

**PUBLIC HEARING ON**  
**PROPOSED AMENDMENTS TO THE**  
**FEDERAL RULES OF CIVIL PROCEDURE**

**JUDICIAL CONFERENCE**  
**ADVISORY COMMITTEE ON CIVIL RULES**

**Thurgood Marshall Federal Judiciary Building**  
**Washington, D.C.**  
**November 3, 2016**

**List of Confirmed Witnesses for the  
Public Hearing on Proposed Amendments to the  
Federal Rules of Civil Procedure  
Judicial Conference  
Advisory Committee on Civil Rules**

**Thurgood Marshall Federal Judiciary Building  
Washington, D.C.  
November 3, 2016 – 9:00 A.M.**

	<b>Witness Name</b>	<b>Organization</b>	<b>Testimony</b>
1.	Sai		No written testimony submitted
2.	Jeffrey A. Holmstrand	DRI: The Voice of the Defense Bar	Tab 1
3.	Mark P. Chalos	Lieff, Cabraser, Heimann & Bernstein	No written testimony submitted
4.	John H. Beisner	Skadden Arps	No written testimony submitted
5.	Alan B. Morrison	George Washington University Law School	Tab 2
6.	John Parker Sweeney	DRI: The Voice of the Defense Bar	Tab 1
7.	Stuart Rossman	National Consumer Law Center and National Association of Consumer Advocates	Tab 3
8.	Brent Johnson	Committee to Support Antitrust Laws (COSAL)	Tab 4
9.	Mary Massaron	Plunkett Cooney	No written testimony submitted
10.	Brian Wolfman	Georgetown University Law Center	Tab 5
11.	Hassan Zavareei	Tycko & Zavareei	Tab 6

Tab 1

Written Testimony of

Jeffrey A. Holmstrand and  
John Parker Sweeney, on behalf of  
DRI: The Voice of the Defense Bar



**COMMENT**

to the

**RULE 23 SUBCOMMITTEE,**

**ADVISORY COMMITTEE ON CIVIL RULES**

**September 10, 2015**

**DRI: The Voice of the Defense Bar**

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## ORGANIZATIONAL OVERVIEW

DRI – The Voice of the Defense Bar is pleased to provide the following comments to the Advisory Committee on Civil Rules’ Rule 23 Subcommittee. For more than 50 years, DRI has been the voice of the defense bar, advocating for 22,000 defense attorneys and corporate counsel members and defending the integrity of the judiciary and the civil justice system. A thought leader, DRI provides world-class legal education, deep expertise for policymakers, legal resources and networking opportunities to facilitate career and law firm growth.

### In a Word

Our members defend businesses in civil suits. If a company or corporation is ever the target of such a suit, there is a great likelihood that one of our member attorneys will be representing them. Their expertise and advocacy is the best defense against a potentially ruinous, and many times frivolous, lawsuit.

### Focus

DRI focuses on six primary areas.

- Justice: DRI strives to improve the civil justice system.
- Judicial Balance: DRI acts as a counterpoint to the plaintiffs’ bar to seek balance in the minds of all participants in the judicial system and in all areas of dispute resolution.
- Education: DRI provides outstanding educational opportunities to improve the skills of the defense lawyer.
- Law Practice Administration: DRI assists its members in dealing with the economic realities of the defense practice in an increasingly competitive legal marketplace.
- Professionalism and Ethics: DRI urges members to practice ethically and responsibly, keeping in mind the lawyer’s responsibilities that go beyond the interest of the client to the good of society as a whole.
- Expertise: DRI acts as an expert resource on legal and judicial issues for the media, policymakers and the general public.

### Services

Seminars/Webinars: Drawing upon leading expertise in various areas of substantive law, DRI provides numerous outstanding Continuing Legal Education seminars and webinars each year and makes materials from previous years’ seminars available to its membership.

Publications: DRI produces the leading professional defense bar publications, including our flagship monthly journal *For The Defense*, *In-House Defense Quarterly*, and others.

Amicus Briefs: DRI regularly files amicus briefs in federal and state courts on such landmark cases as *Dukes v. Wal-Mart*, *Erica John Fund v. Halliburton*, *Glazer v. Whirlpool*, *Comcast. v. Behrend*, *Greenwood v. CompuCredit Corp* and others to provide guidance to the courts and advocacy on issues vital to the defense bar and its clients.

Testimony: DRI provides expert testimony before legislative bodies and regulators on judicial reform and other issues of concern to the defense bar.

Studies: DRI provides in-depth monographs and white papers of various issues critical to the legal profession, on topics such as jury duty, judicial funding, and judicial independence.

### **Center for Law and Public Policy**

The Center for Law and Public Policy was created by DRI to provide thoughtful and expert analysis and commentary on issues of great import to the defense bar, the judiciary, the legal profession, and the country. The Center operates through three committees: Issues and Advocacy, Amicus, and External Policy Groups.

Because our judicial system is an adversarial system embodied in a plaintiff bar and a defense bar, each voice has a unique perspective. Therefore, both voices need to be heard on critical issues affecting DRI individual and corporate members, the civil justice system and judicial reform. DRI performs that function for the defense bar through its Center for Law and Public Policy.

### **The DRI National Poll on the Civil Justice System**

DRI conducts the only annual national poll focused exclusively on the civil justice system. The poll surveys public opinion on such issues as trust in the judicial system, class action, potential juror bias, and judicial funding. All of DRI's polls have been accepted by the Roper Center at the University of Connecticut, a poll repository used for scholarly research.

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## I. DRI Proposal to Address “No Injury” Classes

The testimony of DRI on the issue of “No Injury” Classes submitted to the House Judiciary Committee was summarized orally for the Rule 23 Subcommittee at the DRI Class Actions Seminar held July 23-24, Washington, D.C. The written statement of testimony is attached, along with a list of DRI amicus briefs submitted in class actions and a summary of the issues in those cases. At the DRI Class Action Seminar, the Rule 23 Subcommittee requested DRI to submit proposed language changes to Rule 23(b)(3) that would address DRI’s concerns on this issue. Proposed language amending Rule 23(b)(3) follows:

(3) the court finds that each class representative and each proposed class member suffered actual injury of the same type; that the existence, type and extent of each class member’s injury, as well as the amount of monetary relief due each class member, can be accurately determined for each class member on the basis of classwide proof, without depriving the defendant of the ability to prove any fact or defense that defendant would be entitled to prove as to any class member if that class member’s claims were adjudicated in an individual trial; that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to ~~these~~ findings of predominance and superiority include:

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

In order to have standing, plaintiffs must have suffered an “injury in fact.” Yet, defendants today face suits brought by plaintiffs who admit they have not been harmed on behalf of a proposed class of similarly unharmed individuals. Under current law, consumers who have suffered no harm and may in fact, be very happy with their purchases, can still participate in a class action suit and receive damage awards if the plaintiff side prevails. To participate in a class action, individuals need only show there was a potential for harm.

This practice artificially inflates the size of certified classes, sometimes to millions of participants. When statutory damage provisions are combined with the aggregate power of the class action device, defendants can face significant and potentially ruinous exposure for conduct that harmed no one. Permitting aggregated actions by unharmed individuals places enormous pressure on defendants to settle claims that would be valueless if tried on an individual basis.

The DRI National Poll on the Civil Justice System that showed that 78 percent of Americans would support a law requiring a showing of actual harm rather than potential harm in order for an individual to participate in a class action suit: Large majorities support this reform across 12 demographic categories, including men, women, Republicans (86%), Democrats (71%), Liberals (73%), and Conservatives (85%).

Large majorities of the American public find it makes little sense to pay damages to people who have suffered no harm. They support reform. It's just common sense to them ... and should be to us.

## II. DRI Proposal to Address Ascertainability

DRI proposes that Rule 23(a)(1) be changed to read as follows:

~~the class is so numerous that joinder of all members is impracticable;~~ the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden, and as so identified are sufficiently numerous that joinder of all class members is impractical;

This approach recognizes that inefficiencies and the necessity for highly individualized proof are precisely what class actions are meant to avoid, and if even identifying the class members devolves into a highly individualized or inefficient inquiry, then the objectives of the class action device cannot be achieved.

Recent decisions of the Sixth and Seventh Circuits have created a clear need for the ascertainability issue to be addressed. The case of *Mullins v. Direct Digital, LLC*<sup>1</sup> creates an acknowledged split between the Seventh Circuit, since joined by the Sixth Circuit,<sup>2</sup> and the Third and Eleventh Circuits, among others, as to the existence and proper application of the ascertainability requirement under the current version of Rule 23. How this split is ultimately resolved may one day resolve the question of the proper interpretation of the text of the current rule, but that begs the real question: What should be the ascertainability prerequisites to class certification? The very fact that there is a debate about whether and to what extent this requirement already implicitly exists demonstrates that the Subcommittee should address the issue explicitly.

The Subcommittee should adopt an express ascertainability requirement that ends the debate, and one that recognizes that the various subsections of Rule 23(a), Rule 23(b), and Rule 23(c) are not mere standalone silos, but integrated parts of a procedural mechanism designed to ensure that class treatment is reserved for those cases in which individualized inquiry is unnecessary.

The case for an ascertainability requirement is clear. Class actions that bog down in individualized inquiries and adjudications necessary to determine class membership are no less inefficient than class actions that bog down in individual inquiries and adjudications necessary to determine liability. Defendants' due process interests and the Rules Enabling Act both require that the defendant have a full and fair opportunity to litigate individual issues pertaining to both. For these reasons, even in the absence of any express provision in Rule 23, most courts already consider ascertainability is an "essential" prerequisite for a class action,<sup>3</sup> and treat it as a threshold inquiry for class certification.<sup>4</sup>

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<sup>1</sup> *Mullins v. Direct Digital*, No. 15-1776 (7<sup>th</sup> Cir. July 28, 2015).

<sup>2</sup> *Rikos v. Procter & Gamble*, No. 14-4088 (6<sup>th</sup> Cir. Aug. 20, 2015).

<sup>3</sup> *Marcus*, 687 F.3d at 592-93.

<sup>4</sup> *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4<sup>th</sup> Cir. 2014) ("We have repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'"); *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 395 (S.D.N.Y. 2008) ("Rule 23 contains the additional, implicit requirement that an ascertainable

Even the leading treatise on civil procedure addresses the question before it begins its discussion of the express requirements of Rule 23(a).<sup>5</sup>

The Fourth Circuit has expressed what could be the explicit rule in its simplest form: “However phrased, the requirement is the same. A class cannot be certified unless a court can readily identify the class members in reference to objective criteria.”<sup>26</sup> There is compelling evidence that this rule has sound footing in the overall rationale of Rule 23. Whatever their other differences, until the recent Sixth and Seventh Circuit decisions almost all courts had agreed that the ascertainability inquiry requires the court to find: (1) that it can determine whether someone is in the class using objective criteria;<sup>6</sup> and (2) that there is some reliable and administratively feasible method for determining whether putative class members are members of the class as defined.<sup>7</sup> The disagreement of the Seventh and Sixth Circuit is largely based on the absence of explicit language in the Rule itself, not on the soundness of the policy that an explicit ascertainability rule would reflect.

An explicit objective ascertainability rule would also reduce the problem of one-way intervention, also sometimes referred to as the “fail-safe” or “merits-based” class. In a fail-safe class, until the verdict, there is no way to tell whether the class has thousands of members or none at all. If the plaintiffs prove their case, then the class is populated and bound. If they do not, then the class has a population of zero; it never existed, which means the defendant’s “victory” is hollow because no absent class member is bound by the defense judgment.<sup>8</sup> Most courts already refuse to certify classes with fail-safe class definitions.<sup>9</sup> An explicit rule requiring that the class be readily and objectively identifiable at the time of certification prevents this unfair abuse of the class action device.

The concept of “ready ascertainability” focuses on administrative feasibility. The Third, Fourth, and Eleventh Circuits have held that, in showing that identifying class members is feasible, the plaintiffs must provide evidence of an actual method of objectively identifying class members in an

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class exists and has been properly defined.”).

<sup>5</sup>See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1760 at 142–47 (3d ed. 2005) (“Further, the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated; rather it must be restricted to individuals who are raising the same claims or defenses as the representative. The class definition also cannot be too amorphous.”) (Internal footnotes omitted).

<sup>6</sup> *EQT Prod. Co.*, 764 F.3d at 358 (“However phrased, the requirement is the same. A class cannot be certified unless a court can readily identify the class members in reference to objective criteria.”).

<sup>7</sup> See *Byrd v. Aaron’s, Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).

<sup>8</sup> *Randleman v. Fidelity Nat. Title Ins. Co.*, 646 F. 3d 347, 352 (6th Cir. 2011) (“The class the district court initially certified was flawed in that it only included those who are ‘entitled to relief.’ This is an improper fail-safe class that shields the putative class members from receiving an adverse judgment. Either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment.”); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (“The new class definition, if allowed, would result in a ‘fail-safe’ class, a class which would be bound only by a judgment favorable to plaintiffs but not by an adverse judgment.”); *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal 2011) (“Ascertainability is needed for properly enforcing the preclusive effect of final judgment. The class definition must be clear in its applicability so that it will be clear later on whose rights are merged into the judgment, that is, who gets the benefit of any relief and who gets the burden of any loss.”); see also Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2803–04 (2013) (arguing that allowing fail-safe classes revives one-way intervention).

<sup>9</sup> See, e.g., *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015) (noting “the inappropriateness of certifying what is known as a ‘fail-safe class’—a class defined in terms of the legal injury”). The Fifth Circuit is the lone exception to this rule: it has held that the presence of a fail-safe class definition does not preclude certification. *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012) (“our precedent rejects the fail-safe class prohibition”).

administratively feasible way, such as through existing corporate records.<sup>10</sup> The Sixth and Seventh Circuits, however, have very recently held that ascertainability merely requires that the class be identifiable at some point in the litigation, even if the identification procedure is expensive, burdensome, or requires self-identification or individualized inquiries.<sup>11</sup> Similarly, some federal district courts in California have also rejected the Third Circuit's approach.<sup>12</sup>

If the plaintiffs cannot define their class without reference to the merits, or if they do not have any feasible way of identifying class members for purposes of sending notice in advance of litigation, the class should not be certified. Class actions are not the goal, and they should not be the rule. They are the “exception” to the normal due process expectation “that litigation is conducted by and on behalf of the individual named parties only.”<sup>13</sup> and make sense when they can efficiently achieve collective adjudication. There is no reason that inefficiencies in the class identification process should militate any less against class certification than inefficiencies in the adjudication of liability.

“Administrative burden” does not mean that *any* evidentiary inquiry into identifiability would necessarily defeat certification.<sup>14</sup> But it does mean that any individual or third party inquiries necessary to establish membership in the class should be tolerated only if they inject minimal inefficiency into the class adjudication process. If the inquiry requires separate analysis for each and every class member, vast numbers of affidavits or third party subpoenas, or checking multiple records and deciding multiple legal issues for large segments of the class, the burden is too great.<sup>15</sup>

Nor is self-identification an appropriate short-cut to ascertainability. Given both the potential discovery burdens and the due process concerns associated with self-identification (through, say, affidavits) without affording the defendant a right of cross-examination, and the inefficiencies of allowing such cross-examination, courts have generally held that self-identification imposes too large

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<sup>10</sup> *Carrera v. Bayer Corp.*, 727 F.3d 300, 308–09 (3d Cir. 2013) (class not ascertainable where it would rely on purchase receipts that were likely not retained); *EQT Prod. Co.*, 764 F.3d at 357 (plaintiff “must present evidence that the putative class complies with Rule 23”); *Karhu v. Vital Pharms., Inc.*, 2015 U.S. App. LEXIS 9576, \*6-7 (11th Cir. Jun. 9, 2015) (“A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible.”); *EQT Prod. Co.*, 764 F.3d at 359 (“As the record in this case highlights, numerous heirship, intestacy, and title-defect issues plague many of the potential class members' claims to the gas estate. In our view, these complications pose a significant administrative barrier to ascertaining the ownership classes.”).

<sup>11</sup> *Mullins v. Direct Digital, LLC*, No. 15-1776 (7th Cir. Jul. 28, 2015) (slip op.) (“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”); *Rikos v. Procter & Gamble Co.*, No. 14-4088 (6th Cir. Aug. 20, 2015) slip op. at 33 (“We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts.”).

<sup>12</sup> *In re ConAgra Foods, Inc.*, 2015 U.S. Dist. LEXIS 24971, \*93 (C.D. Cal. Feb. 23, 2015) (rejecting administrative burden argument because it would “effectively prohibit class actions involving low priced consumer goods—the very type of claims that would not be filed individually—thereby upending the policy at the very core of the class action mechanism.”) (Internal quotation omitted); see also *Randolph*, 303 F.R.D. at 686 (noting “[c]ertain California district courts have vehemently rejected *Carrera*”).

<sup>13</sup> *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2550 (2011).

<sup>14</sup> *Bowerman v. Field Asset Servs., Inc.*, 2015 U.S. Dist. LEXIS 37988, \*22 (N.D. Cal. Mar. 24, 2015) (“That the class may have to be ascertained through a combination of evidentiary sources does not necessarily mean that ascertaining it is administratively infeasible.”).

<sup>15</sup> *EQT Prod. Co.*, 764 F.3d at 359 (“As the record in this case highlights, numerous heirship, intestacy, and title-defect issues plague many of the potential class members' claims to the gas estate. In our view, these complications pose a significant administrative barrier to ascertaining the ownership classes.”).

a burden to justify certifying a class.<sup>16</sup> Similarly, offloading the administrative burden to third parties through the creative use of the subpoena power should not be an acceptable substitute.<sup>17</sup>

Finally, a strong ascertainability requirement would also indirectly reduce the need to resort to *cy pres* remedies, another problem the Subcommittee is examining. The so-called need for *cy pres* relief most often arises when the parties cannot readily identify the members of the class. Were Rule 23 to explicitly require that a court find it is possible to readily and objectively identify class members, the need for this controversial form of relief would diminish, as would the problems and abuses associated with it.<sup>18</sup>

### III. DRI Proposal to Provide for Automatic Right to Appeal of Class Certification Decisions

#### Decisions on class certification motions should be subject to immediate and mandatory appellate review.

DRI proposes that Rule 23(f) be amended to provide for mandatory appellate review of certification decisions. “[W]hen a trial court commits an error of law that has an outsized impact, the availability of immediate appellate review should not depend on the subjective value judgments of a single appellate panel deciding a petition for discretionary review.” Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1662 (2011). Although we are sensitive to the workload of our federal appellate judges, we believe that the practical effect of the current discretionary appellate review regime effectively deprives parties of appellate review of what is generally considered the seminal decision in class action litigation. DRI proposes amending that Rule to provide as follows:

(f) APPEALS. A party may obtain interlocutory appellate review of an order ~~court of appeals may permit an appeal from an order~~ granting or denying class-action certification under this rule, provided that a timely notice of appeal of such order is ~~if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered~~ in accordance with Federal Rules of Appellate Procedure 3 and 4. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Authority for this change exists under 28 U.S.C. § 1292(e). DRI believes this change will have a number of beneficial effects for all parties, as well as leading to a more efficient judicial system.

### DISCUSSION

The class certification decision is generally considered the seminal event in class litigation. Jurists have long recognized the coercive effect of a district court’s decision to certify a class on a

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<sup>16</sup> *Marcus*, 687 F.3d at 594; *Karhu*, 2015 U.S. App. LEXIS 9576 at \*8-9; *Jenkins*, 2015 U.S. Dist. LEXIS 22241 at \*15.

<sup>17</sup> *Randolph*, 303 F.R.D. at 690 (rejecting suggestion that plaintiffs could subpoena third-party retailers to determine purchasers of cooking oil); *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 440 (N.D. Cal. 2014) (“In a consumer class action, like this one, where Plaintiffs intend to rely on retailer records, Plaintiffs must produce sufficient evidence to show that such records can be used to identify class members.”).

<sup>18</sup> See generally Martin H. Redish, et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 623 (2010).

defendant's decision to settle the case rather than risk a bet-the-company trial. *See*, Charles Silver, "We're Scared To Death": *Class Certification and Blackmail*, 78 New York University Law Review 1357 (1978). Indeed, the Advisory Committee for the 1998 Amendments to the Federal Rules of Civil Procedure which added Rule 23(f)'s discretionary appellate review provision noted that:

[S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

These concerns – which affect all parties to the case – can only be addressed if the parties actually obtain appellate review. As we will discuss, placing certification appeals under the permissive appellate procedure as opposed to the appeal as of right procedure has effectively foreclosed that review in too many circumstances.

A petition for a discretionary appeal of a certification decision must be filed within 14 days of the order from which review is sought, F.R.Civ.P. 23(f), with the contents of it as set by Rule 4(b) of the Federal Rules of Appellate Procedure. In contrast, an appeal as of right need only be noticed within 30 days, F.R.App.P. 4(a), which allows the party seeking appellate relief significantly more breathing space to review and prepare the appropriate challenge to the district court's certification decision.

In addition, whereas a mandatory appeal allows for full consideration of the questions presented, there are varying standards as to whether a circuit court will even grant permission. The Manual for Complex Litigation states that a "rough consensus" has emerged which limits interlocutory review of class certification decisions to situations where one or more of the following factors are evident: "(1) the certification order represents the death knell of the litigation for either the plaintiffs (who may not be able to proceed without certification) or defendant (who may be compelled to settle after certification); (2) the certification decision shows a substantial weakness, amounting to an abuse of discretion; or (3) an interlocutory appeal will resolve an unsettled legal issue that is central to the case and intrinsically import to other cases but is otherwise likely to escape review." David E. Herr, *Manual for Complex Litigation* (4<sup>th</sup>), § 21.28 at 314 (2005).

While those factors are definitely an improvement over no right to appeal, a recent study conducted by Skadden Arps on behalf of the Institute for Legal Reform looked at Rule 23(f) filings from October of 2006 through December of 2013. *See*, *Rule 23(f) Review of Certification Declining: Certification Disfavored on Appeal, Study Says, Class Action Litigation Report* (BNA May 2, 2014) with the underlying data found at [http://www.skadden.com/newsletters/OUTCOMES\\_TABLE.pdf](http://www.skadden.com/newsletters/OUTCOMES_TABLE.pdf),<sup>19</sup> (last accessed September 8, 2015). That study found that less than one quarter of petitions for interlocutory review under Rule 23(f) have been granted.

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<sup>19</sup> See Summary Tables of 23(f) on the following page.

Appendix A

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

Summary Table of 23(f) Petitions Filed and Granted in Each Circuit

Circuit	Petitions Filed	Number Decided	Number Granted	Total Grant Rate	Def Filed, Decided	Def Grants	Def Grant Rate	Pl Filed, Decided	Pl Grants	Pl Grant Rate	Cases Where Both Parties Petitioned	Dismissed/Withdrawn	Pending
1	39	37	2	5.4%	25	2	8.0%	12	0	0.0%	0	1	1
2	129	111	28	25.2%	67	17	25.4%	42	10	23.8%	2 (1 granted)	14	4
3	73	67	24	35.8%	36	14	38.9%	29	9	31.0%	2 (1 granted)	5	1
4	12	12	4	33.3%	9	2	22.2%	3	2	66.7%	0	0	0
5	34	28	13	46.4%	13	9	69.2%	14	4	28.6%	1 (0 granted)	5	1
6	48	44	11	25.0%	28	6	21.4%	16	5	31.3%	0	3	1
7	119	113	32	28.3%	63	23	36.5%	48	8	16.7%	2 (1 granted)	6	0
8	59	56	8	14.3%	37	7	18.9%	18	1	5.6%	1 (0 granted)	2	1
9	330	304	57	18.8%	157	23	14.6%	144	34	23.6%	3 (0 granted)	24	2
10	55	54	11	20.4%	31	9	29.0%	23	2	8.7%	0	1	0
11	65	53	13	24.5%	30	11	36.7%	22	2	9.1%	1 (0 granted)	11	1
DC	13	10	1	10.0%	5	1	20.0%	5	0	0.0%	0	2	1
<b>Total</b>	<b>976</b>	<b>889</b>	<b>204</b>	<b>22.9%</b>	<b>501</b>	<b>124</b>	<b>24.8%</b>	<b>376</b>	<b>77</b>	<b>20.5%</b>	<b>12 (3 granted)</b>	<b>74</b>	<b>13</b>

Note: Cases in which both parties filed petitions are reflected under Petitions Filed, Number Decided and Number Granted, but are not reflected in the data specific to plaintiffs and defendants. So as not to overstate how frequently class certification decisions were successfully challenged, they are treated as cases where a single petition was filed.

Appendix B

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

Outcomes of 23(f) Appeals Heard by the Courts

Circuit	Class certification granted below						Class certification denied below						Total
	Affirmed	Reversed	Pending	Dismissed	Unclear	Total	Affirmed	Reversed	Pending	Dismissed	Unclear	Total	
1		1		1		2							2
2	4	4	4	4	2	18	4	1	3	1	1	10	28
3	3	7	5			15	5	1	1	2		9	24
4		2				2		1	1			2	4
5	1	7		1		9	3	1				4	13
6	1	3		2		6	4	1				5	11
7	8	13	1	2		24	1	7				8	32
8	1	3	1	2		7	1					1	8
9	5	5	8	5		23	11	7	10	5	1	34	57
10	1	4	2	2		9			2			2	11
11		5	3	3		11	1	1				2	13
DC		1				1						0	1
<b>Total</b>	<b>24</b>	<b>55</b>	<b>24</b>	<b>22</b>	<b>2</b>	<b>127</b>	<b>30</b>	<b>20</b>	<b>17</b>	<b>8</b>	<b>2</b>	<b>77</b>	<b>204</b>

All cases in which class certification orders were affirmed in part are counted as “Affirmed.”

The “Unclear” cases are those for which we could not find a disposition.

Two Second Circuit cases affirmed in part and vacated in part the district courts’ grants of class certification. *Brown v. Kelly*, 609 F.3d 467 (2d Cir. 2010); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29 (2d Cir. 2009).

Three Ninth Circuit cases affirmed in part and reversed in part the district courts’ denials of class certification. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011); *Kelley v. Microsoft Corp.*, No. 2:07-cv-00475-MJP (9th Cir. Sept. 14, 2010); *Edwards v. The First Am. Corp.*, No. CV-07-03796-SJO-FFM (9th Cir. June 21, 2010).



Of those petitions, review was granted in 24.8% of defendant petitions and 20.5% of plaintiff petitions. In contrast, an earlier study found that overall 36% of Rule 23(f) petitions were granted from December 1, 1998 through October 30, 2006, with 45% of defendant petitions and 22% of plaintiff petitions being granted. Barry Sullivan and Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277 (2008). In other words, the Courts of Appeals are becoming less receptive to interlocutory class certification review.

The study further showed that, as of its closing date, the overwhelming majority of granted petitions resulted in the reversal of a decision to certify a class (55 reversed, 24 affirmed at least in part) while the majority of class certification denials were affirmed (30 affirmed, 20 reversed). The study also showed great variation among the Circuits in the grant ranged from 5.4% in the First Circuit (only 2 grants out of 37 decisions on a Rule 23(f) petition) to 46.4% in the Fifth Circuit (13 grants out of 28 decisions of a Rule 23(f) petition).

DRI believes that these numbers suggest that – at least from the defendant’s perspective – the promise that Rule 23(f) would reduce settlement pressure has not been met because the bulk of class certification decisions evade interlocutory review requiring the defendant to try a case involving a certified class to verdict in order to obtain review. We further believe that appellate review of class certification decision is important precisely because of the burdens a certification decision can place on a defendant. *See*, Richard A. Nagareda, *Class Certification In The Age Of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 104 (2009) (highlighting the considerable room for “appellate oversight of class certification determinations, with the appellate courts cast in their familiar role of de novo reviewers...”). But as the 1998 Advisory Committee noted, the burdens placed on parties by an erroneous certification decision cut both ways.

As a result, we believe that Rule 23(f) should be amended to provide for mandatory appellate review of class certification decisions as described above. This proposal will:

- (1) Ensure that what is often the most important legal determination in the case will not escape appellate review because of the pressure to settle. Rule 23 is, after all, a procedural device and a defendant’s right to seek review of the procedural decision to certify a class should not be effectively eliminated by requiring a trial to final judgment in order have an erroneous certification decision reviewed.
- (2) Ensure that the settlements that do occur are not mispriced as a result of uncertainty over the soundness of the district court’s decision. *See*, Pollis at 1673-74.
- (3) Avoid any uncertainty over the availability of Supreme Court review of certification decisions such as those raised by the denial of a discretionary appeals as discussed in *Dart Cherokee Basin Operating Company, LLC v. Owens*, 135 S.Ct. 547 (2014).

#### IV. DRI Proposal to Address “Shady Grove”

Section IV. addresses the issues created by the Supreme Court’s decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010).

#### BACKGROUND

In *Shady Grove Orthopedics Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 397 (2010), Shady Grove, a medical provider, brought a class action suit against Allstate for its refusal to pay interest on overdue benefits. Shady Grove alleged that it had treated Sonia E. Galvez for injuries she suffered in an automobile accident, and as partial payment for the care, Galvez had assigned Shady Grove her rights to insurance benefits under a policy issued in New York by Allstate. *Id.* Shady Grove tendered a claim for the assigned benefits to Allstate. *Id.* Under New York law, Allstate had 30 days to pay the claim or deny it. *Id.* According to Shady Grove, Allstate’s payment on the claim was untimely and it refused to pay the statutory interest that accrued on the overdue benefits. *Id.*

Shady Grove filed a diversity suit in the Eastern District of New York to recover the unpaid statutory interest. *Id.* The District Court dismissed the suit, however, for lack of jurisdiction, reasoning that N.Y. Civ. Prac. Law Ann. § 901(b), which precludes a suit to recover a “penalty” from proceeding as a class action, applies in diversity suits in federal court, despite Federal Rule of Civil Procedure 23. *Id.* The District Court found that the statutory interest owed by Allstate was a “penalty” under New York law and thus the class action was prohibited by § 901(b). *Id.* And, because Shady Grove’s individual claim fell short of the amount in controversy requirement, the District Court held that subject matter jurisdiction was lacking and the case should be remanded to state court. *Id.* The Second Circuit affirmed, holding that § 901(b) was substantive within the meaning of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and thus must be applied by a federal court sitting in diversity. *Id.* at 398.

The Supreme Court, in a plurality opinion,<sup>20</sup> reversed the decision of the Second Circuit, holding that § 901(b) does not preclude a federal district court sitting in diversity from entertaining a class action under Rule 23. *Id.* at 416. A majority of the Court held that if Rule 23 answers the question in dispute, it governs unless it exceeds its statutory authorization or Congress’s rulemaking power. *Id.* at 398. The Court found that Rule 23(b) answered the question in dispute – whether Shady Grove’s suit may proceed as a class action – because it stated that “[a] class action may be maintained” if certain conditions are met. *Id.* Because § 901(b) attempted to answer the same question, in stating that Shady Grove’s suit “may not be maintained as a class action” because of the relief it seeks, the Court held that § 901(b) cannot apply in diversity suits unless Rule 23 is ultra vires. *Id.* at 399.

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<sup>20</sup> Only Parts I and II-A of Justice Scalia’s opinion reflect the views of a five-person majority. Part I describes the case and the basic question presented, *see id.* at 397-98, while Part II-A concludes that Rule 23 answered the “question in dispute” – whether a class action may be maintained in the case before it. *Id.* at 398-406. Justice Ginsburg wrote the dissenting opinion, in which three justices joined. *Id.* at 437-459.

## ANALYSIS

### A. The Problem Created by the Court's Decision in *Shady Grove*.

The problem created by the Supreme Court's decision in *Shady Grove* was acknowledged by the Court itself – namely, that the holding “keep[s] the federal-court door open to class actions that cannot proceed in state court” and therefore “will produce forum shopping.” *Shady Grove*, 559 U.S. at 415. The holding of *Shady Grove* is particularly problematic because it provides no policy reason for treating class actions removed to federal court differently on a substantive basis than those that are not. As Justice Stevens noted in his concurring opinion, Justice Scalia's broad finding that Rule 23 “unambiguously authorizes *any* plaintiffs, in *any* federal civil proceeding, to maintain a class action if the Rules' prerequisites are met”<sup>21</sup> goes too far, allowing a federal procedural rule to “displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.” *Shady Grove*, 559 U.S. at 423. In that instance, Justice Stevens wrote, the federal procedural rule “cannot govern.” *Id.* Simply put, “[i]f a district court follows Justice Scalia's approach, then the decision to remove a putative class action to federal court would result in the loss of the very grounds – a state law prohibiting class certification – that would otherwise defeat class certification in state court.” Martin A. Stern & Taylor E. Brett, *Removal of Class Actions: What Danger Lurks in Shady Grove*, 82 Def. Couns. J. 161, 162 (April 2015).<sup>22</sup>

### B. The Reasoning Behind the Proposed Change to Rule 23.

Justice Scalia's own language suggests a necessary change to Rule 23 to resolve the issue posed by *Shady Grove*:

Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court “to certify a class in each and every case” where the Rule's criteria are met. But that is exactly what Rule 23 does: It says that if the prescribed preconditions are satisfied “[a] class action may be maintained”-- not “a class action may be permitted.” Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's “may” is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 automatically applies “in all civil actions and proceedings in the United States district courts.” *Shady Grove*, 559 U.S. at 399-400.

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<sup>21</sup> *Shady Grove*, 559 U.S. at 406.

<sup>22</sup> Moreover, the *Shady Grove* decision appears to be in tension with a long line of cases holding that whether to certify a class is within the discretion of the court. See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (“The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court. On the facts of this case, we cannot conclude that the District Court . . . abused that discretion . . .”); *Profl Firefighters Assn. of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012) (“The district court is accorded broad discretion to decide whether certification is appropriate, and we will reverse only for abuse of that discretion.”); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 416 (6th Cir. 2012) (“The district court has broad discretion to decide whether to certify a class . . . We review class certification for an abuse of discretion.” (Citation omitted)); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004); *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001) (noting the norm that the district court has “broad discretion” to certify class); *Hartman v. Duffy*, 19 F.3d 1459, 1471 (D.C. Cir. 1994). See also William Hubbard, *Optimal Class Size, Dukes, and the Funny Thing About Shady Grove*, 62 DePaul L. Rev. 693, 707-09 (Spring 2013).

In other words, Justice Scalia’s interpretation of Rule 23’s mandatory application hinges on the language in Rule 23(b) that vests discretion with the plaintiff rather than the Court. If the language is revised to vest discretion with the Court, then Rule 23 no longer acts as “categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action,”<sup>23</sup> and there is no direct conflict between the federal rule and state statutes that limit a plaintiff’s ability to “maintain” a class action.

Moreover, a further change to Rule 23 that would prohibit the certification of class actions where the underlying state statute on which the plaintiff bases its claims specifically disallows aggregate relief would alleviate forum shopping and related concerns that flow from the disparate treatment of such cases that are removed to federal court. Such an amendment would follow Justice Stevens’s opinion that state laws that limit a plaintiff’s ability to bring a class action are not preempted by Rule 23 if 1) the limiting provision is found within the text of a state statute that confers a substantive right and 2) applies only to cases brought under the statute.

### **PROPOSED CHANGES TO RULE 23 TO ADDRESS *SHADY GROVE***

Thus, to address the problems posed by the Court’s decision in *Shady Grove*, the following changes are suggested to Federal Rule of Civil Procedure 23:

- (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
  - (1) the class is so numerous that joinder of all members is impracticable;
  - (2) there are questions of law or fact common to the class;
  - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; ~~and~~
  - (4) the representative parties will fairly and adequately protect the interests of the class; ~~and~~
  - (5) the action is not brought under a state statute that (i) confers a substantive right; and (ii) prohibits recovery of class actions under the statute.
- (b) TYPES OF CLASS ACTIONS. A class action may be ~~maintained~~ permitted if Rule 23(a) is satisfied and if: . . . .

### **V. DRI Comment on Subcommittee’s Conceptual Sketch of RULE 23(B)(4) – Settlement Class Certification Without Predominance**

The DRI opposes the proposed addition of the new category of certifiable class actions reflected in the proposed Rule 23(b)(4). While it might make cases easier to settle on a class action basis, that is not a valid goal of the rules of procedure where the case is not otherwise deserving of class treatment. There is no good policy reason for a rule providing that claims which are too individualized to be certified as a class for litigation purposes is nevertheless certifiable as a class for settlement purposes. Moreover, the risks and unintended consequences of such a change would be significant and highly undesirable.

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<sup>23</sup> *Shady Grove*, 559 U.S. at 398.

By definition, what this proposal seeks to do is to enable the classwide settlement of cases in which individualized issues predominate, and foreclose consideration of those overriding individual differences in the settlement certification process. Such a rule, however, would present serious Constitutional concerns given the United States Supreme Court's past indications that ignoring individual differences has Constitutional implications. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)); *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541, 2561 (2011); *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423 (1915); see also *Philip Morris USA, Inc. v. Scott*, — U.S. —, 131 S. Ct. 1, 3-4 (2010) (Scalia, J., in chambers) (granting a stay of the judgment and noting that fraud claims required proof of individual reliance, which defendants were unable to contest because the trial court relied on representative proof). Due process must always underlie the procedures a court applies, even when a case travels under the “class action” banner. See Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) & the Impact of General Telephone v. Falcon*, 54 Ohio St. L.J. 607, 609 (1993). In due process terms, the class action device is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Dukes*, 131 S. Ct. at 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979)). Even as it already stands, Rule 23(b)(3) had been called the “most adventurous” departure from the normal due process rule of individual adjudication. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). Ignoring the potential conflict between further expansion of Rule 23(b)(3) and the Due Process limits on class treatment will also encourage similar adventurous experiments in state court, where the Due Process limits upon state class action procedures are already being litigated but are not yet fully developed. See, e.g., *Petition for Certiorari in Wal-Mart Stores v. Braun*, No. 14- 1124 in the Supreme Court of the United States.

As the Supreme Court recently made clear in *Dukes*, the commonality requirement of Rule 23(a) requires proof that at least one key issue which drives the adjudication of the case is susceptible of a common answer. 131 S. Ct. at 2556. But the predominance requirement takes that a step further, requiring courts to assess whether individual or common issues would predominate in assessing and adjudicating the claims of every class member and the defenses asserted to those claims. 1 JOSEPH M. McLAUGHLIN, *McLAUGHLIN ON CLASS ACTIONS: LAW & PRACTICE* § 5:23 at 1263 (10th ed. 2013). In so doing, predominance tests “whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc.*, 521 U.S. at 623.

Therefore, the aim of the predominance requirement cannot be fulfilled by reliance on the commonality inquiry alone. They two are distinct inquiries, with predominance being a critical test to determine whether the class is “sufficiently cohesive” to warrant class treatment at all. A class that is not “sufficiently cohesive” to warrant representative adjudication in the first place cannot logically be transformed by the handshake of the lawyers into one that is sufficiently cohesive to warrant representative adjudication for purposes of settlement. As the Supreme Court has observed, “it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place.” *Amchem*, 521 U.S. at 623; accord *Ortiz*, 527 U.S. at 858 (“A fairness hearing under subdivision (e) can no more swallow the preceding protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3).”).

If one assumes that the proposed change achieved its stated goal, and that the predominance of individual issues would then no longer be a concern in certifying settlement classes, then the logical result would be that virtually any claim could be pursued on a class basis. While the proposal

purports to maintain the “superiority” requirement for settlement classes, the proposed rule fails to articulate what “superiority” would mean once completely divorced from the traditional predominance inquiry. After all, from the narrow perspective of the convenience of the court and abstract efficiency, any class settlement is superior to the prospect of individual litigation by each member of the class. But if that alone is the effective meaning of superiority under this proposal—and it seems it would have to be if the predominance of individual issues is expressly removed from the equation for purposes of settlement—then superiority effectively becomes a rubber stamp for settlement classes. It is indeed difficult to imagine any putative class action that could not be certified for settlement purposes if the predominance of individual issues is truly no longer a concern. Would common law fraud class actions now be certifiable for settlement purposes despite the necessity of proving individual reliance in litigated individual cases? What about nationwide personal injury class actions? Mental anguish claims? How does the proposal guarantee otherwise?

Similarly, substantial uncertainty would attend interpretation of Rule 23(a)’s adequacy and typicality requirements if an inquiry into the predominance of common issues is removed from the settlement certification analysis. The “safeguards provided by the Rule 23(a) and (b) class qualifying criteria . . . are not impractical impediments—checks shorn of utility—in the settlement-class context,” rather these “standards set for the protection of absent class members serve to inhibit appraisals of the chancellor’s foot kind—class certifications dependent upon the court’s gestalt judgment or overarching impression of the settlement’s fairness.” *Amchem Prods.*, 521 U.S. at 621. In what sense is a proposed representative adequate and his or her claims typical if each individual’s claim admittedly turns on predominantly individual and not common facts? In what sense is representation for purposes of settlement “adequate” if the representative would not have the power to assert the claims of absent class members in litigation, and the bargaining leverage that comes with the willingness and ability to use that power? Class judgments can be collaterally attacked for lack of adequate representation. *See Hansberry*, 311 U.S. at 45 (“a selection of representatives . . . whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.”). The elimination of the predominance tests for certification of settlement classes risks the unintended effect of fostering more collateral attacks on class settlements because it would effectively and inevitably foster representation of absent class members by persons whose claims are predominately the same as theirs

The 23(b)(4) proposal would in fact create unavoidable perverse incentives on the part of counsel for both sides. Plaintiffs’ counsel would now have undeniable incentives, and indeed implicit permission in Rule 23 itself, to file otherwise uncertifiable class action complaints with the intent and purpose of using the cost and risks of defending them to force a class settlement. This problem already exists to a significant extent under the current version of Rule 23, and has been called the “blackmail effect” of class litigation. *See, e.g., AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S. Ct. 1740, 1752 (2011) (citing *Koben v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677-78 (7th Cir. 2009)); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1299-1300 (5th Cir. 1995). The 23(b)(4) proposal would make that problem much worse. The federal courts would surely see substantial increases in class action filings, since by definition it would then be entirely permissible to file suit with the aim and purpose of achieving settlement certification even for an otherwise uncertifiable class. These otherwise admittedly illegitimate class actions would then very frequently result in class settlements simply because it would very often be cheaper for defendants to settle these cases than litigate them. Indeed, once these cases are filed, both plaintiff’s counsel and defense counsel would have clear incentives to disregard individualized variations and differences in favor of a deal that, in the

absence of Rule 23(b)(4), would surely have been deemed a collusive settlement. After all, Plaintiffs' counsel in these cases would have little to bargain with in negotiating settlement of these cases, since the defendant would face no real threat of classwide liability in litigation. *See, e.g. Amchem Prods.*, 521 U.S. at 621 ("if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation [for settlement purposes] despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer...").

Indeed, if 23(b)(4) became law, it is not hard to imagine that the very fact that the class is *not* certifiable for litigation would become a popular reason for the plaintiffs' counsel to propose, and for the court to approve, a classwide settlement for mere pennies on the dollar. *Cf. City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (risk that class certification could not be maintained through trial endorsed as a factor favoring approval of class settlement), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000). In these and other ways, the adequate representation of absent class members that is critical to due process is inevitably undermined by creating an easy path to settlement certification even where individual issues admittedly predominate and claims are therefore predominately dissimilar. This approach stands the concept of due process on its head.

Placing the burden entirely on the court to ensure the protection of absent class members merely by reviewing the fairness of the settlement's terms is hardly an answer to these problems. The certification of the class and the fairness of a settlement are separate inquiries. In the absence of properly incentivized adversarial advocacy, courts cannot be expected to be fully informed of the important variations in individual claims that may affect both inquiries. The Rule 23(b)(4) proposal largely serves as a disincentive to such advocacy.

There is another problem with the proposal. If the rule were adopted as proposed, it is unclear whether a class certified on this basis would automatically be vacated if the settlement which generated it were disapproved or failed to become effective, or whether a court could deem the parties estopped to challenge certification once they have supported it under the proposed new rule 23(b)(4). *Cf. Carnegie v. Household, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004) (Posner, J.) (holding that parties who had stipulated that Rule 23(a) factors were met for purposes of settlement were judicially estopped to deny that the class met those same Rule 23(a) requirements for purposes of litigation after the settlement fell through). This problem would need to be explicitly addressed if any form of the 23(b)(4) proposal were adopted.

If the new settlement certification provision were applied to (b)(1) and (b)(2) as well as (b)(3), a possibility alluded to but not fully developed in the draft comments to the proposed rule, then all of the foregoing problems are only compounded, and still other new problems and uncertainties would be created.

The abstract efficiency of settling numerous claims at once is simply not a reason in and of itself to certify a class where the underlying issues, claims and damages are predominantly individualized and varying rather than common. In terms of ensuring that the rights of absent class members are fairly represented in proceedings brought by a self-selected class representative, the fees and classwide release that would make such settlement certifications financially attractive to both would-be class counsel and the defendant are hardly a substitute for the identity of interests that the predominance requirement assures. The 23(b)(4) proposal would inevitably be perceived as placing the interests of

class action lawyers ahead of the true interests of individual class members, exacerbating the already widespread perception that class settlements primarily benefit lawyers at the expense of clients. *See, e.g., Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (expressing “fear that class actions will prove less beneficial to class members than to their attorneys, [which] has been often voiced by concerned courts and periodically bolstered by empirical studies”). The DRI’s national poll data confirms the breadth and persistence of the public’s narrow view of class actions. *The DRI National Poll on the Civil Justice System*. It undermines the credibility of the class action device and the class action bar to have a rule that effectively says on its face that classes which are not cohesive, not susceptible of common proof on the predominating issues, and therefore admittedly uncertifiable for purposes of litigation, can nevertheless be a candidate for certification as a settlement class so long as the opposing lawyers agree to settle it on a class basis.

Nor is this the right cure for the problem that some courts see judicial estoppel consequences to the defendant from proposing a class settlement if the class settlement fails. *See, e.g., Carnegie v Household International, Inc.*, 376 F. 3d 656 (7th Cir. 2004). Incentivizing the filing of class actions in which individual issues predominate risks causes more harm than good, and would not prevent a risk of judicial estoppel as to the elements of Rule 23(a) – a problem which *Carnegie* itself demonstrates. In any event, judicial estoppel from a failed class settlement does not seem to be a concept many courts have embraced. Traditionally, judicial estoppel applies only when the party asserting the position has in fact prevailed in arguing the prior position and would gain unfair advantage by contradicting it. *See, e.g., Zedner v. U.S.*, 547 U.S. 489, 503-06 (2006); *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). The notion of “temporary advantage” from a failed settlement, the concept embraced by the *Carnegie* court as sufficient to trigger the doctrine, seems a distinct stretch of the concept, and one not widely followed. Moreover, the concept typically applies to inconsistent positions of fact, not inconsistent positions involving propositions of law. *Lowery v. Stovall*, 92 F. 3d 219, 224 (4th Cir. 1996) (citing *Tenneco Chemicals, Inc. v. William T. Burnett & Co., Inc.*, 691 F.2d 658 (4th Cir. 1982). “Predominance” is largely a conclusion of law, deriving from legal analysis of the elements of the claims and defenses at issue.

A better cure for this problem would be language in the Rule simply saying that in the event a proposed class settlement is not approved, filings in support of or against a class settlement shall not be considered by the Court in determining a subsequent contested motion for class certification in that or any other case. That would resonate with the prohibitions on the use of settlement-related offers and settlement-related statements found Federal Rule of Civil Procedure 68(b) and Federal Rule of Evidence 408(a) and the policies supporting those Rules. *See* FED. R. CIV. P. 68(b) & advisory committee notes to 1946 amendment; FED. R. EVID. 408 & advisory committee notes. Alternatively, defendants can avoid the judicial estoppel risk by simply not taking a position on the Rule 23(a) and (b) factors at all for purposes of settlement, and allowing plaintiffs’ counsel to argue those issues, and Rule 23 could easily be modified to expressly authorize this approach.

## **VI. DRI Comment on the Subcommittee’s Conceptual Sketch Relating to *Cy Pres***

The Subcommittee has proposed adopting § 3.07 the ALI Principles regarding *cy pres* as an amendment to Rule 23(e). In particular, this proposal would permit a court to approve a proposal that includes a *cy pres* remedy, even if such a remedy could not be ordered in a contested case. The proposal also provides the criteria a court should consider in determining whether a *cy pres* award is appropriate. The Subcommittee stated at a recent conference that its reasoning, at least in part, for proposing such changes is to maximize compensation to class members rather than third parties.



DRI agrees with the principle that settlement funds should be directed to class members and third parties, but submits that the proposed change is unnecessary and may actually do more harm to the stated goal than good. The change is unnecessary because courts already do consider the criteria listed in the proposed amendment to Rule 23(e), *see e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063-64 (8th Cir. 2015) (discussing application of the American Law Institute’s standards for *cy pres* awards); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (similar), and there is an entire industry of objectors ready and willing to ensure that courts consider such factors.

If a court finds that a settlement’s notice plan and claims process are appropriate, and the amount of the settlement fund is “fair, adequate, and reasonable,” then there should be no residue in a settlement fund, or no problem with it reverting to the defendant. DRI appreciates that the Subcommittee’s September 2015 comments recognize this. The Subcommittee has proposed bracketed text that would suggest that reversion is an alternative to *cy pres*.

The Subcommittee appears concerned in connection with that sketch that defendants would press for unduly exacting claims processing procedures. But there are at least three mechanisms in place to deter such conduct. First, plaintiffs’ counsel have not only an interest but a duty to ensure that the claims processing procedures are fair. Second, the judge has a duty and obligation to look at the same. Third, objectors often focus on the claims processing procedures. And finally, defendants who have decided to settle want the settlement to be approved, so they are likely to want the claims procedures to be fair so that the settlement is approved.

While the Subcommittee focuses on concerns about what defendants do, little attention is paid to plaintiffs’ conduct. As the Subcommittee’s conceptual sketch regarding notice recognized, notice methods have changed. Dutiful plaintiffs’ counsel nowadays are often monitoring notice and claims returns to maximize claims. The good counsel are looking, in real time, at which electronic notice methods are maximizing claims returns and directing notice administrators to spend more of the funds on those sources rather than on ones not delivering results. Incentivizing plaintiffs to actually get the notice plan right and be vigilant about trying to achieve a healthy claims rate is a better method to maximize payments to class members than codifying a procedure for giving the money to a third party. The Subcommittee could augment the committee notes to the notice provisions to suggest that courts look at plaintiffs’ counsel’s diligence in conducting the notice program in analyzing fees to be awarded.

Similarly, if courts assessed plaintiffs’ counsel’s fees in terms of how much of the funds were distributed to class members – rather than how much was diverted to *cy pres* – this too may provide better incentives for plaintiffs’ counsel to direct funds to class members. Such incentives could be reinforced by including language in Rule 23 that would exclude *cy pres* payments from attorneys’ fee calculations. Judges are increasingly finding that attorneys’ fees should be awarded based on the amount of benefit to the class members, *see Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *Pearson v. NBTY, Inc.*, 722 F.3d 778 (7th Cir. 2015), and because *cy pres* awards do not benefit the class members, plaintiffs’ attorneys should not

be compensated for directing fees to *cy pres* recipients. Such a change would be consistent with where the case law is trending.<sup>24</sup>

Amending Rule 23 to codify the propriety of *cy pres* also may be counterproductive because the reality is that with these changes, plaintiffs' counsel will say that *cy pres* is now blessed by the Federal Rules, so it should be a component of every settlement. This could provide plaintiffs more leverage in settlement than they would have in litigation, which does not appear to be (nor should it be) the Subcommittee's goal. Parties need the flexibility to determine if *cy pres* is appropriate for each particular case. If plaintiffs' case is weak and few claims are expected because, for example, people did not feel harmed by the defendant's conduct, there is no reason the settlement should not reflect that reality and plaintiffs compensated accordingly.

Moreover, in DRI's experience, there is no reason to presume that "individual distributions are not viable for sums of less than \$100," as the conceptual sketch originally stated. Many cases involve less than \$100 where individual distributions are viable, as the Subcommittee recognized with its example of bank fees that are less than \$100 and the bank could easily identify those account holders. But even if distributions are difficult, that reflects a problem with the named plaintiff's ability to prove ascertainability, which suggests that the case is worth less than it would be if class members were ascertainable, and justifies a lower recovery, lower payment by defendants, less or no *cy pres*, and a lower attorneys' fee award – none of which the proposed sketch addresses. Moreover, if it is impractical to distribute a settlement of a few dollars each to lots of class members, does that suggest that class treatment is really not superior to individual litigation after all? Those situations may be better left to regulatory enforcement actions. Class actions are not regulatory enforcement actions, and self-appointed, financially interested, roving private class counsel should not be able to extract the equivalent of a regulatory fine simply by leveraging the defense costs of class litigation into a *cy pres* settlement.

We also are concerned with the Subcommittee's suggestion that distributions to class members who submitted improper claims should be topped up before *cy pres* distributions are made. This is problematic for several reasons, but primarily because of the lack of specificity. The only type of claims that the Subcommittee suggests should be topped up are untimely claims. The reality is that the parties often decide to pay untimely or otherwise improper claims to avoid having to disturb the court or risk objections on such issues. Without more specificity, the Subcommittee's change suggests that the parties may be required to pay claims where the claims administrator has determined that the claimant is not entitled to relief. Parties often build fraud-prevention into their claims process, and they need the flexibility to determine whether a claim is fraudulent and should

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<sup>24</sup> Congress did the same thing in CAFA when it required that attorneys' fee awards be calculated based on the amount of coupons redeemed, *i.e.*, the actual benefit to the class, not the face value of the coupons issued. The same should be true with respect to non-coupon class action settlements. We assume the amount of money that is "fair, adequate, and reasonable" is the amount that plaintiffs' counsel and the defendant agree upon, but it is entirely possible in this day and age when everyone is inundated with class action settlement notices that people are simply choosing not to make claims because they do not believe they were injured, they like the product about which the lawsuit was brought, or simply do not want to bother making a claim even if the process is very easy. Again, if we assume that notice and the claims process are adequate, as we must if a settlement is to be approved, there is no reason to think any remainder is excessive and should be redistributed (which may result in a windfall to class members). It may be that the plaintiff simply did not have a strong case, in which case it is fair and reasonable to revert the remainder back to the defendant. A reverter, which then would not be counted in plaintiffs' counsel's fees, provides incentives to plaintiffs to only bring claims where class members have actually been harmed and will take advantage of opportunity for compensation.

not be paid. Is the Subcommittee suggesting such claims should still be paid? In addition, the Subcommittee does not address how much topping up is necessary, and in fact suggests that claimants should be paid more even if they already have been paid “in full.” DRI does not understand why the federal rules would support giving class members more than was bargained for. Many settlement agreements already include provisions for additional *pro rata* distributions if the fund is under claimed, so is the Subcommittee blessing those provisions or requiring more than that to which the parties agreed?<sup>25</sup>

The Subcommittee has reported that “[m]uch concern has been expressed in several quarters about questionable use of *cy pres* provisions, and the courts’ role in approving those arrangements under Rule 23.” But the Subcommittee’s proposals do not address the questionable role of judges and objectors in influencing the recipient or amount of the *cy pres* award. For example, the Subcommittee may be interested in a website located at [www.ohiolawyersgiveback.org](http://www.ohiolawyersgiveback.org), which appears to be run by a law firm that promotes the use of *cy pres* in class action settlements and actually encourages charities to apply to be *cy pres* recipients. In DRI’s experience, the law firm then goes out and objects to settlements in order to get that charity a piece of the settlement funds.

Although the conceptual sketch would restrict *cy pres* recipients to those whose interests “reasonably approximate” those being pursued by the class, that does nothing to prevent judges or objectors from directing the residue to their pet charities. For their part, judges have been known to “suggest” that *cy pres* funds be donated to local bar foundations or other charitable organizations to which the judge belongs or presides over, and often this is not done on the record. Given that the judge is approving or rejecting the settlement, the parties often feel coerced into making the donation the judge “suggests.”

DRI is not opposed to *cy pres*; its members routinely use it and like having the option of using it to settle cases. Our members need the flexibility to determine when it is appropriate, however, and we are concerned that having the concept engrafted into the Federal Rules as proposed would put defendants in a weaker bargaining position that they would be without it.

## VII. DRI Comment on Subcommittee’s Conceptual Sketch on Objectors

The Subcommittee has sketched out two possible amendments to Rule 23 related to class action settlement objectors. First, the Subcommittee has raised for discussion changes to Rule 23(e)(5) that would require an objector seeking to withdraw an objection to not only obtain court approval to withdraw (which is already required by the current rule), but also file a statement identifying any “agreement made in connection with the withdrawal.” Second, the Subcommittee has proposed language regarding sanctions of objectors if objections are made for improper purposes. In doing so, it has proffered two possible options: (a) language added to 23(e)(5) to make objections subject to Rule 11; or (b) language added to the effect that a court *may* impose sanctions “if the court finds that an objector has made objections that are insubstantial [and/or] not reasonably advanced for the purpose of rejecting or improving the settlement.”

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<sup>25</sup> What does the Subcommittee mean in the bracketed text of page 16 of the September comments when it says “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.” Is this suggesting that courts rewrite settlement agreements? They have no authority to do so.

As an initial note, we completely agree with the Subcommittee's expressed concern that, while some settlement objectors serve a useful purpose (the Subcommittee calls them "good" objectors), others hold up the settlement in the hopes of extracting money from the settling parties, and serve no purpose in improving the settlement (the Subcommittee calls these objectors "bad" objectors). The expressed intention of proposed Rule 23 changes related to objectors is to create a disincentive for the "bad" objectors. While it is definitely true that many objectors are often motivated more by money than by any improvement in recovery for the class, and that "professional objectors" are using Rule 23 as a source of income rather than a method of good legal reform, it does not appear that the changes proposed would necessarily serve the purpose of diminishing or eradicating their practices.

First, in our experience, it appears that Courts are already well-equipped to know who is a "good" objector and who is a "bad" objector. The Parties often spend significant time educating the judge on the history of the objectors, and can tell from briefing and oral argument what purpose they are serving, if any. Moreover, no objector is completely "good" or completely "bad." Most will be mixed – *i.e.*, they are bringing legitimate objections and seeking improvements to a settlement, but their motivation at the end of the day is monetary only. It seems overly simplistic to put objectors into "good" and "bad" categories, without also leaving room for the nuanced considerations (already in use by Courts) to determine how much weight to give objections.

Second, it does not necessarily follow that requiring notification of side agreements before an objector can withdraw will actually lead to less objectors. Rule 23(e)(5) already requires court approval to *withdraw* objections made at the district court level. This seems too late. Why not require court approval to *make* an objection? If we believe that most objections are worthless, why would we make it more difficult to withdraw, rather than more difficult to object in the first place? Moreover, it is questionable whether Rule 23(e)(5) (adopted in 2003), requiring court approval for withdrawal of an objection, actually decreased the number of "hold up" objectors (*e.g.*, professional objectors) simply seeking money, which was its intended purpose? It would seem that adding barriers to withdrawal of an objection may not serve the purpose of reducing objections in the first place – it may just lead to less withdrawals, which is not the desired benefit.

Third, the idea of sanctions, while seemingly helpful for dissuading objectors with less than pure motives, seems rife with difficulty. Sometimes an objector does not have a full record (*e.g.*, if parts of the record are under seal) and may not have a full record unless and until he files an objection. An objector may not be able to say he is complying with Rule 11 when he does not have a full record of the facts. Moreover, a court already has authority to impose sanctions under 28 USC §1927; extra authority is not needed to impose sanctions against objectors.

Finally, every settlement can always be "better" or more beneficial to class members – it is a product of compromise. An objector will typically be able to put forth some argument that appears to have a purpose of improving the settlement (*i.e.*, publication notice that reaches 85 instead of 75 percent; longer claims period; simpler claim form). It may very well be that any changes making life more difficult for objectors are a good thing, as viewed from the defense side of the bar, but we would ask that the Committee first consider whether previous amendments restricting withdrawal of objections have actually led to less objectors. Also, the Committee should consider whether there are other methods that could be used to separate out the "good" objectors from the "bad" objectors, perhaps by expressly allowing for discovery into the objectors' litigation history.

### VIII. DRI Comment on Subcommittee’s Conceptual Sketch on Issue Certification

Even in the usual course, “the vast majority of certified class actions settle, most soon after certification.” Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-1291 (2002) (“[E]mpirical studies...confirm what most class action lawyers know to be true[.]”); see also *Nagareda, supra*, at 99 (“With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs’ case by trial.”); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) (“[A]lmost all certified class actions settle.”). Indeed, a 2005 study conducted by the Federal Judicial Center found that roughly 90% of the suits under review that were filed as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). This is because class actions place defendants in the untenable position of betting the company on the outcome of a trial. Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems “improbable.” See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). Fear of negative publicity is also a motivating factor to settle even weak class claims. L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 La. L. Rev. 157, 222 (Fall 2004).

The elimination of predominance to pave an easier path to issue certification would lead to even more “blackmail settlements.” *Rhone, supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). There is no compelling policy for a change that would allow abusive class actions to progress more easily to certification – and legally unwarranted settlement. The enhanced leverage of an easier path to certification of some sort would inevitably trigger the filing of many more “strike suits” brought by opportunistic plaintiffs’ attorneys to obtain “the defendants’ cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs’ complaint” rather than the true worth of the claim. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996). The strain this places on the individuals and businesses that DRI’s members are regularly called on to defend cannot be overstated. Even without this easier path to certification, class actions can sound the death knell for new companies and those suffering under today’s current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol’y 607, 612 (Spring 2010). But the removal of the predominance requirement from the issue class certification equation gives even more power in upfront settlement discussions to plaintiffs whose claims might require individualized causation and remedy determinations. “Such leverage can essentially force corporate defendants to pay ransom...” S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs’ Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010). And the ripple effects of these exorbitant settlements will be felt throughout the economy. The costs of settlements are, at least partially, inevitably passed on to consumers in some form or another. Removal of superiority and manageability issues from the issue certification equation in addition to eliminating the predominance requirement would only exacerbate these problems.

But there will be additional victims, too, if issue classes may be certified under Rule 23(c)(4) regardless of Rule 23(b). This approach will place a robust strain on the courts and judges called on

to adjudicate these “issue” class claims. It is well-understood that class action litigation consumes more judicial resources than individual litigation. In fact, one study found that class actions consume almost five times more judicial time and resources than non-class civil actions. Thomas E. Willging, *et. al.*, *Empirical Study of Class Actions in Four 13 Federal District Courts*, 7, 11, 23 (1996). It becomes even more problematic for the bench to carry out proceedings when adjudication of a class suit involves both class *and* individual trials. The class action mechanism should not be used in situations where proper adjudication of the claim will require individualized proofs and trial; these claims are better brought as individual suits.

DRI submits that the concept of issue classes should be eliminated from Rule 23 altogether. Alternatively, the rule should be amended to at least make it explicit that all of rule 23(b)’s existing requirements apply with full force to issue classes. Reaffirming the notion that class actions are limited to situations where common classwide claims can be resolved through a single trial will go a long way in preserving the district and appellate courts’ limited judicial resources. Rule 23(b) provides the key component of the balance of when class treatment is preferable over individual actions. The issue certification concept, especially if predominance and/or superiority and manageability concepts are removed from the equation, disrupts this careful balance by allowing a class unable to fit within one of the types set forth in Rule 23(b) to proceed as an “issue” class even though final resolution of the claims will require individualized proofs and trials.

The need for issue class certification is hardly apparent. Where claims are predominantly individual but involve common issues, the doctrine of non-mutual offensive collateral estoppel already provides an avenue whereby resourceful litigants and judges can, where it is fair to the defendant to do so, avoid the need for that issue to be determined over and over as to the same defendant. *See, e.g., Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

In the final analysis, courts are in the business of resolving claims, not issues. Adjudicating issues but not claims on a classwide basis also presents serious Seventh Amendment concerns *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995). It may also present due process concerns. The United States Supreme Court has repeatedly observed that Rule 23(b)(3) is the “most adventuresome” of Rule 23’s experiments with the due process norm of an individual’s right to his own day in court. *See, e.g., Amchem Prods. Inc. v Windsor*, 521 U.S. 591, 614 (1997). Removing its predominance, superiority and manageability components for an issue class certification is more adventuresome by far. The due process risk is even greater under the Subcommittee’s sketch proposals to the extent a right of opt out is not explicitly mandated for issue classes. Having class members bound by *res judicata* to an adverse determination of an issue critical to their individual claims without a right of opt out would almost certainly offend due process when the claims at stake do not turn on predominantly common issues to begin with.

If the concept of issue certification remains in any form, then an appeal as of right should lie from any order granting such certification for the reasons outlined in Section III above. Indeed, given the increased settlement leverage and reduced overall efficiency inherent in an easier path to issue class certification, the need for an appeal of right would be even more acute if any version of the Subcommittee’s issue certification proposals were adopted.

## **CONCLUSION**

*DRI is grateful for the opportunity to submit these comments to the Subcommittee, and wishes to express its sincere appreciation for the active participation of several members of the Subcommittee in the recent “town hall meeting” at the 2015 DRI Class Actions Seminar in Washington D.C. We stand ready to respond to any follow-up questions the Subcommittee may have.*







**John Parker Sweeney, President of DRI – Voice of the Defense Bar**

**Testimony Before**

**Subcommittee on the Constitution and Civil Justice  
The U.S. House of Representatives**

**February 27, 2015**

**“The State of Class Actions Ten Years After the Enactment of  
the Class Action Fairness Act”**

**John Parker Sweeney, President of DRI – Voice of the Defense Bar**  
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**U.S. House of Representatives Subcommittee on the Constitution and Civil Justice**  
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“The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act”

Good morning, Mr. Chairman, Mr. Cohen, and members of the subcommittee. I am John Parker Sweeney, president of DRI – The Voice of the Defense Bar. I will summarize my statement and ask that my full statement be included in the record.

I want to first thank the subcommittee for allowing us to appear here today. With 22,000 members, DRI is the largest association of lawyers defending American businesses – large and small – in court. Over the past four years, we have submitted 23 amicus briefs to the Supreme Court in cases involving class actions. We also conduct the nation’s only annual national opinion poll devoted exclusively to the civil justice system.

I would also like to express our appreciation for the time and skill that went into the enactment of the Class Action Fairness Act of 2005. This legislation brought increased fairness and efficiency to the civil justice system. The importance of CAFA is highlighted by the Supreme Court’s significant decisions over the past ten years in the areas of class and collective actions.

Representative actions such as class actions and collective actions are exceptions “to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979). Exceptional litigation can create exceptional problems and calls for exceptional treatment and the enactment of CAFA helped address some of the exceptional problems inherent in aggregate litigation. As with most important legislation, the passage of time and the accrual of practical experience reveal

opportunities that would make the law more effective, as well as address the vulnerabilities that threaten its purposes.

Although there are a number of areas of concern to DRI's members, we would like to highlight today three areas we believe merit further study and reform:

- 1) No-injury class actions;
- 2) The use of the *cy pres* doctrine to increase the cost of class action settlements; and
- 3) Continued issues with removal of class actions to federal court.

Each of these areas presents unique challenges and each impacts the very concerns that led to the enactment of CAFA in the first place. We believe CAFA's reforms have worked and our discussion here is intended to highlight issues that warrant further review.

## **I. NO-INJURY CLASS ACTIONS**

Article III standing is an “irreducible constitutional minimum,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and an individual lacks standing unless he has been affected “in a personal and individual way.” *Id.* at 560 n.1. A plaintiff cannot rely on any injury others may have suffered to satisfy this requirement. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“[T]he plaintiff . . . must allege a distinct and palpable injury to himself . . .”). In other words, the plaintiff must have suffered an “injury in fact.”

Yet defendants today face abstract claims that threaten to undermine the civil justice system: suits brought by plaintiffs who admittedly have not been harmed on behalf of a proposed class of similarly unharmed individuals. In these no-injury class actions, plaintiffs ask the courts to ignore the requirement of harm, often by seeking to recover some fixed amount or range of statutory damages without any showing of an injury.

Much of our concern over “no-injury” classes involve suits brought under state law, such as deceptive trade practices or consumer protection statutes that provide for a measure of damages untethered to any actual harm sustained by a person. With respect to such “statutory damages,” one commentator has explained:

Several states provide that private litigants may recover statutory damages, which are the greater of actual damages or an amount ranging from \$25 in Massachusetts to \$2,000 in Utah. State laws allow plaintiffs to receive the statutory minimum without proving actual damages. Nebraska law allows the court, in its discretion, to increase the award ‘to an amount which bears a reasonable relation to the actual damages’ up to \$1,000 when ‘damages are not susceptible of measurement by ordinary pecuniary standards.’

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 22-23 (October, 2005).

Federal statutes also contain statutory damages provisions. For example, the Fair and Accurate Transaction Act of 2003 (“FACTA”) requires retailers to truncate credit card information on electronically printed receipts given to customers. 15 U.S.C. § 1681c(g). A part of the Fair Credit Reporting Act, (“FCRA”), 15 U.S.C. §§ 1681 et seq., FACTA incorporates the statutory damages provision of the FCRA, which can range from \$100 to \$1,000 per violation. 15 U.S.C. § 1681n. Copyright law also contains statutory damages provisions. 17 U.S.C. § 504(c), as does the Fair Debt Collections Practices Act. 15 U.S.C. § 1692k(a)(2) (providing for statutory damages but limiting amount recoverable in class actions to \$500,000 or 1% of the violator’s net worth). The Telephone Consumer Protection Act also provides for statutory damages in lieu of actual damages for violations of its provisions. 47 U.S.C. §§ 227(b)(3) and 277(c)(5).

Our experience with statutory damages class actions under both state and federal law is that while few if any of the putative class members have suffered any actual harm, the sheer

number of potential class members creates significant exposure to the defendant. Two justifications typically advanced for statutory damage awards are: (1) the actual damages sustained for a particular violation are difficult to measure or prove and statutory damages provide some measure of compensation to the plaintiff; and (2) to punish a defendant and to deter others from committing similar acts in the future. See, Ben Sheffner, *Due Process Limits on Statutory Civil Damages*, Washington Legal Foundation Legal Backgrounder, Vol. 25, No. 27 at 1 - 2 (August 6, 2010) (discussing proffered justifications for statutory damages in copyright cases). As noted below, when the plaintiff and the putative class have admittedly suffered no harm, there is nothing compensatory about such awards.

When these statutory damage provisions are combined with the aggregate power of the class action device, however, defendants can face significant and potentially ruinous exposure for conduct that admittedly harmed no one. See e.g., *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350 (N.D. Ill. 2002) (denying certification of a nationwide statutory damages class because while “certification should not be denied solely because of the possible financial impact it would have on a defendant, consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended upon such an impact”). In fact, a recent certiorari petition identified 19 lawsuits (14 of them putative class actions) involving alleged technical violations of ten different federal statutes where the plaintiff suffered no economic or other harm. Petition For A Writ of Certiorari, at 9 – 12, *First National Bank of Wahoo v. Charvat*, (No. 13-679). The Court denied that petition and while it had previously granted certiorari in a case raising a similar issue, it ultimately dismissed that writ as improvidently granted. *First American Financial Corp. v. Edwards*, 132 S.Ct. 2536, 2537 (2012).

In a typical case, the plaintiff contends the defendant committed wide-spread technical violations of some statute. She admits that she and the class she seeks to represent sustained no economic or other actual harm as a result of the violation. She then seeks to have the court award aggregate damages based on some formulaic calculation drawn from a range of penalties recoverable under the statute allegedly violated. In other cases, the claims are brought by state attorneys general under a *parens patrie* theory. The relief sought in many class actions or in *parens patrie* actions brought by state attorneys general is based not on the actual harm suffered by any individual person, but rather on some legislatively-defined statutory damage amount set for each violation. Under this scenario, even an unwitting defendant can face catastrophic liability for inadvertent and technical violations when sued in a class action or state AG action. Although some statutes, such as the Truth in Lending Act – recognize the gross unfairness of imposing a statutory damages penalty where aggregate treatment is sought – most statutes do not contain such language and a number of courts have refused to consider the unfairness of the relief sought in making their certification decision.

These cases implicate Article III standing requirements – both for the putative class representatives and for the absent class members. They also implicate broad policy concerns over the appropriateness of using the civil justice system to punish defendants for what are at most technical violations. And punishment it is. Because the class members are by definition unharmed, there is nothing compensatory about the process. Permitting aggregated actions by unharmed individuals places enormous pressure on defendants to settle claims that would be valueless if tried on an individual basis. With little or no interest on the part of absent class members in participating in these settlements, they implicate the same concerns the 109<sup>th</sup>

Congress had with coupon settlements that it attempted to address with CAFA. We believe this is an area in need of further study and reform.

Congress passed the Rules Enabling Act, 28 U.S.C. § 2072, to prevent the use of procedural rules to abridge or enlarge substantive rights. Permitting suits on behalf of unharmed absent class members who lack Article III standing (as several courts have held) contravenes this important Congressional mandate. Likewise, because some courts permit aggregation while others do not – despite the fact that the same statutory provisions and same procedural rules are at issue – the current environment is utterly and unnecessarily unpredictable for our members and our clients. In addition, permitting litigation by and on behalf of unharmed parties impairs the ability of the civil justice system to efficiently adjudicate the claims more properly before it. As an organization devoted to improving the civil justice system, we believe a hard look at addressing the problem of no injury class actions is warranted.

And we are not alone in this belief.

For the past three years, we have conducted the DRI National Opinion Poll on the Civil Justice System. We've asked class action questions on each of our polls. On the question of "harm" in our 2013 poll, 68% said they would require plaintiffs to show actual harm, rather than potential harm, to join a class action.

This year, we took it a step further. We asked if the respondent would support a law requiring a person to show that they were actually harmed by a company's products, services, or policies rather than just showing the potential for harm. Seventy-eight percent would support such a law; just 19% would oppose it. Large majorities supporting this reform occur across 11 demographic categories. Men, women, Republicans (86%), Democrats (71%), Liberals (73%),

Conservatives (85%). We believe these results further support a probing examination of the question of permitting no-injury class actions to proceed.

## II. THE INCREASING USE OF *CY PRES* PAYMENTS IN CLASS ACTIONS

As Judge Posner recently noted, “*Cy pres* (properly *cy près comme possible*, an Anglo-French term meaning "as near as possible") is the name of the doctrine that permits a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent. A familiar example is that when polio was cured, the March of Dimes, a foundation that had been established in the 1930s at the behest of President Roosevelt to fight polio, was permitted to redirect its resources to improving the health of mothers and babies.” *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7<sup>th</sup> Cir. 2014). Over the last decade, courts have increasingly used the *cy pres* doctrine to disperse settlement or judgment funds that remain unclaimed after attempted distribution to class members. That practice is coming under growing criticism. See, e.g., Jennifer Johnston, Comment, *Cy Pres Comme Possible to Anything is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. Econ. & Pol'y 277 (2013); Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014. We believe that criticism is worth considering.

In some instances, settlements made for the ostensible benefit of class members go entirely to *cy pres* recipients because it is infeasible or otherwise difficult to provide benefits directly to class members. Attorneys' fees are often calculated on the gross amount of class settlement. The availability of *cy pres* awards skews the entire process by increasing the size of settlement (and potentially class counsel's fees) while providing no direct benefit to the class members on whose behalf the suit was purportedly brought and whose rights are impacted by the



action. This ad hoc and unlegislated expansion of the class action device calls for specific reform to prohibit or strictly limit its use. Reforms here could be addressed through more rigorous application of the existing civil procedure rules, by the adoption of more explicit rules, and by the enactment of statute specifically addressing it.

### **III. CONTINUED ISSUES WITH REMOVAL OF CLASS ACTIONS**

As the Supreme Court recently noted, “Congress enacted CAFA in order to “amend the procedures that apply to consideration of interstate class actions” in part because “certain requirements of federal diversity jurisdiction had functioned to keep cases of national importance in state courts rather than federal courts.” *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S., 134 S.Ct. 736, 739 (2014) (internal citations and quotations omitted). Even with CAFA, we have seen continued concerns with issues related to the amount in controversy requirements and inconsistent treatment of them by districts and appellate courts both with respect to class actions and to traditional diversity claims. Congress attempted to address this issue somewhat with the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Public Law 112-63, which added 28 U.S.C. § 1446(c)(2)(B), which provides that removal is proper if the district court finds, “by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a) [\$5,000,000].” But what evidence is required to allow the district court to make that finding, and when that evidence must be submitted, is the subject of on-going dispute.

The Supreme Court recently addressed a portion of these concerns in its recent decision in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (Dec. 15, 2014). There, it rejected a presumption against removal in CAFA cases and held that a defendant is not required to provide evidence as to the amount in controversy at the time of removal. In that case, the

evidence was essentially undisputed that the amount in controversy exceeded \$5,000,000.

Although the defendant asserted such in its notice of removal, the district court held it could not consider post-removal evidentiary submissions supporting that assertion and remanded the case.

A divided Tenth Circuit refused to consider the defendant's appeal. The Court granted the defendant's certiorari petition to consider a split between the Tenth Circuit and between five and seven other courts of appeal on the question and the majority agreed the defendant was not required to attach evidence at the time of removal.

Nonetheless, we still comprehend two concerns about the current treatment of the amount in controversy requirement in class action cases. First, we question whether imposing a \$5,000,000 amount in controversy requirement over class actions makes sense when, to use the language of the Senate Judiciary Committee's report on CAFA, "a citizen can bring a 'federal case' by claiming \$75,001 in damages for a simple slip-and-fall case against a party from another state." Senate Report No. 14, 109 Cong., 1<sup>st</sup> Sess., at 11 (2005). We believe that the Committee should consider whether putative interstate class actions involving minimally diverse parties should be subject to the same jurisdictional minimum as traditional diversity claims. This threshold would eliminate a considerable amount of procedural wrangling at the removal stage and place class action defendants on equal footing with other out-of-state defendants sued in state court.

The second issue we believe warrants study goes directly to the courts' treatment of the amount in controversy requirement and the inappropriate burdens some have placed on class action defendants seeking to remove cases to federal court. In particular, we believe a hard look at what "evidence" is required in order for a removing defendant to establish the requisite amount in controversy under 28 U.S.C. § 1446(c)(2)(B). We believe the approach taken by the

United States Court of Appeals for the Seventh Circuit in *Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Company*, 637 F.3d 827 (7<sup>th</sup> Cir. 2011) properly balances the amount in controversy issues and invite the Committee to consider whether the essence of its holding should be incorporated into unambiguous statutory language applicable to all diversity removals.

In *Back Doctors, Ltd.*, the court attempted to lay down a fairly simple test for determining whether a class action defendant had met the amount in controversy requirement. It began by noting that the Supreme Court had long-ago held that when a plaintiff initiates an action in federal court (and thus is the proponent of federal jurisdiction), its allegations regarding the amount in controversy must be accepted unless it is impossible for it to recover the jurisdictional minimum. 637 F.3d at 829 (citing *St. Paul Mercury Indemnity Company v. Red Cab Co.*, 303 U.S. 283 (1938)). The Seventh Circuit held, consistent with 28 U.S.C. § 1446(c)(2)(B), that the same rule applied where a removing defendant (as the proponent of federal jurisdiction), made allegations regarding the amount in controversy in the notice of removal. 637 F.3d at 830. The defendant alleged that the compensatory damages exceeded \$2,900,000 and that a potential punitive award in light of nature of the claims was sufficient to push the amount in controversy above \$5,000,000. The plaintiff countered by pointing out that it had not sought punitive damages on behalf of itself or the putative class and without the possibility of a “speculative” punitive award, the amount in controversy could not be met.

The court recognized that while jurisdictional *facts* must be alleged and, if challenged, proven by a preponderance of the evidence, that does not require the defendant to show it was more likely than not the plaintiff class would recover in excess of the jurisdictional amount. *Id.* at 829. It then identified what it considered to be jurisdictional *facts*:

The legal standard was established by the Supreme Court in *St. Paul Mercury*: unless recovery of an amount exceeding the jurisdictional minimum is legally impossible, the case belongs in federal court. Only jurisdictional facts, such as which state issued a party's certificate of incorporation, or where a corporation's headquarters are located, need be established by a preponderance of the evidence.

*Back Doctors Ltd.*, 637 F.3d at 830. Because the defendant in that case could show that the compensatory damages sought exceeded \$2,900,000 and because the plaintiff could not show that punitive damages were legally impossible to recover under state law, the court reversed the district court's remand order and directed it to consider the case on the merits. *Id.* at 831. We believe this approach would best balance the federalism concerns inherent in diversity removals while allowing the courts to devote their resources to issues other than fights over jurisdiction.

Now, if I may, Mr. Chairman, let me spend a few minutes on the DRI National Public Opinion Poll on the Civil Justice System. Often time in discussing these issues we forget about the American people, to whom the civil justice system really belongs. And that's why we created the DRI Poll.

As an advocacy group, we know that the integrity of our data has to be impeccable. That's why we selected Gary Langer of Langer Research Associates (NY) as our pollster. Langer is the former head of polling for ABC News and a former board member of the American Association of Public Opinion Researchers which sets the standards for the industry. All of our polls have been accepted by the Roper Center at the University of Connecticut, a premier repository that makes methodologically sound polls available to researchers. Summary results of all of our polls are available on our web site at [www.dri.org](http://www.dri.org).

We've asked class action questions on each of our polls. Let me highlight some of the data that we've obtained. We found that 38 percent of all adult Americans say they've been invited to join a class action suit. Six in 10 of them declined. That means a total of 15 percent of

all adults report having participated in a class action suit, the equivalent of nearly 37 million adults. And while 68 percent feel their participation was worthwhile, nearly three-quarters of those who won an award say it was “insignificant.”

Basic attitudes on class actions are mixed. Fifty percent of Americans think most of these lawsuits as justified; 38 percent see them as unjustified, with the rest unsure. Ideology is a key factor: Liberals are 27 percentage points more apt than strong conservatives to see class-action suits as justified, 61 vs. 34 percent, as are Democrats over Republicans, 57 vs. 44 percent.

Yet there’s substantial bipartisan and cross-ideological consensus on two questions – the preference that a class-action plaintiff should show actual harm and opposition to opt-out enrollment. Regardless of partisan and ideological preferences, two-thirds or more agree on these.

I mentioned earlier that 78% of Americans would support a law requiring a showing of actual harm in order for an individual to participate in a class action law suit. On another class action issue, 85% of Americans say class action lawyers should be required to obtain permission from individuals before enrolling them as plaintiffs.

Mr. Chairman, large majorities of the American public find it makes no sense to pay damages to people who have suffered no harm. They find it makes no sense to represent people in a lawsuit without asking their permission.

The public supports reform. It’s just common sense to them...and should be to us.

Feb. 27, 2015

Briefing Paper: Public Attitudes on Class-Action Litigation

Prepared for testimony of DRI-The Voice of the Defense Bar before the U.S. House  
Subcommittee on the Constitution and Civil Justice

Independent public opinion polling sponsored by DRI-The Voice of the Defense Bar since 2012 has found broad public support for significant reforms in the handling of class-action lawsuits, including opposition to opt-out enrollment and support for changes in who can join such suits.

These surveys also have demonstrated the vast reach of this type of litigation – 38 percent of all adult Americans say they’ve been invited to join a class action suit – as well as mixed feelings about their utility. While 54 percent think class actions often enable people to hold companies responsible, 62 percent say they often force companies that have done no wrong to pay damages.

Further, just half think most class action lawsuits that are filed are justified.

The random-sample telephone surveys have been conducted for DRI by the nonpartisan survey research firm Langer Research Associates, with rigorous methodology; neutral, balanced questions; and independent data analysis. The company, which polls for ABC News, Bloomberg and others, is a charter member of the Transparency Initiative of the American Association for Public Opinion Research and subscribes to its Code of Professional Ethics and Practices.

This memo summarizes some key findings from the research to date. Full results are available at DRI’s website, <http://www.dri.org>, including analyses, full questionnaires, topline results and methodological details. Raw datasets from these surveys have been deposited with the nonprofit Roper Center for Public Opinion Research at the University of Connecticut for unfettered secondary analysis.

Among the findings:

- Just 26 percent of Americans say that showing the potential for harm should be adequate to join a class-action lawsuit. Sixty-eight percent instead say plaintiffs should be permitted to join a class only if they can show they’ve actually been harmed.

*The question: Do you think people should be allowed to join class-action lawsuits as plaintiffs only if they can show that they’ve been harmed by a company’s products or actions, or is it enough for them to show the potential for harm, regardless of whether they’ve actually been harmed?*

- A vast 85 percent say class-action lawyers should be required to obtain permission from individuals before enrolling them as plaintiffs. Just 10 percent support the current practice allowing lawyers to include individuals whom they believe are eligible without getting their permission first, then providing them the opportunity to opt-out later.

*The question: Lawyers who file class-action suits often include people who they think are eligible to be plaintiffs without first getting their permission. People who don't want to participate can drop out later. Do you think lawyers should or should not be required to get permission from people before including them as plaintiffs in class-action lawsuits?*

It's probable that few Americans are closely following these issues; as such their expressed attitudes most likely reflect underlying world views, for example favoring personal precepts of fairness, individualism and self-determination. While additional information and argumentation could influence public views, the DRI survey's baseline measurements provide valuable insight into public preferences on these relatively little-studied issues.

Most broadly, basic attitudes on class actions are mixed. Fifty percent of Americans see most of these lawsuits as justified; 38 percent see them as unjustified, with the rest unsure. Ideology is a key factor: Liberals are 27 percentage points more apt than strong conservatives to see class-action suits as justified, 61 vs. 34 percent, as are Democrats over Republicans, 57 vs. 44 percent.

Yet there's substantial bipartisan and cross-ideological consensus on the preference that a class-action plaintiff should show actual harm and on opposition to opt-out enrollment. Across partisan and ideological groups, two-thirds or more agree on the former, eight in 10 or more on the latter.

As noted, 38 percent say they've been invited to join a class action; six in 10 of them declined. That leaves a total of 15 percent of all adults who report having participated in a class action suit, the equivalent of nearly 37 million adults. As many say they joined "to send a message" as to win an award. And indeed while 68 percent feel their participation was worthwhile, nearly three-quarters of those who won an award say it was "insignificant."

Selected results follow. Full results are available at <http://www.dri.org>.

Respectfully submitted,

Gary Langer, president  
Langer Research Associates  
New York, N.Y.

**2012:**

12. Have you yourself ever been invited to participate in a class action lawsuit, or not?

	Yes	No	No opinion
8/19/12	38	62	*

13. (IF INVITED TO PARTICIPATE) Have you ever participated in a class action lawsuit, or not?

	Yes	No	No opinion
8/19/12	39	61	1

12/13 NET:

	----- Invited -----	Never been invited	No opinion		
8/19/12	NET 38	Participated 15	Never participated 23	62	*

15. (IF EVER PARTICIPATED) Did you participate mainly to (win damages), to (send a message to the company involved) or some other reason?

	Win damages	Send a message	Other reason	No opinion
8/19/12	43	45	10	1

16. (IF EVER PARTICIPATED) Did you receive an award, or not?

	Yes	No	No opinion
8/19/12	70	28	2

17. (IF EVER PARTICIPATED AND RECEIVED AN AWARD) Would you describe that award as substantial, modest or insignificant?

	Substantial	Modest	Insignificant	No opinion
8/19/12	8	19	73	*

18. (IF EVER PARTICIPATED) Do you think your participating in this suit was worthwhile, or not worth the trouble?

	Worthwhile	Not worth trouble	No opinion
8/19/12	68	27	5

**2013:**

8. In class-action lawsuits, a group of people known as plaintiffs sue a company for what they see as a faulty product, bad service or an unfair policy. Do you think most class-action lawsuits filed in this country are justified or unjustified?

	Justified	Unjustified	No opinion
10/6/13	50	38	13

9. Do you think people should be allowed to join class-action lawsuits as plaintiffs only if they can show that they've been harmed by a company's products or actions, or is it enough for them to show the potential for harm, regardless of whether they've actually been harmed?

	Show harm	Show potential for harm	No opinion
10/6/13	68	26	6

Compare to (2014): 4. Would you support or oppose a law saying that in order to join a class action lawsuit a person has to show that he or she has been actually harmed by a company's products, services or policies, rather than just showing the potential for harm?

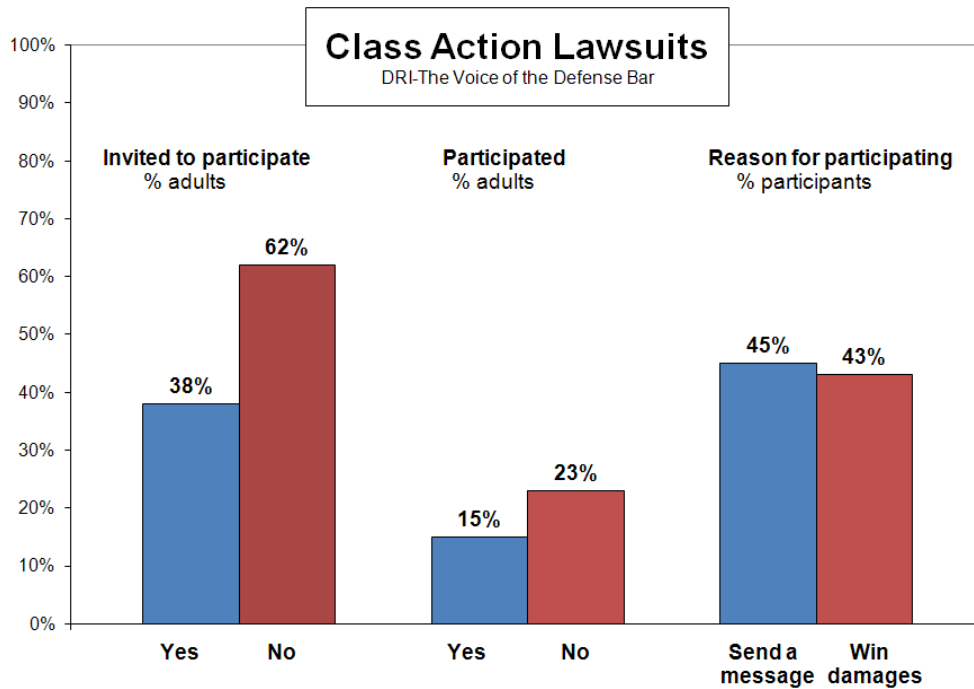


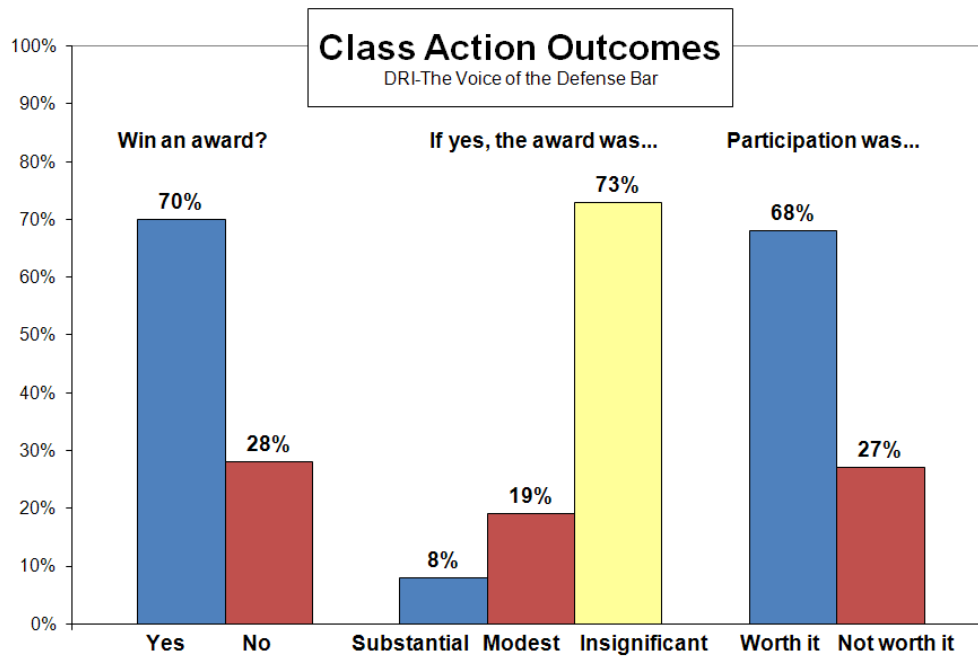
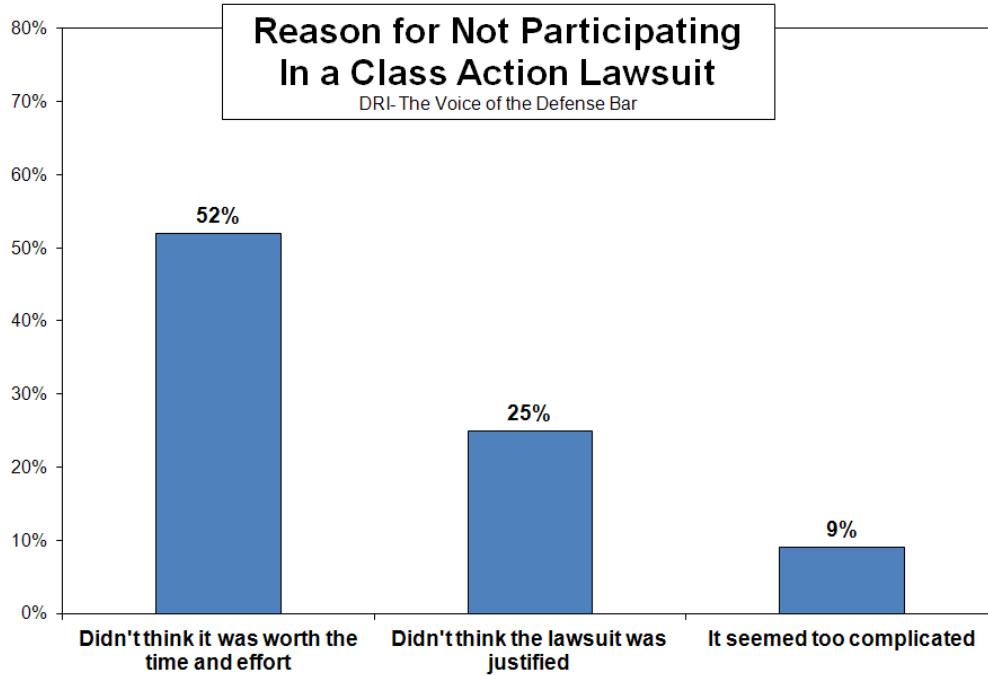
	Support	Oppose	No opinion
9/21/14	78	19	4

10. Lawyers who file class-action suits often include people who they think are eligible to be plaintiffs without first getting their permission. People who don't want to participate can drop out later. Do you think lawyers should or should not be required to get permission from people before including them as plaintiffs in class-action lawsuits?

	Should be required	Should not be required	No opinion
10/6/13	85	10	5

**Selected Charts**





Tab 2

Written Testimony of

Alan B. Morrison  
George Washington University Law School

October 10, 2016

COMMENTS OF ALAN B. MORRISON  
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL  
PROPOSED CHANGES TO CIVIL RULE 23

Committee Members:

I am submitting these comments on the proposals to amend FRCP Rule 23. I support most of the proposed changes, but have some concerns about others. I also have several additions to the comments.

I currently teach civil procedure and constitutional law at George Washington University Law School. For most of my career, I was the director of the Public Citizen Litigation Group, where I was involved in scores of class actions in the federal courts, mainly as counsel on behalf of objecting class members or as amicus supporting objections by others. When I first began representing objectors, federal judges were decidedly uninterested in hearing from objectors at all, and there were many procedural and practical barriers to their making meaningful objections. I am happy to say that these proposals continue the trend that has improved the situation considerably over the years.<sup>1</sup>

*Additional Information Upfront*

**Rule 23(e)(1)(A)** would require the parties to submit sufficient information to enable the judge to determine whether notice of a proposed settlement should be sent to the class. This change would be a positive development that would aid both district judges and class members.

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<sup>1</sup> Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 *George Washington Law Review* 428 (2011).

One of the major impediments to class members making intelligent evaluations of a settlement, which in this context includes certification of the class for settlement, is that in far too many cases, the evidence that the settling parties intend to offer to support the settlement is not filed or otherwise made available until after class members must object or opt out. For example, in the NFL Concussion class action, class counsel and the defendants submitted over 1000 pages of affidavits and documents to support the settlement a month after objections were due and only seven days before the scheduled fairness hearing. They also submitted several hundred pages of legal memoranda at that time. Although the general outlines of the legal arguments in support of the settlement are usually made in a memorandum of law when the parties ask the court to issue notice, those arguments are inevitably general and hence difficult to evaluate, absent the factual support for them, which typically comes much later. As the comments to this proposed change make clear, all of the material to be submitted in support of the settlement and class certification should “ordinarily” be submitted prior to approval of the notice (p. 221). This is a very important and positive change. I suggest that the comments make clear that the submission should be in time to give the court and other interested persons a reasonable opportunity to review those materials and the settlement proposal to ensure that the decision to send the notice is an informed one.

There is one question on these submissions and that relates to attorneys’ fees. It is common practice today for class counsel to include in the notice to the class the maximum amount of the fees that they will seek, and the position of the defendant on that request. In a number of cases (and I have no data on the proportion or significance of the cases), class counsel asks the judge to postpone consideration of the fee request until the judge approves the class certification and the settlement, which is what happened in the NFL case. Some objectors there

argued that the judge was required by Rule 23(e) to decide the fee request when she approved the settlement. I do not believe that is required by current law or that it would be desirable to impose an inflexible rule to that effect.

There is a half-way position that I do support: class counsel should be required, no later than a reasonable time, *e.g.*, 21 days, before any objections and opt outs are due, to file a fee application that explains the basis on which fees will be sought. Fee applications are often quite lengthy, and there is no reason why a judge or counsel for absent class members would need to see the application before deciding on notice. But when the issue is the reasonableness of the settlement, the amount of fees sought, and what work class counsel performed to obtain that result, may sometimes suggest an imbalance that casts doubt on the fairness of the settlement in ways that the terms alone do not. Comparing the proposed relief to the requested fees (including the effort that went into obtaining it) can be particularly revealing when all or a substantial part of the proposed relief is an injunction, whose value is often difficult to determine. For these reasons, I urge the committee to add a requirement that fee applications must be submitted a reasonable time before objections and opt outs are due. At a minimum the fee application should state the maximum fee to be sought, over what time the fees will be paid, out of what fund, and from whom the fee is to be paid. The comments should also clarify whether the discussion of attorneys' fees in proposed **Rule 23(e)(2)(C)(iii)** requires the judge to decide the fee request when the settlement is approved or whether that decision can be postponed. The proposed change also supports the current desirable practice under which the *payment* of fees can, at least in part, be postponed until the actual results of delivering benefits to the class is known. The timing of payment, however, is a separate matter from when the approval should take place.

I have one other suggestion for the comments to this provision. It is a truism that a district judge asked to approve notice of a settlement often has no one to point out its weaknesses. Experienced judges can catch some problems, but especially in cases in which the judge has not been heavily involved before a settlement is reached, the judge may not be aware of the impact of the settlement on absent class members. In short, just as they do at the fairness hearing, judges need someone besides the parties to point out problems in the settlement, the notice, and/or the proposed schedule for the Rule 23(e) hearing. My views on the benefits of bringing in outsiders at an early stage were shaped by the efforts on Judge Sam Pointer who did that in the silicone gel breast implant settlement. He held a series of informal meetings with interested persons and made drafts of the official notice and of a more understandable set of questions and answers for class members available for debate and suggestions. As I recall, there were a number of matters that were clarified and lesser problems eliminated *before* the notice was sent, which is by far the best time to deal with those issues. To be sure, the settlement collapsed because of the large number of opt outs and the many claimants who filed for damages, but by the time of the Rule 23(e) hearing, the court was able to focus on the objections that went to the heart of the settlement and not on peripheral issues.<sup>2</sup>

In the past, when I have suggested that judges should seek outside assistance at the pre-notice stage, one response has been that there is no way, short of giving notice to the entire class, to obtain such assistance. That is not a valid objection for several reasons. First, many class settlements arise out of MDL proceedings in which there are many other lawyers besides lead or

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<sup>2</sup> Other examples of cases in which preliminary proceedings involving persons besides counsel for the settling parties are described in Brian Wolfman and Alan B. Morrison, *Representing the Unrepresented in Class Actions*, 71 NYU Law Rev. 439, 480-485 (1996). Those pages also contain additional suggestions for how outside parties can be used effectively at the pre-notice stage.

class counsel who are able to advise the court of potential problems with the notice and/or the settlement. The court simply has to send out an electronic announcement seeking comments, with or without holding an informal hearing, and the advice will come pouring in. Second, many if not most class settlements today establish a website where a notice could be placed. It may be that no one will be interested, but the ease of providing such notice on the website and the benefits of broader early participation are worth the modest effort. Indeed, in corporate reorganizations under Chapter 11 of the Bankruptcy Code, including those such as the many asbestos cases and that of Dow Corning where tort claimants were a major reason for the proceeding, there is a comparable and inclusive process by which the plan and the notice to claimants are fully vetted in advance before notice is sent to all the claimants. Third, 28 U.S.C. § 1715(b) requires defendants in class actions in federal court to provide the notice of the settlement (and supporting documents specified therein) to the appropriate Federal and State officials no later than ten days after a proposed settlement is filed. Congress has, in effect, made them interested persons to proposed class settlements, which would include participation at this phase of the proceedings.

#### *Other Concerns & Suggestions*

Notice under Rule 23(c) currently applies to classes that have been certified for all purposes. The proposal would extend the best notice practicable requirement in **Rule 23(c)(2)(B)**, which now applies only to (b)(3) certified classes, to class settlements under (b)(3). But settlements also occur in (b)(1) and (b)(2) classes. Because these class members will also be bound by the settlement (and may not even have an opt-out right), they should receive comparable notice. For example, suppose a company seeks to settle an employment discrimination case relating to its seniority practices by agreeing to make significant prospective



changes that are supposed to benefit the entire class in an equitable manner. Class members should also receive the best practicable notice of that settlement because it will affect their rights at least as much as (and perhaps much more than) (b)(3) class members who have only modest claims for monetary damages. That members of (b)(2) classes have no right to opt out is an additional reason for ensuring that they have proper notice so that they can be heard on the proposal, not a reason for avoiding any meaningful notice. My view is that due process requires some notice in non-opt-out cases, but the committee need only agree that such notice is desirable, not that it is constitutionally mandated. In this connection, I note that **Rule 23(e)(1)** currently requires notice in a reasonable manner for all settlements under Rule 23(e), and there is no reason to cut back on this requirement in the amendment to **Rule 23(c)(2)(B)**. This change can be accomplished by simply deleting “under Rule 23(b)(3)” in line 12 on page 211.

I have two suggestions regarding the proposed changes to **Rule 23(e)(1)(B)**. The committee wisely rejects the practice of treating the notice as a preliminary approval. However, the language in this proposed amendment – “if giving notice is *justified* by the parties showing that the court will *likely* be able to *approve*” the class certification and the settlement – seems to keep, if not strengthen, the notion that the court will be giving preliminary approval to class certification and the substance of the settlement. The emphasized words, in particular, are very troubling.

I propose instead that Rule 23(e)(1)(B) be amended to read as follows: “*Before holding a hearing under Rule 23(e) on whether to approve a proposed class certification and settlement, the court must (i) find that there is a sufficient possibility that the proposal will warrant approval, and, if so, (ii) direct notice in a reasonable manner to all class members who would be*

bound by the proposal.” (new language in italics). If adopted, subparagraphs (B)(i) and (B)(ii) would be deleted.

If this change to Rule 23(e)(1)(B) is adopted, I suggest that the comments to that Rule be amended to include the following explanation:

“New Rule 23(e)(1)(B) clarifies the duties of the court in deciding to direct notice to absent class members. First, the court must ensure that the settling parties have provided the factual material to the court that will be used to support the motion for class certification and approval of the settlement. Second, the court must ensure that all such materials, along with the settlement documents, are reasonably available to absent class members so that they can raise concerns to the court before notice is sent to the class. Third, the court must review the settlement and the supporting materials, taking into account any comments from absent class members and others, for any obvious problems that would preclude either class certification or approval of the settlement, with particular focus on subparagraphs (A) [adequate representation] and (D) [equitable treatment among class members].

“Fourth, the court should consider objections to specific provisions of the settlement of the kind that are more easily remedied before notice is given. For example, the court could ask the parties to simplify the claim form or eliminate the need for one entirely by crediting the class member’s recovery directly to that person’s account. Last, the court must review any proposed schedule to ensure that class members are provided a reasonable opportunity to submit objections or opt out after any additional submissions are made by the settling parties, including class counsel’s fee application (even if the court does not propose to hear the merits of the fee application at the time of the settlement hearing). The phrase “*there is a sufficient possibility that the proposal will warrant approval,*” is intended to reflect the concept that the court has

concluded that there are no obvious flaws in the settlement and that there is a reasonable possibility, based on the information currently available, that the class could be certified for settlement purposes and that the settlement could be approved. It is not the equivalent of preliminary approval.”

Second, as the above suggestion indicates, subparagraphs (B)(i) and (ii) are not necessary. If they are nonetheless retained, I urge the committee to reverse their order for two reasons. Logically, class certification always proceeds settlement; if the class cannot be certified, even for settlement purposes, the quality of the settlement is irrelevant. Second, putting settlement before certification could re-enforce a tendency that I have observed in some judges to conclude that a settlement is fair in the aggregate (class counsel obtained a large dollar recovery) and then give short shrift to the issues of fairness among class members – whether they concern unequal distribution of class benefits (see proposed Rule 23(e)(2)(D)) or broader structural conflicts within the class -- which is the essence of the certification requirements in Rules 23(a)(2), (3), & (4). This is not simply a matter of style, but of being sure that the cart is not put before the horse and that class members receive the protections to which they are entitled under Rule 23(a).

**Rule 23(e)(2)**, line 45 page 213, adds the phrase “under Rule 23(c)(3)” which seems unnecessary and is possibly confusing. That Rule makes judgments binding for all Rule 23 classes, albeit with somewhat different requirements. If this phrase is being added for emphasis, it may actually confuse many readers who may think it refers only to classes under Rule 23(b)(3), which is not correct. The phrase should be deleted.

**Rule 23(e)(2)(A)** requires the court to consider whether the class representatives and class counsel “have” adequately represented the class. That is fine as far as it goes, but the work

of both the class representatives and their counsel is not over if the court approves the settlement because implementation is vital to ensuring that class members actually receive their benefits. I would add, after “have,” the phrase, “and will continue to,” and change “represented” to “represent” as a matter of grammar.

In the comment to **paragraphs (C) & (D), Rule 23(e)(2)**, second full paragraph on page 227, the reporting back of claims experience is supported there on the basis that it may be useful in assessing the reasonableness of the attorneys’ fee award. I would also add to the comments the observation that claims experience in one case may be useful to judges in future similar cases in deciding whether to approve a settlement. That experience may also be useful in broader assessments of Rule 23, not tied to a particular class action, which would support a general rule requiring reporting of actual claims results in all class actions.

I do not have any objection to the addition to **Rule 23(e)(5)(A)** which requires objectors to state the basis of their objection as well providing other information. The committee has made it clear that the process of objecting should not be burdensome, but in the NFL Concussion case, the parties required that all objections be personally signed by the class members and not just their lawyers, who in that case had filed complaints on their behalf that were part of the MDL proceeding that led to the class settlement. Aside from the fact that the signature requirement is inconsistent with 28 U.S.C. § 1654 allowing parties to appear through their attorneys,<sup>3</sup> the requirement was burdensome when a lawyer had more than one or two clients who lived around the country. As a result, some objections were filed on behalf of fewer than all of the lawyer’s

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<sup>3</sup> “In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”

clients, which cut down the objection rate. That enabled class counsel to say that “only” this lesser number had objected and to argue that the class viewed the settlement favorably. I urge the committee to include a comment disapproving the practice of requiring class members who are represented by counsel to sign an objection.

In the second paragraph of the comments to **Rule 23(e)(5)(B)** (page 229), the committee correctly observes that class counsel may believe that avoiding delay is worth the price of paying off objectors. In my experience, that incentive is not limited to the plaintiffs’ side; defendants want peace, they do not want to spend more money defending a settlement on appeal, and they do not want the risk of having a settlement overturned. In at least one case, I believe that the payment on appeal was made by the defendant, although objectors were denied discovery to determine who made a payment and how much was paid. In addition, defendants may, at least subconsciously, agree to a larger fee for class counsel, in the anticipation of counsel having to buy off objectors to eliminate an appeal. I suggest adding something along these lines at the end of that paragraph: “In some cases, defendants have similar incentives to pay off objectors.”

I strongly support the proposed addition of **Rule 23(e)(5)(B)** which would prohibit the payment to objectors and /or their counsel absent court approval. Requiring court approval will eliminate the practice of buying off objectors who have the leverage of an appeal, but who have done nothing to justify a payment. A similar situation may arise when a case is filed as a class action, and a settlement is reached with the defendant before a motion for class certification has been filed. Under the current version of Rule 23(e), court approval is not required to dismiss the case, which makes it possible for putative class counsel to use the leverage of the class allegations to obtain an unjustified payment for counsel and, to a lesser extent, the named plaintiffs. I support extending the approach in Rule 23(e)(5)(B) to pre-certification settlements

with payments to named plaintiffs and/or their counsel, although I recognize that it may be somewhat late in the process to make such an addition, which might not fit easily into Rule 23(e)(5)(B).

Tab 3

Written Testimony of

Stuart Rossman, on behalf of  
National Consumer Law Center and  
National Association of Consumer Advocates

**COMMENTS TO THE ADVISORY COMMITTEE ON CIVIL RULES**

**RE: PROPOSED AMENDMENTS TO FEDERAL RULES OF  
CIVIL PROCEDURE RULE 23**

**On Behalf of**

**NATIONAL CONSUMER LAW CENTER, INC. AND NATIONAL ASSOCIATION OF  
CONSUMER ADVOCATES**

**November 3, 2016**

The National Consumer Law Center (“NCLC”) and the National Association of Consumer Advocates (“NACA”) are pleased to submit comments to certain of the proposed amendments to Federal Rules of Civil Procedure Rule 23.

The members of NACA are private and public sector attorneys, legal services attorneys and law professors whose primary practice or areas of specialty involve the protection and representation of consumers. NACA’s mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices.

NCLC is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed and elderly consumers. NCLC is a nationally recognized expert on consumer credit issues and it has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over 47 years. A major focus of NCLC’s work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC publishes a twenty-volume



Consumer Credit and Sales Legal Practice Series, including, *inter alia*, *Consumer Class Actions* (9th ed. 2016).

In the mid-1990's, responding to criticism of consumer class actions, NACA decided to seek and publish a consensus on ethical and effective class action practices. Starting with an initial draft, and incorporating suggestions and comments from many sources, NACA adopted its "Standards and Guidelines for Litigating and Settling Consumer Class Actions" in 1997. *See* 176 F.R.D. 375 (1997)("Guidelines").

The Guidelines have proven helpful to lawyers and courts alike. Through the years, a significant number of courts have referred with approval to the Guidelines, including *Boyle v. Giral*, 820 A.2d 561, 569 fn. 8 (D.C.C.A. 2003); *Braud v. Transport Service Co. of Illinois*, 2010 WL 3283398, at \* 14 (E.D. La. Aug. 17, 2010); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1308 (S.D. Fla. 2007); *Henderson v. Eaton*, 2002 WL 31415728, at \*6 (E.D. La. Oct. 25, 2002); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197, 204 (D. Me. 2003); *In re Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7-12 Litigation*, 447 F. Supp. 2d 612, 634 (E.D. La. Aug. 31, 2006); *In re Mexico Money Transfer Litigation (Western Union and Valuta)*, 164 F. Supp. 2d 1002, 1028-1030 (N.D. Ill. Dec. 22, 2000); *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 278 F.3d 175, 194 fn. 1 (3rd Cir. 2002); *Milkman v. American Travellers Life Ins. Co.*, 2002 WL 778272, at \*7-9 (Pa. Com. Pl. Apr. 1, 2002); *Moody v. Sears*, 2007 WL 2582193, at \*5 (N.C. Super. May 7, 2007); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1009-1011 (Vt. 2003); and *Wilson v. DirectBuy, Inc.*, 2011 WL 2050537, at \*6 (D. Conn. May 16, 2011).

The Guidelines have formed the basis of expert testimony, both in support of class action settlements and in support of objections to bad settlements. Most important, perhaps, they

achieved their primary goal of setting the standard for litigating and settling consumer class actions. Many of the Guidelines have been embraced and adopted by courts, and their principles were reflected in the 2004 changes to Federal Rule of Civil Procedure 23.

In 2006, to reflect both the adoption of these changes to Rule 23, as well as the quickly changing landscape of class action litigation, NACA revised the Guidelines. *See* 255 F.R.D. 215 (2006). This Second Edition addressed new issues, including specific problems with the class action device in predatory home lending litigation, the exponential growth of forced arbitration, and the use of offers of judgment under Federal Rule 68 and state counterparts to forestall class actions.

On May 13, 2014, in an effort to keep the Guidelines current and relevant, NACA issued the Third Edition of the Guidelines. *See* 299 F.R.D. 160 (2014). The Third Edition thoroughly updates the law in order to continue to offer assistance and guidance to lawyers and courts as a standard of practice that encourages only the most ethical and thoughtful of consumer class actions.

NCLC and NACA appreciate the opportunity that the Civil Rules Advisory Committee and its Rule 23 Subcommittee have given us to participate throughout your deliberative process and to contribute to the consideration of potential amendments to Rule 23. Previously we submitted comments and suggestions to the Committee and the Subcommittee on April 1, 2015, when you initially were considering proposals for possible revisions to Rule 23. Subsequently, on September 4, 2015 we submitted responses to certain of the conceptual sketches set forth by the Rule 23 Committee in its Introductory Materials for its Mini-Conference on Rule 23 Issues held on September 11, 2015. This opportunity has permitted us to respond, from our perspective

and given our experiences, to some of the most critical challenges facing class action practitioners and the courts today.

The additional comments we set forth below seek to combine the ethical considerations of the NACA Guidelines with the functional approach adopted by the ALI Principles of the Law of Aggregate Litigation. It is our hope and intention that the proposed amendments as ultimately promulgated and adopted will help maintain class actions as a vital component of American jurisprudence in order to preserve and enforce the rights of consumers while improving the efficiency, effectiveness and fairness of the class action procedure in our federal court system.

**I. NACA’S AND NCLC’S PROPOSED CHANGE TO THE TIME FOR ISSUANCE OF A CERTIFICATION ORDER – RULE 23(c)(1)(A) AND ITS COMMITTEE NOTES.<sup>1</sup>**

Ignoring the United States Supreme Court’s mandate that courts must conduct a “rigorous analysis” of class certification, a number of courts have adopted the practice of considering, and sometimes denying, class certification based solely on the complaint via the vehicle of a motion to strike. In order to eliminate this practice, which NACA and NCLC believe has no support in the text of the Federal Rules, does not allow for proper class certification analysis as now required by *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) and its progeny, and makes the class certification decision an inherently subjective one based on individual judges’ predilections, NACA and NCLC propose an amendment to Rule 23(c)(1)(A).

**A. NACA and NCLC propose changing Rule 23(c)(1)(A) as follows:**

- (c) **CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.**

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<sup>1</sup> NACA’s and NCLC’s Proposed Change to the Time for Issuance of a Certification Order-Rule 23(c)(1)(A) and its Committee notes originally was presented to the Civil Rules Advisory Committee and its Rule 23 Committee in our April 1, 2015, Comments. The proposal did not appear as one of the Subcommittee’s subsequent conceptual “sketches” and was not included as part of the proposed amendments to Rule 23 drafted by the Subcommittee and currently under consideration. The comment is presented here again for reconsideration by the Civil Rules Advisory Committee as a potential improvement to the proposed amendments to Rule 23.

**(1) Certification Order.**

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action. The determination should not be based solely on the complaint, but rather on class certification briefing and evidence submitted after a reasonable time for discovery.

**B. NACA and NCLC propose the following revision to the Committee Notes to the 2003 amendments to Subdivision (c), Paragraph (1):**

In the second paragraph, the first sentence should be changed from “Time *may* be needed to gather information necessary to make the certification decision,” to “Time *must* be granted to gather the information necessary to inform the certification *analysis and decision.*” (emphasis added).

**C. NACA’s and NCLC’s reasons for proposing the changes:**

A motion to strike class allegations at the pleadings stage finds little if any textual basis in the Federal Rules of Civil Procedure. Rule 12(f), which permits a “motion to strike” for “redundant,” “impertinent” or “scandalous” matters, says nothing about purportedly unwinnable class allegations. Yet, many defendants misuse this rule to ask courts to preemptively preclude class actions from the outset. That some courts frequently “strike” class action allegations only emboldens defendants to try this tactic. As a counterpart to this approach, and as a means of avoiding the obvious problems with a Rule 12(f) motion, defendants also file motions under Rule 23(c)(1)(A) or Rule 23(d)(1)(D) at the pleading stage. Some even invoke a court’s inherent power to strike, thus avoiding the Rules entirely. None of these vehicles are directed at evidence or proof. All require a plaintiff to plead Rule 23 elements with heightened particularity and predict the evidence that normally would shape the class certification decision.

Numerous district courts have denied class certification on the pleadings, and been affirmed, without any “rigorous analysis” of the proofs to be forthcoming from future discovery.<sup>2</sup> Yet, the Supreme Court requires the class *determination* to come after a rigorous analysis of the proofs. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551. The Supreme Court has held that it:

may be necessary for the court to probe behind the pleadings before coming to rest on the *certification question*,’ and that certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’... Such an analysis will frequently entail “overlap with the merits of the plaintiff’s underlying claim.” That is so because the “class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’ ...

*Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (emphasis added).<sup>3</sup>

The courts that strike class action allegations cite in support *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982), because it states that sometimes it is “plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claims.” *Id.* However, that statement (which really only addresses typicality and adequacy) does not support denying class certification at the pleading stage, because *Falcon* involved a class certification decision issued after evidence had been collected and presented, *and* it admonished district courts to conduct a rigorous analysis of Rule 23 rather than presuming compliance with Rule 23 based upon the allegations of the complaint. Thus,

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<sup>2</sup> See, e.g., *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *Kennedy v. Unumprovident Corp.*, 50 F. App’x 354, 355 (9th Cir. 2002); *Ross-Randolph v. Allstate Ins. Co.*, 2001 WL 36042162, at \*4 (D. Md. May 11, 2001); *Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 832 (N.D. Ill. 2013); *Alqaq v. CitiMortgage, Inc.*, 2014 WL 1689685, at \*4–6 (N.D. Ill. Apr. 29, 2014).

<sup>3</sup> Allowing Plaintiffs time to develop their classwide proofs makes sense: “the class definition put forth in the complaint is often a working definition—one that will serve to identify relevant inquiries in pre-certification discovery.” *Moore v. Walter Coke, Inc.*, 294 F.R.D. 620, 627 (N.D. Ala. 2013) (citing 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1785.4 at n.1 (3d ed. 2009)); see also, e.g., *Glazer v. Chase Home Fin. LLC*, 2014 U.S. Dist. LEXIS 39297, 15 (N.D. Ohio Mar. 25, 2014); *Chaney v. Crystal Beach Capital, LLC*, 2011 WL 17639, at \*2 (M.D. Fla. Jan. 4, 2011); *Motisola Malikha Abdallah v. Coca-Cola Co.*, 1999 WL 527835 (N.D. Ga. July 16, 1999). The class definition might get “tweaked as the pre-certification discovery process sheds light on the contours of the potential class.” *Moore*, 294 F.R.D. at 627.

striking class action allegations without a rigorous analysis via negative presumptions actually spins *Falcon* off its axis.

Before 2003, Rule 23(c)(1)(A) required that the determination as to whether to certify a class be made “as soon as practicable after commencement of an action.” Effective December 1, 2003, this language was amended to require instead that “the court must – *at an early practicable time* – determine by order to certify the action as a class action.” Fed. R. Civ. P. 23(c)(1)(A) (emphasis added). According to the Committee Notes, the “as soon as practicable” language was changed because class certification decision-making at the pleadings stage did not reflect prevailing practice and because “[t]ime may be needed to gather information necessary to make the certification decision.” Advisory Committee Notes to 2003 Amendments.

In other words, Rule 23(c) was amended expressly to forestall class action decision-making until *after* the parties have conducted discovery. *See id.* (noting that it might make sense for a court to rule on dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified.). Unfortunately, courts frequently ignore the Committee Notes on this issue and strike class action allegations at the pleading stage.

Rule 23(d)(1)(D) permits orders that “require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.” Fed. R. Civ. P. 23(d)(1)(D). But this provision expressly concerns the “conduct” of a class action *after* a class has been certified under Rule 23, because it is prefaced by the general phrase: “In conducting an action under this rule, the court may issue orders that: . . . (D).” *Id.* Considered in its actual context, subpart (D) merely allows a court to exclude opt-outs, bar uncooperative opt-ins, decertify an existing class, or otherwise cabin an already certified class to precise persons so

all the parties will know who will be bound by a final judgment. By its own terms, Rule 23(d)(1)(D) has no application to a pre-certification decision. It cannot, and should not, authorize a motion to strike class allegations at the pleadings stage.

## **II. NOTICE**

NCLC and NACA endorse the proposed amendments to Subdivision (c)(2) of Rule 23 in order to reflect the changing realities of communication modes in the 21<sup>st</sup> Century. Rather than limiting the means of giving “the best notice practicable” to class members, courts should have the ability to exercise discretion to select the most appropriate means of giving notice in a case based on the specific facts and circumstances presented.

We particularly appreciate the Committee Note’s recognition of the fact that a significant portion of class members in certain cases may have limited or no access to email or the Internet and that, therefore, the courts and counsel should focus on the means of notice most likely to be effective in the case before the court. As consumer advocates who represent low income and elderly consumers who disproportionately do not engage in social media and are less likely to have regular access to email or the Internet, we can confirm the Committee Note’s assessment and applaud its sensitivity and understanding.

NCLC and NACA also wish to support the Committee Note’s admonition that in determining whether the proposed means of giving notice is appropriate, the court should give careful attention to the content and the format of the notice and, if notice is given under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. No matter how effective a system is in providing access to notice to class members, the notice received is only as good as the comprehension of the message it delivers. As noted by the Committee Note, “the ultimate goal of giving notice is to enable class members to make

informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or make claims.” Therefore, “the form of notice *should* be tailored to the class members’ anticipated understanding and capabilities.”(Emphasis added).

In this vein, NCLC and NACA would like to propose three additional improvements to the Committee Notes expressly addressing concerns we have regarding the form and content of notices.

**First**, for publication or posting on websites, practitioners increasingly have been turning to more simplified forms of summary notice that state, in plain terms and using easier-to-read graphic fonts and presentation, the nature of the case, who is in the class, what relief is sought, and, for settlement notices, the relief available and the availability of opting out or objecting. One advantage of this approach is that these bolder, more widely published, and possibly smaller notices permit a broader reach. Such “summary notices” also usually provide telephone, website, and physical addresses from which fuller notices—containing all the information required by Rule 23(c)(2)(B) as well as additional detail—can be obtained.

Full notices now often have a summary at the outset of the most salient points (e.g., who is in the class, what relief is sought or being provided by settlement, how claims can be made, who counsel is or what fees they might be requesting, and how counsel can be contacted), with the full details of the settlement (including, for example, who is excluded, what are the verbatim terms of the release, etc.) set forth below.

NCLC and NACA support simplified, plain language disclosure of the salient aspects of a class, including the settlement terms. If anything, the use of a summary notice should be pressed for as a means to ensure wider, not more limited, dissemination. While such determinations invariably depend on the nature of the case, as well as the size and make-up of the class, NCLC



and NACA believe summary notices can be valuable and should be encouraged, provided that they offer enough information to be meaningful.

Certainly, an easy way to obtain a full notice (e.g., a website address) must be provided. Summary notices can either be summaries at the beginning of a “full” notice (as where notice has been provided by direct mail) or two-tiered notices—summary notices combined with available full-form notices. Summaries or summary notices should be considered if doing so can broaden the reach of the notice by permitting more widespread dissemination. A practitioner using a summary notice, however, must ensure that the physical size of the notice remains noticeable enough to catch the attention of class members. When used, the most salient items of information that should be set forth include:

- A clear statement explaining how to tell whether a consumer is a class member.
- The total amount of relief to be granted the class, stated in dollars where the payment is in cash or credit to an account, and the nature and form of the individual relief each class member could obtain.
- How further information can be obtained. More than one means (e.g., phone, fax, email, websites, and mail) of obtaining information should be provided.
- Options available to class members including at least opting out and objecting.
- What the class member would release by not opting-out from the settlement.

**Second**, NCLC and NACA recommend, where appropriate, that counsel consider soliciting the advice of readability experts (often found at local universities) to recommend simplified ways of expressing the relevant concepts. Even though this may be cost-prohibitive or unnecessary in many cases, it is a matter worth considering, particularly if the parties have reached an impasse on the notice’s wording or where a defendant is insisting upon legalistic or

technical wording. At the very least, readability of the notice should be checked using a word processor. Most word processing programs today have a tool that allows the grade level of a document to be checked. Although this is an imprecise measure, it can give class counsel a general understanding of their writing's complexity.

**Third**, NCLC and NACA recommend considering non-English notice publication, in addition to English notices, where a substantial portion of the class may not be fluent in English. If much or most of the class does not speak English, then the notice must be in the other language.

### III. OBJECTORS

NCLC and NACA also endorse the proposed amendment of Subdivision (e)(5)(A) and (B) of Rule 23 relating to Objectors. Although objectionable class action settlements do exist, they are in the significant minority. By protecting the interests of the absent class members, valid objections to bad settlements play an important role in class action practice. Lawyers who learn of a bad settlement (whether through publicity, independently, or because they have a competing class action) may appropriately represent their clients in filing an objection to the settlement. Their goal can be to improve the terms of the settlement or to convince the court to reject the settlement entirely.

Objections can serve many good purposes, but there are objections filed by lawyers who are not sincerely invested in improving a settlement and whose only interest lies in improving their own bank balances. The proposed amendments to Subdivision (e)(5)(A) and (B) of Rule 23 address the issue of these improper objections by providing that any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval, but such an objection must state whether it only applies to the objector, to a specific subset of the class, or

to the entire class, and also must state with specificity the grounds for objection. Such an objection may be withdrawn, but only with the court's approval if it involves a payment or other consideration to an objector or objector's counsel. These rule changes are intended to prevent objectors and their counsel from merely filing boiler plate objections, collecting fees, and disappearing.

In most instances, objectors who add real value to a settlement should be paid on a lodestar basis with a multiplier. NCLC and NACA propose that the Committee Note for Subdivision (e)(5)(B) expressly should indicate, however, that the source of these fees generally should be either the defendant or class counsel. As one court noted, "the cash fund available to the class members should not be reduced by the award of attorney fees to the objectors' counsel and that the benefits to the class, both monetary and non-monetary, should not be reduced in any fashion. In keeping with this conclusion, the attorney fees awarded to objectors are to be paid by Class Counsel and [the defendant] as they may agree, but without diminution in the value afforded to the class." *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 974 (E.D. Tex. 2000); *see also Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 417 (E.D. Wis. 2002) (following *Shaw*). As a corollary, an objector who is no more than a greenmailer should receive nothing at all.

#### ***IV. CYPRES***

In its November 5-6, 2015, Report the Rule 23 Subcommittee indicated that it had determined that the issue of *cy pres* awards would be taken off the agenda for the present Rule reform efforts. The Subcommittee noted that Section 3.07 of the ALI Principles of Aggregate Litigation addresses the issues of how *cy pres* awards should be handled in cases and that courts are increasingly referring to the ALI formulation in addressing these issues. The Subcommittee

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.

However, the proposed Committee Note to amended Subdivision (e)(1) does make the general observation that because some settlement funds are frequently left unclaimed, it is often important for a settlement agreement to address the use of those funds. The Note then goes on to recommend that “[m]any courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).”

Overall, NCLC and NACA support the approach taken by the Committee in its note. NCLC and NACA agree that ALI Principles of Aggregate Litigation §3.07 should be used as a model for best practices in *cy pres* awards and that courts should be encouraged to use *cy pres* awards in circumstances where direct distributions to class members are not viable or feasible. Further discussion and guidance on how to properly handle *cy pres* awards in cases within the contours of § 3.07 may be found in the NACA Standards and Guidelines for Litigating and Settling Consumer Class Actions, 3<sup>rd</sup> ed., Guideline 7, *Cy Pres Award*, 299 F.R.D. 160, 191-200 (2014).

Tab 4

Written Testimony of

Brent Johnson, on behalf of  
Committee to Support Antitrust Laws  
(COSAL)



October 24, 2016

**Via E-Mail and Regular Mail**

Rebecca A. Womeldorf  
Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the  
United States  
Thurgood Marshall Federal Judiciary Building  
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Re: Comments by COSAL on Potential Amendments to the Federal Rule of  
Civil Procedure 23

To the Members of the Advisory Committee on Civil Rules and the Rule 23 Subcommittee:

The Committee to Support the Antitrust Laws (COSAL) submits these comments to generally express its support for the majority of the proposed amendments and highlight one potential area of concern and suggested revision with regards to a new provision, Rule 23(e)(2)(C)(ii).

COSAL was established in 1986 to promote and support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. COSAL members are law firms based throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. COSAL closely monitors and comments on congressional and administrative activity with respect to antitrust policy and plays a leadership role in building support for the antitrust laws.

Brent Johnson and Emmy Levens of Cohen Milstein Sellers & Toll PLLC, whose practice focuses on antitrust class actions, prepared these comments on behalf of COSAL. They are based on our members' extensive experience bringing antitrust class action lawsuits under Rule 23 of the Federal Rules of Civil Procedure. Mr. Johnson will appear before the Committee on November 3. We respectfully request that you consider these views as you consider revisions to Rule 23.

In general, COSAL believes that many of the proposed amendments to Rule 23 are positive – either codifying the existing case law or clarifying prior ambiguity. We are concerned, however, that one suggested change regarding the approval of settlements could be misconstrued in a manner that undermines the Rules Committee's purported purpose for the change.

Specifically, the current language proposed for inclusion under Rule 23(e)(2)(C)(ii) requires courts to take into account, “the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required” in deciding whether to approve a settlement. We believe that some courts could mistakenly interpret the inclusion of such a factor and the word “effectiveness” to mean that there are categorically ineffective methods of distributing relief to classes. Such courts may then impose a heightened standard for identifying class members, processing claims, and distributing settlement proceeds that, for certain groups of cases, no method of distributing relief could meet. Such a standard could lead to the rejection of settlements for the sole reason of not meeting it.

In other words, the language could be misconstrued as imposing a heightened “ascertainability” standard, a topic the Rule 23 Subcommittee specifically decided was not appropriate to address in these proposals. Indeed, ascertainability is an issue that has divided circuit courts<sup>1</sup> and that may be best left to resolution by the Supreme Court. While we do not believe that such an interpretation of the proposed language is correct or the one that most courts would employ, we are mindful that the current ascertainability requirements imposed by some courts for the certification of classes also have little to no basis in the current plain language of Rule 23.<sup>2</sup>

To avoid this potential issue, we suggest that Rule 23(e)(2)(C)(ii) be changed to provide that, in considering whether to approve a class settlement under Rule 23(c)(3), courts consider

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<sup>1</sup> See, e.g., *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663 (7th Cir. 2015) (holding that Rule 23 does not require a heightened “ascertainability” standard for identifying class members); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (requiring that plaintiffs demonstrate an “administratively feasible” method for identifying class members for class certification).

<sup>2</sup> Brent W. Johnson & Emmy L. Levens, *Heightened Ascertainability Requirement Disregards Rule 23's Plain Language*, ANTITRUST, Vol. 30, No. 2, at 68-73 (Spring 2016).

October 24, 2016

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whether: “(ii) the proposed method of distributing relief to the class, including the method of processing class-member claims, if required, is the best method that is practicable under the circumstances.” (emphasis on new language).

This alternative language mirrors the language in Rule 23(c)(2)(B) relating to notice. Courts have ably applied this language to ensure that notice is effectively disseminated to class members; adopting similar language here provides a ready benchmark for courts in applying the new language. Moreover, we believe this suggested language more appropriately balances the concerns outlined in the comments to the proposed amendments – ensuring that the claims processing method deters unjustified claims but stopping shy of imposing a standard that could be used to preclude settlements entirely by itself. Additionally, this proposal eliminates any confusion as to whether the proposed language should be read to impose any type of “ascertainability” requirement in approving a class settlement.

Thank you for considering our views.

Sincerely,

/s/ Pamela Gilbert

Pamela Gilbert

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/s/ Brent W. Johnson

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Tab 5

Written Testimony of

Brian Wolfman  
Georgetown University Law Center

## Comments of Brian Wolfman concerning proposed amendments to Federal Rule of Civil Procedure 23

To the Advisory Committee:

My comments concern proposed **Rule 23(e)(5)(B)**, which would require district-court approval for payments to class-action objectors and their counsel. See Preliminary Draft, p. 216.<sup>1</sup>

I currently teach at Georgetown University Law Center and direct an appellate litigation clinic there. For nearly 20 years, I was a staff lawyer at Public Citizen Litigation Group (serving the last five-plus years as its director). At the Litigation Group and elsewhere, I have represented objectors to about thirty national class-action settlements.<sup>2</sup> I have also represented class-action plaintiffs throughout my career and have negotiated and sought court approval for class-action settlements.

I support proposed Rule 23(e)(5)(B), which seeks to eliminate extortionate class-action objections. As the draft Committee Note puts it, “some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process.” As the Committee recognizes, it is not only (or even principally) objectors, but their lawyers, who are seeking to extract personal gain.

In 1999, I proposed to this Committee a Rule quite similar in purpose to proposed Rule 23(e)(5)(B). My 1999 proposal required public disclosure and district-court approval for all objector side-settlements, and, like the Committee’s current proposal, it expressly applied while

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<sup>1</sup> I join fully in the comments submitted by Alan B. Morrison regarding the proposed amendments to Rule 23, including to proposed Rule 23(e)(5). Mr. Morrison has authorized me to state that he joins in these comments.

<sup>2</sup> See, e.g., *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Koby v. ABR Nat’l Servs., Inc.*, No. 13-56964 (9th Cir.) (pending); *Hecht v. United Collection Bureau*, 691 F.3d 218 (2d Cir. 2012); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011); *In re Comty. Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005); *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

an objector's challenge to a district court's settlement approval was on appeal. The 1999 proposal continues to represent my views, and I believe that the views expressed in it support the Committee's proposed Rule 23(e)(5)(B). Rather than repeat what I said then, I am attaching a copy of it in support of the Committee's current proposal.

I have two suggested amendments to the proposal:

1. Proposed Rule 23(e)(5)(B) properly requires district-court approval for any payment or transfer of other consideration to any objector or objector's counsel who forgoes or withdraws an objection (or who forgoes, withdraws, or abandons an appeal from approval of a class-action settlement). But the proposed Rule does not discuss a standard for approving (or disapproving) a payment or transfer of other consideration to an objector or objector's counsel.

In my view, only in the rarest circumstances should a court approve a payment or other consideration for an objector that is different from what the objector would have received under the class-action settlement. If some objectors are so differently situated from other class members that the objectors should be entitled to a different (and more advantageous) deal, those circumstances typically would be a basis for rejecting the class-action settlement. Indeed, proposed Rule 23(e)(2)(D) — which is a sort of class-action equal protection clause that properly seeks to ensure that settling class members are treated equitably amongst themselves — effectively says just that.

And, so, if the objector's real beef is that the settlement is not a good deal for the objector *and* others similarly situated, then the objector should either (1) see her objections through to their conclusion (which might end in an improved settlement and a court-awarded attorney's fee for the objector under Rule 23(h)), or (2) opt out and pursue her claims individually (or together with other opt-outs). And it follows that if there is no basis for special treatment for the objector,

there is certainly no basis for special treatment for the objector's lawyer.

There may be rare circumstances in which an objector is both uniquely situated, such that the class-action settlement is unfair as to her (but not as to others), and opting out is not a realistic alternative, either because it is a non-opt-out class action or because individual litigation is economically unrealistic. In those rare circumstances, it is possible that a publicly-disclosed and fully vetted side-deal should be approved by the district court under proposed Rule 23(e)(5)(B).

For these reasons, I recommend adding, at the end of proposed Rule 23(e)(5)(B), the following sentence:

The court may not approve a payment or a transfer of other consideration to an objector or objector's counsel unless it finds that (1) the objector's circumstances relative to other class members clearly justifies treatment different from the treatment accorded to other class members under the proposal; and (2) the objector lacked a realistic opportunity to prosecute a separate action.

If the Committee adds this sentence, it may wish to add an explanatory Committee Note providing some or all of the justifications discussed above.

2. The draft Committee Note to proposed Rule 23(e)(5)(B) states that "class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these [extortionate] objectors." Preliminary Draft, p. 229. Based on my experience, this is an accurate description of why some class counsel and class-action defendants pay off extortionate objectors.

But it is not clear that this statement will be viewed as purely descriptive, and so I worry that some lawyers (and even some courts)

will view it as a potential justification for court approval of a payment or transfer of other consideration to an objector or objector's counsel. As explained above (and in more detail in my attached 1999 proposal), this reasoning never justifies making payments or providing other consideration to objectors or their counsel. That the current Rule 23(e)(5) does not adequately eliminate incentives for lawyers to make these payments is part of *the problem*, and so a court should never approve a payment to an objector or an objector's lawyer that is proffered just to make the objector or the objector's lawyer go away.

The proposed Rule, properly construed, should *itself* make the problem go away. To help ensure a proper construction of the Rule, I suggest adding to the Committee Note the following two sentences immediately after the sentence quoted above: "That is not a proper reason for providing payment or other consideration to these objectors. Rule 23(e)(5)(B)(ii) seeks to eliminate any incentive for providing such payment or consideration in the first place."

Brian Wolfman (October 24, 2016)

November 23, 1999

Hon. Anthony J. Scirica  
Chair, Standing Committee on Rules  
of Practice and Procedure  
United States Courthouse  
601 Market Street  
Philadelphia PA 19106

Hon. Paul V. Niemeyer  
Chair, Advisory Committee on Civil Rules  
United States Courthouse  
101 West Lombard Street  
Baltimore, MD 21201

Re: Proposed Amendment to Rule 23(e) Concerning Disclosure and Approval of  
Side-Settlements

Dear Judges Scirica and Niemeyer:

I am writing to you in your respective capacities as Chairs of the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules to request consideration of an amendment to Fed. R. Civ. P. 23. Originally, I sent this proposal to Judge Edward Becker because of a prior discussion we had had on the topic. He in turn suggested that I send the material to you because of your Committee roles.

Attached to this letter is a suggested amendment to Rule 23(e), which would require that all "side-settlements," including their attorney's fee components, be disclosed and approved by the district court. The effect of such a change would be generally to prevent settling class counsel and settling defendants from "buying out" objectors on terms different from those offered to the class as a whole. The proposal would apply to all settlements whether they were struck while the case was before the district court or pending on appeal.

The remainder of this letter sets forth examples of the problems addressed by the Rule change and the need for such a change.

## I.

In our experience, the practice of paying objectors to go away, without disclosure and approval, has become commonplace. Although we are aware of many such cases, consider the following four examples in large nationwide cases:

1. After announcement of the *General Motor Pick-up* class action coupon settlement in the federal MDL proceeding, counsel for GM contacted plaintiffs' counsel in a competing class action pending in state court. GM counsel was aware that this plaintiffs' counsel's clients would likely be objectors to the MDL settlement. GM counsel suggested that objecting plaintiffs' counsel might file an amended complaint that would allow removal of the state court class action to federal court, presumably so that it could be consolidated with the MDL proceedings. GM counsel further suggested that thereafter the settling parties might arrange payment of objecting counsel's fees — but not one penny of additional relief for counsel's clients or for the class as a whole — in exchange for dropping his clients' objections. Our understanding is that the plaintiffs' counsel did not accept the offer.

2. In the *AcroMed* bone screw "limited fund" settlement, *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 176 F.R.D. 158 (E.D. Pa. 1997), the district court's approval was very much in doubt. For one thing, the settling parties' assertions as to the value of the fund likely understated its true value by several fold. The settlement, moreover, released concededly solvent non-parties, against whom a large number of class members had significant claims. Finally, the settlement suffered from all the problems later condemned by the Supreme Court in *Ortiz v. Fibreboard*.

At least three groups of objectors — one that had taken an appeal and two others that were contemplating an appeal — were simply paid significant sums of money to drop their objections, *i.e.*, they received a different and better deal than the other absent class members. The *non*-objecting class members' recoveries were limited by the class action settlement, which the district court approved on an express finding that there was a "limited fund" and that the defendant had nothing more to give. This "buy out" took place in complete secrecy, without disclosure to the court or the class members.

3. In another "limited fund" personal-injury settlement approved earlier this year, now pending on appeal in a federal circuit court, certain objectors now

appear to be seeking a settlement that would involve cash payments without any disclosure or approval by the court, in exchange for dismissal of their appeals. The participants to the settlement recognize that this route is probably the only way to obtain a final judgment, and thus a lucrative private settlement, because the class settlement appears doomed by *Ortiz*.

4. Finally, in the *John Hancock* insurance fraud settlement, we represented a class member challenging what appeared to be a substantial cash payment to objectors and their counsel to drop their appeal on the merits, without any disclosure to the plaintiff class members, who received a decidedly different (and probably far less lucrative) deal. The First Circuit rejected our client's challenge, leaving no doubt that, in its view, secret side-settlements were permissible even if the settling class members were able to use an appeal as leverage to exact a better deal than the deal provided the rest of the class. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999).

In each of these proposed or consummated side-deals, despite the Rule 23(e) requirements that class settlements be scrutinized openly and that the court approve all parts of them, the settling parties and objectors proceeded secretly. Indeed, in the *John Hancock* case, even after we got wind of the deal, the settling parties refused disclosure of these side-deals on the ground that only an *overall* class settlement, not settlement of the individual claims of members of the settlement class, are subject to Rule 23(e). And, since the First Circuit agreed with that analysis, we believe that the best approach now is to amend the Rule, although we may litigate the issue elsewhere if the circumstances warrant it.

In our view, the structure and purpose of Rule 23 demand that side-settlements be disclosed and approved by the district court. Whether one characterizes these side payments as "bribes" by the settling parties or "extortion" by objectors, or some combination of the two, something should be done to put an end to this conduct for at least four reasons.

First, permitting unregulated side-agreements subverts the Rule's structure regarding class membership. The Rule expressly permits only one method of exclusion from the class — opting out in (b)(3) class actions. An opt-out must be exercised individually, and because



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it does not give a class member the ability to defeat the class action, it does not empower the class member to "hold up" an entire settlement. In short, it perverts the Rule to allow objectors, in effect, a "super opt out" that provides them enormous leverage to game the class action process for their own personal gain.

Second, allowing side-deals to go unchecked runs headlong into one of the chief purposes of the class action and of the Rule 23(e) approval requirement — to assure that similarly-situated class members are treated alike. In this regard, a district court considering whether to approve a side-deal should ask this basic question: "Is there a good reason that this one group of class members should get a different [usually better] deal from all the other class members?" Because the courts already conduct something akin to this inquiry when they decide whether additional payments should be made to class representatives, this question is not foreign to the class action process. And the district courts in *Georgine* and *Ortiz* asked essentially the same question when they considered whether the side-deals for class counsel's individual clients were appropriate in light of the decidedly different class settlement. Generally speaking, we believe that it will be quite difficult for settling individual class members to justify disparate treatment, and thus the amendment we propose is likely to drastically curtail, if not eliminate, these side-deals.

Third, we are concerned not only about the existence of unfair side-deals, but in *who* obtains them — lawyers and their clients who know how to game the system. The class action often serves as the means for ordinary citizens, without individual representation, to achieve justice. It is intolerable for the mass of *pro se* litigants (*i.e.*, the absent class members, whether or not they object) to get one deal, while a small group of objectors with lawyers who understand the dynamics of the current system get another (presumably better)

deal.

Finally, a Rule 23(e) disclosure-and-approval requirement will improve the Rule 23 objections process. This process is critical in helping to assure the fairness of class action settlements and in shaping the law on topics ranging from class certification, to opt-out rights, to the intended breadth of Rule 23(b)(1)(B), etc. We believe that more must be done by the courts and the rulemakers to facilitate the objectors' role under Rule 23(e). *See Wolfman & Morrison, Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 70 N.Y.U. L. Rev. 439 (1996) (suggesting Rule changes to improve fairness hearing procedures and to accommodate needs of objectors). Our proposal to require approval of side-settlements will improve the overall Rule 23(e) process, which is intended to assure that the courts approve the good, and reject the bad, by weeding out objections with little merit, and encouraging serious objections that may give the court pause or lead to meaningful amendments to a proposed settlement. In this regard, we note that attorneys for objecting class members whose work benefits the class as a whole should be entitled to a court-approved fee. *See generally Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp.2d 175 (D. Mass. 1998).

## II.

Our proposal also would formalize the current requirement that courts approve all attorney's fees and costs in class actions. Although courts almost always approve fees and costs, in recent years settling class counsel have argued that, when fees and costs are agreed to as part of a settlement, particularly when structured to appear to be separate from the relief accorded to the plaintiff class, they should be given little or no scrutiny. *See, e.g., In re General Motors*, 33 F.3d 768, 819-20 (3d Cir. 1995) (discussing and rejecting this approach);

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*Zucker v. Occidental Petroleum Corp.*, 1999 U.S. App. Lexis 25824 (9th Cir. Oct. 19, 1999)  
(same).

Moreover, the proposed amendment would require disclosure and approval of all fee-sharing arrangements among counsel. The Second Circuit requires as much, *see In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 225 (2d Cir. 1987), but the Sixth Circuit has rejected disclosure except in limited circumstances. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780-81 & n.3 (6th Cir. 1996); *see also* Adv. Comm. Notes to Fed. R. Civ. P. 54(d)(2) (court has discretion to demand disclosure, noting that one court's local rules requires disclosure). At an October 1998 class action conference of judges, academic, and practitioners sponsored by NYU law school, a prominent plaintiffs' class action lawyer candidly acknowledged that counsel fees are sometimes deliberately inflated so that he (as lead counsel) has sufficient funds to pay attorneys that are, in his view, undeserving hangers-on. We have watched this occur ourselves, and challenged the practice in *Bowling, supra*, because it operates to the potential detriment of class members. Without full scrutiny of fee sharing arrangements, it is more difficult to determine whether fees are bloated by payments to lawyers whose contribution does not warrant their allocated share. Thus, secrecy increases the likelihood that some of the money that the defendant was willing to give up goes to undeserving lawyers, rather than their clients. Disclosure and approval are the most direct and appropriate antidotes to this problem.

Moreover, we agree with Judge Weinstein that disclosure and approval of fee-sharing arrangements is important, almost for its own sake, to maintain the integrity of the class action device:

Because class attorneys have special fiduciary obligations to the class, and

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because the court has a responsibility to protect the rights of the class, the class and the court have a right to know about any agreements among counsel for allocating fees payable from a class recovery. In view of the lack of a personal relationship between most class members and the attorneys representing them it is essential that this information be available through the court. Class actions are public or quasi-public in nature. Rule 23 of the Federal Rules of Civil Procedure serves in many respects as a "sunshine" law in its requirements of notice to the class and public hearings. The public and press must have full access to information about this kind of fee-sharing arrangement so that an opportunity is afforded for comment and objection.

*In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1452, 1462-63 (E.D.N.Y. 1985). Simply put, in ordinary bi-polar litigation, we would not tolerate a situation where the client does not know which of her lawyers are getting paid and how much. *See* Model Rules of Prof. Resp. 1.5(b) & (e). In class actions, there is even more reason to require a full accounting and, of course, court approval.

\* \* \*

Thank you for your time and consideration.

Sincerely,

Brian Wolfman

cc: Hon. Edward R. Becker  
Mr. Peter G. McCabe

**PROPOSED AMENDED RULE 23(e)**  
**(new language italicized)**

**(e) Dismissal or Compromise.**

(1) **In general.** A class action shall not be dismissed or compromised without the approval of the court, *including all payments for attorney's fees and costs and the allocation thereof among counsel.* Notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(2) **Individual resolution.** *Any proposed dismissal or compromise of the claims of an individual named or unnamed member of the class who has not been excluded from the class under subdivision (c)(2), including any proposal concerning payment of attorney's fees or costs of such member, shall be filed with the court and served upon any class member who has entered an appearance. No such dismissal or compromise shall be consummated without approval by the court. Such dismissal or compromise shall be subject to approval of the court at any time during the pendency of the action, including when it is pending before the court of appeals or the Supreme Court of the United States.*

Tab 6

Written Testimony of

Hassan Zavareei  
Tycko & Zavareei

**VIA ELECTRONIC MAIL**

October 24, 2016

Our File No. 327-01

Advisory Committee on Civil Rules  
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Re: November 3, 2016 Hearing on Proposed Amendments to the Federal Rules of Civil Procedure

To the Members of the Advisory Committee on Civil Rules:

I am writing in advance of next week's hearing on the proposed amendments to Civil Rules 5, 23, 62, and 65.1. Based on my 21 years practicing law predominantly in the area of class actions, I have extensive experience with the contours of Rule 23, and I have had many productive discussions with my fellow practitioners particularly in recent years about the challenges presented in the areas of notice, settlements, and class objectors. Therefore, I submit to the Advisory Committee this written testimony regarding the proposed amendments to Rule 23 in advance of my appearance at next week's hearing. I believe that the proposed amendments are in large part a positive step, but I also offer my comments where I believe that both clarification and improvement is still possible, particularly in the area of objections to class action settlements.

First, I believe that the proposed changes to the rules regarding class notice are very productive and helpful. With respect to the proposed addition to subdivision 23(c)(2)(B), the first additional clause is very helpful in that it explicitly makes the rule applicable both in the contested class certification and the proposed settlement arenas. And the second additional sentence, which delineates certain means by which individual notice may be effected, is important largely due to its inclusion of electronic mail in addition to United States mail. It has been my experience in recent years that in scenarios where electronic mail information is reliably available for the class members, this is a notice method preferred by plaintiffs and defendants alike because of its efficiency and lower cost than postal mail. Although courts are growing more and more accustomed to ordering notice by electronic means,<sup>1</sup> it is a positive step to codify the availability of this option, and I appreciate the Committee's clarity.

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<sup>1</sup> *E.g.*, *Hanlon v. Palace Entm't Holdings, LLC*, No. 11-987, 2012 WL 27461 at \*6 (W.D. Pa. Jan. 3, 2012) (approving notice consisting of email to defendant's promotional database and publication in USA Today to be sufficient); *Berkson v. Gogo LLC*, 147 F. Supp. 3d 123, 154 (E.D.N.Y. 2015) (approving



With respect to the changes to subdivisions 23(e)(1)(A) and 23(e)(2), which speak to the information to be provided to courts in connection with a motion to preliminarily approve of a class settlement, I believe the additions to and new structure of the Rule is a positive step. Specifically, with respect to Rule 23(e)(2), I applaud the proposed change from simply requiring a finding that the settlement is “fair, reasonable, and adequate” to listing specific factors for courts to consider in order to make this finding. As the Committee is likely aware, Circuit courts have adopted sets of factors that they examine in order to examine a proposed settlement’s fairness, and although the factors that they examine resemble those proposed by the Committee, there are variations from circuit to circuit.<sup>2</sup> By providing a certain set of factors, this proposal by the Committee will provide clarity to litigants and courts alike. The single change that I propose

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email-only notice); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 499 (N.D. Ill. 2015) (rejecting objector’s argument that email notice is insufficient); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 605 (N.D. Cal. 2015) (approving email notice with mailed notice to persons with emails returned as undeliverable); *In re TD Ameritrade Account Holder Litig.*, No. C 07–2852 SBA, 2011 WL 4079226 at \*10 (N.D. Cal. Sept. 13, 2011) (approving email notice even where class members did not receive mailed notice “in cases where the delivery via email failed,” as “there is no requirement that notice be perfect”); *Lane v. Facebook, Inc.*, No. C 08-3845 RS, 2010 WL 9013059 at \*2 (N.D. Cal. Mar. 17, 2010) (even though some e-mail filtered through a SPAM e-mail filter and not all class members saw it, the notice was adequate).

<sup>2</sup> See, e.g., *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983) (“There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs’ success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.”); *Girsh v. Jepsen*, 521 F.2d 153 (3d Cir. 1975) (“(1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . .”); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 691 (S.D. Fla. 2014) (“The factors the Court should consider in determining whether a settlement is fair, adequate, and reasonable are ‘(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which settlement was achieved.’”) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (“(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation”) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)).





is a minor clarification to subdivision 23(e)(2)(C)(ii), to change the first clause from “the effectiveness of the proposed method of distributing relief *to* the class” to “the effectiveness of the proposed method of distributing relief **for the benefit of** the class.” I believe that this phrasing is more accurate because in certain class actions, some relief such as injunctive relief or *cy pres* distributions are not distributed directly “to” the class members.

Finally, I write to discuss the Committee’s proposed amendments to subdivision 23(e)(5) that address unique challenges facing class action practitioners now more than ever, in the area of class member objections. I completely agree with the Committee that many objections are brought in good faith and can both assist courts in evaluating proposed settlements, in addition to providing value to class members. However, the Committee is also correct to recognize that some class objectors and their attorneys are “seeking only personal gain” when they file objections and “have sought to extract tribute to withdraw their objections or dismiss appeals from judgments approving class settlements.” Many courts have recognized the phenomenon of the so-called “professional” or “serial” objector.<sup>3</sup> And while I appreciate the Committee’s efforts to enact procedures that provide litigants tools when they encounter a bad faith objection, I believe both a clarification of and an addition to the proposed rules would be helpful.

With respect to proposed subdivisions 23(e)(5)(B) and 23(e)(5)(C), I believe some background is necessary. The proposal and Committee notes indicate that the Committee is acutely aware that bad faith objectors frequently seek payment from class counsel in exchange for dismissing or foregoing an appeal. In fact, it is my experience (and one echoed to me by many fellow practitioners) that counsel for objectors generally only seek such payment *after* the district court has finally approved a settlement, a notice of appeal has been filed, and the case has been docketed by the court of appeals. This would allow for the simple dismissal of an appeal before the court of appeals without having to notify the district court. I understand that proposed subdivision 23(e)(5)(B)(ii) seeks to involve the district court in this process even after the appeal

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<sup>3</sup> See, e.g., *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 n.3 (N.D. Cal. 2012) (“[P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing.”) (quoting *In re Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330, 1361, n. 30 (S.D. Fla. 2011)); *In re Royal Dutch/Shell Transp. Secs. Litig.*, No. 04-374 (JAP), 2008 WL 9447623, at \*30 (D.N.J. Dec. 9, 2008) (“[f]ederal courts are increasingly weary of professional objectors”) (quoting *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005)); *Rossi v. Proctor & Gamble Co.*, No. 11-7238 (JLL), 2013 WL 5523098, at \*7 n.2 (D.N.J. Oct. 3, 2013) (“[P]rofessional objectors . . . bring objections, typically of a generic sort, that are lodged primarily for the purposes of delay and to extract (indeed, often, to extort) payment to the objector’s counsel to go away.”) (quoting *In re Checking Account Overdraft Litig.*, No. 09-md02036-JLK, Dkt. No. 1885-7 (S.D. Fla. Sept. 16, 2011)) (alteration in original); *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010) (“I concur with the numerous courts that have recognized that professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients.”) (collecting cases).



has been docketed. I believe this will cause some procedural confusion, as discussed below, but, more importantly, I believe that proposed subdivision 23(e)(5)(B) as a whole has some unintended consequences.

Proposed subdivision 23(e)(5)(B) purports to require district court approval whenever consideration is provided to counsel for an objector in exchange for withdrawing or otherwise foregoing an objection or appeal of settlement approval. I believe the intent of this subdivision is to dissuade the filing of bad faith objections altogether, on the rationale that, since bad faith objectors will not want to appraise district courts of their extortion-like tactics, they will not file a frivolous objection if the likely outcome is that they will not be paid (and, instead, they would have to actually litigate the frivolous objection all the way to the conclusion of an appeal that is unlikely to succeed). Unfortunately, professional objectors and their counsel, by the very nature of their business model, are unethical. As such, they file numerous frivolous objections without concern for whether they may be viewed negatively by the bench and bar. Indeed, professional objectors are frequently chastised by district courts and, despite this, are still paid off, and repeat their tactics in case after case.

Thus, my fear is that this subdivision actually will not dissuade the filing of bad faith objections, and, instead, professional objectors will continue to file such objections and seek payment in the manner they currently do. From there, class counsel will be left with the unenviable decision of either litigating a years-long appeal that results in class members not receiving compensation in the interim, or appearing before the district court to inform it that they have decided to pay an objector's counsel to stand down. Although I am not advocating for class counsel to frequently pay counsel for a professional objector, it has been the experience of many of my colleagues that choosing to do this is often a reasonable decision to make in order for members of the class to receive compensation in a timely fashion, when confronted with a bad faith appeal. By imposing the "court approval" requirement, however, this decision would be effectively removed from a class counsel's toolbox, as few class counsel would subject themselves to the public embarrassment of being on the record as having paid a professional objector. Therefore, the unintended consequence of this rule would be to significantly delay class members from receiving negotiated compensation.

I have a further concern with the portions of the proposed subdivisions (23(e)(5)(B)(ii) and 23(e)(5)(C)) that deal with appeals, namely that district court approval is required for dismissing or abandoning an appeal that has already been docketed by a circuit court. Specifically, proposed subdivision 23(e)(5)(C) indicates that once an appeal is pending, Rule 62.1 dictates whether and how the district court may hear a motion, including, presumably, one brought by an objector to voluntarily dismiss or abandon an appeal. But Rule 62.1 only provides for circumstances in which a district court can issue an "indicative ruling" during the pendency of an appeal, which, as the Committee recognized in 2009, is typically the procedure followed when a Rule 60(b) motion to vacate a judgment pending on appeal is filed. *See Fed. R. Civ. P. 62.1 Advisory Committee's note (2009)*. At that time, the Committee also recognized that it "does not attempt to define the circumstances in which an appeal limits or defeats the district



court's authority to act in the face of a pending appeal.” *Id.* However, it seems to me that by *requiring* district court approval of attempts to dismiss a pending appeal in some circumstances, proposed subdivision 23(e)(5)(B)(ii) could be interpreted to improperly curtail the authority of appellate courts to control their own dockets, and directing courts and litigants to Rule 62.1 does not cure this. Indeed, as Rule 62.1 only allows for “indicative rulings” that inform appeals courts what the trial judge would do *if* the appeals court were to remand to the district court, what would happen if the appeals court elected *not* to remand? It stands to reason that this provision could prevent a frivolous appeal from being resolved efficiently, even if all parties favored the outcome.

The Supreme Court has held that “the filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control *over those aspects of the case involved in the appeal.*” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (emphasis added). Indeed, once an appeal has been filed, the trial court “may not finally adjudicate substantial rights directly involved in the appeal.” *Newton v. Consol. Gas Co. of New York*, 258 U.S. 165, 177 (1922). Several appellate courts, in interpreting *Griggs*, have listed the narrow kinds of action that district courts can take despite the pendency of an appeal:

- “We have recognized limited exceptions to the general rule that permit district courts to take subsequent action on matters that are collateral to the appeal, or to take action that aids the appellate process. As our case law amply demonstrates, however, these exceptions are *confined to a narrow class of actions that promote judicial efficiency and facilitate the division of labor between trial and appellate courts.*” *Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) (citations omitted) (emphasis added).
- “Exceptions to the rule in *Griggs* allow the district court to retain jurisdiction to issue orders staying, modifying, or granting injunctive relief, to review applications for attorney's fees, to direct the filing of supersedeas bonds, to correct clerical mistakes, and to issue orders affecting the record on appeal and the granting or vacating of bail.” *Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros.*, 198 F.3d 391, 394 (3d Cir. 1999).
- “The qualification ‘involved in the appeal’ is essential—it is why the district court may award costs and attorneys’ fees after the losing side has filed an appeal on the merits, why the court may conduct proceedings looking toward permanent injunctive relief while an appeal about the grant or denial of a preliminary injunction is pending.” *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997).
- “The district court retains only the authority to act in aid of the appeal, to correct clerical mistakes or to aid in the execution of a judgment that has not been superseded.” *Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 895 F.2d 711, 713 (11th Cir. 1990).



- “[O]nce a notice of appeal has been filed, a district court may take actions only ‘in aid of the appeal or to correct clerical errors.’” *Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. E. Air Lines, Inc.*, 847 F.2d 1014, 1017 (2d Cir. 1988) (citation omitted), *cert. denied*, 451 U.S. 908, (1981).

In short, no matter the construct, there are very limited circumstances in which a trial court retains power after an appeal has been filed. In light of the statements made by the appeals courts interpreting *Griggs*, it stands to reason that requiring district court approval of a decision to voluntarily dismiss an appeal runs afoul of the mandate in *Griggs* that, once the appeal is filed, the appeals court has “control over those aspects of the case involved in the appeal.” 459 U.S. at 58. Of course, it seems that there are few aspects of an appeal more central than a litigant’s decision not to pursue it. In fact, several appeals courts have also held that once the appeal has been filed, the district court has no power to dismiss an appeal:

- “Although a district court retains jurisdiction over issues that are ancillary to those under consideration in the appellate court, the district court cannot dismiss or strike a notice of appeal.” *United States v. Real Prop. Located at 886 N. Hamilton St. Clair Cty., Marissa, Ill.*, 34 F. App’x 235, 237 (7th Cir. 2002) (citations omitted).
- “[T]he district court directed the defendants’ notice of appeal to be dismissed. In so doing, the district court exceeded its authority, and this attempted ‘dismissal’ in no way affects our jurisdiction in this appeal.” *Dickerson v. McClellan*, 37 F.3d 251, 252 (6th Cir. 1994) (citation omitted).
- “[T]he district court in this case was without jurisdiction to dismiss this case and that its attempt to do so had no force or effect.” *Showtime/The Movie Channel, Inc.*, 895 F.2d at 713.
- “A district court cannot dismiss an appeal, and it follows that it cannot condition an appeal on the appellant’s prosecuting it vigorously in the court of appeals.” *Sperow v. Melvin*, 153 F.3d 780, 781 (7th Cir. 1998) (citations omitted).
- “The district court entered an order dismissing the notice of appeal. This it was without jurisdiction to do.” *Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983)

Although this is a slightly different circumstance, I find subdivision 23(e)(5)(B)(ii)’s *requirement* of district court involvement despite the pendency of an appeal to be both confusing and contradictory to traditional notions of appellate jurisdiction.<sup>4</sup>

Because of the procedural morass that subdivisions 23(e)(5)(B)(ii) and 23(e)(5)(C) could cause, I think that at a minimum that Committee should consider clarifying the proposed rules in order to explain exactly how these new provisions impact the traditional jurisdiction of courts of

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<sup>4</sup> It bears noting that the Advisory Committee on Appellate Rules has recently issued proposed rule changes, and none of them touch on the circumstances at issue here.



appeals and district courts. However, since, as discussed above, I also believe that these proposed subdivisions are unlikely to either (1) dissuade the filing of bad faith objections or (2) dissuade bad faith objectors from seeking payment in exchange for withdrawing or otherwise foregoing an objection or appeal of settlement approval, I believe the Committee should consider rescinding proposed subdivisions 23(e)(5)(B) and 23(e)(5)(C) in their entirety and. Instead, I propose replacing them with a subdivision that might more effectively help to combat bad faith objections. The Committee should adopt language equipping parties to request that district courts make a finding that an objections has been brought in bad faith, such as the following, which I propose be included somewhere within Rule 23(e):

*Request for Finding That Objection Was Filed in Bad Faith.* At the request of any party to consider whether an objection has been filed in bad faith, the court may consider all surrounding facts and circumstances—including whether the objector complied with Rule 23(e)(5)(A), whether the objector complied with all noticed requirements for the submission of an objection, whether grounds for the objection have legal support, conduct by the objector or objector’s counsel in the instant case, and previous findings that the objector or objector’s counsel has pursued an objection in bad faith—and, if it deems it appropriate, make a finding that an objection was brought in bad faith.

A finding, where appropriate, that a professional objector acted in “bad faith” would be helpful at the appellate level, because it would increase the likelihood that appellate courts could entertain a motion summary affirmance (or summary dismissal, or similar summary action). Such motions allow for frivolous appeals to be disposed at a procedurally early stage, which would result in class members being compensated in a matter of months rather than having to wait for a years-long appeal to be resolved. My firm successfully won summary affirmance against a professional objector in the Ninth Circuit in *Dennings v. Clearwire Corp.* (No. 13-35038), which resolved a case efficiently and without having to consider paying off a professional objector. If the Committee enacted procedures that allowed for “bad faith objection” findings at the district court level, this could promote efficiency at the appellate level and allow class plaintiffs to not fall victim to the extortionate tactics of professional objectors, which seems to be the Committee’s desire.

Thank you very much for your consideration, and I look forward to appearing before the Advisory Committee next week.

Sincerely,

Hassan Zavareei