another reaction was "I'd like to look at the factor analysis again."

A third reaction was that further reflection on these questions seems in order. Indeed, it seems as though different members of the Subcommittee have different views on how constraining an amended rule should be. One view is that the basic standard (fair, reasonable, and adequate) is really as much as a rule can prescribe, and anything beyond that is really just illustrative. This view might favor Alternative 1 on p. 9. Another view is that more focus should be imposed by the rule, and that therefore Alternative 2 is preferable, including presenting the "fair, reasonable, and adequate" rule language only once, in factor (C). It might be that this choice should be brought to the full Advisory Committee, but it does not seem that the Subcommittee has reached consensus at present on which tack to take.

Further discussion pursued these points. One reaction is that the choice between Alternative 1 and Alternative 2 is "not a huge problem." Another was that "No circuit rejects these four

things." On the other hand, the circuit lists do not rank order their many factors. Another observation was that it's somewhat surprising that the Subcommittee is uncertain about this point. "This was not controversial at the ALI."

A different question was raised: "Why do this if there's really no change because the four factors are essentially shortened lists of the longer ones now in use?" A reaction was that this sort of rule could smooth out the use of these factors nationwide. At present, it is disfavored to cite settlement-review decisions from another circuit. One could argue that this attitude does not make sense; any decision that provides useful guidance would seem helpful. On the other hand, if it's under "their" factors instead of "our" factors, that may deter profitable use of out-of-circuit precedent. Moreover, having such a long list gives objectors searching for ways to raise problems a much greater variety of possible arguments even though most of those really don't matter much.

Issue 3 -- Cy pres

An initial reaction was "I was optimistic that this topic would produce broad agreement on proceeding with a rule modeled on the ALI proposal. But the subject has turned out to produce much more controversy than originally seemed likely."

Another reaction was that "Nobody articulated a reason for us to work on this. Why venture into a controversy when the courts seem to be working things out without rule guidance?" It was added that the courts seem to be converging on the ALI § 3.07 approach, a convergence that may make it unnecessary (perhaps disruptive) to adopt a rule. Moreover, at some point there may be concerns about approaching the elusive line between substance and procedure.

One idea would be to put a reference to cy pres into the Committee Note on frontloading. The laundry list in the rule sketch for that rule has been jettisoned, although much of that list may reappear in the Note. The use of cy pres may be an important topic to address in the Committee Note. The vote in the ALI on this provision was unanimous. Perhaps a nod to the ALI provision could be included in the Note as well, though with care taken to avoid "rulemaking by Committee Note."

At the same time, it is probably best for the rules not to get into what appears to be a vigorous debate about whether cy pres is a good way to provide money for public purposes. At the same time, the Chief Justice's observations in his separate statement in the Facebook case underscores the delicacy of the topic.

The question of situations when it seems that all or virtually all money paid by defendant will go to the cy pres recipient was raised. Should the rules take a position on that? One reaction is that the ALI provision sets up a hierarchy in which that outcome should not be a frequent occurrence because it calls for further distributions to class members as a first reaction. A cy pres provision is not a substitute for trying hard to send the money to class members.

The problem cases are cases in which very large sums are left after distribution to the class. It seems widely agreed that some amount of money will be left over in most, or all, lump-sum settlement cases unless there is a device for direct deposit or payment by defendant. Some class members will not cash the checks or do whatever is needed to receive the payment. Some will have moved and not get the notice. And at some point, paying the claims administrator all the remaining money to pursue an unpromising effort to beat the bushes for more claimants is not as good as delivering the modest residue to the cy pres organization.

In part, this analysis emphasizes the importance of the nexus requirement in the ALI proposal -- that the recipient organization's objectives be closely tied to the nature of the claims asserted in the lawsuit. General "do good" efforts (e.g., supporting legal services for the poor or feeding the hungry) are not the same. But it can be said that the work of an organization that can satisfy a tight nexus requirement really does confer a benefit on the class.

The consensus was that the Committee Note on frontloading is the best way to address this issue. If cy pres is a possibility (as it seems very often to be), it is likely that it should be addressed in the proposed settlement and that the class should be alerted to that possibility. It also appears important to make the parties, not the court, responsible for identifying the cy pres recipient. Then the court could fashion careful guidelines on how it should be used could be modeled on the ALI approach.

Brief discussion of "fluid recovery" concluded that it likely is not appropriate to raise this alternative in a Committee Note.

Topic 6 -- settlement class certification

Initial reactions to the discussion of this topic were that parties are presently able to navigate the issues presented by settlement class certification under current precedents. Another view was that fashioning a rule would be quite difficult, and that it is not clear it is worth the effort. Providing rule language to deal with the issue of predominance in (b)(3) class actions might cast a negative shadow on the availability of

settlement certification in (b)(2) actions.

Concerns include the risk that proceeding with the amendment sketch in the conference materials would encourage abuse of class actions, and invite reverse auctions to an extent not happening under current law.

Another view was that "people are satisfied with current work-arounds." In addition, we have heard concern that a rule like our sketch could lead to undisciplined gathering of claims.

On the other hand, a rule on this subject would bring some discipline to the actual resolution of related claims. One could regard MDL treatment of massed claims as the equivalent of a mandatory class action unregulated by rule. That is a particular problem in certain types of cases. And the volume of MDL actions has grown in recent years. By some calculations they constitute more than a third of all pending civil cases in the federal judicial system.

That drew a skeptical response: "Can we fix the problems with MDL handling of mass claims situations?" We have been advised to leave this problem alone. Maybe a manual of some sort would be desirable, but the Civil Rules are not a manual. A reaction to this point was that MDL proceedings are inherently unique, and that "Judges are just doing it."

The consensus was that a separate settlement class rule should not be pursued at this time.

Objectors

The consensus was that many report experienced lawyers report serious problems with blackmail behavior by some objectors, probably involving a relatively small cadre of serial objectors, but that relatively modest rule changes should suffice to accomplish a great deal to solve the problem.

One measure that did not seem to warrant rulemaking was a detailed rule on objector disclosure. Even those "good" objectors whom we thought would be able easily to satisfy the disclosure provisions have some misgivings about them. Policing a disclosure regime is probably not worth the effort. Extensive arguments on whether objections satisfy a multipart rule could waste more time and energy than having no rule.

Instead, it seems that the court approval of payments model is the way to go. Initial arguments for absolute prohibitions on payments to resolve objections seemed overblown. Instead, the informed discretion of the court in evaluating such payouts seems the way to go, and disclosures about the terms of the payout could be included. But there may be some questions raised about

whether a procedure rule can prevent parties from reaching what is in effect a settlement with the objector.

There may also be some tricky problems about the interaction of the Court of Appeals and the district court when these issues arise. Perhaps the Rule 62.1 approach to indicative rulings would offer a model worth borrowing. At the same time, it may be that the district court could be regarded as retaining jurisdiction to rule on such developments (cf. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994)).

The question of requiring some disclosure of the grounds for the objection was raised. One problem is with objectors who hide "in the weeds" without specifying their grounds for objecting until after the district court approves the settlement. Then they file appeals and may eventually provide some specifics (but perhaps won't if they can extract tribute without bothering to do so). This tactic deprives the district judge of needed information about the grounds for objections. Building on the approach to disclosures by the proponents of the settlement -- a general rule provision with elaboration in the Committee Note -- perhaps a general directive to the objector on what the objection should say is in order. This could be built into the amendment idea on p. 25 of the mini-conference materials:

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~:~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.] T~~t~~he objection may be withdrawn only with the court's approval. Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

If we go forward on this ground, it will be important to coordinate with the Appellate Rules Committee because there probably has to be some sort of Appellate Rules aspect to this reform. In particular, the "retains jurisdiction" locution in the above sketch may not be appropriate in a Civil Rule.

It was noted that, although some disclosure is important, it is also important to avoid imposing significant burdens on objectors.

Other matters

It was noted that these discussions have identified other matters that also might be addressed somewhere or somehow. A prime example is the idea that all material that will be submitted in support of approval of the proposed settlement, including the attorney fees application, should be on file and accessible to class members well in advance of the date for opting out or objecting. Too often, we have also been told, these materials are filed just before, or even after, that date arrives. Some courts (e.g., the 9th Circuit) have pretty clearly said that the filings should precede the due date for opt-outs and objections.

MINI-CONFERENCE ON CLASS ACTIONS
Rule 23 Subcommittee
Advisory Committee on Civil Rules
Dallas, Texas
Sept. 11. 2015

Participating as representatives of the Rule 23 Subcommittee were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Dean Robert Klonoff, and John Barkett. Also participating were Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Judge John Bates (Chair-designate, Advisory Committee), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee). Emery Lee represented the Federal Judicial Center. Representing the Administrative Office were Rebecca Womeldorf, Derek Webb, and Frances Skillman.

Invited participants included David M. Bernick (Dechert LLP), Sheila Birnbaum (Quinn Emanuel), Leslie Brueckner (Public Justice), Theodore H. Frank (Center for Class Action Fairness), Daniel C. Girard (Girard Gibbs LLP), Jeffrey Greenbaum (Sills Cummis & Gross, P.C.), Theodore Hirt (Department of Justice), Paul G. Karlsgodt (Baker Hostetler), Prof. Alexandra Lahav (Univ. of Connecticut), Jocelyn Larkin (Impact Fund), Brad Lerman (Medtronic), Gerald Maatman (Seyfarth Shaw LLP), Prof. Francis McGovern (Duke), Prof. Alan Morrison (G.W.), Prof. Martin Redish (Northwestern), Joseph Rice (Motley Rice LLC), Stuart Rossman (Nat. Consumer Law Center), Eric Soskind (Department of Justice), Hon. Amy St. Eve (N.D. Ill.), Hon. Patti Saris (D. Mass. and U.S. Sentencing Comm'n), Christopher Seeger (Seeger Weiss), Hon. D. Brooks Smith (3d Cir.), and Ariana Tadler (Milberg LLP).

Observers included Alex Dahl (LCJ), Prof. Brendan Maher (Univ. of Connecticut), Roger Mandel (Lackey Hershman LLP), and Mary Morrison (Plunkett Cooney and LCJ).

Judge Dow welcomed and thanked all the participants, and announced that the morning session would be focused on the first three of the Subcommittee's nine topics for possible rule amendments, with the next four topics occupying most of the time after lunch and the last two topics touched upon only if time allowed. He also invited participants to introduce themselves and indicate which topics they felt were most important. Among the topics so identified by several invitees were ascertainability, cy pres, settlement approval criteria, and settlement class certification.

Topic 1 -- Disclosures regarding class-action settlements

This idea has been known as "frontloading," and emerged from the Subcommittee discussions with interested groups during the past year about possible class-action reforms. It is designed to focus more on the decision whether or when to send notice to the

class of a proposed settlement under Rule 23(e)(1) rather than as "preliminary approval" of the proposed settlement or (if the class has not yet been certified) of class certification. The ALI Aggregate Litigation Project and others have cautioned against the "preliminary approval" nomenclature, since the court should have an open mind until objectors have had an opportunity to state their views. In addition, the effort is designed to blunt arguments that Rule 23(f) review is available at the time of the decision to send notice to the class, while ensuring that the notice can call for class members in Rule 23(b)(3) cases to make their opt-out decisions.

Discussion began with the suggestion that it might be desirable to promote a more adversarial presentation at the "front end" of the class settlement process. In the Silicon Gel litigation, for example, Judge Pointer promoted an open process that got many class members involved at an early point. Is there a way to have the judge reach out to members or putative members of the class to solicit their views at this point?

A reaction to this suggestion was there is a serious problem with relying on the judge to take the place of the adversary process. There are strong reasons for getting objectors involved as soon as possible to ensure that the judge has an adversary process to evaluate the proposed settlement.

That idea brought the reaction "This is not doable. You don't know who the objectors are." Right now, counsel proceed on the basis of "preliminary approval." But there is no articulated standard for granting such preliminary approval. Instead, the parties themselves make sure that there are solid grounds to support the settlement proposal, and to support class certification if that has not yet been granted. They very much want to avoid final disapproval.

Putting aside the concern about the term "preliminary approval," a different concern was with a "laundry list" rule like the sketch in the materials, with fully 14 different topics to address. Many of those topics would not be relevant in many cases. In different types of cases, different concerns exist.

Another participant announced strong support for frontloading. This could "shift the paradigm," making the judge more inquisitorial. That is consistent with the view of courts that say that the judge has a fiduciary obligation to protect the interests of the unnamed class members. Indeed, it has been said that in most class actions the judge is "main objector," because there may not be any others.

Another reaction was that a detailed list of topics to address is useful for many of the lawyers who now are bringing class actions in federal courts. The lawyers invited to this

event are the leaders of the bar, and have broad experience in the field. They already know what they have to present to the judge. Many, many lawyers do not know, and judges need help in getting the information that is necessary to making the decision whether to send notice and, later, whether to approve the proposed settlement.

A judge applauded efforts to frontload, an important adjunct to the "contingent certification" that often attends a decision to send notice to the class. Even though it is long, the 14-factor list might be expanded. One thing that is not specifically raised is the basic fairness of the settlement -- why is this damage number appropriate? Actually, although there is no articulated standard for whether to send the notice, it is a reasonableness test; one might even call it a "blush" test.

Another participant agreed that it is good to prompt disclosure of more information. Nonetheless, a laundry list rule should be avoided. That sort of detail is more appropriate in a Committee Note or a Manual.

A note of caution was sounded. This sort of requirement will compound costs. Some factors are not relevant in many cases. How much does it help to have the parties say "We produced 4.2 million documents"? Does that mean that all the members of the class get access to all those documents? How about protective orders that apply to those documents? And the reference to insurance seems far too broad; insurance is simply not relevant in many cases. The inclusion of take rates creates difficulties because that is always hard to estimate at the outset, although calling for disclosure at the end would not be a problem. Requiring disclosure of side agreements could raise many difficulties. Consider agreements with "blow provisions" that permit the settling defendants to withdraw if more than a certain number of opt outs occur. That could produce serious problems. The 2003 amendments have worked pretty well in organizing and focusing the settlement-approval process; having this laundry list is not warranted.

Another participant reported that "We have high take rates." Laundry lists are not useful and can cause problems. And something like this one is not needed now. "Judges are beginning to do this right." For example, in the NFL concussion cases the judge promoted outreach early in the process. There was a even a liaison for the objectors. That sort of good and creative management of a class action cannot be mandated by rule. It was asked whether such outreach could be required by a rule, prompting the answer that the NFL concussion case was the first time this lawyer had seen such an aggressive effort on this front.

Another participant expressed disapproval of laundry list rules, and worried that this might seem like "piling on" on this topic. But it is important to note that in (b)(2) cases many of these factors simply do not apply. More generally, the idea that the information this rule would require will be of use to class members is not persuasive. It will not be comprehensible to class members. For example, how many of them can interpret complicated insurance policies? The average American reading level is about the sixth grade, and if you want to provide class members with information that is useful to them you need to keep that in mind.

A judge observed that the idea of early notice to the court is very attractive. It is important, however, to say that the judge can insist on any information that seems likely to be useful, whether or not it is on the list. And even though there are instances of judges becoming active in soliciting input from class members, that sort of initiative is not true of all judges, perhaps not of most judges. A rule like this would likely produce more early involvement by judges.

Another lawyer participant expressed misgivings about laundry list rules. Guidance in some form for judges and for less experienced lawyers would be useful, but this lawyer is not confident that even this (rather costly) effort of assembling information will be useful to many objectors.

A competing view was that too often critical information does not surface until it is too late or almost too late for class members to act on it. The concern with costs is valid, but providing potential objectors with needed information need not raise costs too much. Nobody is going to want to look at 4.2 million documents. And if there is a protective order, the objectors would have to be bound by it with regard to documents covered by the order. Moreover, focusing on the claims process is very important. Having that front and center is valuable.

A suggestion was offered for those who dislike checklist or laundry list rules: How about rule with a general direction to the court to require appropriate and pertinent information from the proponents of the settlement, coupled with a Committee Note offering a variety of ideas about topics that might be important in individual cases? That concept produced support from many participants.

A different concern emerged, however: "Why do this under the heading of notice. It's not about notice. It's about preliminary approval."

Another idea emerged: An ideal process in many cases is scheduling or case management conference with the judge when the possibility of a settlement proposal looks likely. Then the

parties and the judge can review what's needed. After that's done, the parties should prepare and file all their materials supporting approval of the settlement up front. There's no need to do this whole briefing effort twice. Then, if there are objections or if additional issues arise, supplemental briefing is available to address these matters. That is the way to go; laundry lists are not helpful, particularly in (b)(2) cases.

This suggestion drew support. At least it is critical that all pertinent materials be on file well before the date when class members must decide whether to opt out or object. Too often in the past, it has happened that such things as the attorney fee application come in only after it's too late to opt out or object.

Another participant noted that CAFA sometimes produces involvement by state attorneys general, particularly in consumer class actions. Having access to details on the case and the settlement would be useful for the AGs.

Another voice was raised for keeping the rule open textured and short. It was suggested that perhaps local rules or standing orders could be used to provide pertinent specifics instead of a rule with a laundry list. But a concern was expressed: Adding frontloading may not work without some specifics. Nonetheless, if one wants to do this by rule, it probably should be simple. That drew the response that the default position should be that all supporting materials should be filed up front.

Another participant asked "How can you fight the idea of notice to judges?" On the other hand, this participant did not understand how there could be an obligation to decide whether to opt out unless the class has already been certified. The opt out must follow certification.

That drew concerns. The way this is done is to combine all notices into one notice program. One question is what the judge's action should be called -- "preliminary approval" or "ordering notice." On that score, it seems important not to hamstring the judge. The other is to recognize that this should be done only once; the possible need for a second notice should be avoided.

Another reaction was that "This is certainly certification. You call them class members." That drew the reaction that this highlights the problem. Unless this is certification there's no authority to require an opt-out decision.

An effort to summarize the discussion suggested that a shift to a more general rule or a shorter list seemed indicated. On that score, one could compare the more general orientation of the second topic -- settlement review criteria -- in which one might

say that the current reality is that each circuit has its own laundry list for settlement review. Beyond that, it might be said at least that the best practice is to get all the specifics on the table early.

That drew a warning that one must be careful about the possibility that such a rule would lead to Rule 23(f) appeals from this preliminary or contingent decision.

Another participant suggested that the goal should be a rule that (1) prompts initial care in compiling information that will be needed; (2) makes it clear that notice can call for opt-out decisions; and (3) includes "preliminary certification." This approach will "make the documents" flow. At the same time, it should avoid wasteful and costly activity. Doing discovery just to be able to say that you did discovery is not sensible.

Topic 2 -- Expanded treatment of settlement-approval criteria

This topic was introduced as involving "11 dialects" of settlement review in the federal courts today. Indeed, considering the reaction to laundry lists in relation to Topic 1, one might suggest that Topic 2 seeks to replace competing laundry lists with a single set of considerations. The sketch before the group has four (and perhaps three) "core" factors that seek to consolidate and simplify the variety of expressions adopted in various circuits.

An initial reaction was skeptical: "This is a solution in search of a problem. The courts of appeals have developed their lists to make sure judges are careful. The lists we have now do the job."

A differing view was expressed: "I generally like this approach, but would add a catch-all." Certainly one could simplify too much. For example, if one argued that "fair, reasonable, and adequate" uses too many words, one answer would be that some courts have found that "fairness" and "adequacy" are different things. Meanwhile, the current lists include things that are not useful. For example, in the Third Circuit, the Gersh factors include several things that really don't often, or ever, matter.

It was observed that one thing that is not explicitly included is consideration of take rates and payouts to the class, and relating those to the attorney fee award. This is a difficult problem from the defense side, where the goal is to get the case resolved.

A reaction was that considering the take-up rate is very important. Indeed, a proposal has been submitted to the

Subcommittee to mandate reports at the end of the claims period on the take-up rate. That's where it's needed -- on the back end. That could come with some sort of hold-back of a portion of the attorney fee award.

Discussion returned to the standard for initial Rule 23(e) notice. The suggestion was that Alternative 4 on p. 5 of the materials expresses what should guide the court, looking to whether the court "preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal." That would not be a "preliminary approval" supporting immediate review under Rule 23(f), but should suffice to support a requirement that class members decide whether to opt out.

A judge agreed. This reflects what is happening, and it is what should be happening.

That idea drew opposition: "What governs the opt-out is real certification." One can't skip that step. This same sort of problem comes up again with the settlement-class certification proposal. The fact that something is convenient does not mean that it is justified or proper.

Another participant shifted focus to the choice between Alternative 1 and Alternative 2 on p. 9 of Topic 2, expressing support for Alternative 2 because it permits the court to approve the settlement only when it can find that all four requirements are satisfied. Separate consideration of each and separate findings would be better than generalized "consideration" (as directed by Alternative 1) of all four sets of concerns. This participant also thought that it would be good to standardize the factors.

Another participant agreed with the skepticism of the first speaker on this topic. "I'm not sure these factors are better than the current lists." This participant would certainly keep "fair, reasonable, and adequate" as a standard for the overall consideration of the factors (as in Alternative 1). This participant also does not like the bracketed language in (D) on p. 10. It also seems dubious to focus so heavily on collusion; that is not a frequent concern.

The question whether this listing is exclusive was raised. One reaction was that even if such a rule is adopted, rote listing of existing circuit factors will continue.

Another participant noted that the Third Circuit Gersh factors are also aimed at collusion. In addition, factor (C) -- the adequacy of the benefits to the class, and comparison to the amount of the attorney fee award -- is very important. Emphasizing the importance of this factor is a good idea. In

addition, this participant favors the Alternative 1 approach -- calling for an overall fairness assessment rather than discrete affirmative attention to each of the four factors. This participant agrees that it is important to avoid a rule that would permit a 23(f) appeal from these preliminary settlement review activities.

Topic 3 -- Cy pres provisions

This topic was introduced with a quick summary of some comments received from participants before the conference began. Several participants favored dropping the bracketed phrase "if authorized by law" and also favored removing any reference to making distributions to class members whose claims were rejected on grounds of timeliness. Other topics that have been raised in recent comments include reversion provisions, and the tightness of the nexus between the goals of the class action and the goals of a potential recipient of cy pres funds. Finally, some raised questions about whether cy pres amounts should count in making attorney fee awards.

The first participant raised two levels of problems. (1) It is troubling that the Civil Rules might be amended to include a substantive remedy. The "if authorized by law" proviso would be an important way to steer clear of this risk. But it's contradicted by the very next phrase -- "even if such a remedy could not be ordered in a contested case." (2) The whole idea presents great difficulties unless it is limited to cases involving trivial claims where delivering relief to class members would obviously not be possible. The procedure rules can't be used as a way to create or justify civil fines. Claims in federal court arise under the pertinent substantive law, and the procedure rules cannot be augment the remedies that substantive law provides. Moreover, cy pres provisions in settlements are used too often to create faux class actions -- vehicles for enrichment of lawyers and "public interest" organizations affiliated with the lawyers.

Another participant disagreed. The "if authorized by law" phrase is inappropriate. These provisions are a matter of agreement. Certainly we want to avoid Enabling Act problems, but this is not necessary for that purpose. It's not right to say that the sole purpose of a suit is to compensate. It is also a method to enforce the law. Cy pres fulfills that private enforcement function. But there must be a significant nexus between the rights asserted in the lawsuit and the objectives and work of the cy pres recipient.

It was asked whether there is really any need for a rule. The ALI section on cy pres has gotten much support in the federal courts. Would that suffice without a rule?

One reaction was that there is a division between the state and federal courts on these points. This speaker would favor applying the ALI standards, but they are not universally invoked even in the federal courts. Another participant noted that there are many state law provisions that deal, in one way or another, with these issues. That drew the question whether federal courts had ever applied those standards in cases governed by state law, and the answer was that there might be a Washington case that does so, but that it surely has not been frequent.

It was suggested that empirical data on the frequency of cy pres provisions would be useful. This participant has attempted to determine how often reported instances have occurred in the last seven years, and believes there have been about 550 cases.

One approach that was suggested is class member consent. Surely class members could consent to using their claims to support public service activities. Perhaps the class notice would support the conclusion that the class has consented to such use if it specifies the cy pres provisions and enables class members to object. If some do object, that shows that others do not.

Another participant expressed considerable concern about the use of cy pres. With "leftover money," this is not really troubling, so long as it's not a huge amount. But these sorts of provisions seem to invite what might be called the "classless class." Particularly troublesome is the possibility that some lawyer would devise a "claim" about a product and claim that everyone who bought it suffered some "harm," so that the solution is that the court should direct that the defendant pay a considerable sum to a "public interest" organization selected by the lawyer. This participant would worry that any rule provision would promote such activity. It would be better to leave this to the courts, particularly under the guidance of the ALI Principles.

A judge noted that in more than ten years on the bench, only two cases had involved cy pres provisions. That drew the reaction that "there's always leftover money."

Concern was expressed about reversionary provisions, under which the defendant gets back unclaimed money. One could read the Committee Note sketch on p. 16 as endorsing such provisions. It was asked whether a rule should forbid a reversion. That drew the response that in some districts, such as the N.D. Cal., the experience is that having such a provision will lead to disapproval of the settlement.

A response was offered to the idea that class member consent can be assumed from lack of objection to cy pres provisions in settlement agreements. The purpose of litigation is to

compensate. If class members want to make donations, they can do that on their own. But having this alternative to getting the money to class members raises very troubling issues. Whether or not this rises to a due process level, it would seem much better to give class counsel an incentive to make sure the money mainly gets to the class instead of the lawyer's pet charity. Indeed, it's odd that nobody has suggested the fluid class recovery concept. That is more like compensation than simply imposing a "civil fine" that is paid to a public interest outfit.

This prompted the observation that sometimes, particularly in some consumer class actions, the amounts left over are huge. It's very difficult to get the class members to make claims.

That prompted the reaction that, in such situations, reversion to the defendant is the logical answer. What this rule proposes instead is that the class's money can be used for public policy purposes the judge endorses. Why can't companies insist on a reversion? That facilitates settlements. The company knows that if the class members don't bother to claim the money, it will get the money back. In bankruptcy reorganizations, reversions occur all the time; why not here also? The class is not a judicial entity that can make a donation to a public interest outfit.

A reaction to this idea was that the Committee Note bracketed material on p. 16 seems to endorse reverter, but that endorsing it is a bad idea. To the contrary, the Enabling Act concern and the concern about the faux class action enabled by cy pres are both based on a false premise. The reality is that the defendant has been found to have violated the law, and the class consists of the victims. True, the defendant says that it does not concede violating the plaintiffs' rights, but usually the payment is enough to show that something wrong has occurred.

A different point was made: Usually there is money left after the initial claims process is completed. Speaking the realistically, the choice is between giving that money to the claims administrator or to the cy pres recipient.

That prompted the reaction that this is the place for reversion to the defendant. Indeed, there is no right to these funds unless the claimants come forward and claim them. Their failure to make claims does not make this a pot of money for "do good" purposes. But it was asked: What if the defendant has agreed to this arrangement. Why wouldn't that provide a sufficient basis for cy pres uses?

Another participant reacted that if defendant wants to insist on a reversion provision, that can be a target for objectors. A defense attorney participant reported that "I have been a proponent of reverters. I will push for them." Not all

settlements are lump sum settlements. Some are claims made settlements. Then a reversion provision makes perfect sense. The amount to be paid is determined by the amount that is claimed. It was asked how one presents a claims made settlement to the court. The answer that it is really about attorney fees. From the defendant's perspective, one looks to the maximum amount that could be awarded, and that is used for the fee award. But the amount paid to the class depends on claims actually made.

The question whether a rule amendment was needed returned. "This is the most cited section of the ALI Principles. Do we need to put it into a rule? It's already being adopted in the courts."

The response was that the district courts are "all over the map." A recent Eleventh Circuit case dealt with a situation in which the class got $300,000 and the lawyers got $6 million in fees.

Another response was that cy pres is not compensation. Even fluid recovery is compensatory in orientation, but cy pres is not. If there is a substantial amount left after the claims process is completed, that indicates that the case should not have been certified. The right solution is to add a new Rule 23(a)(5), saying that a class should not be certified unless it is determined that there will be an effective method to distribute relief to the class members.

That idea drew strong disagreement: The bottom line is that defendant has violated the substantive rights of the class members, even if they are hard to identify and do not all seek compensation. Defendant must disgorge its unjust benefits. The bankruptcy comparison offered earlier is not analogous. That does not involve law enforcement, as is often the case in consumer class actions where many class members do not claim what they could claim under the settlement. Under CAFA, attorney fees are a separate consideration. Claims made is not an alternative in consumer cases. Having a reverter is anathema.

A different reaction was that the right question is the substantive law question. The procedural rules should not be distorted in order to "punish" "bad" defendants. Defendants agree to cy pres provisions because they want settlements approved and expect that a reverter would not be accepted. That is "agreement" with a gun to your head.

A response was that there already are rules that deal with "remedies." Rule 64 deals with some, and Rule 65 addresses TROs and preliminary injunctions. Moreover, this is really a common law development. If state law requires escheat, for example, the federal courts must obey that state law. But we must avoid getting caught up in formalist distinctions.

That prompted the question why the Advisory Committee should not simply leave these matters to common law development. Does anyone favor rulemaking in this area?

One reaction was to agree that the rules committees need not venture into this area. Another participant agreed. Consider the Third Circuit Baby Products decision. The court dealt with the problem creatively using common law principles. What actually happened in that case was that another outreach effort located additional claimants; the massive cy pres provision proved unnecessary.

A contrasting view was expressed: There is a value in having a rule. We need to squelch arguments about what is permissible and how these recurrent issues should be handled. It would be good to have a rule saying (1) cy pres is allowed, and (2) reversion is disfavored.

Another plaintiff-side lawyer reported being "very much on the fence." It is good to have clarity. But these are really tough issues. The problem of nexus is serious; class action settlements are not a form of taxation to do public good. But it is also true that entities like legal aid have very worthy goals and very serious needs that cy pres may partly satisfy.

One approach was offered: Is there a case in the last few years in which the ALI approach was rejected by a court? Maybe that proves we don't need a new rule. A participant identified three -- an Eleventh Circuit case that declined to adopt the ALI approach, a Google case, and a Facebook case.

An observer observed that this discussion is missing a key point. This is in Rule 23(e). It is only about the parties' agreement. The reason to have a rule is to achieve consistent treatment, not to create important new authority for such arrangements.

A reaction was that "this is not really a private contract. It requires court approval, which shows that it is not entirely private. And it achieves the goals of the court (and the parties) only if the court order is binding on both sides, including the absent plaintiffs."

Topic 4 -- Objectors

This topic was introduced as involving two general subjects, disclosure by objectors and a ban on payments to objectors or objector counsel.

One participant reported seeking test cases to try to claw back payments to bad faith objectors on behalf of the class. Rule 23(e)(3) calls for disclosure of all side agreements, and this should be a way to support such potential litigation.

A response was that the difficulty is with the delay after filing of a notice of appeal. At least the Rule 23(e)(5) requirement for court approval of withdrawal of the objection does not seem to apply then. The reaction was that even that sort of thing could be addressed in the settlement agreement, if one is really concerned about greenmail. Although an Appellate Rule amendment might close the appeal window partly, there would still be a 30-day gap between the entry of judgment in the district court and the filing of the notice of appeal. During that time there would be no policing.

Another participant noted that the big problem is that it makes great sense for class counsel to pay off the objectors to get the benefits to the class. Class members may be dying or in dire need of the relief that is being held up by the objector. But the proposed disclosure requirements are not effective. They are just a burden on the objector. The main solution is to require court approval of the payment to the objector or objector counsel.

That prompted the point that the proposal made to the Appellate Rules Committee was that there be a flat ban on any payments to objectors or objector counsel, not payments allowed with court approval. The response was that the important goal is to improve settlement agreements and avoid freeloading on them.

Another participant noted that there are surely good objectors, and this lawyer has recently seen several examples. A problem is that one often sees a mix of objectors. Requiring court approval is a way to shed light on this bad activity. Ideally, the courts of appeals would name names, and list the bad faith repeat-objector lawyers. But for class counsel to do this asks a lot. "Do we want to be in the business of name calling?"

Another plaintiff-side lawyer agreed. Hedge funds are stepping into this area and financing objections in hope of payoffs. We need as much transparency as possible. As a result, this lawyer likes the disclosure requirements, even though they may be burdensome to objectors, particularly good faith objectors.

Another plaintiff attorney agreed. There has to be a response. We need to know who these people are and do something about them.

A question was raised about the 2003 addition of the requirement in Rule 23(e)(3) about "identifying" side agreements.

That did not require that the contents of the agreement be revealed. For true transparency, revealing the details would be desirable. But it was observed that some things are properly and importantly kept secret. An recurrent example is the "blow factor," the level of opt-outs that will permit the defendant to withdraw from the settlement. 15 years ago "opt-out farmers" were thought to misuse such information.

Another reaction was that "the limitation on payments on page 25 is very appealing." Sunlight is desirable, and may be an antidote to the public disdain in many quarters for class actions. Suspicions are fed by secrecy.

A judge asked what the standard is for approving payments to objectors. Those who opt out can make whatever deal they prefer. Compare frivolous objectors. The judge suspects a hold up. What standard should the judge use in deciding whether to approve the payment that counsel has agreed to make?

A plaintiff-side lawyer said: "The only way to do it is to refuse to approve."

Another plaintiff-side attorney noted that the idea is that the court approval requirement will support court scrutiny. The district court could approve under some circumstances, but if the district judge refuses to approve the objector is really without a leg to stand on before the appellate court.

Another idea was suggested: What if a rule said the district court must not approve any payment to an objector unless it finds that the payment is reasonable in light of changes or improvements to the settlement resulting from the objection? That would be consistent with the orientation of Rule 23(h).

A first reaction to this idea was that often the improvement is hard to measure. "Cosmetic" improvements might be contrived. And on the other hand, changes in injunctive relief, for example, might be quite significant but difficult to value.

A defense-side lawyer noted that this is more a plaintiff-side problem. For the defendant, the delay in consummating the settlement may not be similarly urgent. Also, why can't the court approve the added payment even though it's not keyed to an "improvement" in the settlement?

Another participant warned "Be very careful what you ask for." Satellite litigation could easily occur about whether there has been an improvement. It's not always easy to determine what is a good faith objection. Indeed, the whole area is probably not typified by binary choices.

A counter to that was the example of the one-sentence objection to really says nothing. That robs the process of the legitimate purpose of class member objections. The basic goal is to inform the district court about possible problems with the deal. The one-sentence objection is a ticket to the appellate court, where the objector attorney can play the delay game.

That prompted the objection that courts of appeals wouldn't credit a one-sentence objection. That would lead to summary affirmance.

A different topic arose: requiring objector intervention to appeal. That would, of course, require a close consideration of Devlin v. Scardeletti, but the desirability of such a rule would be dubious anyway. If that can be litigated, it will be litigated. This lawyer has confronted such litigation three times already, even though he offers to stipulate that he will not accept any side payments and wants only to get an appellate ruling on the merits of his objections. Disclosure, on the other hand, is o.k. so long as it does not create additional things to litigate.

A defense-side lawyer said he was not in favor of a separate intervention or standing requirement for objectors. "If you're bound, how can you not have standing?"

A judge expressed support for a standard that was keyed to improvements in the settlement. That could recognize that more money was not the only way in which a settlement could be improved, but would provide the judge guidance.

But another participant pointed out that this created another appealable issue -- where the payment is rejected, the propriety of that rejection under the rule's standard could be appealed.

Topic 5 -- Ascertainability

This topic was introduced as having received much attention and somewhat divergent treatment lately. A key question is whether a rule change should be pursued, or alternatively that the committee should await a consensus in the courts.

A plaintiff-side lawyer said that the "minimalist" sketch the Subcommittee had circulated seemed to adopt the Third Circuit standard from Carrera. But the Seventh Circuit decision in Mulins "takes apart" Carrera. Carrera should be rejected insofar as it requires that certification turn on whether the court is certain that the identity of each class member can be ascertained later, and that the method of ascertaining it will be administratively feasible. All that should be required at the certification stage is that there is an objective definition of

the class. The sketch relies on the phrase "when necessary" to do too much work. Moreover, any rule should be addressed only to (b)(3) class actions; even the Third Circuit has recognized that Carrera does not apply in (b)(2) cases. The Third Circuit standard makes identifiably a stand-alone factor for certification, and it should not be. The Committee should not proceed this way.

It was asked whether a rule change is needed. The answer was that it is needed. The Third Circuit decision in Bird v. Aaron's preserves the problem. "The Third Circuit has made it clear that you can't have a consumer class action." And the Eleventh Circuit seems to be siding with the Third Circuit on this subject.

A judge asked whether it might be that Carrera has been somewhat over-read in some quarters. A footnote in the case emphasizes that it was not announcing a new or additional requirement.

Another question was raised: Does this apply to settlements also? If so, that's a ground a for objections to settlements.

A defense-side attorney urged that any effort to address this question must take account of what happens after class certification is granted -- it is necessary to confront the question how you distribute the fruits of the suit.

Another response was that the Tyson case in the Supreme Court raises some of these issues.

Another defense lawyer argued that this "goes to the heart of what is a class action." Is it just about one person's gripe? Consumer fraud cases are good examples. It should be implicit in the rule that the objection is actually shared by others who can be identified. Indeed, typicality might be urged to require something of the sort. This lawyer supports the proposal, but thinks "it probably is a bit too early."

Another defense-side lawyer noted that trial plans also call for a relatively specific forecast of how a case will be handled. That drew the point that Judge Hamilton in Mullins said that the current rule has all the pieces needed to deal with these issues.

A plaintiff-side lawyer responded that "If you agree with Hamilton, the rule should be written to make it clear that at the certification stage only an objective definition is required." And it would be valuable to say that a Carrera-style ascertainability requirement is not a prerequisite for certification, and that self-identification is o.k.

Another plaintiff-side lawyer agreed.

Topic 6 -- Settlement class certification

The initial reaction expressed was skepticism from a defense-side lawyer. The settlement class dynamic has been in place for a long time. It reflects a fundamental tension about the proper role of class actions, and in particular about the centrality of the concept of predominance in the (b)(3) setting. Common question class actions are a precise exception to the normal course of business for American courts. They produce a quantum change in the dynamics of litigation. Though they may be very efficient for resolving multiple claims, they also exert huge leverage for compromise from defendants that have a strong basis for resisting claims on the merits. The 1990s experience emphasized mass torts, and involved quick certification decisions. First the courts of appeals put on the brakes. Then the Supreme Court emphasized in Amchem that predominance under (b)(3) is more than commonality under (a)(2). Since Amchem, the rules have tightened, but the problem of pressures has not gone away in the class action marketplace. The recent interest in issue classes and settlement class certification is evidence of this recent pressure. But the core point is that only with a vigorous predominance check can the collective pressure exerted by a (b)(3) class action be suitably cabined and focused. Weakening that check weakens the entire structure.

That statement produced the reaction "I'm not sure that's right. For example, the Third Circuit in Sullivan v. DB Investments struggled with the concept of predominance in the settlement class context." That reaction drew the response that there really is no way to try these cases. The Florida state court litigation following the Engle class action ruling, in effect an issues class outcome, proves that this effort produces a total mess. A judge that certifies for the "limited" purpose of resolving an issue will inevitably look for a settlement after that issue is resolved, at least if it is resolved in favor of the plaintiffs. We need a standards-driven activity, and removing predominance from its central position is the wrong way to go. Don't institutionalize this settlement urge.

Another participant added that there are serious Article III questions regarding a settlement class. "Contingent" certification in regard to a possible settlement destroys the adversarialness that is vital to American litigation. Similar Article III issues arise with regard to issue class certification. That produces an advisory opinion.

A defense-side lawyer responded that settlement classes are used all the time. If the courts shut down one avenue for resolving cases, lawyers will find another one. For examples, inventory settlements come into vogue if in-court resolutions are not possible. But there's no judicial involvement at all in relation to inventory settlements. That is not an improvement.

With class settlements the court has a role to play, and these possible amendments can shape that role. Amchem is not really illustrative of the issues that arise today. That case presented critical future claims problems. Compare the NFL concussion litigation. There is no comparable futures problem there.

A plaintiff-side lawyer identified the problem: Defendants don't have tools that can be used to settle cases. That is a reason to support the settlement class idea. We need more flexibility. If the Florida situation after the Engle decision is a mess it's a mess because this set of defendants won't settle. That prompted the question whether there is any need for a rule on this subject. One could say that the courts are not following Amchem. The response was "I strongly support a rule. We need to have this in the rule book rather than relying on judicial improvisation."

Another participant said the proper attitude had a lot to do with the type of case involved. Two things are important: (1) The reverse auction problem must be kept constantly in mind, and (2) Whatever the rules, there may be courts that in essence play fast and loose with the rules. It is clear that defendants want global peace and want to use settlement classes to get it. But they also want to make litigation class certification difficult to obtain. There is an innate tension between these two desires, which tempts one to regard settlement class certification as worlds apart from litigation class certification. But that view is often hard to maintain when claims are based on class members' very varied circumstances, or on significantly different state laws. Fitting mass tort class actions into a class-action settlement with a transsubstantive rule is a great challenge.

Another participant had no strong view about the necessity of a settlement class rule, and was not troubled by the question of different standards for the settlement and litigation settings. The real concern should be fair treatment of class members. That is the weakness of settlement classes -- how the settlement pot is divided up.

Another participant recalled opposing the 1996 Rule 23(b)(4) proposal, particularly because of the reverse auction problem. How can a plaintiff lawyer drive a hard bargain when there's no way to go to trial? Inevitably the defendant is in the driver's seat, and various plaintiff lawyers are tempted to "bid" against each other by undercutting other plaintiff lawyers.

This discussion produced a question: Should there be a rule forbidding settlement in any case unless a class has already been certified? That resembles the Third Circuit attitude that prompted the publication of the 1996 Rule 23(e)(4) proposal. It also corresponds to some mid 1970s interpretations of the "as soon as possible" language then in Rule 23 about when class

certification should be resolved. The idea was that class certification was the absolute first thing that should be resolved. That primacy has been removed, but maybe Rule 23(e) should forbid settlements in any case that cannot qualify for certification under existing Rules 23(a) and (b).

A reaction was that it's simply true that courts will try to achieve settlements. MDLs are like that; the judge regards reaching a settlement as a big part of the job. The point is that this existing pressure becomes overwhelming if the bar is lowered for certification. To offer a lower threshold for settlement certification will mean that there will be even more pressure to settle. The inventory analogy is not an apt comparison. With inventory settlements, one begins with clients who contact lawyers and have cases. That's the MDL model. Acting for the clients who have hired them, those lawyers can push for a settlement. But in a class action the "clients" don't hire the lawyer or otherwise initiate the process. They don't even know about it. The court deputizes the lawyer to make a deal for the "clients." Where is there another rule that is designed for settlement purposes? The class action setting is not the place to start.

A reaction to these points was that Rule 23 has a variety of protections in the settlement context that are not in place for MDLs. Doesn't that argue for favoring the class-action setting? The response was that the situations are qualitatively different -- in the MDL setting the client initiates the process, but in the class action the initiative belongs entirely to the lawyers.

A judge noted that the defendant can insist on a full-blown certification process. Then if that results in certification, the defendant can settle, and that sequence would not trouble those unnerved by the settlement class possibility. The reality, however, is that the parties -- including the defendant -- want resolution without that extra step. Indeed, the plaintiff lawyers could rebuff settlement overtures until the case is certified in order to strengthen their hand in settlement negotiations. But that does not happen much of the time. The parties are pushing for settlement before a full-dress certification decision.

A settlement-class skeptic responded that making a formal rule inviting settlement class certification will cause ripple effects. The process just described will be magnified. This prospect will affect how and whether cases are brought.

A settlement-class proponent noted that Rule 23(e) says that settlement is a valid outcome for a class action, albeit with the conditions the rule specifies. That drew the response that every other time settlement is referred to in the rules it is as an adjunct to the adversary proceedings that are the norm of

American litigation. In this situation, that adversarialness is missing.

A reaction to this point was that it would make consent decrees unconstitutional. The response to that point was that consent decrees are a different category because they involve governmental enforcement. That is not the same as the settlement classes we should expect under this rule. In those cases, private profit-oriented lawyers are initiating and controlling the cases. Coupled with cy pres possibilities, they may even support a deal that involves absolutely no direct payments to the class members they "represent."

Topic 7 -- Issue class certification

This topic was introduced as involving two sorts of issues. (1) Is there a split in the courts that justifies some effort to clarify how courts are to approach the option provided by (c)(4) in cases certified under (b)(3)? (2) In any event, should there be an amendment to Rule 23(f) to deal with immediate review of the court's resolution of a common issue under (c)(4)?

An initial reaction was that the effect on MDL proceedings is an important consideration. This participant's bias is to "leave the matter to the marketplace."

Another participant (defense-side) agreed. "There are so many issues with issue classes. They are really very hard to do."

A plaintiff-side participant agreed. The case law is actually fairly stable. And it bears noting that (c)(4) is also used in (b)(2) cases. This sketch might disrupt that valuable practice.

Another plaintiff-side participant agreed. In consumer cases, the issue may be the same for all class members, and (b)(2) treatment may be preferred.

A defense-side participant said that changing the rule would be "very dangerous." There would be an explosion of issue classes." Such treatment raises important 7th Amendment jury trial issues, with the jury seeing only part of the case.

Another defense-side participant did not disagree, but mentioned that the sketch's invocation of a "materially advance the litigation" standard for using this device seemed a valuable gloss on the current rule. But the courts may well be embracing this attitude on their own. Rule 23(c)(4) already says that the court should use this route only "when appropriate." That seems the most important consideration in determining whether (c)(4) certification is appropriate.

No voices were raised to support moving forward on the possible revisions to (b)(3) or (c)(4), and the modification to Rule 23(f) did not receive attention.

Topic 8 -- Notice

This topic was introduced with the widely shared view that everyone thinks that being flexible about ways to give notice makes sense, and that taking the 1974 Eisen decision as interpreting the current rule as requiring first class mail seems inflexible.

An initial reaction was that some public interest lawyers say the poor do not have easy access to the Internet, so email or other online notice may not reach them.

A public interest participant agreed. Consumers too often are not able to access online resources. But there may be another concern of at least equal importance -- the cognitive capability of the members of a consumer class. Even if notice "reaches" them, they may not be able to understand or interpret it. Finding ways to ensure that notices are understandable to such class members may be just as important as flexibility in method of delivery.

Another public interest participant said that electronic notice can usually be useful. But it would be important -- whatever the form of notice -- that the rule direct that it be in easily readable format. And creative use of online communications must be approached with suitable caution. For example, one might be intrigued by the possibility of opting out by email, but that raises concerns about verification of who is doing the purported opting out.

Another participant noted that first class mail is far from foolproof. Particularly with the vulnerable groups mentioned by others, is it clear that first-class mail is more likely to reach them and be understood than alternative means of communication? Don't people who have email actually change their email addresses must less frequently than their residential addresses? Many in the most vulnerable groups probably move often.

A different concern was introduced -- spam filters. As the volume of email escalates, those are increasingly prominent. How can one make sure that email notice of a class action certification or settlement does not end up in spam? A response was: How do you make sure first class mail is not discarded without being opened?

It was suggested that claims administrators actually have considerable experience and data about these very subjects. A participant with extensive experience in claims administration

observed that people i the claims administration business are very resistant to revealing this information. The effectiveness of various methods of reaching class members is regarded as proprietary information.

Beyond simply reaching people at all, it was emphasized, there are serious issues about what you reach them with, and what they actually will understand. The goal should be to write the communications in a way that makes it easy for a recipient to make a decision. That will increase the response rate. Another comment was that one needs to tailor the notice to the case involved. A securities fraud case and a consumer class action may call for very different strategies in communicating with class members. The fundamental issue is that the judge should be paying attention to the practicalities of notice to the class in the case before the court; that focus may be more important than what any rule says.

Attention shifted to what the amendment sketch on p. 46 said. It invites "electronic or other means" to give notice. But that seems to give electronic means priority. Is that right? For one thing, it's difficult to foresee what new means of communication may arise in the future; perhaps some of them may become almost universal but not be "electronic." For another, it is not clear that electronic means should be preferred to others across the board. The discussion thus far shows that class actions are not all the same, and that tailoring the notice program to the case before the court is important. Perhaps this amendment would send the wrong signal.

Another participant suggested that "appropriate" might be more appropriate in the rule than "electronic." Then the Committee Note could say that for many Americans electronic communications are the most utilized method of communicating, but that for others more traditional means continue to predominate.

A reaction to these suggestions about phrasing of a rule change was to note the Eisen interpreted the current rule to prefer, perhaps to require, first-class mail. Should that really be privileged over other forms in the 21st century?

A response was that you can make a case for use of email in many cases. But there is no reason to throw out first class mail altogether. At the same time, another participant cautioned, one would not want the rule to appear to require the court to use first class mail where it does not make sense. It's quite expensive, and can be cumbersome and time-consuming.

An observer suggested that the rule should direct that notice be given "by the most appropriate means under the circumstances." Then the Committee Note could say that Eisen's endorsement of first class mail no longer makes sense. The Note

could also add a discussion of the manner of presentation and content of the notice. Claims administrators do have data on what works, and it makes sense to prefer evidence-based decisions about such matters.

Another reaction focused on the method of opting out. At present, the norm still is that class members must mail in something to opt out. In practice, that can operate as a disincentive to opting out. Can this be done electronically instead?

A reaction was that things are evolving very rapidly on these techniques. Sometimes it seems that the preferred way of handling these topics changes between the time the settlement is negotiated and the time that it is presented to the court.

Another comment reminded the group to keep one more thing in mind -- the distinction between reach and claims rate. It is important for a realistic assessment of differing notice strategies to attend to the matters of greatest importance.

Topic 9 -- Pick-off offers and Rule 68

This topic was introduced by noting that the Seventh Circuit announced a month before the conference that it was abandoning its prior interpretation of the effectiveness of pick-off offers, and that the Supreme Court has granted certiorari in a case that may resolve some or all issues surrounding this topic. So the question presently is how the Advisory Committee should approach the issues.

The first response was that the Committee should "pass" -- not take amendment action at this time.

A second response was that the Rule 68 sketch has appeal. Since the Kagan dissent in the FLSA case, no circuit has embraced pick-off maneuvers, but there are a couple of circuits in which this continues to be a potential issue. But there's a considerable likelihood that the Supreme Court will decide the issue in the Campbell-Ewald case.

Another participant favored the "Cooper approach." Rule 68 is not the only place where this problem can arise. It would be desirable to direct in Rule 23 that if a proposed class representative is found inadequate the court must grant time to find a substitute representative. Another thing that might warrant attention is that some district courts are entertaining motions to strike class allegations. But Rule 12(f) is not designed for such a purpose, and the rules should say that it is not.

A judge agreed that it is prudent to see what the Supreme Court does with the case in which it has granted certiorari. That prompted a prediction from another participant that the Court will not contradict what the lower courts have done. At the same time, this defense-side participant noted, a class action is extremely expensive to defend, and it's not at all clear that nullifying the pick-off offer possibility is important to protect significant interests of the class. That drew the response that this is a putative class upon filing of the proposed class action, and there has to be time to find another class representative if the defendant tries to behead the action at this point.

Other issues

Finally, participants were invited to suggest other topics on which the Advisory Committee might focus its attention.

One suggestion was back-end disclosures. Courts should order the parties to report back on take-up rates and other settlement administration matters when it approves a class-action settlement. This might link up to a court order deferring some of the attorney fee award until the actual claims rate is known. That might tie in somewhat with the cy pres discussion, and the question whether moneys paid to a cy pres recipient should be considered to confer a benefit on the class sufficient to warrant an award based on the "value" of the settlement.

Another topic was whether there should be a second try outreach effort if the initial claims process seems not to have drawn much response. There have been instances in which such second efforts very significantly increase the claims rate. A plaintiff-side participant reacted by saying that "I have a duty to the class to ensure delivery to class members of the agreed relief in an effective manner." Indeed NACA has guidelines on this very topic. See Guideline 15 at 299 F.R.D. 228. This is important.

* * * * *

The mini-conference having concluded, Judge Dow reiterated the hearty thanks with which he opened the event. The participants' contributions have been critical to a careful analysis of the various possible amendment ideas, and the Subcommittee is deeply indebted for the participation of each person who attended the event.

INTRODUCTORY MATERIALS
RULE 23 SUBCOMMITTEE
ADVISORY COMMITTEE ON CIVIL RULES
MINI-CONFERENCE ON RULE 23 ISSUES
SEPT. 11, 2015

This memorandum is designed to introduce issues that the Rule 23 Subcommittee hopes to explore during its mini-conference on Sept. 11, 2015. This list of issues has developed over a considerable period and is still evolving. The Subcommittee has had very helpful input from many sources during this period of development. The Sept. 11 mini-conference will provide further insights as it develops its presentation to the full Advisory Committee during its Fall 2015 meeting.

Despite the considerable strides that the Subcommittee has made in refining these issues, it is important to stress at the outset that **the rule amendment sketches and Committee Note possibilities presented below are still evolving. It remains quite uncertain whether any formal proposals to amend Rule 23 will emerge from this process. If formal proposals do emerge, it is also uncertain what those proposals would be.**

The topics addressed below range across a spectrum of class-action issues that has evolved as the Subcommittee has analyzed these issues. They are arranged in a sequence that is designed to facilitate consideration of somewhat related issues together. As to each issue, the memorandum presents some introductory comments, sketches of possible amendment ideas, often a draft (and often brief) sketch of a draft Committee Note and some Reporter's comments and questions that may help focus discussion. This memorandum does not include multiple footnotes and questions of the sort that might be included in an agenda memorandum for an Advisory Committee meeting; the goal of this mini-conference is to focus more about general concepts than implementation details, though those details are and will be important, and comments about them will be welcome.

The topics can be introduced as follows:

(1) "Frontloading" of presentation to the court of specifics about proposed class-action settlements -- Would such a requirement be justified to assist the court in deciding whether to order notice to the class and to afford class members access to information about the proposed settlement if notice is sent?;

(2) Expanded treatment of settlement approval criteria to focus and assist both the court and counsel in evaluating the most important features of proposed settlements of class actions -- Would changes be helpful and effective?;

(3) Guidance on handling cy pres provisions in class-action settlements -- Are changes to Rule 23 needed, and if so what should they include?;

(4) Provisions to improve and address objections to a proposed settlement by class members, including both objector disclosures and court approval for withdrawal of appeals and payments to objectors or their counsel in connection with withdrawal of appeals -- Would rule changes facilitate review of objections from class members, and would court approval for withdrawing an appeal be a useful way to deal with seemingly inappropriate use of the right to object and appeal?;

(5) Addressing class definition and ascertainability more explicitly in the rule -- Would more focused attention to issues of class definition assist the court and the parties in dealing with these issues?;

(6) Settlement class certification -- should a separate Rule 23(b) subdivision be added to address this possibility?;

(7) Issue class certification under Rule 23(c)(4) -- should Rule 23(b)(3) or 23(c)(4) be amended to recognize this possibility, and should Rule 23(f) be amended to authorize a discretionary interlocutory appeal from resolution of an issue certified under Rule 23(c)(4)?;

(8) Notice -- Would a change to Rule 23(c)(2) be desirable to recognize that 21st century communications call for flexible attitudes toward class notice?; and

(9) Pick-off offers of individual settlement and Rule 68 offers of judgment -- Would rule amendments be useful to address this concern?

(1) Disclosures regarding proposed settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) the grounds, including supporting details, which the parties contend support class certification [for purposes of settlement];

(ii) details on all provisions of the proposal, including any release [of liability];

(iii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iv) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(v) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(vi) identification of any agreement that must be identified under Rule 23(e)(3);

(vii) details on any claims process for class members to receive benefits;

(viii) information concerning the anticipated take-up rate by class members of

benefits available under the proposal;

(ix) any plans for disposition of settlement funds remaining after the initial claims process is completed, including any connection between any of the parties and an organization that might be a recipient of remaining funds;

(x) a plan for reporting back to the court on the actual claims history;

(xi) the anticipated amount of any attorney fee award to class counsel;

(xii) any provision for deferring payment of part or all of class counsel's attorney fee award until the court receives a report on the actual claims history;

(xiii) the form of notice that the parties propose sending to the class; and

(xiv) any other matter the parties regard as relevant to whether the proposal should be approved under Rule 23(e)(2).

(B) The court may refuse to direct notice to the class until the parties supply additional information. If the court directs notice to the class, the parties must arrange for class members to have reasonable access to all information provided to the court.

Alternative 1

(C) The court must not direct notice to the class if it has identified significant potential problems with either class certification or approval of the proposal.

Alternative 2

(C) If the preliminary evaluation of the proposal does not disclose grounds to doubt the fairness of the proposal or other obvious deficiencies [such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys] and appears to fall within the range of possible approval,

the court may direct notice to the class.

Alternative 3

(C) The court may direct notice to the class only upon concluding that the prospects for class certification and approval of the proposal are sufficiently strong to support giving notice to the class.

Alternative 4

(C) The court should direct notice to the class if it preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal.

(D) An order that notice be directed to the class is not a preliminary approval of class certification or of the proposal, and is not subject to review under Rule 23(f)(1). But such an order does support notice to class members under Rule 23(c)(2)(B). If the class has not been certified for trial, neither the order nor the parties' submissions in relation to the proposal are binding if class certification for purposes of trial is later sought.[1]

Sketch of Draft Committee Note

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It is not the same as "preliminary approval" of a proposed settlement, for approval must occur only after the final hearing that Rule 23(e)(2) requires, and after class members have an opportunity to object under Rule 23(e)(5). It is not a "preliminary certification" of the proposed class. In cases in which class certification has not yet been granted for purposes of trial, the

[1] To drive home the propriety of requiring opt-out decisions at this time, Rule 23(c)(2)(B) could also be amended as follows:

(B) *For (b)(3) classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. * * * * *

parties' submissions regarding the propriety of certification for purposes of settlement [under Rule 23(b)(4)] are not binding in relation to certification for purposes of trial if that issue is later presented to the court.

Paragraph (A). Many types of information may be important to the court in deciding whether giving notice to the class of a proposed class-action settlement is warranted. This paragraph lists many types of information that the parties should provide the court to enable it to evaluate the prospect of class certification and approval of the proposal. Item (i) addresses the critical question whether there is a basis for certifying a class, at least for purposes of settlement. Items (ii) through (xiii) call for a variety of pieces of information that are often important to evaluating a proposed settlement, [although in some cases some of these items will not apply]. Item (xiv) invites the parties to call the court's attention to any other matters that may bear on whether to approve the proposed settlement; the nature of such additional matters may vary from case to case.

Paragraph (B). The court may conclude that additional information is necessary to make the decision whether to order that notice be sent to the class. In any event, the parties must make arrangements for class members to have access to all the information provided to the court. Often, that access can be provided in some electronic or online manner. Having that access will assist class members in evaluating the proposed settlement and deciding whether to object under Rule 23(e)(5).

Paragraph (C). The court's decision to direct notice to the class must take account of all information made available, including any additional information provided under Paragraph (B) on order of the court. **[Once a standard is agreed upon, more detail about how it is to be approached might be included here.]**

Paragraph (D). The court's decision to direct notice to the class is not a "preliminary approval" of either class certification or of the proposal. Class certification may only be granted after a hearing and in light of all pertinent information. Accordingly, the decision to send notice is not one that supports discretionary appellate review under Rule 23(f)(1). Any such review would be premature, [although the court could in some cases certify a question for review under 28 U.S.C. § 1292(b)].

Often, no decision has been made about class certification for purposes of trial at the time a proposed settlement is submitted to the court. [Rule 23(b)(4) authorizes certification for purposes of settlement in cases that might not satisfy the requirements of Rule 23(b)(3) for certification for trial.] Should certification ultimately be denied, or the proposed

settlement not approved, neither party's statements in connection with the proposal under Rule 23(e) are binding on the parties or the court in connection with a request for certification for purposes of trial.

Although the decision to send notice is not a "preliminary" certification of the class, it is sufficient to support notice to a Rule 23(b)(3) class under Rule 23(c)(2)(B), including notice of the right to opt out and a deadline for opting out. [Rule 23(c)(2)(B) is amended to recognize this consequence.] The availability of the information required under Paragraphs (A) and (B) should enable class members to make a sensible judgment about whether to opt out or to object. If the class is certified and the proposal is approved, those class members who have not opted out will be bound in accordance with Rule 23(c)(3). This provision reflects current practice under Rule 23.

Reporter's Comments and Questions

The listing in Paragraph (A) is quite extensive. Some language alternatives are suggested, but a more basic question is whether all of the items should be retained, and whether other items should be added. The judicial need for additional information in evaluating proposed class-action settlements has been emphasized on occasion. See, e.g., Bucklo & Meites, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation Mag. 18 (Spring 2015). The range of things that could be important in regard to a specific case is very broad, so Paragraph (B) enables the court to direct additional information about other subjects, and item (xiv) invites the parties to submit information about other subjects.

How often is this sort of detailed submission presently provided at the time a proposed settlement is submitted to the court? Some comments suggest that sophisticated lawyers already know that they should fully advise the court at the time of initial submission of the proposal. Other comments suggest that the "real" briefing in support of the proposed settlement should occur at the time of initial submission, and that the further briefing at the time of the final approval hearing is largely an afterthought. This sketch does not compel that briefing sequence. Would that be desirable, or unduly intrude into the flexibility of district-court proceedings? Then further submissions by the settling parties could be limited to responding to objections from class members.

Do class members already have access to this range of information at the time they have to decide whether to opt out or object? At least some judicial doctrine suggests that on occasion important information has been submitted only after the time to opt out or object has passed. For example, information about the proposed attorney fee award may not be available at the time class members must decide whether to object.

Are there items on the list that are so rarely of interest that they should be removed? Are there items on the list that are too demanding, and therefore should not be included? For example, information about likely take-up rates (item (viii)) may be too difficult to obtain. But if so, perhaps a plan for reporting back to the court (item (x)) and/or for taking actual claims experience into account in determining the final attorney fee award (item (xii)) might be in order.

How best should the standard for approving the notice to the class be stated? To some extent, there is a tension between saying two things in proposed Paragraph (D) -- that the decision to send notice is not an order certifying or refusing to certify the class that is subject to review under Rule 23(f), and that it is nonetheless sufficient to require class members to decide whether to opt out under Rule 23(c)(2)(B).

(2) Expanded treatment of settlement criteria

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

* * * * *

Alternative 1

(2) If the proposal would bind class members, the court may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~[2]

(A) the class representatives and class counsel have [been and currently are] adequately represented the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award and any ancillary agreement made in connection with the

[2] These two alternatives offer a choice whether a rule should be more or less "confining." Alternative 1 is less confining for the district court, since it only calls for "consideration" of the listed factors. It may be that a court would regard some as more important than others in a given case, and conclude that the overall settlement is fair, reasonable, and adequate even if it might not find that all four were satisfied. Alternative 2, on the other hand, calls for separate findings on each of the four factors, and thus directs that the district court refuse to approve the settlement even though its overall judgment is that the settlement is fair, reasonable and adequate. This difference in treatment might also affect the scope of appellate review.

settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; and

(D) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] and the proposed method of claims processing is fair [and is designed to achieve the goals of the class action].

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to direct that the court should approve a proposed settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a "checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment provides more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement in order to decide whether it is appropriate to send notice of the settlement to the class. The disclosures required under Rule 23(e)(1) will give class members more information to evaluate a proposed settlement if the court determines that notice should be sent to the class. Objections under Rule 23(e)(5) can be calibrated more carefully to the actual specifics of the proposed settlement. In addition, Rule 23(e)(5) is amended to elicit information from objectors that should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members, and focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

Rule 23(e)(1) disclosures may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiation of the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Various Rule 23(e)(1) disclosures may bear on this topic. The proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for deferring a portion of the fee award until the claims experience is known may bear on the fairness of the overall proposed settlement. Provisions for reporting back to the court about actual claims experience may also bear on the overall fairness of the proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(e)(2) provides the focus the court should use in undertaking that analysis.

Reporter's Comments and Questions

The question whether a rule revision along these lines would produce beneficial results can be debated. The more constrictive a rule becomes (as in Alternative 2), the more one could say it provides direction. But that direction may unduly circumscribe the flexibility of the court in making a realistic assessment of the entire range of issues presented by settlement approval. On the other hand, a more expansive rule, like Alternative 1, might not provide the degree of focus sought.

Another question revolves around the phrase now in the rule -- "fair, reasonable, and adequate," which receives more emphasis in Alternative 1. That is an appropriately broad phrase to describe the concern of the court in evaluating a proposed settlement. But to the extent that a rule amendment is designed to narrow the focus of the settlement review, perhaps the breadth of that phrase is also a drawback. Changing that phrase would vary from longstanding case law on Rule 23(e) analysis. Will a

new rule along the lines sketched above meaningfully concentrate analysis if that overall description of the standard is retained?

At least a revised rule might obviate what reportedly happens on numerous occasions -- the parties and the court adopt something of a rote recitation of many factors deemed pertinent under the case law of a given circuit. Would the sketch's added gloss on "fair, reasonable, and adequate" be useful to lawyers and district judges addressing settlement-approval applications?

If this approach holds promise to improve settlement review, are there specifics included on the list in the sketch that should be removed? Are there other specifics that should be added?

(3) Cy pres provisions in settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(3) The court may approve a proposal that includes a cy pres remedy [if authorized by law][3] even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(A) If individual class members can be identified through reasonable effort, and individual

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[3] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. Thus, the sketch says such a provision may be used "even if such a remedy could not be ordered in a contested case." That phrase seems to be in tension with the bracketed "authorized by law" provision. One might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is no need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

distributions would be economically viable, settlement proceeds must be distributed to individual class members;

(B) If the proposal involves individual distributions to class members and funds remain after initial distributions, the proposal must provide for further distributions to participating class members [or to class members whose claims were initially rejected on timeliness or other grounds] unless individual distributions would not be economically viable {or other specific reasons exist that would make such further distributions impossible or unfair}];

(C) The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class.

(4~~3~~) The parties seeking approval * * *

Sketch of Draft Committee Note

Because class-action settlements often are for lump sums with distribution through a claims process, it can happen that funds are left over after the initial claims process is completed. Rule 23(e)(1) is amended to direct the parties to submit information to the court about the proposed claims process and forecasts of uptake at the time they request notice to the class of the proposed settlement. In addition, they are to address the possibility of deferring payment of a portion of the attorney fee award to class counsel until the actual claims history is known. These measures may affect the frequency and amount of residual funds remaining after the initial claim distribution process is completed. Including provisions about disposition of residual funds in the settlement proposal and addressing these topics in the Rule 23(e)(1) report to the court (which should be available to class members during the objection/opt out period) should obviate any need for a second notice to the class concerning the disposition of such a residue if one remains.

Rule 23(e)(3) guides the court and the parties in handling such provisions in settlement proposals and in determining disposition of the residual funds when that becomes necessary. [It permits such provisions in settlement proposals only "if authorized by law." Although parties may make any agreement they prefer in a private settlement, because the binding effect of the

class-action judgment on unnamed class members depends on the court's authority in approving the settlement such a settlement may not bind them to accept "remedies" not authorized by some source of law beyond Rule 23.]

[One alternative to *cy pres* treatment pursuant to Rule 23(e)(3) might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program. But because the existence of such a reversionary feature might prompt defendants to press for unduly exacting claims processing procedures, a reversionary feature should be evaluated with caution.[4]]

Paragraph (A). Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the distributions are large enough to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving. Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Developments in telecommunications technology have made distributions of relatively small sums economically viable to an extent not similarly possible in the past; further developments may further facilitate both identifying class members and distributing settlement funds to them in the future. This rule calls for the parties and the court to make appropriate use of such technological capabilities.

Paragraph (B). Paragraph (B) follows up on the point in paragraph (A), and directs that even after the first distribution is completed there must be a further distribution to those class members who submitted claims of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.

[4] Is this concern warranted?

[As an alternative, or additionally, a court may designate residual funds to pay class members who submitted claims late or otherwise out of compliance with the claim processing requirements established under the settlement.[5]]

Paragraph (C). Paragraph (C) deals only with the rare case in which individual distributions to class members are not economically viable. The court should not assume that the cost of distribution to class members is prohibitive unless presented with evidence firmly supporting that conclusion. It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases. When the court finds that individual distributions would be economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. Although such a distribution does not provide relief to class members that is as direct as distributions pursuant to Paragraph (A) or (B), it is intended to confer a benefit on the class.

Reporter's Comments and Questions

A basic question is whether inclusion of this provision in the rules is necessary and/or desirable. One could argue that it is not necessary on the ground that there is a growing jurisprudence, including several court of appeals decisions, dealing with these matters. And several of those decisions invoke the proposal in the ALI Aggregate Litigation Principles that provided a starting point for this rule sketch. On the other hand, the rule sketch has evolved beyond that starting point, and would likely be refined further if the rule-amendment process proceeds. Moreover, a national rule is a more authoritative directive than an ALI proposal adopted or invoked by some courts of appeals.

A different sort of argument would be that this kind of provision should not be in the rules because that would somehow be an inappropriate use of the rulemaking power. That argument might be coupled with an argument in favor of retaining the limitation "if authorized by law." It could be supported by the proposition that the only reason such an agreement can dispose of the rights of unnamed class members is that the court enters a

[5] This follows up on bracketed language in the sketch. Would this be a desirable alternative to further distributions to class members who submitted timely and properly filled out claims?

judgment that forecloses their individual claims. And the only reason the class representative and/or class counsel can negotiate such a provision is that they have been deputized to act on behalf of the class by the court.

One might counter this argument by observing that class-action settlements often include provisions that likely are not of a type that a court could adopt after full litigation. Yet those arrangements are often practical and supported by defendants as well as the class representatives. From this point of view, a rule that forbade them might seem impractical.

And it might also seem odd to regard certain provisions of a settlement agreement as qualitatively different from others. Assuming a class action for money damages, for example, one could contend that a primary interest of the class is in maximizing the monetary relief, via judgment or settlement. Yet nobody would question the propriety of a compromise by the class representative on the amount of monetary relief, if approved by the court under Rule 23(e). So it could be said to be odd that this sort of "plenary" power to compromise on monetary relief and surrender a claim that might result in a judgment for a higher amount is qualitatively different from authority to make arrangements for disposition of an unclaimed residue. Put differently, if the class representative and class counsel can compromise in a way that surrenders the potential for a much larger recovery, is there a reason why they can't also agree to a *cy pres* provision that creates the possibility that some of the money would be paid to an organization that would further the goals sought by the class action?

Another argument that might be made is that alternative uses for a residue of funds should be encouraged to achieve deterrence or otherwise effectuate the substantive law. Under some circumstances, a remedy of disgorgement may be authorized by pertinent law. And the law of at least some states directly addresses the appropriate use of the residue from class actions. See Cal. Code Civ. Pro. § 384. Whether a Civil Rule should be fashioned to further such goals might be questioned, however.

The sketch is not designed to confront these issues directly. Instead, it is inspired in part by the reality that cy pres provisions exist and have been included in class-action settlements with some frequency. One could say that the rules appropriately should address practices that are widespread, but perhaps treatment in the Manual for Complex Litigation is sufficient.

A related topic is suggested by a bracketed paragraph in the Committee Note draft -- whether courts should have a bias against reversionary clauses in lump fund class-action settlements. The sketches of amendments to Rule 23(e)(1) and 23(e)(2) both direct

the court's attention to the details of the claims processing method called for by the settlement. Fashioning an effective and fair claims processing method is a challenge, and can involve considerable expense. To the extent that a defendant hoping to recoup a significant portion of the initial settlement payment as unclaimed funds might be tempted to insist on unduly exacting requirements for claims, something in the rules that encouraged courts to resist reversionary provisions in settlements might be appropriate.

A related concern might arise in relation to attorney fee awards to class counsel. Particularly when those awards are keyed to the "value" of the settlement, treating a lump sum payment by the defendant as the value for purposes of the attorney fee award might seem inappropriate. Particularly if there were a reversionary provision and the bulk of the funds were never paid to the class, it could be argued that the true value of the settlement to the class was the amount paid, not the amount deposited temporarily in the fund by the defendant. But see Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (holding that the existence of the common fund conferred a benefit on all class members -- even those who did not submit claims -- sufficient to justify charging the entire fund with the attorney fee award for class counsel).

(4) Objectors

The problem of problem objectors has attracted much attention. Various possible responses have been suggested, and they are introduced below. They have reached different levels of development, and likely would not be fully effective without adoption of some parallel provisions in the Appellate Rules. The Appellate Rules Committee has received proposals for rule amendments that might dovetail with changes to the Civil Rules.

Below are two approaches to the problems sometimes presented by problem objectors. The first relies on rather extensive required disclosure, coupled with expanded court approval requirements designed to reach appeals of denied objections as well as withdrawal of objections before the district court, covered by the present rule. The second is more limited -- seeking only to forbid any payments to objectors or their attorneys for withdrawing objections or appeals, and to designate the district court as the proper court to approve or disapprove such payments.

Objector disclosure

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~.~~ ~~:~~ ~~the objection may be withdrawn only with the court's approval.~~ The objection must be signed under Rule 26(g)(1) and disclose this information:

(A) the facts that bring the objector within the class defined for purposes of the proposal or within an alternative class definition proposed by the objector;

(B) the objector's relationship to any attorney representing the objector;

(C) any agreement describing compensation that may be paid to the objector;

(D) whether the objection seeks to revise or defeat the proposal on behalf of:

(i) the objector alone,
(ii) fewer than all class members, or
(iii) all class members;

(E) the grounds of the objection, including objections to:
(i) certification of any class,
(ii) the class definition,
(iii) the aggregate relief provided,
(iv) allocation of the relief among class members,
(v) the procedure for distributing relief[, including the procedure for filing claims], and
(vi) any provisions for attorney fees;

[**(6)** The objector must move for a hearing on the objection.]

[**(6.1)** An objector [who is not a member of the class included in the judgment] can appeal [denial of the objection] {approval of the settlement} only if the court grants permission to intervene for that purpose.]

(7) Withdrawal of objection or appeal

(A) An objection filed under Rule 23(e) or an appeal from an order denying an objection may be withdrawn only with the court's approval.

(B) A motion seeking approval must include a statement identifying any agreement made in connection with the withdrawal.

Alternative 1

(C) The court must approve any compensation [to be paid] to the objector or the objector's counsel in connection with the withdrawal.

Alternative 2

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

(D) If the motion to withdraw [the objection] was referred to the court under Rule *XY* of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action on the motion.

[As should be apparent, this would be a rather extensive rule revision, and would likely depend upon some change in the Appellate Rules as well. That possible change is indicated by the reference to an imaginary Appellate Rule *XY*[6] in the sketch above. As illustrated in a footnote, such an Appellate Rule could direct that an appeal by an objector from a court's approval of a settlement over an objection may be dismissed only on order of the court, and directing that the court of appeals would refer the decision whether to approve that withdrawal to the district court.]

Sketch of Committee Note Ideas

[The above sketches are at such a preliminary stage that it would be premature to pretend to have a draft Committee Note, or even a sketch of one. But some ideas can be expressed about what points such a Note might make.]

Objecting class members play an important role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement that Rule 23(e)(1) requires be submitted to the court, objectors can make an accurate appraisal

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[6] The Advisory Committee on Civil Rules does not propose changes to the Appellate Rules. But for purposes of discussion of the sketches of possible Civil Rule provisions in text, it might be useful to offer a sketch of a possible Appellate Rule 42(c):

> **(c) Dismissal of Class-Action Objection Appeal**. A motion to dismiss an appeal from an order denying an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure to approval of a class-action settlement must be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Civil Rule 23(e)(7). The district court must report its determination to the court of appeals.

As noted above, any such addition to the Appellate Rules would have to emanate from the Advisory Committee on Appellate Rules, and this sketch is provided only to facilitate discussion of the Civil Rule sketches presented in this memorandum.

of the merits and possible failings of a proposed settlement.

But with this opportunity to participate in the settlement review process should also come some responsibilities. And the Committee has received reports that in a significant number of instances objectors or their counsel appear to have acted in an irresponsible manner. The 2003 amendments to Rule 23 required that withdrawal of an objection before the district court occur only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. At the same time, the disruptive potential of an objection at the district court seems much less significant than the disruption due to delay of an objector appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to finalize the settlement and deliver the settlement funds to the class.

The goal of this amendment is to employ the combined effects of sunlight and required judicial approval to minimize the risk of possible abuse of the objection process, and to assist the court in understanding objections more fully. It is premised in part on the disclosures of amended Rule 23(e)(1), which are designed in part to provide class members with extensive information about the proposed settlement. That extensive information, in turn, makes it appropriate to ask objectors to provide relatively extensive information about the basis for their objections.

Thus, paragraphs (A), (B), and (C) of Rule 23(e)(5) seek "who, what, when, and where" sorts of information about the role of this objector. Paragraph (B) focuses particularly on the relationship with an attorney because there have been reports of allegedly strategic efforts by some counsel to mask their involvement in the objection process, at least at the district court.

Paragraph (D) and (E), then, seek to elicit a variety of specifics about the objection itself. The Subcommittee has been informed that on occasion objections are quite delphic, and that settlement proponents find it difficult to address these objections because they are so uninformative. Calling for specifics is intended to remedy that sort of problem, and thus to provide the court and with details that will assist it in evaluating the objection.

Paragraph 6 suggests, in brackets, that one might require an objector to move for a hearing on the objection. It may be that the ordinary Rule 23(e) settlement-approval process suffices because Rule 23(e)(2) directs the court not to approve the proposed settlement until after a hearing. Having multiple hearings is likely not useful.

Paragraph 6.1, tentative not only due to brackets but also due to numbering, suggests a more aggressive rein on objectors. It relies on required intervention as a prerequisite for appealing denial of an objection. Anything along those lines would require careful consideration of the Supreme Court's decision in Devlin v. Scardeletti, 534 U.S. 1 (2002), in which the Court held that an objector in a Rule 23(b)(1) "mandatory" class action who had been denied leave to intervene to pursue his objection to the proposed settlement nevertheless could appeal. The Court was careful to say that the objector would "only be allowed to appeal that aspect of the District Court's order that affects him -- the District Court's decision to disregard his objections." Id. at 9. And the Court emphasized the mandatory nature of that class action (id. at 10-11):

> Particularly in light of the fact that petitioner had no ability to opt out of the settlement, appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

The Court also rejected an argument advanced by the United States (as amicus curiae) that class members who seek to appeal rejection of their objections must intervene in order to appeal. The Government "asserts that such a limited purpose intervention generally should be available to all those, like petitioner, whose objections at the fairness hearing have been disregarded," id. at 12, and the Court noted that "[a]ccording to the Government, nonnamed class members who state objections at the fairness hearing should easily meet" the Rule 24(a) criteria for intervention of right. Id. The Court reacted (id.):

> Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the government's suggested requirement.

But it is not clear that the Court's ruling would prevent a rule requiring intervention. Thus, the Court rejected the Government's argument that "the structure of the rules of class action procedure requires intervention for the purposes of appeal." Id. at 14. It added that "no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to

appeal from an action that finally disposes of one's rights has a statutory basis. 28 U.S.C. § 1291." Id.

And it may be that reports about allegedly abusive recent experience with objectors would provide a basis for adopting such a rule. Thus, in *Devlin* the Court noted that the Government did not cite the concern with abusive appeals that has been highlighted by commentators (id. at 13):

> It [the Government] identifies only a limited number of instances where the initial intervention motion would be of any use: where the objector is not actually a member of the settlement class or is otherwise not entitled to relief from the settlement, where an objector seeks to appeal even though his objection was successful, where the objection at the fairness hearing was untimely, or where there is a need to consolidate duplicative appeals from class members.

Court approval requirement

As an alternative to the objector disclosure sketch, the following sketch relies entirely on judicial approval of any payment to an objecting class member of the objector's lawyer. It is possible that this simpler approach would be effective in dealing with inappropriate behavior by objectors. But it should be borne in mind that court approval is also an integral feature of the objector disclosure approach.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

Sketch of Committee Note Ideas

Many of the general comments included in the sketch of Committee Note ideas for the objector disclosure draft could introduce the general problem in relation to this approach, but it would emphasize the role of judicial approval rather than the utility of disclosure. The reason for taking this approach would be that the prospect of a financial benefit is the principal apparent stimulus for the kind of objections that the amendment is trying to prevent or deter.

A starting point in evaluating this approach could be the 2003 amendment to add Rule 23(h), which recognized that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." That involvement is no less important when the question is payment to an objector's counsel rather than to class counsel. Although payment may be justified due to the contribution made by the objector to the full review of proposed settlement, that decision should be for the court to make, not for the parties to negotiate entirely between themselves.

The sketch focuses on payments to objectors or their attorneys because that has been the stimulus to this concern; instances of nonmonetary accommodations leading to withdrawal of objections have not emerged as similarly problematical.

The rule focuses on "the benefit of the objection to the class." Particularly with payments to the objector's attorney, that focus may be paramount. If the objection raises an issue unique to the objector, rather than one of general application to the class, that may support a payment to the objector. As the Committee Note to the 2003 amendment to Rule 23(e) explained, approval for a payment to the objector "may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members." But compensation of the objector's attorney would then ordinarily depend on the contractual arrangements between the objector and its attorney.

Ordinarily, if an objector's counsel seeks compensation, that compensation should be justified on the basis of the benefits conferred on the class by the objection. Ordinarily, that would depend in the first instance on the objection being sustained. It is possible that even an objection of potentially general application that is not ultimately sustained nonetheless provides value to the Rule 23(e) review process sufficient to justify compensation for the attorney representing the objector, particularly if such compensation is supported by class counsel. But an objection that confers no benefit on the class ordinarily should not produce a payment to the objector's counsel.

[Objections sometimes lack needed specifics, with the result that they do not facilitate the Rule 23(e) review process. It may even be that some objections raise points that are actually not pertinent to the proposed settlement before the court. Such objections would not confer a benefit on the class or justify payment to the objector's counsel.[7]]

Reporter's Comments and Questions

Both of these rule sketches are particularly preliminary, and should be approached with that in mind. Obviously, a basic question is whether the disclosure approach (coupled with court approval) or the court approval approach should be preferred. Requiring disclosures by objectors may be helpful to the court in evaluating objections as well as determining whether to approve payments to objectors or their lawyers. It may even be that the disclosure provisions would assist good-faith objectors in focusing their objections on the issues presented in the case.

One significant question in evaluating the court-approval approach is whether Rule 23(e)(5)'s current court-approval requirement has been effective. If it has not, does that bear on whether an expanded court-approval requirement, including a parallel provision in the Appellate Rules, would be effective? Perhaps Rule 23(e)(5) has not been fully effective because filing a notice of appeal after denial of an objection serves as something like an "escape valve" from the rule's requirement of judicial approval. If so, that may suggest that the existing rule is effective, or can become effective with this expansion.

A different question is whether the requirements of the disclosure approach would impose undue burdens on good-faith objectors. The Committee gave some consideration to various sanction ideas, but feedback has not favored that approach. One reason is that emphasizing sanctions has the potential to chill

[7] This point may be worth making if the objector disclosure provisions are not included. If they are included, these points seem unnecessary.

good-faith objections. The rule sketch says the disclosures must be signed under Rule 23(g)(1), which does have a sanctions provision. See Rule 26(g)(1)(C). Would that deter good-faith objectors? Except for some difficulty in supplying the information required, it would not seem that the disclosure requirements themselves would raise a risk of *in terrorem* deterrence of good-faith objectors.

Yet another question is whether such an elaborate disclosure regime could burden the court, the parties, and the objectors with disputes about whether "full disclosure" had occurred. Should there be explicit authority for a motion to require fuller disclosure? Rule 37(a)(3)(A) could be amended as follows:

> **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), or if a class member fails to make a disclosure required by Rule 23(e)(5), any other party may move to compel disclosure and for appropriate sanctions.

But it might be said to be odd to have a Rule 37(a) motion apply to a class member, and also unnerving to raise the possibility of Rule 37(b) sanctions if the order were not obeyed (although one sanction might be rejection of the objection). This approach would have the advantage of avoiding the procedural aspects of Rule 11, such as the "safe harbor" for withdrawn papers, given that Rule 23(e)(5) says that an objection may be withdrawn only with the court's approval.

Alternatively, should the rule simply say that the court may disregard any objection that is not accompanied by "full disclosure"? Should satisfying the "full disclosure" requirement be a prerequisite to appellate review of the objection? Some comments have stressed that delphic objections sometimes seem strategically designed to obscure rather than clarify the grounds that may be advanced on appeal, or as a short cut to filing a notice of appeal without actually having identified any real objections to the proposed settlement, and then inviting a payoff to drop the appeal. Disclosure could, in such circumstances, have a prophylactic effect. Should the court of appeals affirm rejections of objections on the ground that full disclosure was not given without considering the merits of the objections? Could that appellate disposition be achieved in an expedited manner, compared to an appeal on the merits of the objection?

Although not principally the province of the Civil Rules Committee, it is worthwhile to note some complications that might follow from an Appellate Rule calling on the district court to approve or disapprove withdrawals of appeals. The operating assumption may be that the district court could make quick work of those approvals, while the appellate court would have little

familiarity with the case. That may often be true, but not in all cases. A 2013 FJC study of appeals by objectors found that the rate of appellate decision on the merits of the objector's appeal varied greatly by circuit. Thus, in the Seventh Circuit, none of the objector appeals had led to a resolution on the merits in the court of appeals during the period studied, while in the Second Circuit fully 63% had. Had the parties in the Second Circuit cases reached a settlement after oral argument, one might argue that the court of appeals would by then be better positioned to evaluate the proposed withdrawal of the appeal than the busy district judge, who may have approved the settlement two years earlier.

Finally, it may be asked whether focusing on whether the objector "improved" the settlement might be useful. It seems that such a focus might invite cosmetic changes to a settlement that confer no significant benefit on the class. And it also may be that some objections that are not accepted may nonetheless impose significant costs on the objector that the court could consider worth compensating because the input was useful to the court in evaluating the settlement.

(5) Class Definition & Ascertainability

Relatively recently, the issue of ascertainability has received a considerable amount of attention. There have been assertions that a circuit conflict is developing or has developed on this topic. The concept that a workable class definition is needed has long been recognized; "all those similarly situated" is unlikely to suffice often. In 2003, Rule 23(c) was amended to make explicit the need to define the class in a meaningful manner. The amendment sketch below builds on that 2003 amendment.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class~~; Appointing Class Counsel~~*. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.

(C) *Defining the Class Claims, Issues, or Defenses.* An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

Initial Sketch of Draft Committee Note

A class definition can be important for various reasons. Rule 23(a)(1) requires that the members of a class be too numerous to be joined, so some clear notion who is included is necessary.. Rule 23(c)(2) requires notice to the Rule 23(b)(3) class after certification. Rule 23(c)(3) directs that the judgment in the class action is binding on all class members. Rule 23(e)(1) says that the court must direct notice of a proposed settlement to the class if it would bind them. Rule 23(e)(5) directs objectors to provide disclosures showing that they are in fact class members. And Rule 23(h)(1) requires that

notice of class counsel's application for an award of attorney's fees be directed to class members. So a workable class definition can be important under many features of Rule 23.

But the class definition requirements of the rule are realistic and pragmatic. Thus, the rule also recognizes that identifying all class members may not be possible. For example, Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must send individual notice to "all members who can be identified through reasonable effort." And in class actions under Rule 23(b)(2) -- such as actions to challenge alleged discrimination in educational institutions -- there may be instances in which it is not possible at the time the class is certified to identify all class members who might in the future claim protection under the court's injunctive decree.

Under these circumstances, Rule 23(c)(1)(B) calls for a pragmatic approach to class definition at the certification stage. As a matter of pleading, a class-action complaint need not satisfy this requirement. The requirement at the certification stage is that the court satisfy itself that members of the class can be identified in a manner that is sufficient for the purposes specified in Rule 23. It need not, at that point, achieve certainty about such identification, which may not be needed for a considerable time, if at all.

[The rule says that the court's focus should be on whether identification can be accomplished "when necessary." This qualification recognizes that the court need not always provide individual notice at the certification stage, even in Rule 23(b)(3) class actions, to all class members. Instead, that task often need be confronted only later. If the case is litigated to judgment, it may then become necessary to identify class members with some specificity whether or not the class prevails. If the case is settled, the settlement itself may include measures designed to identify class members.]

Ultimately, the class definition is significantly a matter of case management. [It is not itself a method for screening the merits of claims that might be asserted by class members.[8]] As with other case-management issues, it calls for judicial resourcefulness and creativity. Although the proponents of class certification bear primary responsibility for the class definition, the court may look to both sides for direction in fashioning a workable definition at the certification stage, and in resolving class-definition issues at later points in the action. In balancing these concerns, the court must recognize that the class opponent has a valid interest in ensuring that a claims process limits relief to those legally entitled to it,

[8] Is this a pertinent or helpful observation?

while also recognizing that claims processing must be realistic in terms of the information likely to be available to class members with valid claims. And the court need not make certain at the time of certification that a perfect solution will later be found to these problems.

Reporter's Comments and Questions

Would a rule provision along the lines above be useful? One might regard the sketch above as a "minimalist" rule provision on this subject, in light of the considerable recent discussion of it. It avoids the use of both "ascertainable" and "objective," words sometimes used in some recent discussions of this general subject.

Some submissions to the Advisory Committee have urged that rule provisions directly address some questions that have been linked to these topics,[9] including:

> *Ensuring that all within the class definition have valid claims*: A class definition that is expressed in terms of having a valid claim can create "fail safe" class problems, because a defense victory would seem to mean that the class contains no members. A class definition that "objectively" ensures that all class members have valid claims may routinely present similar challenges.
>
> *Use of affidavits or other similar "proofs":* Another topic that has arisen is whether affidavits or similar proofs can suffice to prove membership in the class. This problem can be particularly acute when the class claim asserts that defendant made false or misleading statements in connection with inexpensive retail products. A requirement that class members present receipts proving purchase of the product may sometimes be asking too much.
>
> *"No injury" classes:* Somewhat similar to the two points above is the question whether the class includes many who have suffered no injury. Such issues may, for example, arise in data breach situations. In those cases, there may be a debate about whether the breach actually revealed confidential information from class members, and what use was made of that information. The Supreme Court has granted certiorari in a case that may present some such issues. See Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (6th Cir. 2014), cert. granted, 135 S.Ct. 2806 (2015).

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[9] In case these submissions might be of interest, an Appendix to this memorandum presents some of the suggestions that the Advisory Committee has received.

The rule sketch above does not purport to address directly any of these issues. There are likely additional issues that have been discussed under the general heading "ascertainability" that this sketch does not directly address. Would that mean a rule change along these lines would not be useful?

If it appears that a rule change requires an effort to confront the sorts of issues just identified, could it be said that those issues can be handled in the same way across the wide variety of class actions in federal courts?

The courts' resolutions of these issues appear to be in a state of rapid evolution. For one recent analysis, see Mullins v. Direct Digital, ___ F.3d ___, 2015 WL 4546159 (7th Cir. No. 15-1776, July 28, 2015). Would it be best to rely on the evolving jurisprudence to address these issues rather than attempt a rule change that could become effective no sooner than Dec. 1, 2018? If the courts are genuinely split, is there a genuine prospect that the split will be resolved by judicial decisionmaking?

(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * * *

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3)] request certification and the court finds that the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).[10]

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new

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[10] The Subcommittee has also discussed an alternative formulation that would invoke criteria proposed in the ALI Aggregate Litigation project:

> (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

This approach does not fit well with the current lead-in language to Rule 23(b), which says that class actions may be maintained "if Rule 23(a) is satisfied." But the reformulation appears either to offer substitute approaches to matters covered in Rule 23(a) ("significant common issues" and "sufficiently numerous") or to call for more exacting treatment of topics also covered in Rule 23(a).

subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed

to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation. See Rule 23(e)(1)(D).

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said

that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

(7) Issue Class Certification

This topic presents two different sorts of questions or concerns. One is whether experience shows that a change in Rule 23(b) or (c) is needed to ensure that issue class certification is available in appropriate circumstances. Various placements are possible for this purpose. An overarching issue, however, is whether any of these possible rule changes is really needed; if the courts are finding sufficient flexibility in the rule as presently written to make effective use of issues classes, it may be that a rule change is not indicated.

The second question looks to proceedings after resolution of the issue on which certification was based. Particularly if the class is successful on that issue, the resolution of that issue often would not lead to entry of an appealable judgment. But to complete adjudication of class members' claims might require considerable additional activity which might be wasted if there were later a reversal on appeal of the common issue. So a revision of Rule 23(f) might afford a discretionary opportunity for immediate appellate review of the resolution of that issue.

A. Revising Rule 23(b) or (c)

Rule 23(b) approaches

Alternative 1

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, except when certifying under Rule 23(c)(4), and finds that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: * * * *

Alternative 2

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(4) the court finds that the resolution of particular issues will materially advance the litigation,

making certification with respect to those issues appropriate. [In determining whether certification limited to particular issues is appropriate, the court may refer to the matters identified in Rule 23(b)(3)(A) through (D).]

Rule 23(c)(4) approach

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(4) ***Particular issues.*** ~~When appropriate, a~~An action may be brought or maintained as a class action with respect to particular issues if the court finds that the resolution of such issues will materially advance the litigation. [In determining whether certification limited to particular issues is appropriate, the court may refer to the matters identified in Rule 23(b)(3)(A) through (D).]

Sketch of Committee Note Ideas

[Very general; would need to be adapted to actual rule change pursued]

Particularly in actions brought under Rule 23(b)(3), there are cases in which certification to achieve resolution of common issues would be appropriate even if certification with regard to all issues involved in the action would not. Since its amendment in 1966, Rule 23(c)(4) has recognized this possibility. This amendment confirms that such certification may be employed.

The question whether such certification is warranted in a given case may be addressed in light of the factors listed in Rule 23(b)(3)(A) through (D). A primary consideration will be whether the resolution of the common issue or issues will materially advance the resolution of the entire litigation, or the entire claims of class members. When certifying an issues class, the court should specify the issues on which certification was granted in its order under Rule 23(c)(1)(B) and, for Rule 23(b)(3) classes, include that specification in its notice to the class under Rule 23(c)(2)(B)(iii).

[Resolution of the issues for which certification was granted may result in an appealable judgment. But even if those issues are resolved in favor of the class opponent, that may not mean that all related claims of class members are also resolved. Should resolution of the common issues not result in entry of an

appealable judgment, discretionary appellate review may be sought under Rule 23(f)(2).]

Reporter's Comments and Questions

These sketches are obviously at an early stage of development. At a point in time, it appeared that there was a circuit split on whether (c)(4) certification could be sought in an action brought under Rule 23(b)(3) even though predominance could not be satisfied as to the claims as a whole. It is uncertain whether that seeming split has continued, and whether amendments of this sort are needed and helpful in resolving it.

If a rule change is useful, which route seems most promising? Alternative 1 may be the simplest; it seeks only to overcome preoccupation with overall predominance. It could be coupled with a revision of Rule 23(c)(4) that recognizes that the "materially advances" idea is a guide in determining whether it is appropriate to certify as to particular issues. At present, Rule 23(c)(4) says only that such certification may be granted "when appropriate." Alternatively or additionally, one could refer to the factors in Rule 23(b)(3)(A) through (D). But would they be appropriate in relation to issue certification under Rule 23(b)(1) or (2)?

Is issue certification really a concern only as to Rule 23(b)(3) cases? It may be that, particularly after *Wal-Mart*, Rule 23(b)(2) cases are not suited to (c)(4) certification. Rule 23(b)(2) says that certification is proper only when the class opponent has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." It may be that this definition makes issue certification unimportant. In (b)(1) classes, it may be that there is a common issue such as whether there is a "limited fund" that would warrant (c)(4) certification, but if that produced the conclusion that there is a limited fund certification under (b)(1)(B) seems warranted.

B. Interlocutory Appellate Review

(f) Appeals.

(1) *From order granting or denying class-action certification.* A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders

(2) *From order resolving issue in class certified under Rule 23(c)(4).* A court of appeals may permit an appeal from an order deciding an issue with respect to which [certification was granted under Rule 23(c)(4)] {a class action was allowed to be maintained under Rule 23(c)(4)} [when the district court expressly determines that there is no just reason for delay], if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Sketch of Draft Committee Note Ideas

In 1998, Rule 23(f) was added to afford an avenue for interlocutory review of class-certification orders because they are frequently of great importance to the conduct of the action. That provision is retained as Rule 23(f)(1).

Rule 23(f)(2) is added to permit immediate review of another decision that can be extremely important to the further conduct of an action. Rule 23(c)(4) authorizes class certification limited to particular issues when resolution of those issues would materially advance the ultimate resolution of the litigation. In some cases, the resolution of the common issues may lead to entry of an appealable final judgment. But often it will not, and even though that resolution should materially advance the ultimate resolution of the litigation a great deal more may need to be done to accomplish that ultimate resolution.

Before the court and the parties expend the time and effort necessary to complete resolution of the class action, it may be prudent for the court of appeals to review the district court's resolution of the common issue. Rule 23(f)(2) authorizes such review, which is at the discretion of the court of appeals, as is an appeal of a certification order under Rule 23(f)(1). Such an

appeal is allowed only from an order deciding an issue for which certification was granted. That would not include some orders relating to that issue, such as denial of a motion for summary judgment with regard to the issue.

[But to guard against premature appeals, an application to the Court of Appeals for review under Rule 23(f)(2) must be supported by a determination from the district court that there is no just reason for delay. For example, if the court has resolved one of several issues on which certification was granted, it may conclude that immediate appellate review would not be appropriate.]

Reporter's Comments and Questions

A basic question is whether adding Rule 23(f)(2) would produce positive or negative effects. Related to that is the question "What happens now when an issue is resolved in an issues class action?"

One answer to that second question is that if the defendant wins on the common issue judgment is entered in the defendant's favor and the class action ends. That may not mean that class members may not pursue individual claims, but they would likely be bound by the resolution of the common issue and limited to claims not dependent on it. Cf. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) (after court ruled that there was no general pattern or practice of discrimination in defendant's operation, class members could still pursue claims of individual intentional discrimination but could not rely on pattern or practice proof). But it would ordinarily mean that immediate review is available under 28 U.S.C. § 1291 with regard to the class action.

Another answer is that common issue certification often involves multiple issues, so that even if some are definitively resolved in the district court others may remain to be resolved. Under those circumstances, it may be that the district court would conclude that there is just reason for delay. Is it important to condition immediate review on the district court's determination that there is no just reason for delay? That seems to afford the appellate court useful information about whether to allow an immediate appeal, but may also give the district court undue authority to prevent immediate review.

Yet another answer is that if the class opponent loses on the common issue, that might invariably lead to a settlement essentially premised on that resolution of that issue. It could be that the settlement sometimes preserves the class opponent's right to seek appellate review, but may often be that it does not. Is that an argument for adopting Rule 23(f)(2)? One view might be that it would become a "free bite" for the class

opponent.

Could appellate courts develop standards for decisions whether to grant review under Rule 23(f)(2)? Under current Rule 23(f), they have developed standards for review. But it may be that a similar set of general standards would not be easy to fashion. Would input from the district court be useful in making decisions on whether to permit immediate appeals? If so, is the bracketed provision calling for a district court determination that there is no just reason for delay in the appeal a useful method of providing that assistance to the court of appeals? Would it actually be more of a burden to the district court than boon to the court of appeals?

(8) Notice

This topic has received limited attention in discussion to date. Therefore this memorandum presents the discussion that appeared in the agenda memo for the April 9 Advisory Committee meeting and adds some comments and questions.

April 2015 Agenda Materials

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-74, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]
>
> Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1 **(2) Notice**

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice by electronic or other means to all members who can be identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. It appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods will continue to evolve. The likely suggestion will be that courts should not (as *Eisen* seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the

notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Reporter's Comments and Questions

Recurrent references in cases mainly addressing other issues to use of electronic means for giving notice and giving class members access to information about a class action or proposed settlement suggest that creative work is occurring without the need for any rule change. The sketch of additions to Rule 23(e)(1) in Part (1) above directs that the resulting information be made available to class members, and the likely method for

doing so would be some sort of electronic posting. In at least some cases, electronic submission of claims is done.

No doubt participants in the Sept. 11 mini-conference are more familiar with these developments than those who only read the case reports. But these developments raise the question whether there is really any need for a rule change.

If changes are warranted for Rule 23(b)(3) actions, the question remains whether the time has come for revisiting the question of required notice of some sort in (b)(1) and (b)(2) actions.

(9) Pick-Off and Rule 68

This topic has received limited attention since the April 9 Advisory Committee meeting. Accordingly, the material below is drawn from the agenda materials for that meeting.

One development is that the Supreme Court has granted cert. in a case that may address related issues. Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). Another is the Seventh Circuit decision in Chapman v. First Index, Inc., ___ F.3d ___, 2015 WL 4652878 (7th Cir. No. 14-2772, Aug. 6, 2015). See also Hooks v. Landmark Indus., Inc., ___ F.3d ___, 2015 WL _____ (5th Cir. No. 14-20496, Aug. 12, 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action"). Below in the Reporter's Comments and Questions section, a key inquiry will be whether the present state of the law calls for rule changes.

April 2015 Agenda Materials

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
(A) the court has denied class certification and
(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The

court may choose instead to hold the way open for certification of a class different than the one it has refused to certify, or for reconsideration of the certification decision. The court also may treat the tender of complete relief as mooting the representative's claim, but, to protect the possibility that a new representative may come forward, refuse to dismiss the action.

If the court chooses to dismiss the action, the would-be class representative retains standing to appeal the denial of certification. [say something to explain this?]

[If we revise Rule 23(e) to require court approval of a settlement, voluntary dismissal, or compromise of the representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

(e) Inapplicable in Class and Derivative Actions. This rule does not apply to class or derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy

Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **Before certification.** An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) **Certified class.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(A~~1~~) The court must direct notice in a reasonable

manner * * * * *

(3) **Settlement after denial of certification.** If the court denies class-action certification, the plaintiff may settle an individual claim without prejudice to seeking appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

Reporter's Comments and Questions

The above materials suggest a variety of questions that might be illuminated by discussion on Sept. 11. A basic one is the extent of the problem. One view is that (at least pending the Supreme Court's decision in the case it has taken) this problem was largely limited to one circuit, which has seemingly overruled the cases that had presented the problem.

But another view might be that the existence of this issue casts a shadow over cases filed in other circuits. It has happened that parties in such cases have felt obligated to file out-of-the-chute certification motions, and some district judges have stricken such motions in the ground they are premature.

Assuming there is reason to give serious consideration to a rule change, there are a variety of follow-up questions. One is whether anything more than "the minimum" change is needed. And if the minimum is all that is needed, would a change to Rule 68 saying that it is inapplicable in actions under Rules 23, 23.1, and 23.2 suffice?

As illustrated by the above sketches, a number of other issues might be addressed. These include:

(1) Undoing the limitation of Rule 23(e) to settlements that purport in form to bind the class. This limitation was added in 2003. Before that, most circuits held that court review was required for "individual" settlements as well as "class" settlements, but that notice to the class was not.

(2) A rule could require court approval of a dismissal and also require that the parties submit details of the deal to the court.

(3) A rule could affirmatively preserve the settling individual's right to seek appellate review of the district court's denial of class certification.

(4) A rule could specify that the parties must seek judicial approval of an individual settlement before certification, but leave notice to the class to the discretion of the court.

There surely are additional possibilities.

APPENDIX
Selected Ascertainability Suggestions

This listing does not purport to exhaust the submissions on this topic.

No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):

> A class definition shall be stated in a manner that such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B)

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.

Notes of conference call
Rule 23 Subcommittee
July 15, 2015

On July 15, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John D. Bates (Chair designee, Civil Rules Advisory Committee), Judge Stephen Colloton (Chair, Appellate Rules Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Rebecca Womeldorf (Administrative Office), Prof. Edward Cooper (Reporter, Civil Rules Advisory Committee), Prof. Catherine Struve (Reporter, Appellate Rules Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee).

Objectors

Judge Colloton and Prof. Struve participated in the call because the issues raised by class-action objectors potentially involved both the Civil Rules and the Appellate Rules. Proposals had been made to the Appellate Rules Committee regarding appeals by objectors, and concerns about objectors had been voiced by many participants in the Rule 23 Subcommittee event during the Montreal convention of the American Association for Justice. Related issues were raised by a suggested rule change submitted by Prof. Samuel Issacharoff. And the Subcommittee participants during the Montreal event had explored these issues in some detail during their meeting in Montreal after the session with AAJ members.

The topic was introduced with the background that during the April Advisory Committee meeting the Subcommittee had presented proposals of two types -- a disclosure requirement and a sanctions provision. After the Montreal discussion, Prof. Cooper circulated a sketch of a revision to Rule 23(e)(5) that built upon the discussions had in Montreal. A copy of this sketch is attached to these notes as Appendix 1. It calls for a variety of disclosures by class members who file objections, directing that the signature on the disclosure be done under Rule 26(g)(1), which means that the disclosures are complete and correct, and that the objection is "not interposed for any improper purpose."

These disclosures might dovetail with the "frontloading" provisions that the Subcommittee has recently discussed, which call for proponents of a settlement proposal to supply a variety of pieces of pertinent information to the judge at the time they request that the judge order notice to the class under Rule 23(e)(1).

A further introduction is that it is becoming clear that the problem lawyers want addressed relates to appeals from settlement approval, not from district court proceedings. Although unjustified or ill-founded objections can be an annoyance during the district court's Rule 23(e) consideration of a settlement

proposal, they do not create serious problems. The serious problems happen after the notice of appeal is filed; then the appeal presents the prospect of an extended delay in relief to the class.

While these discussions have been occurring with regard to Rule 23, there have not been discussions recently in the Appellate Rules Committee, which has been expecting input from the Civil Rules committee. It does seem, however, that to the extent approval of the court is required for withdrawal of appeals and/or consideration in return for withdrawal of appeal, the district judge would be a more suitable gatekeeper than a motions panel of the court of appeals.

That gatekeeper function could take various forms. One might be to try to require that the objector obtain permission to appeal from the district judge -- something like a certificate of appealability. At a point in time, there was some discussion of whether to limit objectors' appeals to objectors who are granted leave to intervene in the district court. The Supreme Court's 2002 decision in Devlin v. Scardeletti strongly supported the right of class members to appeal without first being granted leave to intervene. And even if there were an intervention requirement in the rule, there is no question that denial of leave to intervene can be appealed, so that requirement might well fail to solve the problem.

Regarding the Cooper sketch, one member noted that it would important to add a requirement that the court approve any payment to the objector or the objector's attorney. At present, it seems to require disclosure and to permit withdrawal of the appeal, but it should be made clear that approval of the payment itself must come from the judge. That would tie in with Rule 23(h), which permits awards to objector's counsel, but relies on the judge to determine those awards.

A question was raised about whether there could be an Article III problem with a rule that says the court may make orders with regard to a non-adversarial matter, which is what would occur if the objector sought to drop the appeal. Can the court really say "you can't leave"? A response compared Rule 11 sanctions imposed after the underlying action was dismissed; the notion was that the court could continue to act in connection with possible misuse of its processes. The same might be said of appeals taken to extract unwarranted tribute from class counsel.

The Cooper sketch also contains a draft of an appellate rule directing that the question whether to approve the withdrawal of the appeal be referred to the district court for disposition. The underlying notion is that the district judge is in a much better position to evaluate a request to withdraw an appeal than the appellate court. Indeed, in some circuits there may be

motions panels and merits panels, so as many as six appellate judges could be called upon to absorb and evaluate the settlement and the objection.

A reaction to this discussion of whether it is best to have these matters decided in the district court or the appellate court was that there probably is no across-the-board answer. Should the motion to withdraw be made shortly after the notice of appeal is filed, it is easy to say that the district court is a much better choice. The appellate court has, by then, invested nothing in the case, and the district court, having recently approved the settlement, should be well equipped to address the matter. But consider an alternative scenario -- the motion to withdraw comes after full briefing and full argument before a merits panel. That might be 18 months or two years after the district judge's approval. By then, the judges on the merits panel will be quite familiar with the case, and it might have faded in the memory of a busy district judge.

A response to this concern was that it is unlikely this sort of situation will occur with the sorts of objectors who are causing the problems, or one might say the sorts of lawyers who are causing the problem. Sometimes they will approach class counsel right after filing the notice of appeal and say something like "I want $250,000 to drop the appeal. But if you make me write a brief the price goes up to $750,000." These are not lawyers who are seeking to litigate the issues raised by the objection. The likelihood of this happening after a merits argument is very low. Good faith objectors are entirely different; they *want* to present their arguments.

This discussion prompted the reaction "I'm in favor of a rule that stops this activity." But to do that effectively probably requires both a Civil Rule and an Appellate Rule. The disclosure provisions in the Cooper sketch should provide a record for deciding a motion to withdraw an appeal. It may be that the Appellate Rule piece would fit in FRAP 42.

A different question arose. Assuming the district court may approve a payment to an objector to settle the matter raised on appeal, could that trigger a need to re-notice the class? The answer was that it is unlikely that would be necessary. The settlement agreement almost certainly sets an attorney fee ceiling, whether or not the fees are paid out of the overall settlement funds payable to the class. So any payment to objector or objector counsel likely would not come out of the amounts to be paid to class members under the settlement. The Manual for Complex Litigation (3d) addressed this notice question in terms of whether the change "materially affects" the rights of the class members.

A different reaction was that this is likely a subject on which there will not be a division between plaintiff and defense lawyers. Both sides of the "v" want the settlement approved, or at least don't want them hijacked by opportunistic behavior of this sort. And the "good" objectors, who do careful work and engage in extensive preparations before objecting, intending to litigate the appeal to obtain relief from the appellate court, may well buy into this sort of approach. They likely do not appreciate the behavior of the sorts of objectors who have prompted this amendment idea.

At the same time, it is not impossible that there is a good reason for compensation of some sort to an objector whose objection is rejected. For example, in one case objectors spent a lot of money on an expert in support of an argument that the proposed deal would actually work out very differently from the way in which the proponents of the settlement expected. Although their arguments ultimately were not accepted, these objectors helped the district court to gain a full appreciation of the issues presented.

The resolution for the present was to substitute the Cooper sketch for the sketches presented in April, and to use it as a basis for materials for the September mini-conference. It will likely connect up with the frontloading sketch during the mini-conference. It is possible the Appellate Rules Committee can discuss these issues during its meeting in October, and the results of that discussion should be available to the Civil Rules Committee for its meeting in November. Meanwhile, the Chairs and Reporters of the two committees will remain in touch.

Settlement Approval Criteria

Judge Colloton and Prof. Struve left the call, and discussion turned to settlement approval criteria. After the June 26 conference call, Prof. Marcus circulated a set of revised sketches on frontloading, ascertainability, and settlement approval criteria. During the Montreal meeting, the first two of these topics were discussed. That left the presentation of the settlement approval criteria for the mini-conference to be addressed. A copy of these revised sketches is attached to these notes as Appendix 2.

The revised sketches were introduced as presenting at least one question that the Subcommittee could attempt to resolve during today's call. The revised sketches had two alternative introductory "lead-ins." Alternative 1 could be called the less confining one; it said only that the judge should determine whether the proposed settlement is fair, reasonable, and adequate "considering whether" it satisfies the four criteria we have identified in the past. Alternative 2 is the more confining; as drafted the sketch says that the district court "must approve [the proposal] on finding that" the four criteria are satisfied.

For present purposes, it may be that preserving both alternatives is appropriate to provide a full range of opinions during the mini-conference. On the other hand, it may be that discussion should be centered on the approach favored by the Subcommittee if it is fairly strongly favored.

An initial reaction was that "we want a good discussion, but I think I favor the less confining approach." For one thing, using the word "must" makes it seem that the district court's decision is entitled to limited deference on appellate review. At the same time, it may be that the old factors of the various circuits hold a warm sentimental spot in the hearts of some lawyers and judges, so something more directive could be preferable.

Another reaction was that it would be very desirable to meld the various "dialects" used in different circuits into a single language of settlement review. But though the more permissive approach could dilute that objective by inviting less uniformity the more permissive approach could still provide significant focus compared to the present laundry lists of factors employed in some circuits.

Another thought was that the way to pursue this goal is to present the criteria as focusing attention on the core considerations likely to be important in most or all proposed class-action settlements. At the same time, to the extent it "supersedes" anything presently in circuit law, what the sketch seeks to replace is "ritual recitation" of compliance with a laundry list of factors. That sort of recitation probably does not improve either the district court's ability to assess the settlement or the court of appeals' ability to review the district court's approval. Perhaps some of these points could be made in the Committee Note.

Looking to the Dallas mini-conference, confidence was expressed that the Subcommittee should come away from that meeting with an appreciation whether the more or less constricting approach is preferable. That sort of resolution is one of the goals of holding the mini-conference.

A question was raised about the factors, however: Where is attention to the proposed attorney fee award? It would seem that would fit into (iii), to the extent it would fit into any of them. But shouldn't it be made explicit?

A first reaction to this question was that usually an application for an attorney fee award under Rule 23(h) is included with the submission of the proposed settlement to the district court under Rule 23(e). At least in the Ninth Circuit, the application must be filed by the time that class members must decide whether to object or opt out. Thus, the settlement approval hearing serves a dual purpose.

Another suggestion was that factor (i), looking to adequate representation, might comprehend the proposed attorney fee award. But a response was that this is sufficiently important to call for explicit inclusion among the factors.

This discussion drew the reaction that it is beginning to appear that the Subcommittee is not uncertain about the choice between the more directive and less directive approaches. Instead, the consensus is tending toward favoring the less directive approach embodied in Alternative 1. It was suggested that approach should be presented as the pending sketch at the Dallas mini-conference, and the more directive alternative should be offered in a footnote, with a prologue like "The Subcommittee also considered, but decided not to prefer, an alternative formulation:" That suggestion drew support and became the consensus of the group.

The need to include the attorney fees issue among the factors also received consensus support. The Dallas sketch should include that topic.

Cy Pres

This subject was introduced as involving a number of potential questions. First, is a rule change needed? The ALI Principles treatment has been very well received by the courts, and the current amendment sketch is modeled on the ALI Principles. It seems it should be carried forward to the mini-conference, but that this basic question should be kept in mind. The comments by Chief Justice Roberts in his separate statement in Marek v. Lane suggests that close attention be paid to this topic.

Other questions focus on bracketed language in the current sketch. Should the "if authorized by law" proviso be retained? Would that mean that the parties could not agree to anything a court could not order as final relief in a litigated case? That would not sit well with the general flexibility of settlements. Should the presumption that distributions smaller than $100 are

not economically viable be retained? That seems to be a holdover from a time when distributions could not be done as readily as they are now done. Should the last bracketed material in (C), authorizing distribution that serves the "public interest," be retained for situations in which no suitable group can be found with interests that "reasonably approximate the interests being pursued by the class"? Given the latitude that the rule would afford without that provision, it seems to invite difficulties to include that.

A first reaction was that comments we have received about whether this should be in the rules are persuasive. It seems that the right place for guidance of this sort is not in the rules, but a manual or another source. But for purposes of the mini-conference, this member would retain the topic on our list.

Another member indicated tentative agreement with this stance. It will be useful to hear more from public interest organizations of the sort that might be appropriate recipients of cy pres grants. It may be that the best response is the "let the jurisprudence develop." These issues tend to be very fact-specific.

Another issue that was mentioned is the link with settlement more generally. Probably it is often true that some residue remains when there is a money settlement. Our "frontloading" sketch asks the parties to tell the judge what they intend to do about that possibility. If cy pres treatment is possible, it is usually better to get it on the table at the outset of settlement review rather than have the possibility that the class will have to be re-noticed once it proves necessary.

Another reaction is that this topic gets to the heart of what cy pres is about. It may be that it is a mechanism to ensure that a defendant that has profited does not retain the profits because it is too difficult to identify the victims, or because the magnitude of the payouts is not sufficient to motivate them to seek payment. Alternatively, it may be viewed as something of a "cleanup device" in connection with settlements.

Another reaction was that, to the extent this sketch would prevent public interest organizations from obtaining money in cases in which they would formerly have received money, they will not be happy about that. On the other hand, an open-ended invitation for all those who serve the "public interest" to seek money is likely to be a source of headaches for the judge and potential embarrassment for the courts.

It was also noted that other problems can arise. In the Facebook case, it seems that an organization was created to be the recipient of the funds, and that the defendant would have a

considerable say in the operation of that organization. There surely could sometimes be serious problems with that sort of arrangement. Perhaps they could even be the subject of parody: "We founded an organization to hound our competitors for doing what we got sued for." Whether that has actually happened is uncertain, but it is useful to recognize the possibility.

For present purposes, it was suggested, retaining the sketch is important because "we will hear a lot about it on Sept. 11."

The consensus was to carry this forward. That left the question whether to retain the three bracketed items mentioned in the introduction. The "if authorized by law" limitation will be retained because it may be useful to have it before the mini-conference participants. But the $100 presumption and the "public interest" possibility in the last bracketed phrase in (C) should come out. Those seem not to be useful.

Issue Class Certification

The issues presented under this heading were introduced as including at least three sorts of questions. One is whether it is important to make any change to Rule 23(b)(3) or 23(c)(4) in light of the possible disappearance of the one-time apparent conflict about using the issue certification authority in (c)(4). A second was whether the rewording of the possible tweak to (b)(3) was satisfactory for current purposes. A third was whether to pursue the idea of amending Rule 23(f) to permit appellate review of the resolution of the common issue. That change to Rule 23(f) might be warranted even in the absence of a need to change (b)(3) or (c)(4).

Overall question carrying forward

It was acknowledged that the seeming split in the courts of appeals on the availability of (c)(4) certification without satisfying (b)(3) had largely disappeared. There have been at least some indications that some district courts still believe that they may not use (c)(4) without insisting that the predominance requirements of (b)(3) are satisfied. "The *Castano* footnote continues to come up." That happens even though the Fifth Circuit has largely fallen in line with the other circuits. But that circuit has not repudiated the statement in *Castano* that nimble use of (c)(4) is no substitute for satisfying the predominance requirements of (b)(3).

A different issue is whether amending (b)(3) would prevent use of (c)(4) in (b)(2) class actions. Is there a negative implication because the amendment is only about (b)(3) class actions. That point drew the response that the (b)(3) predominance factor is the one that has, at least for a period, stood as an obstacle to use of (c)(4). There have not been

reports of similar obstacles to use of (c)(4) in (b)(2) cases. And it is uncertain whether (c)(4) is actually used with any frequency in (b)(2) cases. Perhaps the solution would be for a Committee Note to say this amendment is not intended to affect (c)(4) certification, if appropriate, in actions brought under (b)(2). Instead, it is directed only at the existing concern with issue class certification in (b)(3) cases. The consensus seemed to be that this approach was the way to go for the present, and the question whether (c)(4) is used with any frequency in (b)(2) cases deserved ongoing attention.

Wording of (b)(3) sketch

The initial suggestion in the Subcommittee's April report to the full Committee was that (b)(3) be changed to say that the predominance factor was "subject to" (c)(4). This formulation raised concerns, and has been replaced with an alternative -- "except when certifying under Rule 23(c)(4)." In addition, after the call another slight refinement came to mind -- adding the word "find" before the superiority prong to make clear that this prong applies even when (c)(4) is employed. So revised, (b)(3) would look as follows:

> **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, except when certifying under Rule 23(c)(4), and [finds] that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: * * * *

This formulation would support a Note saying that superiority may often focus on the value of the common resolution of the issue to full resolution of class members' claims. It would also support a Note that says the (c)(4) invitation to use that route only "[w]hen appropriate" could be amplified by reference to the factors in (b)(3).

The discussion prompted a question about what the real or exact nature of an issues class would be. A question that has arisen on occasion is "What happens after the issue is resolved?" In part, that bears on the appealability question under Rule 23(f) that is addressed below. But more basically, it seems that there could be different kinds of "issue certification." If the court says from the beginning that "This certification is only with regard to issue *X*, it would seem that after the issue is resolved in the district court it can enter judgment. On the other hand, if the court says "We will certify as to issue *X* and then, in light of that resolution, proceed to determine the individual claims of class members," the court clearly cannot

enter a judgment at that point because there is more to be done.

Another related question is when notice to the class is appropriate in a (b)(3) issues class. Is notice done right after certification, as suggested by Rule 23(c)(2)? That would seem to include triggering the opt-out opportunity. But what if some class members do opt out, can they nevertheless claim issue preclusion if defendant loses to the class on the common issue? See Premier Elec. Const. Co. v. National Elec. Contractors' Ass'n, 814 F.2d 358 (7th Cir. 1987) (adopting a "categorical rule" forbidding opt-outs from using the class action result to support offensive collateral estoppel); Note, Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action, 31 Hast. L.J. 1189 (1980).

If opt-outs could claim issue preclusion, what would be the difference between opting out and not opting out if the certification is limited to the common issue and there is no intention to proceed further and resolve individual claims? Whether or not they opt out, it would seem that class members must file their own lawsuits if defendant loses on the common issue. Should they receive notice of that resolution and a reminder that they must do more to obtain relief? Then perhaps the only difference between an opt-out class member and a regular class member is entitlement to notice. But except for Rule 23(d), where is there a provision for giving them notice? As with some other areas of class-action practice, issue classes pose substantial questions.

The 2003 amendment to Rule 23(c)(1)(B) that directs the court to define "the class claims, issues, or defenses" seems to highlight these questions because it may pinpoint the nature of the class certification. Indeed, one could say that Rule 23(c)(1)(B) already contemplates a variety of "issues classes" because it envisions certification only of certain claims, issues, or defenses. And Rule 23(c)(2)(B)(iii) seems to come close to saying this definition should be included in the notice to the class in a (b)(3) action.

A reaction to these issues was that they are not directly related to the concern that prompted this amendment discussion at first. That concern was the seeming conflict over whether issue certification is allowed when (b)(3) predominance cannot be satisfied. This amendment idea is directed at that issue. There are surely other issues relating to issue classes that could be addressed, but they already exist separately and need not preoccupy us just yet. Although the Subcommittee has identified these issues, nobody outside the Subcommittee has said, thus far, that these issues are a problem that should be addressed by rule amendment. So although they are extremely challenging to unravel, they do not seem to present a similar need that they be unraveled.

But this discussion prompted a related question -- Why wasn't (c)(4) included in Rule 23(b) in 1962-66, when the modern class-action rule was developed? Isn't it really more like a free-standing alternative to (b)(3) than a subset of (b)(3)?

No entirely satisfactory answer seemed to emerge to this basic question. One reaction was that when modern Rule 23 was drafted in the 1960s, there was limited familiarity with this form of litigation. Indeed, Professor Charles Alan Wright said at the time that he expected the rule would be used only rarely. Another reaction was that the issues class was something of "an afterthought." Another was that this sort of inquiry might shed light at least on the question of the expectation (if any) whether (c)(4) would be used in (b)(2) cases. A look at (b)(2) suggests that issue certification would be a curious approach, since it authorizes certification only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief * * * is appropriate respecting the class as a whole." That does not seem like a case that could be segmented, with certification limited to certain issues and relief for individual members left open.

On the other hand, as the Supreme Court held in *Cooper v. Federal Reserve Bank of Richmond*, in some employment class actions the defendant's victory on classwide discrimination claims (suitable for certification) need not have a claim preclusive effect on individual claims of intentional discrimination against individual plaintiffs. In that sense, the preclusive effect of an employment discrimination class action may sometimes be limited to what would ordinarily be considered issue preclusion, and thus consistent with the issue class idea.

Summing up this discussion, one member said that this is a "very complicated area, and I'm not sure where I come out." For the present, however, the consensus was to proceed with the revised language noted above to focus on these issues during the July 23-24 conference in D.C. and later during the mini-conference.

Appealability -- Possible Rule 23(f) expansion

Related to the above discussion is the question whether to expand Rule 23(f) to authorize a discretionary interlocutory appeal of the resolution of the common issue. Of course, if the class certification was arranged in a way that meant the court undertook nothing more than resolution of that issue, it may be that an appealable final judgment would result without resort to Rule 23(f). But it does not seem that the ordinary expectation is that the class-action court will fold up its tent after resolving the common issues in most instances where (c)(4) is employed.

One reaction was an analogy -- This is like a Rule 42 consolidation of many separate cases for a common trial of a common issue. Then, there may be a great virtue in having the resolution of that issue subject to appellate review before much judicial and litigant time and energy are spent on ensuing matters where that effort could be wasted if the resolution of the common issue were reversed. How is that sort of thing handled?

The answer to this question was -- "confusedly." In essence, it's a Rule 54(b) question, but it may not readily fit what that rule seems to be talking about. That rule speaks of an action with "more than one claim for relief," and that does not seem to be what we are talking about with issue classes, because the idea is that the claims of all class members share a common issue that it would be appropriate to resolve in the class action. But it does not follow that the common issue constitutes a "claim" by itself, somehow separate from individual issues that attend the prospect of relief for individual class members.

Another comparison was to the Supreme Court's recent decision in *Gelboim v. Bank of America* that the entry of summary judgment ending some of multiple actions combined pursuant to 28 U.S.C. § 1407 is final for purposes of immediate appeal even though many other centralized, perhaps consolidated, actions remain pending. But this ruling did not suggest that there could also be an immediate appeal of related issues raised in other consolidated cases that remained pending in the district court.

For present purposes, it appears not to be necessary to try to resolve all these questions, however. Indeed, it might be said that there is "a large amount of law review material" that could address these questions. But the Subcommittee's objective is to provide a practical solution to a practical problem, more than resolving law review questions. And in doing so it should attempt to spot any gaps that would cause difficulties. One that has been called to the Subcommittee's attention is the confusing nature of the sketch of Rule 23(f) presented to the April meeting of the full Committee. On reflection, it seems that the sketch would be clearer if it treated present Rule 23(f) as 23(f)(1) and then separated out the new matter as a Rule 23(f)(2):

(f) Appeals.

(1) *From order granting or denying class-action certification.* A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the

court of appeals so orders

(2) *From order resolving issue in class certified under Rule 23(c)(4).* A court of appeals may permit an appeal from an order deciding an issue with respect to which [certification was granted under Rule 23(c)(4)] {a class action was allowed to be maintained under Rule 23(c)(4)} [if the district court expressly determines that there is no just reason for delay], if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Concern was expressed about whether this idea might prompt undue negative reactions. "The appeals issue can be very complicated and problematic." A response was that the issue is actually already "out there." It was included in the agenda materials for the April full Committee meeting and was before the ALI participants in the May 17 event, and before the AAJ participants in the Montreal event on July 12. So even though the sketch above presents the appeal idea in a different way, it is not a fundamentally different idea. To date it has not prompted a strong reaction, either positive or negative. Moreover, if we want careful consideration of a possible measure like this one, having a concrete example of what it might look like will improve the focus of comments. Being concrete works better with commentators. We will attempt to make clear that neither the Subcommittee nor the full Committee has resolved the question whether these sketches should proceed into more formal drafting.

Brackets in the above proposal present two issues. First, there are two ways of describing the orders that may be appealed. The bracketed version seems a bit more direct than the one in braces, but the one in braces hews closer to the rule language in (c)(4).

The second issue raises the possibility that a petition to the court of appeals may be submitted only if the district court determines that there is no just reason for delay. That is modeled on Rule 54(b)'s requirement that the district court so determine before an appeal of right may be taken. Whether that limitation is appropriate with a discretionary appeal could be debated. Creating new avenues for possibly disruptive interlocutory review might cause more problems than it would solve, and having such a requirement of district court certification could guard against that result. Moreover, this device might be a useful way for the district court to indicate whether the order in question really does resolve the common

issue that led to (c)(4) certification. That question might be disputed among the parties and tricky for the court of appeals to resolve.

In addition, it would be important to alert the Appellate Rules Committee that this topic is under consideration by the Civil Rules Committee because there might be ramifications for the Appellate Rules that would need attention. It seems that Appellate Rule 5(a) would, as presently written, cover this situation without need for revision. The Committee Note to the 1998 amendment to that rule said that it "is intended to govern all discretionary appeals from district-court orders, judgments, or decrees." Should the Rule 23(f)(2) proposal go forward, it would seem to fit within the current rule. But this issue should be flagged for the Appellate Rules Committee.

A different question was whether there is a need to involve the joint Civil/Appellate Subcommittee in this work. That Subcommittee has been working on Rule 62 regarding stays of execution. The resolution was that it was not necessary because the Rule 23 Subcommittee is better positioned to address this topic.

Appendix 1

Cooper sketch of objector disclosure
(as refined on July 16)

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e).~~; the objection may be withdrawn only with the court's approval.~~ The objection must be signed under Rule 26(g)(1) and disclose this information:
  (A) the facts that bring the objector within the class defined for purposes of the proposal or within an alternative class definition proposed by the objector;
  (B) the objector's relationship to any attorney representing the objector;[1]
  (C) any agreement describing compensation that may be paid to the objector;
  (D) whether the objection seeks to revise or defeat the proposal on behalf of:
    (i) the objector alone,
    (ii) fewer than all class members, or
    (iii) all class members;
  (E) the grounds of the objection, including objections to:
    (i) certification of any class,
    (ii) the class definition,
    (iii) the aggregate relief provided,
    (iv) allocation of the relief among class members,
    (v) the procedure for distributing relief[, including the procedure for filing claims], and
    (vi) any provisions for attorney fees;

[(6) The objector must move for a hearing on the objection.]

[(6.1) An objector who is not a member of the class included in the judgment can appeal [denial of the objection][approval of the settlement] only if the court grants permission to intervene for that purpose.]

(7)
  (A) An objection filed under Rule 23(e) or an appeal from an order denying an objection may be withdrawn only with the court's approval.
  (B) A motion seeking approval must include a statement identifying any agreement made in connection with the withdrawal.
  (C) The court must approve any compensation [to be] paid to the objector or the objector's counsel in connection with the withdrawal.

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[1] Is it feasible to add disclosure of every case in which any attorney for the objector has presented objections to a class-action settlement? The snag is the "Batman" problem — how to draft a provision that reaches the mastermind objector behind nominally different attorneys.

(D) If the motion to withdraw [the objection] was referred to the court under Rule XY of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action on the motion.

Appellate Rule XY

A motion to withdraw an appeal from an order denying an objection to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure must be referred to the district court for disposition under Rule 23(e)(6)[(7)].

Comments - Alternatives

Relying on disclosure gets to the interest reflected in the several comments that discovery about the objector is important, without paving the way for discovery of the sort that is inappropriate even as to a class representative.

An advantage of disclosure is that it is possible to invoke the sanctions provisions of Rule 26(g). No need to create a new and independent provision. And none of the procedural incidents of Rule 11.

Many alternatives have been suggested. One would be to require an objector to qualify as an additional class representative whenever the objections seek to improve the settlement for the entire class or for some part of the class (whether or not subclassed). That may be a bit much. Although the essence of the objection in these situations is that the class representatives are not adequately representing the class, there is a powerful argument that class members should be allowed to make that argument without having to meet the requirements imposed on representatives. The class member is going to be bound by a judgment negotiated by a "representative" recognized by the court but not by the class member. But there may be a qualification. We have noted the proposition that it is not enough to offer an objector an opportunity to opt out of the class. The objector may respond that the objector prefers to have its claim resolved on a class basis, just not by this inadequate settlement. That interest could be addressed by providing that an objector who challenges the adequacy of class relief must be prepared to assume the role of class representative. That may be more powerful medicine than we need.

Requiring permission to withdraw an objector’s appeal may be sufficient. An absolute prohibition on paying anything incident to withdrawal of an appeal would have to be qualified by recognizing that payment may be appropriate if the objection goes only to the argument that the objector has distinctive circumstances that distinguish the objector from other class members. That could be difficult to administer. And there might be some difficulty in administering a rule that allows payment to the objector who withdraws an appeal because the settlement has

been improved – distinguishing cosmetic changes from meaningful changes may not always be easy.

Appendix 2

Re-sketches for discussion on July 12 and 15

Based on the June 26 conference call, the following presents interim revisions to the original sketches ("re-sketches"). A few notes will be included also, but this does not present an exhaustive chronicle of possible issues. Together with the notes of the June 26 conference call, however, it will hopefully provide a basis for further discussion. For the present, the goal is to settle on what should be put before the conferees at our Sept. 11 mini-conference. That leads, of course, to the framing of the materials for the Advisory Committee's November meeting and, after that, probably to a presentation of pending thoughts during the Standing Committee's January meeting.

Frontloading

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) the grounds, including supporting details, which the parties contend support class certification [for purposes of settlement];

(ii) details on all provisions of the proposal;

(iii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iv) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(v) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(vi) identification of any agreement that must be identified under Rule 23(e)(3);

(vii) details on any claims process for class members to receive benefits;

(viii) a forecast [based on expert reports] of the anticipated take-up rate by class members of benefits available under the proposal;

(ix) any plans for disposition of settlement funds remaining after the initial claims process is complected;

(x) a plan for reporting back to the court on the actual claims history;

(xi) the anticipated amount of any attorney fee award to class counsel;

(xii) any provision for deferring payment of part or all of class counsel's attorney fee award to class counsel until the court receives a report on the actual claims history;

(xiii) the form of notice that the parties propose sending to the class; and

(xiv) any other matter the parties regard as relevant to whether the proposal should be approved under Rule 23(e)(2).

(B) The court must not direct notice to the class unless satisfied based on the parties' presentation that class certification and approval of the proposal under Rule 23(e)(2) is [substantially] probable. [An order that notice be sent to the class is not a "preliminary approval" of either class certification or of the proposal {but does support notice to class members under Rule 23(c)(2)(B)}.] The court may refuse to authorize notice to the class until the

parties supply additional information. If the court directs notice to the class, the parties must arrange for class members to have reasonable access to all information provided to the court.

[**(C)** An order that notice be sent to the class is not a "preliminary approval" of either class certification or of the proposal {but does support notice to class members under Rule 23(c)(2)(B)}.]

This sketch adds a requirement that the parties supply the court with their grounds for class certification, including a possible link to a new provision on settlement class certification. The sketch adds a (C) that seeks to put into the rule a basis for a Committee Note saying that sending notice does not constitute preliminary approval of class certification or of the proposed settlement. That might fortify arguments against immediate appeal. (c) also tries to confirm that the order that notice be given suffices to support notice to the class that starts the opt-out and objection periods running.

Ascertainability

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class~~; Appointing Class Counsel~~*. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.

(C) *Defining the Class Claims, Issues, or Defenses.* An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

This is a "minimalist" approach to the ascertainability issues that eschews both "ascertainable" and "objective," words that appeared in the sketch before us on June 26. It also does not address whether the court should insist that the definition limit the class to persons who would be entitled to relief, or the manner of proof of eligibility for relief.

This sketch might support a Committee Note saying that the problem of class definition at the certification point is different from the ultimate question of criteria for relief under a settlement or judgment. The "when necessary" phrase might be necessary to support that idea in the Note. It might also support a Committee Note emphasizing that the problem of class definition and eligibility for relief are both essentially management issues. At the same time a Note might recognize that there are sometimes competing considerations, with plaintiffs concerned that the task of providing an airtight definition at the outset and defendants concerned that they face the risk of being required to pay people how really have no claim against them.

A Note might also say, somehow, that it adopts a less exacting approach than *Carrera*. Perhaps we would be permitted to cite that case (as we were ultimately allowed to cite *Residential Funding*) in the Note, but the general rulemaking preference is against such citations. There is also the reality that we are somewhat uncertain what the Third Circuit's actual take on things is, and later Third Circuit cases have somewhat muddied the waters. On the other hand *Carrera* seems to have become shorthand in some quarters for a certain attitude on this subject.

For present purposes, there are at least two questions: (1) Would this be of any real utility? (2) Is there anything more a rule amendment could do without venturing into the center of controversy?

Settlement Approval Criteria

The discussion last time, and ensuing reflection about it, suggests that there are at least two basic ways to go. One might be called the more confining, and the other the less confining. Choosing between them turns in part on the extent to which we think that the term "fair, reasonable, and adequate" is a large tent that includes all the factors every circuit has articulated (even though they have not all articulated the same ones), and whether something that aggressively said that courts could no longer rely on things they formerly declared to be important would invite fervent opposition from at least some judges.

This basic choice may inform, but seems somewhat distinct from the refinement of details of the "approved" list. So to afford a basis for discussion, here are sketches of the two possibilities:

Alternative 1

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and must approve it on finding that:

(i) the class representatives and class counsel have [been and currently are] adequately represented the class [in preparing to negotiate the settlement];

[(ii) the settlement was negotiated at arm's length and was not the product of collusion;]

(iii) the relief awarded to the class -- taking into account any ancillary agreement [that may be part of] {made in connection with} the settlement -- is [fair, reasonable, and adequate] {sufficient} given the costs, risks, probability of success, and delays of trial and appeal; and

(iv) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] {and the proposed method of claims processing is fair {and is designed to achieve the goals of the class action}].

It seems worthwhile to discuss this general set of alternatives. For the Sept. 11 conference, we might want to preserve both approaches. But perhaps we sufficiently prefer one of them now so that we need take only one of these two. This will hopefully be something we can discuss in Montreal, and perhaps revisit on July 15.

The factors list above has been reworked a bit from the original one that was modeled on ALI Principles § 3.07(a). It is perhaps premature to try to do more work on them, but some tentative revisions deserve note. One is that the arm's length provision that was at the end has been moved up as item (ii); whether that is really different from (i) (as augmented with bracketed material) might be debated. In (iii), the question whether to repeat "fair reasonable and adequate" if Alternative 1 is used is raised, with a placeholder substitute ("sufficient"). Maybe it is best to use the same words twice. In (iv) it may be that the bracketed material is not needed in the rule and could be mentioned in a Note. In addition, a bracketed addition to (iv) focuses on the claims processing method. That concern seems worth elevating to the rule rather than only mentioning in the Note. Perhaps it could be included in (iii) instead of (iv).

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Notes of meeting
Rule 23 Subcommittee
Advisory Committee on Civil Rules
Montreal, July 12, 2015

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a meeting in Montreal after its session with AAJ members on July 12, 2015. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizbeth Cabraser, Dean Robert Klonoff, Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee).

Objectors

During the AAJ session beginning at 8:30 on July 12 (and continuing until 10:45 despite the official end time of 10:00), the most frequent topic of comments by AAJ members was that objectors who engage in holdup tactics have become a major difficulty. In part, this problem has arisen due to the Supreme Court's 2002 decision in Devlin v. Scardeletti, which allows any objecting class member to appeal if the settlement is approved despite the objection. There is, at present, no screening device the court may use to limit this activity by objectors. And after the notice of appeal is filed, the Rule 23(e)(5) requirement of court approval to withdraw the objection disappears. So that is when the holdup happens.

At least sometimes, vague objections come in from class members (rather than their counsel), and counsel appear on the scene only after the notice of appeal is filed, and then make demands for large amounts of money despite having done almost no work. Some objections are so generic that they don't even relate to the provisions of the settlement in question. They are mere placeholders for later demands for payment. They provide no assistance to the court in making its decision whether to approve the proposed settlement. Indeed, one might even say that these objectors would not be in business if the court rejected the settlement; they profit only when the court approves the settlement despite their objections and they can exploit the delay resulting from their filing of an appeal. The picture painted by the participants in the AAJ meeting is of lawyers who do essentially no work but demand very considerable tribute to go away. And their leverage comes from their ability to hold up the entire settlement implementation.

One idea endorsed by some at the AAJ session was that objectors should be subject to some court scrutiny before their objections can be the basis for an appeal after approval of the settlement. It was noted that in Matsushita v. Epstein, the Ninth Circuit (later reversed by the Supreme Court) once spoke of "certified objectors," and support was expressed for the idea of applying Rule 23(a) typicality and adequacy requirements to objectors. Long before *Devlin* was decided, some courts required

that class members formally intervene before they could appeal. See Gottlieb v. Wiles, 11 F.3d 4 (10th Cir. 1993); Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) (noting that class member had not qualified to act on behalf of the class); Walker v. City of Mesquite, 858 F.2d 1971 (5th Cir. 1988) (foreclosing appeal by class member denied leave to intervene).

A major reason for requiring either that objecting class members gain intervention or otherwise be deemed qualified to act on behalf of the class is that, by objecting, they hold up relief for the whole rest of the class. The class representatives have to qualify under Rule 23(a) to seek relief for the class. That prompted the question: Why shouldn't the objectors, whose behavior may impact the class members just as much, have to satisfy similar requirements?

It was also suggested during the session with AAJ members that, at least in 23(b)(3) class actions, where opting out is possible, the rule should not allow objections, or at least not allow appeals without some scrutiny of the objectors' bona fides. Perhaps the court could be authorized to "deport" objecting class members by redefining the class to exclude them. Then they could not appeal. That would, however, seem directly contrary to Rule 23(e)(5), which says that class members can object.

The Subcommittee meeting began with the comment that many interesting ideas had been raised about the objector problem during the AAJ meeting. One is that there should be presumptive discovery from objectors. By objecting, they have distinguished themselves from the passive unnamed class members. At least they should be subject to discovery about matters that might bear on their objections. Perhaps, beyond that, the idea that was once floated in the Advisory Committee that they could be denied the right to appeal absent intervention. That would allow the district court to deny intervention with regard to groundless objections. Perhaps that idea should be reexamined.

The idea of requiring intervention might be attractive. It could be likened to the CJA requirement in some circumstances that the district court issue a certificate of appealability. Perhaps that could be supported by the experience since 2002, when Devlin was decided. But it was cautioned that we probably can't cut off the right to object (now guaranteed by Rule 23(e)(5)) or the right to appeal. At least, that would call for a serious look at whether there is room under Devlin for such a rule. And there are policy reasons why requiring formal intervention to obtain appellate review could be questioned.

An alternative that has been suggested to the Appellate Rules Committee is to prohibit any consideration at all for dismissing, abandoning, or withdrawing an appeal. Whether this would be workable is uncertain. An alternative to such a flat

prohibition would be requiring court approval for withdrawal (and for any consideration given in connection with withdrawal of the appeal), but that really should be referred to the district judge, not to the court of appeals. The district judge is, after all, much more familiar with the case than the court of appeals.

It was agreed that the basic problem is at the appeal stage, not the district court stage. Although it may be that objectors produce some delay at the district court stage, there is no serious "holdup" problem then, and Rule 23(e)(5) applies there.

One idea might be to forbid consideration for withdrawing an appeal unless the settlement were improved. But that would likely lead to a regime of "cosmetic" changes to settlements that really do nothing except provide the predicate for the blackmail payment. And determining whether the change is more than cosmetic might be a real challenge for the court of appeals.

A more fruitful avenue might be to look to discovery from the objector. Although that prospect should not be a club to scare away objections, it would be important for the district court to have the sort of record that discovery could provide. This discovery could be channeled but sometimes would be really revealing. Perhaps the objector is really not a class member. Perhaps the objector is a close relative of his or her lawyer. Perhaps this is the 46th time this person has objected to a settlement using this close relative as his or her lawyer. And perhaps, in every one of those 45 prior cases, the appeal was promptly withdrawn after money was paid to the lawyer.

But the possibility of discovery from objectors could raise problems of its own. Objectors may argue that they should get discovery of class counsel to support their objections. In the past, such efforts to depose class counsel had led to pitched battles. Evidence Rule 408 shrouds the negotiations in confidentiality, but the relationship between class members and class counsel, who is in a sense their lawyer, is tricky. At least in some situations, discovery could appear to be a club wielded by objectors as much as it is a device for screening their objections.

Another contrast is to discovery efforts directed to unnamed members of the class. The courts rightly keep a very tight leash on such efforts, which may be strategic measures designed to impose costs on class counsel, frighten away class members, and provide a predicate for seeking dismissal of the claims of class members who do not respond to the discovery. There was no interest in broadening discovery from unnamed class members in general.

Another topic raised was sanctions. "I don't understand the lack of interest in sanctions on bad objectors." Many of the

lawyers who participated in the AAJ session are understandably angry about the behavior they describe. Why not urge sanctions against those who do these things?

One answer is that Rule 11 is ill suited to do the job. Its procedural requirements are ill suited to this situation. The safe harbor is, in a sense, too safe. Moreover, a lot of judges simply don't like Rule 11 and regard Rule 11 litigation as a distraction.

A different consideration, more generally, was that many district judges need some guidance about these issues. Judges who were prosecutors are out of their element when called upon to evaluate a proposed class-action settlement. Rule provisions or Manual directions would be very helpful to them.

A different question was "What would be the sanction?" In the 10th Circuit's bond on appeal case, the largest amount covered by the bond -- about $500,000 -- was for delay costs, the time value of the large amount of money that would be available once the settlement approval became final, but would be held up by the appeal. Is that the proper measure of a sanction? That drew the comment "The harm here is enormous."

Another observation was that until the mid 1990s, defendants would often agree to pay the settlement funds once the district court issued a final approval, without regard to whether there was an appeal. But starting about 20 years ago, defendants stopped doing that. For them, the additional delay may be attractive.

It was suggested that requiring a bond on appeal might be a good way to go. That drew the objection that it could shut down the very type of objectors we want to see in court --- Public Citizen and Public Justice, for example. Those objectors are doing a public service, and assisting district judges. Nothing should be done to endanger their ability to present objections.

Ultimately, it may be that the Civil Rules can't control this activity once it moves into the appellate sphere. But there should be support for "reception" into Rule 23 of whatever is needed to make this work fairly and efficiently. Neither the appellate courts nor the district courts would benefit from shutting the district judge out of evaluating proposals to withdraw the appeal.

At the same time, we must be careful not to overreact. "It's not a capital offense to be stupid or to make a stupid objection." "Don't use a bomb for a gnat." A punitive attitude is not generally indicated with regard to objectors.

Another point was that, ultimately, it is the lawyers, usually class counsel, who are paying off the objectors. This is not pursuant to any court-ordered attorney fee award; no judge makes them do so. Maybe there's an argument that the court has no role in holding up those payments and, thereby, the consummation of the settlement. But class counsel usually are not paying off objectors and their lawyers because they fear the settlement will be overturned. It's merely to end the holdup.

But sometimes there may be some value in paying objectors even if their objections ultimately are rejected. Years ago there was a suggestion that the rule should authorize the judge to compensate objectors for the cost of objecting even if the settlement was ultimately approved without change to respond to the objection. Objectors can be the district judge's friend when they act in good faith. That is one of the frustrations about the "I object" behavior of bad-faith objectors. They don't provide any assistance to the district judge, and keep their powder dry for appeal. They don't want the district judge to reject the settlement, or prompt improvements in it.

Discussion shifted to the possibility of requiring objectors to make certain disclosures when they object. This might tie in with a right to take discovery from them, or instead to provide the needed information without opening the Pandora's Box of discovery. Perhaps these disclosures could reveal grounds for rejecting objections not supported by the required disclosures. A problem might arise with the good faith objectors who do not have lawyers behind them; they might not do the disclosures correctly. And how would this insulate against appeal of the denial of the objection on this ground? At present, the objections are rejected on their merits and we still have this problem.

Another way of looking at this set of issues is that it resembles our frontloading proposals for approval of notice to the class. Under the frontloading approach, we would ensure that a list of items would have to be disclosed to the judge and available to the class. With objector disclosure, we would provide a list of items the objector must provide that could show that discovery is needed. It could also provide a record that would be of value if there is an appeal.

Ideas for inclusion on such a list included (1) specifics on why the objector believes he or she is in the class; (2) whether the objector consulted or was assisted by counsel in preparing the objection; (3) details about the relationship between counsel and the objector (e.g., close relative, repeat objector); (4) whether the objector has objected to another settlement (using the same lawyer?); (5) whether the objector has received any offer or promise of compensation for making the objection.

At least some of this is of vital importance to class counsel. For example, one cannot directly contact an opposing party represented by counsel. True, class counsel is in some sense the lawyer for all class members, but in this instance it might be an ethical violation for class counsel to call the represented objector. Moreover, it may be that this sort of disclosure would make discovery unnecessary.

These ideas drew support. There's an array of specific factual inquiries that would be useful, and it would not violate due process to insist that they be disclosed. The objector has, by objecting, stepped out of the crowd and into the foreground. The court and class counsel are entitled to know more about her.

Another reaction was that "This sort of requirement won't deter the good objectors. Public Citizen and Public Justice do their homework and would not have difficulty with this sort of disclosure regime." But that drew the further comment that the bad objectors monitor the objections of the good objectors and then join them as free riders. Also, in securities cases the big class members may simply opt out.

Another reaction was that "Public Citizen and Public Justice are very strategic about what they challenge. If they object, you know you need to address that concern." Moreover, some of the things on the disclosure list are not burdensome. For example, it's not hard to reveal whether objector counsel is your relative.

The consensus was to look at the possibility of required objector disclosure. This might be mentioned during the conference in D.C. on July 23-24, and put before the participants in the Sept. 11 mini-conference.

Frontloading

It seemed apparent that the general idea of frontloading had considerable support and should be brought forward during the Sept. 11 mini-conference. The current list of items for inclusion has 14 separate things. A present effort to narrow that list seemed not to be a productive use of time. Almost certainly, some of these items will prompt concerns. It will be informative to see which prompt concerns and what those concerns are.

Proposed (A) was expanded in the revision after the June 26 conference call to include a new (i) on the grounds for class certification. (This redraft is included as an Appendix to the notes on the July 15 conference call.) This addition responds to the reality that certification is an important part of any class-action settlement package, and something the judge should focus upon in deciding whether to send notice.

Attention shifted to (B) of the rewritten sketch. The problem of articulating the standard that should guide the court in making the decision whether to order notice is difficult. On the one hand, sending notice is an important decision and notice should not be sent unless there is good reason to think that the settlement can survive the scrutiny that Rule 23(e) requires, and that the case can support certification, at least for settlement purposes. On the other hand, this decision is also necessarily preliminary and conditional, for class members have had no opportunity to object, and the court has not had the benefit of the insights they can offer. Indeed, since almost always both sides support the settlement, there is a non-adversarial aspect to the setting in which this decision must be made.

The sketch offered something like the preliminary injunction standard -- "that class certification and approval of the proposal under Rule 23(e)(2) is [substantially] likely." But something like the preliminary injunction standard may well not be appropriate for this decision. A preliminary injunction is a weightier judicial action than authorization for notice to the class of a possible settlement of a class action. An injunction often has real and immediate effect on the litigants outside the context of the case. The notice does call for attention by class members, but does not immediately affect their rights. And in (b)(3) class actions they can simply opt out.

Discussion shifted to alternative possible formulations of what we are getting at -- a standard that recognizes the importance of this decision, but also recognizes that it is tentative and based on the limited information available at the time it must be made, and before objectors can be heard. Various ideas were suggested:

> a negative standard -- "the court may not order notice sent if it has identified significant potential problems with either class certification or approval of the proposal"
>
> a somewhat circular standard: "the prospects for class certification and approval of the proposal are [good enough} {sufficiently strong} to support giving notice to the class"
>
> a blending of the preliminary aspect and forecast, also somewhat circular -- "preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal"
>
> borrowing from the language in Manual of Complex Litigation (3d), § 30.41, p. 237: "If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys, and

appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing."

A separate but related issue is to address the Rule 23(f) problem -- would the standard for deciding to sent notice arguably qualify as a decision to certify or not certify a class that can be immediately appealed under Rule 23(f)? The desired goal is that it be clear that the decision is too tentative for that. It may be that an affirmative negative in the sketch would be desirable -- "The decision to send notice is not subject to review under Rule 23(f)." That could foreclose arguments. And if there is a really good reason for appellate review, 28 U.S.C. § 1292(b) is available. True, that requires certification by the district judge, but it should suffice as a safety valve. It is hard to imagine why there would be a good reason for immediate review, in any event, given that the thing that matters is final approval and judgment. If, for example, the court also enjoins other litigation in order to permit full review of the proposed settlement, that injunction would be subject to immediate review under 28 U.S.C. § 1291.

Another sightly different subject is to make it clear that this determination triggers notice of the right to opt out, and the court can set a schedule for opting out. It may be that a reference to Rule 23(e)(2) would clarify and fortify this message.

Ascertainability

Other than objectors, it is likely that the topic that drew most attention in the AAJ session on July 12 was ascertainability. [During another AAJ session on class actions after the Subcommittee's meeting, there was considerable further attention to this topic.]

The redraft after the June 26 conference call included a "minimalist" treatment of ascertainability. It avoided using the word "ascertainable" and the word "objective."

There was discussion on what orientation a sketch for Sept. 11 should adopt. One approach would be aggressive and reject the Third Circuit's *Carrera* approach. That idea drew the observation that it is not entirely clear what the Third Circuit's actual view is.

The sketch included the bracketed phrase "when necessary." It was observed that this phrase in the rule would support a Committee Note the focus of the class definition is only on the need to give notice and determine whether those who claim they are class members actually are . That, after all, is one of the issues that we may include among the possible disclosures for

those who file objections. It would seem that a class definition should enable them to make the determination whether they are included and explain how they reached the conclusion that they are.

Another point was that the Third Circuit has recognized that the class definition need not be done as assiduously for a (b)(2) class. Indeed, there may be many of those where the members cannot be identified at the time the case is resolved. Consider, for example, a suit seeking to change the practices of a prison or a school. At the time the case is decided, there is no way to know who will be imprisoned or enrolled a decade later. But a class definition should be sufficient if it would enable the court to make that determination later (e.g., when somebody sought to have the defendant held in contempt for treatment of the applicant that she says violates the class-action injunction). And there is no opt-out right for (b)(2) class members.

Another approach might be to make clear, in rule or Note, that ascertainability does not exist as an additional requirement for class certification, and that problems of administration later should not prevent certification. At the same time, a Note to such a rule should make clear that concerns about fraudulent claims are valid, and that defendants have a valid interest in contesting claims to settlement funds. It might be added that genuine class members also have an interest in making sure that payouts are only to valid class members. As our cy pres discussions show, if there is a residue after initial payouts there may well be a further distribution. So those who might benefit from that distribution should be assured that only genuine class members are getting paid.

In the limited time available, the Subcommittee was not able to refine its approach to these issues. The issue surely should be carried forward. But it is not so clear that it will ultimately appear that there is a good rule amendment to propose. This should be a significant focus of the Sept. 11 mini-conference. One approach might be to re-examine Judge Rendell's separate opinion in Byrd v. Aaron's. That opinion may inspire solutions, but none have emerged as yet. It might be useful to invite the judge to the mini-conference, for her opinion was very thoughtful. But we need also to ensure an opportunity to be heard to those who favor a strong ascertainability requirement.

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Notes on Conference Call
Rule 23 Subcommittee
Advisory Committee on Civil Rules
June 26, 2015

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call on June 26, 2015. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett (for only part of the call), Prof. Edward Cooper, Reporter of the Advisory Committee, Rebecca Womeldorf (Rules Committee Support Office), and Prof. Richard Marcus (Reporter of the Rule 23 Subcommittee).

The call began with discussion of legislative developments and of logistics for the mini-conference on Sept. 11, 2015. It then turned to the three topics on the agenda for this call:

Frontloading

During the April 9 Advisory Committee meeting, the Subcommittee decided that it would look seriously at the possibility of adding rule provisions specifying what should be presented to the judge at the time that judicial approval for sending notice to the class is sought in regard to a proposed settlement. Before the Subcommittee's May 12 conference call, Prof. Marcus circulated a sketch of a possible rule. For the record, a copy of the circulated sketches is attached to these Notes as an Appendix.

The topic was introduced with the observation that this possibility raised some competing considerations. One is that judges would benefit from having more information about proposed class-action settlements. Judge Bucklo (N.D. Ill.) recently wrote an article about that problem. Bucklo & Meites, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation 18 (Spring 2015). So there seem to be positive benefits to providing specifics on a variety of topics.

On the other hand, there is a competing concern with making the decision to send notice tantamount to approval of the proposed settlement. The ALI resisted the commonplace term "preliminary approval" to describe this initial review, even when based on rather cursory presentations at that stage of the proceedings. Bolstering the requirements in the way suggested by the sketch would seem to strengthen the argument that "this has all been decided already," thereby seeming to freeze out the objectors.

But something along this line could also operate to the benefit of objectors. Too often, the details class members would need to decide whether to object, or what to object to, come out after notice goes out. Sometimes they come out only after the due date for objections. Something like this approach would provide a method for objectors to obtain needed information in a timely fashion.

Even if this opportunity is not essential for most objectors, the sketch offers something of value to the "number 1 objector" -- the district judge. As explained in Judge Bucklo's article, some courts of appeals regard the judge as something of a fiduciary for the class members when reviewing a proposed settlement. Getting the details before the judge up front could be valuable because it would permit the judge to intercept problems early on, before large amounts of money had been spent on notice to the class and other activities. It could also enable the judge then to offer guidance on where changes to the proposal would be important to support later approval.

A first reaction was "I like the idea a lot." The general concept is good, but it will be valuable to make clear at the same time that this is not "preliminary approval." There is also the detail question which factors should be included.

A second reaction was concurrence with this positive attitude. The Bucklo article is "terrific." It's hard to imagine a valid objection to laying this out for the lawyers and the judge.

Another reaction was that this is what the good lawyers are providing already, but it is hardly universal and having something to guide the other lawyers would be valuable.

A salutary side effect was noted -- screening out useless objections resulting from lack of information. A big selling point is that class members should get considerably more information if this procedure is employed.

The initial discussion was summed up: "There's no dissent from the view that trying to do this is a good idea." That shifted attention to what a rule amendment should say.

One reaction on that point was that it would be important to put in a cross-reference to the Rule 23(e) factors for approving a proposed settlement. But that met the objection that it would cut against saying that this order to send notice is not a "preliminary approval" of the settlement. Instead, the listing on the sketch is desirable because it consists of factual items rather than calling for evaluative judgments.

Another member agreed. Collapsing this into a one-stage process lends support to the view that the settlement is a done deal out of the gate. That would make it seem that there is an unduly heavy burden on objectors.

A response was that it could be very important to know such things as (1) who participated in the negotiation of the proposed settlement; (2) when did these negotiations begin?; (3) how long did they last?

Another reaction was that if one asked ten judges about what they needed to know, you might get ten different answers. Perhaps we should try to poll some judges and see what they think they need to know.

Another consideration, in terms of need to know, would distinguish between judges who are active case managers and those who are not. The former are more likely to be up to speed on a class action assigned to them than the latter, and therefore in less need of a detailed menu at the time the question of notice to the class comes up.

That idea prompted the reaction that a different breakdown might be between cases of different types. Securities fraud and antitrust class actions, for example, are likely to generate a lot of pretrial activity. Judges will almost unavoidably become familiar with them. Probably employment cases are somewhat like that. But consumer cases may not come to the judge's attention before a proposed settlement arrives in chambers.

The point was made again that good lawyers know what the judge needs to make an informed decision, and make a point of providing it. But not all lawyers are good lawyers, and for those who need guidance the sort of points made in Judge Bucklo's article are very useful.

A new point was raised -- Should there also be specifics on whether certification would be appropriate, not just on whether the settlement should be approved? Particularly if we go forward with a Rule 23(b)(4) settlement certification proposal, that could be cross-referenced. Isn't something like "tentative" or "conditional" certification implicit in giving notice to the class of the settlement proposal? In (b)(3) classes, this notice is ordinarily the way to give notice of the right to opt out. Doesn't that presume that the court has, at least tentatively, certified the class? If so, shouldn't the showing include whatever is needed to support certification under (b)(4) or otherwise?

That point raised a problem -- this sort of approach would seem to mean that Rule 23(f) appellate review could be sought upon approval of notice to the class. It also raised the point that the 2003 amendments removed authority for "conditional" class certification.

Another observation was that there are really three separate notice provisions in Rule 23. For Rule 23(b)(3) cases, Rule 23(c)(2)(B) requires notice "for any class certified under Rule 23(b)(3)," including notice of the right to opt out. The precise question here seems to be whether, at the time notice of a proposed settlement is sent out one can -- for purposes of Rule 23(c)(2)(B) say that the class has been "certified." That has certainly been the assumption for decades. But what if the court refuses to

approve the settlement and therefore backs away from "tentative" class certification? There is something of a chicken/egg question of sequencing here.

Second, Rule 23(e)(1) independently and additionally requires, in all class actions, that the court give notice of a proposed settlement to the class along with notice of the right to opt out.

Third, Rule 23(h)(1) calls for notice to the class of class counsel's motion for an attorney's fee award.

The normal reality is that all three notices are given at once. The idea of sending the class three separate notices is extremely unattractive. Not only might that be very costly, it also would probably confuse class members. Getting one omnibus notice is confusing enough for them without adding two additional notices.

So the prevalent current practice assumes notice of proposed settlements directed by the court under Rule 23(e)(1) suffices to satisfy the Rule 23(c)(2)(B) and Rule 23(h)(1) notice requirements. And it "starts the opt-out period running." That can be important because (a) the proposed settlement may authorize the defendant to withdraw if more than a certain number of class members opt out, and (b) the notice also gives class members the right to object and sets a time limit for that. Normally those who opt out should not be heard also to object. So it is important to know, when there are objectors, whether they are also opt-outs.

Altogether, this discussion was summed up as leading to at least two conclusions: (1) Nothing requires that the court certify the class to give notice. Indeed Rule 23(d) has an additional authorization for giving notice to the class when that seems wise without regard to certification. (2) There are definite reasons to want to make sure the Rule 23(e)(1) notice triggers the time for opting out, although Rule 23(c)(2)(B) seems to authorize that only after the class has been certified.

One reaction was that the sketch of a new (b)(4) assumes that certification under the provision is appropriate only after the court grants certification. "If that's not what we mean, we should rewrite it."

Other possibilities exist. One is a right to opt out after approval of the settlement. Another might be to recognize in the rule that, despite the prohibition in general on "conditional" certification, something like that can be done in conjunction with the decision to authorize notice to the class of the proposed settlement. The rule might say that this invokes and satisfies the Rule 23(c)(2)(B) notice (including opt-out) requirements.

Another way of looking at the notice issue in (b)(3) class actions is to focus on what 23(c)(2)(B) says must be done and when. In connection with a proposed settlement, it is worth noting that Rule 23(e)(4) says that the court may insist on a second opportunity to opt out if there has already been one and the time to opt out has passed. The rule does not seem explicitly to address the situation in which the parties change their agreement to satisfy the court's concerns. That can happen, and may happen in part because the full hearing after notice and objections acquaints the court with concerns that were not originally evident. The "frontloading" idea should reduce the likelihood that will happen, and the fact that it can happen shows that "preliminary approval" is not final approval. But the question when it becomes necessary to re-notice the class (at least in (b)(3) cases) is worth having in mind.

A related consideration is whether there should be an opportunity for those who opted out to "opt back in" in light of changes made after notice was originally given.

It was noted that practical concerns and objectives should be kept in mind: (1) There is no rule requirement that full certification happen before notice to the class; (2) It is important to enable the court to trigger the time limit for opting out; (3) Rule 23(c)(2)(B) should be given a practical reading to achieve its objective of providing fair notice to class members of the right to opt out; (4) Of necessity, there will be occasions when the actual deal approved by the court differs in some ways from what was initially agreed upon; (5) In some situations, a re-notice is required due to those changes, but not in every case, particularly if the change is favorable to the class; (6) If the change is favorable, it is possible the opt-outs should be allowed to opt back in; and (7) There should nonetheless be some latitude to provide for post-approval notice and a new right to opt out, as contemplated by Rule 23(e)(4). Surely more points of this nature could be identified

Current practice might be said to exist in gaps in the current rule. Current practice calls for final approval of a proposed settlement only after notice to the class, an opportunity to object or opt out, and (if the district court approves the settlement) possible appeal by objectors if the settlement is approved over their objections. Current practice does not require that any change to a proposed deal (perhaps in response to objections) trigger a new right to opt out. There is no requirement that the court notice the class that the settlement has been approved. Class members who do not object can, of course, monitor proceedings in the case. Class members who object will be notified of the court's ruling on their objections, and this notice triggers their time to appeal.

One inviting possibility might be that a national website could be established to provide notice in all class actions nationwide, at least in federal court. One might say that existing MDL practice offers something like that in connection with cases centralized by the Judicial Panel. But a Civil Rule probably can't provide that sort of thing.

A reaction to this discussion was that it may be better for a rule to articulate a standard rather than including a great deal of detail like the sketch before the Subcommittee. What seems to have happened under the current rule is that what some might call "gaps" in the rule have permitted timing practices that seem to work pretty well.

Another member pointed out that the current effort is to get more information up front. But putting more details into the rule probably means that we also need to provide more specifics on class certification, and particularly chronology.

Another member supported including details in the rule. It's simply true in many cases that the "preliminary approval" is something like what that phrase says. Probably 90% of all federal-court class action settlements do not draw objectors. That's the sense in which the district judge is the "main objector." There are no others.

A summary of the discussion emphasized that it would good if the rule could explain how things are to work -- initial review comes first, perhaps with a detailed list of topics for presentation; notice to the class follows; informing class members of the right to object and opt-out, with a schedule for doing so.

It was noted that all of this could be linked to new (b)(4) on settlement certification. Adoption of that provision would introduce something a great deal like "certification without prejudice." At the same time, many of the issues under discussion do not depend on adoption of a (b)(4) settlement certification provision. Instead, they show that there are gaps in the current rule compared to the practice.

One idea that was suggested was to focus on Rule 23(e), which speaks of the claims of "a certified class." That might be a place to build in provisions addressing the concerns under discussion.

Another focus might be pp. 320-21 of the Manual for Complex Litigation (4th), which presents considerable detail about how the process works.

Another point was that the initial hearing is often fairly pro forma at present. The only ones on notice are the proponents of the settlement. This discussion is about the information that should be presented to the judge at that point, and (if something

along these lines is adopted) that would then be in the record and should be available to the class members as they decide whether to opt out or object.

Summing the overall discussion, the view of the participants in the call was that the general idea of guidance on what the judge should be presented with at the point of authorizing notice to the class is a good one, but that the current sketch does not address things on which the discussion has focused. In all likelihood, it will be important to add some specifics about matters bearing on class certification, and also stress that authorization to send notice does not constitute "preliminary approval" by the court before it has heard from objectors.

Ascertainability

This topic was introduced with two overall reactions: (1) The level of interest in the issues described by the word "ascertainability" suggests that it should be brought forward as a possible topic for rule changes, but (2) It is not at all clear what ascertainability is as a legal doctrine, and even the Third Circuit's treatment leaves some uncertainty about whether it is presently possible to ascertain what ascertainability implicates.

Another participant had a similar reaction. From the perspective of some judges, the problems involved are really not difficult. At least in cases involving low value retail purchases, using an affidavit is a simple way to screen claims. The simplest solution would, like the sketch in the Appendix to these Notes, build on the existing requirement that the court define the class upon granting certification.

Another participant agreed in general, but said that ascertainability is really not the same a class definition. It comes into play in regard to two basic issues -- certification and preclusive effect of the class-action judgment. And this participant thought that the Committee Note to an amendment should say that the rule rejects the Third Circuit *Carrera* doctrine. The most recent effort by the Third Circuit to "explain" that doctrine in the *Byrd* case is almost impossible to follow. This drew agreement. "We should walk back from *Carrera*."

Another point made was that it would be valuable to work hard to be nonpartisan in drafting. That means the effort should be to avoid taking a stance that embraces one side or the other. But that drew the comment that achieving that goal may prove very difficult. Almost any resolution of the issues at the heart of the "ascertainability" debate will appear to take one side or the other.

On this subject, one view was that the ascertainability decisions seem to reflect some hostility to consumer class actions.

Indeed, the debate seems to be very merits related. On the one hand, the concern is that defendants have a right to defend against fraudulent claims. On the other hand, wholehearted embrace of the most aggressive versions of ascertainability could doom consumer class actions, as some judges have noted in declining to follow what they understand to be the *Carrera* view.

One possibility might be to regard these issues as essentially case management matters. Rather than embodying some across-the-board solution, perhaps a rule could be developed that would delegate to the presiding judge the task of dealing with these concerns in the context of the pending case.

It was also suggested that the Third Circuit's *Baby Products* case provides important guidance on the general questions presented, and should be studied.

On the need for action by the Committee, it was noted that there is a clear division among the circuits about how to address this problem, even if there is not an absolutely clear definition of the approach of the Third Circuit and some other circuits, as illustrated by a recent Eleventh Circuit decision.

With these introductory comments, the discussion turned to the pending sketches. One suggestion was that using "ascertainable" in the rule text is probably an invitation to conflict instead of a way to resolve conflict. It was suggested that the same point can be made without using that word -- "so that members of the class can be identified [when necessary] . . ."

Another possible problem is to use the word "objective" in the rule text, because that word has been invoked much in the cases.

This discussion prompted the suggestion that it may be most prudent to be sparing as well as trying to avoid use of charged terms. The pending sketch has various alternatives that address whether the class definition must ensure that all within it have valid claims (whether or not they ultimately come forward to make claims), and/or that "ordinary proofs" including affidavits can be used to establish claims. It may be that Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), cert. granted, 135 S.Ct. 1892 (2015), will shed some light on the proper handling of the "no injury" class, which could also bear on the ascertainability issues.

A very simple version could be:

> An order that certifies a class action must define the class so that members of the class can be identified [when necessary] in [an administratively feasible] {manageable} manner.

That would leave some of the heavy lifting for the Committee Note. One possibility would be to say in the Note that the *Carrera* approach is rejected, but that would seem to depend on more confidence than presently exists about exactly what that approach is. Another idea for a Note would be to recognize the competing concerns of ensuring the defendant has a genuine opportunity to challenge groundless claims and also ensure that the class action remains a viable device for consumer cases in situations in which valid claims are presented. Perhaps that should be presented as a management issue to be addressed principally on the basis of the specifics of the particular case rather than some general legal rule on ascertainability. This is not the same as the "fail safe" class problem, but involves somewhat similar issues.

One way of looking at it was suggested by a thoughtful *Yale Law Journal* student Note that offered an example -- "everyone who bought a rotisserie chicken from a specific supermarket chain in Florida on Jan. 1, 2000." This is an "objective" definition, but how does one identify members of the class in an administratively feasible manner? Perhaps adding "when necessary" would at least punt on this issue, allowing the parties to say that bridge can be crossed later and assuming the case will actually settle and the court will be presented with an agreed claims processing regime. Trial courts will often say that they are confident they will be able to sort these things out when and if that becomes necessary.

That drew the response that there is probably presently a divide on these questions between two camps. One says something like "trust the judge." The other says something like "insist on certainty up front."

This discussion pointed up the reality that these issues are "enormously case specific." Implicitly, something must assure that class actions cannot be used for legal extortion. It is hard to deny that this core concern is important. But the way in which it's been employed in some cases shows that it can be a very blunt instrument. "This is a hard one."

The conclusion was that we should stay at a high level of generality in the rule text, and avoid using either "ascertainable" or "objective."

Settlement Approval Standards

The final topic on the agenda for the call was to revisit the first item on the "front burner" list -- clarifying the standards for determining whether a proposed settlement is "fair, reasonable, and adequate."

The topic was introduced as presenting questions of at least two general sorts -- whether it would be helpful to try to develop more explicit criteria, and whether these criteria are good ones.

At the April 9 meeting of the full Committee, the advice was to remove (B) in the sketch then before us, which explicitly authorized the judge to reject a settlement that satisfied the four enumerated criteria in (A) on any other ground the judge found important. Relatedly, an issue had been raised in email discussion prompted by a recent Ninth Circuit decision reversing approval of a settlement that some court of appeals criteria may actually have merit, and that "superseding" them could be unfortunate. On the other hand, since the "fair, reasonable and adequate" standard, all by itself, is quite flexible, it would seem adequate to capture anything that a judge would seize upon under (B). A similar drafting issue bears on whether the word "must" should be added:

> the court may approve it [the proposed settlement] only after a hearing and must approve it on finding that:

Finally, Dean Kane (and others) had suggested that some explicit reference to the claims process should be incorporated into the factors. It was noted that this would correspond to the inclusion of that among the various things that should be presented to the judge under the "frontloading" sketch discussed earlier in the call.

A drafting issue involved a choice between Alternative 1 and Alternative 2 of the lead-in in (A). The basic difference was the Alternative 1 retains "fair, reasonable, and adequate" in the prologue as well as in item (ii). That might be regarded as nearly circular; if item (ii) is as broad as suggested above, using the phrase twice could be overkill.

An initial reaction emphasized a judge's view expressed in one of the meetings attended by Subcommittee members that replacing the diverse checklists in different circuits would be very beneficial for judges. At present, this judge really can't give full weight to decisions by district judges outside his circuit because they are using different standards. With a single set of national standards, a body of case law could develop.

One participant was very dubious about whether adopting something like the current sketch -- even without (B) -- will really produce anything like national uniformity, or even change circuit law in any circuit. Though the various circuits use different factors or different words for what seem to be similar factors, the key point is that almost everything they invoke could be linked up to one of the enumerated factors and tied in with the "fair, reasonable, and adequate" standard.

In 2000, the initial drafting of a revised 23(e) began with a very detailed list of factors that were later demoted to Committee Note and then removed from the Note. Many of those factors were in Appendix I to the agenda materials for the April meeting of the full Committee.

Others were less pessimistic about whether adopting a set of factors like those in the sketch would promote uniformity. A rule change is, after, a rule change. It says something should be done differently, and the Committee Note with the current sketch says that it is intended to replace the various factor lists that have dominated many circuits' treatment of things for 30 or 40 years. At a minimum, an amended rule should focus the presentations lawyers will make, and that should prompt judges to focus in much the same way. Perhaps a court of appeals will nonetheless insist that one of its former factors is essential to make a settlement "fair, reasonable, and adequate," but (particularly without (B)) the rule may ward off such reactions.

The conclusion was to move forward. "We should try to push judges who are now speaking essentially eleven dialects into using a single language, even if that does not ensure absolute uniformity." It seemed that there was no dissent from going forward on the basis of Alternative 2 in the April 9 agenda materials (using "fair, reasonable, and adequate" only once) and trying to fit something about the claims process into the rule.

A final comment warned against trying to say that this rule is really "superseding" anything, given the elasticity of the provisions in the sketch.

APPENDIX

SKETCHES ON FRONTLOADING AND ASCERTAINABILITY

Tentative drafting ideas for possible discussion during May 12 conference call

The following initial sketches attempt to provide a starting point on the two additional topics that have been added to our list of potential subjects for consideration. These sketches may be discussed during our May 12 conference call.

The goal of the sketches is to get the discussion started; to some extent, then, they include possible items that may well not commend themselves to the Subcommittee. As refinement proceeds, it is likely not only that some things included below will be removed, but that new items will be added. Assuming the Subcommittee concludes that serious consideration of these issues should go forward, we will probably want to include sketches of rule changes and Committee Note drafts among the materials for the Sept. 11 mini-conference.

Approving notice to class

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) details on all provisions of the proposal;

(ii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iii) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(iv) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(v) identification of any agreement that must be identified under Rule 23(e)(3);

(vi) details on any claims process for class members to receive benefits;

(vii) a forecast [based on expert reports] of the anticipated take-up rate by class members of benefits available under the proposal;

(viii) any plans for disposition of settlement funds remaining after the initial claims process is complected;

(ix) a plan for reporting back to the court on the actual claims history;

(x) the anticipated amount of any attorney fee award to class counsel;

(xi) any provision for deferring payment of part or all of class counsel's attorney fee award to class counsel until the court receives a report on the actual claims history;

(xii) the form of notice that the parties propose sending to the class; and

(xiii) any other matter the parties regard as relevant to whether the proposal should be approved under Rule 23(e)(2).

(B) The court must not direct notice to the class unless satisfied based on the parties' presentation that approval under Rule 23(e)(2) is [substantially] probable. The court may refuse to authorize notice to the class until the parties supply additional information. If the court directs notice to the class, the parties must arrange for class members to have reasonable access to all information provided to the court.

Committee Note Thoughts

In part, the above listing reflects suggestions contained in Judge Bucklo's recent article, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation (no. 3) 18 (Spring 2015).

What to say in a Committee Note really must await clarification on what is in the rule. The above list of features to include in the submission to the court tries to list many we heard about on April 8 (and at other times). The listing may be redundant (everything included within (A)(i) or unduly demanding (for example, (iii), (vii), and (xi). There are surely lots of others that could be added.

Item (ix) may be responsive to the request from Deborah Hensler and several others that courts begin to collect information about the actual pay-outs, etc., in class actions. That is a side effect; the main focus is on the utility of that information in administration of this class action. Nonetheless, the collection of this information might serve the goal urged on us by Prof. Hensler.

Another idea we have heard that is not included is whether unnamed members of the class have expressed views on the proposal. Some have suggested that there be a prod toward seeking such views at this stage. It is not clear how that would be done.

A Note could also say that this decision to send notice is not a "preliminary approval," and emphasize that the approval can come only after the court considers all objections (perhaps as directed by amendments to Rule 23(e)(2)).

(e)(1)(B), then, makes the point that this decision to send notice is only that, and that the accumulated information should be available to the class members. This might be one place to say that electronic means (posting on a "settlement website") would be a useful method of affording access to this information.

But the draft uses something like the preliminary injunction standard ("probability of success on the merits") as the conclusion the court must reach to justify ordering that notice be sent. That may cut against saying this is not a "preliminary approval," although it obviously cannot take account of objections from class members.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class~~; Appointing Class Counsel~~*. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that membership in the class is ascertainable by objective criteria in an administratively feasible manner.

Alternative 1

The class definition may include class members who may ultimately prove ineligible for judicial relief.

Alternative 2

The court need not find that all persons included in the class definition will be entitled to relief if the class prevails.

Alternative 3

The class definition is sufficient if class members can be identified through ordinary proofs {including affidavits} prior to issuance of a judgment.

(C) *Defining the Class Claims, Issues, or Defenses.* An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

Committee Note Thoughts

Along with this memo there should be a copy of the recent article The Ascendency of Ascertainability as a Threshold Requirement for Certification, by Jamie Zysk Isani and Jason B. Sherry, from the CCH Class Action Litigation Report (May 4, 2015).

Approaching this issue involves a moving target. The most recent Third Circuit decision suggests that court is still grappling with its ascertainability idea. Other courts of appeals have not directly addressed their take on the Third Circuit view. And the Subcommittee has not discussed the attitude it thinks should be adopted about *Carrera* and kindred cases.

Another issue is suggested by Spokeo, Inc. v. Robins, No. 13-1339, cert. granted, April 27, 2015. This is a proposed class action under the Fair Credit Reporting Act, raising the issue whether the named plaintiff has standing in the absence of an allegation of a concrete injury. Plaintiff alleges online posting of incorrect personal information about him. Defendant contends that he must allege some injury to sue. The basic issue is how to handle the "no injury" class action, as some have labeled the problem. Although that is not the same as the rule's requirements on class definition, it seems related.

The above draft offers two efforts to phrase what the Subcommittee may decide to favor -- a rule requirement that does not require assurances (or a finding) that every person in the defined class has been injured or has a viable claim.

A Committee Note could explore the ascertainability issues at length or limit itself to recognizing that much case law has addressed these issues, and that the rule is designed to handle those problems.

2015 WL 5438797
Only the Westlaw citation is currently available.
United States Court of Appeals,
Second Circuit.

Henry H. BRECHER, individually and on behalf of all others similarly situated, Plaintiff–Appellee,
v.
REPUBLIC OF ARGENTINA,
Defendant–Appellant.

No. 14–4385. | Argued: Aug. 21, 2015. | Decided: Sept. 16, 2015.

Synopsis
Background: Holders of defaulted bonds brought class actions against Republic of Argentina for losses arising out of country's default on roughly $80 to $100 billion of sovereign debt. The United States District Court for the Southern District of New York, Griesa, J., modified the class definition. Republic of Argentina appealed.

[Holding:] The Court of Appeals, Wesley, Circuit Judge, held that modification of class definition by expanding class to all holders of beneficial interests in relevant defaulted bond series without limitation as to time held violated ascertainability requirement.

Vacated and remanded.

Appellant the Republic of Argentina appeals from an order entered on August 29, 2014, in the United States District Court for the Southern District of New York (Griesa, J.), modifying the class definition. On November 25, 2014, a panel of this Court granted permission to appeal pursuant to Federal Rule of Civil Procedure 23(f). Appellant argues that the District Court's new class definition violates the requirements of ascertainability contained in Rule 23 of the Federal Rules of Civil Procedure. We agree and hold that the class definition's reference to objective criteria is insufficient to establish an identifiable and administratively feasible class. We therefore VACATE and REMAND the case for an evidentiary hearing on damages.

Attorneys and Law Firms

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Before CALABRESI, RAGGI, AND WESLEY, Circuit Judges.

Opinion

WESLEY, Circuit Judge:

***1** Defining the precise class to which Argentina owes damages for its refusal to meet its bond payment obligations and calculating those damages have proven to be exasperating tasks. In this, the fourth time this Court has addressed the methods by which damages must be calculated and the manner in which the class is defined in this case and several similar matters, *see Seijas v. Republic of Argentina (Seijas I*), 606 F.3d 53 (2d Cir.2010); *Hickory Sec., Ltd. v. Republic of Argentina (Seijas II*), 493 F. App'x 156 (2d Cir.2012) (summary order); *Puricelli v. Republic of Argentina* (*Seijas III*), No. 14–2104–cv(L), 797 F.3d 213, 2015 WL 4716474 (2d Cir. Aug.10, 2015), we again must vacate the District Court's order and remand for specific proceedings.

By now, the factual background of these cases is all too familiar. After Argentina defaulted on between $80 and $100 billion of sovereign debt in 2001, *see Seijas I,* 606 F.3d at 55, numerous bondholders, including Appellee here and those in the related *Seijas* cases, filed suit. In Appellee's suit, the District Court entered an order on May 29, 2009, that certified a class under a continuous holder requirement, *i.e.,* the class contained only those individuals who, like Appellee, possessed beneficial interests in a particular bond series issued by the Republic of Argentina from the date of the complaint-December 19, 2006–through the date of final judgment in the District Court. *Cf. Seijas I,* 606 F.3d at 56 (same requirement in class definition).

After this Court held in *Seijas I* and *II* that the District Court's method of calculating damages was inflated and remanded with instructions to conduct an evidentiary hearing, *see Seijas I,* 606 F.3d at 58–59; *Seijas II,* 493 F. App'x at 160, the Appellee in this case offered the District Court an alternative solution to its difficulties in assessing damages—simply modifying the class definition by removing the continuous holder requirement

and expanding the class to all holders of beneficial interests in the relevant bond series without limitation as to time held. The District Court granted the motion, Argentina promptly sought leave to appeal under Rule 23(f) of the Federal Rules of Civil Procedure, and on November 25, 2014, a panel of this Court granted leave to appeal.

DISCUSSION

[1] [2] We review a district court's class certification rulings for abuse of discretion, but we review *de novo* its conclusions of law informing that decision. *In re Pub. Offerings Secs. Litig.*, 471 F.3d 24, 32 (2d Cir.2006). The District Court below neither articulated a standard for ascertainability of its new class nor made any specific finding under such a standard. Absent that analysis, we must determine whether the District Court's ultimate decision to modify the class "rests on an error of law ... [or] cannot be located within the range of permissible decisions."*Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir.2003) (internal quotation marks omitted). The District Court's decision rests upon an error of law as to ascertainability; the resulting class definition cannot be located within the range of permissible options.

***2** [3] Like our sister Circuits, we have recognized an "implied requirement of ascertainability" in Rule 23 of the Federal Rules of Civil Procedure. *In re Pub. Offerings Secs. Litig.*, 471 F.3d at 30; *accord, e.g., Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–93 (3d Cir.2012); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir.1970). While we have noted this requirement is distinct from predominance, *see In re Pub. Offerings Secs. Litig.*, 471 F.3d at 45, we have not further defined its content. We here clarify that the touchstone of ascertainability is whether the class is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 1760 (3d ed.1998); *see also Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12 (S.D.N.Y. Aug.5, 2010) (a class must be "readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling" (internal quotation marks omitted))."A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."*Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y.2010) (citations and internal quotation marks omitted).

[4] On appeal, Appellee argues that a class defined by "reference to objective criteria ... is all that is required" to satisfy ascertainability. Appellee Br. at 19. We are not persuaded. While objective criteria may be necessary to define an ascertainable class, it cannot be the case that any objective criterion will do.[1]A class defined as "those wearing blue shirts," while objective, could hardly be called sufficiently definite and readily identifiable; it has no limitation on time or context, and the ever-changing composition of the membership would make determining the identity of those wearing blue shirts impossible. In short, the use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.[2]

This case presents just such a circumstance where an objective standard—owning a beneficial interest in a bond series—is insufficiently definite to allow ready identification of the class or the persons who will be bound by the judgment. *See Weiner*, 2010 WL 3119452, at *12. The secondary market for Argentine bonds is active and has continued trading after the commencement of this and other lawsuits. *See NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir.2012); *Seijas II*, 493 F. App'x at 160. The nature of the beneficial interest itself and the difficulty of establishing a particular interest's provenance make the objective criterion used here, without more, inadequate. *See Bakalar v. Vavra*, 237 F.R.D. 59, 65–66 (S.D.N.Y.2006) (necessity of individualized inquiries into provenance of artwork made class insufficiently "precise, objective and presently ascertainable" (internal quotation marks omitted)).

***3** Appellee argues that the class here is comparable to those cases involving gift cards, which are fully transferable instruments. However, gift cards are qualitatively different: For example, they exist in a physical form and possess a unique serial number. By contrast, an individual holding a beneficial interest in Argentina's bond series possesses a right to the *benefit* of the bond but does not hold the physical bond itself. Thus, trading on the secondary market changes only to whom the benefit enures. Further, all bonds from the same series have the same trading number identifier (called a CUSIP/ISIN), making it practically impossible to trace purchases and sales of a particular beneficial interest. Thus, when it becomes necessary to determine who holds bonds that opted into (or out of) the class, it will be nearly impossible to distinguish between them once traded on the secondary market. *See Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y.2014) (observing that

ascertainability requirement "prevent[s] the certification of a class whose membership is truly indeterminable" (internal quotation marks omitted)).

A hypothetical illustrates this problem. Two bondholders—*A* and *B*—each hold beneficial interests in $50,000 of bonds. *A* opts out of the class, while *B* opts in. Both *A* and *B* then sell their interests on the secondary market to a third party, *C*. *C* now holds a beneficial interest in $100,000 of bonds, half inside the class and half outside the class. If *C* then sells a beneficial interest in $25,000 of bonds to a fourth party, *D*, neither the purchaser nor the court can ascertain whether *D*'s beneficial interest falls inside or outside of the class.[3] Even if there were a method by which the beneficial interests could be traced, determining class membership would require the kind of individualized mini-hearings that run contrary to the principle of ascertainability. *See Charron*, 269 F.R.D. at 229; *Bakalar*, 237 F.R.D. at 64–66. The features of the bonds in this case thus make the modified class insufficiently definite as a matter of law. Although the class as originally defined by the District Court may have presented difficult questions of calculating damages, it did not suffer from a lack of ascertainability. The District Court erred in attempting to address those questions by introducing an ascertainability defect into the class definition.

There remains the question of determining damages on remand. Given that Appellee here is identically situated to the *Seijas* plaintiffs and this Court has already addressed the requirements for determining damages in those cases, we conclude that the District Court should apply the same process dictated by *Seijas II* for calculating the appropriate damages:

> Specifically, it shall: (1) consider evidence with respect to the volume of bonds purchased in the secondary market after the start of the class periods that were not tendered in the debt exchange offers or are currently held by opt-out parties or litigants in other proceedings; (2) make findings as to a reasonably accurate, non-speculative estimate of that volume based on the evidence provided by the parties; (3) account for such volume in any subsequent damage calculation such that an aggregate damage award would "roughly reflect" the loss to each class, *see Seijas I*, 606 F.3d at 58–59; and (4) if no reasonably accurate, non-speculative estimate can be made, then determine how to proceed with awarding damages on an individual basis. Ultimately, if an aggregate approach cannot produce a reasonable approximation of the actual loss, the district court must adopt an individualized approach.

***4** 493 F. App'x at 160; *see also Seijas III*, 797 F.3d 213, 2015 WL 4716474, at *4 (repeating instructions). The hearing will ensure that damages do not "enlarge[ ] plaintiffs' rights by allowing them to encumber property to which they have no colorable claim."*Seijas I*, 606 F.3d at 59.

CONCLUSION

Because we conclude the District Court's order violated the requirement of ascertainability contained in Rule 23, it is not necessary for us to reach the remaining issues raised by Appellant. Therefore, for the reasons stated above, the order of the District Court is VACATED, and the case is REMANDED for an evidentiary hearing on damages.

[1] Even Appellee's principal sources for this standard use the requirement in context to observe that *subjective* criteria are inappropriate and, thus, any criteria used in defining a class need to be "objective." Appellee Br. at 20 (citing *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 HB, 2003 WL 21659373, at *2 (S.D.N.Y. July 15, 2003); *In re Methyl Tertiary Butyl Ether (MBTE) Prods. Liab. Litig.*, 209 F.R.D. 323, 337 (S.D.N.Y.2002); MANUAL FOR COMPLEX LITIGATION (FOURTH)) § 21.222, at 270 (2004)). This approach accords with our prior discussions of objective criteria. *See In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d at 44–45.

[2] Of course, "identifiable" does not mean "identified"; ascertainability does not require a complete list of class members at the certification stage. *See*1 MCLAUGHLIN ON CLASS ACTIONS § 4:2 (11th ed. 2014) ("The class need not be so finely described, however, that every potential member can be specifically identified at the commencement of the action; it is sufficient that the general parameters of membership are determinable at the outset.").

[3] This hypothetical was posed by the panel at oral argument; counsel for Appellee was unable to offer a method by which the District Court would be able to make this determination.

All Citations

--- F.3d ----, 2015 WL 5438797

795 F.3d 654
United States Court of Appeals,
Seventh Circuit.

Vince MULLINS, on behalf of himself and all others similarly situated, Plaintiff–Appellee.
v.
DIRECT DIGITAL, LLC, a Delaware Limited Liability Company, Defendant–Appellant.

No. 15–1776. | Argued June 3, 2015. | Decided July 28, 2015.

Synopsis
Background: Consumers brought putative class action against seller of dietary joint supplement, alleging that seller made fraudulent statements about supplement's effectiveness in advertising and marketing materials. The United States District Court for the Northern District of Illinois, Charles R. Norgle, J., 2014 WL 5461903, granted motion to certify the class. Seller appealed.

Holdings: The Court of Appeals, Hamilton, Circuit Judge, held that:

[1] federal rules do not impose a heightened ascertainability requirement for class certification;

[2] class definition satisfied certification requirements;

[3] district court did not abuse its discretion in deferring ascertainability and management issues; and

[4] questions of law were common to the class.

Affirmed.

Attorneys and Law Firms

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Before BAUER, KANNE, and HAMILTON, Circuit Judges.

Opinion

HAMILTON, Circuit Judge.

We agreed to hear this appeal under Federal Rule of Civil Procedure 23(f), which permits interlocutory review of orders granting or denying class action certification, to address whether Rule 23(b)(3) imposes a heightened "ascertainability" requirement as the Third Circuit and some district courts have held recently. See, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir.2013). In this case, the plaintiff alleges consumer fraud by the seller of a dietary supplement, and the district court certified a plaintiff class. The court found that the proposed class satisfies the explicit requirements of Rule 23(a) and (b)(3), and the court rejected's argument that Rule 23(b)(3) implies a heightened ascertainability requirement.

[1] We affirm. We and other courts have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind. In addressing this requirement, courts have sometimes used the term "ascertainability." They have applied this requirement to all class actions, regardless of whether certification was sought under Rule 23(b)(1), (2), or (3). Class definitions have failed this requirement when they were too vague or subjective, or when class membership was defined in terms of success on the merits (so-called "fail-safe" classes). This version of ascertainability is well-settled in our circuit, and this class satisfies it.

More recently, however, some courts have raised the bar for class actions under Rule 23(b)(3). Using the term "ascertainability," at times without recognizing the extension, these courts have imposed a new requirement that plaintiffs prove at the certification stage that there is a "reliable and administratively feasible" way to identify all who fall within the class definition. These courts have moved beyond examining the adequacy of the class definition itself to examine the potential difficulty of

identifying particular members of the class and evaluating the validity of claims they might eventually submit. See *Byrd v. Aaron's Inc.*, 784 F.3d 154, 168 (3d Cir.2015) (distinguishing between our circuit's standard and the Third Circuit's ascertainability requirement).

This heightened requirement has defeated certification, especially in consumer class actions. See, e.g., *Karhu v. Vital Pharmaceuticals, Inc.*, ——Fed.Appx. ——, —— – ——, 2015 WL 3560722, at *2–4 (11th Cir. June 9, 2015) (purchasers of dietary supplements); *Carrera*, 727 F.3d at 307–12 (purchasers of dietary supplements); *Xavier v. Philip Morris USA Inc.*, 787 F.Supp.2d 1075, 1089–90 (N.D.Cal.2011) (Marlboro smokers); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 5, 2010) (purchasers of Snapple beverages). All of these classes would seem to have satisfied the established meaning of "ascertainability." See generally Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small–Claims Consumer Class Actions*, 59 DePaul L.Rev. 305 (2010) (describing recent cases).

***658** **[2]** We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes. The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3). These existing requirements already address the balance of interests that Rule 23 is designed to protect. A court must consider "the likely difficulties in managing a class action," but in doing so it must balance countervailing interests to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." See Fed.R.Civ.P. 23(b)(3).

The heightened ascertainability requirement upsets this balance. In effect, it gives one factor in the balance absolute priority, with the effect of barring class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase. These are cases where the class device is often essential "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997); see also *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir.2014) (reversing denial of class certification: "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all"), quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir.2004) (affirming certification of class with millions of members).

I. ***Factual and Procedural Background***

Plaintiff Vince Mullins sued defendant Direct Digital, LLC for fraudulently representing that its product, Instaflex Joint Support, relieves joint discomfort. He alleges that statements on the Instaflex labels and marketing materials—"relieve discomfort," "improve flexibility," "increase mobility," "support cartilage repair," "scientifically formulated," and "clinically tested for maximum effectiveness"—are fraudulent because the primary ingredient in the supplement (glucosamine sulfate) is nothing more than a sugar pill and there is no scientific support for these claims. Mullins asserts that Direct Digital is liable for consumer fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, and similar consumer protection laws in nine other states.

Mullins moved to certify a class of consumers "who purchased Instaflex within the applicable statute of limitations of the respective Class States for personal use until the date notice is disseminated." The district court certified the class under Rule 23(b)(3).

Direct Digital filed a petition for leave to appeal under Rule 23(f) arguing that the district court abused its discretion in certifying the class without first finding that the class was "ascertainable." Direct Digital also argued that the district court erred by concluding that the efficacy of a health product can qualify as a "common" question under Rule 23(a)(2). We granted the Rule 23(f) petition primarily to address the developing law of ascertainability, including among district courts within this circuit. See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir.1999) (granting an appeal is appropriate to "facilitate ***659** the development of the law" governing class actions).[1]

[1] Compare *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3–4 (N.D.Ill. Feb. 25,

2015) (favorably citing *Carrera* and denying certification), with *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417–18 (N.D.Ill.2012) (rejecting stringent version of ascertainability and certifying class); see also *Balschmiter v. TD Auto Finance LLC*, 303 F.R.D. 508, 514 (E.D.Wis.2014) (noting "a dearth of case law from this circuit on the requirement" of ascertainability and discussing Third Circuit precedent); *Harris v. comScore, Inc.*, 292 F.R.D. 579, 587–88 (N.D.Ill.2013) (favorably citing Third Circuit precedent adopting heightened ascertainability but also the district court opinion in *Carrera*, which was later vacated by the Third Circuit).

[3] We review the grant or denial of a motion for class certification for an abuse of discretion, e.g., *Harper v. Sheriff of Cook County*, 581 F.3d 511, 514 (7th Cir.2009), but a decision based on an erroneous view of the law, such as imposing a new requirement under Rule 23(b)(3), is likely to be an abuse of discretion. E.g., *Ervin v. OS Restaurant Services, Inc.*, 632 F.3d 971, 976 (7th Cir.2011) ("If, however, the district court applies an incorrect legal rule as part of its decision, then the framework within which it has applied its discretion is flawed, and the decision must be set aside as an abuse.").

II. *Analysis*

A. *The Established Meaning of "Ascertainability"*

We begin with the current state of the law in this circuit. Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria. See William B. Rubenstein, *Newberg on Class Actions* § 3:3 (5th ed.2015); Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (11th ed.2014); see, e.g., *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 139 (1st Cir.2012); *Bakalar v. Vavra*, 237 F.R.D. 59, 64 (S.D.N.Y.2006); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir.1970) (per curiam). When courts wrote of this implicit requirement of "ascertainability," they trained their attention on the adequacy of the class definition itself. They were not focused on whether, given an adequate class definition, it would be difficult to identify particular members of the class.

This "weak" version of ascertainability has long been the law in this circuit. See *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 495 (7th Cir.2012) ("It's not hard to see how this class lacks the definiteness required for class certification; there is no way to know or readily ascertain who is a member of the class."); *Oshana v. Coca–Cola Co.*, 472 F.3d 506, 513 (7th Cir.2006) (class definition "must be definite enough that the class can be ascertained"); accord, *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir.1980) ("In summary, the proposed class of plaintiffs is so highly diverse and so difficult to identify that it is not adequately defined or nearly ascertainable.").

The language of this well-settled requirement is susceptible to misinterpretation, though, which may explain some of the doctrinal drift described below. To understand its established meaning, it's better to focus on the three common problems that have caused plaintiffs to flunk this requirement.

[4] First, classes that are defined too vaguely fail to satisfy the "clear definition" component. See, e.g., *Young v. Nationwide Mutual Ins. Co.*, 693 F.3d 532, 538 (6th Cir.2012) ("There can be no class action if the proposed class is amorphous or imprecise." (citation and internal quotation marks omitted)); *APB Associates, Inc. v. Bronco's Saloon, Inc.*, 297 F.R.D. 302, 316 (E.D.Mich.2013) (denying certification because ***660** proposed class definition was too "imprecise and amorphous"); *DeBremaecker*, 433 F.2d at 734 (affirming denial of certification for proposed class defined as residents "active in the 'peace movement' "); 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed.2005) (collecting cases). Vagueness is a problem because a court needs to be able to identify who will receive notice, who will share in any recovery, and who will be bound by a judgment. See *Kent v. SunAmerica Life Ins. Co.*, 190 F.R.D. 271, 278 (D.Mass.2000). To avoid vagueness, class definitions generally need to identify a particular group, harmed during a particular time frame, in a particular location, in a particular way. See *McLaughlin on Class Actions* § 4:2; see, e.g., *Rodriguez v. Berrybrook Farms, Inc.*, 672 F.Supp. 1009, 1012 (W.D.Mich.1987) (granting certification and noting the class definition specified "a group of agricultural laborers during a specific time frame and at a specific location who were harmed in a specific way").

[5] Second, classes that are defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement. E.g., *Simer v. Rios*, 661 F.2d 655, 669–70 (7th Cir.1981) (affirming denial of certification of class of people who felt discouraged from applying for government energy assistance); *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977–78 (7th

Cir.1977) (affirming certification of class defined by actions of defendants rather than class members' states of mind); *Harris v. General Development Corp.*, 127 F.R.D. 655, 659 (N.D.Ill.1989) (denying class certification of proposed subclass defined by mental state: "The proposed class of persons who allegedly were discouraged from applying at GDC is too imprecise and speculative to be certified."); 7A Wright et al., *Federal Practice & Procedure* § 1760 (collecting cases). Plaintiffs can generally avoid the subjectivity problem by defining the class in terms of conduct (an objective fact) rather than a state of mind. See, e.g., *National Org. for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 358–59 (N.D.Ill.1997) (accepting modified class definition so that "membership in the classes sought to be certified is based exclusively on the defendants' conduct with no particular state of mind required"); *Newberg on Class Actions* § 3:5.

[6] Third, classes that are defined in terms of success on the merits—so-called "fail-safe classes"—also are not properly defined. See *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir.2015); *Young*, 693 F.3d at 538; *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir.2012); *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir.2011); but see *In re Rodriguez*, 695 F.3d 360, 369–70 (5th Cir.2012) (affirming fail-safe class certification). Defining the class in terms of success on the merits is a problem because "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. This raises an obvious fairness problem for the defendant: the defendant is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation. See Erin L. Geller, Note, *The Fail–Safe Class as an Independent Bar to Class Certification*, 81 Fordham L.Rev. 2769 (2013). The key to avoiding this problem is to define the class so that membership does not depend on the liability of the defendant.

[7] The class definition in this case complies with this settled law and avoids all of these problems. It is not vague. It identifies a particular group of individuals (purchasers of Instaflex) harmed in a particular way (defrauded by labels and marketing ***661** materials) during a specific period in particular areas. The class definition also is not based on subjective criteria. It focuses on the act of purchase and Direct Digital's conduct in labeling and advertising the product. It also does not create a fail-safe class. If Direct Digital prevails, *res judicata* will bar class members from re-litigating their claims.

Direct Digital argues, however, that we should demand more. It urges us to adopt a new component to the ascertain-ability requirement that goes beyond the adequacy of the class definition itself. Drawing on recent decisions by the Third Circuit, Direct Digital argues that class certification should be denied if the plaintiff fails to show a reliable and administratively feasible way to determine whether a particular person is a member of the class. And, Direct Digital continues, affidavits from putative class members are insufficient as a matter of law to satisfy this requirement.

In support of this argument, Direct Digital asserts that the only method of identifying class members here is by affidavit from the putative class members themselves. That remains to be seen. We do not know yet what sales and customer records Direct Digital has. We assume for purposes of this decision that Direct Digital will have no records for a large number of retail customers. We also assume that many consumers of Instaflex are unlikely to have kept their receipts since it's a relatively inexpensive consumer good.

B. *The Recent Expansion of "Ascertainability"*

To understand the genesis of Direct Digital's argument, we briefly summarize the law of the Third Circuit, which has adopted this more stringent version of ascertainability. The Third Circuit's innovation began with *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir.2012), where the court vacated certification of a poorly defined class. The decisive portion of the opinion, *id.* at 592–94, certainly seems sound, but the opinion went on to caution that on remand, if defendants' records would not identify class members, the district court should not approve a method relying on "potential class members' say so," and the opinion said that reliance on class members' affidavits might not be "proper or just," *id.* at 594 (internal quotation marks omitted). The opinion did not explain this new requirement other than to cite an easily distinguishable district court decision.

Since *Marcus*, the court has applied this heightened ascertainability requirement in several more cases: *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 354–56 (3d Cir.2013); *Carrera v. Bayer Corp.*, 727 F.3d 300, 305–12 (3d Cir.2013); *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 184–85 (3d Cir.2014); *Shelton v. Bledsoe*, 775 F.3d 554, 559–63 (3d Cir.2015); *Byrd v. Aaron's Inc.*,

784 F.3d 154, 161–71 (3d Cir.2015). As the requirement has evolved, several members of the court have expressed doubts about the expanding ascertainability doctrine. See *Byrd*, 784 F.3d at 172–77 (Rendell, J., concurring); *Carrera v. Bayer Corp.*, No. 12–2621, 2014 WL 3887938, at *1–3 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing en banc).[2]

[2] The Eleventh Circuit recently applied a fairly strong version of an ascertainability requirement in a non-precedential decision, *Karhu v. Vital Pharmaceuticals, Inc.*, —— Fed.Appx. ——, —— – ——, 2015 WL 3560722, at *2–4 (11th Cir. June 9, 2015) (unpublished). Some courts have followed the Third Circuit's innovation. See, e.g., *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3–4 (N.D.Ill. Feb. 25, 2015); *Jones v. ConAgra Foods, Inc.*, No. C 12–01633 CRB, 2014 WL 2702726, at *8–11 (N.D.Cal. June 13, 2014), appeal docketed, No. 14–16327; *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12–2907–SC, 2014 WL 580696, at *5–6 (N.D.Cal. Feb. 13, 2014). Others have rejected it. See, e.g., *Daniels v. Hollister Co.*, 440 N.J.Super. 359, 113 A.3d 796, 798–803 (N.J.App.2015); *Rahman v. Mott's LLP*, No. 13–cv–03482–SI, 2014 WL 6815779, at *4 (N.D.Cal. Dec. 3, 2014); *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *4–6 (N.D.Cal. Sept. 18, 2014); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 565–67 (C.D.Cal.2014).

***662** As it stands now, the Third Circuit's test for ascertainability has two prongs: (1) the class must be "defined with reference to objective criteria" (consistent with long-established law discussed above), and (2) there must be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd*, 784 F.3d at 163, quoting *Hayes*, 725 F.3d at 355; see also *Shelton*, 775 F.3d at 560 (making clear that "the question of ascertainability" is separate from "the question of whether the class was properly defined").

This second requirement sounds sensible at first glance. Who could reasonably argue that a plaintiff should be allowed to certify a class whose members are impossible to identify? In practice, however, some courts have used this requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims.

The demands of this heightened requirement are most apparent from the Third Circuit's discussion of self-identification by affidavit. It has said that affidavits from putative class members cannot satisfy the stringent ascertainability requirement. See *Carrera*, 727 F.3d at 308–12 (remanding to give plaintiff "another opportunity to satisfy the ascertainability requirement" but rejecting plaintiff's attempt to use affidavits from class members to show their purchases of weight loss supplement); *Hayes*, 725 F.3d at 356 ("But the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements."); *Marcus*, 687 F.3d at 594 ("We caution, however, against approving a method that would amount to no more than ascertaining by potential class members' say so."). Direct Digital urges us to adopt this rule and to reverse the certification order here because the only method for identifying class members proposed by Mullins in the district court was self-identification by affidavit.

We decline to do so. The Third Circuit's approach in *Carrera*, which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23. *Carrera* and cases like it have given four policy reasons for requiring more than affidavits from putative class members. We address each one below and find them unpersuasive.

[8] In general, we think imposing this stringent version of ascertainability does not further any interest of Rule 23 that is not already adequately protected by the Rule's explicit requirements. On the other side of the balance, the costs of imposing the requirement are substantial. The stringent version of ascertainability effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do. Accordingly, we conclude that the district court here did not abuse its discretion by deferring until later in the litigation decisions about more detailed aspects of ascertainability and the management of any claims process. At bottom, the district court was correct not to let a quest for perfect treatment of one issue become a reason to deny class certification and with it the hope of any effective relief at all.

We now turn to the policy concerns identified by the courts that have embraced ***663** this heightened ascertainability requirement. The policy concerns are substantial and legitimate, but we do not believe they justify the new requirement. As will become clear, we agree in essence with Judge Rendell's concurring opinion in *Byrd*, 784 F.3d at 172–77, which urged "retreat from

[the] heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23," *id.* at 177.

1. ***Administrative Convenience***

Some courts have argued that imposing a stringent version of ascertainability "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members." *Marcus*, 687 F.3d at 593 (citation and internal quotation marks omitted). It does this by ensuring that the court will be able to identify class members without "extensive and individualized fact-finding or mini-trials." *Carrera*, 727 F.3d at 307 (citation and internal quotation marks omitted).

This concern about administrative inconvenience is better addressed by the explicit requirements of Rule 23(b)(3), which requires that the class device be "superior to other available methods for fairly and efficiently adjudicating the controversy." One relevant factor is "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3)(D).

[9] The superiority requirement of Rule 23(b)(3) is clarified by substantial case law. See 7AA Wright et al., *Federal Practice & Procedure* §§ 1779, 1780. Imposing a stringent version of ascertainability because of concerns about administrative inconvenience renders the manageability criterion of the superiority requirement superfluous. See Daniel Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member*, 82 Fordham L.Rev. 2359, 2395 (2014). It also conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir.2001) (Sotomayor, J.) (noting that failure to certify a class action under Rule 23(b)(3) solely on manageability grounds is generally disfavored), *overruled on other grounds by In re IPO*, 471 F.3d 24 (2d Cir.2006); accord, *Byrd*, 784 F.3d at 175 (Rendell, J., concurring) ("Imposing a proof-of-purchase requirement does nothing to ensure the manageability of a class or the 'efficiencies' of the class action mechanism; rather, it obstructs certification by assuming that hypothetical roadblocks will exist at the claims administration stage of the proceedings.").

A reader might fairly ask whether there is any practical difference between addressing administrative inconvenience as a matter of ascertainability versus as a matter of superiority. In fact, there is. When administrative inconvenience is addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs and headaches of proceeding as a class action. See, e.g., *Sethavanish*, 2014 WL 580696, at *6 (purchasers of "all natural" nutrition bars sold through retailers; denying class certification solely on the ground of ascertainability without addressing other available methods for adjudicating the controversy). But when courts approach the issue as part of a careful application of Rule 23(b)(3)'s superiority standard, they must recognize both the costs *and benefits* of the class device. See 7AA Wright et al., *Federal Practice & Procedure* § 1780 ("Viewing the potential administrative difficulties from a comparative perspective seems sound and a decision against class-action treatment should be rendered only ***664** when the ministerial efforts simply will not produce corresponding efficiencies. In no event should the court use the possibility of becoming involved with the administration of a complex lawsuit as a justification for evading the responsibilities imposed by Rule 23.").

Rule 23(b)(3)'s superiority requirement, unlike the freestanding ascertainability requirement, is comparative: the court must assess efficiency with an eye toward "other available methods." In many cases where the heightened ascertainability requirement will be hardest to satisfy, there realistically is no other alternative to class treatment. See *id.* ("If judicial management of a class action ... will reap the rewards of efficiency and economy for the entire system that the drafters of the federal rule envisioned, then the individual judge should undertake the task. Ironically, those Rule 23(b)(3) actions requiring the most management may yield the greatest pay-off in terms of effective dispute resolution."); cf. *Schleicher v. Wendt*, 618 F.3d 679, 686–87 (7th Cir.2010) (rejecting defendant's invitation to "tighten" Rule 23 requirements for class certification and noting that doing so would make certification impossible in many securities fraud cases).

This does not mean, of course, that district courts should automatically certify classes in these difficult cases. But it does mean that before refusing to certify a class that meets the requirements of Rule 23(a), the district court should consider the alternatives as Rule 23(b)(3) instructs rather than denying certification because it may be

challenging to identify particular class members. District courts have considerable experience with and flexibility in engineering solutions to difficult problems of case management.

[10] In addition, a district judge has discretion to (and we think normally should) wait and see how serious the problem may turn out to be after settlement or judgment, when much more may be known about available records, response rates, and other relevant factors. And if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation. See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir.2004).

If faced with what appear to be unusually difficult manageability problems at the certification stage, district courts have discretion to insist on details of the plaintiff's plan for notifying the class and managing the action. In conducting this inquiry, district courts should consider also whether the administrative burdens can be eased by the procedures set out in Rule 23(c) and (d). See, e.g., *Bobbitt v. Academy of Court Reporting, Inc.*, 252 F.R.D. 327, 344–45 (E.D.Mich.2008) (granting class certification despite potential manageability problems and noting options "a special master, representative trials, or other means" to manage the problems).

[11] Under this comparative framework, refusing to certify on manageability grounds alone should be the last resort. See *Carnegie*, 376 F.3d at 661 ("a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all"), quoted in *Suchanek*, 764 F.3d at 760. In all events, deciding whether and when to insist on details, and how many details, are matters for the sound discretion of district judges who have so much first-hand experience managing class actions.

On the other hand, if courts look only at the cost-side of the equation and fail to consider administrative solutions like those available under Rule 23(c) and (d), courts will err systematically against certification. See Geoffrey C. Shaw, Note, *Class Ascertainability*, ***665** 124 Yale L.J. 2354, 2396–99 (2015) (explaining why addressing issue of manageability under umbrella of superiority is preferable to addressing it as a matter of ascertainability). The stringent version of ascertainability invites precisely this type of systemic error.

2. *Unfairness to Absent Class Members*

Courts also have asserted that the heightened ascertainability requirement is needed to protect absent class members. If the identities of absent class members cannot be ascertained, the argument goes, it is unfair to bind them by the judicial proceeding. See *Carrera*, 727 F.3d at 307; *Marcus*, 687 F.3d at 593. A central premise of this argument is that class members must receive actual notice of the class action so that they do not lose their opt-out rights.

[12] We believe that premise is mistaken. For Rule 23(b)(3) classes, Rule 23(c)(2)(B) requires the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The rule does not insist on actual notice to all class members in all cases. It recognizes it might be *impossible* to identify some class members for purposes of actual notice. See Shaw, 124 Yale L.J. at 2367–69. While actual individual notice may be the ideal, due process does not always require it. See *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (7th Cir.2004) (rejecting requirement of individual notice); *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir.2012) (noting that "even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice" and collecting cases); accord, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

[13] [14] When class members' names and addresses are known or knowable with reasonable effort, notice can be accomplished by first-class mail. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174–75, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). When that is not possible, courts may use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process. See *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 676–77 (7th Cir.2013). As long as the alternative means satisfy the standard of Rule 23(b)(3), there is no due process violation. See, e.g., *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *5 (N.D.Cal. Sept. 18, 2014) (rejecting notice argument for same reason); *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 418 (N.D.Ill.2012) (same). Due process simply does not require the ability to identify all members of the class at the certification stage.

More broadly, the stringent version of ascertainability loses sight of a critical feature of class actions for low-value claims like this one. In these cases, "only a lunatic or a fanatic" would litigate the claim individually, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir.2004), so opt-out rights are not likely to be exercised by anyone planning a separate individual lawsuit. When this is true, it is particularly important that the types of notice that courts require correspond to the value of the absent class members' interests. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). That is why in *Hughes*, for example, where each plaintiff's claim was valued at approximately $1,000 or less, we approved a notice plan consisting of sticker notices on the defendant's two ATMs, publication ***666** of a notice in the primary local newspaper, and notice on a website. *Hughes*, 731 F.3d at 676–77. We did not insist on first-class mail even though the notice plan likely would not reach everyone in the class. We approved the plan because the notice plan was "commensurate with the stakes." *Id.* at 676.

The heightened ascertainability approach upsets this balance. It comes close to insisting on actual notice to protect the interests of absent class members, yet overlooks the reality that without certification, putative class members with valid claims would not recover anything at all. See *Amchem*, 521 U.S. at 617, 117 S.Ct. 2231; *Eisen*, 417 U.S. at 161, 94 S.Ct. 2140; *Hughes*, 731 F.3d at 677; *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir.2013); see also, e.g., *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y.2014) ("Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the action."); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D.Cal.2013) ("If class actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a consumer class action." (citation and internal quotation marks omitted)). When it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good.

3. *Unfairness to Bona Fide Class Members*

The third concern offered to justify the heightened ascertainability requirement is the interests of class members with valid claims. Courts have expressed concern that if class members are identified only by their own affidavits, individuals without a valid claim will submit erroneous or fraudulent claims and dilute the share of recovery for true class members. See *Carrera*, 727 F.3d at 310 ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.").[3]

[3] *Bello v. Beam Global Spirits & Wine, Inc.*, No. 11–5149 (NLH/KMW), 2015 WL 3613723 (D.N.J. June 9, 2015), is a striking example of how demanding this approach has become, requiring something close to perfection in identifying class members. When the plaintiff first moved to certify a class of consumers who had purchased a beverage product, she attempted to satisfy the ascertainability requirement with affidavits from putative class members. The court, relying on the recent Third Circuit cases, denied the motion without prejudice and gave her another opportunity to propose "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at *11, quoting *Hayes*, 725 F.3d at 355. The plaintiff renewed her motion, this time proposing a detailed screening method to weed out mistaken or fraudulent claims. See *id.* at *6–7 (describing three levels of review). The court denied her renewed motion, holding that even this screening method failed to satisfy *Carrera's* heightened ascertainability requirement. See *id.* at *11–14. At one point, the court wrote that even an affidavit *plus a receipt* would not be enough to clear the ascertainability hurdle. See *id.* at *12.

Again, this concern about the danger of fraudulent or mistaken claims is legitimate and understandable, especially when contemplating the prospect that money might seem available just for the asking. In the words of then-future President John Adams, "it is prudent not to put virtue to too serious a test." 2 John Adams, *The Works of John Adams, Second President of the United States: Diary, with A Life of the Author, Notes & Illustrations* 457 (Charles Francis Adams ed. 1850) (during 1775 debate on whether to open ports for trade and the need for customs officials to regulate the ports).

***667** We see two problems with using these concerns to impose the heightened ascertainability standard. First, in practice, the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible. We are aware of no empirical evidence that the risk of dilution caused by inaccurate or fraudulent claims in the typical low-value consumer class action is significant. In most cases, the expected recovery is so

small that we question whether many people would be willing to sign affidavits under penalty of perjury saying that they purchased the good or service. See *Byrd*, 784 F.3d at 175 (Rendell, J., concurring). In this case, for example, the value of each claim is approximately $70 (the retail price). Direct Digital has provided no evidence, and we have found none, that claims of this magnitude have provoked the widespread submission of inaccurate or fraudulent claims.

We could be wrong, of course, about this empirical prediction. Suppose people are more willing to file inaccurate or fraudulent claims for low-value recoveries than we suspect. Even then, the risk of dilution appears small because only a tiny fraction of eligible claimants ever submit claims for compensation in consumer class actions. See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L.Rev. 71, 119–20 (2007) (noting that it is not unusual to have participation rates of 10 to 15 percent and examining more recent examples of rates lower than 5 percent). Any participation rate less than 100 percent leaves unclaimed funds in the pot, whether it is a judgment award or a settlement fund. When there are unclaimed funds, the addition of a fraudulent or inaccurate claim typically does not detract from a bona fide class member's recovery because the non-deserving claimant merely takes from unclaimed funds, not the deserving class member. It is of course theoretically possible that the total sum claimed by non-deserving claimants exceeds the total amount of unclaimed funds, in which case there would be dilution, but given the low participation rates actually observed in the real world, this danger is not so great that it justifies denying class certification altogether, at least without empirical evidence supporting the fear. See Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small–Claims Consumer Class Actions*, 59 DePaul L.Rev. 305, 315 (2010) (given actual claims rates in practice, "it is simply not true that compensation of uninjured parties affects the compensation interests of injured class members"). *Carrera* and cases like it have given no reason to think otherwise.

We recognize that the risk of mistaken or fraudulent claims is not zero. But courts are not without tools to combat this problem during the claims administration process. They can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to take into account the size of the claims, the cost of the techniques, and an empirical assessment of the likelihood of fraud or inaccuracy. See Manual for Complex Litigation §§ 21.66–.661 (4th ed.2004); *Newberg on Class Actions* § 12:20; see also, e.g., *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D.Ill.2012) (affirming class certification where class included individuals who threw away promotional gift cards because they were told that the balances had been voided: "anybody claiming class membership on that basis will be required to submit an appropriate affidavit, which can be evaluated during the claims administration process"). Relying on concerns about what are essentially claim administration issues to deny ***668** certification and to prevent any recovery on valid claims upsets the balance a district judge must consider. In the face of such empirical uncertainty, a district judge has discretion to say let's wait until we know more and see how big a problem this turns out to be.

The second problem with this dilution argument is that class certification provides the only meaningful possibility for bona fide class members to recover anything at all. Keep in mind what's at stake. If the class is certified and fraudulent or inaccurate claims actually cause dilution, then deserving class members still receive something. But if class certification is denied, they will receive nothing, for they would not have brought suit individually in the first place. See *Amchem*, 521 U.S. at 617, 117 S.Ct. 2231; *Eisen*, 417 U.S. at 161, 94 S.Ct. 2140; *Hughes*, 731 F.3d at 677; *Butler*, 727 F.3d at 798. To deny class certification based on fear of dilution would in effect deprive bona fide class members of any recovery as a means to ensure they do not recover too little.

This stringent approach has far-reaching consequences, too. By "focusing on making absolutely certain that compensation is distributed only to those individuals who were actually harmed," the heightened ascertainability requirement "has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing." *Byrd*, 784 F.3d at 175–76 (Rendell, J., concurring), discussing *Hughes*, 731 F.3d at 677 ("A class action, like litigation in general, has a deterrent as well as a compensatory objective."). Even if the risk of dilution is not trivial, refusing to certify on this basis effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions. See *Daniels v. Hollister Co.*, 440 N.J.Super. 359, 113 A.3d 796, 801 (N.J.App.2015) ("Ascertainability ... is particularly misguided when applied to a case where any difficulties encountered in identifying class members

are a consequence of a defendant's own acts or omissions.... Allowing a defendant to escape responsibility for its alleged wrongdoing by dint of its particular recordkeeping policies ... is not in harmony with the principles governing class actions."); *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 250 (N.D.Ill.2014) ("Doing this—or declining to certify a class altogether, as defendants propose—would create an incentive for a person to violate the TCPA on a mass scale and keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct."); *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *4 (N.D.Cal. Sept. 18, 2014) ("Adopting the *Carrera* approach would have significant negative ramifications for the ability to obtain redress for consumer injuries."); *Carrera v. Bayer Corp.*, No. 12–2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing en banc) (explaining that *Carrera* may have gone too far where "a defendant's lack of records and business practices make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class").

When faced with this counterargument, courts applying the heightened ascertainability approach have tended to emphasize that the plaintiff has the burden to satisfy Rule 23 and that the deterrence concern is therefore irrelevant. See, e.g., *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 356 (3d Cir.2013) ("Rule 23's requirements that the class be administratively feasible to ascertain and sufficiently numerous to warrant class action treatment cannot be relaxed or adjusted on the basis of Hayes' assertion that Wal–Mart's records are of no help to him."). With respect, that response begs an important question. Why are affidavits from putative class members ***669** deemed *insufficient as a matter of law* to satisfy this burden? In other words, no one disputes that the plaintiff carries the burden; the decisive question is whether certain evidence is sufficient to meet it. Cf. *Carrera*, 2014 WL 3887938, at *1 (Ambro, J., dissenting from denial of rehearing en banc) ("Even if ... the ability to identify class members is a set piece for Rule 23 to work, how far we go in requiring plaintiffs to prove that ability at the outset is exceptionally important and requires a delicate balancing of interests.").

If not disputed, self-serving affidavits can support a defendant's motion for summary judgment, for example, and defendants surely will be entitled to a fair opportunity to challenge self-serving affidavits from plaintiffs. We are aware of only one type of case in American law where the testimony of one witness is legally insufficient to prove a fact. See U.S. Const., Art. III, § 3, cl. 1 ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."). There is no good reason to extend that rule to consumer class actions.

Given the significant harm caused by immunizing corporate misconduct, we believe a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.

4. *Due Process Interest of the Defendant*

Finally, courts have said the heightened ascertainability requirement is needed to protect a defendant's due process rights. Relying on cases about a defendant's right to "present every available defense," e.g., *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), these courts have argued that the defendant must have a similar right to challenge the reliability of evidence submitted to prove class membership. See *Carrera*, 727 F.3d at 307 ("Ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership."); *Marcus*, 687 F.3d at 594 ("Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.").

[15] We agree with the due process premise but not the conclusion. A defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage. That does not mean a court cannot rely on self-identifying affidavits, subject as needed to audits and verification procedures and challenges, to identify class members. To see why, separate the two claims about a defendant's interest. It is certainly true that a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability. See *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. ——, 131 S.Ct. 2541, 2560–61, 180 L.Ed.2d 374 (2011). It does not follow that a defendant has a due process right to a *cost-effective* procedure for challenging every individual claim to class membership. Cf. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ——,

133 S.Ct. 2304, 2309, 186 L.Ed.2d 417 (2013) ("the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim"). And we should not underestimate the ability of district courts to develop effective auditing and screening methods tailored to the individual case.

Whether a defendant's due process interest is violated depends on the nature of the class action, the plaintiff's theory of recovery, and the defendant's opportunity ***670** to contest liability and the amount of damages it owes. The due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward. A district court can tailor fair verification procedures to the particular case, and a defendant may need to decide how much it wants to invest in litigating individual claims.

To see why this due process argument does not justify the heightened ascertainability requirement, consider three types of class actions. The first type is where the total amount of damages can be determined in the aggregate. A leading treatise provides an example:

> Assume a class of employees has a $50 million pension fund with each employee's share determinable only by a complex formula concerning age, years in service, retirement age, etc. Further assume that the fund's trustee simply transfers the full $50 million to her own personal account. In a case for conversion or fraud, the class would have to demonstrate damage to show liability. They could make that showing simply by demonstrating the aggregate damage the class has suffered—the amount the defendant converted. Individual damages could be worked out later or in subsequent proceedings.

Newberg on Class Actions § 12:2 (footnote omitted). In this situation, the identity of particular class members does not implicate the defendant's due process interest at all. The addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class. See, e.g., *In re Urethane Antitrust Litig.,* 768 F.3d 1245, 1269 (10th Cir.2014) (rejecting Seventh Amendment challenge to allocation of damages award among class members because defendant "has no interest in the method of distributing the aggregate damages award among the class members"); *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 582 F.3d 156, 197–98 (1st Cir.2009) (rejecting due process challenge to entry of class-wide judgment and award of aggregate damages); *Allapattah Services, Inc. v. Exxon Corp.,* 333 F.3d 1248, 1258 (11th Cir.2003) ("[A] defendant has no interest in how the class members apportion and distribute a [n] [aggregate] damage [award] among themselves."), *aff'd*, 545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005); *Hilao v. Estate of Marcos,* 103 F.3d 767, 786 (9th Cir.1996) (noting that defendant's interest is "only in the total amount of damages for which it will be liable," not "the identities of those receiving damage awards"); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members.").

The second type of class action is where the total amount of damages cannot be determined in the aggregate, but there is a common method of determining individual damages. (Most consumer fraud class actions fit this model.) The same treatise provides this example:

> Now assume that [the] same class of current employees is statutorily entitled to overtime wages at time and a half after 40 hours work/week but that the defendant employer has never paid such overtime. In a case alleging violation of the statute, it may be sufficient to demonstrate that the defendant failed to pay overtime without assessing a full aggregate liability. There would be a common method for showing individual damages—a simple formula could be applied to each class member's employment records ***671** —and that would be sufficient for the predominance and superiority requirements to be met.

Newberg on Class Actions § 12:2 (footnote omitted). In this situation, the defendant's due process interest is implicated because the calculation of each class member's damages affects the total amount of damages it owes to the class. That's why the method of determining damages must match the plaintiff's theory of liability and be sufficiently reliable. See *Comcast Corp. v. Behrend*, 569 U.S. ——, 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (2013). It's also why the defendant must be given the opportunity to raise individual defenses and to challenge the calculation of damages awards for particular class members. See *Allapattah Services*, 333 F.3d at 1259.

But neither of these requirements has any necessary connection to the heightened ascertainability requirement. Whether putative class members self-identify by affidavits simply does not matter. Suppose an employee files an affidavit falsely claiming that she worked 60 hours a week when in fact she worked only 50, or suppose a person files an affidavit falsely claiming to have been an employee. In either case, so long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant during the claims administration process, its due process rights have been protected.

The third type of class action is where the defendant's liability can be determined on a class-wide basis, but aggregate damages cannot be established and there is no common method for determining individual damages. In this situation, courts often bifurcate the case into a liability phase and a damages phase. See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir.2013) ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed").

[16] It has long been recognized that the need for individual damages determinations at this later stage of the litigation does not itself justify the denial of certification. See *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir.2010) ("The possibility that individual hearings will be required for some plaintiffs to establish damages does not preclude certification."); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir.2010) (per curiam); *Arreola v. Godinez*, 546 F.3d 788, 799–801 (7th Cir.2008); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir.2004). Here again, using the heightened ascertainability requirement to deny class certification is not the only means, or even the best means, to protect the defendant's due process rights.

[17] As long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected. See *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *6 (N.D.Cal. Sept. 18, 2014) ("Defendants would certainly be entitled to object to a process through which a non-judicial administrator 'ascertains' each applicant's class membership on the basis of the applicants' own self-identification, gives a defendant no opportunity to challenge that determination, and then racks up the defendant's bill every time an individual submits a form."); *Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 524 (C.D.Cal.2011) ("If Mr. Johnson establishes liability for the class, Defendants may challenge reliance and causation individually during a determination of damages, after the issues that are common have been litigated and resolved."); *Godec* ***672** *v. Bayer Corp.*, No. 1:10–CV–224, 2011 WL 5513202, at *7 (N.D.Ohio Nov. 11, 2011) ("In any event, to the extent Bayer has individualized defenses, it is free to try those defenses against individual claimants.").[4]

[4] What we have said is consistent with *Comcast Corp. v. Behrend*, 569 U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), which held that class treatment is inappropriate where the class-wide measure of damages does not match the plaintiff's theory of liability. See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799–800 (7th Cir.2013); see also *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18–19 (1st Cir.2015); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir.2014); *In re Whirlpool Corp. Front–Loading Washer Products Liability Litig.*, 722 F.3d 838, 860–61 (6th Cir.2013); *Leyva v. Medline Industries Inc.*, 716 F.3d 510, 514 (9th Cir.2013).

In sum, the concern about protecting a defendant's due process rights does not justify the heightened ascertainability requirement. In all cases, the defendant has a right not to pay in excess of its liability and to present individual defenses, but both rights are protected by other features of the class device and ordinary civil procedure. *Carrera* itself appeared to recognize this rejoinder, but it pivoted to the argument discussed above about protecting absent class members. See 727 F.3d at 310 ("Because Bayer's total liability cannot be so affected by unreliable affidavits, Carrera argues Bayer lacks an

interest in challenging class membership.... But ascertainability protects absent class members as well as defendants, so Carrera's focus on Bayer alone is misplaced." (citation omitted)). *Carrera* gave no other reason to think the heightened ascertainability requirement is needed to protect a defendant's due process rights. We can't think of one either.

Ultimately, we decline Direct Digital's invitation to adopt a heightened ascertainability requirement. Nothing in Rule 23 mentions or implies it, and we are not persuaded by the policy concerns identified by other courts. Those concerns are better addressed by a careful and balanced application of the Rule 23(a) and (b)(3) requirements, keeping in mind under Rule 23(b)(3) that the court must compare the available alternatives to class action litigation. District courts should continue to insist that the class definition satisfy the established meaning of ascertainability by defining classes clearly and with objective criteria. If a class is ascertainable in this sense, courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits. If the proposed class presents unusually difficult manageability problems, district courts have discretion to press the plaintiff for details about the plain-tiff's plan to identify class members. A plaintiff's failure to address the district court's concerns adequately may well cause the plaintiff to flunk the superiority requirement of Rule 23(b)(3). But in conducting this analysis, the district court should always keep in mind that the superiority standard is comparative and that Rule 23(c) and (d) permit creative solutions to the administrative burdens of the class device.

C. *Commonality*

[18] Direct Digital's other primary challenge to the district court's certification order relates to the commonality requirement of Rule 23(a)(2). The district court found this requirement satisfied by a preponderance of the evidence, see *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir.2012), explaining that whether Instaflex has been clinically tested or scientifically formulated to relieve joint pain, improve flexibility, increase mobility, and support cartilage repair ***673** are questions common to the class. [See R. 89 at 2, 3–4]

Direct Digital argues that Mullins cannot satisfy the commonality requirement because his suit alleges that Instaflex is ineffective. The efficacy of a health product can never form the basis of a common question, Direct Digital argues, because efficacy depends on individual factors such as the severity of the consumer's pre-use medical condition, the consumer's pattern of use, and other potentially confounding variables such as the consumer's overall health, age, activity level, use of other drugs, and the like.

Direct Digital's objection fails because it has mischaracterized Mullins's theory of liability. Mullins does not claim that Instaflex was ineffective, ergo defendant is liable. He alleges that Direct Digital's statements representing that Instaflex has been "clinically tested" and "scientifically formulated" to relieve joint discomfort, improve flexibility, increase mobility, and repair cartilage are false or misleading because they imply there was scientific support for these claims but in fact no reasonable scientific expert would conclude that glucosamine sulfate (the primary ingredient in the supplement) has any positive effect on joint health. Mullins alleges that these statements would have misled a reasonable consumer. See *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 316 Ill.Dec. 522, 879 N.E.2d 910, 925–27 (2007) (reasonable consumer standard); accord, *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756–57 (7th Cir.2014) (discussing consumer fraud statutes in Illinois and other states). As the district court correctly concluded, this theory presents a common question: Were the statements false or misleading? This is a "common contention" that is "capable of classwide resolution" because the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). Nothing more is required to satisfy Rule 23(a)(2).

Of course the efficacy of the product can be *relevant* to that determination. If consumers experience the reduction or elimination of their symptoms, then that is evidence that the supplement does in fact relieve joint discomfort consistent with Direct Digital's representations. But that's not the focus of Mullins's theory of consumer fraud. What really matters under his theory is whether there is any scientific support for the assertions contained in the labels and advertising materials. In other words, Mullins's claims do not rise or fall on whether individual consumers experienced health benefits, due to the placebo effect or otherwise. They rise or fall on whether Direct Digital's representations were deceptive. See *Suchanek*, 764 F.3d at 756–57 (reversing district court's order denying class certification; commonality is satisfied where plaintiff's theory of liability turns on proving unfair or deceptive

marketing and packaging of consumer product).

That's why even if Direct Digital were to prove that consumers experienced less joint pain because of a placebo effect (a theory Direct Digital appears to embrace on appeal), it could still be liable for consumer fraud. Consumers might have paid more than they otherwise would have because of the representations about clinical testing. Or they could have decided not to seek out better therapeutic alternatives because they believed Instaflex was addressing their underlying condition. See *FTC v. QT, Inc.*, 512 F.3d 858, 862–63 (7th Cir.2008) (placebo effect is not a defense to consumer fraud where defendant has made specific claims about intended benefits; requiring truth in labeling leads to appropriate ***674** prices and ensures that consumers do not forgo better alternatives in reliance on the placebo). At any rate, we express no view on the merits of Mullins's allegations. The key point is that whether the representations were false or misleading is a common question suitable for class treatment, even if Instaflex relieved joint discomfort for some consumers.

III. *Conclusion*

Direct Digital raises a number of other, less developed objections to the district court's certification order. None of these issues would have justified granting an appeal under Rule 23(f), but we have considered them and find them without merit. Direct Digital has not demonstrated that the district court abused its discretion in certifying the class. The order of the district court granting class certification is AFFIRMED.

All Citations

795 F.3d 654

784 F.3d 154 (3d Cir. 2015)

United States Court of Appeals,
Third Circuit.

Crystal BYRD; Brian Byrd, Individually, and on Behalf of all Similarly Situated Persons,
Appellants
v.
AARON'S INC; Aspen Way Enterprises Inc, d/b/a Aaron's Sales and Leasing, A Franchisee of Aaron's Inc.; DesignerWare LLC; AH & H Leasing LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; AMG Enterprises Group LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Arona Corporation d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Bear Rental Purchase LTD, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Boxer Enterprise Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Circle City Rentals, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; CMH Leasing Partners, LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Cram Leasing, Inc., d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DC Sales and Lease Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Dirigo Leasing Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DPR Alaska LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DPR Colorado LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DW3 LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DWC Ventures LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Fairway Leasing LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Five Star Financials LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; FT Got Three LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; GNS & Associates INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Great American Rent to Own Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Green River Corp, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Hanson Holding Co., d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Honey Harbor Investments LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Howard Rents LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; HPH Investments LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; J & L Beach Enterprises Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; J.R. Rents, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; J.M. Darden and Co, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Jenfour LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Jenkins Rental LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; KFJ Enterprises LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Lifestyle Furniture Leasing, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; LTL Investments LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Madison Capital Investments INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; MKW Investments INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; No Three Putts Enterprises LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; NW Freedom Corp, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Pomona Lane Partners LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; R & Double K LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Rebco Investments LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Rex Neal Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Royal Rents Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Royal Rocket Retail LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Shining Star, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Showcase Home Furnishings Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Sultan Financial Corp, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Tanglewood Management LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; TDS Foods INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; TUR INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Watershed Development Corp, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; WGC LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; John Does (1–45) Aaron's Franchisees.

No. 14–3050. | Argued Jan. 23, 2015. | Filed April 16, 2015. | Amended April 28, 2015.

Synopsis

Background: Lessee of computer from rent-to-own store brought putative class action against lessor store, its

franchisor, and other franchisee stores alleging violations of the Electronic Communications Privacy Act (ECPA), invasion of privacy, conspiracy, and aiding and abetting for installing and using software on leased computers allowing remote and surreptitious access and transmission of electronic communications and images. The United States District Court for the Western District of Pennsylvania, Cathy Bissoon, J., 2014 WL 1316055, denied motion for class certification. Lessee took an interlocutory appeal.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

[1] proposed classes consisting of "owners" and "lessees" were ascertainable;

[2] proposed classes consisting of "household members" of owners or lessees were ascertainable; and

[3] ascertaining "household members" though reconciling their identities with known class members and some public records would not violate due process rights of defendants.

Reversed and remanded.

Rendell, Circuit Judge, filed concurring opinion.

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Before: RENDELL, SMITH, and KRAUSE, Circuit Judges.

OPINION

SMITH, Circuit Judge.

Plaintiffs Crystal and Brian Byrd bring this interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure. The Byrds brought a putative class action against Aaron's, Inc. and its franchisee store Aspen Way Enterprises, Inc. (collectively "Defendants"), who they allege violated the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. § 2511. Concluding that the Byrds' proposed classes were not ascertainable, the District Court denied their motion for class certification. Because the District ***159** Court erred in applying our ascertainability precedent, we will reverse and remand.

I.

Aaron's operates company-owned stores and also oversees independently-owned franchise stores that sell and lease residential and office furniture, consumer electronics, home appliances, and accessories. On July 30, 2010, Crystal Byrd entered into a lease agreement to rent a laptop computer from Aspen Way, an Aaron's franchisee. Although Ms. Byrd asserts that she made full payments according to that agreement, on December 22, 2010, an agent of Aspen Way came to the Byrds' home to repossess the laptop on the grounds that the lease payments had not been made. The agent allegedly presented a screenshot of a poker website Mr. Byrd had visited as well as a picture taken of him by the laptop's camera as he played. The Byrds were troubled and surprised by what they considered a significant and

unauthorized invasion of their privacy.

Aspen Way obtained the picture and screenshot through spyware—a type of computer software—designed by DesignerWare, LLC and named "PC Rental Agent." This spyware had an optional function called "Detective Mode," which could collect screenshots, keystrokes, and webcam images from the computer and its users. Between November 16, 2010 and December 20, 2010, the Byrds alleged that this spyware secretly accessed their laptop 347 times on eleven different days.[1] In total, "the computers of 895 customers across the country ... [had] surveillance conducted through the Detective Mode function of PC Rental Agent." *Byrd v. Aaron's, Inc.*, No. CIV.A. 11101E, 2014 WL 1316055, at *2 (W.D.Pa. Mar. 31, 2014).

[1] The spyware allegedly captured a wide array of personal information: "credit and debit card numbers, expiration dates, security codes, pin numbers, passwords, social security numbers, birth dates, identity of children and the children's personal school records, tax returns, personal health information, employment records, bank account records, email addresses, login credentials, answers to security questions and private communications with health care providers, therapists, attorneys, and other confidants." The record also reveals what appear to be screenshots of adult-oriented and active webcam transmissions and conversations of an intimate nature.

The spyware, as described in the Byrds' complaint, was Orwellian-like in that it guaranteed that "[t]here was of course no way of knowing whether you were being watched at any given moment," George Orwell, *1984*, at 3 (Signet Classics 1950), because Aspen Way's corporate intranet (and Aaron's corporate server by proxy) apparently activated the PC Rental Agent's Detective Mode "whenever they wanted to." *Id.*

The Byrds' operative class-action complaint asserts claims against Aaron's, Aspen Way, more than 50 other independent Aaron's franchisees, and DesignerWare, LLC.[2] The complaint alleges violations of and conspiracy to violate the ECPA, common law invasion of privacy, and aiding and abetting. On Defendants' motion to dismiss, the District Court dismissed the claims against all Aaron's franchisees other than Aspen Way for lack of standing and also all claims for common law invasion of privacy, conspiracy, and aiding and abetting. Thus, the Byrds' remaining claims, and those of the class, are against Aaron's and Aspen Way for direct liability under the ECPA.

[2] On March 20, 2012, the District Court issued an order noting that DesignerWare filed for bankruptcy in the U.S. Bankruptcy Court for the Western District of Pennsylvania. Accordingly, the District Court ordered that no action be taken against DesignerWare and that the case be administratively closed as to that defendant.

In the meantime, the Byrds moved to certify the class under ***160** Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), in which the Byrds provided two proposed classes and one alternative proposed class.[3] In briefing the motion, the Byrds proposed the following alternative class definitions:

[3] In the motion for class certification, the Byrds proposed the following classes:

Class I (against Aaron's Inc. for direct liability under ECPA)—

All persons residing in the United States, who have purchased, leased, rented or rented to own, Aaron's computers and individuals who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted via PC Rental Agent or other devices or software without the customers [sic] authorization.

Class II (against Aaron's Inc., Aspen Way, and all other Franchisee Defendants for direct liability under ECPA, invasion of privacy, conspiracy, and aiding and abetting)—

All customers of the Aaron's Defendants who reside in the United States, who have purchased, leased, rented or rented to own, Aaron's computers and individuals who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted by the Aaron's Defendants via PC Rental Agent or other devices or software without the customers [sic] authorization.

Byrd, 2014 WL 1316055, at *4. The Byrds also set forth an alternative class definition for Class II as:

Class II (against Aaron's Inc., and Aspen Way for direct liability under the ECPA, invasion of privacy, conspiracy, and aiding and abetting (under Wyoming law))—

All persons residing in the United States, who have purchased, leased, rented or rented to own, Aaron's computers from Aspen Way Enterprises, Inc., d/b/a Aarons Sales and Leasing, and individual[s] who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted by Aspen Way and/or Aaron's via PC Rental Agent or other devices or software without the customers [sic] authorization.

Id. It is worth noting that the Byrds' revised proposed class definitions did not expressly require

an electronic communication to be "intercepted," although that is a necessary element in successfully proving their ECPA claims. See 18 U.S.C. §§ 2511, 2520(a).

> **Class I**—All persons who leased and/or purchased one or more computers from Aaron's, Inc., and their household members, on whose computers DesignerWare's Detective Mode was installed and activated without such person's consent on or after January 1, 2007.
>
> **Class II**—All persons who leased and/or purchased one or more computers from Aaron's, Inc. or an Aaron's, Inc. franchisee, and their household members, on whose computers DesignerWare's Detective Mode was installed and activated without such person's consent on or after January 1, 2007.

Byrd, 2014 WL 1316055, at *5.

The Magistrate Judge recommended denying the Byrds' motion for certification because the proposed classes were not ascertainable. Regarding owner and lessee class members, the Magistrate Judge concluded that the proposed classes were underinclusive because they did "not encompass all those individuals whose information [was] surreptitiously gathered by Aaron's franchisees." *Id.* The Magistrate Judge also determined that the classes were "overly broad" because not "every computer upon which Detective Mode was activated will state a claim under the ECPA for the interception of an electronic communication." *Id.* Regarding "household members," the Magistrate Judge took issue with the fact that the Byrds did not define the phrase. *Id.* Further, although the Byrds stated that the identity of household members could be gleaned from "public records," the Magistrate Judge, citing to *Carrera v. Bayer Corp.*, 727 F.3d 300, 306, 308 (3d Cir.2013), reasoned that "[i]t [was] not ***161** enough to propose a method by which this information may be obtained." *Byrd*, 2014 WL 1316055, at *5. The District Court adopted the Report and Recommendation as the opinion of the court over the Byrds' objections. The Byrds timely appealed.

II.

[1] [2] The District Court had federal question jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). "We review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 179 (3d Cir.2014) (quoting *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 354 (3d Cir.2013)) (internal quotation marks omitted). We review de novo a legal standard applied by a district court. *Carrera*, 727 F.3d at 305.

III.

The central question in this appeal is whether the District Court erred in determining that the Byrds' proposed classes were not ascertainable. Because the District Court confused ascertainability with other relevant inquiries under Rule 23, we conclude it abused its discretion and will vacate and remand.

Before discussing these errors, however, we believe it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated. Our ascertainability decisions have been consistent and reflect a relatively simple requirement. Yet there has been apparent confusion in the invocation and application of ascertainability in this Circuit. (Whether that is because, for example, the courts of appeals have discussed ascertainability in varying and distinct ways,[4] or the ascertainability requirement ***162** is implicit rather than explicit in Rule 23,[5] we need not say.) Not surprisingly, defendants in class actions have seized upon this lack of precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification.[6]

[4] For example, some of our sister courts of appeals have interspersed their analysis of ascertainability, or "identifiability," with explicit Rule 23 requirements. *See, e.g., Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir.2014) (discussing ascertainability and numerosity simultaneously); *Romberio v. Unumprovident Corp.*, 385 Fed.Appx. 423, 431 (6th Cir.2009) (unpublished) (discussing ascertainability but reversing class certification based on lack of typicality); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 44–45 (2d Cir.2006) (discussing ascertainability and predominance simultaneously, although noting they are separate inquiries), *decision clarified on denial of reh'g sub nom. In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70 (2d Cir.2007); *Oshana v. Coca–Cola Co.*, 472 F.3d 506, 514 (7th Cir.2006) (discussing identifiability—the Seventh Circuit's approximation of the "ascertainability" standard—in conjunction with the typicality requirement).

Conversely, others have framed ascertainability as requiring that there be an "objective standard" to

determine whether class members are included in or excluded from the class without reference to any particular portion of Rule 23. *See, e.g., EQT Prod. Co. v. Adair,* 764 F.3d 347, 358–60 (4th Cir.2014) (explaining the Fourth Circuit's implicit "readily identifiable" requirement for a proposed class is the same as our Circuit's "ascertainability" requirement, without discussing the source of the standard); *In re Deepwater Horizon,* 739 F.3d 790, 821 (5th Cir.2014) (requiring a class to be "adequately defined and clearly ascertainable" (citation and internal quotation marks omitted)), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.,* —— U.S. ——, 135 S.Ct. 754, 190 L.Ed.2d 641 (2014); *Matamoros v. Starbucks Corp.,* 699 F.3d 129, 139 (1st Cir.2012) (discussing only that the "presence of such an objective criterion overcomes the claim that the class is unascertainable"); *Little v. T–Mobile USA, Inc.,* 691 F.3d 1302, 1308 (11th Cir.2012) (mentioning ascertainability but ruling under Rule 23(b)(3)'s predominance standard); *Oshana,* 472 F.3d at 513–14 (applying an "identifiab[ility]" standard without discussing the source of the rule); *Shook v. El Paso Cnty.,* 386 F.3d 963, 972 (10th Cir.2004) (noting an "identifiability" requirement for 23(b)(3) classes but declining to apply the standard to a Rule 23(b)(2) class).

Even the citations we relied upon in *Marcus v. BMW of North America, LLC,* to discuss the policy rationales behind ascertainability, 687 F.3d 583, 593 (3d Cir.2012), failed to address squarely the undergirding for this implicit requirement. *See, e.g., Xavier v. Philip Morris USA, Inc.,* 787 F.Supp.2d 1075, 1089 (N.D.Cal.2011) (relying in part on our decision in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 191–93 (3d Cir.2001), which in fact analyzed a proposed class under Rule 23(b)(3) and the superiority requirement); *Sanneman v. Chrysler Corp.,* 191 F.R.D. 441, 446 & n. 9 (E.D.Pa.2000) (blending the issue of ascertainability with class definition and cross-referencing a later discussion on predominance and superiority); Federal Judicial Center, *Manual for Complex Litigation* § 21.222 (4th ed.2004) (citing to Rule 23(c)(2)'s requirement that class members in a Rule 23(b)(3) action receive the "best notice practicable").

[5] Ascertainability is an "essential prerequisite," or an *implied* requirement, of Rule 23, "at least with respect to actions under Rule 23(b)(3)." *Marcus,* 687 F.3d at 592–93. *Marcus* identified "important objectives," *id.* at 593, or policy rationales, supporting the ascertainability requirement. These included removing administrative burdens that were "incongruous with the efficiencies expected in a class action," providing the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action, and protecting defendants by ensuring that those persons ultimately bound by the final judgment could be clearly identified. *Id.* at 593. Our opinion in *Carrera* expanded on some of the concerns addressed in *Marcus,* specifically relating to a defendant's "due process right to challenge the proof used to demonstrate class membership." 727 F.3d at 307.

[6] *See, e.g.,* Class Action Reporter, *Courts Scrutinize Class Certification "Ascertainability,"* Vol. 17, Feb. 6, 2015, (explaining that "courts across the country are increasingly scrutinizing 'ascertainability' at the class certification stage"); Melody E. Akhavan, *Ascertainability Challenge Is Viable Weapon for* Defense, Law360, Nov. 26, 2014, http://www.law360.com/articles/599335/ascertainability-challenge-is-viable-weapon-for-defense ("Courts' focus on ascertainability has become an increasingly useful tool for defendants fighting class certification."); Alida Kass, *Third Circuit Case Could Limit Consumer Class Actions,* N.J. Law Journal, June 25, 2014 ("[T]he Third Circuit will be a fertile ground for exploring the boundaries of ascertainability.").

[3] We seek here to dispel any confusion. The source of, or basis for, the ascertainability requirement as to a Rule 23(b)(3) class is grounded in the nature of the class-action device itself. In endeavoring to further explain this concept, we adhere to the precise boundaries of ascertainability previously iterated in the quartet of cases we discuss below. The ascertainability requirement as to a Rule 23(b)(3) class is consistent with the general understanding that the class-action device deviates from the normal course of litigation in large part to achieve judicial economy. *See Comcast,* 133 S.Ct. at 1432 (discussing generally the nature of the class-action device). Ascertainability functions as a necessary prerequisite (or implicit requirement) because it allows a trial court effectively to evaluate the explicit requirements of Rule 23. In other words, the independent ascertainability inquiry ensures that a proposed class will actually function as a class. This understanding of the source of the ascertainability requirement takes a forward-looking view of the administration of the Rule 23(b)(3) class-action device in practice.

***163 A.**

[4] [5] [6] The class-action device is an exception to the rule that litigation is usually " 'conducted by and on behalf of the individual named parties only.' " *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (quoting *Califano v. Yamasaki,* 442

U.S. 682, 700–01, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). Accordingly, the party proposing class-action certification bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of Rule 23. *Id.* And a court evaluating a motion for class certification is obligated to probe behind the pleadings when necessary and conduct a "rigorous analysis" in order to determine whether the Rule 23 certification requirements are satisfied. *Id.; In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir.2008), *as amended* (Jan. 16, 2009). A plaintiff seeking certification of a Rule 23(b)(3) class must prove by a preponderance of the evidence that the class is ascertainable.[7] *Hayes*, 725 F.3d at 354. The rigorous analysis requirement applies equally to the ascertainability inquiry. *Carrera*, 727 F.3d at 306.

[7] In *Shelton v. Bledsoe*, we held that ascertainability is not a requisite of a Rule 23(b)(2) class. 775 F.3d 554, 559–63 (3d Cir.2015). The Byrds sought certification of their proposed classes under both Rule 23(b)(2) and Rule 23(b)(3). Lacking the benefit of our *Shelton* decision, the District Court denied certification without distinguishing between Rule 23(b)(2) and Rule 23(b)(3). Accordingly, the District Court on remand should also consider whether the classes may be separately certified under Rule 23(b)(2).

[7] [8] [9] The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is "defined with reference to objective criteria"; and (2) there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at 355 (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593–94 (3d Cir.2012)). The ascertainability requirement consists of nothing more than these two inquiries. And it does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that "class members *can* be identified." *Carrera*, 727 F.3d at 308 n. 2 (emphasis added). This preliminary analysis dovetails with, but is separate from, Rule 23(c)(1)(B)'s requirement that the class-certification order include "(1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 187–88 (3d Cir.2006).

We have on four occasions addressed the requirement that a Rule 23(b)(3) class be "ascertainable" in order to be certified. Our quartet of cases began with *Marcus v. BMW of North America, LLC*, in which we adopted this implicit ascertainability requirement. 687 F.3d at 592–94. We explained, "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.* at 593. We concluded that the proposed class "raise[d] serious ascertainability issues," largely because the plaintiffs could not identify cars with the allegedly defective run-flat tires. *Id.* at 593. The defendants did not maintain records that would demonstrate whether a putative class member's run-flat tires " 'ha[d] gone flat and been replaced,' as the class definition require[d]," and the plaintiffs had not proposed "a reliable, administratively feasible alternative" to identify class members. *Id.* at 594.

***164** Shortly thereafter, in *Hayes v. Wal–Mart Stores, Inc.*, we straightforwardly applied the ascertainability rule established by *Marcus* and remanded the case to the district court to apply *Marcus* 's standard and to allow the plaintiffs to "offer some reliable and administratively feasible alternative that would permit the court to determine" whether the class was ascertainable. 725 F.3d at 355. That same month, we decided *Carrera v. Bayer Corp.*, an appeal involving the proposed certification of a "class of consumers who purchased Bayer's One–A–Day WeightSmart diet supplement in Florida." 727 F.3d at 303. To prove ascertainability, the plaintiff proposed using retailer records and class member affidavits attesting to purchases of the diet supplement. *Id.* at 308. Although we opined that retail records "may be a perfectly acceptable method of proving class membership," we noted that the plaintiff's proposed retail records did not identify a single purchaser of the Bayer diet supplement. *Id.* at 308–09. We therefore rejected the proposed methods of proving ascertainability.

As to the use of affidavits, we began by explaining that in *Marcus*, "[w]e cautioned 'against approving a method that would amount to no more than ascertaining by potential class members' say so.' " *Id.* at 306 (quoting *Marcus*, 687 F.3d at 594). We rejected the plaintiff's proposed methodology to screen out false affidavits because the plaintiff's expert declaration did not establish that the "affidavits will be reliable" or "propose a model for screening claims." *Id.* at 311. Remarkably, even the named plaintiff could not recall whether he had purchased the diet supplement. *Id.* at 311 n. 9.

[10] We were careful to specify in *Carrera* that "[a]lthough some evidence used to satisfy ascertainability, such as corporate records, will actually identify class members at the certification stage, ascertainability only requires the plaintiff to show that class members *can be identified.*" *Id.* at 308 n. 2 (emphasis added). Accordingly, there is no records requirement. *Carrera* stands for the proposition that a party cannot merely provide assurances to the district court that it will later meet Rule 23's

requirements. *Id.* at 306. Nor may a party "merely propose a method of ascertaining a class without any evidentiary support that the method will be successful." *Id.* at 306, 307, 311.

Following the *Marcus-Hayes-Carrera* trilogy, we again considered the issue of ascertainability in *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d at 184–85. There we affirmed the denial of certification of a Rule 23(b)(3) class on predominance grounds, but noted that the district court also erred in denying certification based on ascertainability. *Id.* at 184–85. We concluded that the district court's analysis "conflated ascertainability with the predominance inquiry." *Id.* at 184. The predominance and ascertainability inquiries are distinct, we explained, because " 'the ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort to mini-trials, whereas the predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence.' " *Id.* (quoting *Hayes*, 725 F.3d at 359).

[11] Ascertainability is closely tied to the other relevant preliminary inquiry we addressed in *Marcus*, 687 F.3d at 592, that plaintiffs provide a proper class definition, Fed.R.Civ.P. 23(c)(1)(B). A trial court also needs a class to be "defined with reference to objective criteria" and some assurance that there can be "a reliable and administratively feasible mechanism for determining whether putative class members fall ***165** within the class definition," *Hayes*, 725 F.3d at 355, in order to rigorously analyze the explicit Rule 23(a) and (b) certification requirements, *Comcast*, 133 S.Ct. at 1432. When combined with the separate class-definition requirement from *Wachtel*, that a class-certification order contain "a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified," 453 F.3d at 187–88, district courts have the necessary tools to determine whether "a party seeking to maintain a class action" can " 'affirmatively demonstrate his compliance' with Rule 23." *See Comcast*, 133 S.Ct. at 1432 (quoting *Wal–Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011)).

And after certification, a trial court is tasked with providing "the best notice that is practicable" to the class members under Rule 23(c)(2)(B), " 'including individual notice to all class members who can be identified through reasonable effort.' " *Larson v. AT & T Mobility LLC*, 687 F.3d 109, 123 (3d Cir.2012) (quoting Fed.R.Civ.P. 23(c)(2)(B)). We are "stringent in enforcing th[at] individual notice requirement." *Id.* at 126. The separate ascertainability requirement ensures that class members can be identified after certification, *Carrera*, 727 F.3d at 308 n. 2, and therefore better prepares a district court to "direct to class members the best notice that is practicable under the circumstances," Fed.R.Civ.P. 23(c)(2)(B); *see also Larson*, 687 F.3d at 117 n. 10, 123–31 (applying the Rule 23(c)(2)(B) requirement).[8]

[8] An additional post-certification concern relates to the argument by some that the class-action device fails in its purpose if a judgment or settlement cannot be executed without resulting in a largely *cy pres* fund. *E.g., Marek v. Lane*, —— U.S. ——, 134 S.Ct. 8, 9, 187 L.Ed.2d 392 (2013) (Roberts, C.J., statement respecting denial of certiorari) (noting "fundamental concerns surrounding the use of [*cy pres*] remedies in class action litigation"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172–74 (3d Cir.2013) (upholding limited use of *cy pres* distributions but cautioning against largely *cy pres* funds). Although we need not address the propriety of *cy pres* funds in this case, we do note that the risk of a *cy pres* fund is reduced, even if not entirely removed, when a court has affirmatively concluded that there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *See Hayes*, 725 F.3d at 355.

The ascertainability inquiry is narrow. If defendants intend to challenge ascertainability, they must be exacting in their analysis and not infuse the ascertainability inquiry with other class-certification requirements. As we said in *Carrera*, "ascertainability only requires the plaintiff to show that class members can be identified." 727 F.3d at 308 n. 2. This inquiry will not be relevant in every case and is independent from the other requirements of Rule 23.

B.

[12] With this explanation of ascertainability in mind, we will reverse the District Court for four reasons. First, the District Court abused its discretion by misstating the rule governing ascertainability. Second, the District Court engrafted an "underinclusive" requirement that is foreign to our ascertainability standard. Third, the District Court made an errant conclusion of law in finding that an "overly broad" class was not ascertainable. And fourth, the District Court improperly applied the legal principles from *Carrera* to the issue of whether "household members" could be ascertainable.

1.

The District Court misstated the law governing ascertainability by conflating our standards governing class definition ***166** with the ascertainability requirement. The District Court prefaced its discussion with the section header "Ascertainability and Defining the Class." The District Court then stated the following as the applicable legal standard:

> "As an 'essential prerequisite' to the Rule 23 analysis, the Court must consider 1) whether there is a precisely defined class and 2) whether the named Plaintiffs are members of the class. *Marcus v. BMW of North America*, 687 F.3d 583, 596 (3d Cir.2012). ... At the first step of the analysis, determining whether there is a precisely defined class entails two separate and important elements: 'first, the class must be defined with reference to objective criteria' and 'second, there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.' *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir.2013)."

Byrd, 2014 WL 1316055, at *3.

[13] Although the District Court is correct that the class definition requirements are applicable to a class-certification order, *Wachtel*, 453 F.3d at 187–88, and that class definition is a valid preliminary consideration, *Marcus*, 687 F.3d at 591–92, it was not the reason the District Court denied class certification. What the District Court described as the two requirements for a "precisely defined class" was in fact the inquiry relevant to the *ascertainability* standard. *See Hayes*, 725 F.3d at 355. In blending the issue of ascertainability with that of class definition (which *Marcus* took pains to address as separate preliminary inquiries that preceded the Rule 23 analysis, 687 F.3d at 591–94), the District Court erred.

Also troubling is the District Court's discussion of class membership. *Byrd*, 2014 WL 1316055, at *3, *6 n. 8. The question of "whether the named Plaintiffs are members of the class" has nothing to do with either the requirements of a class definition, *Wachtel*, 453 F.3d at 187–88, or the ascertainability standard, *Marcus*, 687 F.3d at 592–94. In fact, the District Court's citation to *Marcus* on this point related to its discussion of numerosity—not class definition or ascertainability. *See Byrd*, 2014 WL 1316055, at *3 (citing *Marcus*, 687 F.3d at 596 (discussing numerosity)). And although the District Court generally cited to *Hayes*, in that case we addressed "membership" not as relating to ascertainability and only with regard to whether the named plaintiff had Article III standing to sue as a class representative. *See Hayes*, 725 F.3d at 360–61. In sum, we conclude that the District Court should have applied nothing more or less than the ascertainability test that has been consistently laid out by this Court.

2.

The District Court also abused its discretion in determining that the proposed classes were not ascertainable because they were underinclusive. The District Court reasoned that although the records provided by Aaron's "may reveal the computers upon which Detective Mode was activated and the owner/lessee of that computer," the Byrds did "not provide an administratively feasible way to determine whose information was surreptitiously gathered." *Byrd*, 2014 WL 1316055, at *5. For this reason, the District Court explained, the proposed "class definition [did] not encompass all those individuals whose information ha[d] been surreptitiously gathered by Aaron's franchisees." *Id.* But the District Court was looking to an old, no-longer-operative class definition, *see supra*, n. 3, because the Byrds had redefined the proposed classes by eliminating the requirement that a class member's information ***167** was "intercepted" or "surreptitiously gathered."[9] Thus, the District Court's analysis was not germane to the Byrds' proposed class definitions or the relevant bases for class membership.

[9] The ECPA permits any person to bring a civil action "whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter." 18 U.S.C. § 2520(a); *see also id.* § 2511. The Byrds' operative complaint alleges that the PC Rental Agent "allows its installer (here, the rent-to-own store) to remotely and surreptitiously build and activate the 'Detective Mode' function on the laptop over the Internet and through the Aaron's Inc. and DesignerWare websites." *Byrd*, 2014 WL 1316055, at *2. The relevant statutory terms were discussed because the District Court observed that "not all information gathered surreptitiously will constitute an 'interception' of the 'contents' of an 'electronic communication' " by the PC Rental Agent. *Id.*

[14] Defendants contend that "underinclusiveness" was an appropriate consideration in support of the denial of class certification. They rely on a district court decision, *Bright v. Asset Acceptance, LLC*, 292 F.R.D. 190, 197 (D.N.J.2013), to support their argument. But "whether the defined class specifies a particular group that was *harmed* during a particular time frame, in a particular location, in a particular way," *Bright*, 292 F.R.D. at 197 (emphasis added), is not included in our ascertainability test. Further, requiring such specificity may be unworkable in

some cases and approaches requiring a fail-safe class. *See Messner v. Northshore Univ. HealthSystem,* 669 F.3d 802, 825 (7th Cir.2012) (explaining that a fail-safe class is "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim"). Defining the class "in terms of the legal injury," *In re Nexium Antitrust Litig.,* 777 F.3d at 22, is not the same as requiring the class to be defined "with reference to objective criteria." *See Hayes,* 725 F.3d at 355.

[15] We decline to engraft an "underinclusivity" standard onto the ascertainability requirement. Individuals who are injured by a defendant but are excluded from a class are simply not bound by the outcome of that particular action. *Cf., e.g., Taylor v. Sturgell,* 553 U.S. 880, 884, 894, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) ("Representative suits with preclusive effect on nonparties include properly conducted class actions."); *United States v. Mendoza,* 464 U.S. 154, 158 n. 3, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984) ("Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action."). In the context of ascertainability, we have only mentioned "underinclusivity" with regard to whether the *records* used to establish ascertainability were sufficient, *see Hayes,* 725 F.3d at 355 (citing *Marcus,* 687 F.3d at 594), not whether there are injured parties that could also be included in the class. Requiring a putative class to include all individuals who may have been harmed by a particular defendant could also severely undermine the named class representative's ability to present typical claims (Fed.R.Civ.P. 23(a)(3)) and adequately represent the interests of the class (Fed.R.Civ.P. 23(a)(4)). The ascertainability standard is neither designed nor intended to force all potential plaintiffs who may have been harmed in different ways by a particular defendant to be included in the class in order for the class to be certified.

3.

Similarly, the District Court also abused its discretion in determining that the proposed classes were not ascertainable ***168** because they were "overly broad." The District Court concluded that "more problematic for Plaintiffs is the fact that the alternative definitions are overly broad" because "[n]ot every computer upon which Detective Mode was activated will state a claim under the ECPA for the interception of electronic communication." *Byrd,* 2014 WL 1316055, at *5. There was, again, no reference to our ascertainability precedent or that of any other court.

Defendants also rely on *Bright* for the proposition that a class is not "ascertainable if it is decoupled from the underlying allegations of harm rendering it ... overbroad." *See Bright,* 292 F.R.D. at 197. They also cite myriad cases from other district courts and courts of appeals to justify the consideration of overbreadth in our ascertainability standard. Such applications of the ascertainability standard fuel the precise mistake we attempted to correct in *Grandalski v. Quest Diagnostics Inc.*—that is, injecting the explicit requirements of Rule 23 into the ascertainability standard without actually analyzing those requirements under the correct portion of Rule 23. *See* 767 F.3d at 184 n. 5 ("Predominance and ascertainability are separate issues."). And at oral argument, Defendants conceded that the District Court's analysis regarding overbreadth was really identifying a potential predominance problem.

Defendants' reliance on authority outside this Circuit does nothing to bolster their argument. For example, they extensively discuss *Oshana v. Coca–Cola Co.,* 472 F.3d 506 (7th Cir.2006), to support the proposition that an overbroad class is not ascertainable. In *Oshana,* the Seventh Circuit considered whether a class consisting of "all Illinois purchasers of fountain Diet Coke from March 12, 1999 forward" was certifiable under Rule 23. *Id.* at 509. The Court required that in addition to satisfying the Rule 23(a) and (b) requirements, a "plaintiff must also show ... that the class is indeed identifiable as a class." *Id.* at 513. Reasoning that the proposed class could "include millions who were not deceived and thus have no grievance under the [Illinois Consumer Fraud and Deceptive Practices Act]," the Seventh Circuit affirmed the district court's determination that the proposed class was "not sufficiently definite to warrant class certification." *Id.* at 513–14.

The "definiteness" standard from *Oshana* is distinguishable from our Circuit's ascertainability requirement. The standard applied in the Seventh Circuit is based on the premise that because "[i]t is axiomatic that for a class action to be certified a 'class' must exist," *Simer v. Rios,* 661 F.2d 655, 669 (7th Cir.1981), a class definition must be *definite enough* for the class to be ascertained, *Alliance to End Repression v. Rochford,* 565 F.2d 975, 977 (7th Cir.1977). In short, the class must be "indeed identifiable as a class." *Oshana,* 472 F.3d at 513. A class may be indefinite where "the relevant criteria for class membership [is] unknown." *Jamie S. v. Milwaukee Pub. Sch.,* 668 F.3d 481, 495 (7th Cir.2012). Although this doctrine is similar to the parameters laid out in our ascertainability cases, it blends together our Circuit's ascertainability and class definition requirements. *Compare Oshana,* 472 F.3d at 513, *with Hayes,* 725 F.3d at 355, and *Wachtel,* 453 F.3d at 187–88. As we made patent in *Marcus,* we address class definition and ascertainability as separate inquiries. 687 F.3d at 591–94.

Defendants also argue that a proposed class is overbroad "where putative class members lack standing or have not been injured." Defendants' argument conflates the issues of ascertainability, overbreadth (or predominance), and Article III standing. We have explained that the issue of ***169** standing is separate from the requirements of Rule 23. *See, e.g., Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir.2000) ("In addition to the requirements expressly enumerated in Rule 23, class actions are also subject to more generally applicable rules such as those governing standing and mootness."). To the extent Defendants meant to challenge any potential differences between the proposed class representatives and unnamed class members, such differences should be considered within the rubric of the relevant Rule 23 requirements—such as adequacy, typicality, commonality, or predominance. *See Grandalski*, 767 F.3d at 184–85; *see also Holmes*, 213 F.3d at 137–38 (discussing an "overbroad" class as requiring individual determinations that fail to satisfy Rule 23(b)(3)'s predominance requirement). Conversely, if Defendants intended to argue that all putative class members must have standing, such challenges should be squarely raised and decided by the District Court. Because the District Court has yet to conduct a rigorous analysis of the Rule 23 requirements, we decline to address these issues in the first instance.

The Byrds' proposed classes consisting of "owners" and "lessees" are ascertainable. There are "objective records" that can "readily identify" these class members, *cf. Grandalski*, 767 F.3d at 184 n. 5, because, as explained by the District Court, "Aaron's own records reveal the computers upon which Detective Mode was activated, as well as the full identity of the customer who leased or purchased each of those computers." *Byrd*, 2014 WL 1316055, at *5. The District Court's conclusion to the contrary was an abuse of discretion.

4.

[16] The District Court again abused its discretion in determining that "household members" were not ascertainable. The District Court concluded that the inclusion of the phrase "household members" in the Byrds' revised class definitions was vague and not ascertainable. In the Byrds' reply brief on the motion for class-action certification, they asserted in a footnote that "[h]ousehold members can easily be objectively verified through personal and public records. And their usage of the owner/lessee's computers can also be easily objectively established." The Magistrate Judge recommended denying class certification because the Byrds did not define "household members" or prove by a preponderance of the evidence how " 'household members' can be verified through personal and public records."

In their objections to the Magistrate Judge's Report and Recommendation, the Byrds argued that they intended "the plain meaning of 'household members.' " On appeal, the Byrds continue to argue that they intended the plain meaning of "household members" to be "all of the people, related or unrelated, who occupy a housing unit." By way of example, the Byrds cite to multiple definitions used in government documents for census, taxation, and immigration purposes. With these definitions, they contend that the simple act of confirming membership would mean matching addresses in public records with that of an owner or lessee that had already been identified.

The "household members" of owners or lessees are ascertainable. Although the government documents cited by the Byrds do contain slight variations on the definition of a household member (as noted by Defendants), the Byrds presented the District Court with various ways in which "household members" could be defined and how relevant records could be used to verify the identity of household members. ***170** Because the District Court summarily adopted the Magistrate Judge's Report and Recommendation, and no oral argument was held on the class-certification motion, we are left to wonder why the District Court determined that the Byrds' explanation in their objections to the Report and Recommendation was inadequate.

The parties also dispute whether the phrase "household members" is often used in class definitions. Although it is true that the phrase "household members" has been used in other class definitions,[10] we decline the invitation categorically to conclude that the use of this phrase will always have sufficient precision in the ascertainability context. The inquiry in any given case should be whether a class is "defined with reference to objective criteria" and whether there is a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes*, 725 F.3d at 355. Whether a class is ascertainable is dependent on the nature of the claims at issue. But as used here, "household members" is a phrase that is easily defined and not, as Defendants argue, inherently vague.

[10] *See, e.g., Ortiz*, 527 U.S. at 827 n. 5, 119 S.Ct. 2295 (reversing the approval of an asbestos settlement class that happened to include "household member" in the class definition); *Amchem Prods., Inc.*, 521 U.S. at 602, 117 S.Ct. 2231 (analyzing the validity of a class that included "household members" on grounds other than

ascertainability); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 619 & n. 3, 633 (3d Cir.1996) (including in the class "occupational exposure of a spouse or household member to asbestos, or to asbestos-containing products"), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 108 (E.D.Pa.2013) (settlement class definition that included "household members"), *appeal dismissed* (July 25, 2013); *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 319 (E.D.Pa.1993) (using a similar definition as *Georgine*).

We also conclude that Defendants' and the District Court's reliance on *Carrera* is misplaced. In *Carrera*, we concluded that the plaintiffs' proposed reliance on affidavits alone, without any objective records to identify class members or a method to weed out unreliable affidavits, could not satisfy the ascertainability requirement. 727 F.3d at 311. Here the Byrds presented the District Court with multiple definitions of class members and simply argued that a form similar to those provided could be used to identify household members. This is a far cry from an unverifiable affidavit, or the absence of any methodology that can be used later to ascertain class members. *See id.* at 310–11.

[17] The Byrds' proposed method to ascertain "household members" is neither administratively infeasible nor a violation of Defendants' due process rights. Because the location of household members is already known (a shared address with one of the 895 owners and lessees identified by the Byrds), there are unlikely to be "serious administrative burdens that are incongruous with the efficiencies expected in a class action." *Marcus*, 687 F.3d at 593 (citation and internal quotation marks omitted). There will always be some level of inquiry required to verify that a person is a member of a class; for example, a person's statement that she owned or leased an Aspen Way computer would eventually require anyone charged with administering the fund resulting from a successful class action to ensure that person is actually among the 895 customers identified by the Byrds. Such a process of identification does not require a " 'mini-trial,' " nor does it amount to " 'individualized fact-finding,' " *Carrera*, 727 F.3d at 307 (quoting *Marcus*, 687 F.3d at 594), and ***171** indeed must be done in most successful class actions.

[18] Certainly, *Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken. If that were the case, no Rule 23(b)(3) class could ever be certified. We are not alone in concluding that "the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification." *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539–40 (6th Cir.2012) (collecting cases). To hold otherwise would seriously undermine the purpose of a Rule 23(b)(3) class to aggregate and vindicate meritorious individual claims in an efficient manner. Fed.R.Civ.P. Rule 23(b)(3) 1966 advisory committee's notes (Rule 23(b)(3) "achieve[s] economies of time, effort, and expense, and promote[s] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

As to Defendants' contention that their due process rights would be violated, *Carrera* counsels that this due process right relates to the ability to "challenge the proof used to demonstrate class membership." 727 F.3d at 307. Here, the Byrds are not relying solely on unverified affidavits to establish ascertainability. *See id.* at 307–08; *Hayes*, 725 F.3d at 356 (reasoning that a class is not ascertainable where "the only proof of class membership [was] the say-so of putative class members"). Any form used to indicate a household member's status in the putative class must be reconciled with the 895 known class members or some additional public records. Defendants are not foreclosed from challenging the evidence the Byrds propose to use.

In sum, the District Court erred in its application of *Carrera* and in concluding that the phrase "household members" was inherently vague.

C.

In light of the errors discussed above, we will remand to the District Court to consider the remaining Rule 23 certification requirements in the first instance. At oral argument and in their briefs, Defendants urged us to read the District Court's ruling as one on predominance, independently review the record in this case, and conclude that the Byrds' proposed classes fail to satisfy Rule 23(b)(3)'s predominance requirement. Defendants contend that the elements of an ECPA claim, particularly that each plaintiff must show the interception of the "contents" of an "electronic communication," create insurmountable barriers to proving predominance. *See* 18 U.S.C. § 2511(1)(a), (c), (d). Formidable though these barriers may be, they are not for us to address in the first instance.

Beginning in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160–161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), through its recent decision in *Comcast Corp. v. Behrend*, 133 S.Ct. at 1432, the

Supreme Court has repeatedly emphasized the need for a district court to conduct a rigorous analysis of the evidence in support of certification under Rule 23. "By their nature, interlocutory appeals are disruptive, time-consuming, and expensive"; thus, it makes sense to allow the "district court an opportunity to fine-tune its class certification order ... rather than opening the door too widely to interlocutory appellate review." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294–95 (1st Cir.2000) (exercising discretionary authority under Rule 23(f) in order to give a district court "a better sense as to which aspects of the class certification decision might reasonably be open to subsequent reconsideration"). This is consistent with ***172** the narrow, yet flexible, set of considerations we address in granting a Rule 23(f) petition. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164–65 (3d Cir.2001); *see also In re Nat'l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 578 n. 9 (3d Cir.2014). We best exercise appellate review when the dust has settled and a district court has fully considered a motion for class-action certification.

What is more, a close reading of Defendants' response briefs demonstrates how they continue to conflate ascertainability with the other relevant requirements of Rule 23. We write again to emphasize that at class certification, Rule 23's explicit requirements go beyond and are separate from the ascertainability inquiry. Precise analysis of *relevant* Rule 23 requirements will always be necessary. We therefore decline to go beyond the scope of the District Court's opinion.

IV.

The District Court erred both in relying on an errant conclusion of law and improperly applying law to fact. Accordingly, we will reverse and remand for further consideration in light of this opinion.

RENDELL, Circuit Judge, concurring:

I agree with the majority that, under our current jurisprudence, the class members here are clearly ascertainable. Indeed, as Judge Smith points out, "Aaron's own records reveal the computers upon which Detective Mode was activated, as well as the full identity of the customer who leased or purchased each of those computers." (Maj. Op. at 169) (quoting *Byrd v. Aaron's, Inc.*, No. 11–cv–101, 2014 WL 1316055, at *5 (W.D.Pa. Mar. 31, 2014)). It is hard to argue otherwise, and I do not. However, I do suggest that the lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means, and to explain how this implicit requirement fits in the class certification calculus, indicate that the time has come to do away with this newly created aspect of Rule 23 in the Third Circuit. Our heightened ascertainability requirement defies clarification. Additionally, it narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended.

Historically, the ascertainability inquiry related to whether the court will be able to determine who fits within the class definition for purposes of award or settlement distribution and the preclusion of the relitigation of claims.[1] It is a test that scrutinizes the class definition, and properly so.[2] But this is now only the first element of our two-part test for ascertainability. ***173** *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir.2012); *see also Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir.2013) ("The class must be defined with reference to objective criteria.").

1 *See* Manual for Complex Litigation (Fourth) § 21.222 (2004) ("An identifiable class exists if its members can be ascertained by reference to objective criteria."); Joseph M. McLaughlin, McLaughlin on Class Actions § 4:2 (11th ed.2014) ("[C]lass members need to be able to determine with certainty from a class notice whether they are in the class.... If the class definition is amorphous, persons may not recognize that they are in the class, and thus may be deprived of the opportunity to object or opt out."); 5 James Wm. Moore et al., Moore's Federal Practice ¶ 23.21[1] (3d ed.1999) (noting that a class must be "susceptible to precise definition").

2 Courts have found classes to be ascertainable when the class definition is sufficiently specific. *Compare Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 593 (C.D.Cal.2008) (holding that prospective plaintiffs are capable of determining whether they were class members because class definition included purchasers of a certain vehicle who paid for the replacement of a certain part in a certain time period), *and Bynum v. District of Columbia*, 214 F.R.D. 27, 31–32 (D.D.C.2003) (holding that prospective class members are capable of identifying themselves based on the dates of their incarceration included in the class definition), *and Pigford v. Glickman*, 182 F.R.D. 341, 346 (D.D.C.1998) (holding that class members are capable of identifying themselves based on whether they had applied for participation in a USDA federal farm program during the specified dates), *with In re Copper Antitrust Litig.*, 196 F.R.D. 348, 350–51, 358–60 (W.D.Wis.2000) (refusing to certify class of "[a]ll copper or metals dealers ... that purchased

physical copper" during a specified time period "at prices expressly related to LME or Comex copper future prices" because the class definition fell "far short of communicating to copper purchasers what they need to know to decide whether they are in or outside the proposed class," in that the definition failed to explain the terms "copper or metals dealers," "physical copper," and "expressly related to").

In 2012 we adopted a second element, namely, requiring district courts to make certain that there is "a reliable, administratively feasible" method of determining who fits into the class, thereby imposing a heightened evidentiary burden. *Marcus*, 687 F.3d at 594. We have precluded class certification unless there can be objective proof—beyond mere affidavits—that someone is actually a class member. *Id.; accord Carrera v. Bayer Corp.*, 727 F.3d 300, 308–12 (3d Cir.2013). This concept has gained traction in recent years.[3] I submit that this "business record" or "paper trail" requirement is ill-advised.[4] In most low-value consumer class actions, prospective class members are unlikely to have documentary proof of purchase, because very few people keep receipts from drug stores or grocery stores. This should not be the reason to deny certification of a class.[5] As Judge Ambro's dissent from the denial of the petition for rehearing en banc in *Carrera* noted, "[w]here a defendant's lack of records ... make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class, the consumers who make up that class should not be made to suffer." *Carrera v. Bayer Corp.*, No. 12–2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J. dissenting).

[3] Several courts have denied class certification on ascertainability grounds similar to our current ascertainability test. *See, e.g., Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 689 (S.D.Fla.2014) (denying certification of class suing defendant for mislabeling product as "All Natural" in violation of Florida's deceptive advertising law because potential class members were unlikely to remember if they bought a product with such a label); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 299 F.R.D. 555, 572 (E.D.Tenn.2014) (denying certification of class suing drug manufacturer for violating antitrust laws because plaintiffs did not propose feasible model for screening fraudulent claims); *Brey Corp. v. LQ Mgmt. LLC*, No. 11–cv–718, 2014 WL 943445, at *1 (D.Md. Jan. 30, 2014) (denying certification of class suing defendant for violating antitrust laws because ascertaining who belongs in the class would require individualized fact-finding).

[4] While the majority cites a footnote in *Carrera* as standing for the proposition that we have no "records requirement," the class in *Carrera* failed the ascertainability test because there were no records from which the class members could be ascertained with certainty. (Maj. Op. at 164 (citing *Carrera*, 727 F.3d at 308, n. 2)).

[5] *See, e.g., McCrary v. Elations Co., LLC*, No. 13–cv–242, 2014 WL 1779243, at *8 (C.D.Cal. Jan. 13, 2014) ("It appears that pursuant to *Carerra* [sic] in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, *Carerra* [sic] prohibits certification of the class."); *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 535 (N.D.Cal.2012) (warning that, if lack of receipts dooms certification, "there would be no such thing as a consumer class action" in cases concerning false or deceptive labeling of small-value items).

Records are not the only way to prove that someone is in a class. It is the trial ***174** judge's province to determine what proof may be required at the claims submission and claims administration stage. It is up to the judge overseeing the class action to decide what she will accept as proof when approving the claim form. Could not the judge decide that, in addition to an individual's "say so" that he is a member of the class, the claimant needs to submit an affidavit from another household member or from his doctor corroborating his assertion that he did, in fact, take Bayer aspirin? Is that not permissible and appropriate? Yet, we foreclose this process at the outset of the case by requiring that plaintiffs conjure up all the ways that they might find the evidence sufficient to approve someone as a class member.

This puts the class action cart before the horse and confuses the class certification process, as this case makes manifest. The irony of this result is that it thwarts "[t]he policy at the very core of the class action mechanism," i.e., "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)). Indeed, "[a] class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* We have effectively thwarted small-value consumer class actions by defining ascertainability in such a way that consumer classes will necessarily fail to satisfy for lack of adequate substantiation.[6] Consumers now need to keep a receipt or

a can, ***175** bottle, tube, or wrapper of the offending consumer items in order to succeed in bringing a class action.

[6] Small-value consumer class actions certified by district courts nationwide would not pass muster in our Circuit because of our heightened ascertainability requirement. *See, e.g., Hughes v. Kore of Ind. Enter., Inc.,* 731 F.3d 672, 675 (7th Cir.2013) (reversing district court's order decertifying class of consumers who brought action against owners of automatic teller machines for failing to post notice on machines that they charged fee for use despite difficulty in determining which plaintiffs would have been deceived by lack of notice); *Ebin v. Kangadis Food Inc.,* 297 F.R.D. 561, 567 (S.D.N.Y.2014) (certifying class of consumers who claimed defendant placed misleading "All Natural" label on olive oil bottles even though plaintiffs were unlikely to have retained receipts or packaging proving membership in class); *Boundas v. Abercrombie & Fitch Stores, Inc.,* 280 F.R.D. 408, 417 (N.D.Ill.2012) (certifying class of plaintiffs who possessed promotional gift cards stating "No expiration date" that were voided by defendant or told that the cards had expired or been voided and thrown away cards even though some class members would only be able to claim class membership through affidavit); *see also Lilly v. Jamba Juice Co.,* No. 13–cv–2998, 2014 WL 4652283, at *4 (N.D.Cal. Sept. 18, 2014) (certifying class of consumers who purchased frozen smoothie kits containing label "All Natural" where product allegedly contained various artificial ingredients and where consumers did not necessarily have proof of purchase); *Allen v. Hyland's, Inc.,* 300 F.R.D. 643, 658–59, 672 (C.D.Cal.2014) (certifying class of plaintiffs who purchased homeopathic products where packaging contained alleged misrepresentations even though class members would have to self-identify without corroborating evidence); *Forcellati v. Hyland's, Inc.,* No. 12–1983, 2014 WL 1410264, at *5, *13 (C.D.Cal. Apr. 9, 2014) (certifying class of plaintiffs who purchased children's cold or flu products within a prescribed time frame despite purchasers' lack of proof of purchase and defendants' lack of records identifying consumers who purchased their products via retail intermediaries); *McCrary,* 2014 WL 1779243, at *7–8 (certifying class of purchasers of dietary joint supplement containing allegedly deceptive label despite plaintiffs' lack of proof of purchase); *Astiana v. Kashi Co.,* 291 F.R.D. 493, 500 (S.D.Cal.2013) (certifying class of consumers who purchased cereal and snack products labeled as "All Natural" or "Nothing Artificial" but which allegedly contained synthetic ingredients in violation of various false advertising laws even though plaintiffs unlikely to have retained receipts or containers); *Ries,* 287 F.R.D. at 535 (certifying class of consumers who purchased iced tea with "natural" on label despite plaintiffs' lack of proofs of purchase, finding self-identification sufficient for ascertainability).

The policy rationales that we cite in support of our expanded ascertainability requirement are relatively weak when compared to the significant policy justifications that motivate the class action mechanism. We have noted three rationales for our ascertainability requirement: (1) eliminating administrative burdens "incongruous" with the efficiencies of a class action, (2) protecting absent class members' rights to opt out by facilitating the best notice practicable, and (3) protecting the due process rights of defendants to challenge plaintiffs' proffered evidence of harm. *Marcus,* 687 F.3d at 593.

Eliminating "administrative burdens" really means short-circuiting the claims process by assuming that when individuals file claims, they burden the court. But claims administration is part of every class action. Imposing a proof-of-purchase requirement does nothing to ensure the manageability of a class or the "efficiencies" of the class action mechanism; rather, it obstructs certification by assuming that hypothetical roadblocks will exist at the claims administration stage of the proceedings.[7]

[7] *See Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004) ("[T]here is a big difference from the standpoint of manageability between the liability and remedy phases of a class action.").

Denying class certification due to concerns about providing notice to class members makes little sense. Rule 23 requires the "best notice that is practicable under the circumstances" to potential class members after a class has been certified.[8] Potential difficulties in providing individualized notice to all class members should not be a reason to deny certification of a class. As the Supreme Court noted in *Phillips Petroleum Co. v. Shutts,* due process is satisfied when notice is "reasonably calculated" to reach the defined class. 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). The question is not whether every class member will receive actual individual notice, but whether class members can be notified of their opt-out rights consistent with due process. *See Dusenbery v. United States,* 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002) (holding that due process did not require actual notice to federal prisoner of his right to contest civil forfeiture, but rather, due process must be "reasonably calculated" to apprise a party of the pendency of an action).[9]

[8] Fed.R.Civ.P. 23(c)(2)(B).

[9] *See also Girsh v. Jepson,* 521 F.2d 153, 159 n. 12 (3d

> Cir.1975) ("We do not mean to indicate that individual notice must be given in all cases."). Furthermore, Rule 23 requires courts to provide the best practicable notice *after* a class has been certified. *See* Fed.R.Civ.P. 23(c)(2)(B).

The concerns regarding the due process rights of defendants are unwarranted as well, because there is no evidence that, in small-claims class actions, fabricated claims impose a significant harm on defendants. The chances that someone would, under penalty of perjury, sign a false affidavit stating that he or she bought Bayer aspirin for the sake of receiving a windfall of $1.59 are far-fetched at best. On the other hand, while most injured individuals will find that it is not worth the effort to claim the few dollars in damages that the class action can provide, in the aggregate, this sum is significant enough to deter corporate misconduct. Our ascertainability doctrine, by focusing on making absolutely ***176** certain that compensation is distributed only to those individuals who were actually harmed, has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing. As Judge Posner, writing for the Court of Appeals for the Seventh Circuit, stated in *Hughes v. Kore of Indiana Enterprise, Inc.*, "when what is small is not the aggregate but the individual claim ... that's the type of case in which class action treatment is most needful.... A class action, like litigation in general, has a deterrent as well as a compensatory objective." 731 F.3d 672, 677 (7th Cir.2013). The rigorous application of the ascertainability requirement translates into impunity for corporate defendants who have harmed large numbers of consumers in relatively modest increments.[10] Without the class action mechanism, corporations selling small-value items for which it is unlikely that consumers would keep receipts are free to engage in false advertising, overcharging, and a variety of other wrongs without consequence.

[10] As one court has noted,

> [a]dopting the *Carrera* approach would have significant negative ramifications for the ability to obtain redress for consumer injuries. Few people retain receipts for low-priced goods, since there is little possibility they will need to later verify that they made the purchase. Yet it is precisely in circumstances like these, where the injury to any individual consumer is small, but the cumulative injury to consumers as a group is substantial, that the class action mechanism provides one of its most important social benefits.

Lilly, 2014 WL 4652283, at *4 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)).

The concerns about defendants' due process rights are also overblown because damages liability under Rule 23 is determined in the aggregate: courts determine the extent of a defendant's monetary liability to the entire class. Therefore, whether an individual can establish membership in that class does not affect the rights of defendants not to pay in excess of their liability. *Carrera* 's concern that allowing undeserving individuals to claim damages will dilute deserving class members' recoveries is unrealistic in modern day class action practice, and it makes little sense when used to justify the wholesale dooming of the small-value class action such that *no* injured plaintiff can recover at all. Moreover, this is an issue to be dealt with in the implementation of a class action settlement, not in conjunction with ascertaining the class for purposes of certification. Concerns about claims processing should not be used to scuttle these types of class actions altogether.

The policy concerns animating our ascertainability doctrine boil down to ensuring that there is a surefire way to get damages into the hands of only those individuals who we can be 100% certain have suffered injury, and out of the hands of those who may not have. However, by disabling plaintiffs from bringing small-value claims as a class, we have ensured that other policy goals of class actions—compensation of at least *some* of the injured and deterrence of wrongdoing, for example—have been lost. In small-claims class actions like *Carrera*, the real choice for courts is between compensating a few of the injured, on the one hand, versus compensating none while allowing corporate malfeasance to go unchecked, on the other. As such, where there are small-value claims, class actions offer the only means for achieving individual redress. As the Supreme Court stated in *Eisen*, when individual damages are so low, "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all." 417 U.S. at 161, 94 S.Ct. 2140. The ***177** concern that we are defeating what is at the "core" of what the class action was designed to accomplish is very real. As Judge Rakoff noted in certifying a class over objections regarding ascertainability based on receipts or documentation:

> [T]he class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit. Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the

action.

Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 567 (S.D.N.Y.2014). While a rigorous insistence on a proof-of-purchase requirement, which our heightened ascertainability jurisprudence has imposed, keeps damages from the uninjured, it does an equally effective job of keeping damages from the truly injured as well, and "it does so with brutal efficiency."[11]

[11] Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small–Claims Consumer Class Actions*, 59 DePaul L.Rev. 305, 308 (2010).

Therefore, while I concur in the judgment, I suggest that it is time to retreat from our heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23. I would therefore reverse the District Court's ruling, and hold that (1) hereafter, our ascertainability analysis will focus on class definition only, and (2) the District Court's analysis regarding the second prong of our ascertainability test was unnecessary. We thus would instruct the District Court to proceed to determine whether the class can be certified under the traditional mandates of Rule 23. Until we revisit this issue as a full Court or it is addressed by the Supreme Court or the Advisory Committee on Civil Rules, we will continue to administer the ascertainability requirement in a way that contravenes the purpose of Rule 23 and, in my view, disserves the public.

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7. Discovery Subcommittee: Requester Pays

Outside groups have urged that the discovery rules should be amended to include some form of "requester pays" provisions. Members of Congress have shown an interest in this topic. In response to this interest, the Discovery Subcommittee has carried the topic on its agenda while it devoted its attention to the major projects that developed the rules that the Supreme Court adopted and transmitted to Congress last April. Further consideration has led to the conclusion that the time has not yet come for active work on the questions that must be answered in developing any "requester pays" proposal.

The first set of questions address just what form of changes might be made. The most sweeping change would be an across-the-boards rule that a party requesting discovery must pay all the reasonable costs of responding. The proponents of change do not seem to be pressing that approach. If adopted, it would work a fundamental transformation in the system of civil litigation that has developed around the innovative discovery regime created on the adoption of the Civil Rules in 1938. Although modern discovery was created and expanded through the Rules Enabling Act process and natural evolution in the courts, it has become a necessary element in enforcing a broad range of laws. It shapes and implements policies that reach beyond private interests to profound social and political goals. Drastic revision could be justified only by a sense of crisis that does not now appear.

More modest changes seem to be the goal of those who seek change. The central concept is that some measure of discovery should continue as it has been — a request is made, and the party who responds bears all the costs of understanding the request, gathering all the information that bears on the response, and responding. But the cost of more extensive discovery reaching beyond an appropriate core should be borne by the requesting party. This approach might be undertaken in an individual case-management order. A first "wave" of discovery would be defined, to be followed by consideration of the need for further discovery and of the question whether the requesting party should bear part or all of the costs of responding. This approach could work when the parties can define the core in relation to the needs of a particular case. One judge who uses this approach has reported that it works so well that the question of a "requester pays" order has never had to be addressed. But any attempt to expand this approach into a general rule that depends on an all-purpose concept of "core" is not now possible. Even for cases that fall within a common descriptive category — wrongful discharge, for example — a workable definition is thwarted by variations in the specific claim, the total amount of information that may be available, the difficulty of uncovering the information and reviewing it, and the pre-discovery distribution of information among the parties. The task of defining core discovery has seemed simply unworkable if it is to be approached in the context of present discovery rules that are framed to apply across the full

range of civil litigation in the district courts.

There are additional difficulties in any general attempt to adopt rules that require the requesting party to bear the costs of discovery beyond some core. An immediate difficulty is policing the costs that may be claimed for responding. What of the party who reports devoting 1,000 hours to searching for information that, in the end, could not be found? Or the party who claims the fees of attorneys who devoted many costly hours to reviewing information for privilege, work-product, and other protections? Workable answers might be reached in practice, but only after many years of uncertainty. They could be alleviated in some measure by establishing discretion to award only some part of the response costs, but that could prove difficult to administer.

Another question goes to the reallocation of costs after judgment on the merits. One relatively clear case would be put by a requester who paid to discover information that enabled the requester to win the judgment. Should the requester recover the cost? Or is that simply another cost of victory that should be borne by the victor, just as attorney fees must be borne in many cases? One step down the line would be the victor who paid to discover both information that was essential to the victory and also other information that was not important, perhaps not even used. Many steps would follow.

These questions of implementation are supplemented by concerns that address the basic concept of imposing cost-bearing after the completion of core discovery. Often the concerns focus on the need for discovery in specific subjects of litigation, and on the imbalance of information typically available to plaintiffs and defendants. Strong statements of these concerns were made in hundreds of public comments on the package of discovery amendments transmitted by the Supreme Court to Congress last April. These statements led to revisions in some of the proposals as published. The most readily identifiable changes were retraction of the proposals to reduce the presumptive number of depositions to 5 per side and the presumptive number of interrogatories to 15, while creating a first-time presumptive limit to 25 requests to admit (apart from requests addressed to the authenticity of documents). Individual wrongful-discharge litigation featured prominently in these comments. The comments noted that individual employees often have very little discoverable information, while employers hold virtually all of the information needed to prove the case against them. A proposal that would require the employee to pay part of the employer’s response costs would be strongly resisted, a sentiment that would

be paralleled across many other fields of litigation. The resistance would draw in part from the costs that may be incurred in responding to discovery requests for electronically stored information. And the concern would regularly focus on access to justice, emphasizing the role of litigation in advancing important public interests as well as protecting the private rights of an individual plaintiff.

Another reason supports deferring consideration of this difficult topic. In a matter of weeks, we will know whether the discovery amendments now pending in Congress will take effect this December 1. They are part of a broader package that is designed to reduce the cost of discovery and to encourage universal, early, hands-on case management. As with all rules changes, assessment of the outcome will be possible only after a few years of experience and, perhaps, experimentation. One outcome may be an increase in the frequency of case-specific management that allocates the costs of discovery reaching beyond the central information clearly important to the case. Another outcome may be that the refocused emphasis on the scope of discovery permitted by Rule 26(b)(1) will of its own force lead to more nearly proportional discovery, more often. And yet another may be that cost bearing is at times addressed through Rule 26(c) protective orders, given the new emphasis on specifying terms that include "the allocation of expenses," although as observed in the Committee Note this provision "does not imply that cost-shifting should become a common practice." The landscape may look different in five years. If experience proves the value of the new rules, there may be less apparent reason to move toward more general cost-bearing rules. But if experience shows that discovery costs are excessive, there may be stronger reason to undertake the arduous task of moving toward more general rules.

Finally, there is one further, although contingent, reason to go slowly. Initial disclosure rules continue to command attention. Several states have adopted rules that go beyond Civil Rule 26(a)(1)(A). The recently developed protocols for individual employment claims seem to be proving successful. It may be that initial disclosure practices can be developed, most likely in ways that assume the cost of disclosure is borne by the party making the disclosures. Any such developments would shed a different light on the value of allocating the costs of such discovery as remains necessary after, or along with, the initial disclosures.

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TAB 8A

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8. Rule 62: Stays of Execution

Introduction

These Rule 62 proposals are made to the Appellate and Civil Rules Committees by a joint subcommittee appointed by the two Committees. The Subcommittee was chaired by Judge Scott Matheson. Its other members include Judge Peter Fay, Douglas Letter, Kevin Newsom, and Virginia Seitz.

The Rule 62 proposals reorganize present subdivisions (a) through (d) and make several additions to rule text. The provisions in present subdivisions (a) and (c) that address judgments for injunctions, receiverships, and accountings in actions for patent infringement are consolidated in a single subdivision (d), with a few minor style revisions. The provisions that address stays of execution on judgments for other remedies provide the occasion for the additions to rule text. Most of those judgments simply award money, but some award other forms of relief such as foreclosing a lien or quieting title.

It seems likely that most of the revisions do no more than make explicit the authority to do things that courts have understood can be done in the shadow of present Rule 62. The broad theme is to recognize authority to grant, modify, or refuse a stay in all of the circumstances addressed by — or perhaps inadvertently omitted from — the present rule. Any of those actions can be taken with or without security. For example, the proposals allow the court to refuse or vacate an automatic stay, and at the same time decide whether to require the judgment creditor to post security as a condition of permitting present enforcement. The proposal expressly recognizes the opportunity to post security in a form other than a bond, and makes it clear that a party who wishes to do so can arrange security in a single undertaking that will run from the moment judgment is entered through completion of the final acts on appeal. Throughout, the emphasis is on trial court discretion to adjust to the circumstances of a particular case.

Proposed Rule 62(a) identifies three types of stay: The automatic stay, present Rule 62(a); a stay initiated by the judgment debtor by posting a bond or other security, succeeding to the "supersedeas" bond provisions of present Rule 62(d); and a stay ordered by the court, expanding the provisions of present Rule 62(b) for a stay pending disposition of post-trial motions. Proposed Rule 62(b) allows the court, for good cause, to refuse a stay sought by posting a bond, and to dissolve any stay or modify its terms. Proposed Rule 62(c) establishes broad discretion to require and set appropriate terms for security or to deny security.

The next section briefly describes the origins of the Rule 62 work and several of the broad concerns that emerged as the work progressed. Detailed discussion of the proposed rule text is provided in the concluding section.

Developing the Proposal

Rule 62 came to the agenda by two paths, one beginning in the Appellate Rules Committee and the other in the Civil Rules Committee.

The Appellate Rules Committee took up Rule 62 at the suggestion of a member who was interested in making it clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. This beginning led to a comprehensive report by Professor Struve, Reporter for the Committee, examining many different aspects of Rule 62 stays.

The Civil Rules Committee first looked at Rule 62 in response to a question raised by a district judge. The question arose from a complication in the relationship between automatic stays and the authority to order a stay pending disposition of a post-judgment motion. The complication arose from the Time Computation Project that led each of the several advisory committees to reset many of the time periods set in the various sets of rules. Before the Time Project changes, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(a) extinguished the automatic stay 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rule 50, 52, 59, or 60. The Time Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset expiration of the automatic stay at 14 days after entry of judgment. The result was that the automatic stay expired half-way through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The judge submitted a suggestion that Rule 62 should be amended to make it clear that a stay could be issued before a post-judgment motion is made. The Committee decided against any immediate action. It believed that there is inherent authority to issue a stay as part of the court’s necessary control over its own judgment. It concluded that the usual conservative approach made it sensible to wait to see whether actual problems might emerge in practice.

Consultation through the joint Subcommittee led to consideration of many other questions. The central questions are described here. Other questions are addressed in looking at particular provisions of the proposal.

The "gap" between expiration of the automatic stay and the later time allowed to make a post-trial motion was addressed from the beginning. The simplest adjustment would be to rewrite the rule to allow the court to enter a stay at any time after expiration of the automatic stay. That would make explicit the authority that should exist in any event. It would avoid any need to worry whether a pre-motion stay could be ordered only on a party's representation that a post-judgment motion would, or likely would, be made. But it would add to the burdens imposed on the judgment debtor, to some extent vitiating the advantages sought by extending the motion time to 28 days. The alternative was to adopt two approaches. Proposed Rule 62(a)(3) authorizes the court to order a stay at any time, including a stay that supersedes the automatic stay before it expires. And proposed Rule 62(a)(1) extends the time of the automatic stay to 30 days. That time allows two days beyond the time for making a post-trial motion, an advantage that could become important in cases in which decisions whether to appeal may be affected by the absence of any post-trial motion. It also provides a brief window to arrange security for a court-ordered stay.

The possible disadvantage of extending the automatic stay is the risk that it will become easier to take steps to defeat any execution, ever. That risk is addressed at the outset of proposed Rule 62(a)(1): the automatic stay takes hold "unless the court orders otherwise." There may be no automatic stay at all. Or the court may supersede the automatic stay by ordering a stay under Rule 62(a)(3). So too, proposed Rule 62(b) authorizes the court to dissolve or modify a stay for good cause — the automatic stay is included. The countering risks that denial of a stay may work irremediable injury on the judgment debtor are addressed by the court's authority under proposed Rule 62(c) to require security on refusing or dissolving a stay.

The single-security question turned attention to present Rule 62(d)'s provisions for a stay by supersedeas bond. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present rule language that recognizes this procedure "If an appeal is taken," and directs that "[t]he bond may be given upon or after filing the notice of appeal." It should not be hard work to redraft to dispel the implication that a pre-appeal bond is premature. Proposed Rule 62(a)(2) does that by enabling a party

to obtain a stay by providing a bond "at any time after judgment is entered." So too, it is easy enough to add language authorizing security in a form other than a bond. Proposed Rule 62(a)(2) does that by recognizing "a bond or other security."

But consideration of the stay by supersedeas bond raised the question whether there is an absolute right to a stay. Practitioners report a belief that this provision establishes a right to stay execution on posting a satisfactory bond. This belief may be supported by the rule text: "the appellant may obtain a stay by supersedeas bond * * *." There may be some offsetting implication in the further provision that the stay takes effect when the court approves the bond, although approval may be limited to considering the amount of the security, the form of the bond, and the assurance that the bond can be made good. This question was discussed at length. In the end, the Subcommittee concluded that it is better to recognize authority to refuse a stay for good cause even if adequate security is tendered. Even as to a money judgment, delay in execution may inflict harms that cannot be compensated by full payment of the judgment, with interest, after affirmance. Judgments for other forms of relief may present risks comparable to the risks posed by staying an injunction. Staying a declaration of title may defeat a favorable transaction that cannot be accurately measured in setting a bond amount. (The alternative of exercising Enabling Act authority to allow bond provisions for "delay damages" might invite significant difficulties.)

The final major decision was to reorganize and carry forward the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement. They are joined in proposed subdivision (d). One change is proposed. Present Rule 62(c) incorporates some, but not all, of the words used in the interlocutory injunction appeal statute, 28 U.S.C. § 1292(a)(1). The Rule refers to "an interlocutory order or final judgment that grants, dissolves, or denies an injunction." The formula in § 1292(a)(1) is more elaborate. Although the Subcommittee is not aware of any difficulties arising from the differences, it has seemed wise to forestall any arguments about appeals from such orders as those that "continue" or "modify" an injunction.

The Subcommittee also considered present Rules 62(e) and (f). Rule 62(e) is captured in its tag line: "Stay without Bond on an Appeal by the United States, Its Officers, or Its Agencies." Representatives of the Department of Justice reported that they were not aware of any difficulties arising from this

subdivision. Rule 62(f) invokes state law that entitles a judgment debtor to a stay when a judgment is a lien on the judgment debtor's property under the law of the state where the court is located. Professor Struve's memorandum described potential problems of the sort that might be expected when incorporating state law. These questions were put aside for want of any clear sense whether there are significant problems in practice, or how to address any problems that might be identified.

Details of The Rule

Automatic Stay:

(a) STAY OF EXECUTION. Except as provided in Rule 62(d), execution on a judgment, or proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.

Two points may be noted about the introduction. It begins with a reminder that subsection (d) sets out different rules for judgments in actions for an injunction or receivership, or for an accounting in an action for patent infringement. It also carries forward the part of the present rule that includes "proceedings to enforce" the judgment. It would be a legitimate use of the Committee Note to note that a court might distinguish between execution and other proceedings to enforce the judgment. Discovery in aid of future execution, and perhaps security orders aimed to preserve discovered assets, would be an obvious example. The current draft Note has not gone that far, in part for uncertainty whether courts or even litigants need to be reminded of this distinction in the present rule.

The automatic stay itself is discussed above. The draft adds express authority to defeat the automatic stay, either from the inception by ordering otherwise, by superseding it under Rule 62(a)(3), or by dissolving it under subdivision (b). The automatic stay is extended from 14 days to 30 days. And the "gap" between the end of the 14th day and the time to make post-judgment motions is eliminated.

Stay by Bond:

(2) *By Bond or Other Security.* A party may at any time after judgment is entered obtain a stay by providing a bond or other security. The stay takes effect when the court

approves the bond or other security and remains in effect for the time specified in the bond or security.

As noted above, the time for seeking a stay by posting a bond is advanced from "upon or after filing the notice of appeal" to "at any time after judgment is entered." This change securely establishes the practice that allows a party to obtain a single security that lasts from expiration of the automatic stay – or, with fast action, from the entry of judgment – through completion of all proceedings on appeal.

The proposed rule text also expressly recognizes authority to accept "other security." As compared to bond premiums, for example, a party might find it advantageous to place the amount of the judgment in escrow. A showing that the judgment debtor has assets that amply ensure future execution also might displace any need for security; subsection (c) confirms the court's authority to approve that outcome.

The provision that the bond takes effect when the court approves the bond is taken verbatim from present Rule 62(d); "other security" is added. No attempt is made, either in rule text or Committee Note, to explore whatever measure of discretion has been established in determining whether to approve the bond. Similar discretion is appropriate as to other forms of security, although the parties are likely to exercise greater inventiveness, exacting closer scrutiny by the court. Most importantly, no suggestion is offered either way as to the possibility that the court's authority to approve the security establishes authority to deny a stay on any terms – that question is important under the present rule, but is expressly answered by subdivision (b) of the proposal, which establishes authority to refuse a stay under subdivision (a)(2) for good cause.

The further provision that the bond remains in effect for the time specified complements the time for posting, reinforcing the opportunity to provide a single bond or other security that runs from judgment through post-judgment proceedings and appeal.

By Court Order:

(3) *By Court Order*. The court may at any time order a stay that remains in effect until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

"[A]t any time" does at least two things. It authorizes the court to issue a stay that displaces the automatic stay, either before the automatic stay arises with entry of judgment or during its initial life. The purpose of displacing the stay with the court-ordered stay may be to require security, or perhaps to establish other terms. It also ensures the power established by present Rule 62(b) to issue a stay pending disposition of post-judgment motions.

The "remains in effect" language confirms the "single bond" for a court-ordered stay, whether or not security is required. The bracketed clause is redundant, but it may be a helpful reminder to court and parties that the time can run to completion of all proceedings in the court of appeals.

Refusing, Dissolving, or Modifying:

(b) REFUSING, DISSOLVING, OR MODIFYING STAY. The court may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a stay or modify its terms.

This subdivision explicitly establishes the court's authority to control the stay process.

The first authority, described above, is to refuse a stay even though a judgment debtor is prepared to post full security. Good cause is required to refuse. This outcome may depart from the present rule – at least some lawyers believe that posting adequate security establishes an indefeasible right to a stay. But there may be circumstances in which immediate execution seems important because the judgment creditor will be irreparably harmed by delay, because only wasting (or disappearing) assets can be identified for execution, because the judgment orders relief that is not for money but also is not an injunction, or for still other reasons. Protection for the judgment debtor is provided by proposed subdivision (c), which expressly authorizes the court to demand that the judgment creditor post security as a condition of refusing the stay.

The other aspects of the court's control extend to dissolving a stay or modifying its terms. Again, good cause is required. This authority extends to all stays. In addition to the (a)(2) stay-by-bond, it includes the (a)(3) court-ordered stay. It also includes the (a)(1) automatic stay, although the occasions to dissolve or modify may be reduced by the initial authority to "order otherwise" before the automatic stay even takes effect. The court also may supersede an automatic stay by

issuing a stay under Rule 62(a)(3). (There is no explicit "good cause" requirement to forestall the automatic stay before it springs into effect under (a)(1), but the court's discretion will be influenced by the same factors that enter into a good-cause determination.)

Security:

(c) SECURITY ON GRANTING, REFUSING, OR DISSOLVING A STAY. The court may, on entering a stay or on refusing or dissolving a stay, require and set appropriate terms for security or deny security.

This subdivision is new. It recognizes full authority as to security. The increased emphasis on authority to deny any stay is supported by expressly recognizing authority to require security as a condition of refusing or dissolving a stay.

Injunctions, etc.:

Proposed subdivision (d) consolidates the provisions of present subdivisions (a) and (c) that address judgments in actions for an injunction or receivership, or for an accounting in an action for patent infringement. Apart from new subdivision, paragraph, and subparagraph designations, the only change is to incorporate all of the many terms used in 28 U.S.C. § 1292(a)(1) to establish jurisdiction of appeals from interlocutory orders with respect to injunctions.

Rule 62: September 2015 Draft

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) STAY OF EXECUTION. Except as provided in Rule 62(d), execution on a judgment, and proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.

(2) *By Bond or Other Security.* A party may at any time after judgment is entered obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(3) *By Court Order.* The court may at any time order a stay

that remains in effect until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

(b) REFUSING, DISSOLVING, OR MODIFYING STAY. The court may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a stay or modify its terms.

(c) SECURITY ON GRANTING, REFUSING, OR DISSOLVING A STAY. The court may, on entering a stay or on refusing or dissolving a stay, require and set appropriate terms for security or deny security.

(d) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms [for bond or other terms] that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

* * * * *

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or patent accounting order are reorganized by consolidating them in new subdivision (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivision (d) applies to both interlocutory injunction orders and final judgments that grant, refuse, or otherwise deal with an injunction.

The provisions for staying a judgment are revised to clarify several points. The automatic stay is extended to 30 days, and it is made clear that the court may forestall any automatic stay or vacate an automatic stay before it expires. The former provision for a court-ordered stay "pending the disposition of" enumerated post-judgment motions is superseded by establishing authority to order a stay at any time. This provision closes the apparent gap in the present rule between expiration of the automatic stay after 14 days and the 28-day time set for making these motions. The court's authority to issue a stay designed to last through final disposition on any appeal is established, and it is made clear that the court can accept security by bond or by other means, can set the amount of security, can dispense with any security, and can order security as a condition of refusing or dissolving any stay. A single bond or other form of security can be provided for the life of the stay.

The provision for obtaining a stay by posting a supersedeas bond is changed. New subdivision (a)(2) provides for a stay by providing a bond or other security at any time after judgment is entered. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security. The stay may be refused, dissolved, or modified by the court for good cause under subdivision (b). Refusal can be accomplished by refusing to approve the bond or other security.

Subdivisions (a), (b), and (c) address stays of all judgments, except as provided in subdivision (d). The determination whether to direct a stay and what its terms should be may be more complicated when a judgment includes provisions for relief other than — or in addition to — a payment of money,

and that are outside subdivision (d). Examples include a variety of non-injunctive orders directed to property, such as enforcing a lien, or quieting title.

Some orders that direct a payment of money may not be a "judgment" for purposes of Rule 62. An order to pay money to the court as a procedural sanction is a matter left to the court's inherent power. The decision whether to stay the sanction is made as part of the sanction determination. The same result may hold if the sanction is payable to another party. But if some circumstance establishes an opportunity to appeal, the order becomes a "judgment" under Rule 54(a) and is governed by Rule 62.

Special concerns surround civil contempt orders. The ordinary rule is that a party cannot appeal a civil contempt order, whether it is compensatory or coercive. A nonparty, however, can appeal a civil contempt order. If appeal is available, effective implementation of the contempt authority may counsel against any stay. This need is adequately protected by the discretion to refuse a stay. So too, a stay of an order committing a person for contempt is left to the court's inherent control of the contempt power and the authority to refuse a stay.

New Rule 62(a)(1) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. Thirty days of automatic stay also is sufficient in cases governed by a 60-day appeal period.

Amended Rule 62(a)(1) expressly recognizes the court's authority to supersede the automatic stay. Several reasons may suggest that the court act. Among them are these: A stay may be justified, but security seems appropriate. The court can make an appropriate order under Rule 62(a)(3). Or immediate execution may seem important. Again, the court can make an appropriate order, and under Rule 62(c) may order security as a condition of denying a stay.

Subdivision 62(a)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (a)(2) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule text makes explicit the opportunity to post security in a form other than a bond. The stay remains in effect for the time specified in the bond or security — a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari.

Rule 62(a)(2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as its form, terms, and quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. Some local rules set higher figures. [E.D. Cal. Local Rule 151(d) and D.Kan. Local Rule 62.2, for example, set the figure at one hundred and twenty-five percent of the amount of the judgment.] The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62(d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant’s means. And, although the stay is ordinarily available on posting a bond or other security, the court may for good cause refuse the stay, or dissolve or modify it, under subdivision (b). A stay with lesser or different security may be obtained by court order under subdivision (a)(3).

Subdivision (a)(3) recognizes the court’s broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. This broad authority is supplemented by subdivision (b), which authorizes modification or dissolution of a stay for good cause. The court may set terms for any of these actions under subdivision (c). A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation — for example, a contract claim may be fully secured by a payment bond. So too the court may, under subdivision (c), require security on refusing or

dissolving a stay. Security may be an important safeguard when immediate execution seems important but may entail consequences that cannot, absent security, be cured if the judgment on appeal reverses, vacates, or modifies the judgment.

Subdivision (b) authorizes the court to dissolve or modify any stay for good cause, including one initially obtained by posting bond under subdivision (a)(2).

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a)(1) applies as on any appeal. The appellee may seek a stay under subdivisions (a)(2) and (3), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well as to the appellant, the appellant also may seek a stay.

Style Revision

Professor Kimble has made a first pass at styling the proposed draft. He may wish to suggest further revisions. The current version is set out here. When the time comes, the Subcommittee will consider final styling decisions.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) AUTOMATIC STAY. Except as provided in Rule 62(e), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) *Stay by Other Means.*

(1) By Court Order. The court may at any time order a stay that remains in effect until a designated time[, which may be as late as issuance of the mandate on appeal].

(2) By Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security. But the court may, for good cause, refuse the stay.

(c) *Dissolving, or Modifying a Stay.* The court may, for good cause, dissolve a stay or modify its terms.

(d) *Security on Granting, Refusing, or Dissolving a Stay.* On entering a stay or on refusing or dissolving one, the court may require and set appropriate terms for security or deny security.

(e) STAY OF INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDERS. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(f) *Injunction Pending an Appeal.* While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms [for bond or other terms] that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

Present Rule 62

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) *Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.* Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(b) *Stay Pending the Disposition of a Motion.* On appropriate terms for the opposing party's security, the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) *Injunction Pending an Appeal.* While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(d) *Stay with Bond on Appeal.* If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) *Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies.* The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its

agencies or on an appeal directed by a department of the federal government.

(f) *Stay in Favor of a Judgment Debtor Under State Law.* If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) *Appellate Court's Power Not Limited.* This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings--or suspend, modify, restore, or grant an injunction--while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) *Stay with Multiple Claims or Parties.* A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

TAB 8B

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Notes, Appellate-Civil Subcommittee September 24, 2015

The Appellate-Civil Subcommittee met by conference call on September 24, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. John D. Bates; Hon. Peter Fay; H. Thomas Byron, Esq.; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Julie Wilson, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson opened the meeting by observing that the Notes describing the August 20 meeting showed that serious progress was made. The most important change in the August draft was recognition that it had been a mistake to move away from present Rule 62 by addressing only judgments for money in the provisions for judgments other than injunctions, receiverships, and accountings in proceedings for patent infringement. Present Rule 62 addresses all judgments. Something should be said about judgments that are not for money, but also are not injunctions. Familiar examples may be a judgment quieting title or foreclosing a lien. Restoring provisions for non-money judgments, however, leads to complex drafting issues if we retain the provision establishing a presumption that the bond for a stay obtained by posting bond should be set at 125% of the amount of the judgment. The answer may be that complex rule provisions are worthwhile. The answer instead may be that it is better to let the rule go on as it has been, silent as to the amount of the bond or other security.

Discussion began with a related issue. Even under earlier drafts that addressed only judgments for money, problems could be foreseen as to some forms of money awards. Sanctions and civil contempt are common examples. It does not seem likely that a procedural sanction should be subject to an automatic stay, nor many civil contempt awards — particularly those designed to encourage compliance. Often those orders are not immediately appealable. And it is important that the trial court's authority be maintained. Those questions are addressed in the draft Committee Note. There was no further discussion of this point.

Discussion then moved to the decision to return to the present scope of Rule 62, addressing all "judgments." The Department of Justice has become concerned about the effects of stays on types of non-money, non-injunctive judgments it often wins. The concerns focus on the part of the draft that extends the automatic stay from 14 days to 30 days. Civil asset forfeiture is one setting. Often the government seizes property incident to a criminal prosecution, but rather than seek criminal forfeiture waits for a conviction and then initiates civil forfeiture proceedings. The seized property can be expensive to hold and maintain — common examples include

boats, automobiles, and houses. Storage and maintenance costs can be steep. And the value of the assets may decline directly with time. An added 16 days of automatic say may aggravate these costs.

Discussion pointed out that an additional 16 days after a prolonged period may not seem a significant marginal aggravation of preservation costs. A fix, even if narrowly tailored to these and perhaps some other kinds of cases, would intrude on the purpose to close the "gap" in the present rule between expiration of the automatic stay after 14 days and the 28 days allowed to make any of the post-judgment motions that suspend appeal time and, under the present rule, trigger the first express provision for a court-ordered stay. The court, moreover, seems to have useful authority to address preservation costs and diminishing value assets through Supplemental Rule G(7). Most importantly, the draft rule text establishing the automatic stay begins: "Unless the court orders otherwise * * *." The court has wide discretion to deny any automatic stay when judgment is entered. In addition, draft Rule 62(b) allows the court to dissolve any stay for good cause.

The Department has similar concerns about other types of non-money judgments. An example is provided by disputes with ranchers who use government land to graze their cattle. The judgment may do no more than declare that the United States owns the land and the defendant has been trespassing. An automatic stay for 30 days could aggravate the damage done by the trespassing cattle. But the same ameliorating features of the draft rule apply.

More generally, it may be that the United States has more frequent encounters than most judgment creditors with judgment debtors who are bent on dissipating or concealing their assets.

One suggestion was that perhaps the rule text should be expanded to provide some sort of criterion to guide the court’s exercise of discretion in determining whether to "order otherwise" against an automatic stay. The consensus was that it is better to provide open-ended discretion. The judge knows the case and parties, and often will confront circumstances that can be addressed only awkwardly by any rule language. No change will be made on this score.

It also was noted that the Committee Note makes clear what the text of draft Rule 62(b) clearly says: the court can, for good cause, dissolve any stay.

This part of the discussion concluded with the Department’s undertaking to consider the issue further. If it decides to recommend some changes in rule text to still further alleviate the risks posed by a 16-day extension of the automatic stay, it will

also consider whether it would be better to work through Supplemental Rule G than through Rule 62.

Discussion then turned to the questions that arise from adding to a rule that covers all judgments a provision that a stay obtained by posting a bond should be secured by a bond or other security for one hundred and twenty-five percent of the amount of the judgment. The questions were illustrated by bracketed language introduced to draft Rule 62(a)(2): "The bond must be for an amount equal to [at least] one hundred and twenty-five percent of the [net] amount of any monetary award [plus an amount for any other relief not governed by Rule 62(d)]." (Draft Rule 62(d) carries forward the provisions of present Rule 62(a) and (c) for injunctions, receiverships, and patent accountings.)

"[A]t least" 125% of the monetary award was added as an introduction to the provision for adding "an amount for any other relief not governed by Rule 62(d)." The judgment, for example, might both quiet title and award damages for trespass. A stay of the declaration of title might encourage the defendant to continue the activities found to be trespassing. If that is the effect of the stay, the amount of the bond should reflect the ongoing damages caused by continuing the activities that may be affirmed on appeal to be trespassing. This part of the drafting seems reasonably clear, but only on reflecting about the circumstances it addresses. It may not seem so clear to those who come to it afresh.

Greater complications are suggested by referring to the "net" amount of the judgment. This word opens onto cases in which two or more parties win awards. Even the simplest situations can call for close thought. Suppose the judgment awards $40,000 to the plaintiff and $50,000 to the defendant. In most circumstances, the awards will be set off, leaving the defendant with a net recovery of $10,000. (Set off may not be available in some circumstances — in some states, if both awards are covered by liability insurance, each party may be allowed to recover the full award. That is simply one added wrinkle.) The amount to be secured — or 125% of that amount — will depend on who appeals, and to what purpose. If the plaintiff is the only appellant, a stay imposes only a $10,000 risk on the defendant, whether the plaintiff seeks only to increase the award to the plaintiff, to decrease the award to the defendant, or both. At least in most circumstances, the defendant’s failure to appeal means that the award to the plaintiff cannot be decreased, and the award to the defendant cannot be increased. If the defendant is the only appellant, the award to the plaintiff cannot be increased and the award to the defendant cannot be decreased. No matter whether the defendant seeks to diminish the award to the plaintiff or to increase its own award, the plaintiff will not be

entitled to any recovery even if the judgment is affirmed. There is no apparent need for security for the plaintiff. But things become much messier if both parties appeal. Should the court begin by looking at the appellant? Or should it shift focus when there is a cross-appeal? Does the answer depend on whether both parties want a stay — and is there a risk of strategic behavior in that dimension?

No obvious or easy solution was found so long as the 125% super-security provision remains. The original proponent of adopting this feature from the practice in some states, and some local rules in the federal courts, suggested that the problems that arise on close consideration may justify putting aside any effort to address this in rule text. The Committee Note could mention the possibility of setting a presumptive amount by local rule, perhaps referring to one or two of the existing local rules. That would leave the rule where we find it — present Rule 62 does not say anything about the amount of the bond.

An alternative might be to add a few words to rule text: "the bond must be for an appropriate amount." No such language appears in the present rule. It might interfere with the current practice, recognized by at least some courts, allowing the bond to be set at an amount below the amount of the judgment, perhaps as low as zero. This risk would be offset by the provisions in draft Rule 62(b) and (c) that allow the court to modify the terms of a stay and to set appropriate terms for security, but there could be some internal dissonance in the rule text. This possibility was rejected.

The conclusion was that the provision for 125% security should be removed. The accompanying rule text complications would disappear with it.

Other issues were discussed briefly.

The tag line for draft Rule 62(a)(2) is "By bond or Other Security." It is not elegant. It reflects a choice to drop the reference to "supersedeas bond" in present Rule 62(d). This choice reflects the determination that the rule text should refer expressly to "other security." The rule still could refer to "supersedeas bond or other security," but the traditions of supersedeas bonds might carry implications inconsistent with the deliberately pragmatic and discretionary focus of the draft rule. No changes were suggested.

Another question is raised by bracketed language in draft Rule 62(a)(2): "A party may at any time [after judgment is entered] obtain a stay by providing a bond or other security * * *." The

question posed by the bracketed words relates to one of the original purposes that launched reexamination of Rule 62 stays. A party may wish to secure a single bond that covers the entire period from termination of the automatic stay (if there is one) through the conclusion of all proceedings on appeal. Present Rule 62(d) authorizes an appeal by bond "If an appeal is taken." Draft Rule 62(a)(3), on the other hand, provides that a court may at any time order a stay. Might it be that a party who prefers to obtain a stay by posting a bond or other security will wish to arrange the bond even before judgment is entered? But should the rule cater to any such wish? The court may make the terms of the judgment clear some time before judgment is actually entered, particularly if there is a lapse between entry of the dispositive order and entry of judgment on a separate document. But both present Rule 62(d) and draft Rule 62(a)(2) provide that the stay becomes effective only when the court approves the bond (or other security). A party who is anxious to proceed by way of bond or other security, depending on a court order only for approval of the bond or other security, can submit the security to the court with a request that it be approved at the same time as judgment is entered. There is no need for a stay until judgment is entered. Further discussion concluded that there is no need for "jumping the gun." "after judgment is entered" will be retained in rule text without brackets.

Earlier discussions explored the possibility that the provisions for a stay on posting a bond or other security might be combined in a single paragraph with the provisions for a stay ordered by the court. An illustrative draft was prepared. Brief discussion concluded that greater clarity is achieved by the present separation into paragraphs (1), (2), and (3).

Draft Rule 62(d) combines the provisions of present Rule 62(a) and (c) for judgments for injunctions, receiverships, and patent accountings. But it revises present (c) by adopting the full language of 28 U.S.C. § 1292(a)(1) for appeals from interlocutory orders with respect to injunctions. The statutory language is comprehensive. The effort to streamline it is worthy. But departures from the statute create a risk of unintended gaps. This change was approved.

The next step will be circulation of revised rule text to reflect these decisions. A revised draft Committee Note also will be circulated. The plan is to receive written (likely e-written) comments by early October, facilitating preparation of a draft that can be submitted for discussion at the October meeting of the Appellate Rules Committee and the November meeting of the Civil Rules Committee.

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Notes, Appellate-Civil Subcommittee August 20, 2015

The Appellate-Civil Subcommittee met by conference call on August 20, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. John D. Bates; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; Virginia Seitz, Esq.; Hon. Jeffrey Sutton, Chair, Standing Committee; and Rebecca Womeldorf, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson began the meeting by noting that as compared to the "mid-stream" point of progress reached at the start of the June 30 conference call, the work on Civil Rule 62 has moved further along the stream. It may prove useful to begin by confirming that the Subcommittee has indeed reached substantial agreement on some of the points discussed in earlier meetings.

30-Day Automatic Stay: Draft Rule 62(a)(1) extends the automatic stay from the 14 days provided by the current rule to 30 days. One purpose is to eliminate the "gap" between expiration of the 14 days and the 28-day time allowed to make post-judgment motions under Rules 50, 52, 59, and (for this purpose) 60. The present rule seems to contemplate a court-ordered stay only "pending disposition" of those motions. It does not address the availability of a stay in contemplation of a motion that has not yet been made.

It was noted that the Time Project established a presumption in favor of measuring time in 7-day intervals. Most of the time provisions set at less than 30 days were reset to 7, 14, or 21 days. When it was decided that more than 14 days were needed for many motions under Rules 50, 52, and 59, the initial choice was to set them at 30 days. Existing 30-day periods were kept at 30 days, rather than reduce them to 28 days or expand them to 35 days. But this convention was put aside because a timely motion under these rules (and a Rule 60 motion made within the same time) suspends appeal time. Setting the time at 28 days avoided the prospect that a party uncertain whether to appeal would not know whether a timely post-judgment motion had been made on the last day of a 30-day appeal period.

Against this background, setting the automatic stay at 30 days has the advantage that a party who has lost a judgment has not only 28 days to decide whether to make a post-judgment motion, but the remaining two days both to file a notice of appeal and take steps to secure a stay after expiration of the automatic stay. The full advantage of the 30-day appeal period might be diminished if a party, still uncertain whether to appeal, must arrange a continuing stay 2 days before finally deciding whether to appeal.

The 30-day period was accepted.

It was noted that many civil actions have a 60-day period to appeal because the government is a party. The Committee Note should not convey any misleading impression on this score. But there is no need to provide an automatic 60-day stay in those cases.

The automatic stay provision came on for further discussion in conjunction with the question whether the court should have authority to dissolve a stay obtained by posting a bond or other security for 125% of the amount of the judgment. Present Rule 62(a) does not speak to dissolution of the automatic stay. Why should it be amended to begin "unless the court orders otherwise"? The concern is that some judgment debtors may manage to dissipate or conceal assets even during a 14-day period. Extension to 30 days will exacerbate this risk. And the automatic stay arises automatically, without any bond. This explanation came to be accepted in comparing the provision for obtaining a stay by providing a bond or other security. So too, although "good cause" is required by the draft provision for dissolving a stay, there is no need to add a "good cause" threshold for ordering away an automatic stay. Courts will understand that they should not act lightly. This discussion was summarized by observing that with the automatic stay, discretion is important "because of bad people." It is different with an appeal-bond stay: "you're putting up a lot of money to get the bond," and there is less need to dissolve it.

Further attention should be paid to the wording of draft (b)(1). It recognizes authority to require security for a stay under draft (a)(3), "or on denying or lifting a stay." "Lifting" seems an unusual word in the Rules. "Vacating" or "dissolving" are more familiar. "Denying" might be "refusing," a common word in the rules. And there may be a subtle difference — "denying" might be read back to imply authority to forestall a stay by posting bond. "Refusing" may not pose the same risk, since it implies that action by the court had to be sought in the effort to obtain a stay. A stay obtained without more on posting bond does not involve court action.

Single Bond: Recognizing the practice of securing a single bond that extends from expiration of the automatic stay through the completion of all appeal proceedings that may be taken was generally approved in June. Brief discussion confirmed that this approach should go forward.

Right to a Stay: The question whether the court can dissolve or modify a stay obtained by filing a full-value appeal bond was not firmly resolved in June. Present Rule 62(d) says "the appellant may

obtain a stay by supersedeas bond * * *." Practitioners widely believe that there is a right to a stay on posting a bond in the full amount of the judgment. The current draft of a new Rule 62(a)(2) sets the amount of the bond at one hundred and twenty-five percent of the amount of the [money] judgment. One Subcommittee member went looking for cases that might authorize dissolution of a stay obtained by a supersedeas bond. None were found. That is not conclusive; obscure practices may exist or even thrive below the most visible levels.

This question was initially tied to the questions that arise when a sanction or civil-contempt order directs payment of money. But those pose broader questions about the risks that a stay may undermine the court's authority to compel compliance with its orders. They will be considered separately.

The question was then confronted directly. The reason to recognize authority to dissolve a stay obtained by posting a 125% bond is that eventual full payment after affirmance, with interest, may not compensate for harm done by the stay. The continuing example is the judgment creditor whose business is on the brink of failure. Collecting on the judgment after the business has failed may afford no real protection. It might be that a litigation finance firm would be willing to advance the value of the judgment, but that may not always be available and is likely to be costly. Concern about recapture could be met by the court's authority under draft (b)(1) to require security on "denying or lifting" a stay. [Those words may be revised — perhaps to "refusing or dissolving" a stay.]

One member expressed strong support for recognizing authority to dissolve a stay obtained by posting a bond or other security.

This question is reflected in the draft in two stages. Subdivision (a)(2), drawing from present Rule 62(d), provides that a party "may * * * obtain a stay" by providing the bond. This language is similar to Civil Rule 23(b), where the words "[a] class action may be maintained" were read in the Shady Grove decision to establish a right to maintain a class action. Then subdivision (b)(2) provides in general terms that the court may, for good cause, dissolve a stay. This language embraces all stays issued under subdivision (a). The idea is that a judgment debtor is assured that normally a bond will obtain a stay, but also will recognize that the court may dissolve it for good cause.

Discussion opened by asking whether the power to deny a stay on posting a bond should be set out in (a)(2), as it is for the automatic stay in (a)(1): "Unless the court orders otherwise, a

party may * * * obtain a stay." That would make the point clear immediately. But addressing authority to dissolve in a later subdivision may be wise. This approach subtly underscores the expectation that posting bond under (a)(2) will usually establish a stay that endures for the time specified in the bond or other security.

Addressing authority to dissolve in a separate subdivision prompted the observation that this will be authority to dissolve, not to deny before the bond is posted. That will "avoid watering down the presumption" in favor of the stay.

But it was asked whether "may obtain" is strong enough. Should the rule be expressed as an entitlement: "A party is entitled to obtain a stay by providing a bond or other security * * *"? That would bolster the implication that the stay can be dissolved only in extraordinary circumstances. And it might add force to arguments that if the judgment creditor manages to win dissolution, the price should be reimbursement of the considerable costs likely to have been incurred by the judgment debtor in securing a bond. It was pointed out that "entitled" is used in Rule 62(f), and is used — albeit in a quite different sense — in Rule 8(a)(2) directing that a pleading "show[] that the pleader is entitled to relief." But fear was expressed that "entitlement" "would skew the debate."

Further discussion suggested that sufficient clarity is achieved by the draft structure. The authority to dissolve is clearly expressed in (b)(2). Unlike the automatic stay, which does not provide security, there is less need to emphasize the authority to dissolve by beginning (a)(2) with "unless the court orders otherwise." It was further observed that "judges tend to be practical." If a judgment creditor anticipates a bond stay and approaches the court before bond is posted, the problem will be worked out, quite possibly in a way that protects the judgment debtor against incurring the cost of a bond only to have the stay dissolved.

At the end, it was agreed that "good cause" should be retained in the provision for dissolving or modifying a stay.

Security for immediate execution: Draft 62(b)(1) authorizes the court to require security for a stay "or on denying or lifting a stay." (As above, this may become "or on refusing or dissolving [vacating] a stay.") This is a reciprocal of security for a stay. Allowing immediate execution exposes the judgment debtor to the risk that the amounts collected will not be recaptured upon final disposition of the case. Brief discussion approved this approach.

Structure: Some ambivalence continues as to the structure of draft subdivision (a). It is divided into (1), automatic stay; (2) stay by posting bond; and (3) stay by court order.

The question is whether, although this structure seems clear enough, greater clarity could be achieved by reducing it to two paragraphs. (1) would be the automatic stay. (2), most likely divided into subparagraphs (A) and (B), would be all other stays. It was agreed that an alternative draft would be prepared to illustrate this approach.

Sanctions, contempt: Uncertainty continues as to the best approach to orders that impose sanctions or civil contempt. Staying a sanction may impair the court's authority to direct compliance with the rules and its orders. Civil contempt may present similar problems. In part, these questions are caught up with the "judgment" concept. Rule 54(a) defines "judgment" for purposes of the Civil Rules. It "includes a decree and any order from which an appeal lies." A sanction order often cannot be appealed when entered. The traditional rule is that an adjudication of civil contempt cannot be appealed by a party before the action proceeds to a final judgment, but can be appealed by a nonparty. Some part of the contempt issues may be approached through present Rule 62(a)(1), to be carried forward in the draft. This rule provides that an interlocutory or final judgment in an action for an injunction is not stayed unless the court orders otherwise. But contempt may be imposed for disobeying an order that is not an injunction.

These questions were supplemented by asking why draft 62(a) limits Rule 62 to stays of "execution on a judgment to pay money, and proceedings to enforce it." Present Rule 62 simply addresses "a judgment." There may be judgments that fall between injunctions and money judgments. What about foreclosure of a lien? A declaration of title? Various of the orders authorized by Rule 70 — a vesting order, an attachment or sequestration to compel obedience to an order, a writ of assistance on an order for possession? And what does Rule 65(f) mean for purposes of Rule 62 by providing that Rule 65 — injunctions and restraining orders — applies to copyright impoundment proceedings?

The initial impulse to draft a revised Rule 62 to address money judgments reflected a desire to separate out injunctions. What should be done for other forms of judgments that do not direct payment of money remains for further discussion. The first step will be an inquiry within the Department of Justice to determine whether their collective experience sheds any light on these issues.

A new draft will be prepared and circulated for further work.

Notes, Appellate-Civil Subcommittee June 30, 2015

The Appellate-Civil Subcommittee met by conference call on June 30, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. David G. Campbell, Civil Rules Committee Chair; Hon. John D. Bates; Hon. Peter Fay; H. Thomas Byron, Esq. (for Douglas Letter, Esq.); Kevin Newsom, Esq.; Virginia Seitz, Esq.; and Rebecca Womeldorf, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson began the meeting by recounting events in the advisory committees and the Standing Committee following the Subcommittee conference call in February.

The Subcommittee reported to the Civil Rules Committee and the Appellate Rules Committee that, just as an earlier Subcommittee, it had not been able to reach a consensus on the multiple questions gathered under the "manufactured finality" label. The advisory committees appreciated the work the Subcommittee had done, and also appreciated the difficulty in deciding whether it might be useful to address these questions by explicit provisions in the rules. The Civil Rules Committee explored the Subcommittee report and concluded, by a nearly unanimous vote, that the topic should be put aside. It is better to let the issues percolate in the courts. The Appellate Rules Committee came out in the same basic place. These conclusions were reported to the Standing Committee, which accepted them. Manufactured finality is not on the active docket of either advisory committee. But it can be moved back for active consideration if further developments in the courts show an opportunity for improvement by rule.

The Subcommittee also reported to the advisory committees on stays of execution under Civil Rule 62. The report was clear in characterizing this work as "midstream." Neither committee reported any sense of difficulties under present Rule 62, either in general or by anecdote. At the same time, there was a sense that it is worthwhile to continue Subcommittee consideration. The seeming "gap" between expiration of the automatic stay and the time to make the post-judgment motions covered by Rule 62(b) is worth addressing. So is the prospect of expressly allowing a single bond to cover the period between expiration of the automatic stay and completion of all appeal proceedings. It also is appropriate, having begun to consider Rule 62, to open the inquiry. It is better to make this the occasion to examine all of Rule 62 and to determine whether other changes may be desirable.

Discussion of Rule 62 in the Standing Committee was, for the most part, similar to the discussion in the advisory committees.

Some concerns were expressed about the best way to address the three types of stays presented by the draft of Rule 62(a): (1) the automatic stay; (2) stays ordered by the court; and (3) a stay as of right obtained by filing a supersedeas bond. A better integration may be possible. A related concern was noted: a court should have authority to insist on full security as a condition of staying execution. This concern was reflected in an anecdote describing a case in which the judgment debtor sought a stay without a bond, the court exacted a full bond, and it was only the bond that enabled execution after the appellant-debtor became insolvent. A stay without security should be approached with caution.

Discussion turned to the drafts circulated for this call: the two versions from February that were before the advisory committees and the Standing Committee, and an annotated version of the draft prepared by Kevin Newsom.

The first question went to the "gap" between expiration of the Rule 62(a) automatic stay 14 days after judgment enters and the ambiguous provision of Rule 62(b) for a stay pending disposition of post-judgment motions under Rules 50, 52, 59, or 60. Motions under Rules 50, 52, and 59 may be made as late as 28 days after entry of judgment. Rule 60 has a different time table, but a Rule 60 motion made within the 28-day period is treated for many purposes in the same way as motions under Rules 50, 52, and 59. Rule 62(b) authorizes the court to order a stay "pending disposition of any of" those motions. Can it order a stay before the motion is made? If it can, must it insist on a firm commitment to make such a motion within the allotted time?

Other questions also were identified at the outset. Should the rule address the single-bond practice? Are there broader questions about the court's authority to grant or deny a stay? To require security — for example, to require the judgment creditor to post security as a condition of denying a stay? To allow a stay with diminished security, or no security? Should there be general recognition of authority to accept security in a form other than a bond? Should there be an absolute right to a stay on posting adequate security?

The first of these questions to be addressed was whether the automatic stay should remain set at 14 days, or be expanded — most likely to 28 days or 30 days.

The purpose of the automatic stay was described from a practitioner's viewpoint: It allows the judgment debtor to "get his act together," to file a bond, to prepare post-judgment motions. In

the end, it was decided that 30 days is an appropriate period. It endures through the 28 days for making post-judgment motions that would suspend appeal time, and allows a small 2-day margin to the expiration of appeal time. It is fair to ask that a party take appropriate steps to secure a stay by motion or other means within that time.

But it was asked whether the automatic stay should be invulnerable. The discussion draft implements an automatic stay "unless the court orders otherwise." Current Rule 62(a) does not say that, although Rule 62(g)(2) says that a court may "issue an order to preserve the status quo or the effectiveness of the judgment to be entered." There may be circumstances in which even a 14-day stay will enable the judgment debtor to conceal or dissipate assets, thwarting collection on the judgment. Subcommittee members described experience with such circumstances.

Having agreed that the court should have authority to lift the automatic stay, the discussion turned to the question whether the authority should be limited by adding a "good cause" requirement. It was pointed out that the discussion draft included a bracketed option that would include "for good cause" in describing authority to dissolve or modify a stay. On the other hand, "good cause" should be implicit in most grants of authority: who would read the rule to contemplate whimsical or arbitrary action? The choice whether to refer to good cause recurs continually in drafting proposed rules. There is no apparent consensus on a general approach . Nor was a consensus reached for this setting. The discussion draft will go ahead with a simple "Unless the court orders otherwise," recognizing that an exhortation to find good cause may be added.

The next question addressed the draft provision that allows a court to order a stay "at any time." The structure of the draft contemplates three varieties of stay: (1) The automatic stay, subject to action by the court to lift the stay; (2) a stay ordered by the court; and (3) a stay obtained as a matter of right by posting a supersedeas bond or equivalent security. Is this structure the best means of explaining the alternatives? Or could everything after the automatic stay be set out in a single provision?

This structural question leads to the underlying question whether the court should be able to deny a stay even though a supersedeas bond has been posted. The draft provides alternatives. It is noted that a leading treatise "states flatly that a stay on posting a supersedeas bond is a matter of right." But it also suggests that this approach might be rejected by adopting an

express provision that the court may dissolve or modify any stay. The argument for allowing the court to reject an absolute right to a stay is that there may be circumstances in which the judgment creditor is not adequately protected by recovering the full amount of the judgment only after the appeal process culminates in affirmance. "My case is so strong that I won summary judgment that the defendant has wrongfully withheld the final million dollars due under our contract. I plan to seek sanctions under Appellate Rule 38 for taking a frivolous appeal. But my business is on the brink of insolvency. It will not survive through the time required to complete the appeal process. I can post security for enforcement." This question was deferred for further discussion of the structure issues.

Kevin Newsom provided a draft that also had three parts: the automatic stay, a stay pending disposition of post-judgment motions, and a stay pending appeal. These parts reflect the way he thinks of stay issues in practice, but still can be used to recognize the "single bond" practice. But the drafting may be more difficult than at first appeared.

Everyone agreed that it is desirable to craft a rule that authorizes a single bond that covers the period from issuance of any stay that supersedes the automatic stay through the completion of all proceedings on appeal. That feature will be retained no matter how many subdivisions or paragraphs are used to describe the various means of obtaining a stay.

Returning to the question whether there should be an absolute right to a stay on posting adequate security, it was asked what should be done about a judgment that combines money and specific relief. The answer was that the separate parts of the judgment present separate stay questions — so far, we have considered only the stay of a judgment to pay money, and have thought to carry forward without change the provisions for stays of an injunction or similar relief. The only change for those provisions is to combine them into a single subdivision, making for easier tracking than allowed by the present rule.

The question whether there should be an absolute right to a stay on posting an adequate supersedeas bond returned. It was agreed that it is possible to imagine circumstances in which it might be desirable to direct immediate execution. But it seems to be understood now that although immediate execution should be available absent full security, posting full security establishes a right to a stay that cannot be undone. At the same time, a court may authorize a stay on less than full security. One reason may be

that full security cannot be obtained. Other reasons may arise.[1]

Recognizing an absolute right to a stay on posting a supersedeas bond may affect the choice of rule structure. It was agreed that this right should arise when the automatic stay is lifted by the court or expires at the end of 30 days. That will facilitate security by a single bond that endures through the end of all appeals, if the judgment debtor chooses to post such a bond. It will mean there is no need to seek a stay from the court, either pending disposition of post-judgment motions or pending appeal after the time for motions has expired or all motions have been decided.

The right to a stay on posting full security leaves open the opportunity to obtain a stay on less than full security. Courts implementing the present supersedeas bond requirement assert the right to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond. All of these alternatives seem attractive. So the rule should provide for these alternatives. The discussion draft does that, allowing the court to order a stay at any time. It further provides that the court may set appropriate terms for security, and for that matter can require security as a condition of denying a stay. And the court may dissolve or modify a stay, subject to the question whether there should be authority to undo the right to a stay on posting an adequate bond.

The structure question remains after all of this discussion. Which structure will achieve greater clarity? A sequence that begins with the automatic stay and then brings together in one provision the supersedeas stay as of right and the discretionary stay by court order? Or a sequence that follows the automatic stay with separate provisions — perhaps beginning with the stay as of right on posting full security, and then recognizing authority to grant or deny a stay absent full security? This sequence may make sense if it is decided to deny discretion to defeat the stay obtained on posting full security.

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[1] A related question was not discussed. Present Rule 62(a) and (b) both provide for a stay of execution and of "proceedings to enforce" the judgment. Present Rule 62(d) providing a stay on giving a supersedeas bond refers only to "a stay." It may be desirable to allow proceedings in aid of enforcement even if actual execution is stayed. Discovery in aid of execution is an obvious example. It also may be useful to think about other possibilities — a lien on executable assets, as directed by the court, might be an example.

Discussion turned to the amount of the security that should be required to obtain a stay as of right. The draft suggests one hundred and twenty-five percent of the amount of the money judgment. This amount was taken from a state statute. Local rules in the federal courts often address this question, specifying amounts that range from 110% to 125%, or even to 150% of small judgments below a specified amount. The reason for rising above the amount of the money judgment goes to the time value of money. Interest rates are low just now. But they have been higher in the past, and indeed there have been times when the interest allowed on a judgment falls below the returns the judgment debtor may expect from devoting the amount of the judgment to other purposes. Those days may return.

A related question went unanswered. Are bond premiums geared directly to the amount of the bond, so a 125% bond will always cost 25% more than a 100% bond? Or is allowance made for the prospect that even full affirmance will lead to total liability less than 125%? For that matter, are bond premiums calculated with an eye to such questions as the judgment debtor's probable ability to pay, or even the apparent risk of affirmance? And what about security by means other than a bond — including a showing of assets sufficient to ensure payment if the judgment is affirmed?

Another question as to the amount of the bond was considered briefly. An injunction bond can be set to compensate the harm done by complying with the injunction. Should the amount of an appeal bond be set to reflect the harms that may flow from the stay apart from delay in collecting? That question may seem more pressing if there is an absolute right to a stay on posting full security. But the complications of attempting to measure various kinds of damages that may arise from delay seem daunting. And our courts are structured around the right to appeal. Perhaps exercising the right to appeal should not expose the appellant to the risk of liability for delay damages, particularly when the decision to appeal is made reasonably and in good faith.

This discussion concluded by agreeing to set the amount at 125%. The choice can be informed by public comment if this project leads to proposals to amend Rule 62.

Parts of Rule 62 not yet explored were then considered. The Subcommittee has focused its initial work on the basic provisions for staying money judgments. It has concluded that the provisions for injunctions, receiverships, and patent accountings can be rearranged and carried forward without substantive change. But Professor Struve's comprehensive memorandum at the beginning of this work addresses other issues. Should any of them be taken up?

It was agreed that the most complex questions presented by other parts of Rule 62 arise from Rule 62(f), which provides that when state law provides a lien on the judgment debtor's property, the judgment debtor is entitled to the same stay of execution the state court would give. Professor Struve will explore these issues a second time and make recommendations whether this question should be added to the agenda.

Rule 62(e), dispenses with a "bond, obligation, or other security" when the United States (etc.) is granted a stay on appeal. No problems with this subdivision are familiar at the moment, but an inquiry will be made to determine whether this subject should also be added to the agenda.

It was agreed that it would be undesirable to limit the present work short of identifying every part of Rule 62 that might be improved by feasible amendments. The Rule should be overhauled as may prove desirable, so that it seems designed to survive for some time without a need for further consideration in a separate project.

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9. e-RULES: CIVIL RULE 5

Last April this Committee voted to recommend publication of proposed amendments addressing e-filing, e-service, and recognition of a Notice of Electronic Filing as a certificate of service. Work on parallel proposals in the other advisory committees, however, made it wise to defer the recommendation to await conclusion of their work. The Appellate and Bankruptcy Rules Committees have worked toward conclusions that are compatible with the Civil Rules proposals, with an adjustment to fit within the particular structure of the Appellate Rules. The Criminal Rules Committee, however, has faced a more arduous task. Criminal Rule 49(b) has directed that service be made in the manner provided for a civil action, and Rule 49(d) has directed that a paper be filed in a manner provided for in a civil action. The Criminal Rules Committee has undertaken to develop specific service and filing provisions in Rule 49, sparing litigants and courts the need to resort to a separate set of rules. Much of the work was accomplished at their September meeting, but time has not proved available to address the task of developing common language for the Civil and Criminal Rules.

The Criminal Rules Committee does not expect to have a proposal ready to recommend to the Standing Committee at the January meeting. But there will be opportunities to work toward common provisions before then, and the common work will benefit from discussion with the Standing Committee. There may not be much work left to be done at this Committee's April meeting.

To refresh memory, the materials submitted to the Standing Committee last May are set out here:

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Standing Committee Agenda Materials, May, 2014, pages 155-162

The following materials on e-filing, e-service, and recognition of a Notice of Electronic Filing as a certificate of service are taken verbatim from the Civil Rules Committee report to the May, 2015 meeting of the Standing Committee. The purpose is to be prepared to work further on these topics if that comes to be useful in light of such progress as may have been made at the meetings of the Appellate, Bankruptcy, and Criminal Rules Committees. The Criminal Rules Committee met at the end of September and had the most work to do. The fruits of that work are noted here. The work of the other committees will be reported separately if time and purpose allow.

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Committee initially worked through to recommendations to publish three rules amendments for comment in August, 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities; and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But, as noted in the Introduction, continuing exchanges with the other advisory committees show that further work is needed to achieve as much uniformity as possible in language, and at times in meaning. The drafts presented here have gone through several variations, but cannot yet be regarded as the assuredly final recommendations to approve for publication. There is no urgent need to publish now, and good reason for delay. Criminal Rule 49(b) now directs that "service must be made in the manner provided for a civil action." The Criminal Rules Committee hopes to move free from this cross-reference, adopting a self-contained provision that will avoid the need to consult another set of rules. And the familiar problems with signing an electronic filing continue to resist confident drafting resolution.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Discussion of these provisions recognized that they might be

suitable for some sets of rules but not for others. For the Civil Rules, many different words that seem to imply written form appear in many different rules. The working conclusion has been that at a minimum, several exceptions would have to be made. The time has not come to allow electronic service of initiating process as a general matter — the most common example is the initial summons and complaint, but Rules 4.1, 14, and Supplemental Rules B, C, D, E(3) and G also are involved. And a blanket exception might not be quite right. Rule 4 incorporates state grounds of personal jurisdiction; if state practice recognizes e-service, should Rule 4 insist on other modes of service?

Determining what other exceptions might be desirable would be a long and uncertain task. Developing e-technology and increasingly widespread use of it are likely to change the calculations frequently. And there is no apparent sense that courts and litigants are in fact having difficulty in adjusting practice to ongoing e-reality.

The conclusion, then, has been that the time has not come to propose general provisions that equate electrons with paper for all purposes in all Civil Rules. The Evidence Rules already have a provision. It does not appear that the Appellate, Bankruptcy, or Criminal Rules Committees will move toward proposals for similar rules in the immediate future.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses.

It seems to have been agreed that it is too early to attempt to propose a national rule that addresses electronic signatures other than the signature of an authorized person who makes an e-filing. The draft Rule 5(d)(3) does provide that the user name and password of an attorney of record serves as the attorney's signature. And some issues may remain in drafting even that proposal.

Rule 5(d)(3): Electronic Filing

The draft Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person proceeding without an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person proceeding without an attorney may file electronically only if permitted by court order or local rule. And the user name and password of an attorney of record serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Attorneys in most districts already are required to file electronically by local rules. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing.

RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS

(d) FILING * * *

(3) *Electronic Filing and Signing ~~, or Verification~~.*

(A) *When Required or Allowed; Paper Filing.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an

attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature.

Clean Rule Text

(3) *Electronic Filing and Signing.*

(A) *When Required or Allowed; Paper Filing.* All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically is a written paper for purposes of these rules.

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user – and very few are – is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

Although consent remains important when it is required, the Committee recommends deletion of the requirement that consent be in writing. Consent by electronic means is the most likely form; many people now rely routinely on e-communication rather than paper. Beyond that, the Committee believes that in some circumstances less formal means of consent may do, such as a telephone conversation.

Rule 5. Serving and Filing Pleadings and Other Papers

(B) SERVICE: HOW MADE. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means ~~if~~ that the person consented to ~~in writing — in which event~~. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. [Consent can be limited to [service at] a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(B) SERVICE: HOW MADE. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means that the person consented to. Electronic service is complete upon transmission, but is not effective if the

serving party learns that it did not reach the person to be served; or * * *

Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

As noted above, this package of drafts includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service through the court's facilities on a registered user without requiring consent. Rule 5(b)(3) reads:

(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service through the court's facilities in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

COMMITTEE NOTE

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user through the court's transmission facilities. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by

amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served through the court's transmission facilities. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where filing was made and also identifies the parties who were not authorized users of the court's electronic transmission facilities, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint

that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any party[2] served through the court's transmission facilities.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service.

[2] We have yet to resolve the question whether this should change to "person." The Civil Rules participants report that persons who are not yet formal parties are treated as if parties for filing purposes. "Party" in rule text could — and should — be read to include anyone who is asking the court to do something. Opening a miscellaneous docket to enforce a discovery subpoena in aid of litigation pending in another district would be an example. The applicant-movant would count as a party.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service – a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

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10. RULE 68

Proposals for dramatic amendments of Rule 68 were published in 1983 and 1984 before the project was abandoned. Rule 68 was studied again twenty years ago; the elaborate draft developed then was put aside without publication. Spontaneous public suggestions for revisions are submitted regularly. In response to proposals made over several years, Rule 68 was discussed extensively at the meeting in October 2014. Rather than reach a conclusion, the Committee decided to sponsor research into similar state provisions to determine whether effective models for reform may be found. The Administrative Office was asked to help with the research. Resources were not immediately available. A brief report at the meeting last April held out hope that the work could begin later this year.

The Administrative Office hopes that advances in this work can be made soon. Some impetus may be provided by 15-CV-V, the most recent public suggestion. This suggestion points to New Jersey Court Rule 4:58 and urges that, like it, Rule 68 should provide for offers by plaintiffs. The New Jersey rule follows the lead of most of those who urge that Rule 68 should include plaintiffs – if a defendant rejects a plaintiff's offer that is lower than the judgment, the plaintiff is awarded "all reasonable litigation expenses incurred following non-acceptance," enhanced interest, and "a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance." Recognizing that many cases present a range of potentially reasonable awards, these consequences are triggered only if the plaintiff recovers at least 120% of the rejected offer. The consequences for a plaintiff who fails to win at least 80% of a rejected offer are similar, but qualified by several features designed to protect the plaintiff against undue hardship.

Rule 68 remains on the agenda. It will be brought back when further materials become available.

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11. New Docket Items

Many public submissions have been made since the October, 2014 meeting to propose various Civil Rules amendments. Many of the submissions relate to Rule 23, and are being considered by the Rule 23 Subcommittee. One, 15-CV-V, relates to Rule 68; it can be considered when pending research on state-court analogs to Rule 68 has concluded. Others are presented here. For each, the question is whether to act now to remove the submission from the docket or to undertake more extensive study.

Informal submissions by members of the rules committees are noted separately at the end of this section.

15-CV-A: Rule 81(c)(3)(A)

This submission addresses a single word in Rule 81(c)(3)(A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c)(3). Examination of the specific problem in the setting of the full rule suggests more serious questions. It seems worthwhile to identify the questions, even if the most likely outcome will be to put all of them aside to defer to more pressing work. Apart from this one submission, there is little reason to believe that significant problems are arising in practice.

Rule 81. Applicability of the Rules in General; Removed Actions

(c) Removed Actions.

(1) *Applicability.* These rules apply to a civil action after it is removed from a state court. * * *

(3) *Demand for a Jury Trial.*

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, "does," and underlining the substitute, "did."]

The specific suggestion focuses narrowly on the change from "does" to "did." The suggestion is that the change has created a trap for the unwary. So long as the rule said "does," it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying "did" may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts continue to interpret the rule as if it says "does;" an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

Initial research into the change from "does" to "did" has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that "did" appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that "Joe Spaniol is right" that there is a gap in the rule, but suggesting that it cannot be fixed — if fixing is needed — in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was "expressly demanded * * * in accordance with state law" before removal. It makes sense to carry the demand forward after removal.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal — a demand must be served, "not 14 days after the last pleading directed to the issue is served," but 14 days after removing or being served with the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job — Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is "to avoid unintended waivers of jury trial." But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that "a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases." Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it might be useful to adopt a local rule "under which the direction is to be given routinely." But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone "would recreate the difficulty which the amendment seeks to meet." These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that "a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial."

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from "does" to "did" may create some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: it did not require an express demand at any time in the progress of the case, but has been revised after removal to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading

can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. "Does" took on an apparently established and quite limited meaning. It is possible to read "did" in the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts — no matter what may be the experience of particular lawyers — seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case — but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial only because the judge does not seem sufficiently sympathetic is reduced. Rule 39(b) protects the opportunity to reclaim a jury trial after failing to make a timely demand.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

> (3) *Demand for a Jury Trial.* Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38

must be given one[3] if the party serves a demand within 14 days after:
(A) it files a notice of removal, or
(B) it is served with a notice of removal filed by another party.

With all of this, the two most likely choices are these: Do nothing, or undertake a thorough reexamination of Rule 81(c). Matters can be resolved reasonably without changing "did" back to "does." But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification.

[3] This version simply tracks the current rule. It might be shortened: "If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after * * *."

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From: Mark Wray <mwray@markwraylaw.com>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Date: 01/17/2015 06:51 PM
Subject: Change to Rule 81

As for the body of people that apparently is meeting April 9-10 in Wash., D.C., to discuss the civil rules, please consider the following:

I propose that Fed. R. Civ. P. 81 be amended by adding words to clarify that in a case removed from state to federal court, if the state law requires a jury demand to be filed, and one was not required to be filed before the removal under the applicable state law, a jury demand does not have to be filed following removal until the federal judge orders it to be filed.

I actually think the rule already reads the way I stated it in the previous sentence, but in the Ninth Circuit, relying on an old case that predates the 2007 rule changes, the judges have uniformly denied jury demands for allegedly being untimely, using an interpretation of the rule that frankly is contrary to the way the rule actually reads. I have attached a brief and a court order to prove my point. I am not alone on this issue. There are dozens of cases from across the country that have dealt with it.

One would think that of all the things that should be protected by a simple rule, it is the ability to have a jury trial. Under Rule 81, however, that fundamental right is easily lost, due to the botched "style" changes of 2007.

As my reason for this rule change, I submit that Rule 81 as amended by this Committee in 2007 during the so-called "style" changes has created a trap for the unwary by changing the present tense to the past tense, and yet courts continue interpreting the rule in the present tense, to make jury demands untimely, as occurred in my case. If what I just said is unclear, please read the attached brief, which I hope will make the problem clearer. In short, the rule itself needs to be clarified, so that the courts will apply it according to the way it is actually written.

Many of the contributors to the process of the 2007 "style" changes objected repeatedly that the "style" changes would lead to costs to parties that were not acceptable. They included the group from the Eastern District of New York and others. I don't know why their cogent and compelling input was ignored, but it was ignored.

Somehow, some sub-committee of persons operating under the auspices of the full committee (the administrative office of the courts repelled my efforts to get the actual records to find out who, and why, and where, and how) approved Rule 81 language that changed the present tense to past tense, and the overall rules committee then pronounced that draft acceptable.

The big committee has minutes stating that the big committee felt that whatever "costs" may be borne by those of us subject to the substantive and unintended consequences of "style" changes, those costs are "acceptable".

I respectfully disagree. Enough people, like my client, have paid the "costs", and the "costs" are unacceptable. This is an unfairly tricky rule that can be easily clarified, and needs to be fixed. Please do so. Thanks.

Regards,

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Attorneys for Plaintiff
TOM GONZALES

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES,

Plaintiff,

vs.

SHOTGUN NEVADA INVESTMENTS, LLC, a Nevada limited liability company; SHOTGUN CREEK LAS VEGAS, LLC, a Nevada limited liability company; SHOTGUN CREEK INVESTMENTS, LLC, a Washington State limited liability company; and WAYNE PERRY, an individual,

Defendants.
_____/

Case No. 2:13-cv-00931-RCJ-VPC

(Eighth Judicial District Court Case No. A-13-679826)

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE JURY DEMAND

In this action removed from the District Court in and for Clark County, Nevada, Plaintiff filed a jury demand September 18, 2014, two days after this Court denied the Defendants' motion for summary judgment. With summary judgment having been denied, Plaintiff believed it was appropriate to consolidate

this action with the Desert Lands case (3:11-cv-00613-RCJ-VPC), file demands for jury in both cases, and prepare for trial. *See Wray Decl., attached.*

According to the applicable rule for jury demands in actions removed from state court, Plaintiff believes his jury demand was timely. Fed. R. Civ. P. 81(c)(3)(A) states:

(3) *Demand for a Jury Trial.*

> (A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

This case was removed from a state court in Nevada. Under Nevada law, "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving as required by Rule 5(b) upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Thus, jury demands are not required to be filed in Nevada state court until the time of the entry of the order first setting the case for trial.

Defendants removed this action within 30 days of being served with the Summons and Complaint and before even filing their Answer to the Complaint. *ECF No. 1, 4.* Obviously, at that point in time, a jury demand was not required by Nevada law. In such a situation, the second sentence of Rule 81(c)(3)(A) states: "If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." The Court still has not ordered the parties to file a jury demand

within a specified time, and thus the Plaintiff's jury demand filed September 18, 2014 was timely under the rule.

Defendants now bring this Motion to Strike Plaintiff's Jury Demand (*ECF No. 69*), objecting that the second sentence of Fed. R. Civ. P. 81(c)(3)(A) is inapplicable because "the second sentence applies where State Law *does not require an express demand for jury trial* and Nevada law, NRCivP Rule 38, does require an express demand for a jury trial." *Motion, ECF No. 69, p. 8:5-7* (*emphasis* in original).

The Defendants' argument incorporates a subtle, yet significant, anachronism that leads to a faulty interpretation of Rule 81(c)(3)(A). The Defendants argue that Rule 81(c)(3)(A) applies when state law "**does** not require an express demand for jury trial," thus using the present tense of the verb. The second sentence of the rule actually is written in the past tense: "If the state law **did** not require an express demand for jury trial . . .". The shift from present to past tense results in a change in the meaning of the rule that is significant to deciding this motion.

Using the present tense, as the Defendants choose to do, the meaning is that if the state law does not require an express demand for jury trial; i.e., if no express demand for jury trial is required by state law *at any time*, then the Court must order the parties to file a demand. Stated alternatively, using the present tense, if *at any time* the state law requires an express demand for jury trial, then Rule 81(c)(3)(A) does not apply, and a jury demand must be filed with 14 days of filing of the last pleading directed to the issue. *See Fed. R. Civ. P. 38(b)(1).*

On the other hand, using the past tense, which is how the rule is written, of course, the meaning is that if the state law did not require an express demand for jury trial; i.e., if the Plaintiff did not have to make a jury demand under state law *before the case was removed*, then the Plaintiff need not make a jury demand until

ordered to do so. Reading Rule 81(c)(3)(A) as it is written, therefore, Plaintiff filed a timely jury demand on September 18, 2014.

The use of the present tense is an anachronism because prior to 2007, the rule was written in the present tense -- "does not" -- and starting in 2007, the rule was changed to the past tense -- "did not". The Defendants' motion disregards this distinction, but in fairness, court decisions have overlooked it as well.

A leading case on Rule 81(c) in the Ninth Circuit is *Lewis v. Time, Inc.,* 710 F.2d 549, 556 (9th Cir. 1983), which has been cited by courts in the Ninth Circuit at least 27 times for its interpretation of the rule. When *Lewis* was decided in 1983, Rule 81(c) was written in the present tense, and stated, in pertinent part: "If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so. . . ". *Id.* The court held in *Lewis* that California law does require an express demand when the trial is set. *Id.* Lewis had not requested a trial before his case was removed from California state court. *Id.* "Therefore, F.R. Civ. P. 38(d), made applicable by Rule 81(c), required Lewis to file a demand 'not later than 10 days after the service of the last pleading directed to such issue [to be tried].' Failure to file within the time provided constituted a waiver of the right to trial by jury. Rule 38(d)." *Id.* (The 10-day deadline subsequently was extended to 14 days by other rule amendments.)

This holding from *Lewis* continues to be followed, uncritically, by district courts in the Ninth Circuit. *See, e.g., Ortega v. Home Depot U.S.A., Inc.,* 2012 U.S. Dist. LEXIS 2787 (E.D.Cal. 2012) (following *Lewis* as to its interpretation of Rule 81(c)(3)(A)); *Nascimento v. Wells Fargo Bank,* 2011 U.S. Dist. LEXIS 111019 (D.Nev. 2011) (applying the *Lewis* holdings to an action removed from Nevada state court); *Kaldor v. Skolnik*, 2010 U.S. Dist. LEXIS 137109 (D.Nev. 2010) (finding that under *Lewis*, Rule 81(c)(3)(A) is inapplicable if state law

requires an express demand for jury trial, "regardless of when the demand is required").

With due respect for these district court decisions, it is questionable that they would follow the holding in *Lewis* today, as a matter of *stare decisis*, given the intervening changes in Rule 81(c). For *Lewis* to supply the rule of decision, it would seem that one must discount the change from the present to the past tense – from "does not" to "did not" -- as having no effect on the meaning of the second sentence of Rule 81(c)(3)(A). Disregarding differences in words runs counter to well-established rules of statutory construction. *See Boise Cascade Corp. v. United States EPA,* 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."); *In re Transcon Lines,* 58 F.3d 1432, 1437 (9th Cir. 1995) (the cardinal principle is that the plain meaning of a statute controls).

Furthermore, taking the view that the change from "does not " to "did not" makes no difference to the meaning of the second sentence then begs the question as to why rule-makers made the change at all.

The Notes of the Advisory Committee on 2007 Amendments state: "The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The problem with the Advisory Committee's note is that a change in "style" can also affect meaning, and therefore affect substance. A practitioner can read the amended Rule 81(c)(3)(A) to mean exactly what it says, and can reasonably believe that a jury trial demand that state law did not require to be filed before removal is not required to filed in federal court unless and until ordered by the federal judge. The problem with the note of the Advisory Committee is that in the

case of Rule 81(c)(3)(A), the effect of "style" changes is a critical change in meaning; if that meaning is not applied and the result is the loss of the right to trial by jury, the rule has become a trap for the unwary.

Many district courts in the Ninth Circuit have acknowledged that Rule 81 suffers from poor drafting and tricky wording, but have applied *Lewis* regardless. In *Rump v. Lifeline,* 2009 U.S. Dist. LEXIS 98506 (N.D.Cal. 2009), the court said:

> The Court recognizes that the federal rules governing jury demands after removal, in conjunction with California's rules permitting a plaintiff to make a jury demand up until the time of trial, creates ambiguity and a trap for the unwary. However, *Lewis* addressed the interplay between California's rules and Rules 38 and 81, and held that a jury demand must be made within 10 days of removal. Accordingly, ***because the Court is bound by Lewis***, the Court GRANTS defendants' motion and STRIKES plaintiff's jury demand.

Id., emphasis added; see also: Gilmore v. O'Daniel Motor Ctr., Inc., 2010 U.S. Dist. LEXIS 57792 (D.Neb. 2010); *Cross v. Monumental Life Ins. Co.,* 2008 U.S. Dist. LEXIS 109235 (D.Ariz. 2008) ("[T]he needless complexity of the removal rule, Rule 81(c), sometimes creates a trap for the unwary.")

Indeed, if Rule 81(c)(3)(A) cannot be relied upon to mean what it says, it is not only a trap for the unwary, it is an *unfair* trap for the unwary.

The problem with altering the "style" of any rule is that it requires changes in language, and changes in language alter meaning, which is a principle that was recognized by the people who changed the rules in 2007. The Judicial Conference Committee on Rules of Practice and Procedure keeps online records of its proceedings through the Administrative Office of the U.S. Courts in Washington, D.C. The online archives[1] contain the minutes and reports of various rules committee meetings. Attached as Exhibit 1 to this Opposition are copies of

[1] http://www.uscourts.gov/rulesandpolicies/rules/archives.aspx

excerpts from the June 2, 2006 report of the Civil Rules Advisory Committee on the subject of "style" changes, with portions highlighted for purpose of emphasis. The report refers to various contributors to the process who were highly critical of the "style" changes, including the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, whose members wrote:

> The unanimous judgment of every member of the Committee who expressed a view was that the costs and other disadvantages of the style revision project outweigh its benefits. First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found they had uncovered many more – and there was almost no overlap, suggesting that there remain a significant number of unintended consequences that neither we nor they have spotted. Second, any style revisions will bring disruptions. The sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come.

See Exhibit 1, attached. The words of the committee from the Eastern District of New York are amazingly prescient in anticipating the current situation with the Plaintiff.

In its "Overall Evaluation", the rules committee asked Profession Stephen B. Burbank and Gregory P. Joseph, Esq. (the "Burbank-Joseph" group) to comment on their working group's view of the wisdom of the style project. Burbank-Joseph reported that 14 members participated in the final conference call. "Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed." *See Exhibit 1, attached.*

The rules committee spoke of "costs that will be entailed", which in this case, is the cost of losing the right to a jury trial. Forfeiting that Constitutional

right because of a tricky rule, which cannot be relied upon to mean what it says, is not a cost that can or should be borne by the Plaintiff or any other litigant.

Nor is the situation in the Plaintiff's case in any way unique. Dozens of cases are reported from U.S. District Courts across the country where a party was deprived of a right to a jury trial in a case removed from state court based on an interpretation of Rule 81(c)(3)(A). This means attorneys across the land are losing the right to jury trials for their clients in cases that are removed from state court to federal court because the rule is not being interpreted the way it reads.

To Plaintiff's knowledge, only one of the many reported decisions on this issue explicitly discusses the change from the present to past tense, and is the only case that squarely addresses the issue raised by this Opposition. In *Kay Beer Distrib. v. Energy Brands, Inc.,* 2009 U.S. Dist. LEXIS 49792 (E.D. Wisc. 2009), the district judge analyzed and decided the issue as follows:

> The language of the current Rule 81 is ambiguous. At least one court has observed that the Rule is "poorly crafted." Cross v. Monumental Life Ins. Co., 2008 U.S. Dist. LEXIS 109235, 2008 WL 2705134, *1 (D. Ariz. July 8, 2008). This court agrees. The use of the past tense -- "If state law did not require an express demand" -- without any qualification, makes it unclear whether the exception is intended to apply to cases in which a demand for a jury under state law was not yet due when the case was removed, or to cases in which a demand is not required at all. Kay's interpretation of Rule 81(c)(3)(A) thus has some merit. But ultimately, I conclude that Energy's interpretation is correct. Rule 81(c)(3)(A) only applies when the applicable state law does not require a jury demand at all. It has no application when, as in this case, the applicable state law requires an express demand, but the time for making the demand has not yet expired when the case is removed.
>
> This is apparent from the language of the Rule prior to its amendment in 2007. Prior to the 2007 amendment to Rule 81, it read:
>
> If state law applicable in the court from which the case is removed *does not* require the parties to make express demands after removal in

order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury.

Fed. Rule Civ. P. 81(c) (2006) (amended 2007) (italics added).

The Advisory Committee Notes for the 2007 Amendments to Rule 81 state that the language of the Rule was amended "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." The note states that the changes were intended to be "stylistic only."

The earlier version of Rule 81(c) was the result of the 1963 amendment to the Rules which added the exception in the first place. The Advisory Committee Notes relating to the 1963 Amendment state that the change was meant to avoid unintended waivers of a party's right to a jury trial in cases that are removed to federal court from state courts in which no demand is required. To achieve this purpose, "the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal." Fed. R. Civ. P. 81 Advisory Committee Note, 1963 Amendment. See also 9 Wright & Miller, Federal Practice and Procedure (hereafter Wright & Miller) § 2319 at 228-29 (3d ed. 2008). It therefore follows that the exception in Rule 81(c)(3)(A), which relieves a party in a removed case from the obligation to demand a jury trial, applies only where the applicable state law does not require an express demand for a jury trial. Since Wisconsin law does require a jury demand, Rule 81(c)(3)(A)'s exception does not apply.

Kay cites Williams v. J.F.K. Int'l Carting Co., 164 F.R.D. 340 (S.D.N.Y. 1996) and Marvel Entm't Group, Inc. v. Arp Films, Inc., 116 F.R.D. 86 (S.D.N.Y. 1987), in support of its interpretation of Rule 81, but both dealt with actions removed from New York courts. Cases removed from New York court provide little guidance because "the practice in New York falls within a gray area not covered by Rule 81(c)." Cascone v. Ortho Pharm. Corp., 702 F.2d 389, 391 (2d Cir. 1983); see also 9 Wright & Miller § 2319 at 231 ("Many cases

> removed from New York state courts pose a unique situation."). Wisconsin law unequivocally requires a demand in order to preserve one's right to a jury trial. I therefore conclude that Rule 81(c)(3)(A) is inapplicable and Kay's demand for a jury trial was untimely under Rule 38(b).

Plaintiff respectfully urges that this Court *not* adopt the reasoning of *Kay Beer*. The court in *Kay Beer* did not apply the language of the rule as it reads today, and instead reverted to the former version of the rule. The court stated: "Rule 81(c)(3)(A) only applies when the applicable state law **does not** require a jury demand at all." (Emphasis added). The only rationale offered by the court in *Kay Beer* for applying the former version of the rule instead of the current rule is that the Notes of the Advisory Committee state that the 2007 changes to the rules were intended to be "stylistic only". Respectfully, changes that may have been intended to be "stylistic only" can in fact be substantive. The people that adopted the rules openly debated the effect that the "stylistic" changes would have on the substantive law, and ultimately, the rules committee adopted the rules knowing that certain "costs" would be borne by litigants and the court system, including "costs" in the form of substantive rule changes that may not have been intended. The rules committee nonetheless deemed these costs to be acceptable in adopting the new rules. *See Exhibit 1, attached.* When a "stylistic" change alters the meaning of a rule, this is deemed an acceptable cost, and the Court should apply the rule as it is written. Practitioners also should be able to rely on the rules as written.

As an additional consideration, the court in *Kay Beer* only followed the rationale that the general purpose of the 2007 changes was to effect changes in style and not substance. The court in *Kay Beer* had no apparent knowledge as to the specific reasons why the change was made from "does not" to "did not". One would have to access the minutes and reports of the style subcommittee of the Civil Rules Advisory Committee to obtain that knowledge. The minutes and reports of the style subcommittee do not appear to be available online or in any

readily available alternative source, however, and Plaintiff is unable to provide them to the Court. *See Wray Decl., attached.*

In the absence of the subcommittee minutes and reports, the proper approach is to apply ordinary rules of statutory construction and construe the rule as it is written. By applying the plain language of the rule, one must reasonably conclude that in cases removed from state to federal court, when the applicable state law requires an express jury demand, but the time for making the demand has not yet expired when the case is removed, the time for making a jury demand is to be set by the court.

Accordingly, the jury demand filed September 18, 2014 in this action is timely. It respectfully requested that the Defendants' Motion to Strike Plaintiff's Jury Demand be denied.

DATED: October 16, 2014 LAW OFFICES OF MARK WRAY

By __/s/ Mark Wray_____
MARK WRAY
Attorneys for Plaintiff TOM GONZALES

DECLARATION OF MARK WRAY IN SUPPORT OF OPPOSITION TO STRIKE JURY DEMAND

I, Mark Wray, declare:

1. My name is Mark Wray. I substituted in as attorney for Plaintiff Tom Gonzales in this action on June 11, 2014. I know the following facts of my personal knowledge and could, if asked, competently testify to the truth of the same under oath.

2. On September 16, 2014, the Court denied the Defendants' motion for summary judgment. *ECF No. 65.*

3. Upon receiving the order, I reviewed Fed. R. Civ. P. 81(c)(3)(A) and prepared a jury demand which I filed with the Court on September 18, 2014. I also called Defendants' counsel, Mr. Schwartzer, and asked if he would inquire about obtaining his clients' permission to consolidate the trial of the two related actions.

4. On September 26, 2014, Mr. Schwartzer advised me that his clients would not agree to consolidation and that he would be filing a motion to strike the jury demand.

5. After receiving the Defendants' motion and re-reading Rule 81(c)(3)(A), I reviewed minutes and reports of the Judicial Conference Committee on Rules of Practice and Procedure for the years 2003 through 2007. I also contacted the support staff of the committee in Washington, D.C. I learned there are six members of the support staff, headed by their chief, Jonathan Rose, and they are busy with six different committees. Over a period of days and follow-up phone calls, I attempted to find out whether anyone on the support staff has access to any minutes and reports of the style subcommittee of the Advisory Committee on Civil Rules during the years leading up to the 2007 rule changes. I spoke to Mr. Rose specifically about this subject, explaining my interest in knowing the genesis of the change from "does not" to "did not". Although I followed up several times

seeking to obtain this information from Mr. Rose or his staff, I did not receive a response from them before having to prepare and file this Opposition.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on October 16, 2014 at Reno, Nevada.

/s/ Mark Wray
MARK WRAY

CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray hereby certifies that a true copy of the foregoing document was sealed in an envelope with first-class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on October 16, 2014 addressed as follows:

Lenard E. Schwartzer
Schwartzer & McPherson Law Firm
2850 S. Jones Blvd., Suite 1
Las Vegas, NV 89146

_____/s/ Theresa Moore_____

EXHIBIT INDEX

Exhibit 1 Excerpts of Minutes of the Civil Rules Advisory Committee

EXHIBIT 1

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **June 2, 2006**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006. Draft minutes of the meeting are attached.

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — Style Rules 1-86; Style-Substance amendments to Rules 4(k), 9(h), 11(a),14(b),16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78; Style Forms; and the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

Subpart I B recommends approval for publication of new Rule 62.1 on indicative rulings and amendments to Rules 13(f), 15(a)(amended pleadings), and 48 (jury polling). The recommendation is to publish these proposals — along with the modest amendment of Rule 8(c) approved for publication at the January meeting — at a later date, presumably August, 2007, when they can be included in a package with other proposals.

Part II of this report presents information items describing the projects that are being developed for further consideration.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.	**(b) Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.
(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.	**(c) Removed Actions.** **(1)** ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.	**(2)** ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: **(A)** 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief; **(B)** 20 days after being served with the summons for an initial pleading on file at the time of service; or **(C)** 5 days after the notice of removal is filed.
A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.	**(3)** ***Demand for a Jury Trial.*** **(A)** *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. **(B)** *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after: **(i)** it files a notice of removal; or **(ii)** it is served with a notice of removal filed by another party.

Summary of Comments

The written comments on Style Rules 1-86, the Style-Substance Rules, and the Style Forms, are described in the Summary of Comments. The hearing on November 18, 2005, and discussion at the Committee meeting that followed, are described in the Notes on the meeting.

SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner, Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

November 22 draft

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES, Plaintiff, vs. SHOTGUN NEVADA INVESTMENTS, LLC et al., Defendants.	)	2:13-cv-00931-RCJ-VPC **ORDER**

This case arises out of the alleged breach of a settlement agreement that was part of a confirmation plan in a Chapter 11 bankruptcy action. Pending before the Court are a Motion to Reconsider (ECF No. 68) and a Motion to Strike Jury Demand (ECF No. 69). For the reasons given herein, the Court denies the motion to reconsider and grants the motion to strike jury demand.

I. FACTS AND PROCEDURAL HISTORY

This is the second action in this Court by Plaintiff Tom Gonzales concerning his entitlement to a fee under a Confirmation Order the undersigned entered over ten years ago while sitting as a bankruptcy judge.

A. The Previous Case

On December 7, 2000, Plaintiff loaned $41.5 million to Desert Land, LLC and Desert

Oasis Apartments, LLC to finance their acquisition and/or development of land ("Parcel A") in Las Vegas, Nevada. The loan was secured by a deed of trust. On May 31, 2002, Desert Land and Desert Oasis Apartments, as well as Desert Ranch, LLC (collectively, the "Desert Entities"), each filed for bankruptcy, and the undersigned jointly administered those three bankruptcies while sitting as a bankruptcy judge. The court confirmed the second amended plan, and the Confirmation Order included a finding that a settlement had been reached under which Gonzales would extinguish his note and reconvey his deed of trust, Gonzales and another party would convey their fractional interests in Parcel A to Desert Land so that Desert Land would own 100% of Parcel A, Gonzales would receive Desert Ranch's 65% in interest in another property, and Gonzales would receive $10 million if Parcel A were sold or transferred after 90 days (the "Parcel Transfer Fee"). Gonzales appealed the Confirmation Order, and the Bankruptcy Appellate Panel affirmed, except as to a provision subordinating Gonzales's interest in the Parcel Transfer Fee to up to $45 million in financing obtained by the Desert Entities.

In 2011, Gonzales sued Desert Land, Desert Oasis Apartments, Desert Oasis Investments, LLC, Specialty Trust, Specialty Strategic Financing Fund, LP, Eagle Mortgage Co., and Wells Fargo (as trustee for a mortgage-backed security) in state court for: (1) declaratory judgment that a transfer of Parcel A had occurred entitling him to the Parcel Transfer Fee; (2) declaratory judgment that the lender defendants in that action knew of the bankruptcy proceedings and the requirement of the Parcel Transfer Fee; (3) breach of contract (for breach of the Confirmation Order); (4) breach of the implied covenant of good faith and fair dealing (same); (5) judicial foreclosure against Parcel A under Nevada law; and (6) injunctive relief. Defendants removed that case to the Bankruptcy Court. The Bankruptcy Court recommended moving to withdraw the reference, because the undersigned issued the underlying Confirmation Order while sitting as a bankruptcy judge. One or more parties so moved, and the Court granted the motion. The Court dismissed the second and fifth causes of action and later granted certain defendants' counter-

motion for summary judgment as against the remaining claims. Plaintiff asked the Court to reconsider and to clarify which, if any, of its claims remained, and defendants asked the Court to certify its summary judgment order under Rule 54(b) and to enter judgment in their favor on all claims. The Court denied the motion to reconsider, clarified that it had intended to rule on all claims, and certified the summary judgment order for immediate appeal. The Court of Appeals affirmed, ruling that the Parcel Transfer Fee had not been triggered based on the allegations in that case, and that Plaintiff had no lien against Parcel A.

B. The Present Case

In the present case, also removed from state court, Plaintiff recounts the Confirmation Order and the Parcel Transfer Fee. (*See* Compl. ¶¶ 10–14, Apr. 10, 2013, ECF No. 1, at 11). Plaintiff also recounts the history of the '613 Case. (*See id.* ¶¶ 17–21). Plaintiff alleges that Defendant Shotgun Nevada Investments, LLC ("Shotgun") began making loans to Desert Entities for the development of Parcel A between 2012 and January 2013 despite its awareness of the Confirmation Order and Parcel A transfer fee provision therein. (*See id.* ¶¶ 22–23). Plaintiff sued Shotgun, Shotgun Creek Las Vegas, LLC, Shotgun Creek Investments, LLC, and Wayne M. Perry for intentional interference with contract, intentional interference with prospective economic advantage, and unjust enrichment based upon their having provided financing to the Desert Entities to develop Parcel A. Defendants removed and moved for summary judgment, arguing that the preclusion of certain issues decided in the '613 Case necessarily prevented Plaintiffs from prevailing in the present case. The Court granted that motion as a motion to dismiss, with leave to amend.

Plaintiff filed the Amended Complaint ("AC"). (*See* Am. Compl., Aug. 20, 2013, ECF No. 28). Plaintiff alleges that the Confirmation Order permitted Parcel A to be used as collateral for up to $25,000,000 in mortgages of Parcel A itself or as collateral for a mortgage securing the purchase of real property subject to the FLT Option if the proceeds were used only for the

purchase of that real property, but that any encumbrance of Parcel A outside of these parameters would trigger the Parcel Transfer Fee. (*See id.* ¶¶ 15–16). Various Shotgun entities made additional loans to the Desert Entities in 2012 and 2013 "related to the development of Parcel A." (*Id.* ¶¶ 25–26). Multiple Shotgun entities have also invested in SkyVue Las Vegas, LLC ("SkyVue"), the company that owns the entities that own Parcel A. (*Id.* ¶ 27). Plaintiff alleges that the reason Perry, the principal of the Shotgun entities, did not document his $10 million investment was to "avoid evidence of a transfer," and thus the triggering of the Parcel Transfer Fee. (*See id.* ¶ 29).

Defendants moved for summary judgment, and Plaintiff moved to compel discovery under Rule 56(d). The Court struck the conspiracy and declaratory judgment claims from the AC, because Plaintiff had no leave to add them. The Court otherwise denied the motion for summary judgment and granted the motion to compel discovery, although the Court noted that the intentional interference with prospective economic advantage claim (but not the intentional interference with contractual relations claim) was legally insufficient. Defendants again moved for summary judgment after further discovery and filed a motion in limine asking the Court to exclude any testimony of witnesses or documents not disclosed in discovery. The Court denied the motion for summary judgment because the allegations in the AC concerned events subsequent to the events alleged in the '613 Case, and Plaintiff had submitted evidence sufficient to create a genuine issue of material fact for trial as to the sole remaining claim for intentional interference with contractual relations. The Court denied the motion in limine because it identified no particular evidence to exclude but simply asked the Court to enforce the evidence rules at trial as a general matter.

Defendants have asked the Court to reconsider their latest motion for summary judgment and to strike Plaintiff's recently filed jury demand.

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II. DISCUSSION

A. Motion to Reconsider

Defendants argue that the Court noted no timely reply had been filed, but that they in fact filed a reply that was timely under a stipulation to extend time. The Court has examined the reply, and it does not negate the genuine issue of material fact Plaintiff showed in his response.

B. Motion to Strike Jury Demand

Plaintiff did not demand a jury trial in the Complaint, (*see* Compl., ECF No. 1, at 11), or in the AC, (*see* Am. Compl., ECF No. 28). Defendants did not demand a jury trial in the Answer to the Complaint, (*see* Answer, ECF No. 4), or in the Answer to the AC, (*see* Answer, ECF No. 30). A jury must be demanded by serving the other parties with a written demand no later than fourteen days after service of the last pleading directed to the issue for which a jury trial is demanded. Fed. R. Civ. P. 38(b)(1). The last such pleading in this case was the Answer to the AC, which was served upon Plaintiff via ECF on September 3, 2013. (*See* Cert. Service, ECF No. 30, at 8). The deadline for any party to demand a jury trial was therefore Tuesday, September 17, 2013. The Jury Demand at ECF No. 67 was served upon Defendants via ECF on September 18, 2014, over a year after the deadline. (*See* Cert. Service, ECF No. 67, at 3). Defendants are therefore correct that the demand is untimely and should be stricken.

In response, Plaintiff notes that in removal cases such as the present one, an express jury demand made before removal that is sufficient under state law need not be renewed after removal, and that where state law requires no express jury demand, a party need not make such a demand after removal unless specially ordered to do so by the court within a specified time. *See* Fed. R. Civ. P. 81(c)(3)(A). Plaintiff argues that Nevada law requires a jury demand "not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Plaintiff argues that because a jury demand was not yet due under state law at the time the case was removed, he need not make such a demand after removal unless ordered to do so by the

court within a specified time, and the Court has not issued such an order in this case.

Rule 81 waives the requirements of Rule 38 where an express jury demand has been made under state law before removal. Plaintiff does not claim to have made any express jury demand before removal, however. It is also true that where state law does not require an express jury demand, none need be made after removal. The questions here are whether and when a party must make a jury demand in federal court after removal in cases where state law does in fact require a jury demand, but where it was not yet due under state law at the time of removal. In such cases, is the jury demand requirement under Rule 38 negated, as is the case where state law requires no demand at all?

Plaintiff candidly admits that the Court of Appeals has ruled that in such cases a jury demand must be made in accordance with Rule 38, and that district courts typically follow that rule. *See Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983). However, Plaintiff also notes that the rule at the time of *Lewis* read, "If state law applicable in the court from which the case is removed *does* not require the parties to make express demands in order to claim trial by jury . . . ." *See id.* (quoting Fed. R. Civ. P. 81(c) (1983)) (emphasis added). Plaintiff argues that the result should be different today, because the rule was amended in relevant part in 2007 to read, "If the state law *did* not require an express demand for a jury trial . . . ." Fed. R. Civ. P. 81(c)(3)(A) (emphasis added). Plaintiff argues that because the current rule uses the past tense as to the requirement to make a jury demand under state law when viewed from the point of removal, that there is no requirement to make a jury demand in federal court if none was yet due under state law at the time of removal. Plaintiff admits that the 2007 amendments to the rules were "intended to be stylistic only," *see* Fed. R. Civ. P. 81 advisory committee's note, but argues that the stylistic change is an "unfair trap for the unwary."

The Court agrees with the district courts that continue to enforce the *Lewis* rule. Rule 81 is not a trap for the unwary. Even if that had been a fair argument when Rule 81 was newly

amended, as Plaintiff notes, district courts, including those in this district, have consistently enforced the *Lewis* rule under Rule 81 as amended. *See Nascimento v. Wells Fargo Bank*, No. 2:11-cv-1049, 2011 WL 4500410, at *2 (D. Nev. Sept. 27, 2011) (Mahan, J.); *Kaldor v. Skolnik*, No. 3:10-cv-529, 2010 WL 5441999, at *2 (D. Nev. Dec. 28, 2010) (Hicks, J.). And the new language of the rule is not particularly confusing. The Rule 38 demand is required unless the state law "did not require an express demand," not only if the state law "did not *yet* require an express demand *to have been served at the time of removal*." The latter reading of the rule is improbable. The committee's notes make clear that such a meaning was not intended, as the amendment was only for style. The authors of the rule surely knew how to distinguish the concepts of whether and when, and they did not add any language reasonably invoking the concept of timing into the amendment of Rule 81(c)(3)(A).

Moreover, Plaintiff's own Case Management Report of July 30, 2013 notes that "A jury trial has not been requested" under paragraph VIII, entitled "JURY TRIAL." (*See* Case Mgmt. Report 6, July 30, 2013, ECF No. 25). If Plaintiff had truly been under the impression that the right to a jury trial had been preserved under Rule 81(c)(3)(A) because no jury demand was yet due at the time of removal, he surely would have noted his expectation of a jury trial and/or explained his position that no jury demand was necessary; he would not have simply noted that no jury trial had been requested and left it at that. Plaintiff's "unfair trap for the unwary" argument in this case is therefore not made in good faith, even if the argument could avail a litigant in an appropriate case.

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CONCLUSION

IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 68) is DENIED.

IT IS FURTHER ORDERED that the Motion to Strike Jury Demand (ECF No. 69) is GRANTED.

IT IS SO ORDERED.

Dated this 23rd day of October, 2014.

ROBERT C. JONES
United States District Judge

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15-CV-C

This submission seems to suggest only that the Committee create a "comment," not a change in the text of Rule 30(c)(2). It seems better to refuse to act on the proposal than to attempt to create a suitable change in rule text.

Rule 30(c)(2) says, among other things, that an objection at an oral deposition "must be stated concisely in a nonargumentative and nonsuggestive manner." The submission asks for a comment "indicating that it is improper to merely object to 'form' without providing more precise information as to how the question asked is 'defective as to form' (e.g., compound, leading, assumes facts not in evidence, etc.)."

Support for the submission is provided by attaching an opinion by Judge Mark W. Bennett in Security National Bank of Sioux City v. Abbott Laboratories, 2014 WL 3704277 (N.D.Iowa). The opinion imposes sanctions on a lawyer for making improper objections in defending depositions. "First, Counsel interposed an astounding number of 'form' objections, many of which stated no recognized basis for objection." Beyond that, the objections often coached the witness, and "Counsel excessively interrupted * * *." The opinion rejects the assumption "that uttering the word 'form' is sufficient to state a valid objection." Rule 32(d)(3)(B)(i) says that an objection to an error at an oral examination is waived by failure to make it timely at the deposition if it relates to "the form of a question or answer," or other matters that might have been corrected at the time. That does not mean that it suffices to say: "Object as to form."

It may be fair to assume that too many lawyers rely, too often, on unelaborated objections as to form. Providing a further explanation — if in fact the lawyer has thought of one — can only advance the conduct of the deposition and the value of the information discovered. It would be nice to find rule language that effectively alleviates this tendency.

But what language would do the job? "[I]n a nonargumentative, nonsuggestive, and helpful manner"? "[I]n a nonargumentative and nonsuggestive manner that reasonably explains the basis of the objection"? Is there a risk that directing more elaborate objections will prove counterproductive, encouraging non-concise, prolix, and otherwise obfuscating objections when the basis of the objection is in fact apparent without further explanation?

Unless pragmatic judgment suggests there is an opportunity to do something useful to improve form objections, it is better not to take up this suggestion.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8e6l-60c3
Comments Due: February 17, 2015

Docket: USC-RULES-CV-2014-0003
Proposed Amendments to the Federal Rules of Civil Procedure

Comment On: USC-RULES-CV-2014-0003-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure

Document: USC-RULES-CV-2014-0003-0005
Comment from Shawna Bligh, NA

Submitter Information

Name: Shawna Bligh
Organization: NA

General Comment

Perhaps consider clarifying the statement in the advisory notes to Fed. R. Civ. P. 30(c)(2) regarding "form" objections. As discussed more fully in the case Security National Bank of Sioux City v. Abbott Laboratories, 2014 WL 3704277, objections to "form" of the question is merely a one of a "category of objections," but not a proper objection in and of itself. There should be a comment indicating that it is improper to merely object to "form" without providing more precise information as to how the question asked is "defective as to form" (e.g. compound, leading, assumes facts not in evidence, etc.). The above-referenced case (also attached with this comment) has a great discussion about how such "form" objections can "frustrate the goals underlying the Federal Rules," as well as provides a good example of how the use of such objections can be abused in the discovery process.

Attachments

sanctions-order

2014 WL 3704277
Only the Westlaw citation is currently available.
United States District Court,
N.D. Iowa,
Western Division.

The SECURITY NATIONAL BANK OF SIOUX CITY, IOWA, as Conservator for J.M.K., a Minor, Plaintiff,
v.
ABBOTT LABORATORIES, Defendant.

No. C 11–4017–MWB. | Signed July 28, 2014.

Synopsis

Background: Conservator for minor child brought products liability action against manufacturer of baby formula, alleging that formula contained dangerous bacteria. After jury trial, judgment was entered for manufacturer. The District Court, sua sponte, filed order to show cause as to why manufacturer's attorney should not be sanctioned for obstructive conduct at depositions.

Holdings: Following telephonic hearing, the District Court, Mark W. Bennett, J., held that:

[1] attorney's conduct violated procedural rule prohibiting witness coaching;

[2] attorney violated procedural rule that prohibited impeding, delaying, and frustrating examination of witnesses during depositions; and

[3] attorney's conduct warranted sanction in which attorney was required to write and produce training video that addressed impropriety of his conduct.

Ordered accordingly.

West Headnotes (8)

[1] **Federal Courts**

A federal court may consider collateral issues, like sanctions, after an action is no longer pending.

Cases that cite this headnote

[2] **Attorney and Client**

District courts have an inherent power to levy sanctions in response to abusive litigation practices; a primary aspect of that power is the ability to fashion an appropriate sanction for conduct which abuses the judicial process, and that power can be invoked even if procedural rules exist which sanction the same conduct.

Cases that cite this headnote

[3] **Attorney and Client**

Only the most extreme sanctions under a court's inherent power, like assessing attorney's fees or dismissing with prejudice, require a bad-faith finding; for less extreme sanctions, a finding of bad faith is not always necessary to the court's exercise of its inherent power to impose sanctions.

Cases that cite this headnote

[4] **Attorney and Client**

Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear; lawyers may not object simply because they find a question to be vague, nor may they assume that the witness will not understand the question. Fed.Rules Civ.Proc.Rule 30(c)(2), 28 U.S.C.A.

Cases that cite this headnote

[5] **Attorney and Client**

Instructions to a witness at a deposition that they may answer a question "if they know" or "if they

understand the question" are raw, unmitigated coaching, and are never appropriate. Fed.Rules Civ.Proc.Rule 30(c)(2), 28 U.S.C.A.

Cases that cite this headnote

[6] **Attorney and Client**

Attorney's conduct at depositions, i.e., making objections that prompted witnesses to request that examiner clarify otherwise cogent questions, concluding objections by telling witness to answer "if you know," and rephrasing examiner's questions, violated procedural rule prohibiting witness coaching. Fed.Rules Civ.Proc.Rule 30(c)(2), 28 U.S.C.A.

Cases that cite this headnote

[7] **Attorney and Client**

Attorney's excessive interruptions and objections at depositions, such that attorney's name appeared on average between one and three times per page of deposition transcript, violated procedural rule that prohibited impeding, delaying, and frustrating examination of witnesses during depositions. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

Cases that cite this headnote

[8] **Attorney and Client**

Conduct of attorney in engaging in witness coaching and excessive interruptions at depositions warranted sanction in which attorney was required to write and produce training video that addressed impropriety of his conduct, so as to deter and change future improper tactics. Fed.Rules Civ.Proc.Rules 26, 30, 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION AND ORDER REGARDING SANCTIONS

MARK W. BENNETT, District Judge.

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*1 Something is rotten, but contrary to Marcellus's suggestion to Horatio, it's not in Denmark. [1] Rather, it's in discovery in modern federal civil litigation right here in the United States. Over two decades ago, Griffin Bell—a former United States Attorney General, United States appeals court judge, and private practitioner—observed: "The criticism of the civil justice system has reached a crescendo in recent years. Because much of the cost of litigation is incurred in discovery, the discovery process has been the focal point of considerable criticism." [2] How little things have changed.

Discovery—a process intended to facilitate the free flow of information between parties—is now too often mired in obstructionism. Today's "litigators" are quick to dispute discovery requests, slow to produce information, and all-too-eager to object at every stage of the process. They often object using boilerplate language containing every objection imaginable, despite the fact that courts have resoundingly disapproved of such boilerplate objections. [3] Some litigators do this to grandstand for their client, to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party. Others do it simply because it's how they were taught. As my distinguished colleague and renowned expert on civil procedure Judge Paul Grimm of the District of Maryland has written: "It would appear that there is something in the DNA of the American civil justice system that resists cooperation during discovery." [4] Whatever the reason, obstructionist discovery conduct is born of a warped view of zealous advocacy, often formed by insecurities and fear of the truth. This conduct fuels the astronomically costly litigation industry at the expense of "the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. It persists because most litigators and a few real trial lawyers—even very good ones, like the lawyers in this case—have come to accept it as part of the routine chicanery of federal discovery practice. [5]

But the litigators and trial lawyers do not deserve all the blame for obstructionist discovery conduct because judges so often ignore this conduct, [6] and by doing so we reinforce —even *incentivize*—obstructionist tactics. [7] Most litigators, while often inept in jury trials (only because they so seldom experience them), are both smart and savvy and will continue to do what has worked for them in the past. Obstructionist litigators, like Ivan Pavlov's dogs, salivate when they see discovery requests and are conditioned to unleash their treasure chest of obstructive weaponry. Unlike Pavlov's dogs, their rewards are not food but successfully blocking or impeding the flow of discoverable information. Unless judges impose serious adverse consequences, like court-imposed sanctions, litigators' conditional reflexes will persist. The point of court-imposed sanctions is to stop reinforcing winning through obstruction.

*2 While obstructionist tactics pervade all aspects of pretrial discovery, this case involves discovery abuse perpetrated during depositions. Earlier this year, in preparation for a hard-fought product liability jury trial, I was called upon by the parties to rule on numerous objections to deposition transcripts that the parties intended to use at trial. I noticed that the deposition transcripts were littered with what I perceived to be meritless objections made by one of the defendant's lawyers, whom I refer to here as "Counsel." I was shocked by what I read. Thus, for the reasons discussed below, I find that Counsel's deposition conduct warrants sanctions.

I do not come to this decision lightly. Counsel's partner, who advocated for Counsel during the sanctions hearing related to this case (and who is one of the best trial lawyers I have ever encountered), urged that sanctions by a federal judge, especially on a lawyer with an outstanding career, like Counsel, should be imposed, if at all, with great hesitation and a full appreciation for how a serious sanction could affect that lawyer's career. I wholeheartedly agree. I am still able to count each of the sanctions I have imposed on lawyers in my twenty years as a district court judge on less than all the fingers of one hand. Virtually all of those sanctions have been imposed on (or threatened to be imposed on) lawyers from out-of-state law firms. [8]

I. PROCEDURAL HISTORY

This matter arises out of a product liability case tried to a jury in January of 2014. Plaintiff Security National Bank (SNB), acting as conservator for a minor child, J.M.K., sued Defendant Abbott Laboratories (Abbott), claiming that J.M.K. suffered permanent brain damage after consuming baby formula, produced by Abbott, that allegedly contained a dangerous bacteria called enterobacter sakazakii. SNB went to trial against Abbott on design defect, manufacturing defect, and warning defect claims. On January 17, 2014, a jury found

in favor of Abbott on SNB's product liability claims. The Clerk entered judgment in favor of Abbott on January 21, 2014.

During the trial, I addressed Counsel's conduct in defending depositions related to this case. Specifically, I filed a *sua sponte* order to show cause as to why I should not sanction Counsel for the "serious pattern of obstructive conduct" that Counsel exhibited during depositions by making hundreds of "form" objections that ostensibly lacked a valid basis. Because I did not want to burden Counsel with the distraction of a sanctions hearing during trial, I suggested we table any discussion of sanctions until after the trial was over. Thus, the same day the judgment was filed, I entered a supplemental order to show cause, ordering Counsel to address three issues that potentially warrant sanctions: (1) Counsel's excessive use of "form" objections; (2) Counsel's numerous attempts to coach witnesses; and (3) Counsel's ubiquitous interruptions and attempts to clarify questions posed by opposing counsel. My supplemental order focused on Counsel's conduct in defending two particular depositions —those of Bridget Barrett–Reis and Sharon Bottock—but I noted that I would consider any relevant depositions in deciding whether to impose sanctions. On January 24, 2014, Counsel requested a substantial extension of time to respond to my supplemental order, which I granted. On April 21, 2014, Counsel responded to my supplemental order to show cause. My chambers later contacted Counsel to set this matter for telephonic hearing. Counsel requested another one-month delay, which I granted. Counsel filed an additional brief on July 9, 2014, and the hearing was finally held on July 17, 2014. During the hearing, I requested that Counsel follow up with an e-mail suggesting an appropriate sanction, should I decide to impose one. On July 21, 2014, Counsel's partner sent an e-mail to me declining to suggest a sanction, and urging me not to impose sanctions.

*3 After reviewing Counsel's submissions, I find that Counsel's conduct during depositions warrants sanctions. I discuss below the basis for imposing sanctions and the particular sanction that I deem appropriate in this case.

II. ANALYSIS

A. Standards for Deposition Sanctions

[1] "It is well established that a federal court may consider collateral issues [like sanctions] after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Because Counsel's deposition conduct is at issue here, Federal Rule of Civil Procedure 30 applies. Rule 30(d)(2) provides: "The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party —on a person who impedes, delays, or frustrates the fair examination of the deponent." Rule 30(d)(2) does not limit the types of sanctions available; it only requires that the sanctions be "appropriate." *See Francisco v. Verizon S., Inc.*, 756 F.Supp.2d 705, 712 (E.D.Va.2010), *aff'd*, 442 F. App'x 752 (4th Cir.2011) ("Although Rule 30(d)(2) does not define the phrase 'appropriate sanction,' the imposition of discovery sanctions is generally within the sound discretion of the trial court." (citations omitted)).

[2] District courts also have a " 'well-acknowledged' inherent power ... to levy sanctions in response to abusive litigation practices." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). "A primary aspect of that [power] is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). "[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Id.* at 49.

Counsel incorrectly argues—without citing to any dispositive authority—that I may not impose sanctions *sua sponte* under Rule 30(d)(2). Because SNB's lawyers did not file a motion for sanctions, Counsel argues that I am without power to impose them under the Federal Rules.[9] Rule 30(d)(2)'s text, however, imposes no such limitation on a court's authority to sanction deposition conduct. The rule contains no motion-related preconditions whatsoever; it simply provides that "[t]he court may impose an appropriate sanction" on a person who obstructs a deposition. The advisory committee notes further suggest that courts may issue Rule 30(d)(2) sanctions without a motion from a party. The notes provide that sanctions under Rule 30(d) are congruent to those under Rule 26(g):

> The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or

> attorney, but is otherwise congruent with Rule 26(g).

Fed.R.Civ.P. 30, advisory committee notes (1993 amendments). Under Rule 26(g), courts may issue sanctions *sua sponte:* "If a certification violates this rule without substantial justification, the court, on motion *or on its own,* must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Fed.R.Civ.P. 26(g)(3) (emphasis added). In addition to Rule 30(d)'s text and the advisory committee notes, the United States Supreme Court has noted that "court[s] generally may act *sua sponte* in imposing sanctions under the Rules." *Chambers,* 501 U.S. at 43 n. 8; *see also Jurczenko v. Fast Prop. Solutions, Inc.,* No. 1:09 CV 1127, 2010 WL 2891584, at *2–4 (N.D.Ohio July 20, 2010) (imposing sanctions under Rule 30(d)(2) where party moved for sanctions only under Rule 37(d)). And even if I lacked the power to issue sanctions under Rule 30(d), I would retain the authority to sanction Counsel under my inherent power. *See In re Itel Sec. Litig.,* 791 F.2d 672, 675 (9th Cir.1986) ("Sanctions may also be awarded sua sponte under the court's inherent power." (citing *Roadway Exp.,* 447 U.S. at 765)).

*4 [3] Counsel also claims to have acted in good faith during the depositions related to this case. Even if that is true, it is inapposite. In imposing sanctions under either Rule 30(d)(2) or my inherent power, I need not find that Counsel acted in bad faith. "[T]he imposition of sanctions under Federal Rule[ ] of Civil Procedure 30(d)(2) ... does not require a finding of bad faith." *GMAC Bank v. HTFC Corp.,* 248 F.R.D. 182, 196 (E.D.Pa.2008). Rather, the person sanctioned need only have "impede[d], delay[ed], or frustrate[d] the fair examination of the deponent." Fed.R.Civ.P. 30(d)(2). And only the most extreme sanctions under a court's inherent power—like assessing attorney's fees or dismissing with prejudice—require a bad-faith finding. *See Chambers,* 501 U.S. at 45–46 (noting that "a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" (citations and internal quotation marks omitted)); *Stevenson v. Union Pac. R. Co.,* 354 F.3d 739, 751 (8th Cir.2004) ("A bad faith finding is specifically required in order to assess attorneys' fees." (citations omitted)); *Lorin Corp. v. Goto & Co., Ltd.,* 700 F.2d 1202, 1207 (8th Cir.1983) ("Dismissal with prejudice is an extreme sanction and should not be imposed unless the default was wilful or in bad faith."). For less extreme sanctions, like those at issue here, "a finding of bad faith is not always necessary to the court's exercise of its inherent power to impose sanctions." *Stevenson,* 354 F.3d at 745 (citations omitted); *see also Harlan v. Lewis,* 982 F.2d 1255, 1260 (8th Cir.1993) ("We do not believe *Roadway* extends the 'bad faith' requirement to every possible disciplinary exercise of the court's inherent power, especially because such an extension would apply the requirement to even the most routine exercises of the inherent power. We find no statement in *Roadway, Chambers,* or any other decision cited by the parties, that the Supreme Court intended this 'bad faith' requirement to limit the application of monetary sanctions under the inherent power." (internal citations and footnote omitted)). Still, while I need not find bad faith before imposing sanctions, I find it difficult to believe that Counsel could, in good faith, engage in the conduct outlined in this opinion.

The Eighth Circuit Court of Appeals "review[s] the imposition of discovery sanctions for an abuse of discretion." *Craig v. St. Anthony's Med. Ctr.,* 384 F. App'x 531, 532 (8th Cir.2010).

B. Deposition Conduct

In defending depositions related to this case, Counsel proliferated hundreds of unnecessary objections and interruptions during the examiner's questioning. Most of these objections completely lacked merit and often ended up influencing how the witnesses responded to questions. In particular, Counsel engaged in three broad categories of improper conduct. First, Counsel interposed an astounding number of "form" objections, many of which stated no recognized basis for objection. Second, Counsel repeatedly objected and interjected in ways that coached the witness to give a particular answer or to unnecessarily quibble with the examiner. Finally, Counsel excessively interrupted the depositions that Counsel defended, frustrating and delaying the fair examination of witnesses. I will address each category of conduct in turn.

1. "Form" Objections

*5 In the two depositions I asked Counsel to review in my order to show cause, Counsel objected to the "form" of the examiner's question at least 115 times. That means that Counsel's "form" objections can be found on roughly 50% of the pages [10] of both the Barrett–Reis and Bottock depositions. Counsel made "form" objections with similar frequency while defending other depositions, too. Sometimes Counsel followed these "form" objections with a particular basis for objection, like "speculation" or "narrative." Other times, Counsel simply objected to "form," requiring the

reader (and, presumably, the examiner) to guess as to the objection's basis.

In addition to the sheer number of "form" objections Counsel interposed, Counsel also demonstrated the "form" objection's considerable range, using it for a number of purposes. For example, Counsel used "form" objections to quibble with the questioner's word choice (for no apparent reason, other than, perhaps, to coach the witness to give a desired answer):

> Q. Would it be fair to say that in your career, work with human milk fortifier has been a significant part of your job?
>
> COUNSEL: Object to the form of the question. "Significant," it's vague and ambiguous. You can answer it.
>
> A. Yeah, I can't really say it's been a significant part. It's been a part of my job, but "significant" is rather difficult because I have a wide range of things that I do there.

(Barrett–Reis Depo. 56:19 to 57:4).[11] Counsel used "form" objections to voice absurdly hyper-technical truths:

> Q. Are there certain levels that one can get, that have catwalks or some similar apparatus so I can get to the dryer?
>
> A. The dryer is totally enclosed. You cannot get into the dryer from any of the levels.
>
> Q. Can I get on the outside of the dryer?
>
> COUNSEL: Object to the form of the question; outside of the dryer? Everything is—I mean, outside of the dryer is a huge expanse of space; anything that's not inside the dryer is outside the dryer, so I object to it as vague and ambiguous. Object to the form of the question.
>
> A. Rephrase the question.

(Bottock Depo. 130:3–15). Counsel also used "form" objections to break new ground, inventing novel objections not grounded in the rules of evidence or common law:

> Q. Are you familiar with the term "immunocompromised"?
>
> A. Yes.
>
> Q. And that would include premature babies?
>
> COUNSEL: Object to the form of the question, "that would include premature babies?" It's a non sequitur.[12]

(Barrett–Reis Depo. 54:15–21). (In case there is any doubt, *non sequitur* is not a proper objection.) But, whatever their purpose, Counsel's "form" objections rarely, if ever, followed a truly objectionable question.

In my view, objecting to "form" is like objecting to "improper"—it does no more than vaguely suggest that the objector takes issue with the question. It is not itself a ground for objection, nor does it preserve any objection. Instead, "form" objections refer to a *category* of objections, which includes objections to "leading questions, lack of foundation, assuming facts not in evidence, mischaracterization or misleading question, non-responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question, and witness' answers that were beyond the scope of the question." *NGM Ins. Co. v. Walker Const. & Dev., LLC*, No. 1:11–CV–146, 2012 WL 6553272, at *2 (E.D.Tenn. Dec.13, 2012). At trial, when I asked Counsel to define what "form" objections entail, Counsel gave an even broader definition. Counsel first stated simply, "I know it when I hear it." Counsel then settled on the barely narrower definition that "form" objections include "anything that can be remedied at the time of the deposition so that you do not waive the objection if the deposition is used at a hearing or trial." Given that "form" may refer to any number of objections, saying "form" to challenge a leading question is as useful as saying "exception" to admit an excited utterance.

***6** Yet, many lawyers—and courts for that matter—assume that uttering the word "form" is sufficient to state a valid objection. This assumption presumably comes from the terminology used in the Federal Rules. Rule 30(c)(2) governs deposition objections and provides in part:

> An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner.

The advisory committee notes clarify the types of objections that must be noted on a deposition record:

> While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, *i.e.*, objections on grounds that might be immediately obviated, removed, or cured, *such as to the form of a question* or the responsiveness of an answer.

Fed.R.Civ.P. 30, advisory committee notes (1993 amendments) (emphasis added). These notes refer to Rule 32(d)(3), which provides that certain objections are waived if not made during a deposition:

> An objection to an error or irregularity at an oral examination is waived if:
>
> (i) it relates to the manner of taking the deposition, the *form of a question* or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
>
> (ii) it is not timely made during the deposition.

Fed.R.Civ.P. 32(d)(3)(B) (emphasis added). Together, these rules provide that any objection to the form of a question must be made on the record at a deposition, or that objection is waived.

But these rules do *not* endorse the notion that "form" is a freestanding objection. They simply describe categories of objections—like those to the form of a question—that must be noted during a deposition. Nothing about the text of Rules 30 or 32 suggests that a lawyer preserves the universe of "form" objections simply by objecting to "form." I agree with my colleague, Magistrate Judge Scoles, in his analysis of this issue:

> [Some] contend that the objection should be limited to the words "I object to the form of the question." The Rule, however, is not so restrictive. Rather, it simply provides that the objection must be "stated concisely in a nonargumentative and nonsuggestive manner ." ... [T]he general practice in Iowa permits an objector to state in a few words the manner in which the question is defective as to form (e.g., compound, vague as to time, misstates the record, etc.). This process alerts the questioner to the alleged defect, and affords an opportunity to cure the objection.

Rakes v. Life Investors Ins. Co. of Am., No. C06–0099, 2008 WL 429060, at *5 (N.D.Iowa Feb.14, 2008); *see also Cincinnati Ins. Co. v. Serrano*, No. 11–2075–JAR, 2012 WL 28071, at *5 (D.Kan. Jan.5, 2012) ("Although the [rules] talk about objections based on the 'form' of the question (or responsiveness of the answer), this does not mean that an objection may not briefly specify the nature of the form objection (e.g. 'compound,' 'leading,' 'assumes facts not in evidence')."). I would go further, however, and note that lawyers are *required*, not just permitted, to state the basis for their objections.

*7 Moreover, "form" objections are inefficient and frustrate the goals underlying the Federal Rules. The Rules contemplate that objections should be concise and afford the examiner the opportunity to cure the objection. *See* Fed.R.Civ.P. 30(c)(2) (noting that "objection[s] must be stated concisely"); *id.*, advisory committee notes (1993 amendments) (noting that "[d]epositions frequently have been unduly prolonged ... by lengthy objections and colloquy" and that objections "ordinarily should be limited to those ... grounds that might be immediately obviated, removed, or cured, such as to the form of a question"). While unspecified "form" objections are certainly concise, they do nothing to alert the examiner to a question's alleged defect. Because they lack specificity, "form" objections do not allow the examiner to immediately cure the objection. Instead, the examiner must ask the objector to clarify, which takes *more* time and *increases* the amount of objection banter between the lawyers. Briefly stating the particular ground for the objection, on the other hand, is no less concise and allows the examiner to ask a remedial question without further clarification.

Additionally, it is difficult, if not impossible, for courts to judge the validity of unspecified "form" objections:

> [U]nless an objector states with some specificity the nature of his objection, rather than mimicking the general language of the rule, i.e., "objection to the form of the question," it is impossible to determine, based upon the transcript of the deposition itself, whether the objection was proper when made or merely frivolous.

Mayor & City Council of Baltimore v. Theiss, 354 Md. 234, 729 A.2d 965, 976 (Md.1999). When called upon to rule on an unspecified "form" objection, a judge either must be

clairvoyant or must guess as to the objection's basis. Neither option is particularly realistic or satisfying. This is reason enough to require a specific objection.

Requiring lawyers to state the basis for their objections is not the same thing as requiring "speaking objections" in which lawyers amplify or argue the basis for their objections. For example, "Objection, hearsay" is a proper objection. By contrast, "Objection, the last assertion by Mr. Jones was an out-of-court statement by Ms. Day, said in the hotel room, that Mr. Jones allegedly heard, that he never testified to in a deposition, and that is now being offered for the truth of Ms. Day's statement" is an improper speaking objection. I have always required the former and barred the latter.

I recognize, however, that not all courts share my views regarding "form" objections. In fact, some courts explicitly *require* lawyers to state nothing more than unspecified "form" objections during depositions. *See Offshore Marine Contractors, Inc. v. Palm Energy Offshore, L.L.C.*, No. CIV.A. 10–4151, 2013 WL 1412197, at *4 (E.D.La. Apr.8, 2013) ("The Court finds that the behavior of counsel for OMC does not warrant sanctions here. Indeed, most of the objections by OMC's counsel are simple form objections with no unwarranted, lengthy speaking objections."); *Serrano*, 2012 WL 28071, at *5 ("But such an objection [to a vague question] to avoid a suggestive speaking objection should be limited to an objection 'to form,' unless opposing counsel requests further clarification of the objection."); *Druck Corp. v. Macro Fund (U.S.) Ltd.*, No. 02 CIV.6164(RO)(DFE), 2005 WL 1949519, at *4 (S.D.N.Y. Aug. 12, 2005) ("Any 'objection as to form' must say only those four words, unless the questioner asks the objector to state a reason."); *Turner v. Glock, Inc.*, No. CIV.A. 1:02CV825, 2004 WL 5511620, at *1 (E.D.Tex. Mar.29, 2004) ("All other objections to questions during an oral deposition must be limited to 'Objection, leading' and 'Objection, form.' These particular objections are waived if not stated as phrased above during the oral deposition."); *Auscape Int'l v. Nat'l Geographic Soc'y*, No. 02 CIV. 6441(LAK), 2002 WL 31014829, at *1 (S.D.N.Y. Sept.6, 2002) ("Once counsel representing any party states, 'Objection' following a question, then all parties have preserved all possible objections to the form of the question unless the objector states a particular ground or grounds of objection, in which case that ground or those grounds alone are preserved."); *In re St. Jude Med., Inc.*, No. 1396, 2002 WL 1050311, at *5 (D.Minn. May 24, 2002) ("Objecting counsel shall say simply the word 'objection', and no more, to preserve all objections as to form."). [13] For the reasons discussed above, I think this approach makes little legal or practical sense.

***8** But, because there is authority validating "form" objections, I do not impose sanctions based on the fact that Counsel used these objections while defending depositions. Counsel's "form" objections, however, amplified two other issues: witness coaching and excessive interruptions. As I discuss below, *those* aspects of Counsel's deposition conduct warrant sanctions. Thus, I impose sanctions related to Counsel's "form" objections only to the extent that those objections facilitated the coaching and interruptions. Although I do not impose sanctions based on Counsel's "form" objections in this case, lawyers should consider themselves warned: Unspecified "form" objections are improper and will invite sanctions if lawyers choose to use them in the future.

2. Witness Coaching

While there appears to be disagreement about the validity of "form" objections, the law clearly prohibits a lawyer from coaching a witness during a deposition. Under Rule 30(c)(2), deposition "objection[s] must be stated concisely in a nonargumentative and nonsuggestive manner." *See also* Fed.R.Civ.P. 30, advisory committee notes (1993 amendments) ("Depositions frequently have been ... unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."). This clause mandates what should already be obvious—lawyers may not comment on questions in any way that might affect the witness's answer:

> The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.

Hall v. Clifton Precision, 150 F.R.D. 525, 530–31 (E.D.Pa.1993); *see also Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D.Ill.2010) ("Objections that are argumentative

or that suggest an answer to a witness are called 'speaking objections' and are improper under Rule 30(c)(2).").

Despite the Federal Rules' prohibition on witness coaching, Counsel's repeated interjections frequently prompted witnesses to give particular, desired answers to the examiner's questions. This happened in a number of ways. To start, Counsel often made "clarification-inducing" objections—objections that prompted witnesses to request that the examiner clarify otherwise cogent questions. For example, Counsel regularly objected that questions were "vague," called for "speculation," were "ambiguous," or were "hypothetical." These objections usually followed completely reasonable questions. But, after hearing these objections, the witness would usually ask for clarification, or even refuse to answer the question:

> Q. Is there—do you believe that there's—if there's any kind of a correlation that could be drawn from OAL environmental samples to the quality of the finished product?
>
> *9 COUNSEL: Objection; vague and ambiguous.
>
> A. That would be speculation.
>
> Q. Well, if there were high numbers of OAL, Eb samples in the factory, wouldn't that be a cause for concern about the microbiological quality of the finished product?
>
> COUNSEL: Object to the form of the question. It's a hypothetical; lacks facts.
>
> A. Yeah, those are hypotheticals.
>
> ...
>
> Q. Would that be a concern of yours?
>
> COUNSEL: Same objection.
>
> A. Not going to answer.
>
> Q. You're not going to answer?
>
> A. Yeah, I mean, it's speculation. It would be guessing.
>
> COUNSEL: You don't have to guess.

(Bottock Depo. 106:24 to 108:2). While it is impossible to know for certain what a witness would have said absent Counsel's objections, I find it inconceivable that the witnesses deposed in this case would so regularly request clarification were they not tipped-off by Counsel's objections. *See McDonough v. Keniston,* 188 F.R.D. 22, 24 (D.N.H.1998) ("The effectiveness of [witness] coaching is clearly demonstrated when the [witness] subsequently adopts his lawyer's coaching and complains of the broadness of the question...."); *Cordova v. United States,* No. CIV.05 563 JB/LFG, 2006 WL 4109659, at *3 (D.N.M. July 30, 2006) (awarding sanctions based on a lawyer's deposition coaching because "it became impossible to know if [a witness's] answers emanated from her own line of reasoning or whether she adopted [the] lawyer's reasoning from listening to his objections").

These same objections spilled over into the trial. The following colloquy occurred during the plaintiff's cross-examination of Counsel's expert:

> Q.... Isn't [J.M.K.'s mother] saying that every time she used a bottle she boiled it first?
>
> COUNSEL: Your Honor, I would just object that in the—it's not clear from the context of this one page or several pages what it is they're talking about in terms of which feedings, if he can point it out to him.
>
> THE COURT: And so what is the nature of that objection? I haven't ever heard that one before.
>
> COUNSEL: It's confusing.
>
> THE COURT: Well, it may be confusing to you, but he didn't ask the question to you. He asked it of the witness.
>
> COUNSEL: Okay. Might be confusing to the witness.
>
> THE COURT: Yeah, that's suggesting an answer which is exactly the problem I had with your depositions.
>
> COUNSEL: I would just object to the form of the question then, Your Honor.
>
> THE COURT: That's not a proper objection, so it's overruled.
>
> A. As I read this, I can't be certain as to what exactly she's referring to at what point here.

Once again, after Counsel's objection suggested that the question "might" confuse the witness, the witness replied that he "[couldn't] be certain" as to what was being asked.

But perhaps the most egregious examples of clarification-inducing objections arose when Counsel defended the deposition of Sharon Bottock. During that deposition, Counsel lodged no fewer than 65 "form" objections, many of which did not specify any particular basis. Immediately after most of these "form" objections, the witness gave the seemingly Pavlovian response, "Rephrase." At times, the transcript feels like a tag-team match, with Counsel and witness delivering the one-two punch of "objection"—"rephrase":

> ***10** Q.... I'm wondering if you could perhaps in a ... little bit less technical language explain to me what they're talking about in that portion of the exhibit.
>
> COUNSEL: Object to the form of the question.
>
> A. So rephrase.
>
> Q. Could you tell me what they're saying here?
>
> COUNSEL: Same objection.
>
> A. Rephrase it again.
>
> ...
>
> Q. So it—that's what they're talking about, the two types, the finished product and the overs? Does it separate those two things?
>
> A. Yes.
>
> Q. What's an "over"?
>
> COUNSEL: Object to the form. He doesn't want you to characterize it. He wants to know what's it made out of, I think. [14]
>
> Q. I mean, is it too big?
>
> COUNSEL: Object to the form of the question.
>
> A. Rephrase.

(Bottock Depo. 58:20 to 59:25). Note the witness's first answer in this colloquy: *So* rephrase. The witness's language makes clear that she is requesting—actually, *commanding*—the examiner to rephrase based on Counsel's objection.

[4] These clarification-inducing objections are improper. Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The *witness*—not the lawyer—gets to decide whether he or she understands a particular question:

> Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be remedied on cross-examination.

Serrano, 2012 WL 28071, at *5; *see also Hall,* 150 F.R.D. at 528–29 ("If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer." (footnote omitted)); Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses,* Prac. Litig., Sept. 2006, at 15, 16 ("It is improper for an attorney to interpret that the witness does not understand a question because the lawyer doesn't understand a question. And the lawyer certainly shouldn't suggest a response. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition.").

Counsel's clarification-inducing objections are reminiscent of the improper objections at issue in *Phillips v. Manufacturers Hanover Trust Co.,* No. 92 CIV. 8527(KTD), 1994 WL 116078 (S.D.N.Y. Mar.29, 1994). In *Phillips,* a lawyer

> ***11** objected or otherwise interjected during [the examiner's] questioning of the deponent at least 49 times though the deposition lasted only an hour and a half. Indeed, approximately 60 percent of the pages of the transcript contain such interruptions. Many of these were objections as to form, which are waived if not made at

> the deposition, Fed.R.Civ.P. 32(d)(3)(B), but on numerous occasions [the lawyer's] objections appeared to have no basis.... Moreover, after 21 of [the lawyer's] objections as to form, the deponent asked for clarification or claimed he did not understand the question.... [The lawyer] objected as to form, and the deponent then stated he did not understand the question, subsequently asking that it be narrowed.

Id. at *3. In considering whether to impose sanctions, the court described the lawyer's conduct as "inappropriate" and "obnoxious." *Id.* The court also noted that the lawyer's conduct frustrated the deposition:

> Such interplay clearly did hamper the free flow of the deposition. Rather than answer [the examiner's] questions to the best of his ability, the deponent hesitated, asking for clarification of apparently unambiguous questions.... In addition, the deponent asked for such clarifications almost exclusively after [the lawyer] objected or interrupted in some fashion.

Id. Finally, the court recognized that the lawyer's conduct violated Rule 30, but chose not to impose sanctions because, at the time, Rule 30 was newly amended and because the examiner was able to finish the deposition. *Id.* at *4. The court warned, however, that "a repeat performance [would] result in sanctions." *Id.*

Like the lawyer in *Phillips,* Counsel's endless "vague" and "form" objections (and their variants described above) frustrated the free flow of the depositions Counsel defended. They frequently induced witnesses to request clarification to otherwise unambiguous questions. Counsel's "form" objections also emboldened witnesses to quibble about the legal basis for certain questions—*e.g.,* "That would be speculation"—and to stonewall the examiner—*e.g.,* "Not going to answer." In short, these objections were suggestive and amounted to witness coaching, thereby violating Rule 30.

[5] But Counsel's clarification-inducing objections are only part of the problem. In a related tactic, Counsel frequently concluded objections by telling the witness, "You can answer if you know" or something similar. Predictably, after receiving this instruction, witnesses would often claim to be unable to answer the question:

> Q. Are these the ingredients that are added after preparation or after pasteurization?
>
> COUNSEL: If you know. Don't guess.
>
> A. If you could rephrase the question. There's no ingredients on 28.
>
> COUNSEL: So you can't answer the question.

(Bottock Depo. 47:12–18).

> Q. If it's high enough to kill bacteria, why does Abbott prior to that go through a process of pasteurization?
>
> ***12** COUNSEL: If you know, and you're not a production person so don't feel like you have to guess.
>
> A. I don't know.

(Bottock Depo. 48:12–17).

> Q. Does it describe the heat treatment that you referred to a few moments ago, the heat treatment that occurs in the dryer phase?
>
> ...
>
> COUNSEL: Okay. Do you know his question? He's asking you if this is what you're describing.
>
> A. Yeah, I don't know.

(Bottock Depo. 57:8–21).

> Q.... Is there any particular reason that that language is stated with respect to powdered infant formula?
>
> COUNSEL: If you know. Don't—if you know.
>
> A. No, I—no, not to my knowledge.
>
> COUNSEL: If you know. I mean, do you know or not know?
>
> A. I don't know.

(Barrett–Reis Depo. 49:10–18). These responses are unsurprising. When a lawyer tells a witness to answer "if you know," it not-so-subtly suggests that the witness may not know the answer, inviting the witness to dodge or qualify an

otherwise clear question. For this reason, "[i]nstructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw, unmitigated coaching, and are never appropriate." *Serrano*. 2012 WL 28071, at *5; *see also Specht*, 268 F.R.D. at 599 ("Mr. Fleming egregiously violated Rule 30(c)(2) by instructing Mr. Murphy not to answer a question because his answer would be a 'guess.' "); *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 567 (D.Kan.1997) (noting that an attorney violated Rule 30 when he "interrupted [a] deposition in mid-question, objected to the assumption of facts by the witness, and advised the witness that he was not obligated to assume facts").

Lastly, Counsel often directly coached the witness to give a particular, substantive answer. This happened in a few ways. Sometimes Counsel reinterpreted or rephrased the examiner's questions:

> Q. To what extent do you have knowledge of the testing procedures that Abbott employs in raw materials or the environment, the plant environment or final product?
>
> A. Very limited knowledge, again, because that would be product development.
>
> COUNSEL: He's just asking you what do you have. Do you have any? If it's no, then just say "no."
>
> A. Okay.

(Barrett–Reis Depo. 20:16 to 21:2).

> Q.... Do you know when that occurs or does it occur on a regular basis?
>
> COUNSEL: Object to the form, regular basis. It says, "Once a year." He means the same time once a year presumably but—
>
> A. On an annual basis, the time may vary when we close the facility to fumigate.

(Bottock Depo. 34:5–11).

> Q. At any rate, you'll see that on both the first page of Exhibit 22 and the first page of Exhibit 23, there's a picture of the product, and both of them have the word "NeoSure" on the product. Would you be able to tell me what the difference between those two products is?
>
> ...
>
> COUNSEL: Well, he said difference between the products. It lacks foundation that there's a difference between the products.
>
> *13 Q. There may not be. I don't know. Can you tell me?
>
> COUNSEL: Well, the question is—I object to the form of the question. He's not asking you just about the label. He's asking you is there a difference in the product. So can you answer that?

(Barrett–Reis Depo. 29:2–20). Sometimes Counsel gave the witness additional information to consider in answering a question:

> Q. For that particular infant who is not premature, like in this case was a twin, do you believe that NeoSure is an appropriate version of powdered infant formula?
>
> COUNSEL: Object to the form. Lack of foundation in terms of what this baby—whether this baby was preterm or not. It's not in evidence in this deposition nor in the record anyplace. And I object to the form of the question as calling for speculation.
>
> Q: Go ahead.
>
> COUNSEL: You can answer.
>
> A. I can't answer it without more information.

(Barrett–Reis Depo. 99:7–19). Sometimes Counsel answered the examiner's question first, followed by the witness:

> Q.... Is that accurate or is there something that they, you know, just chose not to put—
>
> COUNSEL: If you know. She didn't write this.
>
> A. Yes, I didn't write this.

(Bottock Depo. 27:20–25)

> Q. Okay. The part that counsel just read, is that basically an accurate summary of the process?
>
> COUNSEL: In general.
>
> A. In general.

(Bottock Depo. 28:21–24).

> Q.... And then under "Follow–Up Test" for Eb it's essentially the same thing as E. sak negative; right?
>
> COUNSEL: It says zero.
>
> A. It says zero.
>
> Q. But which would—that would be the same type of finding if it said E. sak negative; right?
>
> COUNSEL: In other words, there's no Eb. There's no Eb; there's no—
>
> A. It's zero. There's no Eb.

(Bottock Depo. 114:14–24). Counsel even audibly disagreed with a witness's answer, prompting the witness to change her response to a question:

> Q. My question is, was that a test—do you know if that test was performed in Casa Grande or Columbus?
>
> A. I don't.
>
> COUNSEL: Yes, you do. Read it.
>
> A. Yes, the micro—the batch records show finished micro testing were acceptable for the batch in question.

(Bottock Depo. 86:9–15).

[6] All of the objections described in this section violate Rule 30 by suggesting, in one way or another, how the witness should answer a question. More troublingly, these objections allowed Counsel to commandeer the depositions, influencing the testimony in ways not contemplated by the Federal Rules. Instead of allowing for a question-and-answer session between examiner and witness, Counsel acted as an intermediary, which frustrated the purpose of the deposition:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.

***14** *Hall,* 150 F.R.D. at 528 (footnote omitted); *see also Alexander v. F.B.I.,* 186 F.R.D. 21, 52–53 (D.D.C.1998) (noting that "[i]t is highly inappropriate for counsel for the witness to provide the witness with responses to deposition questions by means of an objection" or to "rephrase or alter the question" asked of the witness); Panken & Valbrune, *supra,* at 16 ("[C]ounsel is not permitted to state on the record an interpretation of questions, because those interpretations are irrelevant and are often suggestive of a particularly desired answer.").

In response to my order to show cause, Counsel explains what motivated many of the objections that I perceive to be coaching:

> In many places during the depositions of Abbott witnesses ... where it was clear that the plaintiff's counsel was on the wrong track factually ... defense counsel attempted to steer him to the correct ground. When things got bogged down, hours in, defense counsel also attempted to speed up the process by helping to clarify or facilitate things, for which the plaintiff's counsel seemed appreciative.

(Docket no. 193, at 4–5) (footnote omitted). It is not for the defending lawyer to decide whether the examiner is on the "wrong track," nor is it the defending lawyer's prerogative to "steer [the examiner] to the correct ground." While lawyers are encouraged to be collegial and helpful to one another during depositions, Counsel's conduct, on balance, was neither. It defies common sense to suggest that Counsel's omnipresent commentary sped up the depositions in this case. Moreover, most of Counsel's commentary during depositions were *objections,* not benign attempts to clarify. Because this commentary coached witnesses to give particular answers, I find that sanctions are appropriate.

3. Excessive Interruptions

[7] Beyond the "form" objections and witness coaching, Counsel's interruptions while defending depositions were grossly excessive. Counsel's name appears at least 92 times in the transcript of the Barrett–Reis deposition (about once per page), and 381 times in the transcript of the Bottock deposition (approaching three times per page). Counsel's name appears with similar frequency in the other depositions that Counsel defended. And, as I noted earlier, nearly all of Counsel's objections and interruptions are unnecessary and unwarranted.

These excessive and unnecessary interruptions are an independent reason to impose sanctions. The notes accompanying Rule 30 provide that sanctions may be appropriate "when a deposition is unreasonably prolonged" and that "[t]he making of an excessive number of unnecessary objections may itself constitute sanctionable conduct...." Fed.R.Civ.P. 30, advisory committee notes (1993 amendments); *see also Craig,* 384 F. App'x at 533 ("The notes also explain that an excessive number of unnecessary objections may constitute actionable conduct, though the objections be not argumentative or suggestive."). At least two courts in this circuit have imposed sanctions based, in part, on a lawyer's excessive and unnecessary objections during depositions. *See id.* (affirming a monetary sanction against a lawyer who made "a substantial number of argumentative objections together with suggestive objections" that "impeded, delayed, or frustrated [a] deposition"); *Van Pilsum v. Iowa State Univ. of Sci. & Tech.,* 152 F.R.D. 179, 181 (S.D.Iowa 1993) (sanctioning a lawyer who had "no justification for ... monopoliz[ing] 20% of his client's deposition" and whose objections "were for the most part groundless, and were only disputatious grandstanding").

***15** By interposing many unnecessary comments, clarifications, and objections, Counsel impeded, delayed, and frustrated the fair examination of witnesses during the depositions Counsel defended. Thus, sanctions are independently appropriate based on Counsel's excessive interruptions.

C. Appropriate Sanction

Based on Counsel's deposition conduct, I would be well within my discretion to impose substantial monetary sanctions on Counsel. But I am less interested in negatively affecting Counsel's pocketbook than I am in positively affecting Counsel's obstructive deposition practices. I am also interested in deterring others who might be inclined to comport themselves similarly to Counsel. The Federal Rules specifically acknowledge that one function of discovery sanctions should be deterrence. *See* Fed.R.Civ.P. 26, advisory committee notes (1983 amendments) ("Sanctions to deter discovery abuse would be more effective if they were diligently applied 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.' " (quoting *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976)). Deterrence is especially important given that so many litigators are *trained* to make obstructionist objections. For instance, at trial, when I challenged Counsel's use of "form" objections, Counsel responded, "Well, I'm sorry, Your Honor, but that was my training...." While monetary sanctions are certainly warranted for Counsel's witness coaching and excessive interruptions, a more outside-the-box sanction [15] may better serve the goal of changing improper tactics that modern litigators are trained to use. *See* Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them,* 61 DRAKE L.REV. 913, 931–36 (2013) (discussing the importance of unorthodox sanctions in deterring discovery abuse).

[8] In light of this goal, I impose the following sanction: Counsel must write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court. [16] The video must specifically address the impropriety of unspecified "form" objections, witness coaching, and excessive interruptions. The lawyer appearing in the video may mention the few jurisdictions that actually require only unspecified "form" objections and may suggest that such objections are proper in only those jurisdictions. The lawyer in the video must state that the video is being produced and distributed pursuant to a federal court's sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order. Upon completing the video, Counsel must file it with this court, under seal, for my review and approval. If and when I approve the video, Counsel must (1) notify certain lawyers at Counsel's firm about the video via e-mail and (2) provide those lawyers with access to the video. The lawyers who must receive this notice and access include each lawyer at Counsel's firm—including its branch

offices worldwide—who engages in federal or state litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state or federal case in the United States. After providing these lawyers with notice of and access to the video, Counsel must file in this court, under seal, (1) an affidavit certifying that Counsel complied with this order and received no assistance (other than technical help or help from the lawyer appearing in the video) in creating the video's content and (2) a copy of the e-mail notifying the appropriate lawyers in Counsel's firm about the video. The lawyer appearing in the video need not state during the video that he or she agrees with this opinion, or that Counsel was the lawyer whose deposition conduct prompted this sanction. Counsel need not make the video publicly available to anyone outside Counsel's firm. Failure to comply with this order within 90 days may result in additional sanctions.

***16** To be clear, had Counsel made only a handful of improper objections or comments while taking depositions, I would not have raised these issues *sua sponte.* Depositions can be stressful and contentious, and lawyers are bound to make the occasional improper objection. But Counsel's improper objections, coaching, and interruptions went far beyond what judges should tolerate of any lawyer, let alone one as experienced and skilled as Counsel. Counsel's baseless interjections and obstructionist commentary were ubiquitous; they pervaded the depositions in this case and even spilled over into the trial. It is the repeated nature of Counsel's obstructionist deposition conduct that warrants sanctions here.

Finally, I note that, despite Counsel's deposition conduct, I was greatly impressed by how Counsel performed at trial. Unlike the "litigators" I discussed earlier, Counsel was extremely well-prepared, had clearly mastered the facts of this case, and did a great job of incorporating electronic evidence into Counsel's direct- and cross-examinations. Those aspects of Counsel's noteworthy trial skills, expertise, and preparation are laudable, but they do not excuse Counsel's pretrial conduct.

If Counsel appeals this sanctions order I will, *sua sponte,* automatically stay it pending the appeal.

III. CONCLUSION

For the reasons stated in this opinion, I find that sanctions are appropriate in response to Counsel's improper deposition conduct, which impeded, delayed, and frustrated the fair examination of witnesses in the depositions related to this case that Counsel defended. I therefore impose the sanction described above.

IT IS SO ORDERED.

Footnotes

1 WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 4.

2 Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform,* 27 GA. L.REV. 1, 1 (1992).

3 *See* Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them,* 61 DRAKE L.REV. 913, 917 n. 20 (2013) (collecting cases disapproving of boilerplate objections); *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.,* 198 F.R.D. 508, 513 (N.D.Iowa 2000) (same).

4 Hon. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery,* 64 S.C. L.REV. 495, 530 (2013).

5 Judge Grimm and David Yellin aptly describe some of the misplaced motivations behind obstructionist tactics:

> The truth is that lawyers and clients avoid cooperating with their adversary during discovery—despite the fact that it is in their clear interest to do so—for a variety of inadequate and unconvincing reasons. They do not cooperate because they want to make the discovery process as expensive and punitive as possible for their adversary, in order to force a settlement to end the costs rather than having the case decided on the merits. They do not cooperate because they wrongly assume that cooperation requires them to compromise the legitimate legal positions that they have a good faith basis to hold. Lawyers do not cooperate because they have a misguided sense that they have an ethical duty to be oppositional during the discovery process—to "protect" their client's interests—often even at the substantial economic expense of the client. Clients do not cooperate during discovery because they want to retaliate against their adversary, or "get back" at them for the events that led to the litigation. But the least persuasive of the reasons for not cooperating during the discovery process is the entirely misplaced notion that the "adversary system" somehow prohibits it.

Grimm & Yellin, *supra* note 4, at 525–26 (footnotes omitted). Amen Brother Grimm and Mr. Yellin for being so insightful and refreshingly candid.

6 *Cf.* Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost–Saving Amendments to the Federal Rules*, 87 DENV. U.L.REV., 473, 475 (2010) ("The Federal Rules prohibit evasive responses.... In practice, however, these rules are not enforced. Service of evasive discovery responses has become a routine—and rewarding—litigation tactic.").

7 *Cf. id.* at 483 ("The reluctance of courts to impose sanctions under Rule 37 has encouraged the use of evasive and dilatory behavior in response to discovery requests. Such behavior serves no purpose other than to increase the cost and delays of litigation.").

8 Iowa trial lawyers have a long and storied tradition and culture of civility that is first taught at the state's two law schools, the University of Iowa College of Law and the Drake University Law School. I know this because I have taught and lectured at both of these outstanding law schools that produce the bulk of Iowa lawyers. Civility is then taken very seriously, nourished and lead by the Iowa Supreme Court, and continually reinforced by the Iowa State Bar Association, the Iowa Academy of Trial Lawyers, and all of the other legal organizations in the state, as well as senior members of the bar, law firm partners from large to small firms, and solo practitioners across the state. There is great pride in being an Iowa lawyer, and describing someone as an Iowa lawyer almost always connotes that lawyer's high commitment to civility and professionalism. Of course, there are stinkers in the Iowa bar, but they are few and far between.

9 The fact that SNB's lawyers did not move for sanctions further suggests that lawyers have simply become numb to obstructionist discovery tactics, either because they are used to them, they choose to take the high ground, or perhaps because they use such tactics themselves. (After observing SNB's lead lawyer at trial, I seriously doubt the latter.) Based on my 39 years as a member of the federal bar, I surmise that SNB's lawyer did not move for sanctions because he has other enterobacter sakazakii cases against Counsel and did not want to undermine his ongoing relationship with Counsel by seeking sanctions. This rationale makes particular sense in a case like this where all of the information SNB's lawyer needed to prove SNB's manufacturing and product defect claim resided with Abbott and Counsel, and where there was no other avenue to obtaining case-critical information.

10 I calculated this number based on the number of deposition pages that actually contained testimony, excluding pages like the title page, etc.

11 In reproducing portions of the deposition transcripts for this opinion, I occasionally change the notation identifying the speaker for reasons of anonymity, consistency, and ease of reading. For example, I do not use Counsel's name, which appears in the transcripts. I also use "A." to indicate a witness's answer, whereas some of the transcripts use the phrase "the witness." The words used by the speakers, however, remain unaltered.

12 In response to my order to show cause, Counsel claims that "the question was misleading, confusing, vague and ambiguous[,]" and that it "call[ed] for a medical opinion or conclusion" (docket no. 193, at 13). None of these reasons relate to Counsel's original claim that the question was a non sequitur. But, in any event, there is absolutely nothing confusing about the question, nor does it call for a medical conclusion (the witness held a PhD in nutritional science, though). This litany of adjectives—"misleading, confusing, vague and ambiguous"—are all too common in federal depositions and roll too easily and too frequently off the lips of lawyers who engage in repeated obstructionist conduct. Multiple objections like this are often a harbinger of obstructionist lawyers. That Counsel would cite those objections in "defense" of Counsel's conduct suggests very strongly that Counsel just doesn't get it, and further undermines Counsel's claim of good faith. That these objections are part of an oft-used litigation strategy does not suggest that Counsel made them in good faith.

13 The record contains no indication that Counsel knew of, or relied on, these, or similar cases when Counsel made "form" objections during depositions. Counsel did not claim to know of these cases, or similar lines of authority, at the time Counsel made the "form" objections, in Counsel's response to either of my show-cause orders, or at the sanctions hearing.

14 Here, Counsel reinterprets the question for the witness—an issue that I address below.

15 For examples of outside-the-box discovery sanctions, see the following cases: *St. Paul Reinsurance Co.*, 198 F.R.D. at 518 (imposing a write-a-bar-journal-article sanction); *R.E. Linder Steel Erection Co., Inc. v. U.S. Fire Ins. Co.*, 102 F.R.D. 39, 41 (D.Md.1983) (imposing a $5.00–per–inturruption sanction); *Huggins v. Coatesville Area Sch. Dist.*, No. CIV.A. 07–4917, 2009 WL 2973044, at *4 (E.D.Pa. Sept.16, 2009) (imposing a sit-down-and-share-a-meal-together sanction).

16 I am not the first judge to suggest a video-related sanction. In *Florida Bar v. Ratiner*, 46 So.3d 35, 41 n. 4 (Fla.2010), the Florida Supreme Court noted that law students and members of the Florida bar could view footage of a videotaped deposition in which a later-suspended lawyer behaved unprofessionally toward his opposing counsel as part of a course on professionalism.

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This submission suggests amendments of Rules 12(a)(4) and 12(d). Rule 12(a)(4) extends the time to file a responsive pleading when "a motion under this rule" is made. The amendment of Rule 12(a)(4) would say expressly that the extension is available "even if the motion does not address all the claims in a pleading." Rule 12(d) would be amended to say that the extension under Rule 12(a)(4) applies even if a Rule 12(b)(6) motion is treated as one for summary judgment.

The substance of the proposals seems sound. The submission supports them by pointing to Federal Practice & Procedure: Civil, Vol. 5B, § 1346, p. 46, which says — citing one district-court opinion — that while "some courts" have ruled that a motion to dismiss only parts of a pleading does not enlarge the time to respond to other parts, "the weight of the limited authority" enlarges the time. Enlarging the time is supported because it avoids duplicative pleadings and confusion over the proper scope of discovery. The 2015 supplement adds eight cases to the four cases cited in the main volume to support this approach. An additional case is cited with new text. This case also enlarges the time to respond, but observes that as motions to dismiss have become more frequent in response to new pleading standards, "prompt resolution of cases is becoming increasingly difficult."

The submission addresses Rule 56 by pointing to Vol. 10A, Federal Practice & Procedure: Civil, pp. 303-304. The discussion criticizes a 1953 district-court decision that denied an enlargement of time when a defendant filed a motion for summary judgment before filing an answer. The argument is that Rule 12(a)(4) enlarges the time for a Rule 12(b)(6) motion, and thus enlarges the time when a Rule 12(b)(6) motion is converted to a motion for summary judgment. The argument continues that it makes no sense to distinguish between summary judgment motions filed directly under Rule 56 and those created by converting a Rule 12(b)(6) motion. One case is described to support this conclusion.

This submission proposes amendments that seem to make good practice explicit. But the dearth of cases involving these issues, and the apparent convergence on the desired outcome, suggest that it may be better to avoid increasing the length of the rules by adding these amendments.

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SUBMITTED ELECTRONICALLY

March 6, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

RE: Proposed Amendments to Federal Civil Rule 12(a)(4) and 12(d)

To Whom It May Concern:

The State Bar of Michigan Committee on United States Courts ("Committee") respectfully submits the following proposed amendments to FRCP 12(a)(4) and 12(d) for consideration:

> 12(a)
> (4) Effect of Motion. Unless the court sets a different time, serving a motion under this rule—even if the motion does not address all the claims in a pleading—alters these time periods as follows:...
>
> 12(d)
> Result of Presenting Matters Outside the Pleadings. If, on motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion. Unless the court orders otherwise, the time for filing a responsive pleading under Rule 12(a)(4) applies to a Rule 12(b)(6) motion treated as one for summary judgment under Rule 56."

Both amendments provide needed clarification to what happens to the deadline to file a responsive pleading in the event a 12(b) motion to dismiss is filed as to some but not all asserted claims or presents matters outside the pleadings. The underlying rationale for both proposed amendments is set forth in the attached memorandum.

The Committee is a standing committee of the State Bar of Michigan comprised of seventeen members appointed by the President of the State Bar of Michigan. Its mission is to make recommendations concerning the administration, organization, and operation of the United States Courts for the purpose of securing the effective administration of justice. The Committee's members are federal judges and attorneys who work in and are familiar with the federal court system.

The State Bar of Michigan has authorized the Committee to submit these comments to the Committee on Rules of Practice and Procedure. These Federal Civil Rule amendment proposals represent the position of the Committee on the United States Courts and should not be considered a position of the State Bar of Michigan.

Thank you for your consideration.

Sincerely,

Kelley Megan Haladyna
Chair, Committee on United States Courts

Thaddeus E. Morgan
Federal Civil Rule Amendment Sub-Committee

Attachment

MEMORANDUM

To: United States Courts Committee

From: Rule Amendment Subcommittee (Thad Morgan, Mark McInerney, and Matt Heron)

RE: Federal Civil Rule Amendment Proposals

Date: January 19, 2015

Introduction

The Subcommittee requests approval from the Committee to submit the following two rule amendment proposals to the Federal Rules Advisory Committee for consideration, and if accepted by the Advisory Committee, for publication and comment.

Rule Amendment Proposals

Issue: Rule 12(a)(4) provides that serving a Rule 12(b) motion to dismiss alters the time to serve responsive pleadings so that, if the motion is denied, "responsive pleadings must be served within 14 days after notice of the court's action[.]" Rule 12(a)(4), however, is silent on the issue of whether a partial Rule 12(b) motion that attacks some, but not all, of the claims raised in a pleading operates to toll the entire responsive pleading obligation.

Proposed Amendment and Rationale: An amendment to Rule 12(a)(4) is proposed for consideration by the Federal Rules Advisory Committee, and the Subcommittee submits the following two versions for consideration:

> (4) ***Effect of Motion.*** Unless the court sets a different time, serving a motion under this rule—even if the motion does not address all the claims in a pleading—alters these time periods as follows:…
>
> or
>
> (4) ***Effect of Motion.*** Unless the court sets a different time, serving ~~a~~ any motion under this rule alters ~~these~~ the time periods for filing answer to all or part of the complaint as follows:…

It is fairly settled that a party who files a partial Rule 12(b) motion gets the benefit of having its responsive pleading obligation tolled pending a decision on the motion.[1] There are, however, outlier decisions and some commentary to the contrary.[2] The rationale behind the majority rule seems to comport with Rule 1's admonition that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." As *Wright & Miller* point out:

> Courts following this majority rule have noted that the minority approach would require duplicative sets of pleadings in the event that the Rule 12(b) motion is denied and cause confusion over the proper scope of discovery during the motion's pendency.[3]

Therefore, request is made for approval from the Committee to forward the proposed amendment to Rule 12(a) to the Federal Rules Advisory Committee for consideration, and, if accepted, for publication and comment by the Advisory Committee.

Issue: When matters outside the pleadings are presented to and not excluded by the court as part of a Rule (12)(b) motion, Rule 12(d) states that a court "must" treat the motion as one for summary judgment brought under Rule 56. When a Rule 12(b) motion is so converted, and no responsive pleading is filed, the open question is whether the Rule 12(a)(4) tolling continues to apply to the Rule 56 motion?

To begin, and ignoring for the moment the question of tolling in the context of a converted Rule 12(b) motion, there is disagreement on the basic question of whether a Rule 56 motion, clearly labeled as such and filed in lieu of an answer, abrogates the requirement that a defendant serve an answer within the prescribed time period. As *Wright & Miller*

---

[1] *See e.g. Gortat v. Capala Bros.,* 257 F.R.D. 353, 366 (E.D. N.Y. 2009); *Aslani v. Sparow Health Sys.*, 2009 WL 736654, at *4 n. 10 (W.D. Mich. 2009).
[2] *Gerlach v. Michigan Bell Tel. Co.*, 448 F.Supp 1168 (E.D. Mich. 1978); Scott L. Cagan, *A "Partial" Motion to Dismiss under Federal Rule of Civil Procedure 12: You Had Better Answer*, 39 Fed. B.J. 202 (1992).
[3] Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1346, p. 46 (3d ed. 2004) ("*Wright & Miller").*

contend, "[a] defending party is not required by [Rule 56] to file an answer before moving for summary judgment."[4] There are, however, a number of decisions to the contrary[5], and in *Rashidi v. Albright*[6], the district court confronted the question of whether it should entertain the plaintiff's request for entry of default in light of the defendants' motion for summary judgment filed without any accompanying responsive pleading. The district court rejected the request for entry of default reasoning:

> The ambiguity of the rules makes disposition of this issue difficult. Generally the best course of action is to complete the pleadings for the record. However, defendants' belief that the law supports the notion that a summary judgment motion falls within the scope of "defend" within the meaning contemplated by Rule 55 and that the summary judgment motion can toll the response time, minimally amounts to a good faith interpretation of the law or alternatively could be considered excusable neglect pursuant to Rule 6(b).[7]

Unlike summary judgment, motions to dismiss are designed to test the adequacy of pleadings, and expanding the inquiry to consider materials outside the pleadings would be inconsistent with the goals of Rule 12.[8] Further, mislabeled Rule 12 motions that rely upon materials extrinsic to the complaint are disfavored as an attempt to manipulate the Rules and gain an advantage:

> [T]he Court has no hesitancy concluding that [defendant] has labeled its Motion for Summary Judgment a 'Motion to Dismiss' simply to *avoid* filing an answer. Such an attempt to manipulate the Federal Rules of Civil Procedure should not be condoned or encouraged by the Court…A litigant should not be permitted to gain an advantage by intentionally mislabeling a filing.[9]

---

[4] *Id.* at § 2718, p. 301, citing *First Nat. Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968) (Supreme Court affirmed grant of summary judgment to a defendant who never answered in more than six years of litigation).
[5] *See Modrowski v. Pigatto*, 712 F.3d 1166, 1170 (7th Cir. 2013) ("While serving a Rule 12 motion tolls the deadline for a defendant to file an answer, filing a Rule 56 motion has no such effect."); *See also Poe v. Cristina Copper Mines*, 15 F.R.D. 85, 87 (D. Del. 1953) "[an] extension of time to file a responsive pleading until determination of a motion for summary judgment under Rule 56 is not a definite and fixed right but a matter to be granted or denied under Rule 6(b) from a consideration of all the circumstances.")
[6] 818 F.Supp. 1354 (D. Nev. 1993).
[7] *Id.* at 1356.
[8] *See Winget v. JP Morgan Chase Ban, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008).
[9] *Ricke v. Armco, Inc.*, 158 F.R.D. 149, 150 (D. Minn. 1994) (citations omitted) (italics in original) (denying the defendant's motion to confirm that an answer did not need to filed).

Returning to the question of whether the Rule 12(a)(4) tolling continues when a Rule 12(b) motion is converted to one for summary judgment, the limited authority suggests that the tolling should continue.[10] This is also the approach taken by *Wright & Miller*: "By analogy, this [Rule 12(a)] language should apply to a Rule 56 motion."[11]

Proposed Amendment and Rationale: An amendment to Rule 12(d) is proposed for consideration by the Federal Rules Advisory Committee as follows:

> **(d) Result of Presenting Matters Outside the Pleadings.** If, on motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion. Unless the court orders otherwise—either on its own initiative or at the request of a party—the time for filing a responsive pleading under Rule 12(a)(4) applies.

Given the unsettled question of whether a Rule 56 motion operates to toll the time to answer[12], Rule 12(d) should be amended in the manner set-forth above to *at least* clarify that a converted Rule 12(b) motion continues to be subject to the tolling in Rule 12(a)(4), unless the court orders otherwise. There are several practical reasons in support of the amendment.

First, a party that files a Rule 12 motion should reasonably expect that the tolling provided for in Rule 12(a)(4) will apply even if the Rule 12 motion is converted to a Rule 56 motion. Second, the proposed amendment will eliminate the uncertainty that comes with notice from a court that a Rule 12 motion is converted to a Rule 56 motion, i.e. does the notice require a party to immediately answer or file a motion for an extension of time under Rule 6(b) on the basis of excusable neglect? *Rashidi, supra*. Or, is a plaintiff free to seek an entry of default? Third, the "matters outside the pleadings" may be so innocuous that

[10] *See Marquez v. Cable One, Inc.*, 463 F.3d 1118, 1120-1121 (10th Cir. 2006) ("Thus, the motion did toll the time to file an answer until the district court converted it to a motion for summary judgment and resolve the motion.")
[11] *Wright & Miller,* § 2718, p. 303.
[12] This could be a matter taken up by the Committee in the future.

responsive pleading is not warranted. For example, the additional material could consist of an undisputed declaration that the party has complied with all conditions precedent to an arbitration demand, such as compliance with a pre-demand settlement procedure.

To be sure, there may be instances where a party manipulates the tolling provided in Rule (a)(4) by filing a mislabeled Rule 12 motion to avoid filing an answer. *Ricke*, *supra* n. 9. That is why the proposed amendment allows either the court to order, or a party to request, that a responsive pleading be filed in connection with a converted Rule 12 motion. Currently, there is no such authority in the Rules to compel an answer. There are situations, in addition to mislabeled Rule 12 motions, where an answer should be compelled. For instance, again in the arbitration context, the party demanding arbitration in a Rule 12 motion that is converted to a Rule 56 motion could have counter-claims that are outside the ambit of, and unrelated to, the parties' agreement to arbitrate. In that situation, it seems reasonable to permit a party to compel responsive pleadings before the court orders the entire matter to arbitration.

Conclusion

Committee approval is sought to submit the proposed Rule amendments to the Federal Rules Advisory Committee, on State Bar letterhead, for consideration. The Subcommittee acknowledges that any proposal may need further approval from the State Bar Executive Committee prior to submission to the Rules Advisory Committee.

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TAB 11D

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15-CV-X

This submission proposes to amend the Rule 45 provisions for trial subpoenas in two ways. One would extend its geographic reach, "to force a representative of a non-resident corporate defendant to appear at trial in the court that has jurisdiction over the parties and case." The other would adopt the corporate deposition procedure of Rule 30(b)(6) into Rule 45, so that a subpoena could name an entity as witness and direct the entity to produce one or more real persons to testify for the entity.

The suggestion to expand the geographic reach of a trial subpoena raises an issue that was thoroughly explored in developing the Rule 45 amendments that took effect in 2013. The Committee considered conflicting interpretations of then-Rule 45(c)(3)(A)(ii). Some courts had interpreted the rule to authorize a trial subpoena for a witness who is a party or a party's officer without regard to the geographic limits in then-Rule 45(b)(2) on serving subpoenas. Other courts disagreed. The Committee concluded that parties and a party's officers should be protected by the same geographic limits as other witnesses. But, without recommending its adoption, the Committee invited comment on an alternative that was published for comment. The alternative was this:

> Notwithstanding the limitations of Rule 45(c)(1)(A), for good cause the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In determining whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.

After considering extensive public comments, the Committee confirmed its decision that this alternative should not be adopted.

This recent history provides strong reason to decline to reopen this question. Reconsideration may be appropriate if experience comes to suggest broader subpoenas are needed. But at least several years of experience will be needed.

The suggestion to authorize a trial subpoena addressed to a non-human entity builds on analogy to the Rule 30(b)(6) deposition of an entity. The reach of this suggestion can be illustrated by recalling the central parts of Rule 30(b)(6). A subpoena may name an entity as deponent

> and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization.

The Committee has considered Rule 30(b)(6) on at least two separate occasions over the last several years. Each time it concluded that although valid concerns had been raised about its operation, it is better left as it is. That does not mean that comparable provisions should be added to Rule 45.

However well Rule 30(b)(6) works in discovery of corporate parties, the difficulties it presents would be magnified for nonparty corporations in discovery and at trial. At a minimum, a timing requirement would have to be added to ensure that the entity has sufficient time to find the "information known or reasonably available to the organization." Then it would have to inculcate this information into the minds of one or more people designated to testify to that information. The human witnesses inevitably would make mistakes, calling for correction by means still more unsatisfactory than whatever means may be available with a deposition.

The outer limits of the submission are uncertain. It could be pushed to the point of requiring a nonparty entity to produce witnesses to testify at a deposition in the district where an action is pending. The Committee has been concerned about the burdens a Rule 30(b)(6) deposition imposes on a nonparty. There is little to be said for expanding its geographic reach.

It is better to refuse to act on this submission.

Rule 45 Changes
Troy Doucet, Esq.
to:
Rules_Support
08/21/2015 03:31 PM
Hide Details
From: "Troy Doucet, Esq." <troy@troydoucet.com>
To: <Rules_Support@ao.uscourts.gov>

15-CV-X

1 Attachment

2015.08.21_Order Affirming District Court's Decision.pdf

Dear Rules Committee,

A change to Rule 45 is necessary so that a plaintiff has the power to compel an out-of-state corporate representative of the defendant to appear at trial in the court that has jurisdiction over the case.

The Sixth Circuit ruled in the attached *Hill v. Homeward,* 14-4168 (8/21/2015) that a plaintiff cannot use Rule 45 to force a representative of a non-resident corporate defendant to appear at trial in the court that has jurisdiction over the parties and case. Here, we attempted to compel the out-of-state corporation to produce a representative to appear at trial and answer questions regarding the matter at hand. Our subpoena was quashed, and affirmed on appeal. A corporate representative of the defendant appeared to give testimony during discovery, but was not compelled to appear at trial.

The court's decision means that the way the current Rules are drafted, a plaintiff can require a corporate defendant to produce a representative to appear at a deposition to testify about certain areas of knowledge during discovery, but cannot force a corporate representative to actually appear at trial.
The Sixth Circuit suggests that the way around this limitation is to use discovery depositions during trial, rather than read Rules 30(b)(6) and 45 together to be able to specify areas of knowledge for a representative (versus picking a particular person) to appear in person. Further, the court's decision allows a corporation to avoid the production of someone in the jurisdiction of the litigation when the corporation's headquarters is located elsewhere.

The way that Rule 45 is now drafted, the result is what happened in this case: Our client, the plaintiff, did not have the power to force the corporate defendant to have a corporate representative appear at trial. Because the corporation's headquarters was outside the jurisdiction of the Southern District of Ohio (its headquarters is in Florida), we also could not force someone from Florida to appear in Ohio for trial. Further, even if we were able to subpoena the corporation, the court's decision limits our ability to compel attendance by a representative in favor of requiring us to name a particular person. Of course, if we did name the very particular person who appeared as the corporate representative for the corporation, that person could be fired or otherwise made unavailable.

The end result of this decision allows for significant gamesmanship by corporate defendants, which is why the Rules need amended to allow a plaintiff to compel a defendant non-resident corporate representative to appear and give testimony at trial. Please feel free to contact me at the number below if you would like further information.

Thank you,

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How have you helped those less fortunate today?

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: August 21, 2015

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Re: Case No. 14-4168, *Stephen Hill v. Homeward Residential, Inc.*
Originating Case No. : 2:13-cv-00388

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Richard W. Nagel

Enclosures

Mandate to issue.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0201p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STEPHEN M. HILL,

Plaintiff-Appellant,

v.

HOMEWARD RESIDENTIAL, INC., fka American Home Mortgage Servicing, Inc.,

Defendant-Appellee.

No. 14-4168

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:13-cv-00388—Gregory L. Frost, District Judge.

Argued: August 4, 2015

Decided and Filed: August 21, 2015

Before: CLAY and McKEAGUE, Circuit Judges; BERTELSMAN, District Judge.*

COUNSEL

ARGUED: Troy J. Doucet, DOUCET & ASSOCIATES, CO., L.P.A., Dublin, Ohio, for Appellant. Kimberly Y. Smith Rivera, MCGLINCHEY STAFFORD, Cleveland, Ohio, for Appellee. **ON BRIEF:** Troy J. Doucet, DOUCET & ASSOCIATES, CO., L.P.A., Dublin, Ohio, for Appellant. Kimberly Y. Smith Rivera, MCGLINCHEY STAFFORD, Cleveland, Ohio, for Appellee.

McKEAGUE, J., delivered the opinion of the court in which CLAY, J., and BERTELSMAN, D.J., joined. CLAY, J. (pg. 11), delivered a separate concurring opinion.

*The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

McKEAGUE, Circuit Judge. The Telephone Consumer Protection Act prohibits companies from making automated calls to a person's cellphone without that person's prior express consent. We must primarily decide whether a person gives his "prior express consent" when he gives his creditor his cellphone number in connection with a debt he owes. In line with the agency in charge of enforcing the Act, we conclude that this constitutes "prior express consent" to be called on that number about the debt. Because the district court's decision reflects that rule, and because the court did not commit any other error, we affirm.

I

Congress passed the Telephone Consumer Protection Act in response to "[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012). The Act accordingly "restricts certain kinds of telephonic and electronic" communications. *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218, 221 (6th Cir. 2015). For example, the Act prohibits any person from making "any call" to someone's cellphone "(other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A)(iii). The recipient of one of these prohibited communications can sue for private money damages—for at least $500 per violation. § 227(b)(3)(B).

Stephen Hill claims he received well over a hundred of these prohibited phone calls from his creditor, Homeward Residential, Inc., in connection to a debt he owed. His story began in 2003 when he obtained a mortgage loan from Jordan West Companies. He provided his home and work numbers on that loan. Three years later, though, he cancelled his home phone and replaced it with a cellphone. After his loan transferred to Homeward, he contacted the company to advise it that his primary phone number had changed. Homeward then replaced Hill's

obsolete home number with his cellphone number in its records. Hill knew that this number would be used if Homeward needed to reach him about his mortgage.

Hill eventually fell behind on his mortgage, but Hill and Homeward worked out a loan modification so Hill could keep his home. Hill listed his cell phone number on that document. When he continued to fail to pay his mortgage payments on time, Homeward called him to collect its payments. In July 2010, Hill told Homeward not to call him at work anymore, instructing Homeward to call his cellphone instead. This left his cellphone number as the only number listed in his records with Homeward.

Hill's loan modification failed, and he ultimately defaulted on his mortgage. After that, from May 2011 through January 2013, Hill filled out at least ten forms with Homeward to try to mitigate his losses. He provided his cellphone number on all these forms. *See* Appellee Br. 3–4 (listing the forms). He also provided express written consent for Homeward to call his cellphone. *See, e.g.*, R. 19-3 (Uniform Borrower Assistance Form) at 30 ("I consent to being contacted concerning this request for mortgage assistance at any cellular or mobile telephone number I have provided[,] . . . includ[ing] . . . telephone calls to my cellular or mobile telephone."). By doing so, Hill testified that he understood Homeward "would call me at that cell phone number." R. 18-1 (Hill Depo.) at 49.

To collect from Hill and in other matters regarding his loan, Homeward called Hill on the number he provided: his cellphone. In all, Homeward called him an alleged 482 times from 2009 to 2013. One hundred seventy-six of these calls used Prairie, a device "capable of autodialing a phone number." Appellee Br. 13. But Homeward says that it didn't actually use its phone systems that way, instead only manually dialing Hill's number. Likewise, Homeward says it never used automated messages to call Hill, although Hill disputes the point.

Hill, upset at these repeated calls, sued Homeward in federal court. He complained that Homeward's calls constituted either knowing or negligent violations of the Telephone Consumer Protection Act, which, as explained, prohibits companies from using auto-dialers to call cellphone numbers without the called party's consent. After discovery, each side moved for summary judgment, but the court denied each motion. It held that two genuine issues of material fact existed: (1) whether Homeward used an "automatic telephone dialing system" to call Hill;

and (2) whether Hill offered his cellphone number to Homeward, or whether Homeward "captured" Hill's number and called Hill outside the scope of his consent. R. 31 at 3–11. The case would proceed to a jury on these two questions.

Before trial, Hill tried to subpoena an unidentified corporate representative of Homeward to testify about twenty-six topics at trial. Homeward moved to quash the subpoena because it did not comply with Federal Rule of Civil Procedure 45. Apparently recognizing its defects, Hill filed another subpoena one week before trial, mooting his first subpoena. Homeward again moved to quash this subpoena because it also failed to comply with Rule 45, including it did not identify a witness and did not tender the necessary fees. The district court agreed with Homeward and quashed the subpoena. The court also rejected Hill's subsequent efforts to compel Homeward to produce a corporate representative at trial.

Trial began—and ended nearly as quickly as it began. A jury returned a general verdict for Homeward after one day. The court accepted the verdict and issued judgment.

II

Hill appealed. He makes three arguments: (A) that the district court should have granted his summary-judgment motion because the record showed that Homeward used an auto-dialer to call his cellphone without his prior express consent; (B) that the jury instruction on "prior express consent" was too broad; and (C) that the district court should have compelled a Homeward witness to testify at trial. None has merit.

A

Hill's *post-trial* appeal from the district court's denial of his *pretrial* summary-judgment motion cannot succeed, because a losing party may not "appeal an order denying summary judgment after a full trial on the merits." *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011); *accord Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990). A district court's summary-judgment denial is "interlocutory" in nature—the antithesis of what Congress has given us jurisdiction to hear. 28 U.S.C. § 1291 (giving us jurisdiction over *final* decisions); *see Ortiz*, 562 U.S. at 188. When a court denies a summary-judgment motion because of a genuine issue of fact (as the court did here) it "decides only one thing—that the case should go to trial"; the denial "does not settle

or even tentatively decide anything about the merits of the claim." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966). A trial, of course, *does* settle the matter on the merits and *is* final in nature. So once a trial occurs, the losing party may appeal from *that* judgment—but not from the summary-judgment denial, because § 1291 does not give us jurisdiction to hear those non-final appeals. *See Ortiz*, 562 U.S. at 184, 188–89.

We accordingly lack appellate jurisdiction over this portion of Hill's appeal. Hill lost his summary-judgment motion in August 2014 but did not appeal it until November 2014—after he lost at trial. He does not say that the evidence produced *at trial* shows that he must win, but rather that the evidence *at summary judgment* does. Here is what he should have done: make a Rule 50(a) motion, renew that motion after the jury verdict under Rule 50(b), and then appeal the denial of the Rule 50(b) motion. *See Maxwell v. Dodd*, 662 F.3d 418, 421 (6th Cir. 2011). But here is what he did instead: make an oral Rule 50(a) motion, fail to renew that motion, and then appeal the denial of the *Rule 56 motion* rather than the Rule 50 motion. *See* R. 59 (Notice of Appeal). His "failure to renew" or appeal his "motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b)" leaves us "with no warrant" to address the summary-judgment denial. *Ortiz*, 562 U.S. at 185; *see Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005). And even if his generic notice of appeal of the trial judgment encompassed the denial of his oral Rule 50(a) motion, *see, e.g.*, *Blockel v. J.C. Penney Co.*, 337 F.3d 17, 24 (1st Cir. 2003), he forfeited any argument on that issue by not discussing it in his briefing.

Even though Homeward did not address our lack of appellate jurisdiction, we have "a duty to consider [it] sua sponte." *Mattingly v. Farmers State Bank*, 153 F.3d 336, 336 (6th Cir. 1998) (per curiam). And this issue cannot be waived or forfeited by the parties. *See Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 659–60 (6th Cir. 2013).

No exceptions apply. When a summary-judgment denial involves "a pure question of law," our caselaw says that we may review it. *In re AmTrust Fin. Corp.*, 694 F.3d 741, 750 (6th Cir. 2012). But that is not what happened here; like *Ortiz*, it involved questions of fact. The district court held, for example, that there was a genuine issue of *fact* whether Hill gave his cellphone number to Homeward (*i.e.* expressly consented) or whether Homeward acquired it by other means. R. 31 at 10; *see also* R. 63 (Trial Transcript) at 30. "Depending upon the answers"

to this and other factual issues, the court wrote, Hill may or may not have given his consent. R. 31 at 10. A jury had to decide. And after a jury has given its answer, we cannot review the court's pretrial order. *Nolfi v. Ohio Kentucky Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012).

B

The district court's jury instructions on "prior express consent" were not overly broad. Our role in reviewing these instructions is merely to ensure they "adequately informed the jury of the relevant considerations" of the law. *United States v. Kuehne*, 547 F.3d 667, 679 (6th Cir. 2008) (citations omitted). A district court has discretion to deny proposed instructions, so we review this challenge "for abuse of discretion." *Id.* We may reverse only if the instructions "were confusing, misleading, or prejudicial." *Id.* (citations omitted). They were not here.

The court's jury instruction on this issue read, in full:

> "'Prior express consent' means that before Defendant made a call to Plaintiff's cellular telephone number, Plaintiff had given an invitation or permission to receive calls to that number.
>
> Autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party."

R. 54 at 75.

This language adequately reflects the legal definition of prior express consent promulgated by the Federal Communications Commission (FCC). It was taken directly from the FCC's rulings—which shape the law in this area, *see* 47 U.S.C. § 227(b)(2) (charging the FCC with prescribing rules and regulations under the Act). The instructions paraphrased the FCC's original definition on "prior express consent"—that a party who gives an "invitation or permission to be called at [a certain] number" has given its express consent with respect to that number. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8769 (1992). And the instructions quote verbatim the FCC's later clarification of that definition in the debtor–creditor context—that a creditor doesn't violate the Act when it calls a debtor who has "provided [his number] in connection with an existing debt." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*,

23 F.C.C. Rcd. 559, 564 (2008). A court does not misstate the law when it simply states the law. This jury instruction was proper.

Hill takes issue because the instruction leaves out a small excerpt from these rulings—that "prior express consent is . . . granted only if the wireless number was provided . . . during the transaction that resulted in the debt owed." *Id.* Hill adds the word *initial* before "transaction" and thus reads the rule to limit consent to only when it's given at the "initial transaction" that creates the debt. Appellant Br. 11 (emphasis in original); Reply Br. 4. That would be 2003 for Hill—before Homeward was Hill's creditor and before Hill even had a cellphone—too early, Hill says, for him to possibly give his express consent.

But this excerpt does not bear the weight Hill puts on it. Unlike Hill, the FCC never uses the words *initial* or *original* before "transaction." It instead says that the debtor has given his consent when he gives his number "*during the transaction*" that involves the debt (*i.e.*, "regarding the debt"). 23 F.C.C. Rcd. at 564–65, 567 (emphasis added). This language does not change the general definition of express consent; it instead "emphasize[s]" that creditors can call debtors only "to recover payment for obligations owed," not on any topic whatsoever. *See id.* at 564, 565 n.36. So it ensures that a debtor who gives his number *outside* the context of the debt has not given his consent to be called regarding the debt. FCC's Letter Brief, *Re: Nigro v. Mercantile Adjustment Bureau, LLC*, 2014 WL 3612689 (C.A.2), at *8–*9; *see Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804, 806–07 (2d Cir. 2014) (holding that a third party did not give his prior express consent to be called about a debt when he gave his number outside of the context of the debt). *Contra* Reply Br. 9–11. Still, then, any "autodialed and prerecorded message calls to wireless numbers *provided by the called party in connection with an existing debt* are made with the 'prior express consent' of the called party." 23 F.C.C. Rcd. at 564 (emphasis added). And that's precisely what this jury instruction said. R. 54 at 75.

Although the FCC has yet to explicitly address this issue, *see* FCC's Letter Brief, 2014 WL 3612689 at *10–*11, courts interpreting the excerpt agree with our reading. A debtor consents to calls about "an existing debt" when he gives his number "in connection with" that debt, 23 F.C.C. Rcd. at 564—including after his initial signing of the loan. *See Moore v. Firstsource Advantage, LLC*, No. 07-CV-770, 2011 WL 4345703, at *10 (W.D.N.Y. Sept. 15,

2011). While debtors may "[t]ypically" give their cellphone number "as part of a credit application" at the beginning of the debtor–creditor relationship, *see* 23 F.C.C. Rcd. at 565 n.36, it doesn't *have* to be that way. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1122 (11th Cir. 2014); *see, e.g.*, *Sartori v. Susan C. Little & Associates, P.A.*, 571 F. App'x 677, 683 (10th Cir. 2014) (holding that the debtor gave his prior express consent, even though he didn't give his number until one year after debt was incurred). Unsurprisingly, then, a person gives his "prior express consent" under the statute if he gives a company his number before it calls him.

Finally, a debtor does not need to give his consent to automated calls specifically; his general consent to being called on a cellphone constitutes "prior express consent." The FCC's regulations for telemarketers now require a more specific type of consent—namely, that the called party consents, in writing, to being called *by an auto-dialer*. *E.g.*, 47 C.F.R. 64.1200(f)(8). But these telemarketer regulations do not apply in the debtor–creditor context. 23 F.C.C. Rcd. at 565. In this context, once the debtor gives his consent to be called on his cellphone, the creditor can use automated calls to that number. *See id.* at 564.

The district court did not err by leaving out the excerpt from the FCC's ruling; its instructions adequately informed the jury of the law and did not confuse or mislead them.

C

Hill's final argument—that the district court's denials of his requests to compel a Homeward representative to testify at trial—fares no better than his first two. The court made three rulings relating to Hill's request for a Homeward trial witness: It (1) quashed Hill's subpoena; (2) denied his request for a trial deposition; and (3) denied his motion to compel. We can reverse these rulings "only if . . . [they] w[ere] an abuse of discretion resulting in substantial prejudice." *B & H Med., L.L.C. v. ABP Admin., Inc.*, 526 F.3d 257, 268 (6th Cir. 2008); *accord* Appellant Br. 22. They were not even close.

(1) *The subpoena*. Hill's subpoena failed several aspects of Federal Rule of Civil Procedure 45, so the district court did not abuse its discretion in quashing it. Rule 45 requires, among other things, that the party serving it to tender certain fees, Fed. R. Civ. P. 45(b)(1), comply with geographical limitations, *id.* at 45(c), and allow a reasonable time to comply, *id.* at

45(d)(3)(A)(i). And it requires the party to specify the "person" who is being subpoenaed, and to serve it on that "named person." *Id.* at 45(a)(1)(A)(iii), (b)(1), (c)(1); *see* David D. Siegel, *Practice Commentaries to Rule 45*, at C45-9 ("If a particular person in the employ of a corporation or other entity is the person sought as a witness, the subpoena should of course be delivered to that person."). Hill's subpoena did none of these things. The court was thus within its discretion to quash it.

(2) *The trial deposition*. The district court was right to deny Hill's unusual request—made after his subpoena failed—to take a "deposition" on new topics at trial. The Rules don't allow for it. Hill's claimed support, Rule 30(b)(6), does not help, because that rule contemplates depositions during *discovery*, not at trial. Of course, discovery had long since closed when Hill made this request—only one full business day before trial. Allowing a trial "deposition" in these circumstances would allow "an end-run around the failed subpoenas." R. 49 (District Court Order) at 1. Like the district court, we will not require it.

(3) *The motion to compel*. The court also correctly rejected Hill's last-ditch effort: his motion to compel. When all else failed—on the Friday before the Monday trial—Hill moved the district court to compel Homeward to bring a witness to trial. There is no procedure for this request in the Rules; Hill attempted it because he was out of options. But his real option—one that, at least five-and-a-half weeks before trial, Homeward told him he would need to do—was to subpoena a corporate witness who either "resides, is employed, or regularly transacts business in person" in Ohio. Fed. R. Civ. P. 45(c)(1)(B). If no one that Hill wanted fit that description, then he could have taken a deposition of a corporate officer during discovery for its use at trial. Yet he waited (and waited) . . . and then filed a deficient subpoena. Like his previous efforts, his motion to compel fails. The district court did not abuse its discretion in denying this request.

Hill tries to avoid these conclusions by urging us to "temper[]" the "technical" Rules by interpreting them "through the lens of common sense." Appellant Br. 24. But these rules were not made to be "tempered"; they were made to be "technical"—from the specific amount of fees tendered, to the court issuing the subpoena, to the geographic scope of the request. It is not surprising, then, that Hill can point to only one case that supports his position, *Conyers v. Balboa Ins. Co.*, No. 8:12-CV-30-T-33EAJ, 2013 WL 2450108, at *1 (M.D. Fla. June 5, 2013) (using

Rule 30 to expand Rule 45). Even if that case persuaded us that the Rules should be modified by judicial fiat, the district court did not abuse its discretion in enforcing them as written.

III

For these reasons, we affirm.

CONCURRENCE

CLAY, Circuit Judge, concurring. I join the majority opinion in full. I write separately only to highlight the limited scope of the primary question presented in today's case. Plaintiff Stephen Hill challenges the district court's interpretation of the Federal Communications Commission (FCC) regulations concerning the circumstances under which a debtor gives a creditor "prior express consent" to call his cellphone. Hill does *not* challenge the FCC's interpretation of 47 U.S.C. § 227(b)(1)(A)(iii) as promulgated in paragraphs 9 and 10 of *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C. Rcd. 559 (2008).

I agree with the majority that "a debtor does not need to give his consent to automated calls specifically" because the FCC regulations say as much. Majority Op. at 8. However, I express serious doubt as to whether the FCC correctly interpreted the statute when it promulgated its regulations. The notion that a debtor gives his prior *express* consent to receiving calls from a creditor using an auto-dialer or prerecorded voice simply by giving his cellphone number to the creditor strikes me as contrary to both the plain language of the statute and the underlying legislative intent. *See id.* at 2 (quoting *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012)). But because the plaintiff in this case does not challenge the FCC regulation itself, we do not have occasion to pass judgment on it. I concur in the majority opinion on the understanding that such a challenge is not foreclosed in a future case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-4168

FILED
Aug 21, 2015
DEBORAH S. HUNT, Clerk

STEPHEN M. HILL,
Plaintiff - Appellant,

v.

HOMEWARD RESIDENTIAL, INC.,
fka American Home Mortgage Servicing, Inc.,
Defendant - Appellee.

Before: CLAY and McKEAGUE, Circuit Judges; BERTELSMAN, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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TAB 11E

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15-CV-EE

This submission addresses four topics. Some of them affect the Appellate, Bankruptcy, Civil, and Criminal Rules.

Social Security Numbers: The first proposal is to amend Civil Rule 5.2(a)(1) to forbid including any part of a social security or taxpayer identification number. The underlying concern is that if the place and date of birth are known, the last four digits "effectively give[] away all of the private information" because only the last four digits are random for numbers issued before "a recent change by the SSA." This concern was considered carefully when Rule 5.2 was first adopted. The risk was recognized then, but the several committees decided that the value of having the information overcame the risks. The Bankruptcy Rules Committee found particular needs for full numbers in some settings. Preliminary exchanges suggest that they continue to recognize these needs. This question should be resolved in coordination with the other advisory committees.

In forma pauperis Affidavits: The second proposal is to add a new subdivision to Rule 5.2 to address "any affidavit made in support of a motion under 28 U.S.C. § 1915." The rule would provide that the affidavit must be filed under seal and reviewed ex parte. For good cause, the court may order that the affidavit be disclosed to other parties under an appropriate protective order, or be unsealed in appropriately redacted form. The submission directs attention to a petition for certiorari regarding this issue. (The proposal includes affidavits under 18 U.S.C. § 3006A, which directs each district court to create a plan for furnishing representation for any person "financially eligible." It is not apparent that much would be accomplished by addressing representation of criminal defendants in a Civil Rule.)

Section 1915(a)(1) enables a court to

> authorize commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.

The privacy interests affected by the affidavit are manifest. Whether a rule is required to deal with them is not so clear.

Current practice should be reviewed, beginning with the Federal Judicial Center study of sealing practices in general.

This proposal affects the other advisory committees. Coordination will be required if any committee decides to move toward consideration of new rule text.

New Rule 7.2 — Copies of Unpublished Authorities: This proposal is to adopt a new Rule 7.2 that would address the needs of pro se litigants created by citation by counsel of cases or other authorities "that are unpublished or reported exclusively on computerized databases." Counsel would be required to provide the pro se litigant with copies. In addition, counsel, upon request, must provide copies of such cases and authorities that are cited in a decision of the court if they were not previously cited by any party. The proposal tracks verbatim Local Rule 7.2, E.D. & S.D.N.Y.

Something like this is also to be found in Appellate Rule 32.1(b): "If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited." This rule is part of the rule on citing non-precedential opinions added in 2007. As compared to 2007, it seems likely that most, if not all, federal-court orders are now available from the court's own site. However that may be, this rule applies only on appeal, and does not reach decisions by state courts or courts in other countries.

This proposal raises the familiar question whether this level of detail should be fixed in the national rules, or is better left to local practice, and perhaps reflected in a local rule.

e-Filing by Pro Se Litigants: This proposal is that pro se litigants should be permitted, but not required, to file by paper. They must be permitted to qualify for CM/ECF access to avoid imposing burdens not borne by other parties who have such access.

This topic is addressed by the current e-filing proposals pending before all advisory committees other than the Evidence Rules Committee. This proposal will be considered in the final development of those proposals.

Re: Proposed rule changes for fairness to pro se and IFP litigants

Sai to: Rules_Support 09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:
> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> https://www.pnas.org/content/106/27/10975.full.pdf
> http://www.heinz.cmu.edu/~acquisti/ssnstudy/
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> https://epic.org/privacy/ssn/
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> http://latanyasweeney.org/work/ssnwatch.html
> http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: http://s.ai/ifp
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

TAB 11F

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Civil Rule 56: Judge Zouhary

Judge Zouhary suggests consideration of an amendment to Rule 56 that would require a pre-motion conference with the court before filing a formal motion for summary judgment.

Several advantages may be realized by a pre-motion conference. The movant may decide not to make the motion, or may better focus the motion by omitting issues that are genuinely disputed. The nonmovant may realize that some issues should not be disputed, or are not material. These advantages may flow from better understanding of the facts, the law, or both. Supporting materials may be simplified. Discussion with the court may work better than a conference of the parties alone — the court's perspective can help a party understand that a motion will fail, or should be limited, or will impose unnecessary costs, or may impede opportunities for settlement.

Judge Zouhary notes that several other judges have adopted variations on these practices. He also notes that several courts of appeals have said that Rule 56 establishes a right to move for summary judgment. The court can confer and advise, but it cannot forbid a motion. The discussion that follows accepts the proposition that summary judgment should not be effectively denied without allowing a motion. One result would be to complicate the pre-motion procedure, often forcing it to become equivalent to a motion. Another might be to discourage desirable motions.

The advantages of a pre-motion conference are real. The proposed rule amendments now pending in Congress include the addition of a new Rule 16(b)(3)(B)(v), which provides that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." The advantages are described in the Committee Note: "Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion." The Note adds, however, that "the decision whether to require such conferences is left to the discretion of the judge in each case." The choice to rely on discretion rather than mandate was deliberate. The Duke Conference Subcommittee discussed the choice at length. It concluded that the pre-motion conference procedure is not likely to work well with a judge who resists it. Encouragement was thought the more effective way to proceed.

The Duke Conference Subcommittee also discussed the possibility of addressing pre-motion conferences for summary judgment. The advantages of this practice were recognized. The

decision not to add yet another feature to the broad package of proposals should not be taken to reflect a judgment that it would be unwise to address the practice by further rule revisions.

One modest approach would be to go once more to Rule 16. Rule 16(c)(2)(E) already lists among the matters for appropriate action at a pretrial conference "determining the appropriateness and timing of summary adjudication under Rule 56." It would be easy to extend anticipated Rule 16(b)(3)(B)(v) to include summary judgment in the pre-motion conference: "direct that before moving for an order relating to discovery or for summary judgment, the movant must request a conference with the court."

If it were decided to make a pre-motion conference mandatory, or mandatory subject to defeasance, it might be better to add the requirement directly to Rule 56. Without attempting polished drafting, Rule 56(b) could be amended to look something like this:

> **(b) Time to File a Motion**. Unless a different time is set by local rule or the court orders otherwise, a party may, after requesting a conference with the court, file a motion for summary judgment at any time until 30 days after the close of all discovery..

A comprehensive revision of Rule 56 was adopted in 2010. A proposed amendment could not take effect before 2018 in the ordinary course of Enabling Act procedure. The Rule 56 revision is not so recent as to deter a further worthwhile amendment. Nor should the fact that a pre-motion requirement was not adopted in 2010 be cause for reluctance. The importance of active case management has come to the fore since the time when the Rule 56 work was done, particularly with the Duke Conference.

If the Rule 56 revisions do not of themselves provide reason to go slow, the more recent work of the Duke Conference Subcommittee may. Many judges now exercise the authority to direct pre-motion conferences. Others seem not to. Even a direction in Rule 56 that a party must request a conference could be met by denying a conference. A direction that the parties and court must hold a conference before a motion is made could meet substantial resistance, and in any event could carry a generally worthy practice too far.

In short, this may be a good practice that should be encouraged without yet amending the rules to provide more formal encouragement or a general requirement.

TAB 11G

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Civil Rule 58: Judge Pratter

Judge Pratter has transmitted a question raised by one of her colleagues about the "separate document" requirement of Rule 58:

Rule 58. Entering Judgment
(a) **SEPARATE DOCUMENT.** Every judgment and amended judgment must be set out in a separate document * * *.

The separate document requirement was added to Rule 58 in 1963. The Committee Note observed that "some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words * * *." The difficulty was uncertainty as to the event that started the time to appeal. "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document — distinct from any opinion or memorandum — which provides the basis for the entry of judgment."

Rule 58 was amended in 2002. The separate document requirement was retained, but Rule 58(c)(2) was added. Rule 58(c)(2)(B) provides that if a separate document is required, judgment is entered when it is entered on the civil docket "and the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket." The Committee Note explained: "This simple separate document requirement has been ignored in many cases." One result was that the time for post-judgment motions never ended because it never began, but that did not seem to present serious problems. But another result was that appeal time also never started to run. The Note observed that "there have been many and horridly confused problems under Appellate Rule 4(a)." The 150-day fiction was adopted to ensure that appeal time would begin at that point, and conclude in due course. Appellate Rule 4 was revised in parallel with Rule 58.

The 2002 Committee Note added this:

> No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority.

These amendments did not address all questions. Many of them arise from the provision in Rule 54(a) that defines "judgment" to "include[] a decree and any order from which an appeal lies." One

example of the potential difficulties is provided by collateral-order finality. The most common example of collateral-order appeals arise from interlocutory orders that refuse to accept an official-immunity defense, ordinarily by denying a motion to dismiss or for summary judgment. The 2002 Committee Note suggests that "[t]he new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered." It seems unlikely that many judges bother to enter a Rule 58 separate document when denying an official-immunity motion for summary judgment. But it is better not to allow 150 days plus the ordinary appeal time to take the appeal.

The 2002 amendment resulted from long and hard work by the Civil Rules and Appellate Rules Committees acting jointly. Judge Schiltz, then Reporter for the Appellate Rules Committee, studied hundreds of cases dealing with the "time bombs" of never-beginning and thus never-ending appeal time created by failures to enter judgment on a separate document.

The Appellate Rules Committee returned to the separate document requirement in 2008. Professor Struve prepared two memoranda for two separate meetings. Their liaison to circuit clerks undertook a survey of circuit clerks to determine the frequency of failures to enter judgment on a separate document. Experiences varied among the circuits, but noncompliance ranged from not uncommon to rather common. One circuit judge discussed the problem at a meeting of judges, resulting in communications with district court clerks that produced a marked increase in compliance. Discussion came to focus on a particular problem that had not been much considered during the work that led to the 2002 amendments. Judgment is entered, but not on a separate document. A timely appeal is taken. After the appeal is taken a motion for post-judgment relief is made. Because there is no separate document, the motion can be timely up to 178 days after judgment is entered on the document (150 days to the constructive entry under Rule 58(c)(2)(B) plus 28 days under Rules 50, 52, or 59, or for a Rule 60 motion made at a time that suspends appeal time). The post-judgment motion suspends the appeal. The court of appeals may — or may not — be informed of the post-judgment motion. If it is not informed, it may continue to invest effort in a case that is no longer technically in the court. The Committee found that this problem does not arise frequently. It gave some thought to eliminating the separate-document requirement as a nuisance, but in the end, it concluded that it is better to leave the rules as they are. The discussion noted both the simplicity of the requirement and the value of retaining it as a clear signal that starts appeal time. District clerks should be reminded of the need to police the separate-document requirement. And perhaps the CM/ECF system can be

used to include a suitable prompt. These conclusions were reported to the Standing Committee in January 2009. They were accepted, with a suggestion that education efforts could be coordinated with the Committee on Court Administration and Court Management.

The separate document requirement survived this intense study. But it seems not to have taken on a more active life in practice. Judge Pratter's submission is accompanied by a "Not Precedential" opinion. Bazargani v. Radel, No. 14-3110 (3d Cir., March 3, 2015). The Bazargani case found an appeal timely because the time began 150 days after "[t]he District Court's opinion [was] set forth in the footnotes to the dismissal order * * *." The footnotes meant there was no separate document.

Judge Pratter asks

> whether it makes sense for the Rules to build in tolerance for such a significant timing difference simply because order language is accompanied by reasoning.

And she notes that perhaps the question is interesting only

> to those of us whose local judicial drafting culture is typically to incorporate reasoning (at least briefly) in orders in matters that do not merit lengthy opinions or memoranda but where it seems appropriate to give the litigants at least a brief explanation.

These succinct observations frame the question perfectly. Judges understand that it is important to explain the grounds for a decision, and that often the grounds can be stated clearly and effectively by a brief statement that is readily understood by the parties to the case. They do that. And at the same time the formal requirement to enter a still more succinct "judgment" in a separate document is easily overlooked — the district court's work is done, and there is no obvious prompt to remind the court of the needs for timing post-judgment motions and appeals that are advanced by entering judgment on a separate document.

Doing nothing to take up these questions probably will mean that matters lurch along into the future as they have for the 13 years since Rule 58(a) was most recently amended, and the 52 years since the separate document requirement was first adopted. Taking these questions up again, on the other hand, will run the risk of recreating the difficulty and uncertainties lamented in the 1963 Committee Note. Perhaps the best outcome would be to find a system that automatically prompts judges and court staff to always remember the separate document requirement. Short of that, it may

be better to adhere to the judgment reached in formulating the 2002 amendments, retaining the separate document requirement and living with the occasional 150-day inadvertent extensions of appeal and motions times.

TAB 12

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M E M O R A N D U M

To: Advisory Committee

From: Pilot Project Subcommittee

Date: October 15, 2015

One of the conclusions reached in the process of developing the rule amendments that will become effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. The charge for the subcommittee is to investigate pilot projects already completed in other locations and to recommend possible pilot projects for federal court.

The committee began its work by collecting information. Contact was made with the National Center for State Courts, the Institute for Advancement of the American Legal System, the Conference of State Court Chief Justices, various innovative federal courts, and even British lawyers. The subcommittee divided into three groups, one to study "rocket dockets," a second to study enhanced initial disclosures, and a third to study simplified procedures for some or all cases. These groups have conducted investigations, conferred, and made recommendations.

The purpose of this memo is two-fold: (1) acquaint the full committee with the work done to date by the subcommittee, and (2) present various thoughts for discussion at the November meeting. Exhibits A, B, C, and D contain summary memos prepared by some members of the subcommittee regarding pilot projects undertaken in various state and federal courts. Exhibits E, F, and G contain additional thoughts and recommendations compiled by the three groups on possible pilot projects. Exhibit H is a copy of Arizona's disclosure rule.

The subcommittee has focused on the three categories of pilot projects identified above: rocket dockets, enhanced initial disclosures, and simplified procedures. As discussion has proceeded through a series of phone calls, this focus has narrowed to two categories of pilot projects: procedures designed to move some or all civil cases more quickly through a court's docket, and enhanced initial disclosures. This memo will attempt

to capture the subcommittee's thinking on these two subjects and raise questions for the Committee's consideration.

A. Expedited Procedures.

As you will see from reviewing Exhibits A-D, several states and some federal courts have experimented with procedures designed to reduce the cost and delay of civil litigation. These pilot projects have included a number of different procedures such as more detailed pleading in the complaint and answer, early case management conferences followed by early case management orders (with continuances granted rarely), more substantial initial disclosures, various limitations on discovery, limitations on expert discovery, expedited procedures for resolving discovery disputes, and mandatory trial dates within a relatively short time from the start of the case. The most robust and carefully-studied of the state pilot projects – Utah and Colorado – produced shorter times to disposition than existed in those states before the pilot projects. Additional results included fewer discovery disputes and higher settlement rates. Neither project produced an increase in the percentage of cases going to trial.

The subcommittee believes that pilot projects could be developed for federal court that use some or all of these procedures. The idea would be to put together a package of procedures and enlist the involvement of specific districts or specific judges to apply the procedures to some or all of their cases over a period of time long enough to measure results. Several questions have arisen, and we would appreciate input from the Committee:

1. If such a pilot were to be applied only to a category of cases on the court's docket, such as small- or modest-sized cases, the procedures could be quite streamlined and could test the question of whether federal courts can treat different sizes of cases differently as opposed to having one set of rules for all cases. The problem arises in trying to identify cases that would be included in such a pilot. One approach would be to simply set a dollar amount for the cases, say $100,000 or less. Another approach would be to identify various categories of federal-question cases (such as FDCPA, FCRA, non-class FLSA cases) and direct them into the pilot, and also task judges with identifying diversity-jurisdiction cases (with input from the parties) that are modest enough to go into the pilot. Some of the challenges presented by such an approach would include lawyers trying to plead around the pilot projects and requiring time from judges and their staffs to determine which cases should go into the pilot. Case tracking systems employed by individual federal courts to divide cases into categories for case management purposes have met with mixed success in the past.

2. An alternative would be to adopt tighter time frames and more expedited procedures for all cases in a particular district. This approach, which would be something like the faster dockets used in some courts such as the Southern District of Florida, would

test the ability of courts to move civil litigation more quickly. Some flexibility would be needed to ensure that more complex cases receive sufficient discovery, but the idea would be to significantly shorten the time and the procedure afforded all cases. One difficulty presented by such an approach would be buy-in. Judges and lawyers in the district may be less than enthusiastic about aggressively reducing the amount of litigation applied to civil cases generally. This approach would avoid the problem of trying to classify cases for a pilot project, but obviously would introduce other complications.

3. It has been the view of the subcommittee that a pilot project will be effective only if it is mandatory. If parties are given the opportunity to opt out of a pilot project, only the most progressive and efficient lawyers are likely to opt in. This self-selection would skew any measurable results from the pilot project. A mandatory program would likely produce more reliable results. The challenge of a mandatory system, of course, is dealing with parties who object.

4. A further question is whether the pilot should be applied by an entire district or by individual judges. The challenge in presenting it to an entire district, again, is buy-in. There may be judges in a district who are less than enthusiastic about applying the pilot. The problem with applying it only through individual judges, however, is self-selection. The judges most likely to take on the pilot would likely be progressive, active-managers. Any results from such a pilot would be difficult to attribute to the pilot as opposed to the efficiency of the judges who chose to participate.

5. The subcommittee recognizes that some pilot provisions could raise Rules Enabling Act issues (where the pilot requirements arguably are inconsistent with the rules). For now, the subcommittee is focusing on general approaches. An analysis of this issue will be required before any pilot is approved.

B. Initial disclosures.

As you know, the Committee actually required mandatory disclosure of unfavorable information in the version of Rule 26(a)(1) that was in effect from 1993 to 2000, but it permitted individual districts to opt out. So many districts opted out that the Committee eventually concluded that elimination of the opt-out provision was needed, and the only way to get such a change through the full Enabling Act process was to dial back the 26(a)(1) disclosure requirements to information a party may use to support its own claims or defenses. There was no judgment reached on the actual merits of the more aggressive form of initial disclosures. Favorable results from a pilot might have helped.

Nevertheless, as shown in Exhibits A-D, many state court pilot projects have included enhanced initial disclosures. The idea, of course, is to get information on the table that otherwise would be found only through expensive discovery. The discovery

protocols for federal employment cases appear to have shown that enhanced disclosures can improve the efficiency of litigation.

Some states require more substantial initial disclosures. One example is Arizona Rule 26.1(a), a copy of which is included as Exhibit H. The idea behind Rule 26.1(a)(9) is to require parties to produce all documents relevant to the case, including unfavorable documents, at the outset of the litigation. The rule also requires parties to identify all persons with knowledge of the case, and to provide a general description of their knowledge. These rules, combined with other Arizona innovations (depositions limited to parties and experts, depositions limited to four hours, limitations of one expert per issue) have produced favorable results. 73% of Arizona lawyers who practice in federal and state court say that they prefer state court, as compared to 43% of lawyers nationally.

Exhibit E includes a draft set of initial disclosure rules prepared by one of the subcommittee's groups. It includes portions of the Arizona rule, but is not as aggressive. The draft rules include several paragraphs of explanation and thought.

Several questions for your consideration: Should the Committee promote a pilot project that tests the benefits of initial disclosures? Should such a pilot project be undertaken separately from the more comprehensive expedited procedures pilots discussed above? If an initial disclosure pilot were to be undertaken, should it follow the more aggressive format of the Arizona rule or something like Exhibit E? If a pilot project includes only initial disclosures, what measurable results do we think would be achieved? Do we think initial disclosures would shorten the time to disposition? Reduce the number of discovery disputes? Reduce the overall cost of discovery? Which of these results would be measurable at the end of the pilot?

C. Other possible pilot projects.

The committee has focused on the pilot projects discussed above because they appear to address some of the more expensive aspects of civil litigation and they have been tested, with some success, in state courts. Should we be considering other pilot projects? There are at least a few possibilities.

1. The Seventh Circuit has sponsored an ongoing and comprehensive pilot project on the handling of electronically stored information in civil litigation. Details can be found at www.discoverypilot.com. Some of you were involved in that effort. Should we be encouraging similar pilot projects in other courts?

2. Several courts and judges have experimented with expedited jury trials. For example, the Northern District of California developed a program under which parties could obtain a jury trial within a relatively short time and after limited discovery and

motion practice. The idea was to provide an opportunity for parties to get to trial quickly and avoid the expense and delay of discovery and motion practice. The proposal was rolled out with substantial fanfare, and produced no results. Not a single case enrolled in the program, which was voluntary. It died for lack of use. Other judges have tried similar programs with similar results. It would be wonderful to find a way to increase the use of juries to resolve disputes and decrease the expense and delay of litigation. Is there an approach to a pilot project that would be worth trying?

3. A pilot could also be designed to promote alternative dispute resolution for small cases. As discussed in Exhibit C, Arizona has adopted a system under which cases worth $50,000 or less are submitted to mandatory arbitration. Members of the state bar are required to act as arbitrators. Parties have the right to appeal an arbitrator's decision to the state trial court, in which event they receive a trial *de novo* on the merits, but unless they significantly improve their result over the result achieved in arbitration, they are liable for at least some of the costs of the state-court procedure. The majority of cases that go into this system are resolved without returning to state court. Other states have adopted similar approaches. Would something like this be a good idea for a federal court pilot project?

D. Final Thoughts.

One key to any pilot project will be to design it in a way that allows meaningful measurement of the results. Involvement of the FJC in the design and implementation of the pilot will be key.

In addition, any pilot effort likely will require the involvement of the Court Administration and Case Management Committee ("CACM") chaired by Judge Hodges. Amy St. Eve, a member of the Standing Committee and a CACM alum, has agreed to act as a liaison with CACM on this project. We will be apprising CACM of the results of the full Committee's November discussion.

We look forward to hearing your thoughts on these issues at the November meeting.

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EX. A

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MEMORANDUM

To: Simplified Procedures Working Group, Pilot Project Subcommittee

From: Virginia Seitz

Re: Summary of CO, MN, IA and MA Projects and Reforms

Date: October 2015

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To assist the Simplified Procedures working group of the Pilot Project Subcommittee, this memorandum summarizes recent reforms and pilot projects undertaken by courts in Colorado, Massachusetts, Iowa and Minnesota. The Colorado, Iowa, and Massachusetts pilots all focused on "business cases." Minnesota conducted an expedited case pilot project which focused on particular types of cases (e.g., contract and consumer injury cases). Generally, all of these actions were the product of study done by task forces within the states. As was true in the state reforms discussed in Judge St. Eve's memorandum, the purpose of the reforms and the pilots was to improve access to justice by decreasing costs and time to resolution in civil cases. I reviewed the task force recommendations, the pilot projects, available evaluations and the helpful material on the website of the Institute for the Advancement of the American Legal System's ("IAALS'") Rule One initiative project. As you will see, there was far more information about the Colorado pilot than any of the other three states' pilots which were less ambitious and which did not have the benefit of an IAALS evaluation.

I. Colorado Civil Access Pilot Project ("CAPP"). Based on the recommendations of a Task Force, Colorado implemented a pilot project that applied generally to "business actions" on January 1, 2012. Five district courts in the state participated in the project. Initially, the project had a term of two years, but it was twice extended and concluded only in June 2015.

A. Pilot Rules. The pilot rules incorporated a number of components that will sound familiar to this group:

1. The rules expressly provided that proportionality principles would guide the interpretation and application of the rules.

2. The rules required that complaints and responsive pleadings include all material facts. General denials in responsive pleadings were deemed admissions.

3. The rules required robust initial disclosures, including all matters beneficial and harmful, to be accompanied by a privilege log. Both the disclosures and the log had to be filed with the court. In addition, disclosures took place on a staggered schedule, that is, the plaintiff was required to make disclosures before the defendant was required to answer. The court had the power to impose sanctions if either party failed to make proper disclosures.

4. The rules required defendant(s) to answer the complaint even when moving to dismiss the complaint.

5. The rules required the parties to meet and confer on the preservation of documents shortly after the defendant answers the complaint. In addition, the parties were required to promptly prepare a joint case management report which states the issues, makes a proportionality assessment, and proposes timelines and levels of discovery.

6. Again every early on, the Judge was required to hold an initial case management conference to shape the pretrial process. That process was then set forth in a Case Management Order, which could be modified only for "good cause."

7. The rules provided that the scope of discovery should be matters that "enable a party to prove or disprove a claim or defense or to impeach a witness" and, again, should be subject to the proportionality principle.

8. The rules allowed each party only one expert per issue or specialty at issue. In addition, expert discovery and testimony was limited to the expert report. No depositions of expert witnesses were allowed.

9. The general rule was that one judge would handle all pretrial matters and the trial; the judge would engage in "active" management of the case, holding prompt conferences to address any issues that arise on summary briefing.

10. The rules provided that no continuances would be granted absent "extraordinary circumstances."

B. Pilot Hypotheses. The developers of the project had the following hypotheses about the effect of the CAPP rules:

1. There would be a reduction in the length of time to resolution for cases.

2. There would be a decrease in the cost of resolution for cases.

3. The process would be fair for all parties.

4. There would be a substantial increase in judicial involvement in cases.

5. The number of judges per case would decrease.

6. There would be a decrease in motions practice.

7. There would be a decrease in motions practice associated with discovery.

8. There would be a decrease in trial time.

9. There would be an increase in the number of cases that went to trial.

10. There would be a decrease in the amount of trial time per trial.

11. There would be an improvement in all aspects of proportionality.

C. Pilot Evaluation. At the request of the pilot project developers, IAALS conducted an evaluation and issued a report about the CAPP rules in October 2014. The report reached the following conclusions:

1. The CAPP rules reduced the time to resolution of cases over both the existing regular and expedited procedures. Four of five attorneys surveyed expressed the view that the time spent on the case was proportionate to the nature of the case.

2. Three of four attorneys surveyed expressed the view that the cost of cases under the CAPP rules was proportionate to the nature of the case.

3. Both a docket study and the attorney survey indicated that the CAPP process was not tilted toward plaintiffs or defendants.

4. The docket study and surveys reported a general adherence to the timelines imposed.

5. The evaluation reports that parties did see the judge in a case at a much earlier stage and that cases were generally handled by a single judge. This was by far the "most approved" part of the CAPP rules – the early, active and ongoing judicial management of the cases. In addition, the evaluation concluded that the initial case management conference was the most useful tool in shaping the pretrial process, including ensuring proportionate discovery. E.g., the evaluation states: "Judges point to the initial case management conference as the most useful tool in shaping the pre-trial process to ensure that it was proportional."

6. The evaluation found that the CAPP rules significantly reduce motions practice, especially extension requests.

7. The evaluation found that far fewer discovery motions were filed.

8. The evaluation concluded that discovery was both proportionate and sufficient.

9. **Notable Non-Results.** The evaluators were surprised to see that the CAPP rules had little effect on the rate at which cases went to trial, the length of trials or the number of dispositive motions filed or granted.

The evaluation also identified certain "challenges" with respect to the CAPP rules which might more forthrightly be called criticisms. First, parties were generally critical of the staggered deadlines for a number of reasons. Because the timing of a defendant's responsive disclosures and pleadings were keyed to the time of a plaintiff's disclosures, there was no predictability about that deadline. In addition, plaintiffs sometimes sought to compress a defendant's timing by immediately filing disclosures with his or her complaint or shortly thereafter. Both the parties and the courts complained about the uncertainty resulting from making one deadline contingent upon a prior event, preferring rules that specify due dates. Second, there were complaints about the enforcement of the requirements of both expanded pleading and robust early disclosures. Third, both litigants and judges complained about the uncertainty of the extraordinary circumstances test for continuances and extensions. Fourth, the parties surveyed strongly advocated for the return of depositions of expert witnesses. Finally, the parties and judges found that the categorization of cases as "business" and within the pilot or not was too difficult and should be simplified.

One other interesting point: The evaluators noted that the anecdotal responses and comments in the attorney and judicial surveys were not nearly as positive as the data was. The parties in particular cited the complexity and bureaucracy of the CAPP rules, and observed that it was inherently confusing to have several different sets of civil rules operating at the same time in the same court. This may be an under-appreciated downside of pilot projects.

II. Minnesota Civil Justice Reform Task Force. Pursuant to a December 2011 report from the Civil Justice Reform Task Force, Minnesota implemented revisions to its Rules of Civil Procedure and General Rules of Practice and a pilot project. Minnesota's Rules of Civil Procedure and General Rules of Practice for District Courts were amended in February 2013. The rules amendments included:

1. Incorporating proportionality into the scope of discovery.

2. Adoption of the federal regime of automatic initial disclosures.

3. Requirement of a discovery conference of counsel and discovery plan in every case.

4. An expedited process for non-dispositive motions.

5. A new program to address Complex Cases.

No evaluation of these rule changes has yet occurred.

On May 7, 2013, the Minnesota Supreme Court also authorized the creation of a Pilot Expedited Civil Litigation Track in two districts. This track applies to cases involving "contract disputes, consumer credit, personal injury and some other types of civil cases." The project is intended to answer the question whether this package of changes will reduce the duration and cost of civil suits.

1. The track requires early automatic disclosures from both parties, as well as a summary of the contentions in support of every claim, a witness list and contact information and any statements of those witnesses.

2. The track requires both parties to produce copies of all documents and things that will be used to support all claims or defenses, a description of the damages sought, a disclosure of insurance coverage, and a summary of any expert's qualifications accompanied by a statement that sets forth any facts and opinions of that expert and their grounds.

3. The track requires an early case management conference that includes a discussion of settlement prospects and the setting of a trial date, as well as deadlines for the submission of documents that will be used in trial.

4. The track limits discovery to 90 days after issuance of the case management order. The track both limits written discovery and requires that it be served within 30 days of issuance of the case management order.

5. The track requires parties to meet and confer on all motions and then limits the parties to letter briefs of two pages on issues submitted to the judge for resolution.

6. The "intention" of the track is to secure the setting of an early trial date (within four to six months of filing) and to have that date be a "date certain."

It appears that the Court intended that an initial evaluation of the pilot should have occurred by this time, but I have been unable to locate any evaluation. The 2014 Annual Report of the Minnesota Judicial Branch stated that an evaluation of the pilot project is now expected sometime in 2015.

III. Iowa Civil Justice Reform Task Force. Iowa is implementing a report called *Reforming the Iowa Civil Justice System*, issued in March 2012. That report called for a specialty business court pilot project for three years starting in May of 2013. "Cases are eligible to be heard in the Business Court Pilot Project if compensatory damages totaling $200,000 or more are alleged or the claims seek primarily injunctive or declaratory relief." Parties participate in the pilot only if both sides agree and if the state administrator accepts the case for the project. The court has assigned three judges who manage all cases assigned to the project. In every accepted matter, the court assigns one judge for litigation while another is assigned to handle settlement negotiations.

I found an "initial evaluation" of the pilot project that was issued in August 2014. At that point, this specialized court had handled only ten cases, and only one attorney had submitted an evaluation, so that data set was quite limited.

The judges assigned to the business court made the following observations:

1. The strategy of assigning a separate business court judge to handle settlement negotiations works well.

2. The judges suggested that videoconferencing could save travel time and money for lawyers using a specialized court.

3. Additional steps would be needed to publicize and promote the business court program.

In addition, on August 29, 2014, Iowa adopted new Iowa Rule of Civil Procedures 1.281, an expedited civil action rule for cases involving $75,000 or less in damages, to become effective January 1, 2015. Parties with higher damages may stipulate to proceeding under this rule. [The court separately amended its rules to require proportional discovery and initial disclosures; I did not review these provisions as they fall into another working group's area.] The key features of the expedited civil action rule are:

1. Limits on discovery, i.e., no more than 10 interrogatories, 10 requests for production and 10 requests for admission (absent leave of court). There are also limited numbers of depositions.

2. One summary judgment motion may be filed by each party.

3. When cases on this track go to trial, the jury includes only six persons, and trial time is limited to six hours. In addition, cases on this track shall be tried within one year of filing unless otherwise ordered for good cause.

The new expedited civil action rule has not yet been evaluated. Within the first month of its effective date, however, more than 25 cases were filed to proceed on the expedited track.

IV. Massachusetts Business Litigation Session Pilot Project. This project was implemented on a voluntary basis in only a couple of county courts. It is focused on initial disclosures and discovery, which are the purview of another working group. The project began in January 2010 and ran through December 2011. The pilot incorporated several of the IAALS principles, including:

1. Limiting discovery proportionally to the magnitude of the claims at issue.

2. Staging discovery where possible.

3. Requiring all parties to produce "all reasonably available non-privileged, non-work product documents and things that may be used to support the parties' claims, counterclaims or defenses."

4. Requiring the parties to confer early and often and to make periodic reports to the court especially in complex cases.

At the conclusion of the pilot, the court conducted a survey which had a low rate of response, but follow up questions elicited more feedback. A large majority

of users of the project rules reported high satisfaction (80%). I could locate no substantive evaluation of the project.

* * * *

There are several elements of any regime of simplified rules that we should consider if we pursue a pilot project in this area. The following elements seem to receive universal acclaim: Robust early disclosures; an early case management conference and case management order with firm deadlines for discovery and trial date; accessible, active judicial management of the case, with short letter briefs and quick decisions on non-dispositive motions. One regular bone of contention appears to be selecting the right cases for slimmed-down procedures.

EX. B

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SIMPLIFIED PROCEDURES SUBCOMMITTEE --
SUMMARY OF CERTAIN JUDICIAL REFORMS

As part of the "Simplified Procedures" Pilot Project Subcommittee, this memorandum summarizes recent judicial reforms employed by New Hampshire, New York, Ohio, and Texas. The New Hampshire and Ohio reforms arose out of pilot projects implemented in various counties in those states. The New York and Texas reforms were based on recommendations by Task Forces created by their respective Supreme Courts. The general goal of these judicial reforms was to increase access, decrease expenses, and increase judicial management in civil cases.

I have reviewed the relevant pilot projects, the Task Force recommendations, the new rules, various articles about the rules, an evaluation from the National Center for State Courts, and any relevant information on the Institute for the Advancement of the American Legal System's ("IAALS") Rule One initiative project.

I. New Hampshire Pilot Project:

In 2013, the Supreme Court of New Hampshire ordered the implementation of its Superior Court Proportional Discovery/Automatic Disclosure Pilot ("PAD") Rules in all counties in the state. New Hampshire originally implemented the pilot in two counties. The PAD Pilot Rules focus on changes to the pleading requirements and discovery rules. Specifically, the PAD Pilot Rules have five aspects:

1. **Pleading Standards:** The pleading standard changed from notice pleading to fact pleading for both complaints and answers. The parties must state the material factual basis on which any claim or defense is based. The intent behind the rule is to expedite the civil litigation process by giving sufficient factual information for the other side to evaluate the merits.

2. **Early Meet and Confer:** The parties must meet and confer within twenty days of the filing of the answer and establish deadlines for discovery, ADR, dispositive motions, and a trial date. The parties submit their agreement to the court and it becomes the "case structuring order." If the parties agree on the deadlines, they do not need a conference with the court.

3. **Early and Meaningful Initial Disclosures:** This requirement mandates automatic disclosure of names and contact information of those individuals who have information about a party's claims or defenses and a brief summary of such information. The parties also have to disclose all documents, ESI and tangible things to support their respective claims and defenses, including a) a category of damages, and b) insurance agreements or polices under which such damages may be paid. If a party fails to make

these disclosures, a court can impose sanctions including barring the use of them at trial. This rule is intended to expedite discovery.

4. Limit on Interrogatories and Deposition Hours: The fourth aspect of the pilot project limits the number of interrogatories to no more than 25 and the number of deposition hours to 20 hours. Given the early disclosures in number 3, the PAD Pilot Project anticipated that the parties would need less discovery. The parties can waive these limitations by stipulation or the court can waive them for good cause.

5. Preservation of ESI: The fifth rule requires the parties to meet and confer to discuss the preservation of ESI and to agree on deadlines and procedures for the production of ESI. This rule includes a proportionality requirement – the ESI costs must be proportional to the significance of the issues in dispute.

The National Center for State Courts ("NCSC") evaluated the New Hampshire PAD Pilot Rules. As part of the review, the NCSC interviewed judges, attorneys, court clerks, and staff of the Administrative Office of the Courts. They also evaluated pre-implementation and post-implementation case data. The NCSC's findings are discussed below.

First, the PAD Pilot Rules have not impacted the case disposition time, although the NCSC only had a small number of cases over a short period of time to evaluate. They have, however, significantly decreased the proportion of cases that ended in a default judgment.

Second, the PAD Pilot Rules have not had any real impact on discovery disputes based on the NCSC's review of the percentage of cases both pre-implementation and post-implementation with discovery disputes. New Hampshire thought the automatic disclosure requirement in number 3 would decrease discovery disputes.

The NCSC made several recommendations based on its review:

1. Clarify the existing ambiguity in the current appearance requirement.

2. Establish a firm trial date in the case structuring order.

3. Avoid aggressive enforcement of the rules except for intentional or bad faith noncompliance.

4. Establish a uniform time standard for return of service.

II. New York Task Force

New York created a Task Force on Commercial Litigation in the 21st Century to recommend reforms to enhance litigation in its Commercial Division. The New York Task Force submitted its final report to the Chief Judge in June 2012. The report made multiple recommendations that are not relevant to our pilot project's scope including endorsing the Chief

Judge's legislative proposal to establish a new class of Court of Claims judges; increasing the monetary threshold for actions to be heard in the Commercial Division; implementing several measures to provide additional support to the Division, including additional law clerks and the creation of a panel of "Special Masters"; assigning cases to the Commercial Division earlier in the process; creating standardized forms; improving technology in the courtrooms; and appointing a statewide Advisory Council to review the recommendations and guide implementation.

In addition, the Task Force made several recommendations, some of which have resulted in the implementation of new rules. All of the recommendations apply to cases in the Commercial Division only. These areas may be appropriate for pilot projects.

1. Robust expert disclosures: The Task Force recommended the parties make more robust and timely expert disclosures, similar to the disclosure requirements in the Federal Rules. The Rule would require expert disclosures, written reports, and depositions of testifying experts to be completed no later than four months after the close of fact discovery.

2. New privilege log rules to streamline discovery: The Task Force concluded that the creation of privilege logs has become a substantial, needless expense in many complex commercial cases. In order to limit unnecessary costs and delay in the creation of such logs, the Task Force recommended limitations on privilege logs. Specifically, the Task Force recommended that parties meet and confer in advance in an effort to stipulate to limitations on privilege logs. It referenced four orders or principles as examples for limiting privilege logs:

a) The Sedona Principles: The Sedona Principles encourage parties to meet in advance and reach mutually agreed-upon procedures for the production of privileged information. The Principles encourage the acceptance of privilege logs that classify privileged documents by categories, rather than individual documents.

b) The Facciola-Redgrave Framework: Magistrate Judge John Facciola and attorney Jonathan Redgrave have proposed that parties should meet regarding privilege logs and agree to limit documents that require logging, use categories to organize privileged documents, and use detailed logs only when necessary. *See* John Facciola & Jonathan Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 The Fed. Cts. L. Rev. 19 (2009).

c) The Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases: The SDNY addresses privilege assertions in its pilot project for complex cases. The following documents do not have to be included on a privilege log: 1) communications exclusively between a party and its trial counsel; 2) work product created by trial counsel, or an agent of trial counsel other than a party, after the commencement of

the action; 3) internal communications within a law firm, a legal assistance organization, a governmental law office, or a legal department of a corporation or of another organization; and 4) documents authored by trial counsel for an alleged infringer in a patent infringement action. The order also provides a specific procedure for a person who challenges the assertion of a privilege regarding documents, including the submission of a letter to the court with no more than five representative documents that are the subject of the request.

d) The District of Delaware's Default Standard for Discovery: The District of Delaware has a Standing Order governing default standards for discovery, including privilege logs. Under this order, parties must confer on the nature and scope of privilege logs, "including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged." It also excludes two categories of documents from inclusion on privilege logs: 1) any information generated after the complaint was filed and 2) any activities "undertaken in compliance with the duty to preserve information from disclosure and discovery" under Rule 26(b)(3)(A) and (B). In addition, the order directs the parties to confer on a non-waiver order under Federal Rule of Evidence 502.

In response to the Task Force's recommendation, New York adopted a rule in the Commercial Division that requires parties to meet and confer at the inception of the case to discuss "the scope of privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order."

3. E-discovery: The Task Force recommended that parties who appear at a preliminary conference before the court have an attorney appear who has sufficient knowledge of the client's computer systems "to have a meaningful discussion of e-discovery issues." The Task Force also encouraged the E-Discovery Working Group to examine how other courts are addressing e-discovery issues.

4. Deposition and Interrogatory Limits: The Task Force recommended, and the Supreme Court ultimately adopted rules, that limit depositions to ten per side for the duration of seven hours per witness. The parties can extend the number by agreement or the court can order additional depositions for good cause. In addition, New York implemented a new rule consistent with the Task Force's recommendation to limit interrogatories to 25 per side unless the court orders otherwise.

5. An accelerated adjudication procedure: The Task Force recommended an accelerated adjudication procedure for the Commercial Division. This recommendation amounts to an expedited bench trial. The Task Force suggested that this procedure involve highly truncated discovery. The Chief Judge of the New York Supreme Court

adopted an accelerated adjudication rule in response to the recommendation. Under the rule, the parties have to agree to the procedure. By agreeing to the procedure, the parties agree to waive any objections based on lack of personal jurisdiction, the right to a jury trial, and the right to punitive or exemplary damages. Under this procedure, discovery is limited to seven interrogatories, five requests to admit, and seven depositions per side. The parties also agree to certain limits on electronic discovery. As part of the accelerated adjudication procedure, the parties agree to be ready for trial within nine months from the date of the filing of a request for assignment of the case to the Commercial Division.

New York adopted the new Commercial Division rules primarily in 2014. It is too early to assess their effectiveness.

III. Ohio Pilot Project

In April 2007, the Chief Justice of the Ohio Supreme Court created the Supreme Court Task Force on Commercial Dockets to "develop, oversee, and evaluate a pilot project implementing commercial civil litigation dockets in select courts of common pleas." Four counties agreed to serve as pilot project courts and commercial dockets were created in all four counties in 2009. The Supreme Court of Ohio's Task Force on Commercial Dockets made 27 recommendations for the permanent establishment of commercial dockets in Ohio's courts of common pleas. The recommendations pertained to the permanent establishment of commercial dockets in Ohio, the selection of judges to handle the commercial dockets, the training of judges, the assignment of cases, the balancing of the workload of the judges who handle commercial dockets, and certain case management procedures. The relevant case management procedures include:

1. **The Use of Special Masters:** The Task Force recommended the use of special maters because they provided a process through which pretrial, evidentiary, and post-trial matters could be addressed timely and effectively through extra-judicial resources.
2. **Alternative Dispute Resolution:** The Task Force recommended that a commercial docket judge in one county be able to refer a commercial case to a commercial docket judge of another county.
3. **Pretrial Order:** The Task Force recommended against adopting a mandatory model case management pretrial order because most of the participating pilot project judges use their own pretrial orders and procedures.
4. **Motion Timeline:** The Task Force also recommended that commercial judges decide dispositive motions no later than 90 days from completion of briefing or oral arguments, whichever is later. It also suggested that they decide all other motions no later than 60 days from completion of briefing or oral arguments, whichever is later.

The report found that the benefits of the program included accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state. The Supreme Court of Ohio thereafter adopted rules pertaining to commercial dockets.

IV. Texas Task Force

In May 2011, the Texas legislature passed a bill regarding procedural reforms in certain civil actions, and directed the Texas Supreme Court to adopt rules to "promote the prompt, efficient and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000." In November 2012, the Texas Supreme Court issued mandatory rules for the expedited handling of civil cases. The rules limit pre-trial discovery and trials in cases where the party seeks monetary relief of $100,000 or less. In response to the legislation, the Texas Supreme Court appointed a Task Force to address the issues and "advise the Supreme Court regarding rules to be adopted" to address the legislation. The Task Force focused on: scope of discovery, disclosure, proof of medical expenses, time limits, expedited resolution, monetary limits, and alternative dispute resolution. The Task Force submitted various recommendations to the Texas Supreme Court, but it could not agree on whether the process should be mandatory or voluntary. Based on the recommendations of the Task Force, the Supreme Court issued mandatory rules in November 2012. The goal of the new rules is to "aid in the prompt, efficient and cost effective resolution of cases, while maintaining fairness to litigants." The Texas project is not based on a pilot project, although the Task Force apparently looked at the procedures that some other States were implementing.

The new rules include the following:

1. Expedited Actions: This Rule applies to all cases that seek $100,000 or less in damages, other than cases under the Family Code, Property Code, Tax Code, or a specific section of the Civil Practice & Remedies Code. It provides for limited, expedited discovery and a trial within 90 days after the discovery period ends. A court can only continue a trial for cause twice and each continuance cannot exceed a 60 days. Each side is allowed no more than eight hours to complete its portion of the trial. The Rule also limits the court's ability to require ADR and limits challenges to expert testimony. A court may remove a case from this process for good cause.

2. Pleading Requirements Regarding Relief Sought: The Texas Supreme Court amended its pleading requirements to require a more specific statement of the relief sought. A party must state the monetary relief it seeks so a court can determine if it falls within an Expedited Action. Texas does not require fact pleading for the underlying claims.

3. Discovery Plan: For Expedited Actions, the discovery period starts when the suit is filed and continues until 180 days after the date the first request for discovery is served on a party. Parties can serve no more than 15 written interrogatories, 15 requests for production, and 15 requests for admission, and spend no more than six hours in total to

examine and cross examine all witnesses in depositions. It also provides for requests for disclosure from a party that are separate and distinct from its requests for production.

I could not find any data on the effectiveness of these new rules. The NCSC currently is evaluating the use and effectiveness of the new rules and is expected to issue its report at some point in the Fall of 2015.

CONCLUSION

Based on the evaluations that exist of these reforms and the scope of our sub-committee to focus on "simplified procedures", I recommend having further discussion on three particular reforms:

1. The New Hampshire rule requiring early and meaningful initial disclosures. A pilot project focusing on these disclosures would be fairly easy to achieve and should expedite discovery. Interestingly, the NCSC found that the PAD Pilot Rules (which include early and meaningful initial disclosures) did not have any real impact on discovery disputes. This conclusion may be based, in part, on the fact that NCSC did not have a wide range of data to work with given the initial limited implementation of the program.

2. The New York Task Force's recommendation regarding new privilege logs to streamline discovery. This recommendation focuses on the expense such logs generate in relation to the usefulness of the logs in most cases. This proposal is worth discussing further, especially given the amount of privileged information ESI generates.

3. Expedited Actions. Both Texas' and New York's Task Forces recommended expedited actions for certain types of cases. Judge Campbell has been trying to get lawyers to adopt this efficient concept for some time. It is worth discussing with Judge Campbell's insights because it would save significant time and money for the parties.

Amy J. St. Eve
September 24, 2015

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EX. C

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M E M O R A N D U M

To: Pilot Project Subcommittee

From: Dave Campbell

Date: September 25, 2015

Re: Innovations in Arizona, Utah, Oregon, and the District of Kansas

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This memo will summarize my review of materials related to civil litigation innovations adopted in Arizona, Utah, Oregon, and the Federal District Court for the District of Kansas. I have plagiarized language from various reports I have reviewed. I include a few conclusions at the end.

A. Arizona.

In 1990, the Arizona Supreme Court appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation. The result was the "Zlaket Rules," a thorough revision of the state rules of civil procedure adopted by the Supreme Court effective July 1, 1992. Arizona has adopted a number of other unique procedures since then. Key provisions of the Arizona rules are described briefly.

1. Disclosures.

The rules require broad initial disclosures by all parties within 40 days after a responsive pleading is filed. Each disclosure must be under oath and signed by the party making the disclosure. The rules require disclosure of the following (in addition to disclosures required in the federal rules):

- The legal theory upon which each claim or defense is based, including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities;
- The names and addresses of all persons whom the party believes may have knowledge or information relevant to the case, and the nature of the knowledge or information;
- The names and addresses of all persons who have given statements related to the case, whether or not the statements were made under oath;

- The names and addresses of expert witnesses, including the substance of the facts and opinions to which the person is expected to testify;
- A list of the documents or ESI known by a party to exist and which the party believes may be relevant to the subject matter of the action, or reasonably calculated to lead to the discovery of admissible evidence, and the date on which the documents and ESI will be made available for inspection and copying.

2. Depositions.

Only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission, and depositions are limited to four hours each.

3. Experts.

Each side is presumptively entitled to only one independent expert on an issue, except on a showing of good cause.

4. Medical Malpractice Cases.

Within ten days after defendants answer, the plaintiff must serve on all defendants copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action. All defendants must do the same within ten days thereafter.

5. Mandatory Arbitration.

Arizona rules require mandatory arbitration of all cases worth less than $50,000. At the time the complaint is filed, the plaintiff must file a certificate of compulsory arbitration stating the amount in controversy. If the defendant disagrees, the issue is determined by the court. Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.

The arbitrator must set a hearing within 60 to 120 days. Because the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims, the arbitrator is directed to limit discovery "whenever appropriate." In general, the Arizona Rules of Evidence apply to arbitration hearings, but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible. The arbitrator must issue a decision within 10 days of the hearing.

In the absence of an appeal to the court of the arbitrator's decision, any party may obtain judgment on the award. If an appeal is filed, a trial de novo is held in the state trial

court, and any party entitled to a jury may demand one. If the appellant fails to recover a judgment on appeal at least 23 percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.

A 2004 study revealed that, in most counties, an arbitration award was filed in less than half the cases assigned to arbitration (suggesting the cases settled before the arbitration), and a trial de novo was sought in less than a third of all cases in which an award was filed. This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing.

6. Complex Case Courts.

The Maricopa County Superior Court has established complex litigation courts staffed by judges experienced in complex case management. Cases are eligible for assignment to the complex litigation courts based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether the case would benefit from permanent assignment to a judge who has acquired a substantial body of knowledge in the specific area of the law. A 2006 survey of attorneys who had used these courts found that 96% favored their continuation. Responding attorneys gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.

7. Commercial Courts.

A few months ago, the Maricopa County Superior Court launched commercial courts for all business disputes that exceed $50,000, other than those that qualify for the complex case courts. Cases in these commercial courts will include an early conference on ESI, use of an ESI checklist and a standard ESI order, and an early case management conference that focuses on ADR options, sequencing of discovery, and proportionality in discovery.

8. Survey Results.

In a 2008 survey of fellows of the American College of Trial Lawyers, 78% of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court. In contrast, only 43% of the national respondents to the ACTL survey preferred litigation in state court. 67% of the Arizona respondents indicated that cases were disposed of more quickly in state court. 56% believed that processing cases was less expensive in the state forum.

In 2009, the IAALS conducted a survey of the Arizona bench and bar about civil procedure in the State's superior courts. Over 70% of respondents reported litigation experience in federal district court, and they preferred litigating in state court over federal court by a two-to-one ratio. Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules. Respondents favoring the state forum also indicated that state court is faster and less costly.

B. Utah.

On November 1, 2011, the Utah Supreme Court implemented a set of revisions to Rule 26 and Rule 26.1 of the Utah Rules of Civil Procedure designed to address concerns regarding the scope and cost of discovery in civil cases. The revisions included seven primary components:

- Proportionality is the key principle governing the scope of discovery — specifically, the cost of discovery should be proportional to what is at stake in the litigation.
- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of each witness's expected testimony. Failure to make timely disclosure results in the inadmissibility of the undisclosed evidence.
- Upon filing, cases are assigned to one of three discovery tiers based on the amount in controversy; each discovery tier has defined limits on the amount of discovery and the time frame in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify to the court that the additional discovery is proportional to the stakes of the case and that clients have reviewed and approved a discovery budget.
- A party may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

The three tiers and their limits are as follows:

- Tier 1 applies to cases of $50,000 or less and allows no interrogatories, 5 requests for production, 5 requests for admission, 3 total hours for depositions, and completion of discovery within 120 days.

- Tier 2 applies to cases between $50,000 and $300,000 and allows 10 interrogatories, 10 requests for production, 10 requests for admission, 15 total hours for depositions, and completion of discovery within 180 days.

- Tier 3 applies to cases of $300,000 or more and allows 20 interrogatories, 20 requests for production, 20 requests for admission, 30 total hours for depositions, and completion of discovery within 210 days.

Since these changes were adopted, some Utah courts have also adopted a procedure for expediting discovery disputes. It requires a requires a party to file a "Statement of Discovery Issues" no more than four pages in length in lieu of a motion to compel discovery or a motion for a protective order. The statement must describe the relief sought and the basis for the relief and must include a statement regarding the proportionality of the request and certification that the parties have met and conferred in an attempt to resolve or narrow the dispute without court involvement. Any party opposing the relief sought must file a "Statement in Opposition," also no more than 4 pages in length, within 5 days, after which the filing party may file a Request to Submit for Decision. After receiving the Request to Submit, the court must promptly schedule a telephonic hearing to resolve the dispute.

In April, 2015, the National Center for State Courts completed a comprehensive study of the Utah rule changes. The study produced the following findings:

- The new rules have had no impact on the number of case filings.
- Some plaintiffs may be increasing the amount in controversy in the complaint to secure a higher discovery tier assignment and more discovery.
- There have been increases of 13% to 18% in the settlement rate among the various tiers. The study associates this with the parties obtaining more information earlier in the litigation.
- Across all case types and tiers, cases filed after the implementation of the new rules tended to reach a final disposition more quickly than cases filed prior to the revisions.
- Contrary to expectations, the parties sought permission for additional discovery (called "extraordinary discovery" in the rules) in only a small minority of cases. Stipulations for additional discovery were filed in 0.9% of cases, and contested motions were filed in just 0.4% of cases.

- Discovery disputes fell in Tier 1 non-debt collection cases and Tier 3 cases and did not exhibit a statistically significant change in Tier 2 cases. Discovery disputes in post-implementation cases tended to occur about four months earlier in the life of the case compared to pre-implementation cases. Attorney surveys and judicial focus groups also provided evidence for the rarity of discovery disputes under the revised rules.

The NCSC study included a survey of attorneys that afforded the opportunity to make open-ended comments. Although it may have been due to self-selection by those unhappy with the new rules, 74% of the comments were negative, with only 9% positive. The negative comments were equally divided between plaintiff and defense lawyers.

The NCSC also did judge focus groups. Among the results:

- A recurring theme across all of the focus group discussions was the difficulty involved in changing well-established legal practices and culture in a relatively short period of time.
- The judges expressed widespread suspicion that attorneys are routinely agreeing to discovery stipulations at the beginning of litigation, but not filing those stipulations with the court unless they are unable to complete discovery within the required time frame.
- Many judges indicated that they had experienced significant decreases in the number of motions to compel discovery and motions for protective orders since implementation of the new rules.
- In general, the judges who participated in the focus groups were fairly positive about the impact of the rule revisions thus far.
- There was general agreement that one benefit of the revisions was that they leveled the playing field between smaller and larger law firms and that larger firms could no longer bury the small firms with excessive discovery requests.

C. Oregon.

Although not on our list, I have heard for some time about innovative practices in Oregon, so I took a quick look. These are some of the practices used in the Oregon state courts:

- Oregon's rules require parties to plead ultimate facts rather than providing mere notice of a cause of action. Civil complaints must contain a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition." The Oregon Supreme Court has interpreted this to mean that "whatever the theory of recovery, facts must be alleged which, if proved, will establish the right to recovery."

- Oregon's civil rules impose limitations on discovery. No more than 30 requests for admission are allowed, and interrogatories are not permitted at all.
- Discovery of experts is also significantly curtailed. The Oregon rules do not permit depositions of experts, nor do they require the production of expert reports. Indeed, the identity of expert witnesses need not even be disclosed until trial. A party may defeat summary judgment simply by filing an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact.
- Plaintiffs must file a return or acceptance of service on the defendant within 63 days of the filing of a complaint. If the plaintiff does not meet this requirement, the court issues a notice of pending dismissal that gives the plaintiff 28 days from the date of mailing to take action to avoid the dismissal.
- Motions for summary judgment are relatively rare compared to federal court. In an IAALS study, only 91 motions were filed in 495 cases, and more than one-third of those motions were concentrated in two cases (23 motions in one case, and 11 motions in another). Interestingly, more than half of the summary judgment motions filed in Multnomah County (where Portland is located) never received a ruling from the court. Fewer than 30% of summary judgment motions filed were granted in whole or in part.
- As in Arizona, Oregon requires that all civil cases with $50,000 or less at issue, except small claims cases, go to arbitration.
- For the years 2005 to 2008 the statewide average for civil cases closed in a calendar year by trial was 1.6% and the average for Multnomah County was 1.4%.
- The IAALS study found that when compared to Oregon federal court, the Multnomah County system is faster, less prone to motion practice, and less likely to see schedules interrupted by continuances or extensions of time.

D. District of Kansas.

In early March 2012, the U.S. District Court for the District of Kansas undertook an effort to increase the just, speedy, and inexpensive determination of every matter. Spearheaded by the court's Bench-Bar Committee, the Rule 1 Task Force divided into six working groups with corresponding recommendations: 1) overall civil case management, 2) discovery involving ESI, 3) traditional non-ESI discovery, 4) dispositive-motion practice, 5) trial scheduling and procedures, and 6) professionalism and sanctions. Nearly all of the Rule 1 Task Force's recommendations were approved by the Bench-Bar Committee, and then by the court.

As a result of the Rule 1 Task Force's recommendations, the court revised its four principal civil case management forms: 1) the Initial Order Regarding Planning and

Scheduling, 2) the Rule 26(f) Report of Parties' Planning Conference, 3) the Scheduling Order, and 4) the Pre-trial Order. The court also revised its Guidelines for Cases Involving Electronically Stored Information and its Guidelines for Agreed Protective Orders, along with a corresponding pre-approved form order, and developed new guidelines for summary judgment. The court has also adopted corresponding amendments to its local rules.

I am not aware of any studies that have been completed regarding these changes, but the form orders contain many best practices and helpful suggestions. In addition to standard case management orders, the district has adopted helpful ESI guidelines and a form protective order.

E. Thoughts.

1. Arizona and Utah seem to have had success requiring greater disclosures at the outset of the case. We should consider that as part of a potential pilot program.

2. The Utah model for tiering cases, limiting the discovery in each tier, and limiting the time for discovery in each tier, is intriguing. It may be responsible for the reduced disposition time found in the NCSC survey. We have heard that assigning cases to tiers based solely on the amount in controversy could be problematic in federal court.

3. I find the Utah limit on total deposition hours very appealing. It creates the right incentive for lawyers – to conclude each deposition as efficiently as possible. I have used it in several cases and have received positive feedback. Such limits could be included in any pilot that involved tiering.

4. Mandatory arbitration of cases worth $50,000 or less seems to be working well in Utah and Oregon. The statistics in Arizona suggest that it is quite successful in removing a large number of cases from the trial court and resolving them quickly. It is not clear how many federal court cases would fall in this damages range (no diversity cases would). Could we get away with setting the number higher in a pilot – say $100,000?

5. The severe limitations placed on expert discovery in Oregon is another interesting idea, but it likely would be viewed as directly contrary to Rule 26(a)(2). I also suspect it is something unique to the Oregon culture (which the IAALS survey found quite different than other states) and would not be received well in federal court.

6. If we end up putting together a package of proposed orders or forms for pilot projects, we should look at Kansas's.

EX. D

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MEMORANDUM

To: Judge Neil M. Gorsuch

From: Stefan Hasselblad

Date: September 24, 2015

Re: Summary of Materials Concerning Simplified Federal Procedures

This memorandum briefly summarizes three reports and two law review articles that discuss the past, present, and future of efforts to reform the federal rules to create simplified procedures for less complex cases.

* * *

I. The Federal Simplified Procedure Project: A History, Institute for the Advancement of the American Legal System, 2009.

In 1999, Judge Niemeyer proposed that the Advisory Committee on Civil Rules develop a set of simplified procedural rules applicable to simple federal cases. This proposal stemmed from a concern that the current federal rules provided too much procedure for smaller cases, which raises costs and effectively bars access to courts for many litigants.

In response, the Advisory Committee initiated the Simplified Procedure Project, which aimed at developing procedures that would shift emphasis away from discovery, and toward disclosure and pleading in an effort to ensure prompt trials. As the Committee began its work, it discussed a number of possible options and difficulties: the interaction between simplified rules and federal diversity requirements, the possibility of capping damages, the possibility of simple majority jury verdicts, and whether simplified procedures could draw litigants from state to federal courts, thereby increasing federal case loads.

The Simplified Procedure Project met nine times between 1999 and 2001. The project's discussions were guided by a set of draft rules provided by Professor Edward H. Cooper, discussed below and later published in a law review article. During the project's two years of activity, some committee members

raised significant reservations about the possibility of capping damages, interference with ADR, and unintentionally creating a "cheap and inferior set of rules" for small claims. In 2001, the Advisory Committee found that the project lacked direction because of difficulty identifying the cases appropriate for application of the simplified rules. The project was then held in abeyance. Over the next seven years the project was occasionally mentioned in Committee minutes, but no further progress was made.

Professor Cooper wrote the draft rules that guided the committee's discussions. He later published these rules in a 2002 law review article. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002). The rationale behind Professor Cooper's simplified rules is that "current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery." *Id.* at 1796. The following is an overview of these simplified rules.

- The simplified rules are to be construed and administered to secure the just, speedy, and economical determination of simplified actions. Furthermore, discovery should be limited, and the costs of litigation should be proportional to the stakes.

- The simplified rules apply to all cases where the amount in controversy is less than $50,000, and may be applied voluntarily when the amount in controversy is between $50,000 and $250,000.

- The simplified rules provide for fact pleadings no longer than 20 pages. To the extent practicable, claims and answers must state details of the time, place, participants, and events involved in the claim. Furthermore, any documents relied on must be attached to the pleadings. This approach is designed to encourage careful preparation before litigation and limit costs for small claims. The rules also make clear that fact pleading should still be construed in the same spirit of liberality as notice pleading.

- The rules provide for a demand judgment procedure for plaintiffs, in which they may submit a demand asserting a contract claim for a sum certain. The demand must include any writings or sworn statements that establish the obligations owed under the contract. Sworn responses to demands for judgment, or admission of the amount due, must be submitted in the answer. Then, the clerk of the court is required to enter judgment for any amounts admitted due.

- Federal Rule 12 applies to simplified procedure cases, but the time frame for filing motions is limited. Motions to dismiss based on 12(b)(2)-(5) and (7) may be made in the answer or in a motion filed no later than 10 days after the answer.

- The simplified rules combine Rule 12(b)(6) and Rule 56 motions into a single motion filed no later than 30 days after an answer or reply. This reduces delay while preserving the functions of both rules.

- The simplified rules favor enhanced disclosure in an effort to make the pre-trial process more efficient. Both parties must disclose 1) the names and phone numbers of any person likely to have relevant information, 2) the source of information in any pleadings, 3) a sworn statement of known facts, and 4) any documents or tangible items known to be relevant to the facts disputed. Disclosure is based on information reasonably available to the parties and is not excused because either party has not completed an investigation or because a party believes an opponent has not provided sufficient disclosure.

- While pleading and disclosure requirements are expanded under the rules, discovery is limited. An FRCP 26(f) conference is available, but no discovery requests are available until after the conference. Even then, requests for production of documents and tangible things must specifically identify the things requested. Parties are limited to three depositions of three hours each.

- Expert witnesses are discouraged. The court should evaluate the issues and stakes of the claim to determine if party experts should be allowed.

- The simplified rules provide an early and firm trial date six months from the filing date in most cases. The rules specifically preclude consideration of a party's failure to complete investigations, disclosure, or discovery as a rationale for delaying trial.

II. Reforming Our Civil Justice System: A Report on Progress and Promise, The American College of Trial Lawyers Task Force on Discovery and Civil Justice & The Institute for the Advancement of the American Legal System, 2015.

The report presents 24 principles that aim to both reform civil rules and improve legal culture in a way that leads to full, fair, and rational resolution of disputes.

There are two "fundamental principles" for civil justice reform. The first principle makes FRCP 1 applicable to lawyers (in addition to parties and judges) in an effort to encourage lawyers to "secure the just, speedy, and inexpensive determination of every action." The second principle states that the "one size fits all approach" to current state and federal rules should be abandoned in favor of a flexible approach that applies different rules to different types of cases.

The report presents nine principles relating to case management. The first two of these principles relate to case management conferences. The report urges an initial, robust case management conference that informs the court about the issues (allowing judges to better plan case management), narrows the issues, and rationally limits discovery. These early conferences should discuss such topics as limits on discovery, financial limitations of the parties, a trial date, dispositive motions, preservation of electronic information, and the importance of cooperation and collegiality.

The report recommends engagement between the court and parties early in litigation. First, the court should set an early and firm trial date to encourage parties to work more efficiently and narrow the issues. Second, counsel should be required to confer and communicate early and often. Studies have shown that this reduces discovery and client costs. Third, all issues to be tried should be identified early so as to limit discovery.

The final case management principles deal with the general process of litigation. First, courts should have discretion to order mediation or other alternative dispute resolution unless *all* parties agree otherwise. Second, the court should rule promptly on motions, and prioritize motions that will advance the case more quickly. Third, judges should be more involved throughout the litigation process, which will likely require more judicial resources. Fourth, judges should be trained on managing trials and trial practice.

The report provides a single pleading principle: "[p]leadings should

concisely set out all material facts that are known to the pleading party to establish the pleading party's claims or defenses." Parties may plead facts on "information and belief" if they cannot obtain information necessary to support a claim, but they must still submit the basis for their belief. The report argues that more specific pleadings would enable courts to make proportionality determinations and allow parties to better target discovery.

The report's eleven principles on discovery begin by stating that proportionality should be the most important principle of discovery. Currently, discovery is crippling the legal system by creating inefficiency and undue expense. The first step is for courts to supervise an agreement to proportional discovery between the parties. Second, parties must recognize that all facts are not necessarily subject to discovery. This agreement should appropriately limit parties' expectations as they enter discovery.

The principles also call for parties to produce all known and reasonably available documents and tangible things that support or contradict specifically pleaded factual allegations. This principle is broader than the federal rules because it requires *production* rather than merely description. The next principle provides that, in general, discovery should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness. In addition, parties should be required to disclose trial witnesses early in litigation.

After initial production, only limited discovery subject to proportionality should be allowed. And, once that discovery is complete, further discovery should be barred absent a court order granted only with a showing of good cause and proportionality. This would create more active judicial supervision of the discovery process, while reducing discovery in conjunction with increased disclosure. Finally, in some cases, courts should stay discovery and disclosure until after a motion to dismiss is decided. This procedure would ensure discovery is used to prove a claim, rather than to determine whether a valid claim exists.

Early in litigation, parties should meet and agree on procedures for preservation of electronically stored information (ESI). All parties should be responsible for reasonable efforts to protect ESI that may be relevant to claims, but all parties must also understand that it is unreasonable to expect other parties to take every conceivable step to preserve all potentially relevant ESI. Furthermore, the same principle of proportionality that controls discovery generally should apply to ESI specifically. To make ESI discovery more efficient, attorneys and judges should be trained on principles of ESI technology.

Finally, there should be only one expert per issue per party. Experts should furnish a written report setting forth their opinion, the basis for that opinion, a CV, a list of cases in which they have testified, and the materials they have reviewed. This final principle will limit the "battle of the experts" and reduce the cost of expert testimony.

III. Summary of Streamlined Pathway Efforts, Conference of Chief Justices, Civil Justice Improvements Committee, Rules/Litigation Subcommittee, 2015.

The Civil Justice Improvements Committee anticipates that in making recommendations for improving the civil justice system it will address three different paths for civil cases: the streamlined pathway, the general pathway, and the highly-managed pathway. Defining different approaches for different paths recognizes the modern reality that one size does not fit all.

In the streamlined pathway are cases with a limited number of parties, simple issues relating to liability and damages, few or no pretrial motions, few witnesses, and minimal documentary evidence. Case types that could be presumptively assigned to the streamlined pathway include:

- automobile, intentional, and premises liability torts
- insurance coverage claims arising out of such torts
- cases where a buyer or seller is a plaintiff
- consumer debt
- appeals from small claims decisions

The subcommittee is undertaking a draft of procedural rules for the streamlined pathway. Key features of rules applied to the streamlined pathway may include:

- a focus on case attributes rather than dollar value
- presumptive mandatory inclusion for cases identified by streamlined-pathway attributes
- mandatory disclosures
- truncated discovery
- simplified motion practice
- an easy standard for removal from the pathway
- conventional fact finding
- no displacement of existing procedural rules consistent with streamlined pathway rules
- an early and firm trial date

IV. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

The Federal Rules rightly provide for open-ended rules that call for wise discretion. However, there is reason to believe our litigation system does not sufficiently prevent inept misuse and deliberate strategic over-use of the rules. The draft rules in this article provide for more detailed pleading, enhanced disclosure obligations, restricted discovery opportunities, reduced motion practice, and an early and firm trial date. The purpose of these simplified rules is not to establish second-class procedures for second-class litigation, but rather to enable access to justice by creating more efficient and more affordable procedures without the unnecessary complexity of rules designed for high-stakes, multi-party litigation.

There are some potential problems with these rules. For one, it is unclear if they could be adopted as a local experiment because Civil Rule 83 only authorizes the adoption of national rules. Second, these simplified rules assume knowledge of the Federal Rules of Civil Procedure. This made drafting the rules easier, but it would make it more difficult for a *pro se* party to litigate. A self-contained, short, and clearly stated set of rules might be a better approach.

As for the rules themselves, Rule 102 states that the simplified rules apply in actions where the plaintiff seeks monetary relief less than $50,000, where the plaintiff seeks monetary relief between $50,000 and $250,000 and the defendants do not object, and where all parties consent. This rule is tentative and is included in part to illustrate the difficulty of defining the cases appropriate for simplified procedural rules. Other approaches are also possible. For example, consent of all parties could always be required, or the power to determine when to use simplified procedures could be left to the discretion of the district court.

Fact-based pleading is at the heart of the simplified rules. Rule 103 requires that a claim state, to the extent reasonably practicable, the details of time, place, participants, and events involved in the claim. Furthermore, pleaders must attach each document the pleader may use to support the claim. Answers require the same. And avoidances and affirmative defenses must be specifically identified in a pleading. These provisions should enhance parties' ability to litigate small claims effectively and efficiently. It is important to note, however, that fact-pleading should not be approached in a spirit of technicality. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement in the detail that might be provided in proposed findings of fact. One question that remains to be answered is the

applicability of Rule 15's amendment procedures. Allowing amendments might lead to delay and strategic misuse, but *pro se* plaintiffs in simple cases may need to use good-faith amendments even more than typical litigants.

Rule 104 provides for a demand for judgment in which a party may attach a demand to a pleading that asserts a contract claim for a sum certain. The demand must be supported by a writing and sworn statements that evidence the obligation and the amount due. A defendant must admit the amount due or file a response. If the defendant admits an amount due, a court clerk may enter judgment. Essentially, Rule 104 creates a plaintiffs' motion for summary judgment. This rule is necessary because a substantial number of actions in federal court are brought to collect small sums due on contracts or unpaid loans.

Rule 104A limits motions practice. A motion to dismiss under the defenses of Rule 12(b)(2)-(5) and (7) may be made in an answer or within 10 days of an answer. The time periods to answer provided under Rule 12(a)(1)-(3) cannot be suspended by motion. And, a party seeking relief under Rule 56, 12(b)(6), 12(c), or 12(f) must combine that relief in a single motion filed no later than 30 days after the answer or reply. These rules are meant to prevent the strategic delays often created by protracted motion practice.

Rule 105's disclosure requirements are designed to reduce discovery. No later than 20 days after the last pleading, a plaintiff must provide 1) the name and telephone number of any person likely to have discoverable information relevant to the facts disputed in the pleadings, 2) sworn statements with any discoverable information known to the plaintiff or a person reasonably available, 3) a copy of all reasonably accessible documents and tangible things known to be relevant, and 4) damages computations and insurance information. 20 days later, other parties must make a corresponding disclosure. Such disclosures cannot be excused because a party has not fully completed an investigation, challenges another party's disclosure, or has not been provided another party's disclosure.

Of course, with heightened disclosure comes more limited discovery. Under Rule 106, a discovery request may only be made with the stipulation of all parties or in a Rule 26(f) conference. And a conference must be held only if requested in writing. Parties are limited to three depositions of three hours each, and 10 interrogatories. Finally, Rule 34 discovery requests must specifically identify the items requested.

Rule 108 provides that a court should first consider the issues, the amount in controversy, and the resources of the parties, and only then determine whether

to allow expert testimony. This rule is meant to reduce the risk that a better-resourced party will introduce expert testimony merely to increase the costs of litigating.

Finally, the draft rules provide for setting a trial date six months from the initial filing. This trial date should not be extended on the basis that discovery is incomplete or an action is too complex. There may be problems with this proposal. For example, it seems to give docket priority to cases that courts typically consider low-priority.

V. Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673 (2013).

The current federal civil process is inadequate for the purpose of discharging justice speedily and inexpensively. It takes three years and hundreds of thousands of dollars to try a medium-sized commercial dispute. Meanwhile, the private bar is fleeing from courts to alternative dispute resolution systems.

Although well-intentioned, the 1938 transition from fact pleading to notice pleading is part of the problem. The reformers of 1938 sought to avoid procedural maneuvering in the pleading stage that often proved too complex for the common lawyer, effectively denying litigants access to courts. The reformers' solution was notice pleading and liberal discovery rules. This reassigned resolution of procedural battles from court-supervised pleading to attorney-controlled discovery. Then, reforms in 1946, 1963, 1966, and 1970 further liberalized pleading and discovery rules. The process grew increasingly expensive, complicated, and time-consuming.

In the late 1970s, the tides shifted and courts and reformers began to attempt to limit discovery practice. In 1993, the Civil Justice Reform Act required federal districts to conduct self-study and develop a civil case management plan to reduce costs and delays. In addition, the Act called for evaluation of these plans to identify best practices. That evaluation came to three conclusions. First, early court intervention in the management of cases reduced delay, but increased litigant costs. Second, setting a firm trial date early was the most effective tool of case management – reducing delay without producing more costs. Finally, reducing the length of discovery reduced both costs and delays without adversely affecting attorney satisfaction.

In 2000, the Rules Committee and Supreme Court made several small but

beneficial changes. First, they limited discovery to any matter related to a "claim or defense of a party," rather than any matter related to a "subject matter involved in the pending action." Under the new rules, parties could still seek broader discovery, but they would need a court order that required a showing of good cause. This amendment was designed to allow courts to better supervise discovery. Second, the Rules Committee expanded mandatory disclosure and reduced interrogatories and depositions. After these reforms, Supreme Court cases in the 2000s heightened pleading standards, requiring that a complaint allege enough factual matter to state a plausible claim for relief.

It is within this context that the Civil Rules Committee chaired by Judge Niemeyer sought to draft rules that would further reduce costs and delays. From 1999 to 2000, the Rules Committee discussed a number of reform proposals but did not begin detailed debate before Judge Niemeyer's term expired. However, the Committee's reporter, Professor Edward Cooper, drafted a set of proposed simplified rules that should be the starting point for further reforms.

Professor Cooper's proposed rules would apply to all small money-damage actions and parties could choose to apply them to larger money-damage actions. These draft rules incorporated five basic elements that address known problems of costs and delay in the federal civil process. First, the rules required more detailed pleadings, enabling an early look at the merits of a case. Second, the rules would enhance early disclosures, which would have to be made within twenty days of the filing of the last pleading. Third, the draft rules restrict discovery, authorizing only three depositions and ten interrogatories. Fourth, the draft rules would reduce the burden of motions practice, combining all motions to dismiss into a single motion that must be filed early in the proceedings. Finally, the draft requires an early and strict trial date scheduled six months from the filing.

Professor Cooper's draft rules are a good basis for further reform, but there are three other ideas worthy of consideration. First, simplified rules should be applied to a wider range of cases by making them available for all damage actions, and mandatory for a larger segment of damage actions. Second, it may be wise to include incentives to encourage plaintiffs' and defendants' attorneys to use simplified rules in damage actions, as some attorneys may initially shy away from the simplified track. Third, practice under Rule 56 may need to be trimmed down, as summary judgment is now often an expensive mini-trial within the pretrial phase, creating disproportionate costs and delays.

EX. E

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INITIAL DISCLOSURE - DISCOVERY PILOT PROJECT RULE

Proposed Rule Sketch

The sketch set out below is proposed as a starting point in working toward a rule that might be tested to expand on the initial disclosure provisions in present Rule 26(a)(1). It is derived from Arizona Rule 26.1, but simplified in several ways. The reasons for this proposal follow.

(a) [*Version 1*: Within the times set forth in subdivision (b),[1] each party must disclose in writing to every other party:[2]] [*Version 2*: Before seeking discovery from any source, except in a proceeding listed in Rule 26(a)(1)(B), each party must answer these Rule 33 interrogatories {and Rule 34 requests to produce or permit entry and inspection}, providing:]

(1) (A) the factual basis of its claims or defenses;

(B) the legal theory upon which each claim or defense is based;

(C) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of the injuries suffered;

(D) for inspection and copying as under Rule 34 any insurance [or other] agreement under which an insurance business [or other person] may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment;[3] and

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[1] The times established in present Rule 26(a)(1)(C) and (D) may need to be reconsidered in light of the increased disclosures required by this rule. See footnote 2.

[2] Version 2 makes this exchange of information a first wave of discovery. Adopting the full incidents of those rules will set times to respond, and address many other issues that may arise.

[3] This is present Rule 26(a)(1)(A)(iv) as a placekeeper. Are there reasons to broaden the disclosures it requires? Indemnification agreements, for example, are not covered. It has been observed that these questions do arise. The

(2) whether or not the disclosing party intends to use them in presenting its claims or defenses:

(A) the names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action;

(B) the names and addresses of all persons known to have given statements, and — if known — the custodian of any copies of those statements; and

(C) a list of the categories of documents, electronically stored information, nondocumentary tangible things or land or other property, known by a party to exist whether or not in the party's possession, custody or control and which that party reasonably believes may be relevant to any party's claims or defenses, including — if known — the custodian of the documents or electronically stored information not in the party's possession, custody, or control.

Discussion

RULE DESIGN

Designing the rule to be tested in a pilot project is not entirely separate from designing the project's structure. But the first task is to determine the elements of the rule that is to be tested.

Many real-world models could be used as a point of departure, perhaps combining elements from different models, adding new elements, or subtracting elements from a truly demanding model. This proposal was framed by reducing the scope of Arizona Rule 26.1. This foundation provides solid reassurance that the elements of the proposal have been tested in practice, and in combination with each other.

Arizona Rule 26.1 is the broadest disclosure rule we know of. Over the course of twenty years it seems to have built toward substantial success. It would be difficult to implement a more

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bracketed language is used to contrast with the otherwise unchanged language of the present rule; if disclosure is to reach further, integrated language may prove more attractive. Whatever may be done on that score, the Committee decided recently that the time has not yet come to consider disclosure of litigation finance arrangements.

demanding model. And to the extent that it may be possible to structure a pilot project in ways that make it possible to evaluate different components of the model, separating those that work from those that do not work, aiming high has real advantages.

Caution, however, suggests adoption of a model that is robust but not aggressive. The project will fail at the outset if the model is so demanding that no court can be found to test it. As described in more detail below, there may be independent reasons to question whether the Arizona rule can work on a nationwide basis, across courts with different mixes of cases and different local cultures. The proposal aims at a less demanding but still robust regime.

The first question to be addressed in working from the Arizona model is whether to frame the model as initial disclosure or as first-wave discovery. The original version of Rule 26(a)(1) was adopted in 1993 in an effort to streamline the exchange of information that inevitably would be sought in the first wave of discovery. Although more demanding than the version adopted in 2000, it was focused on a sufficiently narrow target to make it work as disclosure. The disclosure approach is illustrated by Version 1 in the model.

An alternative is to frame the model as mandatory initial discovery. This approach has at least two potential advantages. First, by incorporating Rules 33 [and 34], it incorporates the provisions of those rules that set times to respond and obligations in responding. (It might be helpful to complicate the rule text by prohibiting objections, but the complication seems unnecessary.) The second advantage is to avoid claims that the model is inconsistent with present Rule 26(a)(1). Everything in the model is well within the court’s authority to control discovery and disclosures, particularly through Rule 16(b)(3) and (c)(2)(F). These advantages may well lead to adopting this alternative.

The next questions go to the details: What elements of the Arizona rule might be reduced? Some of the changes are simple matters of drafting. For example, it suffices to say "the factual basis of its claims or defenses," instead of "the factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense." Other changes are more substantive.

Model (a)(1)(B) is limited to "the legal theory on which each claim or defense is based." It omits "including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities." Requiring these added details will often lead to unnecessary information and provides a rich occasion for disputes about the adequacy of

the disclosures.

Arizona Rule 26.1(a)(3) calls for initial disclosure of expected trial witnesses, including a fair description of the substance of the expected testimony. It is omitted entirely, in the belief that present Rule 26(a)(3) pretrial disclosures do the job adequately, and at a more suitable time. Arizona Rule 26.1(a)(8) calls for initial disclosure of documents, electronically stored information, and tangible evidence the party plans to use at trial. It is omitted for similar reasons; the part that calls for disclosure of "relevant insurance agreements" is reflected in Model Rule (1)(D).

Model Rule subparagraphs (1)(C) and (D) are drawn verbatim from present Rule 26(a)(1)(A)(iii) and (iv). These rules seem to work well. They displace Arizona Rule 26.1(a)(7) on computation of damages and the part of (8) that calls for identification of "relevant insurance agreements."

Paragraph (2) of the model begins by requiring disclosure of additional matters "whether or not the disclosing party intends to use them in presenting its claims or defenses." Although this obligation is implicit in the initial direction to disclose, it seems wise to emphasize that this model goes beyond the "may use" limit in present Rule 26(a)(1)(A)(i) and (ii).

Subparagraph (2)(A), requiring disclosure of persons believed to have knowledge of the events in suit, is taken verbatim from the first part of Arizona Rule 26.1(a)(4), but omits "and the nature of the knowledge or information each such individual is believed to possess." There may be sufficient uncertainty or outright mistake, and sufficient difficulty in describing these matters, to urge caution in going so far.

Subparagraph (2)(B) departs from Arizona Rule 26.1(a)(5) in two ways. It omits the description of witness statements "whether written or recorded, signed or unsigned." Those words seem ambiguous as to oral "statements" not reduced to writing or recording. And it adds "if known" to the requirement to disclose the custodian of copies of the statement. This provision may need further work to decide whether to include oral statements, or to exclude them explicitly.

Subparagraph (2)(C) substantially shortens Arizona Rule 26.1(a)(9). First, the Arizona rule initially requires a list of all documents or electronically stored information, allowing a list by categories only "in the case of voluminous" information. The Model Rule is content with a list by categories for all cases. That is enough to pave the way and direction for later Rule 34 requests. Second, the Arizona rule invokes a term omitted from Federal Rule 26(b)(1) by the proposed amendments now pending in Congress: "relevant to the subject matter of the action." The

Model Rule substitutes "relevant to any party's claims or defenses." Third, the Model Rule eliminates the direction to list documents "reasonably calculated to lead to the discovery of admissible evidence." Whatever might be made of that familiar phrase in defining the outer scope of discovery, it overreaches for initial disclosure. Finally, and most importantly, the Model Rule eliminates the direction to serve a copy of the documents or electronically stored information with the disclosure "[u]nless good cause is stated for not doing so." The related provisions for identifying the custodian if production is not made, and for the mode of producing, are also omitted. Full production at this early stage is likely to encompass more — often far more — than would actually be demanded after the categories of documents and ESI are described. Too much production does no favors, either for the producing party or for the receiving party. The Arizona alternative of stating good cause for not producing everything that is listed might work if all parties behave sensibly, but it also could add another opportunity for pointless disputes.

Pilot Project Design

Designing the project itself will take a great deal of work, much of it by the experts at the Federal Judicial Center. It is imperative that the structure provide a firm basis for evaluating the model chosen for testing. But a few preliminary and often tentative thoughts may be offered.

The initial recommendation is to structure the pilot to mandate participation. The choice between mandatory or voluntary participation is one of the first questions common to all pilot projects. A choice could be introduced in various ways — as opt-in or opt-out, either at the behest of one party or on agreement of all parties. Resistance to a pilot is likely to decline as the degree of voluntariness expands. But there is a great danger that self-selection will defeat the purposes of the test. To be sure, it would be useful to learn that more and more parties opt to stay in the model as experience with it grows. But in many circumstances it would be difficult to draw meaningful lessons from comparison of cases that stay in the model to cases that opt out.

The second recommendation is that the pilot should include all cases, subject to the possibility of excluding the categories of cases now exempted by Rule 26(a)(1)(B) from initial disclosure. Those cases were selected as cases that seldom have any discovery, and they occupy a substantial portion of the federal docket. Nothing important is likely to be lost by excluding them, and much unnecessary work is likely to be spared. Beyond those cases, arguments can be made for excluding others. One of the concerns about the original version of Rule 26(a)(1) was that it would require useless duplicating work in the many cases in which the parties, not trusting the initial disclosures,

would conduct discovery exactly as it would have been without any disclosures. That might well be for complex, high-stakes, or otherwise contentious cases. But the more expanded disclosures required by the model provide some reassurance that this danger will be avoided. The model, particularly when seen as an efficient form of focused first-wave discovery, is designed in the hope that it really will reduce the cost and delay of discovery in many cases, including — perhaps particularly including — complex cases.

A quite different concern arises from cases with at least one pro se party. It may be wondered whether these initial requirements will prove overwhelming. But pro se litigants are subject to discovery now. And here too, it may be hoped that simple rule directions will provide better guidance than the complex language of lawyer-formulated Rule 33 [and Rule 34] discovery demands.

One particularly valuable consequence of including all cases is that information will be provided on how well the model actually works across the full range of litigation. There may be surprises, but that is the point of having a pilot. Any national rule that is eventually adopted would be crafted on the basis of this experience. If, for example, broad initial disclosures prove useless or even pernicious in antitrust cases, a way can be found to accommodate them. (It seems likely that the rule would recognize judicial discretion to excuse or modify the disclosure requirements, but that choice will await evaluation of the pilot's lessons.)

Selection of pilot courts is also important. Potentially conflicting considerations must be weighed. There are obvious advantages in selecting courts in states that have some form of initial disclosure more extensive than the present federal rule. Lawyers will be familiar with the state practice, and can adapt to the federal model with some ease, at least if they can check reflexes ingrained by habitual state practice. The same may hold, although to a lesser extent, for the judges. From this perspective, the District of Arizona might be a natural choice. Another might be the District of Connecticut, where the judges have widespread experience with the protocols for initial discovery in individual employment cases. Courts in Colorado, New Hampshire, Texas, and Utah also might be considered: each state has experience with initial disclosure systems more extensive than the current federal model. A particular advantage of selecting such courts may be that because they are already primed, they will achieve better results than would be achieved in other courts. That could mean that other courts will be encouraged to adopt the practice, or the national rules to embrace it, even though success will take somewhat longer to achieve in other courts.

Reliance on courts already familiar with expanded disclosure, however, might undermine confidence in whatever favorable findings might be supported by the pilot court. That a rule works with courts and lawyers who have favorable attitudes is not a sure sign that it will work with lawyers who remain hostile. And there may be a further problem. A means must be found to compare cases managed under the model with other cases. Comparison of pilot cases with cases in the same court in earlier years runs the risk that the earlier cases were shaped by habits developed under the already familiar disclosure regime. Comparison of pilot cases with cases in other courts might encounter similar difficulties.

In the most attractive world, it might prove possible to engage a number of courts with different characteristics in the pilot program. But if the project is to be tested in only one court, or even two, it will be necessary to decide whether to look to a court that already has some experience, whether it is by vicarious connection to local practice or by direct experience.

The proper duration of a pilot project may vary by subject. A model that departs substantially from present practice in discovery and disclosure is likely to require a rather extensive period of adjustment. It takes time for lawyers and judges to learn how to make the most of a new model, and to learn how to defeat efforts to subvert it. Surely anything less than three years would be too short, and five years seems a more realistic duration.

There is a point of structure peculiar to disclosure. Comparison of results depends on sure knowledge whether the model was actually used. The pilot should include a requirement that the parties file a certificate of compliance that will lead researchers to the proper starting point.

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EX. F

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Re: Simplified Procedures Pilot Project Subcommittee

David Campbell (Dist Judge) to: Amy St Eve 10/07/2015 09:17 PM

Cc: coopere, Coquille, elee, jbarkett, Jeffrey Sutton, JFogel, John D. Bates, Judge Neil Gorsuch, Judge Paul Grimm, Nancy Outley, pfolse, Rebecca Womeldorf, vseitz

From: David Campbell/AZD/09/USCOURTS(Dist Judge)
To: Amy St Eve/ILND/07/USCOURTS@USCOURTS
Cc: coopere@umich.edu, Coquille@law.harvard.edu, elee@fjc.com, jbarkett@shb.com, Jeffrey Sutton/CA06/06/USCOURTS@USCOURTS, JFogel@fjc.gov, John D. Bates/DCD/DC/USCOURTS@USCOURTS, Judge Neil

History: This message has been replied to.

Dear everyone:

In preparation for our subcommittee conference call on Friday at 4:30 pm eastern, Amy St Eve yesterday circulated to you four summary reports regarding the pilot project information our group has reviewed over the last few weeks. Reviewing those reports will give you a helpful summary of what has been done in various state and federal courts over the last few years. The report provided by Neil Gorsuch also contains a helpful summary of some innovative simplified-procedure rules prepared by Ed Cooper some years ago. This email will add some additional thoughts for you to consider in advance of Friday's call.

Although our reviews and summaries of the various state and federal court projects have not identified a particularly revolutionary approach or result, several have received positive feedback. Utah, Colorado, and New Hampshire come to mind. We can identify a collection practices that have been used in these states, including (but not limited to):

- more detailed in pleading,
- early case management conference followed by an early case management order (with continuances granted rarely and only for good cause),
- more substantial disclosure requirements,
- some limitations on motions to dismiss (such as Ed proposed),
- limitations on discovery, with leave of court required for more,
- limitations on expert discovery,
- expedited procedures for resoling discovery disputes,
- a mandatory trial date 6 to 12 months from the start of the case.

A worthwhile federal pilot project may be to identify categories of cases that tend to be modest in size, and deal with them under a combination of such practices designed to achieve quick and less expensive resolution. The list practices would need to be refined considerably, and we would need to decide whether to give a pilot district a menu of practices to choose from or a more prescriptive program.

A key question will be how to identify cases that would be handled under such a pilot. The experience in some of the state pilots suggests that using a dollar amount to identify pilot cases may not be optimal, in part because parties can attempt to plead around them. And yet diversity jurisdiction makes it challenging to identify suitable cases by category. A diversity-jurisdiction contract case may be worth $75 thousand or ten times that much. One possible approach would be two-part: (1) identify categories of federal causes of action that would go into the pilot program (such as FDCPA, FCRA, and facilities-focused ADA cases), and (2), task judges with holding an early management conference in other cases and deciding, on the basis of the 26(f) report and the conference, which cases are suitable for the pilot. I often see cases that warrant only a modest amount of discovery and expedited treatment, and they usually are apparent at the case management conference.

Our group also discussed the possibility of including in the pilot a recommended list of best practices,

such as the privilege log practices seen in some of the pilots (such as New York). These could be provided to pilot judges as additional resources to be considered in the pilot effort.

We hope to get your reactions to these general thoughts during Friday's call.

Dave

David G. Campbell
United States District Court Judge
District of Arizona
(602) 322-7645
David_Campbell@azd.uscourts.gov

EX. G

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TRACKING PILOT PROJECT

I. Place Cases in Tracks for Presumptive Resolution

- A. Basic—resolution within 6-9 months.
- B. Standard—resolution within 9-14 months.
- C. Complex—resolution within 14-24 months.

II. Criteria for placement

- A. Estimated trial days.
- B. Money demanded.
- C. Type of action.
- D. Number of parties and issues.
- E. Number of potential witnesses and volume of exhibits.
- F. Scope of discovery needed.

III. Responsibilities of District Court

- A. With input from parties, pick a track and timetable.
- B. Set firm discovery time tables (*e.g.,* 3 months in a basic case).
- C. Set firm dates for dispositive motions and trial.
- D. Resolve any discovery motions and dispositive motions promptly.
- E. Adhere to schedule except in extraordinary circumstances.

IV. Responsibilities of Parties

- A. Comply with time tables.
- B. Engage in cooperative and proportionate discovery.

V. Premises and Goals

- A. Should not create any Rules Enabling Act concerns.
- B. Should be sufficiently flexible that different district courts may implement it in different ways.
- C. Should streamline discovery and in the process should benefit plaintiffs (by decreasing the time between complaint, trial, and potential relief) and defendants (by lowering the costs of litigation).

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tions. The 1984 amendment to Rule 11 adequately accomplishes the purposes of Federal Rule 26(g).

The rejection of Federal Rule 26(g), and the concomitant loss of its language expressly requiring certification that the discovery request, response or objection is not unreasonable or unduly burdensome or expensive, is not intended to diminish the protection provided by Rule 26(c).

Rule 26(g). Discovery motions

No discovery motion will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Added and effective June 27, 2001.

Rule 26(h). Deleted. Effective Nov. 1, 1970

Rule 26.1. Prompt disclosure of information

(a) **Duty to Disclose, Scope.** Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Court Comment to 1991 Amendment

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving

the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

Committee Comment to 1991 Amendment

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

Committee Comment to 1996 Amendment

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than sixty (60) days before trial shall seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Committee Comment to 1991 Amendment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

SUPPLEMENT TO THE AGENDA BOOK

ADVISORY COMMITTEE
ON
CIVIL RULES

Salt Lake City, UT
November 5-6, 2015

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SUPPLEMENTAL MEMORANDUM

To: Advisory Committee

From: Pilot Project Subcommittee

Date: October 23, 2015

This memorandum supplements the October 15, 2015 memorandum included in the agenda materials for the November 5-6, 2015 committee meeting in Salt Lake City (Tab 12). It addresses a comprehensive pilot project undertaken by the Judicial Conference in the early 1990s at the direction of Congress that we learned about through coordination with the Court Administration and Case Management Committee ("CACM"). A copy of a memorandum from Supreme Court Fellow Amelia Yowell summarizing the 1990s pilot project is attached. The subcommittee will continue to review the substantial information available about this pilot project and others as it formulates its pilot project recommendations, and we will continue to coordinate with CACM through our liaison member Amy St. Eve and committee staff.

When Congress passed the Civil Justice Reform Act ("CJRA") in 1990, it directed the federal courts to conduct an extensive test of procedures to reduce the delay and expense of civil litigation. The CJRA required the creation of advisory groups in every district, consisting of judges and lawyers, to come up with a "civil justice expense and delay reduction plan." JCUS Report at 15. The CJRA also required the Judicial Conference to choose 10 pilot districts, 10 comparison districts, and 5 "demonstration" districts to test CJRA-recommended procedures. In 1996, the RAND Corporation completed a study of more than 12,000 cases from the pilot and comparison districts using funds provided by Congress. The procedures tested in the pilot program are similar to some of those suggested in our October 15, 2015 memorandum:

- Case tracking, where cases are sorted into expedited, standard, and complex tracks that have specific procedures and time lines;

- Early and ongoing judicial control of the pretrial process, including early motion and trial dates and limits on the extent of discovery;

- Active management of complex cases, including bifurcation of issues, early trial dates, a defined discovery schedule, and encouragement to settle;

- Encouraging voluntary exchange of information and the use of cooperative discovery techniques;

- Prohibiting the consideration of discovery motions unless accompanied by a good-faith certification that the parties have conferred; and

- Encouraging alternative dispute resolution programs.

The subcommittee has not had time to digest the RAND study, which is four volumes and more than 1,000 pages, or an FJC study of the demonstration districts, which is 400 pages long. But we have reviewed the 50-page final report from the Judicial Conference to Congress, and share some thoughts in light of that summary.

1. Case Management, Discovery, and Firm Trial Dates. The RAND study found that case disposition times can be reduced without a cost increase through early judicial case management, shortened discovery cut-offs, and a fixed trial date. JCUS Report at 20. This result reinforces the findings of some state pilots and the thinking behind several of our recent rule amendments.[1]

One might reasonably ask, however, why the CJRA pilot and the RAND study did not lead to efficient case management in all federal courts? Why did participants in the 2010 Duke Conference – some 13 years after the pilot and RAND studies were completed – still complain that civil litigation takes too long, costs too much, and involves too little active case management? Perhaps the problem is not the principles, but their implementation. Perhaps we should consider a pilot that focuses on training and motivating judges rather than testing new procedures. What would happen, for example, if we picked some pilot districts where active training of judges would occur over the course of a few years on matters such as early and active case management, setting short but reasonable discovery schedules, and setting firm trial dates? The RAND study and state pilots provide data to show that these practices work if judges will use them.

2. Case Tracking. Our October 15, 2015 memorandum suggested a pilot under which medium and small cases are identified and placed on a track where they receive faster and less complicated process. This was tested in the CJRA pilot. The CJRA called for all districts to implement a system of Differentiated Case Management ("DCM") that divides cases into "expedited," "standard," and "complex" tracks, with each track having a specific set of procedures and event timelines. *Id.* at 31. The JCUS Report to Congress at the end of the pilot contained this observation:

[1] The RAND study often noted that it could not draw conclusions on "causation" – whether a particular technique caused an observed favorable result. "It can only suggest a possible correlation between a technique and a given result." JCUS Report at 20. Given the many variables that affect case processing, this likely is true of any pilot.

> [T]he difficulty of determining in which track to place a particular case, based on the initial case filings, made the policy impracticable. For this reason, most courts placed the vast majority of cases in the "standard" track. Also, many courts found that a judge's ability to tailor the management of each particular case was more effective than rigid case tracks.

Id. at 31 (citation omitted). The FJC's separate study of demonstration districts found a generally favorable reaction to case tracking. *Id.* at 32.

Although the Judicial Conference "encourage[d] differential treatment of civil cases to reduce cost and delay," it declined to endorse a formal tracking approach:

> Track systems . . . may not always be the most efficient format for DCM. As the pilot courts demonstrated, such systems can be bureaucratic, unwieldy, and difficult to implement. For example, some courts found that they lacked sufficient information at the beginning of a case to know in which track a case belonged. Therefore, the Conference recommends that individual districts continue to determine on a local basis whether the nature of their caseload calls for the more rigid track model or the judicial discretion model for their DCM systems.

Id. (citation omitted).[2]

The subcommittee recognized in our October 15 memo that challenges could arise in attempting to classify cases for the application of certain streamlined and expedited procedures. For that reason we also suggested the idea of testing the application of tighter time frames and expedited procedures for all cases in particular districts.

3. Early Disclosures. The CJRA pilot included "[e]ncouragement of cost effective discovery through voluntary exchange of information among litigants[.]" *Id.* at 37. The 1993 amendments to Rule 26, which apparently came into effect as a result of the CJRA, required more robust disclosures than the current rule. That rule, which was optional for districts, was in play during the CJRA pilot. As a result, RAND found it difficult to measure the effects of the pilot project on initial disclosures and no firm conclusions were reached. *Id.* at 38. The Judicial Conference therefore declined to make specific recommendations, but encouraged the civil rules committee to continue studying

[2] During discussions of our subcommittee, it was noted that several districts still have local rules that call for case tracking, but members of the subcommittee were not aware of those rules being used. The rules apparently originated 25 years ago with the CJRA experiment.

the issue. Although the CJRA study was inconclusive, promising signs were found both by RAND and the FJC. The 2000 amendment to Rule 26(a)(1) scaled back the 1993 disclosure regime because of a desire to achieve a uniform national rule rather than any sense that the 1993 rule was ineffective or undesirable. Enhanced initial disclosures should still be considered as a possible pilot project.

4. Changes since 1990s.

Review of the CJRA study has prompted the subcommittee to consider how civil litigation today differs from civil litigation in 1990-96. Several changes come to mind. The most significant, of course, is the advent of ESI and its growing influence in a wide range of civil cases. Other changes include a likely increase in small statutory cases (TCPA, FCRA, FDCPA), growth in the number of prisoner *pro se* cases, likely growth in the number of non-prisoner *pro se* cases, the increased use of magistrate judges to manage civil cases in some districts, and the arrival of electronic filing and case management. These developments have altered the civil litigation landscape to some extent, and we should keep them in mind as we continue to study the results of the CJRA pilot.

5. Thoughts for discussion.

We suggest a few thoughts for discussion at the November meeting in addition to those identified in our October 15, 2015 memo.

a. What effect should the CJRA pilot have on our own pilot initiatives? Has civil litigation changed sufficiently since the early 1990s to justify some duplication of the earlier study?

b. Reviewing the CJRA pilot has caused the subcommittee to identify other possible pilots that might be pursued (in addition to those mentioned in the October 15, 2015 memo):

- As noted above, we could attempt to design a pilot that tests the ability to train judges to apply early, active case management with short discovery schedules and firm trial dates.

- One tool adopted as a result of the CJRA did produce a meaningful drop in case backlogs. That tool was publishing, for each judge, statistics on the number of motions pending more than 6 months and the number of cases pending more than 3 years. These statistics are still published, but some think they have become an unfortunate docket-management tool. Some judges manage their dockets so as not to have motions on the CJRA report, but using that as the benchmark can result in lengthy delays in deciding motions. For

example, a motion filed on September 29 need not be decided until March 30 to avoid the CJRA report, and a motion filed on October 1 need not be decided until the next September 29 to avoid the CJRA report. Thus, judges can avoid having any motions on the report if they decide motions between 5 months and 29 days after they are filed and 11 months and 29 days after they are filed. What about a pilot that reduces these public reporting times to 3 months for motions and 2 years for cases?

- Following the European model, what about a pleading-only pilot for small cases – no discovery?

- Should we focus on a pilot that tests some of the unique aspects of state-court practice that have not been tested in federal court, such as Oregon's aggressive position on expert discovery, Utah's total-hours limits on depositions, or the abolishment or limitation of interrogatories?

- Is there an ESI-focused pilot that would be helpful? Perhaps making e-discovery specialists available in small and medium-sized cases and requiring parties in large cases to include ESI experts in the Rule 26(f) conference?

We look forward to receiving your thoughts at the November meeting.

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To: Rebecca Womeldorf

Cc: Simplified Procedures Pilot Project Subcommittee

From: Amelia Yowell, Supreme Court Fellow

Date: October 15, 2015

RE: CACM report on the CJRA pilot program

The Civil Justice Reform Act of 1990 (CJRA) outlined a series of case management principles, guidelines, and techniques to reduce cost and delay in civil litigation. To test these procedures, Congress established a pilot program in ten districts. Congress directed the Judicial Conference to commission an independent evaluation of the program,[1] study the results, and assess whether other districts should be required to implement the same case management principles. Report at 11. I've provided a brief summary of the Judicial Conference's May 1997 final report below,[2] with an emphasis on the topics that overlap with those discussed at the pilot project subcommittee's conference call on Friday, October 9, 2015.

The CJRA Pilot Program

The pilot program consisted of twenty district courts. Report at 14–15. To obtain representative results, the Judicial Conference did not allow districts to volunteer. *Id.* at 15. Instead, the Judicial Conference chose districts based on their "size, the complexity and size of their caseloads, the status of their dockets and their locations." *Id.* At least five districts were located in a metropolitan area. *Id.* Ten of the districts were "pilot districts,"[3] which were required to implement the following principles:

- Differentiated Case Management, where cases are sorted into expedited, standard, and complex tracks that have a specific set of procedures and time lines;

- Early and ongoing control of the pretrial process, including setting early dispositive motion and trial dates and controlling the extent of discovery;

[1] The RAND Corporation conducted the independent evaluation. Report at 15.

[2] The Judicial Conference delegated oversight responsibility to the Court Administration and Case Management Committee (CACM). Report at 12–13.

[3] The ten pilot courts were: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. Report at 15 n.5.

- "Careful and deliberate monitoring" of complex cases, including bifurcation of issues, early trial dates, a defined discovery schedule, and encouragement to settle;

- Encouraging voluntary exchange of information and the use of cooperative discovery techniques;

- Prohibiting the consideration of discovery motions, unless accompanied by a good faith certification; and

- Encouraging alternative dispute resolution programs

Id. at 15, 26–38. The Judicial Conference also asked the pilot districts to implement the following litigation management techniques:

- Requiring the submission of joint discovery plans;

- Requiring a representative with the power to bind the parties to be present at all pre-trial conferences;

- Requiring all requests for extensions of discovery deadlines or trial postponements to be signed by an attorney and the party;

- Implementing a neutral evaluation program to hold a nonbinding ADR-like conference early in the litigation; and

- Requiring a representative with the power to bind the parties to be present at all settlement conferences

Id. at 15, 39–44.

These pilot districts were compared with ten "comparison districts,"[4] which were not required to implement the above principles or techniques. *Id.* at 15. In total, the RAND Study compared over 12,000 cases in the pilot and comparison courts, as well as case cost and delay data from before and after implementation of the CJRA. *Id.* The Study also collected data from

[4] The ten comparison courts were: the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York, and the Middle District of Pennsylvania. Report at 15 n.6.

five other districts,[5] which implemented "demonstration programs to test systems of differentiated case management and alternative dispute resolution." *Id.* at 9.

The Judicial Conference's Assessment and Recommendation

After review, the Judicial Conference cautioned against implementation of the pilot program nationwide, at least "as a total package." *Id.* at 2, 15. The Conference based its recommendation on the RAND Study's finding that the pilot project, as a whole, did not have a great impact on reducing cost and delay.[6] *Id.* at 26. Assessing these results, the Conference noted that "there is a need for individualized attention to each case that a 'one size fits all' approach cannot satisfy."[7] *Id.* at 46.

The RAND Study outlined six procedures that likely were effective in reducing cost and delay: (1) establishing early judicial case management; (2) setting the trial schedule early; (3) establishing shortened discovery cutoff; (4) reporting the status of each judge's docket; (5) conducting scheduling and discovery conferences by phone; and (6) implementing the advisory group process. *Id.* at 15–16.

Notably, the RAND Study did not address several important questions: (1) the possible differential impact of procedural reforms on small law firms, solo practitioners, and those serving under contingency fee arrangements; (2) the impact of front-loading litigation costs under accelerated case management programs; and (3) the effects of the procedural reforms on particular case disposition types. *Id*. at 45–46. In particular, the Study noted that "[r]eforms that actually increase costs for small and solo practitioners may frustrate the aims of the Act by lessening access to justice for low-income litigants or those with small claims." *Id.* at 46.

The following chart summarizes the relevant parts of the CJRA Pilot Program, the RAND Study's findings, and the Judicial Conference's resulting recommendation.

[5] The Western District of Michigan and the Northern District of Ohio experimented with systems of differentiated case management while the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia experimented with various methods of reducing cost and delay, including ADR. Report at 16–17.

[6] One reason for this may be that the judiciary had already adopted many of the CJRA's case management procedures. Report at 26.

[7] The RAND Study reported that "reduction of litigation costs is largely beyond the reach of court-established procedures because: (a) most litigation costs are driven by the impact of attorney perceptions on how they manage their cases, rather than case management requirements; and (b) case management accounts for only half of the observed reductions in 'time to disposition.'" Report at 46.

Tested Procedure	Findings	Recommendation
Differentiated case management using a "track" system Report at 26–28	· The districts sorted cases into expedited, standard, and complex tracks. · The districts employed a variety of identification methods; many courts used an automatic track assignment process based on subject matter outlined in the initial pleadings. · Districts encountered significant difficulties classifying cases at the pleading stage, especially when identifying and evaluating complex cases. Because of this difficulty, most districts placed the vast majority of cases in the "standard" track. · Many districts found that a judge's ability to tailor the management of each particular case was more effective than rigid case tracks.	· Some form of differentiated case management should be used. · However, track systems "can be bureaucratic, unwieldy, and difficult to implement." · Therefore, individual districts should determine on a local basis whether the nature of the caseload calls for a more rigid track model or a judicial discretion model.
Early judicial case management Report at 19, 29–31	· Early judicial case management included "any schedule, conference, status report, joint plan, or referral to ADR that occurred within 180 days of case filing. · Early case management alone significantly reduced time to disposition (by up to two months), but significantly increased lawyer work hours. · If early judicial intervention was combined with shortened discovery (from 180 days to 120 days), then lawyer work hours (and therefore cost) decreased.	· Courts should follow Rule 16(b), which requires entry of a scheduling order within 120 days and encourages setting an early and firm trial date as well as a shorter discovery period. · The Conference was "opposed to the establishment of a uniform time-frame, such as eighteen months, within which all trials must begin," mainly because a standard time line would slow down cases that could be resolved more quickly.

Early voluntary exchange of information and use of cooperative discovery techniques Report at 33–	· All pilot and comparison courts instituted some form of voluntary or mandatory early exchange of information. · It was difficult to analyze the effects of voluntary disclosure versus mandatory discovery. · Discovery deadlines were a major factor in decreasing the cost and length of litigation.	· The Judicial Conference did not find enough information in the RAND Study to make a specific recommendation about voluntary versus mandatory initial disclosures · The Committee on Rules of Practice and Procedure should re-examine the need for national uniformity in applying Rule 26(a).

Based on these results and recommendations, the Judicial Conference proposed the following alternative cost and delay procedures:

- Continued and increased use of district court advisory groups, composed of attorneys and other litigant representatives;
- Public reporting of court dockets;
- Setting early, firm trial dates and shorter discovery periods in complex cases;
- Effective use of magistrate judges;
- Increased use of chief judges in case management;
- Increased use of visiting judges to help with backlogged dockets;
- Educating judges and lawyers about case management, especially considering the RAND Study's finding that one of the primary drivers of litigation costs is attorney perception of case complexity; and
- Increased use of technology

Id. at 18–26.

The Judicial Conference also made several recommendations that required the action of Congress or the Executive branch. For example, the Conference pointed out that "a high number of judicial vacancies, and the delay in filling these vacancies, contribute substantially to cost and

delay." Report at 22. The Conference also noted that a court's ability to try cases in a timely manner depended on available courtrooms and facilities. *Id.* at 25.

SUPPLEMENT TO THE AGENDA BOOK

ADVISORY COMMITTEE
ON
CIVIL RULES

Salt Lake City, UT
November 5-6, 2015

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UNIVERSITY OF ILLINOIS
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October 14, 2015

The Honorable Raner C. Collins
U. S. District Court for the District of Arizona
Evo A. DeConcini U.S. Courthouse
405 West Congress Street, Suite 5190
Tucson, AZ 85701-5051

Dear Chief Judge Collins,

I understand that a training has been scheduled for the judges in your courthouse on the proportionality amendment to the Federal Rules of Civil Procedure. I write to express my concerns about this training entitled *Hello "Proportionality," Goodbye "Reasonably Calculated": Reinventing Case Management and Discovery Under the 2015 Civil Rules Amendments* and to ask Your Honor to consider not holding it.

As Your Honor may be aware, Judge Lee Rosenthal and Professor Steven Gensler, who served respectively as the chair of the advisory and standing committees and as a member of the advisory committee, will lead these trainings. In brief, they will use guidelines and practices, which were generated through Duke Law School's privately-funded Center for Judicial Studies, to train judges on how the rules should be interpreted. It is my opinion based on the law that the trainings are inappropriate under the Rules Enabling Act ("REA").

I have enclosed a copy of the eleven-page set of private guidelines and practices ("private guidelines"). Also enclosed is a copy of the proportionality amendment. In the program in Your Honor's courthouse, these eleven pages of private guidelines will be used to train your judges on this less than one sentence amendment.

As illustrated on diagram A, the guidelines are the result of a private corporate sponsored initiative. Through a parallel process designed to be akin to the rulemaking process under the Rules Enabling Act, this private initiative has attempted to portray itself as part of the official rulemaking process. It includes the same types of steps, including a so-called public commentary period. However, it is far from a public process like the rule-making process under the REA. For example, the private process started with an expensive "Invitation Only" conference which groups such as the NAACP Legal Defense Fund were unable to attend. Moreover, the corporate sponsors include companies that testified in the public commentary period about the proportionality rule. https://law.duke.edu/judicialstudies/sponsors/

As depicted on diagram B, the official process is supposed to be from A to B; the rule is adopted and judges interpret it. Instead, now, there is an attempt for the process to be from A

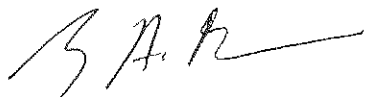
to X to B; the rule is adopted, private guidelines are formed, and judges are told to follow these guidelines. As illustrated on diagram B, this new process is even more problematic given that several judges, including current advisory committee members and/or those who were involved in proposing the original rule to the standing committee, are involved in the private guideline process.

The webpage on the federal courthouse trainings describes Judge Rosenthal and Professor Gensler chiefly in relationship to their advisory committee and standing committee affiliations, which again gives the training an imprimatur of approval. If the trainings on the guidelines continue, I believe a congressional hearing on this matter is warranted.

In the past, I wrote to Judge Campbell, the outgoing chair of the Advisory Committee, Judge Sutton, the chair of the Standing Committee, and Judge Bates, the newly-seated chair of the Advisory Committee about my concerns. Judge Campbell stated that the Advisory Committee was not part of this private guideline process, and the Committee did not propose the trainings.

To reiterate my concern: federal judges should not be trained on privately generated, corporate sponsored guidelines on any rules, including the proportionality rule.

Sincerely,



Suja A. Thomas
Professor

cc: (Original letters and enclosures were sent to the following thirteen Chief Judges where trainings are scheduled: Judges Loretta A. Preska, Petrese B. Tucker, Jerome B. Simandle, Catherine D. Perry, Thomas W. Thrash, Jr., Ruben Castillo, Richard W. Roberts, George H. King, Phyllis J. Hamilton, Raner C. Collins, Marcia S. Krieger, Jorge A. Solis, K. Michael Moore.)
Senator Chuck Grassley, Chairman, United States Senate Committee on the Judiciary (copy of one letter and enclosures)
Congressman Bob Goodlatte, Chairman, United States House Committee on the Judiciary (copy of one letter and enclosures)
Senator Patrick Leahy, Ranking Member, United States Senate Committee on the Judiciary (copy of one letter and enclosures)
Congressman John Conyers, Jr., Ranking Member, United States House Committee on the Judiciary (copy of one letter and enclosures)
The Honorable John Roberts, Jr. (copy of one letter and enclosures)
The Honorable Lee H. Rosenthal (copy of one letter and enclosures)
Professor Steven S. Gensler (copy of one letter and enclosures)
The Honorable Jeffrey Sutton (copy of one letter and enclosures)
The Honorable David G. Campbell (copy of one letter and enclosures)
The Honorable John D. Bates (copy of one letter and enclosures)

Diagram A

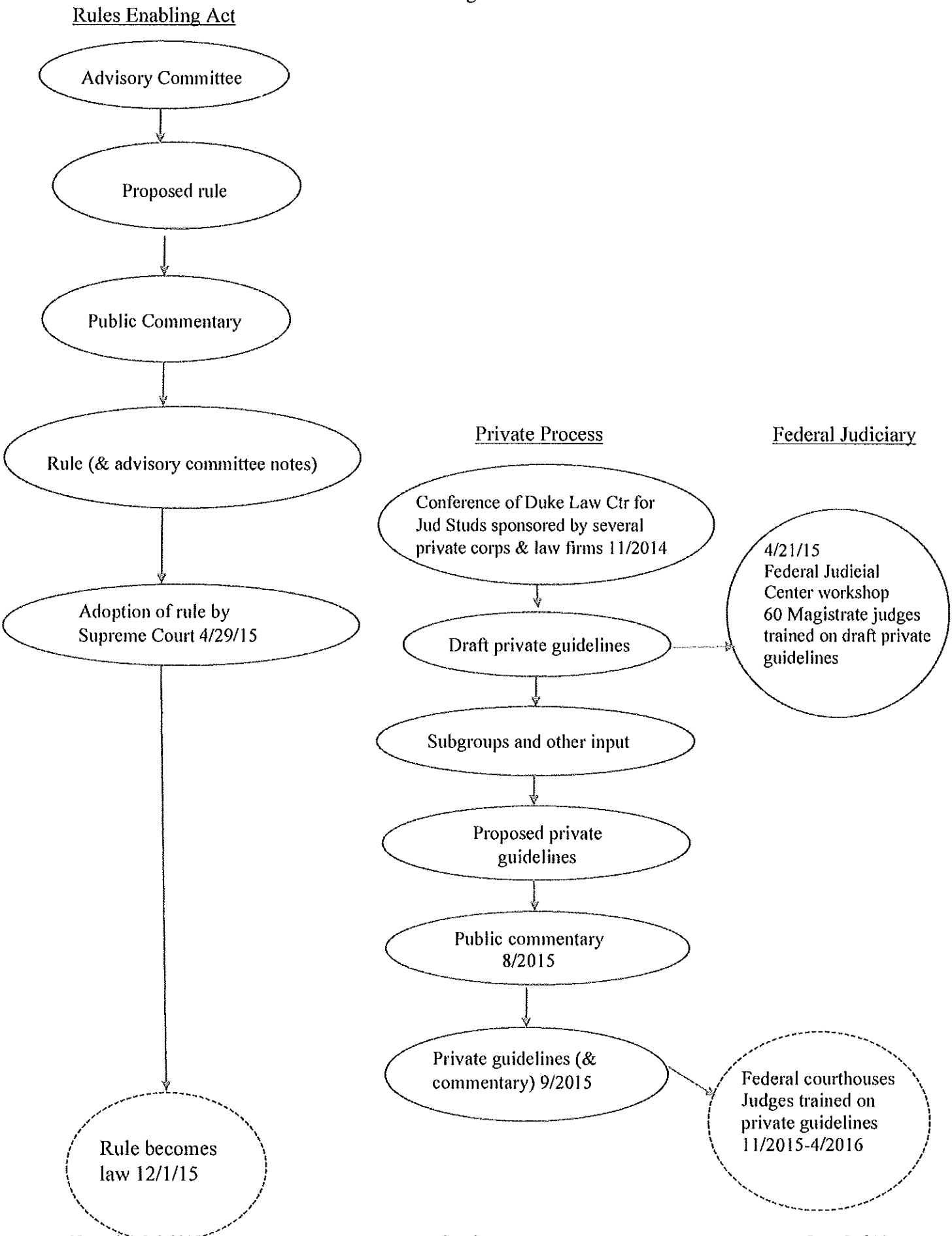
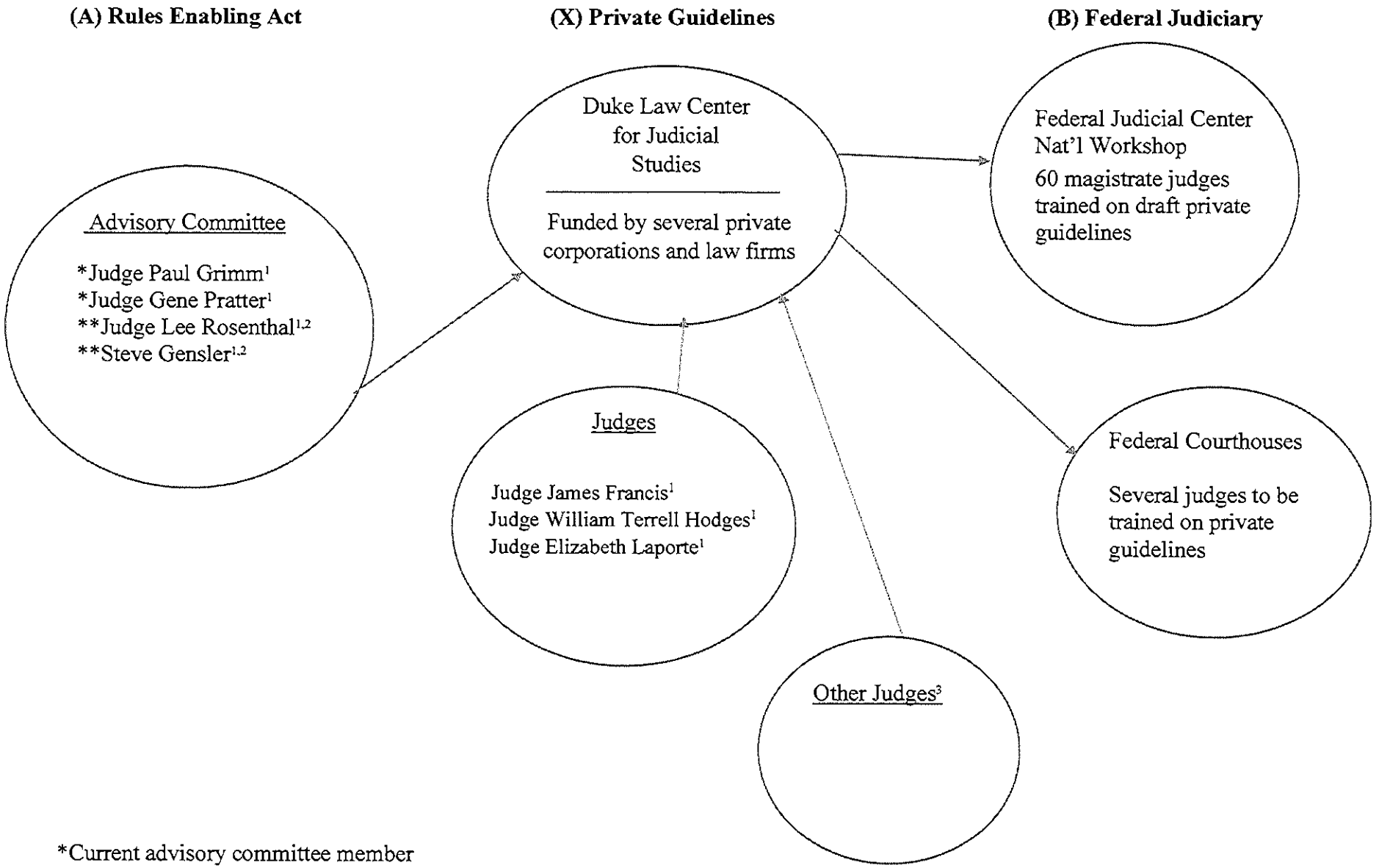

Rules Enabling Act
Advisory Committee
Proposed rule
Public Commentary
Rule (& advisory committee notes)
Adoption of rule by Supreme Court 4/29/15
Rule becomes law 12/1/15
Private Process
Federal Judiciary
Conference of Duke Law Ctr for Jud Studs sponsored by several private corps & law firms 11/2014
Draft private guidelines
4/21/15 Federal Judicial Center workshop 60 Magistrate judges trained on draft private guidelines
Subgroups and other input
Proposed private guidelines
Public commentary 8/2015
Private guidelines (& commentary) 9/2015
Federal courthouses Judges trained on private guidelines 11/2015-4/2016

Diagram B



*Current advisory committee member
**Advisory committee member while proportionality was discussed

[1] Member of Duke group forming private guidelines
[2] Drafter of private guidelines
[3] Other input into private guidelines (may have current or former ties to a Committee under Rules Enabling Act)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

* * * * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

* * * * *

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending —

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

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JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS, III
EVIDENCE RULES

October 26, 2015

The Honorable Raner C. Collins

Dear Chief Judge Collins:

You recently received a letter from Professor Suja Thomas concerning a conference hosted by the Duke Center for Judicial Studies and the ABA Section of Litigation and scheduled to be held in your courthouse during the next few months about proposed amendments to the Federal Rules of Civil Procedure. We too received copies of the letter. In our capacities as the chair of the Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) and the current and past chairs of the Advisory Committee on the Federal Rules of Civil Procedure, we wish to respond. The key points are these: The conferences do not involve official "judge" "training" of any sort, which remains the province of the Federal Judicial Center, and the Rules Committees do not endorse the "guidelines" developed by the Duke Center about the proposed amendments to the Civil Rules and any such guidelines are not part of the amendments or the Committee Notes to them.

Professor Thomas correctly points out that the Rules Enabling Act calls for amendments to the Federal Rules of Civil Procedure to be promulgated through a public and independent process of open meetings, publicly available committee materials, and public hearings. When it comes to the 2015 package of Civil Rules amendments currently in front of Congress, that process has been followed but is not complete. The Supreme Court approved the package last Spring, and it is slated to go into effect on December 1, 2015, absent congressional action.

If the current rules package goes into effect later this year, the Standing Committee and the Civil Rules Committee, in conjunction with the Federal Judicial Center, plan to educate judges and lawyers about the amendments. In particular, we hope to use judicial conferences over the next year or two to inform the bench and bar about these important changes to the Civil Rules. We expect other groups will devote conferences to the amendments as well, as they often do for important changes to the rules. That is not unusual or to be discouraged. Nor is it unusual (or to be discouraged) to have past and present members of the Rules Committees participate in

these kinds of events so long as they make clear that they do not speak for the Committees. Whether it is the ABA, the FBA, the ALI, the Institute for the Advancement of the American Legal System, the National Employment Lawyers Association, the Sedona Conference, the Duke Center for Judicial Studies, or any other bar, private, or university-related entity, all of them have something to offer when it comes to informing the legal community about significant rules changes. In that respect, we are grateful for their efforts in furthering our shared goal of a well-functioning legal system.

Professor Thomas does not appear to be concerned about these traditional methods of educating the bench and bar about rules amendments. Her concern instead seems to be twofold: (1) that the Duke Center is a private entity that has engaged groups from the legal community, including a few members of the Rules Committees, to draft guidelines for application of some of the new rule amendments; and (2) that the Center is using its 13 conferences to "train judges" about the amendments. Taken together, she believes, these two features of Duke's efforts create a Rules Enabling Act problem.

With all respect to Professor Thomas, we see no Rules Enabling Act problem. In the first place, the Duke Center is indeed a private entity. Its guidelines are not part of the new rules or the committee notes that accompany the rules, and they have not been endorsed by the Standing Committee or Advisory Committee. We understand that the introduction to the guidelines states that they do not represent the views of any Judicial Conference committee and are not part of the rules. In the second place, the conferences do not involve any form of official judicial training. Such training is the province of the federal courts, usually in conjunction with the FJC, and will begin after December 1, 2015, assuming Congress permits the new Civil Rules to go into effect. Although the Rules Committees have had no role in planning the conferences addressed in Professor Thomas's letter, we understand them to be CLE conferences sponsored by the ABA Litigation Section and the Duke Center. The conference website suggests that they are publicly open events with a variety of presenters, like many other CLE events being held with respect to the new rules. See www.frcpamendments2015.org.

That said, judges and present and former Rules Committee members should take the same precautions with regard to these conferences that they take with all similar conferences. The first is to respect the Rules Enabling Act process, which is not over. Congress has until December 1, 2015, to reject or modify the amendments. If federal judges and past and present Rules Committee members participate in such conferences before December 1, they should emphasize that the rules have not yet gone into effect and Congress may modify or reject them before December 1.

A second step is to make clear that the Duke guidelines and any presentation at the conferences do not come with the imprimatur of the Rules Committees. The Duke Center, like other groups, is free to hold conferences or propose guidelines with respect to the rules or any other area of law. But they are not entitled to communicate, or suggest, that they bear the stamp of approval of the Rules Committees.

As for whether the conferences should be held in federal courthouses, that of course is a choice for each Chief Judge and each court. If similar events are held in your courthouse, it is difficult to understand why this kind of conference cannot occur there. See Guide to Judiciary Policy, Vol. 2B, Chap. 3, section 4.7-1(d). The choice whether to attend a conference as a member of the audience is for each judge to make—just as it would be with respect to any other conference sponsored by a private organization.

We request that you share this letter with the judges in your district to make clear that the Rules Committees do not endorse the Duke Center's guidelines and are not sponsors of these conferences, and that the conferences are not any sort of committee- or judiciary-sanctioned "training" for judges. Please feel free to contact any of us if you have further questions.

Judge Jeffrey S. Sutton Judge John D. Bates Judge David G. Campbell

cc: Senator Chuck Grassley
Congressman Bob Goodlatte
Senator Patrick Leahy
Congressman John Conyers, Jr.
The Honorable John G. Roberts, Jr.
The Honorable Lee H. Rosenthal
Professor Steven S. Gensler
James C. Duff, Director
Professor Suja A. Thomas

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October 26, 2015

Professor Suja A. Thomas
University of Illinois
College of Law
504 East Pennsylvania Avenue
Champaign, Illinois 61820

Dear Professor Thomas:

We have received your letter concerning conferences scheduled at courthouses in several cities. We write to share our views on some of the concerns you have raised.

You are correct that the Rules Enabling Act calls for amendments to the Federal Rules of Civil Procedure to be promulgated through a public and independent process of open meetings, publicly available committee materials, and public hearings. The 2015 rules amendments were adopted through that process.

We know that the Duke Center for Judicial Studies has engaged groups from the legal community to draft "guidelines" for application of some of the new discovery rule amendments. Those guidelines are not part of the new rules or the committee notes that accompany the rules, and have received no approval by the Standing Committee or Advisory Committee. We understand and share your view that no private group should have, or appear to have, too close a connection to the rules committee. For that reason, after earlier communications from you, we specifically asked the Duke Center to include a statement in the guidelines stating that they do not represent the views of any judicial conference committee. We also reminded members of the Advisory Committee of the need to preserve the committee's independence, both in fact and in appearance.

We understand that the conferences addressed in your letter are being sponsored by the ABA Section of Litigation and the Duke Center. Your letter suggests that the purpose of the conferences is to "train judges." That is not our understanding of their purpose. From the conference website, we understand the conferences to be public CLE events for the bar with a variety of presenters covering a range of perspectives, like many other CLE events being held with respect to the new rules. To avoid any confusion on this issue, however, we have sent a letter to the Chief Judges addressed in your letter making clear that the conferences are not "judge training" in any form. We also have asked that our letter be shared with all judges in the districts where the conferences will be held. A copy of the letter is enclosed.

As you know, many bar associations and other groups hold conferences to discuss civil litigation issues, including the civil rules amendments. In our experience, it is not unusual for bar groups to hold CLE conferences at federal courthouses. Present and past members of the advisory committee have participated in a wide range of CLE conferences, and we have not thought that inappropriate. They appear as individuals, not as representatives of the committee, and they often find such conferences informative and helpful in their work as lawyers, judges, and committee members.

In summary, the Standing and Advisory Committees are not sponsoring or endorsing the conferences mentioned in your letter, and the Duke guidelines are not part of the civil rules or their committee notes and have received no approval from the Standing or Advisory Committees. We have tried to make these points as clearly as we could in the letter sent to Chief Judges and others today.

Thank you for your continuing interest in the rules process.

Sincerely,

Judge Jeffrey S. Sutton Judge John D. Bates Judge David G. Campbell