PUBLIC HEARING ON

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

U. S. District Courthouse
Phoenix, Arizona
January 4, 2017

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

U. S. District Courthouse
Phoenix, Arizona
January 4, 2017 – 9:00 A.M.

	Witness Name	Organization	Testimony/Comments Received
1.	Jennie Lee Anderson	Andrus Anderson LLP	**Tab 1** Testimony outline dated 12/20/2016
2.	Thomas Sobol	Hagens Berman Sobol Shapiro LLP	**Tab 7** Testimony dated 1/4/2017
3.	Jocelyn D. Larkin	Impact Fund	**Tab 2** Comments dated 3/25/2015 and 9/4/2015
4.	Michael R. Nelson	Sutherland Asbill & Brennan	No testimony or comment received
5.	Annika K. Martin	Lieff Cabraser Heimann & Bernstein	No testimony or comment received
6.	Todd B. Hilsee	The Hilsee Group LLC	**Tab 3** Testimony outline dated 12/20/2016; Comment dated 10/31/2016, along with attachments of Comments dated 3/23/16 and 5/24/2016
7.	Paul Bland	Public Justice	**Tab 4** Comments dated 3/27/2015 and 9/8/2015
8.	James E. Weatherholtz	Womble Carlyle Sandridge & Rice, LLP	**Tab 5** Testimony Outline dated 12/30/2016; Comment dated 9/10/2015
9	Scott Burnett Smith	Bradley Arant Boult Cummings LLP	**Tab 6** Testimony outline dated 12/19/2016
10.	Patrick J. Paul	Snell & Wilmer LLP	**See Tab 5**

TAB 1

TESTIMONY OUTLINE OF

JENNIE LEE ANDERSON, ANDRUS ANDERSON LLP

Proposed Rule 23 Testimony for Jennie Lee Anderon
Jennie Anderson
to:
rebecca_womeldorf
12/20/2016 04:21 PM
Cc:
frances_skillman
Hide Details
From: Jennie Anderson <jennie.anderson@andrusanderson.com>
To: rebecca_womeldorf@ao.uscourts.gov
Cc: frances_skillman@ao.uscourts.gov

Dear Ms. Womeldorf,

Below is a summary of the anticipated focus of my testimony at the January 4, 2017 hearing. Thank you very much for your attention.

Proposed RULE 23 TESTIMONY –Jennie Lee Anderson

I. Amendments to Notice Provisions in 23(c)(2)(B)

- We support the committee's proposal. Specifically, support the allowance of mixed notice (both certified mail and electronic). In our experience, mail notice is not the only vehicle available, and what type of notice is appropriate depends on the circumstances.

II. Amendments to 23(e)(5) Addressing Objectors

- We applaud the committee for trying to address the problem because it affects parties and counsel on either side of the "v". We believe that it is important to provide balance because the right and ability to object when appropriate to ensure fairness is critical. However, the issues created by serial objectors who bog down good settlements highlights why reform here is needed. We believe that the court approval provisions will help, but it may not be enough to fully remedy the issue. But that doesn't mean this proposal isn't worth trying. As such, it is important for the Committee to make sure that the rules are working as intended, and anticipate that future adjustments and/or coordination with the Appellate Rules Committee may be necessary.

Sincerely,

Jennie Lee Anderson
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TAB 2

COMMENTS OF

JOCELYN D. LARKIN, IMPACT FUND

IMPACT FUND

125 University Avenue, Suite 102, Berkeley, CA 94710-1616
Tel 510.845.3473 | Fax 510.845.3654 | impactfund@impactfund.org | www.impactfund.org

March 25, 2015

Electronic Delivery to rules_support@ao.uscourts.gov

Committee on Rules of Practice and Procedure
Thurgood Marshall Building
Administrative Office of the United States Courts
One Columbus Circle NE
Washington D.C. 20544

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

The purpose of this letter is to offer a number of suggestions in connection with the Committee's upcoming review of Rule 23.

Rule 23 is of keen interest to the Impact Fund because our mission is to support firms and organizations that bring public interest class action cases throughout the United States. The Impact Fund, a legal non-profit, awards grants to help defray litigation costs and offers training programs and consultation for practitioners involved in complex litigation to advance social justice. The Impact Fund has also served as lead counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws. Through the California State Bar Trust Fund program, the Impact Fund is a designated support center on complex litigation issues for legal services programs throughout California.

The Impact Fund has frequently commented on proposed changes to the Federal Rules of Civil Procedure and participated in the Advisory Committee's public hearings. I was an invited speaker at the Duke Conference in May 2010. The Impact Fund endeavors to represent the perspective of individuals and communities who do not have the resources to litigate in the federal courts on their own behalf and who rely on class action impact cases as their only viable means for redress.

1. NOTICE

Adequate notice is a central pillar of class action jurisprudence and is critical for ensuring that the due process rights of absent class members are protected. The Rules Committee recognized in 2003 that "[i]t is difficult to provide information about most class actions that is both accurate and easily understood" but reminded us of "the need to work unremittingly at the difficult task of communicating with class members."

The 2003 amendment requiring that notice be in "plain, easily understood language" was an important first step. The Federal Judicial Center model class notices and its "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" are also excellent

resources. Some judges do closely review notice language and direct parties to change or improve the quality and readability of notices.

a. Proposal that Notices Be In "An Easily Readable Format"

Unfortunately, these efforts have not been enough. Inscrutable class action notices remain the norm. Even apart from the unnecessary legalese, notices often use very small font and leave only narrow margins with very little white space. Postcard notices, which at least have the virtue of brevity, often suffer these same formatting defects. Even before reading (or trying to read) a word, the reader is deterred by the small dense text and uninviting visual presentation.

The costs of poor notice are, of course, significant. Class members do not understand nor exercise their rights, resulting in low claim rates. Objections based on a misunderstanding of the terms of the settlement waste judicial resources. Misperceptions and cynicism about class actions follow.

Accordingly, we propose that Rule 23(c)(2)(B) be amended to read:

> The notice must **be in an easily readable format and** clearly and concisely state in plain, easily understood language. . .

b. Proposal to Expand Required Notice Information

Recent research that the Impact Fund commissioned suggests that even a notice written in plain English can still miss the mark. Across economic and educational levels, the participants in our focus groups understood very little about how class actions work. They did not understand how cases start, the oversight role of the court, the certification process, or how individual settlement shares are calculated. They did not understand the role of lawyers, how their fees are calculated, or that attorneys' fees are subject to court review and approval. When asked about their primary information sources concerning class actions, virtually *all* listed class notices – "the postcard."

While none of this is new to seasoned notice professionals, our research suggests that judges and lawyers are assuming a *baseline* understanding of class actions among putative class members that may not accord with reality. Without a grasp of these basics, class members are unlikely to understand the seven enumerated topics included in a Rule 23(c)(2)(B) notice. The FJC model notices provide useful language that explains these concepts, but none of this information is required by the rule. Indeed, these concepts are typically consigned to a lengthy (and often circular) list of "Defined Terms," without any coherent narrative or context.

Accordingly, we propose that Rule 23(b)(2)(B) include a new romanette (i), with subsequent items re-numbered:

> **(i) an explanation of the class action procedure, including the role of the court, the named plaintiffs and class counsel;**

While this additional information is no panacea, it will serve to remind counsel about drafting the notice with the actual reader in mind, and it will provide class members with a clearer understanding of their rights.

c. Use Notice Checklist to Develop Practitioner Protocol

As noted above, the "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" is an excellent tool but something that few practitioners use or even know about. While not a rule change proposal, we would suggest that a practitioner protocol, like the Northern District of California's e-discovery protocol, be developed to guide the parties' notice negotiations long before the draft notices reach the district court for review.

d. Use of Electronic Notice Alternatives Should be Explored But With Recognition of the Continuing Digital Divide

The Impact Fund supports the Committee's plan to evaluate the use of electronic methods for dissemination of class notice. This evaluation should, however, recognize that large segments of the U.S. population still do not have access to, or regularly use, the Internet. While those numbers continue to decline, the digital divide persists.

According to a 2014 report from the Census Bureau, one in four U.S. households (25.6%) does not have Internet access at home. www.census.gov/history/pdf/2013computeruse.pdf. Not surprisingly, figures for Internet use are significantly lower for low-income families (48.4% for households making less than $25,000 annually) and those individuals with less than a high school education (43.8%). Rates of Internet use for older Americans (58% of households over 65), Blacks (61%), Hispanics (66%) and persons with disabilities (63.8%) are also lower than the national average. *Id.*

As class actions are often used to address injuries suffered by those who do not have the ability or resources to access the legal system on their own, any rule changes to enhance the use of electronic notice should ensure that these groups will still receive appropriate notice.

e. Notice in Rule 23(b)(2) Cases – The Current Standard Remains Appropriate

It has been suggested that the Committee might want to revisit whether notice should be mandatory for cases certified under Rule 23(b)(2). In 2003, the Committee vigorously debated the issue. Because monetary claims (i.e. Title VII back pay claims) were being certified under 23(b)(2) as incidental to injunctive relief claims, a question was raised whether due process required notice and opt-out rights. Civil rights advocates (including the Impact Fund) were concerned, however, that imposing the costs of first class notice in (b)(2) cases might prevent meritorious civil rights claims from ever being brought. The Rules Committee ultimately added language to the rule permitting—but not requiring—a district court to direct "appropriate notice to the class."

In our view, there is no reason to revisit that debate because the Supreme Court's decision in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), has largely mooted the question.

In *Dukes,* the Court held that Title VII class actions seeking back pay remedies should be considered for certification under Rule 23(b)(3). *Id.* at 2559-2561. The ruling had the effect of significantly narrowing the types of cases that may be certified under Rule 23(b)(2). Since *Dukes*, Rule 23(b)(2) certification has been used, almost exclusively, for purely injunctive relief cases seeking systemic institutional reform. The remedies sought in these cases—on behalf of the incarcerated, persons with developmental disabilities, and children in foster care, among other vulnerable groups—typically are not personal to the class members, but rather seek to enjoin an illegal system, practice or regulation.[1] Resolution of these cases generally does not impair the ability of the individual class members to seek individual, non-systemic remedies, significantly diminishing the argument for requiring first class notice in all (b)(2) cases. The current rule provides courts with broad and sufficient latitude to provide notice appropriate to the case.

2. CY PRES

Federal law has long recognized the use of the *cy pres* remedy as an appropriate means to dispose of unclaimed funds in class action settlements. The American Law Institute's Principles of Aggregate Litigation similarly endorsed the use of a *cy pres* remedy. The alternative—a reversion to the defendant of unclaimed funds—undermines the deterrent purpose of the litigation, and, particularly in employment cases, creates a strong incentive for the defendant to actively deter the filing of claims by vulnerable employees.

Despite this, the propriety of *cy pres* has been challenged over the past several years by professional objectors, and at least one academic. But contrary to the suggestion of some critics, *cy pres* distributions are not random gifts bestowed on the pet charities of the parties or the judge. Instead, *cy pres* funds are providing, in many cases, a vital source of funding to legal services programs across the country. In 2014, 38 California State Bar-funded legal services programs received a total of $7.9 million, to provide a range of legal services to the more than 8 million Californians who qualify for legal aid. This source of funding is considered so important to filling the state's "justice gap" that the California State Bar has established a *cy pres*

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[1] *See e.g.*, *Reid v. Donelan*, 2014 WL 545144 (D. Mass. Feb. 10, 2014) (certifying a class of non-citizens who are or will be held in immigration detention in Massachusetts for over sixth months without an individualized bond hearing); *Hernandez v. County of Monterey*, No. 13-02354 (N.D. Cal. January 29, 2015) (certifiying a class of plaintiffs challenging the conditions at the Monterey County jail, as well as a subclass of inmates with disabilities); *DL v. District of Columbia*, 2013 WL 6913117, at *17 (D.D.C. Nov. 8, 2013) (challenging systemic failures in district's special education system; four sub-classes certified); *Kenneth R. ex rel. Tri-Cnty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 271 (D.N.H. 2013) (certification of class challenging the institutionalization of people with serious mental illnesses); *Toney-Dick v. Doar*, 2013 WL 5295221, at *13 (S.D.N.Y. Sept. 16, 2013) (class of indigent, disabled New Yorkers denied benefits in the aftermath of Hurricane Sandy); *Connor B., ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 36 (D. Mass. 2011) (class of children challenging systemic deficiencies in the state foster care system).

committee to provide resources to practitioners who want to include *cy pres* provisions in their class action settlements. www.caforjustice.org/about/cypres. Thus, in this era of ever-declining court budgets, *cy pres* awards are helping to ensure access to justice for those who cannot afford to hire a lawyer to protect their rights.

In recent years, federal courts have developed useful parameters for how and when the *cy pres* remedy can be used in a class action settlement. We believe that a rule that memorializes these standards would serve to guide parties and courts, and deter unnecessary objections.

Proposal for *Cy Pres* Language to be Added to Rule 23

New Rule 23(e)(3):

(3) A class action settlement may provide for a *cy pres* distribution for all or part of the class fund in appropriate circumstances, including when the funds remaining after distribution are too small to justify the cost of a further distribution, or when a segment of the class members cannot be located. In determining the propriety of a *cy pres* distribution, the court

(a) must consider:

1. **whether, in lieu of a *cy pres* distribution, distributing the funds directly to class members in amounts consistent with their damages would be feasible and administratively practicable;**

2. **whether the mission of the proposed *cy pres* recipient(s) is consistent with the purpose of the litigation and the underlying legal claims;**

3. **whether the location or geographic service area of the proposed *cy pres* recipient(s) is consistent with that of the class, or the portion of the class that cannot be located; and**

4. **whether the funds, once distributed to the *cy pres* recipient(s), will be free of any control by the defendant.**

(b) may consider any other matter pertinent to ensuring that the cy pres distribution is appropriate.

Thank you for the opportunity to provide our suggestions and views to the Committee. We would be pleased to discuss them further.

Yours very truly,

Jocelyn D. Larkin
Executive Director

IMPACT FUND

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September 4, 2015

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

The purpose of this letter is to provide some initial comments on several of the rule amendment sketches in advance of the September 11 Mini-Conference on Rule 23 Issues. The Impact Fund previously submitted comments and proposed rule changes to the Committee on March 25, 2015, and looks forward to participating at the conference next week.

FRONT-LOADING PROPOSAL AND CLASS NOTICE

The list of items for disclosure is, with a few exceptions, consistent with the evidentiary presentation that good practitioners already submit to courts when requesting preliminary approval of a settlement and notice plan. Enumerating these categories might provide useful guidance for the bench and bar. We would quibble with a few items on the list (e.g. a description of every document produced, a stack of insurance policies). We also question the mandatory nature of all sixteen items, because some will not be available, will legitimately be confidential, or will be inapplicable to the particular case. That problem could be solved with language allowing for "good cause" or "where relevant" exceptions.

While this bevy of information may be helpful for judges in making the fairness determination, we do not think that the additional information is at all useful to class members, except perhaps to the most sophisticated objectors. As noted in our March 25, 2015 letter, the rule presumes *vastly more* understanding and knowledge of class actions on the part of unnamed class members than conforms with reality. What would a class member make of information that an insurance company is defending under a reservation of rights, that forty requests for admission were served, or that the anticipated "take-up" rate is 32%? If the Committee wants to help class members better understand the process and proposed settlement, then the rule needs much stronger requirements about simple and easily readable class notices. If the "front-loaded" information is to be made available to class members on a website, it similarly must be presented

in a user-friendly fashion suited to the audience. This presentation is not the same as what a federal judge needs or wants.

CY PRES PROPOSAL

The Impact Fund proposed a *cy pres* rule in our March 25, 2015 comments and we are pleased that the Committee is considering one. A few comments:

- Reversion – The Committee Note raises the possibility of preserving the option of funds reverting to the defendant in lieu of *cy pres* distribution. We strongly urge the Committee *not* to adopt any language like this in the rule or the comment, because it will increase the opportunities for collusion and abuse. In the employment context, a reversion creates an incentive for an employer to pressure vulnerable class members not to submit claims. In other types of cases, the prospect of a reversion gives defendants a motive for negotiating onerous claim-filing requirements. Professor Rubenstein and the FJC have both highlighted this factor (i.e. cumbersome claims procedure with reversion) as a "red flag" indicating a potentially abusive class settlement. W. Rubenstein, NEWBERG ON CLASS ACTIONS, §13.58 (5TH Ed. 2014); Manual for Complex Litigation, Fourth, §21.61. When the Committee is working hard to *reduce* the incidents of collusive settlements, it is counterproductive to re-open one of the most obvious mechanisms for abusive agreements.

- Conflict of Interest Unaddressed – The small, but vocal, group of *cy pres* opponents most often cite the fear that the money will go to the "pet charity" of the party, judges or lawyers. The Committee's proposal does not address this concern.

- *Cy Pres* in "Rare" Cases – The note suggests that *cy pres* will only be necessary in "rare" cases, when the money cannot be efficiently distributed to class members. We would suggest, and professional claims administrators can confirm, that there is a residual in *every* monetary class settlement. With each successive distribution to class members, fewer will bother to cash the checks in diminishing amounts. An estimated reserve is held back to pay the claims administrator to ensure that taxes are paid and the settlement account is properly closed once distributed. As a result, the Impact Fund receives *cy pres* checks in amounts as small as a few hundred dollars, reflecting a highly successful claims distribution. Thus, the note should correctly reflect that residuals (of varying amounts) will frequently require disposal.

- Fallback Recipient – Unlike the ALI principles, the rule sketch does not address how to select a recipient in the event that there is not one "whose interests reasonably approximate those being pursued by the class." Numerous courts have recognized that organizations that provide access to justice for low-income people are appropriate beneficiaries of *cy pres* funds. See William Boies & Latonia Haney Keith, Class Action Settlement Residue and *Cy Pres* Awards: Emerging Problems and Practical Solutions, 21 Va. J. Soc. Pol'y & L. 267, 290 n.11 (2014).

- "If Authorized by Law" – This language creates uncertainty and invites further litigation.

- Paying Untimely Claims – While superficially appealing, we do not think this is a helpful addition. There are rarely enough untimely claims to significantly reduce the residual, and it seems unwise to have open-ended deadlines in circumstances when the defendant is paying for finality.

CLASS DEFINITION AND ASCERTAINABILITY

We have two concerns with the sketch language proposed here. *First*, the proposed language seems to adopt the much-criticized *Carrera* standard and impose a new certification requirement that class members be identifiable. While the Committee note provides some useful explication, the sketch language can be read to impose a more draconian standard that will undermine the use of class actions in small value consumer cases.

Second, ascertainability is not a requirement for certification of a Rule 23(b)(2) class action. *Shelton v. Bledsoe,* 775 F.3d 554 (3d Cir. 2015). As the Third Circuit recently explained, the focus of a (b)(2) class is on "the nature of the remedy sought . . . a remedy obtained by one member will naturally affect the others." *Id.* at 561. Consequently, "the identities of individual class members are less critical in a (b)(2) action than in a (b)(3) action." *Id.* The *Shelton* court cited to the language of the Advisory Committee Note to Rule 23, which describes illustrative examples of Rule 23(b)(2) cases as "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration.*" *Id.*, citing Fed. R. Civ. P. 23 advisory committee's note (1966) (emphasis added). The *Shelton* court only required a class definition that was a "readily discernible, clear, and precise statement of the parameters defining the class." *Id.* at 563. The qualifying language in the sketch, "when necessary," does not sufficiently convey that, for an entire class of cases, ascertainability is never a requirement

ISSUE CLASSES

Persuasive arguments can be made on both sides of the question of whether a rule change is necessary to address issue classes. If a rule is adopted, we would advocate for Alternative 2 to ensure that the mechanism remains available for use in Rule 23(b)(2) cases, as well as Rule 23(b)(3) cases. Injunctive relief cases can involve multiple discrete legal questions that may benefit from the availability of the issue certification mechanism to facilitate resolution.

RULE 68 OFFERS

Recent and rapid development in the case law, coupled with the pending Supreme Court argument in *Gomez v. Campbell-Ewald Co.*, 135 S. Ct. 2311 (2015), counsel against expending much time on a potential rule change here. That being said, the first proposed sketch is preferable as it is more comprehensive.

Thank you for the opportunity to provide some views to the Committee in advance of the Mini-Conference.

Yours very truly,

Jocelyn D. Larkin
Executive Director

TAB 3

TESTIMONY OUTLINE AND COMMENTS OF

TODD B. HILSEE, THE HILSEE GROUP LLC

Todd B. Hilsee

Outline of Testimony Before the Advisory Committee on Civil Rules Regarding Proposed Changes to Federal Rule of Civil Procedure 23(c)(2)(B) and Accompanying Committee Notes

January 4, 2017, Phoenix, AZ

Conclusion: **Rule 23(c)(2)(B) should not be changed to add the sentence specifying "electronic means and other appropriate means." The Committee notes stating that such means "may be more reliable" than first-class mail are not accurate, and should not be adopted.**

INTRODUCTION

The following outline highlights my testimony. Each of the points below are supported with data, exhibits, and sources, all detailed and referenced in my various written comments:[1]

a. Troubling Class Action Notice Trends are Impacting Potential Rule 23 Changes, Todd B. Hilsee, March 23, 2016, ID: USC-RULES-CV-2016-0004-0032 (posted 8/12/16).

b. Update: Data Does Not Support Premise for Relaxing the Rule 23(C)(2) Individual Notice Requirement, Todd B. Hilsee, May 24, 2016, ID: USC-RULES-CV-2016-0004-0034 (posted 8/12/16).

c. Comments on Rule 23(c)(2)(B): The Proposed Sentence and Accompanying Notes Regarding Electronic Notice Should Not Be Adopted, Todd B. Hilsee, Oct. 31, 2106, ID: USC-RULES-CV-2016-0004-0043 (posted 11/1/16).

d. Further written comments to be submitted prior to Feb. 15, 2017, regarding:

   i. A Nationwide Survey commissioned by The Hilsee Group LLC, finding first-class mailings more reliable and expected for class action notice than electronic means, *even among online adults who use email.*

   ii. Recent Federal Trade Commission "6(b) Orders" to claims administrators compelling production of response data to class action notices.

   iii. Study underway by independent and renowned national digital media expert on overstated electronic advertising reach and abuse in class action notice campaigns.

[1] https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=USC-RULES-CV-2016-0004.

TESTIMONY OUTLINE

1. Rule 23(c)(2)(B) need not change; it currently requires individual notice and does not limit courts as to the method. If the committee note accompanying proposed Rule 23(c)(2)(B) is correct ("*many courts have read the rule to require notice by first class mail in every case*"), then the only reason for the new sentence in Rule 23(c)(2)(B) ("*The notice may be by United States mail, electronic means, and other appropriate means*"), is to encourage means other than first-class mail—even when addresses are reasonably identifiable. The rule should not steer courts away from postal mail.

2. There is no support for the Committee note that electronic means "*are more reliable and important to many*" relative to first-class mail. To the contrary, available data (detailed in written comments) shows first-class mail to be more effective than electronic means. Properly-produced first-class mail produces more claims than electronic means, and claims administrator literature states this. Now, a new Nationwide Study (95% confidence interval/1.8% margin of error) shows that most online adults—even millennials—find first-class mail more reliable than electronic means for class action notice, and overwhelming percentages expect to receive a class action notice by first-class mail when their address is identifiable.

3. An email sent to an individual is an individualized communication, and there is no controversy about this which needs clarification. The current rule allows notice by email, as it does other forms of individual notices. Under the current rule, Courts approve many forms of notice when a postal mail option is not available. The proposed rule and notes would effectively encourage less effective email in lieu of first-class mail.

4. Beyond encouraging bulk-sent email (7-24% opened) in lieu of available physical mail (some 78% read or scanned), the rule allows internet banner ads to be construed as more reliable than individual first-class mailings. Banner ads are not individualized; they are fleeting headlines that often appear for only one second. Many are not even viewable. Even a banner ad that is actually viewed (15-20 words) is not a "notice." Only people who click—and almost no one does (0.04%)—get Rule 23-compliant notice.

5. False information about the supposed low cost of electronic notice has been promulgated by un-trained vendors seeking to win low bids. Internet advertising is rife for fraud, and the audiences are often overstated. Many "exposures" are fake, or created by "bots." Congress stepped in this summer to request answers from the FTC on rampant digital advertising audience fraud. In truth, digital ads require enormous sums to capture attention and garner response—monies that a reverse-auction notice planning system will not allow.

6. Proponents argue that the proposed rule-change simply reflects modern technology. But use of the internet does not mean we pay attention to or click on the ads. And unlike commercial marketing, where general awareness of a brand provides value, un-

clicked banners do not communicate legal rights. Our use of email does not mean we open unsolicited emails from unknown bulk senders. Many go to trash or SPAM without our knowing it. When electronic means are used for notice, Courts are routinely not informed where the banners appear, nor given proof that they actually have appeared, nor told how few people click banners or open emails—even though easily-known to the administrator. This is a danger to the transparent fairness of class actions.

7. This rule change will foster less expensive notice, but it will not foster more effective notice. There is no "high cost notice" problem that needs rule-making attention. Weak notice is being approved and claims are plummeting. Electronic notice in lieu of available mailings are already causing low response, and class action credibility is at risk.

8. Instead of this rule change, I encourage the Committee to address the systemic problems driving weak notice. Even in safety-related defect cases, the proposed rule language will result in mailings rarely being utilized, *because* it costs more, *because* it results in too many claims for a settling defendants' liking, *because* dis-incentivized class counsel will go along, *because* untrained vendors sign off on weak plans just to be chosen, and *because* a culture of "blackballing" limits outside critique. Courts are left in the dark and wondering why so many settlements yield so few claims. Sadly, courts are often erroneously told: "We tried our best but the Class *chose* not to respond."

9. The class action is a valuable social justice tool that is too important to lose. The opt-out class action is "backwards intuitive" for class members, requiring careful communication. The average person cannot imagine that not clicking an internet banner ad, nor opening an email from a unknown sender, can possibly affect them. Yet in opt-out class actions, inaction equates to consent—consent to being bound to an outcome in a faraway courtroom; consent to losing rights to pursue a claim or receive compensation for a wrong. When inaction is by choice, pursuant to a fair opportunity, it is appropriate to infer *informed* consent. But when inaction results from deliberately weakened notice—falsely held out to courts as being the "best"—the opt-out class action will be a sham. Individual notice is a bulwark that should not be undermined.

10. Beyond all else, the Advisory Committee should hold off on any change without knowing the results of recent actions by the Federal Trade Commission. On Nov. 14, 2016, in the absence of publicly available claims data informing the ongoing conversation about low class action claims rates, the FTC issued Orders under Section 6(b) of the FTC Act to eight large claims administrators compelling the production of data on the effectiveness of various types of class action notice methods. The administrators' responses are not due until January 9, 2017—if such responses are not delayed by class action settling parties' contractual arguments of confidentiality that may have to be resolved in Court. The dates by which any FTC analysis of collected data would be completed, and when any report would be made public, are not known.

THE HILSEE GROUP LLC
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October 31, 2016

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Comments on Rule 23(c)(2)(B)*:*
The proposed sentence and accompanying notes regarding electronic notice should not be adopted.

Dear Members of the Committee:

Since 1992, many courts have recognized me as class action notice expert. I have worked *pro bono* with the Federal Judicial Center (FJC) to develop practice standards, including specifically at the request of the Advisory Committee on Civil Rules.[1] I am an independent notice expert, not a notice vendor or claims administrator involved in today's bidding wars. I have continually performed expert analyses to help courts ensure that notice efforts are the "best practicable," and meet the "desire to inform" standard of Due Process. With my media training and experience in major class action cases, I advise judges and the FJC on the changing media landscape today. My c.v. is attached as **Attachment 1**.

I support the edits to Fed. R. Civ. P. 23 except one new sentence in Rule 23(c)(2)(B): "*The notice may be by United States mail, electronic means or other appropriate means*." This only encourages less effective means in lieu of postal mail. I support the accompanying notes except those that encourage electronic notice over postal mail.[2] Email is less expensive than postal mail, but is not, as the notes state, "more reliable." There is no data to support this *more reliable* notion. More reliable implies more likely to be delivered, opened, read, or responded to, relative to postal mail, none of which would be accurate.

[1] I have collaborated *pro bono* with the Federal Judicial Center on Model Plain Language Notices (2002), Judges' Notice and Claims Process Checklist and Plain Language Guide (2010), and notice content in Managing Class Actions: A Pocket Guide for Judges (2010). My case work (notifying Holocaust Survivors, lead-poisoned children, abused aboriginal children, *etc*.), publications including law review articles, speaking including at law schools, and judicial recognition, can be found at www.hilseegroup.org.

[2] **No change to the rule is required in order to allow notice by email when postal mail is not available.** There is no controversy over whether an email to a person who uses email constitutes an individualized communication, and, when *only* email addresses are known, or where a defendant regularly communicates with a class by email, such means are already used. *Note*: my two letters to the Rule 23 sub-Committee, with citations to supporting data, are attached as **Attachments 2** and **3**.

In fact, data shows the opposite to be true: responses to class action notices sent by postal mail are typically higher than by other means—especially when including a claim form with pre-paid return postage.[3] Thus it is counter to class members' interests to encourage courts to avoid postal mail. Data shows that only 7-24% of bulk emails are opened by recipients.[4] Conversely, U.S. Postal Service data shows that 78% of households either read or scan even the *advertising mail* they receive today;[5] of course, notices are not advertisements, and FJC sample envelope designs ensure that notices are recognized as official and important."

Beyond the proposed rule change and related notes encouraging email over mail, the phrase "electronic means" allows "internet banners"—fleeting 10-20 word headlines purporting to target individuals—to suffice in lieu of a Rule 23-compliant notice mailed to a person. Most banner ads are not even "viewable" as that term is defined, many are actively blocked by users, and studies show much of banner audiences are fake, or are viewed by "robots" not humans.[6] Digital audience fraud is of such concern that two U.S. Senators recently wrote to the Federal Trade Commission about it (*see* **Attachment 4**).[7] Regardless of fraud, most of us go about our internet work trying to avoid the banners which few people pay attention to or trust, let alone click. Statistics show that few banner impressions are clicked by humans (0.04% on average), such that when used in class actions few class members are exposed to an actual notice. The attachments hereto detail these facts with data.

Practically speaking, if this electronic notice rule language is adopted, parties will propose the least expensive means of notice the rule specifies—even though less effective—and not just in "small" cases when postal mail is uneconomical. Because of systemic

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[3] *See* **Attachment** 3, at p.3 and Exh.2., citing data and chart provided to Federal Trade Commission by Analytics, LLC showing typical response to mailed notice and claim form outstrips all other means of notice.

[4] *See* **Attachment 3** at p.2-3 and Exh. 1., citing Direct Marketing Association and MailChimp email readership studies.

[5] *See* 2014 Household Diary Study, United States Postal Service, http://www.prc.gov/docs/93/93171/2014%20USPS%20HDS%20Annual%20Report_Final_V3.pdf, last visited Oct. 27, 2016.

[6] *See* **Attachment 3** at p.2, (citing Media Rating Council definition of a "viewable" banner impression: "*1/2 of the pixels are visible on the screen for a minimum of 1 second")*; See *also* Exh. 4 therein, citing Google data showing 56% of "impressions" are not viewable; *See also* U.S. ad block usage expected to more than double by 2020, Business Insider, May 17, 2016, (citing expectation that 37% of online users will block banner ads by 2020), http://www.businessinsider.com/us-ad-block-usage-expected-to-more-than-double-by-2020-2016-5, last visited Oct. 29, 2016. *See also* **Attachment 3** at p.3 and Exh. 5, citing many reports of a $7+ billion digital ad fraud finding significant percentages of purported audiences are outright fake or are fabricated by "robots," *i.e.,* computer-automated programs referred to as "botnets" or "bots," which mimic human behavior to siphon ad dollars.

[7] Letter from Sens. Schumer and Warner to FTC, July 11, 2016, citing Adrian Neal, Quantifying Online Advertising Fraud: Ad-Click Bots vs. Humans, Jan. 2015, http://oxford-biochron.com/downloads/OxfordBioChron_Quantifying-Online-Advertising-Fraud_Report.pdf: "*According to one study, between 88 and 98 percent of all ad-clicks on major advertising platforms such as Google, Yahoo, LinkedIn, and Facebook in a given seven-day period were not executed by human beings.*"

disincentives (*see* **Attachment 2**), the revised rule will legitimize the avoidance of readily available mailed notice as a condition of any claims-made settlement—*even where public safety risks are involved*. For example, in *Pollard v. Remington,* a case involving 7.5 million allegedly defective rifles, a settlement notice plan relied heavily on internet banner impressions in lieu of mailed notice to warranty card and other databases, resulting in only 2,327 claims (0.031%) for a trigger repair; meaning 99.97% of guns the lawsuit says can fire unintendedly causing injuries or deaths would remain in use, with many owners unaware.[8] Lawyers agree to such low-cost banner-reliant plans, lest a defendant settle with other law firms that *will* agree. Then, when response is low, the lawyers argue that their fees should be based on the "potential" settlement value—irrespective of how little is actually claimed by the class due to the failed notice. Parties and courts have been misled by unqualified vendors who hype banner ads while budgeting much less than would truly be required to reach the audiences they purport to reach, while knowing that fewer claims will result. Unscrupulous vendors do this to undercut experienced professionals, and they expect no serious challenges.[9]

This rule change may *seem* to be a simple "modernization." But 41% of adults age 65 and older do not use the internet, nor do 13% of adults overall.[10] A notice campaign that leaves between one third to one half of senior citizens uninformed by design will be vulnerable to objection and collateral attack. For the rest of us, communicating with friends, family, and business associates by email does not mean we open unsolicited emails from bulk senders. Indeed, data shows we typically do not. Using the internet does not mean we see or click on the "needles" that are the banners within the colossal "haystack" that is the internet. In fact, studies show digital notice plans grossly underperform relative to what courts are promised.[11]

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[8] "*The Court cannot conceive that an owner of an allegedly defective firearm would not seek the remedy being provided pursuant to the Settlement Agreement. Thus, this low response rate demonstrates the notice process has not been effective."* Order Deferring Consideration of Settlement …Cancelling Final Approval Hearing… *Pollard v. Remington*, Case No. 13-00086, W.D. Mo., ECF No. 112, Dec. 8, 2015. *See also* **Attachment 5**, Scott Cohn, CNBC, Expert Blasts Proposed Remington Rifle Settlement, July 31, 2016.

[9] *See* **Attachment 5**, Daniel Fisher, Banner Ads Are a Joke in the Real World, But Not in Class-Action Land, Sept. 15, 2016: "*'[W]hoever can come up with the cheapest bid and put an affidavit in that it meets standards of due process, that firm will be hired,' said Katherine Kinsella, the recently retired founder of Kinsella Media, which specializes in legal notification. 'It is a reverse auction.' … 'You can't critique anybody else's work publicly,' said Kinsella, who in retirement feels more free to speak. 'You're blackballed*.'"

[10] *See* Pew Research Center, Sept. 7, 2016. http://www.pewresearch.org/fact-tank/2016/09/07/some-americans-dont-use-the-internet-who-are-they/, last visited Oct. 29, 2016.

[11] *See* Shannon Wheatman, Ph.D. and Alicia Gehring, Accurately Reporting Notice Results to Courts, Dec. 2015, http://rustconsulting.com/Insights/Insights-All. "[*U]nqualified notice providers are making serious errors in their affidavits and declarations*." (citing notification claimed to reach 70% of class, actually reached 16%). *See also* Jeanne C. Finegan, Law360, Think All Internet Impressions Are The Same? Think Again, March 16, 2016, https://www.hefflerclaims.com/wp-content/uploads/2016/03/Think-All-Internet-Impressions-Are-The-Same-Think-Again.pdf (citing analysis of online reach reported to court as 60% that actually reached 9% of the class).

Changing this rule will save money for lawyers and defendants, but will not be better for class members. Specifying and thus encouraging electronic means would weaken the basis for the opt-out mechanism: Class members are supposed to be bound by their silence and inaction only upon being properly notified. But relying on exposure to low budget electronic notice is a "mere gesture"—the modern equivalent of "fine print in the back pages of the classified section." Notice plans that avoid available mailings and rely on unrealistically low-budget digital means are already prevalent in class action practice. These are causing claims rates to drop precipitously, leading to studies lamenting the futility of class actions and to legislation seeking to gut them (*See Forbes*, Banner Ads are a Joke, **Attachment 5**).

A prominent national class action lawyer once made a gracious comment about my dedication to Due Process during a law school panel,[12] and I have not wavered in my intentions since then. The Advisory Committee itself has had faith in me,[13] and the FJC's resulting notice guidance has improved notice practice, having been cited in scores of expert reports and court decisions.[14] I would not jeopardize any of this trust by raising unfounded cautions. The social justice tool that is the opt out class action is too important to be weakened—but this electronic notice rule change would do just that, leaving many class members unaware but nonetheless bound to outcomes without compensation.

I look forward to testifying in Phoenix on January 4, 2017, and I sincerely hope that my information is of assistance to the Committee in reaching the right result, for the right reasons.

Sincerely,

Todd B. Hilsee
Principal

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[12] Elizabeth J. Cabraser, at Tulane Law School, Feb. 2008: "*Todd Hilsee understands and appreciates the profound implications of notice on due process more than many, many lawyers. ... He is a notice expert; he is a communications expert; but his dedication to the idea of due process through communication transcends his work assignments and his living... He is a low key, personable person; very matter of fact about what he does. Do not be fooled; he is a giant in the field.*"

[13] Judge Lee Rosenthal, Advisory Committee on Civil Rules, Jan. 2002: "*I want to tell you how much we collectively appreciate your working with the Federal Judicial Center to improve the quality of the model notices that they're developing. That's a tremendous contribution and we appreciate that very much...You raised three points that are criteria for good noticing, and I was interested in your thoughts on how the rule itself that we've proposed could better support the creation of those or the insistence on those kinds of notices.*"

[14] Judge Barbara J. Rothstein, Federal Judicial Center, 2010, Preface, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES: "*This pocket guide is designed to help federal judges manage the increased number of class action cases filed in or removed to federal courts as a result of the Class Action Fairness Act of 2005. . . This third edition includes an expanded treatment of the notice and claims processes. . . Todd Hilsee, a class action notices expert with The Hilsee Group, supplied pro bono assistance in improving the sections on notices and on claims processes.*"

ATTACHMENT 1

TODD B. HILSEE C.V

Summary

Todd Bruce Hilsee was the first person judicially recognized as an expert on class action notice in published decisions in the United States and in Canada, *See In re Domestic Air Transp. Litig.*, 141 F.R.D. 534, (N.D. Ga., 1992) and *Wilson v. Servier Canada, Inc.*, 49 C.P.C. (4th) 233, [2000] O.J. No. 3392), among many other judicial citations. Mr. Hilsee's ground-breaking work to establish today's notice standards included Holocaust victims' claims programs as well as international securities, asbestos, human rights, and hurricane victims' matters. Hilsee has been cited favorably more than any other notice expert, and has testified in court more often and more successfully than any other person in the field. Hilsee brought to courts the use of media audience data to quantify the "net reach" of class members, and brought "noticeable" notice designs as well.

Mr. Hilsee was the only notice expert invited to testify before the Advisory Committee on Civil Rules of the Judicial Conference of the United States regarding the 2003 plain language amendment to Federal Rule of Civil Procedure 23. He subsequently collaborated to write and design the illustrative "model" plain language notices for the Federal Judicial Center (FJC), including detailed notices, summary notices and envelopes, now at www.fjc.gov. He collaborated to create the FJC's "Notice and Claims Process Checklist and Guide" and contributed with attribution to the FJC's "Managing Class Action Litigation: A Pocket Guide for Judges."

Mr. Hilsee has authored and co-authored numerous articles on notice and due process, including law review and journal articles such as "*Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*," 18 Georgetown Journal of Legal Ethics 1359 (Fall 2005); and "*Hurricanes, Mobility and Due Process. The 'Desire to Inform' Requirement for Effective Class Notice is Highlighted by Katrina*," 80 Tulane Law Review 1771 (June 2006). Hilsee has lectured and/or been featured in educational DVD's and materials used during many judicial and bar association panels and symposiums, and at law schools including Harvard, Columbia, Temple, Cleveland-Marshall, and Tulane. He has lectured at the FJC's "District Judge Workshops," and served as an editor for the ABA's International Litigation committee.

As a communications professional, he served with Foote, Cone & Belding, the largest U.S. domestic advertising firm, where he was awarded the American Marketing Association's award for effectiveness. He received his B.S. in Marketing from the Pennsylvania State University. Todd can be reached at thilsee@hilseegroup.com.

Judicial Recognition

Judge Lee Rosenthal, *Advisory Committee on Civil Rules of the Judicial Conference of the United States* (Jan. 22, 2002), addressing Mr. Hilsee in a public hearing on proposed changes to Federal Rule of Civil Procedure 23:

> *I want to tell you how much we collectively appreciate your working with the Federal Judicial Center to improve the quality of the model notices that they're developing. That's a tremendous contribution and we appreciate that very much…You raised three points that are criteria for good noticing, and I was interested in your thoughts on how the rule itself that we've proposed could better support the creation of those or the insistence on those kinds of notices . . .*

Judge Barbara J. Rothstein, *Director, Federal Judicial Center,* (2010) Managing Class Action Litigation: A Pocket Guide for Judges. (Preface):

> *This pocket guide is designed to help federal judges manage the increased number of class action cases filed in or removed to federal courts as a result of the Class Action Fairness Act of 2005. . . This third edition includes an expanded treatment of the notice and claims processes. . . Todd Hilsee, a class action notices expert with The Hilsee Group, supplied pro bono assistance in improving the sections on notices and on claims processes.*

Judge Marvin Shoob, *In re Domestic Air Transp. Antitrust Litig.,* 141 F.R.D. 534, 548 (N.D. Ga. 1992):

> *The Court finds Mr. Hilsee's testimony to be credible. Mr. Hilsee's experience is in the advertising industry. It is his job to determine the best way to reach the most people. Mr. Hilsee answered all questions in a forthright and clear manner. Mr. Hilsee performed additional research prior to the evidentiary hearing in response to certain questions that were put to him by defendants at his deposition . . . The Court believes that Mr. Hilsee further enhanced his credibility when he deferred responding to the defendant's deposition questions at a time when he did not have the responsive data available and instead utilized the research facilities normally used in his industry to provide the requested information.*

Mr. Justice Peter Cumming, *Wilson v. Servier Canada, Inc.,*, 49 C.P.C. (4th) 233, [2000] O.J. No. 3392:

> *[A] class-notification expert, Mr. Todd Hilsee, to provide advice and to design an appropriate class action notice plan for this proceeding. Mr. Hilsee's credentials and expertise are impressive. The defendants accepted him as an expert witness. Mr. Hilsee provided evidence through an extensive report by way of affidavit, upon which he had been cross-examined. His report meets the criteria for admissibility as expert evidence. R. v. Lavallee, [1990] 1 S.C.R. 852.*

Judge Elaine E. Bucklo, *Carnegie v. Household International*, (Aug. 28, 2006) No. 98 C 2178 (N.D. Ill.):

> *Class members received notice of the proposed settlement pursuant to an extensive notice program designed and implemented by Todd B. Hilsee… Mr. Hilsee has worked with the Federal Judicial Center to improve the quality of class notice. His work has been praised by numerous federal and state judges.*

Judge Eldon E. Fallon, *Turner v. Murphy, USA, Inc.,* 2007 WL 283431, at *6 (E.D. La.):

> *Mr. Hilsee is a highly regarded expert in class action notice who has extensive experience designing and executing notice programs that have been approved by courts across the country. Furthermore, he has handled notice plans in class action cases affected by Hurricanes Katrina, Rita, and Wilma, see In re High Sulfur Content Gasoline Products Liability Litigation, MDL 1632, p. 15-16 (E.D. La. Sept. 6, 2006) (Findings of Fact and Conclusions of Law in Support of Final Approval of Class Settlement), and has recently published an article on this very subject, see Todd B. Hilsee, Gina M. Intrepido, & Shannon R. Wheatman, Hurricanes, Mobility, and Due Process: The "Desire to Inform" Requirement for Effective Class Notice is Highlighted by Katrina, 80 Tul. L.Rev. 1771 (2006) (detailing obstacles and solutions to providing effective notice after Hurricane Katrina).*

Judge Kirk D. Johnson, ***Zarebski v. Hartford Insurance Company of the Midwest,*** (February 13, 2007) No. CV-2006-409-3 (Cir. Ct. Ark.):

> *Having admitted and reviewed the Affidavit of Todd Hilsee, and received testimony from Mr. Hilsee at the Settlement Approval Hearing concerning the success of the notice campaign, including the fact that written notice reached 91.8% of the potential Class*

Members, the Court finds that it is unnecessary to afford a new opportunity to request exclusion to individual Class Members who had an earlier opportunity to request exclusion but failed to do so. The Court also concludes that the extremely small number of objections to the Stipulation and Proposed Settlement embodied therein supports the Court's decision to not offer a second exclusion window.

Judge William A. Mayhew, ***Nature Guard Cement Roofing Shingles Cases***., (June 29, 2006) J.C.C.P. No. 4215 (Cal. Super. Ct.):

The method for dissemination of notice proposed by class counsel and described by the Declaration of Todd Hilsee … constitute the fairest and best notice practicable under the circumstances of this case, comply with the

Judge Sarah S. Vance, *In re Educ. Testing Serv. PLT 7-12 Test Scoring Litig.*, 447 F.Supp.2d 612, 617 (E.D. La. 2006):

At the fairness hearing, the Court received testimony from the Notice Administrator, Todd Hilsee, who described the forms and procedure used to notify class members of the proposed settlement and their rights with respect to it . . . The Court is satisfied that notice to the class fully complied with the requirements of Rule 23.

Judge Douglas L. Combs, *Morris v. Liberty Mutual Fire Ins. Co.*, (Feb. 22, 2005) No. CJ-03-714 (D. Okla.):

I want the record also to demonstrate that with regard to notice, although my experience – this Court's experience in class actions is much less than the experience of not only counsel for the plaintiffs, counsel for the defendant, but also the expert witness, Mr. Hilsee, I am very impressed that the notice was able to reach – be delivered to 97 ½ percent members of the class. That, to me, is admirable. And I'm also – at the time that this was initially entered, I was concerned about the ability of notice to be understood by a common, nonlawyer person, when we talk about legalese in a court setting. In this particular notice, not only the summary notice but even the long form of the notice were easily understandable, for somebody who could read the English language, to tell them whether or not they had the opportunity to file a claim.

Judge John Speroni, *Avery v. State Farm,* (Feb. 25, 1998) No. 97-L-114 (Ill. Cir. Ct. Williamson Co.):

> *[T]his Court having carefully considered all of the submissions, and reviewed their basis, finds Mr. Hilsee's testimony to be credible. Mr. Hilsee carefully and conservatively testified to the reach of the Plaintiffs' proposed Notice Plan, supporting the reach numbers with verifiable data on publication readership, demographics and the effect that overlap of published notice would have on the reach figure . . . This Court's opinion as to Mr. Hilsee's credibility, and the scientific basis of his opinions is bolstered by the findings of other judges that Mr. Hilsee's testimony is credible.*

Judge John D. Allen, *Desportes v. American General Assurance Co.,* (April 24, 2007) No. SU-04-CV-3637 (Ga. Super. Ct.):

> [T]he Parties submitted the Affidavit of Todd Hilsee, the Court-appointed Notice Administrator and one of the preeminent class action notice experts in North America. After completing the necessary rigorous analysis, including careful consideration of Mr. Hilsee's Affidavit, the Court finds that [the notice] . . .fully satisfied the requirements of the Georgia Rules of Civil Procedure (including Ga. Code Ann. § 9-11-23(c)(2) and (e)), the Georgia and United States Constitutions (including the Due Process Clause), the Rules of the Court, and any other applicable law.

Judge Michael Maloan, *Cox v. Shell Oil,* 1995 WL 775363, at *6, (Tenn. Ch. Ct.):

> *Cox Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert . . . He testified at the Fairness Hearing, and his affidavit was also considered by the Court, as to the operation and outcome of this program.*

Judge Marina Corodemus, *Talalai v. Cooper Tire & Rubber Co.,* (Oct. 30, 2001) No. MID-L-8839-00-MT (N.J. Super. Ct. Middlesex Co.):

> *The parties have crafted a notice program which satisfies due process requirements without reliance on an unreasonably burdensome direct notification process. The parties have retained Todd Hilsee… who has extensive experience designing similar notice programs…The form of the notice is reasonably calculated*

to apprise class members of their rights. The notice program is specifically designed to reach a substantial percentage of the putative settlement class members.

Currie v. McDonald's Rests. of Canada Ltd., 2005 CanLll 3360 (ON C.A.):

The respondents rely upon the evidence of Todd Hilsee, an individual with experience in developing notice programs for class actions. In Hilsee's opinion, the notice to Canadian members of the plaintiff class in Boland was inadequate . . . I am satisfied that it would be substantially unjust to find that the Canadian members of the putative class in Boland had received adequate notice of the proceedings and of their right to opt out . . . I am not persuaded that we should interfere with the motion judge's findings . . . The right to opt out must be made clear and plain to the non-resident class members and I see no basis upon which to disagree with the motion judge's assessment of the notice. Nor would I interfere with the motion judge's finding that the mode of the notice was inadequate.

Judge Jerome E. Lebarre, *Harp v. Qwest Commc'ns* (June 21, 2002) No. 0110-10986 (Ore. Cir. Ct. Multnomah Co.):

So, this agreement is not calculated to communicate to plaintiffs any offer. And in this regard I accept the expert testimony conclusions of Mr. Todd Hilsee. Plaintiffs submitted an expert affidavit of Mr. Hilsee dated May 23 of this year, and Mr. Hilsee opines that the User Guide was deceptive and that there were many alternatives available to clearly communicate these matters….

Judge Dewey C. Whitenton, *Ervin v. Movie Gallery, Inc.,* (Nov. 22, 2002) No. 13007 (Tenn. Ch.):

Based on the evidence submitted and based on the opinions of Todd Hilsee, a well-recognized expert on the distribution of class notices . . . MGA and class counsel have taken substantial and extraordinary efforts to ensure that as many class members as practicable received notice about the settlement. As demonstrated by the affidavit of Todd Hilsee, the effectiveness of the notice campaign and the very high level of penetration to the settlement class were truly remarkable . . . The notice campaign was highly successful and effective, and it more than satisfied the due process and state law requirements for class notice.

Judge Joe E. Griffin, *Beasley v. Hartford Insurance Company of the Midwest,* (June 13, 2006) No. CV-2005-58-1 (Cir. Ct. Ark.):

> *Additionally, the Court was provided with expert testimony from Todd Hilsee at the Settlement Approval Hearing concerning the adequacy of the notice program. Based on the Court's review of the evidence admitted and argument of counsel, the Court finds and concludes that the Individual Notice and the Publication Notice, as disseminated to members of the Settlement Class in accordance with provisions of the Preliminarily Approval Order, was the best notice practicable under the circumstances . . . and the requirements of due process under the Arkansas and United States Constitutions.*

Judge Fred Biery, *McManus v. Fleetwood Enter., Inc.*, (Sept. 30, 2003) No. SA-99-CA-464-F (W.D. Tex.):

> *Based upon the uncontroverted showing Class Counsel have submitted to the Court, the Court finds that the settling parties undertook a thorough notice campaign designed by Todd Hilsee . . . a nationally-recognized expert in this specialized field . . . The Court finds and concludes that the Notice Program as designed and implemented provided the best practicable notice to the members of the Class, and satisfied the requirements of due process.*

Judge Richard G. Stearns, *In re Lupron Marketing and Sales Practice Litig.*, 228 F.R.D. 75, 96 (D. Mass. 2005):

> *With respect to the effectiveness of notice, in the absence of any evidence to the contrary, I accept the testimony of Todd Hilsee that the plan he designed achieved its objective of exposing 80 percent of the members of the consumer class. . .*

Mr. Justice Maurice Cullity, *Parsons/Currie v. McDonald's Rests. of Can.*, (Jan. 13, 2004) 2004 Carswell Ont. 76, 45 C.P.C. (5th) 304, [2004] O.J. No.83:

> *I found Mr. Hilsee's criticisms of the notice plan in Boland to be far more convincing than Mr. Pines' attempts during cross-examination and in his affidavit to justify his failure to conduct a reach and frequency analysis of McDonald's Canadian customers. I find it impossible to avoid a conclusion that, to the extent that the notice plan he provided related to Canadian customers, it had not received more than a perfunctory attention from him. The fact that the information provided to the court was inaccurate and misleading and that no attempt was made to advise the court after*

the circulation error had been discovered might possibly be disregarded if the dissemination of the notice fell within an acceptable range of reasonableness. On the basis of Mr. Hilsee's evidence, as well as the standards applied in class proceedings in this court, I am not able to accept that it did.

Judge Catherine C. Blake, *In re Royal Ahold Securities & "ERISA" Litig.,* (June 16, 2006) MDL-1539 (D. Md.):

In that regard, I would also comment on the notice. The form and scope of the notice in this case, and I'm repeating a little bit what already appeared to me to be evident at the preliminary stage, but the form and scope of the notice has been again remarkable . . . The use of sort of plain language, the targeting of publications and media, the website with the translation into multiple languages, the mailings that have been done, I think you all are to be congratulated, and Mr. Hilsee and Claims Administrator as well.

Judge Paul H. Alvarado, *Microsoft I-V Cases,* (July 6, 2004) J.C.C.P. No. 4106 (Cal. Super. Ct.):

[T]he Court finds the notice program of the proposed Settlement was extensive and appropriate. It complied with all requirements of California law and due process. Designed by an expert in the field of class notice, Todd B. Hilsee, the notice plan alone was expected to reach at least 80% of the estimated 14.7 million class members. (Hilsee Decl. Ex. 3, ¶28). The Settlement notice plan was ultimately more successful than anticipated and it now appears that over 80% of the class was notified of the Settlement.

Judge Denise L. Cote, ***In re SCOR Holding (Switzerland) AG Litig.,*** (October 24, 2007) No. 04-CV-7897 (S.D. NY):

I should say I have not had a case before, that I remember, at least, in which an issue of the extent to which notice would effectively be made outside this country, and that seems to be the principal point of the affidavit of Mr. Hilsee, which is the first exhibit to the October 12 submission, and I've reviewed it. It seems as if it proposes something reasonable in terms of a plan of action to obtain notice that would be consistent with the constitutional requirements of due process so a judgment could be effectively entered in this litigation, including a bar order.

Judge Marina Corodemus, *Talalai v. Cooper Tire & Rubber Co.,* (Sept. 13, 2002) No. L-008830.00 (N.J. Super. Ct. Middlesex Co.):

> *Here, the comprehensive bilingual, English and Spanish, court-approved Notice Plan provided by the terms of the settlement meets due process requirements. The Notice Plan used a variety of methods to reach potential class members. For example, short form notices for print media were place . . .throughout the United States and in major national consumer publications which include the most widely read publications among Cooper Tire owner demographic groups . . . Mr. Hilsee designed the notification plan for the proposed settlement in accordance with this court's Nov. 1, 2001 Order. Mr. Hilsee is . . . well versed in implementing and analyzing the effectiveness of settlement notice plans.*

Judge Lewis A. Kaplan, *In re Parmalat Securities Litig.,* (March 1, 2007) MDL No. 1653-LAK (S.D. N.Y.):

> *The court approves, as to form and content, the Notice and the Publication Notice, attached hereto as Exhibits 1 and 2, respectively, and finds that the mailing and distribution of the Notice and the publication of the Publication Notice in the manner and the form set forth in Paragraph 6 of this Order and in the Affidavit of Todd B. Hilsee meet the requirements of Rule 23 of the Federal Rules of Civil Procedure, the Securities Exchange Act of 1934, as emended by Section 21D(a)(7) of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(7), and due process, and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons and entities entitled thereto.*

Judge Richard J. Shroeder, *St. John v. Am. Home Prods. Corp.,* (Aug. 2, 1999) No. 97-2-06368-4 (Wash. Super. Ct. Spokane Co.):

> *[T]he Court considered the oral argument of counsel together with the documents filed herein, including the Affidavit of Todd B. Hilsee on Notice Plan…The Court finds that plaintiffs' proposed Notice Plan is appropriate and is the best notice practicable under the circumstances by which to apprise absent class members of the pendency of the above-captioned Class Action and their rights respecting that action.*

Judge Carter Holly, *Richison v. Am. Cemwood Corp.,* (Nov. 18, 2003) No. 005532 (Cal. Super. Ct. San Joaquin Co.):

> *The parties undertook an extensive notice campaign designed by a nationally recognized class action notice expert. See generally, Affidavit of Todd B. Hilsee on Completion of Additional Settlement Notice Plan.*

Judge Kirk D. Johnson, ***Sweeten v. American Empire Insurance Co.,*** (August 20, 2007) Cir. Ct. Ark., No. CV-2007-154-3:

> *Let [Mr. Hilsee] be so admitted for the purposes of this hearing, having been previously admitted by the Court and the Court having found his qualifications exemplary in this field.*

Judge Robert Wyatt, ***Gunderson v. F.A. Richard & Associates, Inc.,*** (July 19 2007) Cir. Ct. 14th Jud. D. Ct. La., No. 2004-2417-D:

> *The Court will so accept [Mr. Hilsee as an expert] on issues of the content and dissemination of legal notices, including Class Action Notices and notice campaigns.*

Judge John R. Padova, *Rosenberg v. Academy Collection Service, Inc.* (Dec. 19, 2005) No. 04-CV-5585 (E.D. Pa.):

> *[U]pon consideration of the Memorandum of Law in Support of Plaintiff's Proposed Class Questionnaire and Certification of Todd Hilsee, it is hereby ORDERED that Plaintiff's form of class letter and questionnaire in the form appended hereto is APPROVED. F.R.Civ.P. 23(c).*

Judge Bernard Zimmerman, *Ting v. AT&T,* 182 F.Supp.2d 902, 912-913 (N.D. Cal. 2002) (Hilsee had testified on the importance of wording and notice design features):

> *The phrase 'Important Information' is increasingly associated with junk mail or solicitations . . . From the perspective of affecting a person's legal rights, the most effective communication is generally one that is direct and specific.*

Judge David De Alba, *Ford Explorer Cases*, (Aug. 19, 2005) J.C.C.P. Nos. 4226 & 4270 (Cal. Super. Ct., Sacramento Co.):

> *It is ordered that the Notice of Class Action is approved. It is further ordered that the method of notification proposed by Todd B. Hilsee is approved.*

Judge Louis J. Farina, *Soders v. General Motors Corp.* (Oct. 31, 2003) No. CI-00-04255 (Pa. C.P. Lancaster Co.):

> *In this instance, Plaintiff has solicited the opinion of a notice expert who has provided the Court with extensive information explaining and supporting the Plaintiff's notice plan…After balancing the factors laid out in Rule 1712(a), I find that Plaintiff's publication method is the method most reasonably calculated to inform the class members of the pending action.*

Judge Eldon E. Fallon, *Turner v. Murphy, USA, Inc.*, 2007 WL 283431, at *5 (E.D. La.):

> *Most of the putative class members were displaced following hurricane Katrina . . . With this challenge in mind, the parties prepared a notice plan designed to reach the class members wherever they might reside. The parties retained Todd Hilsee . . . to ensure that adequate notice was given to class members in light of the unique challenges presented in this case.*

Judge Ronald B. Leighton, *Grays Harbor Adventist Christian School v. Carrier Corporation,* (May 29, 2007) No. 05-05437 (W.D. Wash):

> *The Court has considered this motion, the Affidavit of Todd B. Hilsee on Class Certification Notice Plan and the exhibits attached thereto, and the files and records herein. Based on the foregoing, the Court finds Plaintiffs' Motion for Approval of Proposed Form of Notice and Notice Plan is appropriate and should be granted.*

Judge Richard J. Holwell, *In re Vivendi Universal, S.A. Securities Litig.*, 2007 WL 1490466, at *34 (S.D.N.Y.):

> *In response to defendants' manageability concerns, plaintiffs have filed a comprehensive affidavit outlining the effectiveness of its proposed method of providing notice in foreign countries. (See Affidavit of Todd B. Hilsee on Ability to Provide Multi-National Notice to Class Members, Dec. 19, 2005 ("Hilsee Aff.") ¶ 7.) According to this . . . the Court is satisfied that plaintiffs intend to provide individual notice to those class members whose names and addresses are ascertainable, and that plaintiffs' proposed form of publication notice, while complex, will prove both manageable and the best means practicable of providing notice.*

Judge Catherine C. Blake, *In re Royal Ahold Securities & "ERISA" Litig.*, 2006 WL 132080, at *4 (D. Md.):

> *The Court further APPROVES the proposed Notice Plan, as set forth in the Affidavit of Todd B. Hilsee On International Settlement Notice Plan, dated December 19, 2005 (Docket No. 684). The Court finds that the form of Notice, the form of Summary Notice, and the Notice Plan satisfy the requirements of Fed.R.Civ.P. 23, due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all members of the Class.*

Judge John D. Allen, *Carter v. North Central Life Ins. Co.,* (April 24, 2007) No. SU-2006-CV-3764-6 (Ga. Super. Ct.):

> [T]he Parties submitted the Affidavit of Todd Hilsee, the Court-appointed Notice Administrator and one of the pre-eminent class action notice experts in North America. After completing the necessary rigorous analysis, including careful consideration of Mr. Hilsee's Affidavit, the Court finds that . . . The Notices prepared in this matter were couched in plain, easily understood language and were written and designed to the highest communication standards. The Notice Plan effectively reached a substantial percentage of Class Members and delivered noticeable Notices designed to capture Class Members' attention;

Judge Louis J. Farina, *Soders v. General Motors Corp.,* (Oct. 31, 2003) No. CI-00-04255 (Pa. C.P. Lancaster Co.):

> *Plaintiff provided extensive information regarding the reach of their proposed plan. Their notice expert, Todd Hilsee, opined that their plan will reach 84.8% of the class members. Defendant provided the Court with no information regarding the potential reach of their proposed plan . . . There is no doubt that some class members will remain unaware of the litigation, however, on balance, the Plaintiff's plan is likely to reach as many class members as the Defendant's plan at less than half the cost. As such, I approve the Plaintiff's publication based plan.*

Judge Paul H. Alvarado, *Microsoft I-V Cases,* (July 6, 2004) J.C.C.P. No. 4106 (Cal. Super. Ct.):

> *The notification plans concerning the pendency of this class action were devised by a recognized class notice expert, Todd B. Hilsee. Mr. Hilsee devised two separate class certification notice plans*

that were estimated to have reached approximately 80% of California PC owners on each occasion.

Judge Robert E. Payne, *Fisher v. Virginia Electric & Power Co.,* (Feb. 12, 2004) No. 3:02-CV-431 (E.D. Va.):

The expert, Todd B. Hilsee, is found to be reliable and credible.

Judge Sarah S. Vance, *In re Educ. Testing Serv. PLT 7-12 Test Scoring Litig.,* 447 F.Supp.2d 612, 627 (E.D. La. 2006):

At the fairness hearing, class counsel, the Special Master, notice expert Todd Hilsee, and the Court Appointed Disbursing Agent detailed the reasons for requiring claims forms . . . As Todd Hilsee pointed out in his testimony, because plaintiffs had the choice of either individualized damages or an expedited payment, to send the expedited payments with the notice has the potential of encouraging plaintiffs to forego individualized recovery for far less than value, merely by cashing the check. The obvious undesirability of this suggestion gives the unmistakable appearance that the objection was captious. The objection to the claims process for expedited payments is overruled.

Judge Richard G. Stearns, *In re Lupron® Marketing and Sales Practice Litig.,* 228 F.R.D. 75, 96 (D. Mass. 2005):

I have examined the materials that were used to publicize the settlement, and I agree with Hilsee's opinion that they complied in all respects with the "plain, easily understood language" requirement of Rule 23(c). In sum, I find that the notice given meets the requirements of due process.

Judge John R. Padova, Nichols v. SmithKline Beecham Corp., (Apr. 22, 2005) No. 00-CV-6222 (E.D. Pa.):

As required by this Court in its Preliminary Approval Order and as described in extensive detail in the Affidavit of Todd B. Hilsee on Design Implementation and Analysis of Settlement Notice Program…Such notice to members of the Class is hereby determined to be fully in compliance with requirements of Fed. R. Civ. P. 23(e) and due process and is found to be the best notice practicable under the circumstances and to constitute due and sufficient notice to all entities entitled thereto.

Judge Sarah S. Vance, *In re Babcock & Wilcox Co.,* (Aug. 25, 2000) No. 00-0558 (E.D. La.):

> *Furthermore, the Committee has not rebutted the affidavit of Todd Hilsee. . . that the (debtor's notice) plan's reach and frequency methodology is consistent with other asbestos-related notice programs, mass tort bankruptcies, and other significant notice programs…After reviewing debtor's Notice Plan, and the objections raised to it, the Court finds that the plan is reasonably calculated to apprise unknown claimants of their rights and meets the due process requirements set forth in Mullane . . . Accordingly, the Notice Plan is approved.*

Judge Joe E. Griffin, *Beasley v. Hartford Insurance Company of the Midwest,* (June 13, 2006) No. CV-2005-58-1 (Cir. Ct. Ark.):

> *[R]eceived testimony from Mr. Hilsee at the Settlement Approval Hearing concerning the success of the notice campaign, including the fact that written notice reached 97.7% of the potential Class members, the Court finds that it is unnecessary to afford a new opportunity to request exclusion to individual Class Members who had an earlier opportunity to request exclusion, but did not do so. The Court also concludes that the lack of valid objections also supports the Court's decision to not offer a second exclusion window . . . Although the Notice Campaign was highly successful and resulted in actual mailed notice being received by over 400,000 Class Members, only one Class Member attempted to file a purported objection to either the Stipulation or Class Counsels' Application for Fees. The Court finds it significant that out of over 400,000 Class Members who received mailed Notice, there was no opposition to the proposed Settlement or Class Counsels' Application for Fees, other than the single void objection. The lack of opposition by a well-noticed Class strongly supports the fairness, reasonableness and adequacy of the Stipulation and Class Counsels' Application for Fees.*

Judge James R. Williamson, Kline v. The Progressive Corp., (Nov. 14, 2002) No. 01-L-6 (Cir. Ct. Ill. Johnson Co.):

> *The Court has reviewed the Affidavit of Todd B. Hilsee, one of the Court-appointed notice administrators, and finds that it is based on sound analysis. Mr. Hilsee has substantial experience designing and evaluating the effectiveness of notice programs.*

Judge Ross P. LaDart, *Meckstroth v. Toyota Motor Sales USA, Inc.*, (February 7, 2007) No. 583-318 (24th Jud. D. Ct. La.):

> *[U]nless there's any objection, the Court is aware of Mr. Hilsee's reputation. I'm aware of the most recent Tulane Law Review and other publications by you and members of your staff. He's so accepted as an expert as tendered.*

Judge Joseph R. Goodwin, *In re Serzone Products Liability Litig.*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005):

> *As Mr. Hilsee explained in his supplemental affidavit, the adequacy of notice is measured by whether notice reached Class Members and gave them an opportunity to participate, not by actual participation. (Hilsee Supp. Aff. ¶ 6(c)(v), June 8, 2005)...Not one of the objectors support challenges to the adequacy of notice with any kind of evidence; rather, these objections consist of mere arguments and speculation. I have, nevertheless, addressed the main arguments herein, and I have considered all arguments when evaluating the notice in this matter. Accordingly, after considering the full record of evidence and filings before the court, I FIND that notice in this matter comports with the requirements of Due Process under the Fifth Amendment and Federal Rules of Civil Procedure 23(c)(2) and 23(e).*

Judge Kirk D. Johnson, ***Zarebski v. Hartford Insurance Company of the Midwest*,** (February 13, 2007) No. CV-2006-409-3 (Cir. Ct. Ark):

> *Additionally, the court was provided with expert testimony from Todd Hilsee at the Settlement Approval Hearing concerning the adequacy of the notice program . . . Based on the Court's review of the evidence admitted and argument of counsel, the Court finds and concludes that the Class Notice, as disseminated to members of the Settlement Class in accordance with provisions of the Preliminary Approval Order, was the best notice practicable under the circumstances to all members of the Settlement Class.*

Judge Alfred G. Chiantelli, *Williams v. Weyerhaeuser Co.*, (Dec. 22, 2000) No. 995787 (Cal. Super. Ct. San Francisco Co.):

> *The Class Notice complied with this Court's Order, was the best practicable notice, and comports with due process . . . Based upon the uncontroverted proof Class Counsel have submitted to the Court, the Court finds that the settling parties undertook an extensive notice campaign designed by Todd Hilsee . . . a nationally recognized expert in this specialized field.*

Judge Kirk D. Johnson, ***Sweeten v. American Empire Insurance Co.,*** (August 20, 2007) Cir. Ct. Ark., No. CV-2007-154-3:

> *[T]he Court . . . of course has recognized the testimony of Todd Hilsee . . . which was given here today in open court, and Mr. Hilsee being admitted as an expert in this particular field . . .*

Judge Ivan L.R. Lemelle, ***In re High Sulfur Content Gasoline Prods. Liability Litig.,*** (November 8, 2006) MDL No. 1632 (E.D. La.):

> *[T]his Court approved a carefully-worded Notice Plan. . . See Affidavit of Todd B. Hilsee on Motion by Billy Ray Kidwell, attached as Exhibit A; see also, Affidavit of Todd B. Hilsee, attached as Exhibit C to the Joint Motion for Final Approval of Class Settlement (Record Doc. No. 71); Testimony of Todd Hilsee at Preliminary Approval Hearing, Tr. pp 6-17, attached as Exhibit B; Testimony of Todd Hilsee at Final Fairness Hearing, Tr. pp. 10-22, attached as Exhibit C.*

Regional Senior Justice Winkler, *Baxter v. Canada (Attorney General),* (March 10, 2006) No. 00-CV-192059- CPA (Ont. Super. Ct.):

> *The plaintiffs have retained Todd Hilsee, an expert recognized by courts in Canada and the United States in respect of the design of class action notice programs, to design an effective national notice program . . . the English versions of the Notices provided to the court on this motion are themselves plainly worded and appear to be both informative and designed to be readily understood. It is contemplated that the form of notice will be published in English, French and Aboriginal languages, as appropriate for each media vehicle.*

Judge James T. Genovese, *West v. G&H Seed Co.,* (May 27, 2003) No. 99-C-4984-A (La. Jud. Dist. Ct. St. Landry Parish):

> *The court finds that, considering the testimony of Mr. Hilsee, the nature of this particular case, and the certifications that this court rendered in its original judgment which have been affirmed by the – for the most part, affirmed by the appellate courts, the court finds Mr. Hilsee to be quite knowledgeable in his field and certainly familiar with these types of cases…the notice has to be one that is practicable under the circumstances. The notice provided and prepared by Mr. Hilsee accomplishes that purpose . . .*

Judge Milton Gunn Shuffield, *Scott v. Blockbuster Inc.,* (Jan. 22, 2002) No. D 162-535 (Tex. Jud. Dist. Ct. Jefferson Co.):

> *In order to maximize the efficiency of the notice . . .Todd Hilsee . . . prepared and oversaw the notification plan. The record reflects that Mr. Hilsee is very experienced in the area of notification in class action settlements…This Court concludes that the notice campaign was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the settlement and afford them an opportunity to present their objections . . . The notice campaign was highly successful and effective, and it more than satisfied the due process and state law requirements for class notice.*

Judge Richard G. Stearns, *In re Lupron Marketing and Sales Practice Litig.*, 228 F.R.D. 75, 84 (D. Mass. 2005):

> *Todd B. Hilsee . . . has served as a notice expert in more than 175 class action cases, including In re Holocaust Victims Assets Litig., No. CV-96-4849 (E.D.N.Y.); In re Domestic Air Transp. Antitrust Litig., MDL 861 (N.D.Ga.); In re Dow Corning Corp., 95-20512-11 (Bankr.E.D.Mich.); In re Synthroid Mktg., MDL 1182 (N.D.III.); and In re Bridgestone/Firestone Tires Prods. Liab. Litig., MDL No. 1373 (S.D.Ind.). Hilsee was the only notice expert invited to testify before the Advisory Committee on Civil Rules on the amendment to Rule 23 requiring "clear, concise, plain language notices." Hilsee was also asked by the Federal Judicial Center to design model notices to illustrate Rule 23 plain language "best practices."…*

Judge Susan Illston (N.D. Cal.), on Todd Hilsee's presentation at the ABA's 7th Annual National institute on Class Actions, Oct. 24, 2003, San Francisco, Cal.:

> *The notice program that was proposed here today, I mean, it's breathtaking. That someone should have thought that clearly about how an effective notice would get out. I've never seen anything like that proposed in practice . . . I thought the program was excellent. The techniques available for giving a notification is something that everyone should know about.*

Madam Justice Joan L. Lax, *Donnelly v. United Technologies,* (October 27, 2008) No. 06-CV-320045CP (Ont. Super. Ct.):

> *. . .Todd Hilsee, an expert recognized by courts in Canada and the United State in respect of the design of class action notice programs, described the Canadian Notice Plan. . .I am satisfied*

that Mr. Hilsee's plan is comprehensive, that it will have a high 'reach'. . .

Madam Justice Joan L. Lax, *Wong v. TJX,* (February 4, 2008) No. 07-CT-000272CP (Ont. Super. Ct.):

Mr. Hilsee has been recognized as a notice expert in Canadian class proceedings as well as in the United States. The proposed notice plan not only comports with Canadian standards, but it has virtually the same coverage as in the United States.

Oregon Court of Appeals, *Froeber v. Liberty Mutual,* (September 10, 2008) No. A132263 (Judge Rex Armstrong):

As to the notice issue, defendants introduced the testimony of Hilsee, an expert on notice who helped the parties in this case draft, create, and disseminate the notice. Hilsee testified, among other things, that the format of the notice followed standards set in national model notices, that the content of the notice adequately informed readers of the claims that the settlement released, and that including specific information about the putative Delaware action would have fostered confusion rather than clarity. After counsel for defendants and for objectors presented arguments, the trial court rejected objectors' notice argument by finding that "the notice is adequate. I feel the testimony by Mr. Hilsee is persuasive. . ." [T]hose conclusions had support in Hilsee's expert testimony, which--although such expert testimony is not strictly required to support a determination that notice is adequate--lent persuasive support that objectors did not counter or controvert with evidence of their own.

Judge Colleen Mary O'Toole, *West v. Carfax,* (December 24, 2009) 2009-Ohio-6857, (Ohio Court of Appeals); 2009 WL 5064143 (Ohio App. 11 Dist.):

[Appellants] question the effectiveness of email notice to post-2003 customers, observing that many people simply delete unsolicited emails as spam. Further, through the affidavit testimony of their expert, Todd B. Hilsee, they question whether mail notice was not possible to the balance of Carfax customers. Mr. Hilsee is a nationally-recognized expert in designing notices for class actions. . . Mr. Hilsee testified that similar procedures are routine in automotive litigation. Mr. Hilsee also questioned the efficacy of the publication notice given in Investor's Business Daily and USA Today, testifying that these papers were unlikely to be read by the population demographic which dominates the used car market.

We agree with appellants that, pursuant to Eisen, the notice provided in this case was defective.

Mr. Justice J.R. Henderson, *Smith v. Inco,* (November 13, 2009) No. 12023/01 (Ontario Super. Ct.):

I also find that Hilsee is qualified to provide an opinion on these Issues. Hilsee has been accepted as an expert witness in many courts in the United States of America as to the design and implementation of notice programs created to notify class members of their rights with respect to class actions. He has also provided prospective and retrospective analyses of such notice programs, both in Canada and the USA. . .Given his education, work experience, and prior court involvement, I accept that Hilsee has an expertise in the fields of comprehension, dissemination, and readability of public documents.

Judge David S. Gorbaty, *Orrill v. AIG,* *Orrill v. AIG, Inc.*, 38 So. 3d 457, 462-466 (La.App. 4 Cir. 2010):

It is our opinion that the persons who were suddenly subsumed into Orrill settlement class did not receive adequate notice and were not adequately represented. . . The appellants also presented the testimony of Todd Hilsee, who the court accepted as an expert in communications and notice. . . Appellants' expert, Todd Hilsee, opined that the notice in this case was woefully inadequate in terms of what a qualified professional would use to actually inform the class of its rights and options.

Judge F. Pat VerSteeg, *Weber v. Mobil Oil,* (March 21, 2011) Case No. CJ-2001-53 (District Court of Custer County, State of Oklahoma):

Based upon testimony of the class notice expert, Todd Hilsee, approximately 40% of the putative class resides outside of the State of Oklahoma. No provision of the notice distribution plan suggests a methodology to reach those absent class members residing outside the State of Oklahoma, or for that matter, outside Dewey and Custer Counties. To be adequate, the notice plan and design must include a methodology whereby the Court can objectively determine the effectiveness of the class members reached. This is measured by a percentage of at least 70% or more. Without a calculation methodology the court has no objective basis from which a notice plan can be evaluated.

Judge M. Joseph Tiemann, *Billieson v. Housing Authority of New Orleans,* (May 27, 2011) Case No. 94-19231 (Civil District Court for The Parish Of Orleans, State Of Louisiana):

> *[T]he Court also gave consideration to the following…The fact that Mr. Hilsee is a highly-regarded Notice Expert, and has provided thoughtful, scientific, carefully researched and detailed reports, analyses, and ultimately, his Affidavit. His recommendations are grounded in relevant experience regarding communicating complex legal information to class members in class action litigation. He was a lead author of the Federal Judicial Center's (the "FJC") Model Plain Language Notices, as well as the FJC publication entitled 2010 Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, and he contributed content on the subject of notice to the FJC's 2010 3rd edition of Managing Class Actions: A Pocket Guide for Judges (all of which may be found at www.fjc.gov.)*

Judge Joan B. Gottschall, *Kaufman v. American Express,* (August 2, 2012) Case No. 07-01707 (United States District Court for the Northern District of Illinois):

> *After considering several proposed notice experts for the purpose of undertaking a second round of notice in this case, the court gave the Settling Parties an opportunity to respond to the proposed appointment of Todd B. Hilsee. The court has reviewed the Settling Parties' objections to Mr. Hilsee's appointment as well as the resumes of all proposed experts. The court does not view the objections to Mr. Hilsee's appointment as substantial. Mr. Hilsee appears to be the most qualified and experienced expert of those proposed, and the court concludes that he is an appropriate expert for this type of case*

Judge Joan B. Gottschall, *Kaufman v. American Express,* (August 9, 2013) Case No. 07-01707 (United States District Court for the Northern District of Illinois):

> *With regard to the limited opposition filed by the intervenors, the court agrees with the position taken by Mr. Hilsee, the court-appointed notice expert, that references to the intervenors' objections in the Supplemental Notice would not be neutral and would potentially prejudice class members, who can decide for themselves whether to object to or opt out of the settlement.*

Academic and Practitioner Comments

Arthur R. Miller, Professor of Law, Harvard Law School:

> *I read your piece on Mullane with great interest and am delighted to learn the details. Indeed, I will probably incorporate some of it in my teaching next fall. I think your analysis is rock solid.*

Dianne M. Nast, Partner, RodaNast, P.C.:

> *Your testimony in Atlanta on Tuesday was exceptional. Rarely does one find a witness so well prepared, so thoughtful, careful and accurate in response to questioning, and so sincerely committed to careful preparation and accurate testimony. We are all appreciative of the extra effort you brought to the task. If the court rules in our favor, it will surely be in some measure as a result of your testimony. If the court does not rule in our favor, it certainly will not be as a result of anything you omitted or failed to do.*

Eugene I. Goldman, Partner, McDermott, Will & Emery LLP:

> *Hilsee was the defendant MCI's notice expert in two consolidated consumer class actions filed in Augusta, Georgia. Hilsee recognized that the socio-economics of class members indicated that the "traditional" media vehicles for notice, i.e., Wall Street Journal, would not reach many class members. Hilsee provided an affidavit and in-court testimony in favor of a plan that involved easy to understand notice in multiple publications. . . He also testified against an alternative plan presented by plaintiffs, which he felt was inferior. Hilsee was questioned by counsel for the parties as well as the Court. The Judge was impressed by Mr. Hilsee's expertise and accepted Mr. Hilsee's advice by ordering the implementation of Mr. Hilsee's notice plan.*

Darren E. Baylor, Associate Director, American Bar Association
Center for Continuing Legal Education:

> *Todd has definitely developed an entertaining and informative presentation on effective notice techniques that creatively connect the class member to class action claims. He presents his information in a way that educates and engages the audience while providing a refreshing perspective on claims notification.*

F. Paul Bland, Jr., Staff Attorney, Public Justice:

Hilsee has a deep and extensive knowledge of communications strategies and marketing for consumers. In several hotly contested cases, he has served as an expert witness on behalf of my clients, and his thoughtful, thorough and careful analyses stood up brilliantly through white-hot cross-examinations and probing. I've also seen a good deal of his work in the class action notice area, and he's a nationally recognized leader in that field.

Elizabeth J. Cabraser, Partner, Lieff, Cabraser, Heimann & Bernstein, LLP, at Tulane Law School, February 2008:

Todd Hilsee understands and appreciates the profound implications of notice on due process more than many, many lawyers. . . He is a notice expert; he is a communications expert; but his dedication to the idea of due process through communication transcends his work assignments and his living. . . He is a low key, personable person; very matter of fact about what he does. Do not be fooled; he is a giant in the field.

Robert J. Niemic, Senior Staff Attorney, Federal Judicial Center:

Todd Hilsee deserves one of the strongest endorsements I can give for his expertise on class action notice processes, his hands-on contributions to revising notices into plain language documents that now serve as "models" for the industry, and his colleagues' widespread recognition of him as a foremost world expert. All the work that Todd did for the Federal Judicial Center (my employer) was pro bono. His commitment to the cause of creating more understandable and complete notices for class action plaintiffs is unparalleled, in my experience. The resulting illustrative notices (posted at www.fjc.gov) reflect significant improvements, in terms of form, clarity, and plain language. Todd has had a huge national impact on the field of class actions that will endure and continue. He is enthusiastic and it's inspiring and enjoyable working with him.

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Case Experience

Todd B. Hilsee's case experience includes the following partial listing of cases (inclusive of all cases in which testimony provided at deposition or trial in past 4 years as marked with *):

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Services		1:06-CV-00332-SEB-VSS
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Stefanyshyn v. Consol. Indus.		Ind. Super. Ct., No. 79 D 01-9712-CT-59
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Stetser v. TAP Pharm. Prods. & Abbott Laboratories		N.C. Super. Ct., No. 01-CVS-5268
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Tawney v. Columbia Natural Res.		Cir. Ct. W. Va. Roane Co., No. 03-C-10E
Tempest v. Rainforest Café		D. Minn., 98-CV-608
Thibodeau v. Comcast		E.D. Pa., No. 04-CV-1777
Thibodeaux v. Conoco Philips		D. La., No. 2003-481
Thompson v. Metropolitan Life Ins.		S.D. N.Y., No. 00-CIV-5071 HB
Ting v. AT&T		N.D. Cal., No. C-01-2969-BZ
Tobacco Farmer Transition Program		U.S. Dept. of Agric.
Tuck v. Whirlpool & Sears, Roebuck		Cir. Ct. Ind. Marion Co., No. 49C01-0111-CP-002701
Turner v. Murphy Oil USA	*	E.D. La., No. 2:05-CV-04206-EEF-JCW
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Walker v. Tap Pharmaceutical Prods.		N.J. Super. Ct., No. CV CPM-L-682-01
Walls v. Am. Tobacco		N.D. Okla., 97-CV-218-H
Walton v. Ford Motor		Cal. Super. Ct., No. SCVSS 126737
Webb v. Liberty Mutual Insurance		Cir. Ct. Ark., No. CV-2007-418-3
Weber v. Mobil Oil	*	Dist. Ct. Okla., No. CJ-2001-53

Wells v. Chevy Chase Bank		Cir. Ct. Md. Balt. City, No. C-99-000202
West v. Carfax		Ohio C.P., No. 04-CV-1898 (ADL)
West v. G&H Seed		27th Jud. D. Ct. La., No. 99-C-4984-A
Westman v. Rogers Family Funeral Home		Cal. Super. Ct., No. C-98-03165
Whetman v. IKON		E.D. Pa., Civil No. 00-87
White v. Washington Mutual		4th Jud. D. Ct. Minn., No. CT 03-1282
Williams v. Weyerhaeuser		Cal. Super. Ct., CV-995787
Wilson v. Servier Canada		Ont. Super. Ct., 98-CV-158832
Withrow v. Enterprise		Cir. Ct. of St. Louis, Mo., No. 10SL-CC01712
Wong v. TJX		Ont. Super. Ct., No. 07-CT-000272CP
Woodard v. Andrus		E.D. La., 2:03 CV2098
World Holdings v. Federal Republic of Germany		S.D. Fla., 1:08-cv-20198
Yacout v. Federal Pacific Electric		N.J. Super. Ct., No. MID-L-2904-97
Zarebski v. Hartford Insurance Co. of the Midwest	*	Cir. Ct. Ark., No. CV-2006-409-3

Work Experience

The Hilsee Group LLC	Feb. 2008 - Present	Principal
Hilsoft Notifications	Oct. 1994 – Feb. 2008	President
Foote Cone & Belding	1987 – 1994	Account Director
Greenwald/Christian	1985 – 1987	Account Executive
McAdams & Ong	1983 – 1985	Media Planner

Education

The Pennsylvania State University	1982	B.S. Marketing Management

ATTACHMENT 2

THE HILSEE GROUP LLC
SERVING COURTS • PROMOTING DUE PROCESS

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PHILADELPHIA,PENNA.

March 23, 2016

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Troubling Class Action Notice Trends are Impacting Potential Rule 23 Changes

Dear Committee and Subcommittee Members:

I understand that a current "sketch" of a potential change to Fed. R. Civ. P. 23(c)(2)(B), if adopted, would specify that "electronic means" or "other appropriate means" are as acceptable for individual notice as "United States mail." Speaking respectfully as a notice expert who has practiced continuously for more than 25 years including devoting significant *pro bono* time to the Federal Judicial Center's work to improve notice, and who cares deeply about the improvements that have come about during this time, this change should not be adopted.[1]

Except the rare instance when one hands a notice to class members, first class mail is the most effective individual notice method, and suppositions to the contrary are erroneous. Physical mail should be required in almost all instances when reasonably possible. Not sending mailings when they can be sent will reduce already low class action notice response rates, and bring disrespect upon the courts that oversee class actions.

[1] Todd B. Hilsee is a class action notice expert who analyzes notice for courts, special masters, and attorneys. He was the first such expert recognized in the U.S. (1992) and in Canada (2000). Hilsee was trained in mass communications, advertising and media audience measurement, and has practiced continuously. He collaborated, *pro bono*, with the Federal Judicial Center to create the FJC's Illustrative "model" Plain Language Notices, at the invitation of the Advisory Committee on Civil Rules in 2002. Those models are used by Courts throughout the U.S. today. Hilsee also collaborated with the FJC to create their Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide in 2010. The FJC Checklist has been relied upon in countless filings and recognized in many court decisions. Hilsee was cited by the FJC for updating with them the notice and claims sections of their Managing Class Action Litigation: A Pocket Guide for Judges, also in 2010. He has designed and undertaken more than 275 of the most significant class action notice efforts in history. Hilsee has worked with the most experienced notice administrators for over 25 years, though he is independent from claims administrators, and no longer implements notice campaigns.

This letter also discloses problematic recent class action notice "industry" practices that may have fueled the proposal, and which pose grave risk to the future and legitimacy of the class action device. Other notice-related Rule 23 suggestions are addressed at the end of this report.

The Rule 23(c)(2)(B) "Sketch" Proposal

I have read the Jan. 29, 2016 report of the Rule 23 Subcommittee of the Civil Rules Advisory Committee. Apparently, a possible edited Rule 23(c)(2)(B) would read (in part) as follows (changes underlined):

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

Administrators Know that First Class U.S. Mailings are Most Effective

The "sketch" is premised on these Rule 23 Subcommittee notes:

> *"Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted the rule to require notice by first class mail in every case. But technology has changed since 1974 and other forms of communication may be more reliable, more effective, and less costly. The rule calls for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may often be true that online notice, most often by email, is the most effective, it is important to leap in mind that a significant portion of class members in certain cases may have limited or no access to the Internet"*

While technology has obviously changed mass-communications:

a. It is not correct that "***other forms of communication may be more reliable, more effective"*** for class action notice than first class mail.
b. It is not correct that ***"online notice, most often by email, is the most effective."***

Claims administrators typically keep response rates private. They treat the data as proprietary information, despite the fact that they serve courts. This is wrong. Any significant rule change should be based on actual data that is fully vetted as to the true effectiveness of various forms of notice. The subcommittee should obtain and study response rate information before making a change of this magnitude.

I have worked together with many different claims administrators and have had access to data on many different cases. I talk to them often. If administrators were compelled to produce class action notice response rate data, and were called to testify, no experienced and credible administrator could, with any honesty, claim that 100 emails, let alone 100 exposures to some other form of "electronic means" or "other appropriate means," would generate anywhere close to the response that 100 physical mailings of a notice and claim form still achieves. **The gold standard for effectiveness and highest response in class actions remains physical first class mail**.

High Notice Cost is not a Problem that Needs Curing

As the notes state, the current 23(c)(2) rule sketch is premised in part on reducing costs. However, there is no real controversy over notice costing too much. Class members are not clamoring for attorneys to spend less effort and money to reach them. There is no influx of court decisions rejecting notice plans for being too expensive. As discussed below, there is immense downward movement on notice cost driven mainly by various disincentives discussed below, and by vendors willing to bid notice down, in order to win assignments and grab market share. As a result, the effectiveness of notice is racing downwards, and with it, response rates.

A class will bind people's claims to the success of a particular set of plaintiffs' attorneys even if they lose, and a settlement will release all class members' claims even if they don't get a payment, so there should be enough money to properly reach and inform the class—as the FJC Notice Checklist advises. It is circular logic to suggest, when proposing a settlement, that the settlement does not afford mailed notice, or any truly high-reaching notice to the mass audience sought to be bound, when the reason to send any such notice is to allow the class to weigh in on whether the settlement is sufficient.

A mass-communications layperson can look at the cost of notice with wishful thinking—wishful that notice could be just as effective if a million dollars were removed from the budget. But just as removing a million dollars from a $1.2 million engineering budget will likely result in a significantly less safe building, dramatically reducing notice budgets will greatly reduce effectiveness.

Embarrassingly Low Response is the Problem that Needs Curing

The number of cases in which courts are faced with results from notice where a tiny percentage of class members submit claims, and where a much greater total amount will be paid to the lawyers, have been increasing and giving courts fits. This is a 'public relations' problem for courts, and a real-world problem for class members. It erodes confidence in class actions and in courts generally.

Pitifully low response is the real class action problem to cure, and now is not the time to encourage non-use of the most responsive tool that notifications have: first class mail. If this rule change is adopted, attorneys will propose to avoid first class mail in most if not all situations for the reasons discussed in this report. There are certain to be more news reports of cases where few people benefitted from a settlement while available mailing addresses went unused. The class action device and the courts will suffer as a result.

Administrators commonly withhold response rates to notices from reports they submit to courts. Submissions often fail to offer: the percentage of email notices sent that were opened; the percentage of email notices that bounced back as undeliverable; the percentage of internet banner impressions that were clicked on; and the number of claims submitted from mailings as compared to emails, publication notices, and internet banners. Inquisitive courts are faced with re-notifying classes as a result of orchestrated efforts to "control" the response to a modest settlement.

The Notion that Electronic Ads Constitute Individual Notice

Perhaps the even greater risk resulting from the rule sketch and notes—greater than expressly allowing email in lieu of a physical mailing address when available—is the notion that an electronic communication which is <u>not</u> individualized might well be pitched to courts as being an acceptable form of individual notice nonetheless.

The notes deliberately distinguish between email and online notice generally ("…*it may often be true that online notice, most often by email, is the most effective*…"). This creates a dangerous premise where courts might believe that a social media posting, or an internet banner on a visited page, can be deemed individualized. This is a frightening thought in that such activities are, in reality, new targeted forms of "publication" or "advertising," which it is well-known are rarely clicked (an average of 0.6% of the time), such that a scant fraction ever sees a real notice.

The rule sketch itself allows one to interpret non-individualized notice as being acceptable individualized notice, by vaguely referring to email instead as "electronic means," and also then including "other appropriate means" to a list that includes U.S. mail as acceptable forms of "individual notice."[2]

The Notice Campaign Bidding Wars

[2] *Note*: The Rule sketch does not use the phrase "First Class Mail." The phrase "United States Mail" allows the interpretation that one could employ far cheaper "Bulk Rate Mail," which, unlike First Class Mail, the Postal Service does not forward to those who have moved.

Rule 23(c)(2) has long required the "best practicable" notice effort. However, attorneys responsible for notice at particular stages of class actions,[3] have increasingly "put out for bid" the administration of the class action, including leaving how much notice up to the suggestions of each bidder. As a result, bidders are incented to propose the least notice that their "expert" is willing to sign his/her name to. This is easy for someone who has never sworn to the importance of high-reaching notice or criticized low-reaching notice. Knowing a level of notice that lost a bidder the job in a prior case leads bidders to reduce his/her proposal further at the next opportunity. Sometimes counsel may prefer a certain bidder only if costs are reduced further, and the bidder will offer that its expert will willingly 'stand down,' *i.e.,* not make any supporting or adverse statement about the notice effort if the budget is less than the bidder's "expert" was willing to publicly stand behind. In those cases, others without appropriate credentials might sign supporting statements in place of the recognized expert employed, but silenced, by that vendor. Courts are routinely not made aware of this.

These bidders now regularly include many vendors who do not employ notice experts, nor any planners with sufficient training in media or any real knowledge of proper audience measurement techniques, especially regarding more complex digital media measurement. These unscrupulous vendors have created unrealistic expectations that for very low costs, one can reach high percentages of mass audiences using bargain-basement electronic notice.

Inflated Audiences for Internet Media

It is increasingly common to see proposals in which a vendor has proposed, in lieu of physical mailings, a campaign promising to reach outrageous percentages of mass audiences using banner ads on various internet sites. While vendors purport such efforts will reach 70% or more of national audiences for sometimes $100,000 or less, in reality, such efforts when tested commonly reach 20% or less. Beyond that, these programs often rely on exposure to 15-word banners that are known to be clicked on average 0.6% of time or less. As a result, after an inexpensive electronic banner-reliant notice effort, it is entirely knowable that a tiny fraction of those exposed to such banners will have been exposed to a Rule 23-compliant notice, because a banner cannot disclose the legal rights that Rule 23 requires practitioners to communicate. Over-reliance on weak banner ad campaigns is thus very problematic. Unless we are prepared to say "you were notified by this banner and shame on you for not clicking on 15 words"—words which might well have been perceived to be a lawyer solicitation—relying on electronic notice as heavily as the rule sketch would permit will be harmful to class actions.

[3] *E.g.*, plaintiffs' lawyers spending against their own 'warchest' when a case is certified, or defendants who have reached a claims-made settlement and are funding the settlement notice by agreement.

Many of the administrator vendors who have pitched and won cheap internet banner ad notice bids have taken to submitting affidavits in connection with final settlement approval in recent years stating, in essence, that low response is typical and expected in such cases. These affidavits are typically submitted on behalf of settling parties who are arguing that settlements should be approved even though class members are receiving little in actual benefits, often less in total than the lawyers' fees, and with most of the money going to *cy pres* as a result.

Even more common are "expert" affidavits that do not offer critical metrics such as how many addresses were available that were not utilized, the email open and banner click rates, and the claims response data. It's understood that such disclosure might derail settlement approval.

The Lack of Critique of Notice Campaigns

I speak with well-respected experts who report to me the type of faulty notice submissions mentioned above. These phone calls are typically accompanied by their exasperation at the "ridiculous" promises that low bidders are making about the effectiveness of electronic-only media proposals. This to them amounts to unfair competition. Experts calling me include those who are well-known to the leading practitioners in class actions.

However, few if any notice experts are willing to accept an assignment today where one party seeks to critique another party's notice submission. This includes situations where Courts seek to retain their own experts. Experts affiliated with claims administrators turn down these assignments because they understand that criticism of notice plans may lead to "blackballing" by defense or plaintiff class action firms. They fear losing a future bid to disseminate notice or perform profitable claims processing. The blackballing phenomena has arisen in the last five to seven years. Lawyers from both sides of the "v" call me and report that another expert referred them to me because that other expert will not accept a critique assignment.

Leading administrators have informed me of "pressure" not to oppose notice submissions or appear adverse to leading firms. I have been subjected to intimidation as well, but I have always been outspoken, and these troubling issues are too important.

The result of the current environment is that very little extra-judicial scrutiny is being rendered on what could be questionable notice efforts. Without much evidence proffered that is contrary to minimal notice submissions, precedents where unaware courts approve such programs are increasing, making it easier and easier to adopt and approve future low-reaching notice campaigns. With the complexities in electronic media that can make one notice campaign "appear" effective while in fact utilize shoddy practices, and with the disincentives discussed below, the paucity of outside critique hurts courts.

The Disincentives to Adequate Notice

I see little adversarial process during the most typical notice situations:

> ***Class Certified for Trial***. When a class is certified for trial, the burden of notice typically falls to plaintiffs' counsel (in the absence of rare cost-shifting situations). At that point, plaintiffs' lawyers often want the least notice that will be acceptable because they are spending their own money without a guarantee of a settlement or judgment. More notice does not help class members, many seem to believe, because they are convinced of their own veracity as representatives of the interests of the class. Better notice might prompt opt-outs. Defendants (who legitimately want to achieve finality) do challenge weak plaintiff proposals at this stage, but without experts willing to challenge leading plaintiffs' lawyers' submissions, their arguments are often just that, arguments. Some defendants do not push for stronger notice at this stage out of a desire to avoid bad publicity from notice that will bring the alleged behavior to customers' attention.
>
> ***Certified and Notified Class Later Settles.*** When plaintiffs later settle a case where they earlier provided notice of the certification, it is very hard to negotiate from defendants a more effective notice effort than plaintiffs provided at certification. In this way, when money is available and notice is arguably meaningful to class members, plaintiffs often can't then provide the opportunity that they might wish their class members could get.
>
> ***Notice of Certification and Settlement***. When a 23(b)(3) case settles and notice is required when none has been issued previously, the notice typically provides opt-out rights together with rights to object, and to claim money. On the one hand, plaintiffs often desire enough claims to make a settlement look good—enough to gain final approval, but worry that too many claims will "swamp" a settlement and make the average payouts too low, such that it appears the settlement is insufficient. Plaintiffs' incentive depends on the nature of the settlement. In a claims-made settlement, where plaintiffs negotiated their fee regardless of the number of claims, they often have little voice relative to defendants, who fund the notice and resulting claims, and thus push back against strong, high-reaching notice. When there is a claims-made settlement and plaintiffs' fees depend on the total value of claims, they may have negotiated or push for very strong notice, but these situations are rarer.

In my experience, one party strongly advocating that notice reach the greatest practicable number of class members is increasingly uncommon. Also, by limiting notice, objections are limited, which suits the interests of both settling parties.

The Media Landscape Today

Today, electronic media is a vital mass communications tool. The number of media options and outlets are increasing every day. Almost every notice plan can and should utilize these tools.

The falsity in the promises being made today is that not only will digital efforts be effective components of a successful notice campaign (true), but that notice efforts can rely almost solely on electronic efforts and cost dramatically less than notice plans which reached large national audiences in the past (not true). In fact, with more and more splintered media consumption, with inflation and rising ad costs, with print publication audiences dropping, with low-attention paid to many online advertising activities, and with the limited content that internet ads convey (absent a viewer clicking to read a real notice), the cost to effectively reach high percentages of mass audiences is not dropping. The cost of gaining attention is increasing. It is very expensive to effectively reach nationwide audiences.

The Federal Judicial Center's Notice and Claims Process Checklist

The Federal Judicial Center's Checklist provides a best-practices resource for courts, and in 2010 it was ahead of the curve when cautioning against inflated electronic media effectiveness, and revealing that when courts approve notice plans and report the "reach," the median was 87%.

A cautionary tale of the class action notice industry's "race to the bottom" can be seen in notice plans from the influx of the "digital notice panacea" vendors who routinely hype inexpensive plans as meeting the lowest range identified in the FJC's study of reach percentages (70-95%) despite the 87% median. They routinely sell 70% notice plans as "meeting" the FJC guidance. The reach guidance was included in the FJC Checklist because the FJC sought to stop the great majority of notice submissions that give courts no information as to how effective a particular notice proposal would be at reaching a class. Sadly, the greatest problem class action courts face today are false promises of high reach low-cost electronic media proposals, that unbeknownst to them, are poorly planned and reach small slices of classes.

The Logic behind First Class Mail's Responsiveness Advantage over Email

Why are administrators reporting to me that response rates for email notice are significantly lower than response rates for first class mailings? Why am I told that response rates from the internet banner-reliant efforts are worse than summary notices in print publications (the audiences of which are plummeting)? Administrators inform me, consistent with my own experience, that they see 15% or significantly greater response rates for physical mailings vs. a ceiling of 5-6% or often much less for email. Does this make logical sense? Yes. Physical mailings do not have SPAM filters, and by law they are delivered by postal workers into "in-boxes." A mailing that is not responded to immediately is often present and visible in the house for future attention. With the volume of email *increasing*, the volume of advertising mail is *decreasing*, as is the risk of class action notice mail being discarded. The FJC envelope and notice design guidelines have helped in this regard as well. Email, on the other hand is subject SPAM filters. Dozens of emails arrive daily, if not a hundred for some people, and many emails do not really "arrive" because they are captured in SPAM filters.

There are many sources of public information available to update physical mailing addresses when class members move, including postal service and credit bureau data. When class members change email addresses there are few if any widely used such tools. Unlike most first class mail, an email that goes to an outdated address often does not bounce back as undeliverable and is not automatically forwarded to the new address.

Stories such as these abound: A leading administrator conveyed that defense counsel—a leading firm—had advocated email for a case. After the administrator had done everything reasonably possible to ensure email delivery and avoid SPAM filters, an associate (presumably not involved in the case) at that firm received an email as part of the notice campaign and reported it to the firm IT department. The IT department issued a firm-wide email instructing everyone not to open the email because it might be a virus. In another recent matter, counsel seeking settlement approval argued that the administrator, if had he testified, would have sworn that the 0.3% response rate to email notice was acceptable and typical.[4] There was no significant critique, and the settlement was approved.

When a class member does not respond immediately to a notice by email, what are the chances that at some later date he/she will scroll all the way to the bottom of a cluttered email inbox to search for and find an old email notice previously received? Consider your own behavior. Why would class members act differently?

Finally, some demographic and socio-economic groups do not use or have access to email and electronic media to the extent lawyers and other professionals do. The rule sketch and notes may be based on personal habits that attorneys apply to all levels of society. Lawyers or their associates perhaps must read all their emails in order to avoid malpractice claims, but average class members do not.

Conclusion

In sum, even without a rule endorsing it, email notice has been approved in the past, and I have supported appropriate uses. Yes, physical mailings can be botched, and rendered ineffective. But when feasible, first class mail is the best, and electronic means are not a replacement. The proposed rule would not make notice better, just cheaper. This at a time when response rates are already too low. In truth, a perfect storm of unsavory practices has led to false promises for cheap electronic notice effectiveness. The rule should not, and need not be changed.

Other Rule 23 Suggestions

[4] It bears noting that in that case, it would appear that physical mailing addresses were available but were unused.

While concerns about a relaxation of the individual notice requirement is the primary focus of this report, other notice issues warrant consideration by the Subcommittee:

a. As important as it was to for Rule 23(c)(2) to require "plain language" in 2003, it is even more important to require that a class be adequately reached with a notice. I urge attention to the decades-long use and reliance upon "reach and frequency" which are the definitive, objective tools which ensure that mass communication methods are sufficient, regardless of the means available to provide notice. Without a rule requiring effective reach of massive audiences, courts are routinely left unaware that significant percentages of a class may not even get an opportunity to see a notice, despite reach being readily calculable. While the 2010 FJC Notice and Claims Process Checklist revealed that courts can always obtain audience measurement calculations if requested, and observed that in reported decisions—when reach was cited—the median reach was 87%, the greatest untold cause of low response remains low reaching, ineffective notice campaigns. Some parties still argue that reaching a high percentage of a class is not required, and courts accept this all too often. With the reach of digital notice campaigns often erroneously calculated by failure to use the necessary complex metrics, the importance of requiring a high reach and a careful determination of reach, is all the more important today;

b. Rule 23(e)(1)(B) could remove the phrase "in a reasonable manner." This phrase is commonly used to argue that somehow a lower standard applies to settlement notice vs. the "best practicable" certification notice standard under 23(c)(2). Compensation is the thing class members actually want from a class action, so settlement notices are at least as important to receive as certification notices; and

c. Rule 23(h)(1) could specify that motions for attorneys' fees be on file prior to the deadline for objections included in class notices, instead of a common historical practice of filing such motions after the deadline for objections in the notice has expired. If they were, courts would avoid re-notification that appellate decisions have compelled in recent years. I suggest consideration of the lessons of *Redman v. Radioshack, Corp.*, 768 F.3d 622, 637 (7th Cir. 2014), and *In re Mercury Interactive Corp. Securities Litigation* 618 F.3d 998 (9th Cir. 2010) before approving and issuing notice.

This report is brief for purposes of expediency. I am available to discuss this at the Subcommittee's convenience if it wishes. I have left out specific case citations and examples. I expect to provide a more detailed report if specific notice-related rule change proposals are eventually released by the Advisory Committee for public comment.

Thank you for your consideration of these remarks.

Sincerely,

Todd B. Hilsee
Principal

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ATTACHMENT 3

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PHILADELPHIA,PENNA.

May 24, 2016

To: The Advisory Committee on Civil Rules
of the Judicial Conference of the
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Rule 23 Subcommittee

by email

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Update: Data does not support premise for relaxing the Rule 23(c)(2) individual notice requirement

Dear Committee and Subcommittee Members:

My letter of March 23, 2016 advised against revising the individual notice requirement in Rule 23(c)(2).[1] I noted that if claims administrators were compelled to produce data, they would reveal that mailed notice outperforms email and dramatically outperforms other "electronic notice." This letter provides data to further inform the committees.

Data shows that if there is a presumption in favor of first class mail, it is a correct one. Regardless, the current rule allows all forms of individual notice, so the revision serves to steer courts away from mailings. Why?

The Rule 23 Subcommittee notes for the April 14-15, 2016 Advisory Committee meeting state:

> *"Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts read the rule to require notice by first class mail in every case. But technological change since 1974 has meant that* ***other forms of communication are more reliable*** *and important to many."*

The key phrase (shown with emphasis added in bold) is not accurate. Rather, data and other facts show the opposite to be true, and prompt serious questions:

1. **On what basis are other methods "more reliable" than first class mail?**
2. **Why change a rule that already allows all methods of individual notice?**
3. **Why change this rule unless to steer courts away from first class mail?**
4. **Why steer courts away from first class mail if data shows it to be better?**

[1] The current rule: "*the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort*" is proposed to be changed to: "*the best notice that is practicable under the circumstances, by United States mail, electronic means or other appropriate means. The notice must include individual notice to all members who can be identified through reasonable effort*."

Courts already approve email as Rule 23-compliant individual notice when appropriate. There is no great controversy where email notice is being rejected by courts when physical mailing addresses are not available and email addresses are. The rule change would only encourage less effective notice than first class mail—even when physical mailing addresses are available.

The phrase "electronic notice" in the proposed rule lets internet banner ads masquerade as individual notices. Vendors seeking to undercut their competitors are telling lawyers and courts that they can target cheap banner ads at individuals and limit the exposure frequency to one banner "impression" per class member over the course of an entire notice program. Realize that the industry definition of a "**viewable**" internet banner impression is one where "**1/2 of the pixels are visible on screen for a minimum of one second.**"[2] With submissions citing this pending rule change, we are already seeing notice proposals that would bind the 99.96% of class members who do not click banner notice ads.[3]

This "half banner/one second" standard for notice, which would be legitimized by this rule change, will de-legitimize our opt-out system.

Class action response rates are already dropping precipitously, which claims administrator affidavits are now revealing. This rule change will embolden parties—and indeed has already done so—to avoid physical mailings even when notice would alert people about a product that may risk their personal safety. The resulting low claims rates are empowering those advocating against class actions altogether—those who cite their futility, *e.g.,* the 2103 Mayer Brown study and its supporters.[4]

New Information and data:

1. Data now publicly available from MailChimp, the world's leading email marketing platform, indicates that only 22.73% of legal industry emails are opened.[5]

[2] Media Rating Council. See http://measurementnow.net/press-release-media-rating-council-updates-viewable-ad-impression-measurement-guidelines/#.V0BuZJErIvg last visited May 20, 2016. Note: Banners can fit only about 15-20 sizable words, thus not themselves compliant with Rule 23 content requirements. Only those who click a banner can see a Rule 23-compliant notice.

[3] Data shows that on average 0.04% of banner "impressions" are clicked. http://www.smartinsights.com/internet-advertising/internet-advertising-analytics/display-advertising-clickthrough-rates/attachment/average-clickthrough-rates-for-different-ad-formats-2016/, last visited 4/27/16.

[4] Mayer Brown, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions, Dec. 2013, https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf, last visited May 19, 2016.

[5] Average Email Campaign Stats of MailChimp Customers by Industry, April 4, 2016. http://mailchimp.com/resources/research/email-marketing-benchmarks/, last visited April 26, 2016.

2. The Direct Marketing Association reports the rate that emails are actually opened ranges from a low of 7-8% to a high of 23-24%. *See* **Exhibit 1**.

3. Based on public information,[6] the Federal Trade Commission ("FTC") is currently undertaking a review of factors that determine notice effectiveness and resulting claims rates. I understand they are actively seeking data.

4. The relative weakness of email notice as compared to physical mail is now supported by data just recently presented to the FTC by the nation's oldest claims administrator. That data, attached as **Exhibit 2**, shows that physical mailings outstrip email, and far outstrip other forms of notice such as internet banners and other forms of publication in terms of effectiveness based on response expectations.

5. According to a booklet published by another claims administrator attached as **Exhibit 3**, "*Email notices tend to generate a lower claims rate than direct-mail notice*" and also according to that document, email is less likely to increase the number of claims relative to any of the various versions of direct postal mail notices.[7]

6. According to Google, only 44% of banners typically included in "impression" statistics are actually viewable.[8] Yes, for 56% of banner impressions, half of the banner is not on the screen for a human to see for more than one second. Even for banners "above the fold," which notice vendors often hold out as a tactic to improve reach, Google reveals that only 68% are viewable. This Google report is attached as **Exhibit 4**.

7. A massive internet advertising fraud is now coming to light. Advertisers have been led to believe that an "impression" means that a person—a human viewer—is exposed to an electronic communication. But new revelations show that millions of internet banner "impressions" purchased for incredibly low prices are seen not by human beings, but by robots or are outright fake. The sampling of national news stories highlighted in **Exhibit 5** are just some of the plentiful, credible, and disturbing reports. For example:

> "*The most startling finding: Only 20 percent of the campaign's "ad impressions"—ads that appear on a computer or smartphone screen—*

[6] https://www.regulations.gov/#!documentDetail;D=FTC-2015-0055-0001, last visited April 27, 2016.

[7] "The following are the most common types of e-mail and direct-mail notices and claim forms. They're listed in order of least to most likely to increase the number of claims filed in a settlement: E-mail notice, Single postcard summary notice, Full notice and claim form, Full notice and claim form with return envelope, Full notice and claim form with postage-paid return envelope, Double postcard notice with tear-away claim form, Double postcard notice and postage-prepaid tear-away claim form." Class Action Settlement Administration for Dummies, KCC Special Edition, at page 14.

[8] https://think.storage.googleapis.com/images/infographics/5-factors-of-viewability_infographics.pdf, last visited April 26, 2016

> *were even seen by actual people...As an advertiser we were paying for eyeballs and thought that we were buying views. But in the digital world, you're just paying for the ad to be served, and there's no guarantee who will see it, or whether a human will see it at all...Increasingly, digital ad viewers aren't human…According to the ANA study, which was conducted by the security firm White Ops and is titled The Bot Baseline: Fraud In Digital Advertising, fake traffic will cost advertisers $6.3 billion this year."*[9]

8. Claims administrators who have pitched electronic notice in lieu of available mailings have also sworn to courts that extremely low claims rates are now normal. In the controversial Duracell battery case, one administrator swore that the median claims rate for their notice plans with little or no direct mailed notice was 0.023%.[10] In the words of a Forbes magazine article pointing to the revelation:

> "*For context, the probability of getting a straight flush in a 7-card poker hand is slightly higher at 0.0279%. Critics of consumer class actions have been saying for years that these cases have abysmal claims rates, but plaintiff lawyers — with the assistance of pliant judges — work hard to keep anybody from knowing the real results of their work. That's why this filing is so fascinating: For the first time, a consultant with access to the real numbers has let us in on the truth."*[11]

9. Failed notice campaigns that are overly reliant on electronic notice may literally be leaving class members at risk of their lives. *Pollard v. Remington*, W.D. Mo., Case No. 13-00086 highlights the exasperating position courts find themselves in after erroneous and exaggerated promises of electronic-reliant notice fall to earth. Notice to a class of owners of 7.5 to 7.8 million guns was purported to reach 73% of the class,[12] yet only 2,327 people submitted a claim for repair of allegedly defective triggers claimed to have the potential to randomly fire without being touched. The Court wrote:

> "*The Court cannot conceive that an owner of an allegedly defective firearm would not seek the remedy being provided pursuant to the*

[9] BLOOMBERG BUSINESSWEEK, How Much of Your Audience is Fake? Marketers thought the Web would allow perfectly targeted ads. Hasn't worked out that way, September 25, 2015. http://www.bloomberg.com/features/2015-click-fraud/, last visited April 28, 2016.

[10] Declaration of Deborah Mccomb Re Settlement Claims, *Poertner v. Gillette*, M.D. Fla., Case No. 12-00803, ECF No. 156, April 22, 2014.

[11] FORBES MAGAZINE, Odds of a Payoff in Consumer Class Action? Less than a Straight Flush, May 8, 2014.

[12] Declaration of Steven Weisbrot, Esq., on Adequacy Notice Plan (stet), *Pollard v. Remington Arms Co*., Case No. 13-00086, M.D. Mo., ECF No. 112, Feb. 9, 2015.

> *Settlement Agreement. Thus, this low response rate demonstrates the notice process has not been effective*."[13]

More data should be captured and studied before making a rule change of this magnitude, especially before acting on presumptions contrary to data known to claims administrators.

The systemic problems I wrote about in March are very real. Since then, a leading notice professional made an astounding revelation to me: A lawyer in settlement discussions called to request a bid on administration. It was explained that a physical mailing list would be provided; one that was comprehensive. The parties sought a vendor who would research and develop an email list, and then, not use the physical mailing list but instead send only emails, and sign an affidavit stating such method was better. This notice professional, knowing this would be counter to best practices, and counter to ethics, declined to participate. But others will. Such requesters know that claims rates will be lower. But that, it seems, is why they want it. Too many people asking for a share reduces *pro rata* payments making a settlement look insufficient. The disincentives that prompt these motivations must be cured; we should not instead weaken the backbone of class action legitimacy.

Numerous notice professionals tell me they have assessed false promises that unscrupulous and untrained vendors have been pitching. But credible notice professionals may speak out only at their own peril. They have been told outright that major firms will not work with them if they publicly oppose notice plans. They face pressure to dial-back effective notice proposals to compete with falsely-effective inexpensive bids from affiants who are untrained in mass communications. Thus, despite the rule requiring "best practicable" notice, courts are too often presented with the least notice a vendor is willing to sign off on *if* awarded the contract to disseminate notice and administer the case. We should not compound the problems in the notice system by making this unnecessary and counter-productive rule change.

I understand a desire to keep pace with technology. A legitimate concern about expense is appropriate. Less expense can benefit class members, but not if high percentages of class members are left unaware and bound by their silence and inaction. I understand a visceral feeling that email use is pervasive. But people other than the homeless will always have physical addresses. U.S. mail must be delivered by law. No reasonable person goes to their mailbox, grabs the contents and drops it all in the trash without a glance at the envelopes in their hands. Not when tax refunds, jury notices, traffic offenses and gifts from grandma might be in there.

[13] ORDER (1) DEFERRING CONSIDERATION OF JOINT MOTION FOR SETTLEMENT APPROVAL AND MOTION FOR ATTORNEY FEES, (2) CANCELLING FINAL APPROVAL HEARING, AND (3) DIRECTING PARTIES TO PROVIDE SUPPLEMENTAL BRIEFING, *Pollard v. Remington Arms Co.*, Case No. 13-00086, M.D. Mo., ECF No. 112, Dec. 8, 2015.

The same cannot be said about email. Knowable statistics can be given to courts. Will parties happily reveal that 80% of their class never opened an email notice when standing in front of a court at a fairness hearing? That most of the so-called "reach" may have been fake or viewed by robots? That 0.04% of the human viewers clicked the banner?

In truth, the type of low-priced electronic-reliant notice plan that has driven this proposed rule too far down the tracks is today's "snake-oil." These cheap plans are indeed too good to be true. Industry research shows *the cost of gaining attention has dramatically increased*.[14]

Please consider this information with the sincere intentions I bring to this process as a neutral notice expert. I have no interest in making notice more expensive than it needs to be. I've simply spent my career helping to improve notice and I just want the class action to remain an effective device for parties and class members, and I want our courts to be respected for overseeing a fair process.

Thank you for your consideration of these remarks.

Sincerely,

Todd B. Hilsee
Principal

[14] The Rising Cost of Consumer Attention: Why You Should Care, and What You Can Do about It, Thales S. Teixeira, HARVARD BUSINESS REVIEW, working paper 14-055, Jan. 17, 2014. "*The cost of gaining attention has increased dramatically (seven- to nine-fold) in the last two decades*."

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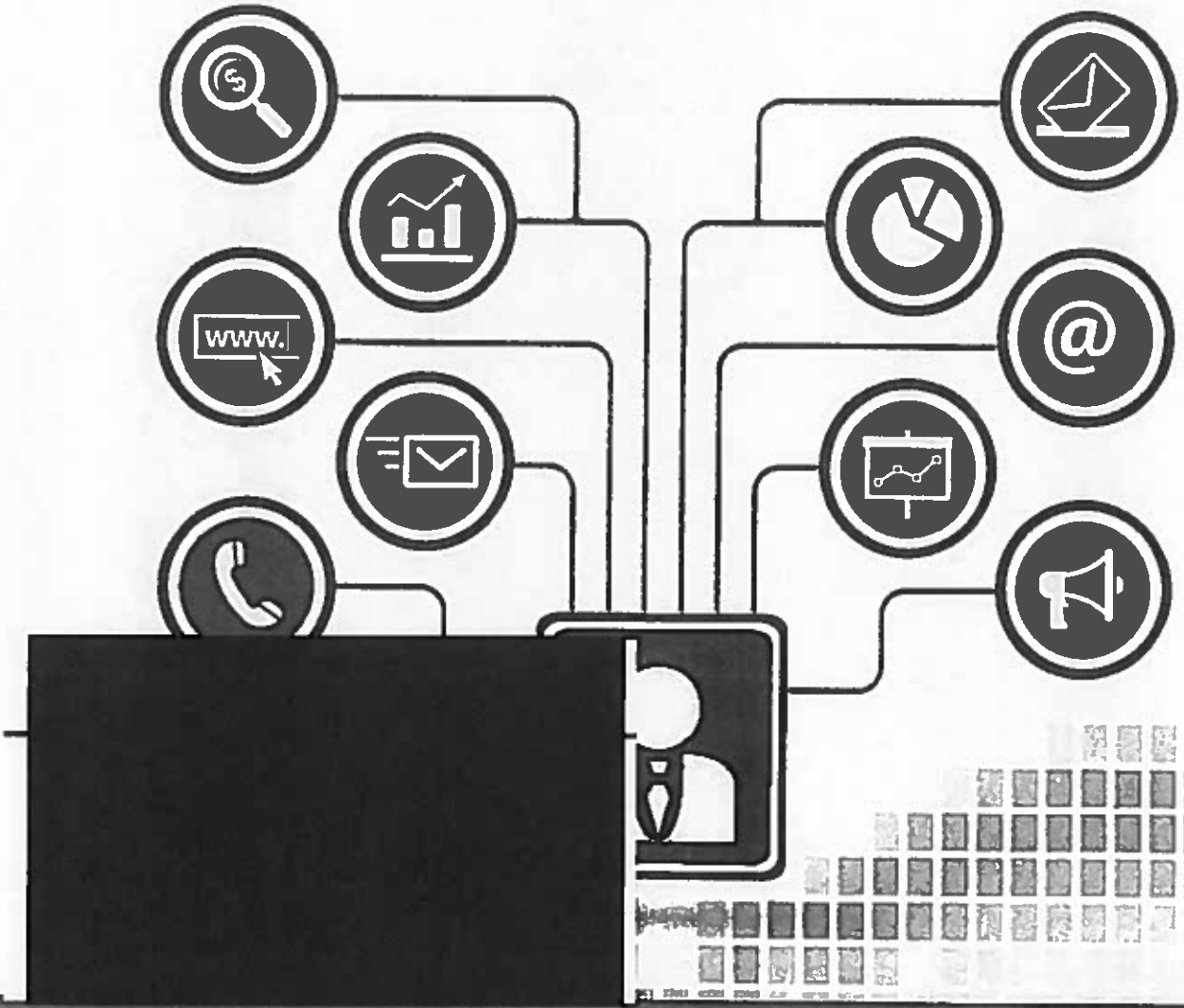
EXHIBIT 1

DMA RESPONSE RATE REPORT 2015



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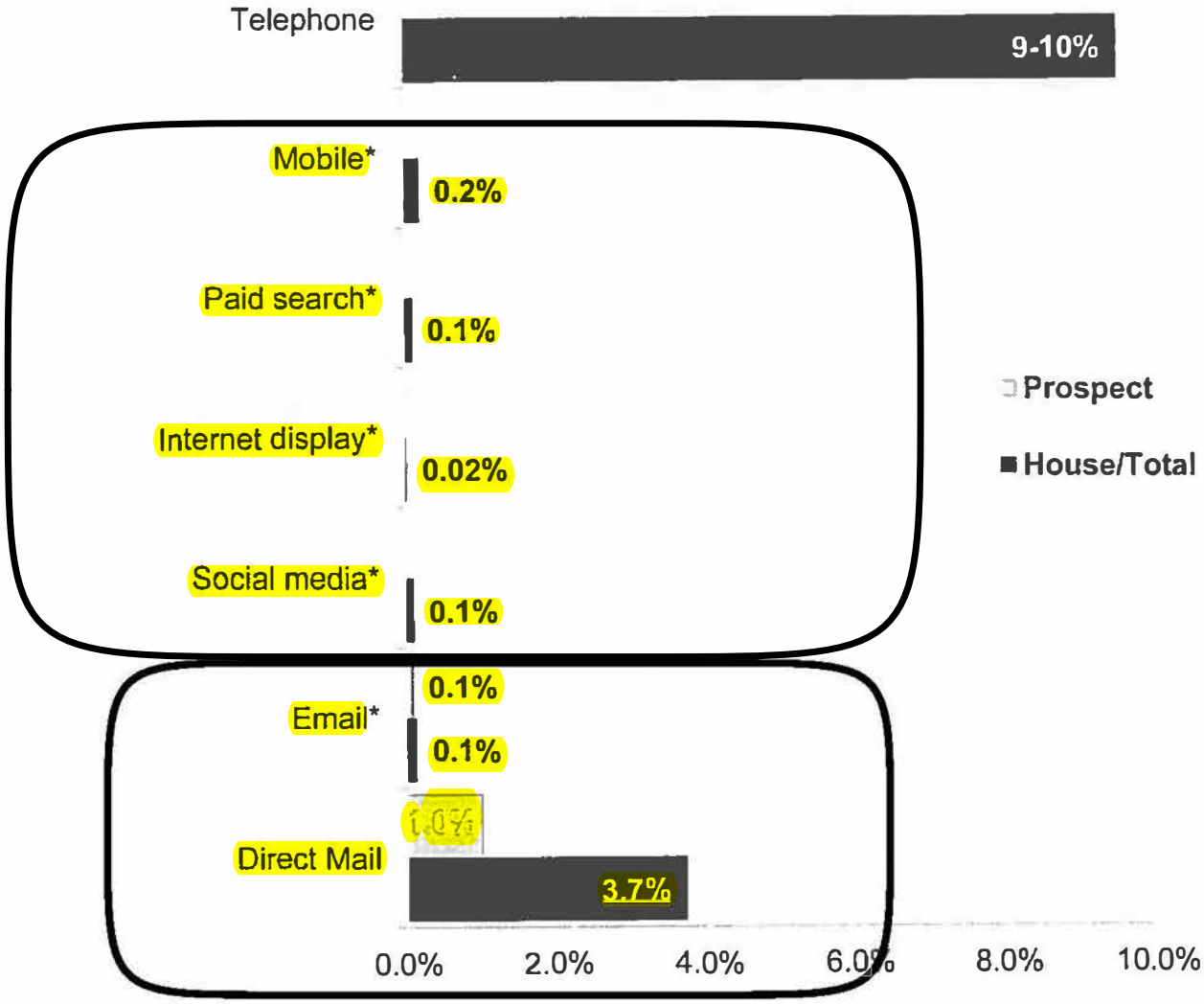
ISBN information: 978-0-9833791-7-1

Figure 3: Response by Selected Media



2015 Response Rate Benchmark Study, DMA & Demand Metric, March 2015

Note: Response rate for telephone was graphed using the midpoint of the range.

**CTR x Conversion rate*

Chapter 3: Email

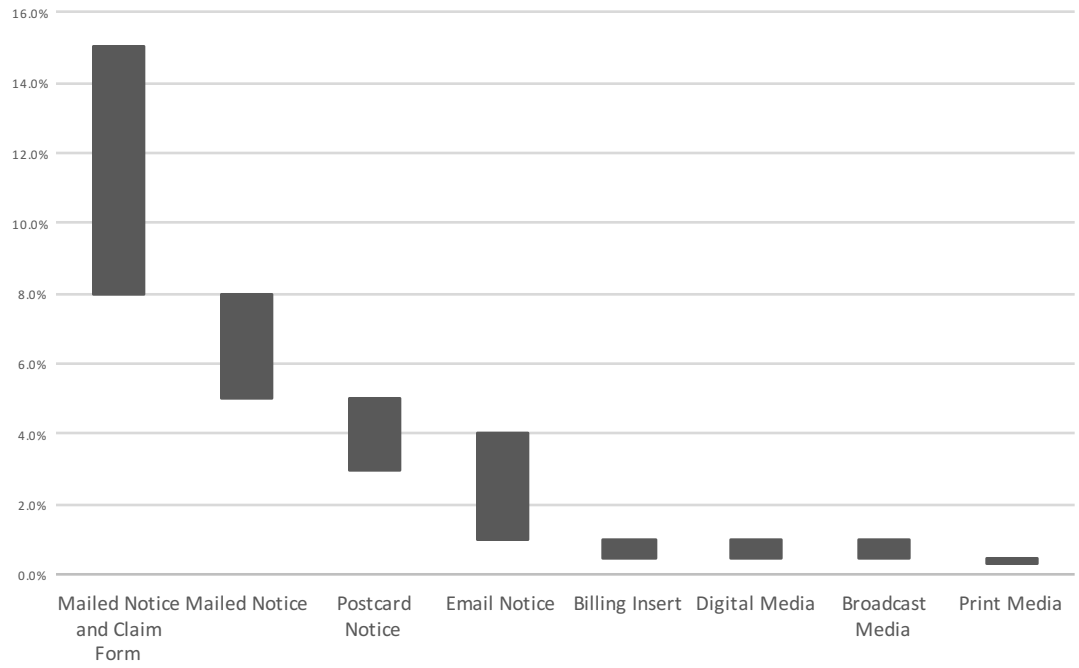
Chapter Highlights

- **Open rates ranged from a low of 7-8%** * for emails sent to prospect lists to drive traffic. Ironically, emails sent to house lists to drive traffic enjoyed the highest open rate at 23-24%.
- **Click rates were lowest for lead generation emails sent to prospect lists (3-4%)** and highest for B-to-B emails sent to house lists (17-18%).
- **Conversion rates were lowest for B-to-C, B-to-B and lead gen emails sent to prospect lists (1-1.9%)** and highest for email campaigns to drive traffic sent to house lists (4-4.9%).
- **For 36% of respondents, the primary purpose of emails sent to house lists was to make a direct sale.** For emails sent to prospect lists, 62% say the main purpose was lead generation.
- **Email usage for marketing campaigns equals or exceeds 80% for most industries.** Email usage is lower for Consumer Packaged Goods (63%), Education (70%), Financial Services/Insurance (75%), Healthcare/Pharmaceuticals (79%) and Travel/Hospitality (53%).

EXHIBIT 2

Participation Rates and Types of Notice

Everything Else Being Equal…



Key Takeaways

Participation Rates are Generalizations

Known Class Members: Direct Notice With a Claim Form is more expensive than the alternatives, but generally has higher class member participation.

EXHIBIT 3

Ensure high-quality, cost-effective notice and settlement administration

Class Action Settlement Administration For Dummies, KCC Special Edition, is packed with details about the administration process and how your administrator makes the process run smoothly. This book provides you with an overview of class action settlement administration and legal notification. You'll learn about the mechanics of settlement administration, how to choose a claims administrator, what makes a notice program effective, and how to keep administration costs in line, among other topics.

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- ***Reduce costs — find out how working with experts saves time and money***
- ***Comply with court requirements — work with experienced professionals to ensure court approval***

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- Dee Christopher
- Robert P. DeWitte
- Drake Foster
- Gina Intrepido-Bowden
- Patrick Ivie
- Patrick Passarella
- Carla Peak
- Nancy Timpanaro
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Class Action Settlement Administration

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E-mail notices tend to generate a lower claims rate than direct-mail notices. But not all direct-mail notices are created equal — many types of notice and claim form designs exist, and they all tend to have different claims rates. The claims rates of the varying types of notice and claim form designs tend to be most impacted by their distribution methods, their ability to be easily understood by recipients, and the ease with which class members can file the necessary forms and take any required action.

The following are the most common types of e-mail and direct-mail notices and claim forms. They're listed in order of least to most likely to increase the number of claims filed in a settlement.

- E-mail notice
- Single postcard summary notice
- Full notice and claim form
- Full notice and claim form with return envelope
- Full notice and claim form with postage-paid return envelope
- Double postcard notice with tear-away claim form
- Double postcard notice and postage-prepaid tear-away claim form

When thinking about the potential claims rate, be sure to think about factors other than just the amount of the monetary award. Your claims administrator should review the settlement details and identify the major factors that impact the claims rate in your settlement.

For example, in an employment context, consider whether a particular class member is a current, past, or seasonal employee. In the consumer context, consider whether the product was a luxury item with a high price tag or whether the lawsuit involved a high-profile product, such as a common, everyday food item. Was there a safety hazard? Was this a well-publicized settlement?

Calculating Claims Rates

While claims rates are an important factor in settlement planning, be sure to focus not only on the individuals making the claims but also on the percentage of the class fund that those claims represent. It'll be pretty straightforward to allocate the class member awards if the settlement is set up on a per capita basis with a set value per claimant or a simple pro rata share with a value that varies in proportion to an easily calculated factor.

The calculation process becomes a lot more complex when the allocations vary based on considerations such as the length of time a customer received a service or the amount of time an employee worked in a particular position. Talk to your claims administrator about the complexity of your settlement, and be sure you understand what the class member allocations are based on.

EXHIBIT 4

5 FACTORS of VIEWABILITY

Many of the ads served on the web never appear on a screen. But thanks to new advancements, we can now measure which digital ads were actually viewable—on screen. And as advertisers shift to paying for viewable instead of served impressions, it's important to understand what factors affect ad viewability. We explored this by conducting a study of our display advertising platforms, including Google and DoubleClick. Here we size up five factors of viewability—from page position to ad dimensions and more.

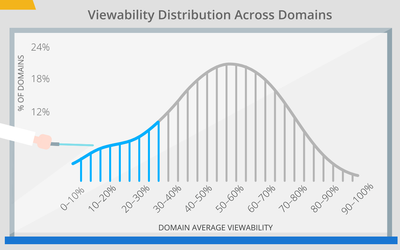
VIEWABLE IMPRESSIONS: A new industry standard

A display ad is considered viewable when **50% of an ad's pixels are in view** on the screen **for a minimum of one second,** as defined by the Media Rating Council.

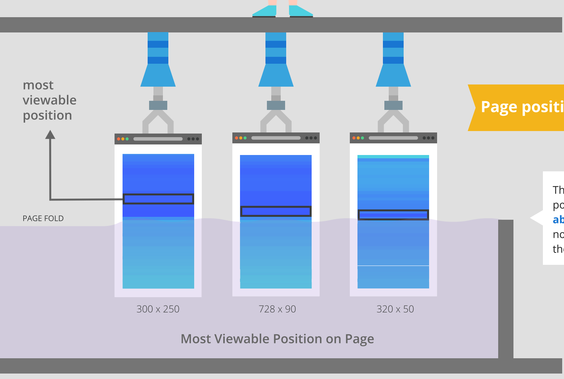
Viewability rate: Percentage of ads determined viewable out of the total number of ads measured.

1 State of publisher viewability

A small number of publishers are serving most of the non-viewable impressions; **56.1% of all impressions** are not seen, but the average **publisher viewability is 50.2%.**



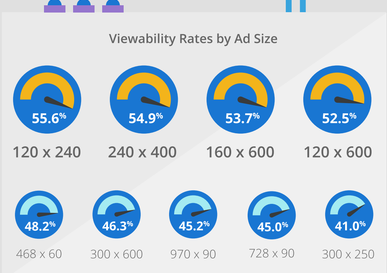
2 Page position matters ...



The most viewable position is **right above the fold,** not at the top of the page.

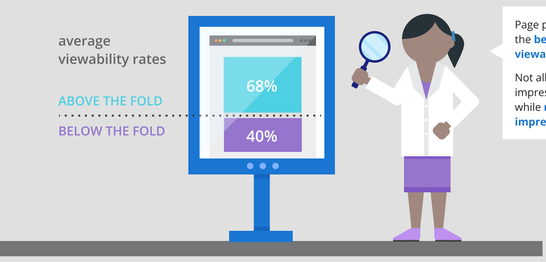
3 ... So does ad size

The most viewable ad sizes are **vertical units.** Not a surprise, since they stay on screen longer as users move around a page.



Popular ad size rates

4 Above the fold ≠ always viewable

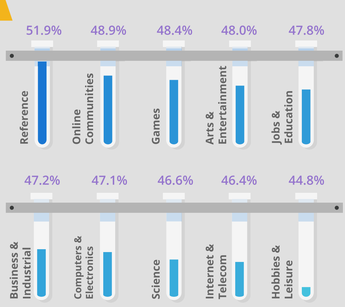


Page position isn't always the **best indicator of viewability.**

Not all above-the-fold impressions are viewable, while **many below-the-fold impressions are.**

5 Viewability varies across industries

While it ranges across content verticals, or industries, content that **holds a user's attention** has the highest viewability.



Source: Google, "The Importance of Being Seen: Viewability Insights for Digital Marketers and Publishers" study, November 2014.

EXHIBIT 5

Examples of News Stories - Fraud of Overstated Internet Banner Reach Statistics

Within the last year, a deluge of national and advertising industry press is revealing a massive $6.3 billion to $8.2 billion internet advertising fraud. Revelations include that millions of internet banner "impressions" that advertisers have been buying for incredibly low prices are seen, not by human beings, but by robots or are outright fake. The majority are not "viewable" as that term is defined:[1]

The Alleged $7.5 billion Fraud in Online Advertising. MOZ, June 22, 2015. "*This is the biggest advertising story of the decade, and it's being buried...the three main allegations…half or more of the paid online display advertisements that ad networks, media buyers, and ad agencies have knowingly been selling to clients over the years have never appeared in front of live human beings. In another words, an "impression" occurs whenever one machine (an ad network) answers a request from another machine (a browser)… Just in case it's not obvious: Human beings and human eyeballs have nothing to do with it. If your advertising data states that a display ad campaign had 500,000 impressions, then that means that the ad network served a browser 500,000 times—and nothing more.*"[2]

Is Ad Fraud Even Worse Than You Thought? Bloomberg Businessweek Seems to Think So. Ad Age, September 25, 2015. "*Just how much of a problem is ad fraud? If you're a regular reader of Ad Age, you know it's a big problem—though just how big depends on lots of variables, including specific digital agencies, ad-tech vendors and publishers a given marketer chooses to work with.*"[3]

How Much of Your Audience is Fake? Marketers thought the Web would allow perfectly targeted ads. Hasn't worked out that way. Bloomberg Businessweek, September 25, 2015. *"The most startling finding: Only 20 percent of the campaign's "ad impressions"—ads that appear on a computer or smartphone screen—were even seen by actual people...As an advertiser we were paying for eyeballs and thought that we were buying views. But in the digital world, you're just paying for the ad to be served, and there's no guarantee who will see it, or whether a human will see it at all...Increasingly, digital ad viewers aren't human. A study done last year in conjunction with the Association of National Advertisers embedded billions of digital ads with code designed to determine who or what was seeing them. Eleven percent of display ads and almost a quarter of video ads were "viewed" by software, not people. According to the ANA study, which was conducted by the security firm White Ops and is titled The Bot Baseline: Fraud In Digital Advertising, fake traffic will cost advertisers $6.3 billion this year.*"[4]

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[1] A display ad is considered viewable when 50% of an ad's pixels are in view on the screen for a minimum of one second, as defined by the Media Ratings Council.

[2] https://moz.com/blog/online-advertising-fraud, last visited April 28, 2016.

[3] http://adage.com/article/the-media-guy/ad-fraud-worse-thought/300545/, last visited April 28, 2016.

[4] http://www.bloomberg.com/features/2015-click-fraud/, last visited April 28, 2016.

What's Being Done to Rein in $7 Billion in Ad Fraud. AdWeek, Feb. 21, 2016. *"Long a dirty little secret of the digital media business, the topic of ad fraud has been thrust front and center in discussions among agency executives, advertisers and publishers over the last three years. Bot traffic, or nonhuman digital traffic, is at its highest ever, and recent projections from the Association of National Advertisers have more than $7 billion in advertising investment wasted."*[5]

Inside Yahoo's troubled advertising business. CNBC, Jan. 7, 2016. *"The company's ad business, which brought in $1.15 billion in the second quarter of 2015, is rife with ad fraud, multiple sources told CNBC...the company's programmatic video ad platform generates mostly fraudulent ad traffic, and otherwise does not work as promised. The platform is largely powered by BrightRoll, which was acquired by Yahoo in November 2014.... discovered 30 to 70 percent of its ads were not running in areas where Yahoo was claiming they were. ...Another source said that it found BrightRoll's traffic was mostly coming from data centers' IP addresses, suggesting most of the ad views were nonhuman and fraudulent."*[6]

Ad Fraud, Pirated Content, Malvertising and Ad Blocking Are Costing $8.2 Billion a Year, IAB says. Ad Age, Dec. 1, 2015. *"More than half of the money lost each year derives from 'non-human traffic' -- fake advertising impressions that advertisers pay for but don't represent contact with real consumers, the [Interactive Advertising Bureau] said in the report, which was conducted for the group by Ernst & Young."*[7]

No More Ads. Wall Street Journal, February, 17, 2015. *"As if the online ad industry didn't have enough thorny issues to deal with–from fraud to ads nobody can see–here come the ad blockers. Reams of people, mainly young and tech-savvy folks, the kinds of people lots of advertisers want to reach, are downloading and utilizing ad blocking software–or tools that keep online ads from ever appearing on a person's screen. Ad blocking is on the rise, and the topic has been thrust to the top of the list by online ad industry leaders, reports Ad Age. In the short term, this creates another worry for brands, who now have to fret about whether they are paying for ads that are getting blocked. But in the long term, the bigger worry for Web publishing is when does the cumulative effect of what seems like a mounting list of problems cause more advertisers to say, "You know what? The Internet just isn't ready for prime time, or my ad budgets."*[8]

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[5] http://www.adweek.com/news/advertising-branding/whats-being-done-rein-7-billion-ad-fraud-169743, last visited April 28, 2016.

[6] http://www.cnbc.com/2016/01/07/yahoos-troubled-advertising-business.html, last visited April 28, 2016.

[7] http://adage.com/article/digital/iab-puts-8-2-billion-price-tag-ad-fraud-report/301545/, last visited April 28, 2016.

[8] http://blogs.wsj.com/cmo/2015/02/17/cmo-today-apples-watch-is-coming-soon/, last visited April 28, 2016.

ATTACHMENT 4

United States Senate
WASHINGTON, DC 20510

July 11, 2016

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Chairwoman Ramirez,

We write to you regarding digital advertising fraud and the associated negative economic impact on consumers and advertisers.

The landscape of advertising in this country has changed considerably. As media consumption has expanded to an ever-larger array of platforms and sources, advertisers have been forced to rethink their marketing efforts to reach consumers across a broader media landscape. These developments have prompted tremendous innovation in online marketing. At the same time, today's media ecosystem has in some ways reduced market transparency. Internet advertising revenues in 2015 were estimated to have totaled $59.6 billion,[1] yet many of the purchased online advertisements are not reaching their intended audience.

The infrastructure to accommodate the rise of digital advertising has grown as sophisticated as our financial markets. A dense network of intermediaries has arisen in order to accommodate the growing automation of ad-buying and selling, much like stock exchanges. Within these intricate exchanges, the real-time bidding for advertising content depends heavily on the recorded consumer traffic on a given platform.

Much like a stock, the value of an ad impression is highly contingent on measured demand. However, the problem with relying on ad "clicks" or "views" to measure that value is that recent studies have shown this data is frequently inaccurate.[2] According to one study, between 88 and 98 percent of all ad-clicks on major advertising platforms such as Google, Yahoo, LinkedIn, and Facebook in a given seven day period were not executed by human beings, but rather by computer-automated programs commonly referred to as "botnets" or "bots."[3] These programs allow hackers to seize control of multiple computers remotely, providing them access to personal information as well as the ability to remotely install malware to engage in advertising fraud,

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[1] See Sarah Sluis, *IAB Report: Digital Advertising's $10 Billion Growth Propelled By Mobile* (April 21, 2016, 3:20pm), http://adexchanger.com/online-advertising/iab-report-digital-advertisings-10-billion-growth-propelled-by-mobile/.
[2] See Ben Elgin, Michael Riley, David Kocieniewski, Joshua Brustein, *The Fake Traffic Schemes That Are Rotting the Internet* (October 20, 2015), http://www.bloomberg.com/features/2015-click-fraud/.
[3] See Adrian Neal, *Quantifying Online Advertising Fraud: Ad-Click Bots vs Humans* (January, 2015), http://oxford-biochron.com/downloads/OxfordBioChron_Quantifying-Online-Advertising-Fraud_Report.pdf.

entirely unbeknownst to the computer's true owner.[4] The ad fraud market has scaled to such an extent that it has attracted participation by organized crime, with a recent report indicating that by 2025 ad fraud could represent the second largest revenue source for organized crime groups after drug trafficking.[5]

Bots plague the digital advertising space by creating fake consumer traffic, artificially driving up the cost of advertising in the same way human fraudsters can manipulate the price of a stock by creating artificial trading volume. In each case, markets highly sensitive to demand signals are manipulated. These bots range in sophistication. While "basic" bots can only mimic human "clicks" on an advertisement, so-called "humanoid" bots can mimic human mouse touch movements with such precision that deep behavioral analysis is required to detect them.[6] Many of these bots are advanced enough to analyze consumer web activity in order to retarget advertisements based on individual browsing preferences.

A comprehensive study conducted by White Ops and the Association of National Advertisers estimates that this market manipulation scheme will cost advertisers over $7.2 billion in the next year alone.[7] Additionally, it is anticipated that as the budget for mobile advertising grows, so will the incidence of bot fraud in mobile advertising, which already accounts for 30 percent of annual digital advertising revenue.[8]

The potential for revenue leakage is so great that our nation's leading advertisers and platforms are already working on new systems to combat these highly evolved computer programs. In February 2014, Google bought spider.io, a company focused on identifying digital ad fraud.[9] In May 2015, the Trustworthy Accountability Group (TAG), an industry group created specifically to stem advertising fraud, rolled out a "Fraud Threat List," through which members will disclose third party vendors promulgating fraudulent consumer traffic.[10] While these developments are significant, it remains to be seen whether voluntary, market-based oversight is sufficient to protect consumers and advertisers from digital advertising fraud. And in the interim, consumer confidence in digital advertising markets has eroded, as evidenced by user adoption of ad blocking tools.[11]

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[4] See The Federal Bureau of Investigation, *Botnets 101: What They Are and How to Avoid Them* (June 6, 2013, 7:00am) https://www.fbi.gov/news/news_blog/botnets-101/botnets-101-what-they-are-and-how-to-avoid-them.

[5] Patrick Kulp, *Ad Fraud Could Become the Second Biggest Organized Crime Enterprise Behind the Drug Trade* (June 9, 2016), http://mashable.com/2016/06/09/ad-fraud-organized-crime/#U1u9xjmtlqL.

[6] See supra note 3, at 4.

[7] See Association of National Advertisers, *The Bot Baseline: Fraud in Digital Advertising* (2016), http://www.ana.net/content/show/id/botfraud-2016.

[8] See IAB and PricewaterhouseCoopers, *IAB Internet Advertising Revenue Report, 2015 Half Year Results* (October, 2015) http://http://www.iab.com/wp-content/uploads/2015/10/IAB_Internet_Advertising_Revenue_Report_HY_2015.pdf.

[9] See Alex Kantrowitz, *Inside Google's Secret War against Ad Fraud* (May 18, 2015), http://adage.com/article/digital/inside-google-s-secret-war-ad-fraud/298652.

[10] See The Trustworthy Accountability Group, *Trustworthy Accountability Group (TAG) and Digital Ad Leaders Announce New Program to Block Fraudulent Data Center Traffic* (July 21, 2015) https://www.tagtoday.net/tag-and-dal-announces-new-program-to-block-fraudulent-data-center-traffic/.

[11] Tim Baysinger, *The Online Industry is Losing $8 Billion a Year, and Ad Blocking Is the Least of Its Worries* (Dec. 1, 2015) www.adweek.com/news/advertising-branding/how-online-industry-losing-8-billion-every-year-168389. ("The IAB considers the adoption of ad blockers to be a side effect of the spread of malicious software, or malware, which costs a total of $1.1 billion in lost dollars.")

The cost of pervasive fraud in the digital advertising space will ultimately be paid by the American consumer in the form of higher prices for goods and services. Just as federal regulation has evolved to keep pace with the ever-growing sophistication of our financial markets, so must oversight of the digital advertising space. To this end, we respectfully request that the Federal Trade Commission (FTC) respond to the following questions:

1. As noted above, digital advertising fraud takes many forms, including through botnets and malware. Is the FTC observing a trend that favors one particular type of advertising fraud over another? If so, what factors are leading to the prevalence of that particular type of fraud?

2. What is the projected economic impact of this degree of data and revenue leakage amongst media owners or publishers?

3. What steps is the FTC taking to protect consumer data and mitigate fraud within the digital advertising industry? What regulatory agency currently provides oversight of mobile advertising platforms?

4. What steps can be taken to reform opaque advertising exchanges?

5. What can be done to more closely align the incentives of ad tech companies with publishers, advertisers and consumers?

6. To the extent that criminal organizations are involved in perpetuating digital advertising fraud, how is the FTC coordinating with both law enforcement (e.g., the Department of Homeland Security or the Federal Bureau of Investigation) and the private sector to formulate an appropriate response?

Thank you for your timely attention to these issues.

Sincerely,

Mark R. Warner
United States Senator

Charles E. Schumer
United States Senator

ATTACHMENT 5

REMINGTON UNDER FIRE

Expert blasts proposed Remington Rifle settlement

Scott Cohn | @ScottCohnTV

Sunday, 31 Jul 2016 | 9:46 PM ET

CNBC

Daniel Acker | Bloomberg | Getty Images

A bolt action rifle sits on display in the Remington Arms Co. LLC booth on the exhibition floor of the 144th National Rifle Association (NRA) Annual Meetings and Exhibits on April 11, 2015.

A proposed plan to replace the triggers in millions of allegedly defective Remington rifles is "designed to fail," a leading expert on class action settlements said.

Philadelphia-based consultant Todd Hilsee said the proposal has been crafted by the company and plaintiffs' attorneys largely to address "Remington's public relations concerns" instead of properly notifying gun owners that there may be a problem.

The allegations in a 30-page letter from Hilsee, who helped write the federal court rules on notifying victims in class action cases, could further threaten a tenuous settlement agreement involving Remington's popular Model 700 bolt-action rifle, which CNBC investigated in a 2010 documentary. Dozens of lawsuits have alleged that for decades, Remington has covered up a deadly design defect that allows the guns to fire without the trigger being pulled, resulting in hundreds of injuries and at least two dozen deaths.

Remington has denied the allegations and continues to maintain that the guns are safe. Nonetheless, the company agreed in 2014 to the landmark settlement covering some 7.5 million rifles including the Model 700 and a

dozen other firearms with similar designs. At the time, the company said it was agreeing to the settlement in order to avoid protracted litigation.

In his scathing letter to the judge overseeing the case, Hilsee wrote that the settlement—and what he called an "inadequate" plan to notify the public—risked leaving millions of allegedly defective guns in the public's hands, with little or no recourse left for accident victims.

"The notice as written reduces safety concerns about the guns, which would have caused fewer people to seek replacement, less money being spent by Remington, and fewer potential deaths and injuries being prevented," Hilsee wrote.

The letter came on the eve of a key hearing Tuesday in Kansas City to consider a new notification plan developed by Remington and plaintiffs' attorneys. U.S. District Judge Ortrie Smith ruled last December that their original plan was inadequate because only around 2,300 gun owners had filed claims.

Hilsee said the new plan was no better than the first one, and urged the judge to send the parties back to the drawing board yet again. Otherwise, he wrote, "I'm afraid the Court and Class will get stung."

Attorneys for Remington did not respond to multiple e-mails over the weekend seeking a comment.

Hilsee reserved some of his harshest criticism for plaintiffs' attorneys, who, he wrote, "were appointed to represent fathers and mothers of kids" killed in Remington rifle accidents. Yet, he said, the attorneys agreed to a "defective" plan to notify the public. Under the proposed settlement agreement, the attorneys stand to collect $12.5 million in fees regardless of how many gun owners get their triggers replaced.

Hilsee also accused the plaintiffs' attorneys of squandering multiple opportunities to publicize the trigger replacement offer. He said one such opportunity occurred in December, when CNBC presented a follow-up investigation on the Remington rifles and the proposed settlement. Hilsee said the report was "the proverbial 'home run' of publicity for a settlement,"

yet the plaintiffs' attorneys declined to comment for the story.

Hilsee wrote that while it was one thing for Remington to continue maintain its guns are safe, "It's quite another thing for Class Counsel to not comment, when speaking up would serve Class members' interests."

A lead attorney for the plaintiffs spoke up in response to Hilsee's letter.

"His letter frightens me," attorney Mark Lanier said in an e-mail. "In effect, he is saying, 'scuttle the settlement and leave the dangers on the street because I think notice should be done my way'."

"He clearly hasn't represented hunters, and doesn't understand the response numbers are not indicative of deficient notice," Lanier writes. "They are indicative of gun owners who don't want to part with their guns regardless."

Nonetheless, on orders from Judge Smith, attorneys for both sides submitted a new notice plan in June. In addition to the direct mail and print advertising promised in the initial proposal, the new plan includes commercials on conservative talk radio programs, internet banner ads, and a social media campaign using Facebook. The parties said they have engaged a former Obama campaign manager, Jim Messina, to administer the plan.

But Hilsee said in his letter that the new plan was also doomed to fail, noting that only half of rifle owners even used Facebook; fewer still would see the ads. He alleged that the advertising metrics cited in the revised plan were inflated. And he said the use of a former Obama aide in the campaign was not what it seemed.

"The implication that past political campaign successes can be repeated here, is belied by the fact that the 2012 Obama campaign spent $483 million on advertising, mostly on TV," Hilsee wrote.

He said a simpler claims process, more direct language, and more targeted marketing—including possibly using the National Rifle Association's mailing list—could result in a campaign that reaches 95 percent of owners, which he said is the industry standard in high-stakes class action cases such as this one.

In a telephone interview, Hilsee said he felt moved to write the letter not because of any personal involvement in the case or any political concerns —he said he had never taken a public position on gun control—but because of much broader legal issues, including proposals in the federal courts to ease some of the requirements for notifying potential victims in class action cases.

"The entire class action field is watching this case with astonishment," he said.

"This is the case where you would turn over every rock to find class

members," he said. "If we can have this kind of notice in this kind of case, the hope for good class action notice is lost."

But Lanier said the fact that the case involved guns made it unique. Not only are many gun owners wary of turning over their rifles, but many also believe they can remedy the problem on their own by practicing better gun safety.

"I want every gun fixed," he said. "But a bunch of gun owners are not going to do it, even if you knock on their door."

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Scott Cohn
Special Correspondent, CNBC

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Daniel Fisher Forbes Staff

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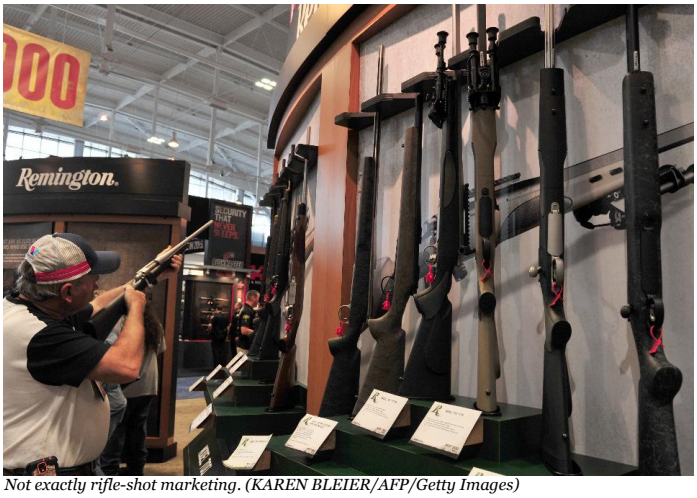
Banner Ads Are A Joke In The Real World, But Not In Class-Action Land

Lawyers use questionable Internet marketing techniques to get notice of class-action settlements out to their clients, with Internet-level response rates.



Not exactly rifle-shot marketing. (KAREN BLEIER/AFP/Getty Images)

In the mid-1990s, Remington Arms settled a class action lawsuit over allegedly defective shotgun barrels, issuing $17.5 million in checks to some 477,000 owners of more than 820,000 12-gauge shotguns.

Last year the company, now owned by Cerberus Capital Management and called Remington Outdoor, settled a similar class action over 7.5 million allegedly defective bolt-action rifles which, according to a lengthy CNBC documentary, can fire accidentally even with the safety on. Remington denied liability but offered a free fix to anyone who responded to the settlement. After several months the grand total of participants was 2,327, leading U.S. District Judge Ortrie D. Smith, who is overseeing the litigation, to erupt: "The Court cannot conceive

that an owner of an allegedly defective firearm would not seek the remedy being provided pursuant to this Settlement Agreement."

What changed in the intervening 20 years? Judge Smith blamed an ineffective notice process, the forgotten stepchild of the class-action system. After plaintiff lawyers have filed suit, after they've convinced a judge to declare their case a class action, and after they've negotiated a settlement and their own fees, they need to tell their clients how to collect their winnings. The Constitution requires notice, because even if class members don't avail themselves of the benefits, they lose their right to bring claims on their own unless they opt out of a settlement negotiated on their behalf.

An entire industry has grown around the process of giving notice to class actions, which depending on the size of the class can cost $100,000 to millions of dollars. Where consultants used to consider direct mail the gold standard, however, now a number of them are touting Internet strategies they say can reach 80% or more of a target audience at much lower cost. Some experts are calling foul, saying notice vendors are overstating the effectiveness of Internet campaigns – the click-through rate on banner ads, by some estimates is less than 0.05% — and misleading courts about how many people are actually being notified of their rights.

Indeed, in a filing in the infamous Duracell case where lawyers sought $5.3 million in fees and consumers filed for only $344,000 in benefits, an executive with Kurtzman Carson Consultants said that after administering hundreds of class actions, "it is KCC's experience that consumer class action settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%)."

A poor notification process can benefit defendant companies, since in a "claims-made" settlement, any money that isn't distributed to class members reverts to the company. Plaintiff lawyers don't have a financial incentive to push for better notification, since they often negotiate "clear sailing" agreements under which defendants agree not to challenge their fees, and judges almost never tie their fees to the amount of money that actually winds up in their clients' hands.

The result: "Defendants say `We'll pay any claim that is made,' and you can imagine what happens: Engineer the notice program so no one finds out about it," said Todd B. Hilsee, a consultant who advises courts and the Federal Judicial Center on how to notify class members.

Plaintiff lawyers rarely disclose the actual response rates in class action settlements but the available data show they are vanishingly small in consumer cases, where individual damages are frequently too low to justify the time required to fill out a settlement form. Participation rates are so predictably low that defendants can buy insurance in claims-made cases where they pay a single up-front premium and the insurer takes the risk that more people than expected file claims.

Watch on Forbes:

"Everybody knows these notice schemes don't work, and they're intended not to work," said Ted Frank with the Competitive Enterprise Institute's Center for Class Action Fairness, which frequently challenges what it believes are collusive settlements and excessive fees. "People intend the foreseeable consequences of their actions. And they know when they do a notice program without attempting to get the names of the class members, you're not going to get a high response rate."

Hilsee thinks that's what happened in the second Remington lawsuit. It represented a "claims process designed to fail," he wrote in a July letter to Judge Smith. Internet ads probably reached half the class, not 73% as the notice vendor told the court, he wrote. The reach should be more like 95% in a case involving a potentially deadly defect, Hilsee told me in an interview.

After Judge Smith rejected the first settlement over concerns about notice, plaintiff lawyers and Remington hired former Obama campaign manager Jim Messina to run a broader plan including targeted Facebook ads and 60-second radio spots on shows hosted by Rush Limbaugh and Sean Hannity. Hilsee is still skeptical the second plan will work.

"With the fragmentation of media there are more choices, more options," said Hilsee, who doesn't compete with notice vendors but has been hired by parties in class actions to critique their methods.. "The cost to gain attention is going up, but guess what, these new firms are coming in and saying `We can put out internet banners, send emails, and get the same reach.'"

The problem with Internet notice is there are no standards for judging its effectiveness. Some vendors boast of reaching millions of potential class members by running banner ads with "frequency capping" limiting them to one view per Internet protocol address. That supposedly guarantees one viewing per individual, but few advertisers in the real world would buy that pitch. A frequency cap of one, or even five or six, guarantees the majority of the "engagements" are with non-human bots. Market research shows real humans need to see a message several times for it to sink in and even then the number of people who click through a banner ad to investigate further is tiny. Google says more than half of Web ads are not "seen" by industry standards, meaning at least 50% of the ad's pixels are on screen for at least a second.

"Unfortunately what we see more and more is whoever can come up with the cheapest bid and put an affidavit in that it meets standards of due process, that firm will be hired," said Katherine Kinsella, the recently retired founder of Kinsella Media, which specializes in legal notification. "It is a reverse auction."

For a settlement of claims over allegedly fire-prone Conair hair driers in California, KCC — the firm that warned of low participation rates without direct mail — proposed a campaign including 15 million Internet ads with frequency capping of one that supposedly would reach 75% of adult women in California and New York. The plan didn't account for the fact that many of the viewers could be bots, half the ads would remain unseen even by humans, and frequency capping of one doesn't eliminate the chance one person with multiple devices will see the same banner ad more than once. Consultants also tell courts they have increased their reach by running ads in front of different groups of people – women in their 20s, say, and women who purchase hair driers – when standard practice in the advertising business is to account for the strong potential for double-counting.

Such objections only come up when one of the parties in a class action hire an expert like Hilsee or Kinsella to contest a notice plan. Notice vendors rarely criticize each others' work because that might cut them out of the next contract.

"You can't critique anybody else's work publicly," said Kinsella, who in retirement feels more free to speak. "You're blackballed."

Hilsee has drawn fierce criticism from notice vendors for denigrating the effectiveness of Internet ads. His letter to Judge Smith in the Remington case "levels accusations that are objectively false, rife with misinformation, and derived from a foregone era of media consumption—the only era during which Mr. Hilsee ever actually professionally planned or implemented notice campaigns," said Steven Weisbrot, a vice president with settlement administrators Angeion Group in a rebuttal to Hilsee's unsolicited comments.

Non-human viewership "is generally regarded to be minimal," Weisbrot wrote, and Angeion hired outside firms to verify bots weren't the only one seeing the notices. Direct mail would be more effective, he said, but there are "enormous legal and practical barriers" to getting names and addresses of gun owners from firearms dealers, the Bureau of Alcohol, Tobacco and Firearms or the NRA. Such an expense is unnecessary anyway, Weisbrot said, since "this is a case about the monetary value of a rifle," seeking economic damages not money for injuries and deaths.

A committee overseeing the revision of the Federal Rules of Civil Procedure is considering loosening the rules for notice, allowing "electronic means" instead of requiring direct mail whenever possible.

Getting names and addresses of class members isn't impossible if lawyers push hard enough to do it, however. After Frank and the Center for Class Action Fairness objected to a settlement of litigation over Bayer aspirin that would have paid lawyers $5 million and only a fraction of that amount to class members, lawyers subpoenaed Safeway for customer sales data and found enough class members to distribute another $5.8 million. In another case involving baby products, lawyers paid an additional $14.5 million to more than 1 million class members

after they'd originally told the court they couldn't find their clients and would distribute the money to charity in what is known as *cy pres*.

"You can make the notice process very effective. It's sometimes costly but in many instances the costs are worth bearing," said Brian Wolfman, an associate professor at Georgetown Law School and former director of litigation at Public Citizen, which frequently intervenes in class actions.

One way to insure plaintiff lawyers push for the most effective notice would be to tie their fees to the amount of money actually distributed. That prospect concerns class-action lawyers, who argue their pay shouldn't be hostage to the efforts of third-party contractors. Wolfman disagrees. As a public-interest lawyer he didn't collect a percentage of settlements he negotiated, but still pushed forcefully to track down class members including in a California case over illegal collection practices by a lender affiliated with the government.

The lender mailed checks directly to class members but even so some of them went uncashed. So Wolfman and a colleague convinced the judge to spend more money locating the recipients of the uncashed checks to make sure they had received them. The claim rates rose past 90%.

This exposes a deep irony in the way the class-action system works. Unique in American law, class actions are opt-out, meaning class members are considered to be plaintiffs in the litigation unless they notify the court they want out. Lawyers claim this is necessary because they couldn't otherwise gather enough plaintiffs to bring a case where individual damages are small.

But the whole system flips when it comes time to distributing the proceeds of a settlement. Then the case becomes opt-in – class members only get paid if they file a claim with the court. Sometimes this is necessary when the case requires proof of damages but critics including Wolfman say plaintiff lawyers should push harder for settlements where benefits flow directly to their clients.

"You can't have an opt-out class action and demand it is effectively opt-in at the back end –that's crazy," Wolfman told me. "Whenever possible, you don't require people to file a claim. You send them a check."

Follow @DanielDFisher

TAB 4

COMMENTS OF

PAUL BLAND AND LESLIE A. BRUECKNER,
PUBLIC JUSTICE

PUBLIC JUSTICE

15-CV-N

Via electronic delivery to: rules_support@ao.uscourts.gov

March 27, 2015

Committee on Rules of Practice and Procedure
Thurgood Marshall Building
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

RE: Possible Amendments to Federal Rule of Civil Procedure 23

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

Public Justice, P.C. and the Public Justice Foundation (collectively, "Public Justice") respectfully submit the following suggestions for amending Federal Rule of Civil Procedure 23 to the Advisory Committee on Civil Rules and its Rule 23 Subcommittee (the "Subcommittee").

Public Justice is the only public interest organization in the country that both aggressively prosecutes a wide range of class actions and has a special project to preserve class actions and prevent their abuse. Public Justice regularly represents workers and consumers in both individual and class actions, and its experience is that aggregate litigation often affords the only way to address corporate wrongdoing where individuals by themselves lack the knowledge, incentive, or effective means to pursue their claims.

Public Justice hereby urges the Subcommittee to adopt the following proposed amendments in order to address certain proposals and judicial decisions that threaten to undermine the viability of the class action device and run contrary to the core purposes of Rule 23.

I. Rule 23(b)(3) Should Be Amended to Add Deterrence of Wrongdoing as a Factor in Determining Whether a Class Action Is the Superior Method of Litigation.

Summary:

Legal commentators and judges alike have long recognized deterrence of wrongdoing as a proper purpose, and beneficial effect, of class litigation. By aggregating small-value claims when the damage caused by wrongdoing is widespread but not ruinous to any of its individual victims, class actions can be particularly well suited to serving this deterrence function. We believe that this oft-cited benefit of class actions should be recognized, and considered on a case-by-case basis, by judges deciding whether to certify class actions under Rule 23. We propose formalizing the deterrence inquiry into the class certification analysis by adding it as an explicit factor under Rule 23(b)(3), to be weighed when ascertaining whether a class action is superior to other forms of litigation in a particular case.

Proposed Amendment:

Rule 23(b) should be amended as follows (matters in brackets are to be deleted; matters italicized are to be added):

> **(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
>
> *** * ***
>
> **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings 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*; and*

(E) *the comparative effectiveness of the class action device in deterring the particular type of misconduct alleged.*

Analysis:

The class action is widely recognized as a vehicle for effective deterrence of wrongdoing. *See* Newberg on Class Actions § 1:8 (5th ed. 2013) ("In addition to their compensatory function, class actions deter misconduct by harnessing private attorneys general to assist in the enforcement of important public policies."); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) ("A class action, like litigation in general, has a deterrent as well as a compensatory objective."); Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 Me. L. Rev. 223, 228 (2004) ("[I]t must be kept in mind that the objective of consumer class actions is not only compensation, but also deterrence and disgorgement of wrongful profits.").

As Judge Posner noted in the *Hughes* decision, litigation in any form provides some amount of deterrent value. 731 F.3d at 677. However, the class action vehicle goes further than ordinary individual litigation in providing deterrence in circumstances where it would otherwise be lacking. *Id.* at 678. First, the aggregating of small claims enables deterrence against widespread wrongdoing, even when individual damages are relatively small. *See Hawaii v. Standard Oil Co. of Cal*., 405 U.S. 251, 266 (1972) ("Rule 23 . . . provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *Jones v. DirecTV, Inc.*, 381 F. App'x 895, 896 (11th Cir. 2010) (recognizing that class actions support "a public policy favoring the pursuit of small-value claims to deter companies from misconduct."); *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970) ("Since [class action rules] allow many small claims to be litigated in the same action, the overall size of compensatory damages alone may constitute a significant deterrent.")

Second, class litigation empowers private parties to act as private attorneys general, enforcing public interests where public law enforcement entities are unable or unwilling to do so. This deterrent function fills the gaps in many areas of the law including antitrust, securities fraud, and consumer financial protection; and it offers several advantages over governmental or agency action. *See, e.g.*, Mark A. Cohen & Paul H. Ruben, *Private Enforcement of Public Policy*, 3 Yale J. on Reg. 167, 168-69 (1985) (arguing that private enforcement may be more

efficient than public enforcement); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185, 189-92 (2000) (arguing that private enforcers are less conflicted and less politically constrained than captured public agencies); Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 Geo. L.J. 1075, 1093 (1980) (same); Thompson, *supra*, at 206 (arguing that private enforcement generates more innovative means of deterrence against wrongful conduct).

A class action will not be a more effective deterrent to wrongdoing than other methods of litigation in every case. For example, when a governmental agency has the authority to exact civil penalties or other sanctions, enforcement action by that agency might well have a stronger deterrent effect than a class action brought by individuals only seeking damages. Governmental action is not always feasible, however, due to scarce resources and conflicting priorities. Class actions are an indispensable way to deter wrongdoing without straining the public coffers. Given the universal recognition of deterrence as a beneficial result of class action litigation, we urge that deterrence be formally included in Rule 23(b)(3)'s analysis of superiority.

II. Rule 23 Should Be Amended to Rectify Court Decisions that Impose a Rigid "Ascertainability" Requirement as a Precondition for Class Certification.

Summary:

In the wake of the Third Circuit's decision in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), courts have been struggling to decide whether Rule 23 requires a showing, at the class certification stage, that the identity of individual class members be "currently and readily ascertainable based on objective criteria." *Id*. at 305 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012)). The *Carrera* panel denied certification of a consumer class action over weight-loss supplements on "ascertainability" grounds even though (1) the class was readily defined based on objective criteria; (2) the defendant's liability was capped at a certain amount; and (3) absent a class action, the consumers would have had no practical ability to redress their injuries.

Notably, four Third Circuit judges dissented from the denial of rehearing en banc in *Carrera*, stating that the panel's decision "goes too far" and arguably "threatens the viability of the low-value consumer class action 'that necessitated Rule 23 in the first instance.'" 2014 WL 3887938, at *1, *2 (May 2, 2014) (quoting Br. of *Amici Curiae* Professors of Civil Procedure and Complex

Litigation 3). The dissent further noted that "[t]he consequence of a step too far is the curtailment of well-intentioned class actions with many members yet all with claims too minimal to be asserted individually." *Id.* at *3. The dissent concluded that, in light of the potentially grave impact of the panel's decision on the viability of small-damages class actions, "the Judicial Conference's Committee on Rules of Practice and Procedure [should] look into this matter." *Id*.

We strongly agree. As explained below, *Carrera* conflicts with well-established Rule 23 jurisprudence and undermines the core purposes of Rule 23(b)(3). It has also spawned conflicting rulings on the so-called ascertainability issue. Guidance, in short, is sorely needed. We accordingly urge the Subcommittee to amend Rule 23(c) to make clear that "ascertainability" merely requires a finding, at the class certification stage, that the class *definition* is based on objective criteria. This is the majority approach used by courts in the past, and it should be enshrined in the Rule to prevent further confusion on this important point.

Proposed Amendment:

Rule 23(c) should be amended as follows (matters in brackets are to be deleted; matters italicized are to be added):

> **(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**
>
> **(1)** ***Certification Order.***
>
> *** * ***
>
> **(B) Defining the Class; Appointing Class Counsel.** An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g). *In certifying a class under Rule 23(b)(3), the court must define the class so it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.*

Analysis:

A. The Proposed Amendment Is Consistent with—and Intended to Codify—Pre-*Carrera* Judicial Practice.

The proposed amendment set forth above is consistent with the way the majority of courts approached "ascertainability" prior to the Third Circuit's decision in *Carrera* and is designed to correct what we see as the major flaw of that ruling. Before addressing *Carrera* in detail (which we do below), it may be helpful to explain why we are proposing to add "ascertainability" to Rule 23(c), as opposed to some other part of the Rule.

Although ascertainability is not an explicit element of Rule 23, many courts view ascertainability as an "implicit" requirement of the Rule. Courts differ, however, as to the statutory basis for that requirement. *See generally* Newberg on Class Actions § 3:2 (5th ed. 2013); 1 McLaughlin on Class Actions § 4.2 (11th ed. 2014). Some courts imply that the term "class" in Rule 23(a) means a definite or ascertainable class; others find support for ascertainability in Rule 23(c)(1)(B), which governs class certification; yet others look to Rule 23(c)(2), which governs the provision of class notice in some types of class actions. *Id.; see generally* Daniel Luks, *Ascertainability in the Third Circuit: Name that Class Member*, 82 Fordham L. Rev. 2359 (2014) (discussing origins of ascertainability). Ascertainability is also arguably an implicit consideration under Rule 23(b)(3), which requires courts to determine whether a class action is "superior to other available methods for fairly and efficiently adjudicating a controversy."

We think that it makes the most sense to address ascertainability in Rule 23(c)(1)(B), which is the stage of class litigation when the question naturally arises and becomes potentially dispositive. However, because "ascertainability" is generally only considered in the context of (b)(3) damages classes, our proposed amendment would limit the amendment to classes brought under that prong of Rule 23.

The wording of the proposed amendment—which provides that "[i]n certifying a class under Rule 23(b)(3), the court must define the class so it is ascertainable by reference to objective criteria"—is consistent with the way pre-*Carrera* courts approached the issue. As one noted authority has written, ascertainability has always "focus[ed] on the question of whether the class can be ascertained by objective criteria," as opposed to "subjective standards (*e.g.* a plaintiff's state of mind) or terms that depend on resolution of the merits (*e.g.*

persons who were discriminated against)." Newberg on Class Actions § 3:3; *see also* Manual for Complex Litig., Fourth § 21.222 (Fed. Judicial Ctr. 2004).

Importantly, courts have long "held that the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action." 7A Wright & Miller, Federal Practice & Procedure § 1760 (3d ed. 2005); *see also* Newberg on Class Actions § 3:3; Manual for Complex Litig. § 21.222. As one learned treatise put it, "[t]o place such a burden on plaintiffs would seem harsh and unnecessary" and make many class actions "very difficult, if not impossible." Wright & Miller § 1760. Hence, "[i]f the general outlines of the membership class is determinable at the outset of the litigation, a class will be deemed to exist." *Id*. (footnote omitted). *Accord Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279 (11th Cir. 2011) (holding that class defined as "all persons who purchased [the defendant's product] in the State of Florida" is adequately ascertainable for class certification purposes).

Requiring courts to consider whether the class definition is based on objective criteria would weed out class actions where the proposed class is so amorphous as to render class treatment unworkable and arguably unfair. For example, the Fifth Circuit once refused to certify a class of "residents of this State active in the 'peace movement' who have been harassed and intimidated as well as those who fear harassment and intimidation in exercising their First Amendment right." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). The Court noted that an essential element to maintaining a class action is that the class be "adequately defined and clearly ascertainable." This requirement was not met, in the Court's view, because the term "peace movement" could mean any number of things, and because it would be impossible to determine which class members "feared harassment and intimidation" without individualized findings of fact.[1]

We agree with this conclusion. It makes perfect sense to eliminate class actions where the class definition is based on subjective criteria. The proposed amendment is designed to codify this approach. What does *not* make sense, in our view, is the approach the Third Circuit adopted in *Carrera*, which makes it virtually impossible to obtain class certification in precisely the cases that need it most—cases involving small-value retail products, where individuals are unlikely

[1] Other circuits' approaches have been similar. *See, e.g., Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981); *Ihrke v. N. States Power Co.*, 459 F.2d 566, 573 & n.3 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972).

to have kept receipts of their purchases and class membership cannot be proven based on the defendants' own records.

B. *Carrera* Is Contrary to Rule 23, Lacks any Grounding in Common Sense, and Has Caused Rampant Confusion in the Courts.

Contrary to all the authorities cited above, *Carrera* held that a consumer class action cannot be certified unless the plaintiffs can prove (1) that that they will be able to identify—or "ascertain"—the individual members of the class; (2) that they will be able to do so through a process that is "reliable," "administratively feasible," and does not require "much, if any, individual factual inquiry"; and (3) that they will be able to do so without relying on affidavits and claims forms (used in claims processes for decades) because those forms of proof are not sufficiently "reliable." *See* 727 F.3d at 307-10.

Applying these criteria to the facts before it, *Carrera* held that the plaintiff class could not be certified even though (1) the damages were too small to justify individual litigation, yet the misconduct was substantial; (2) the proposed class was clearly and objectively defined (it consisted of all persons who purchased a single product—WeightSmart—in a single state—Florida—within a known time period); and (3) it was undisputed that the defendant's total liability to the class was capped at a finite amount that could be determined based on the company's own records.

1. *Carrera* Is Contrary to Rule 23(b)(3)'s Core Purposes.

We believe that this result is indefensible on several levels. First and foremost, *Carrera* runs afoul of the most basic purposes underlying Rule 23(b)(3). As the U.S. Supreme Court has explained, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quotation omitted). "A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id*. (citation omitted). As another court has written, "[t]he smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013).

If *Carrera*'s approach to ascertainability becomes the law of the land, "the problem" addressed in *Amchem* will go unrectified in a large number of cases and

tortfeasors will get off scot free. That cannot be reconciled with the core purposes of Rule 23. *See* Judith Resnick, *From "Cases" to "Litigation,"* 54 Law & Contemp. Probs. 5, 14 (1991) (explaining that Benjamin Kaplan, primary drafter of Rule 23, intended the rule to "provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all") (citation omitted).

2. *Carrera*'s Reasoning Is Unconvincing and Illogical.

Second, *Carrera*'s reasoning is flawed at its core. The *Carrera* panel defended its novel approach to ascertainability on the ground that defendants have a "due process right to challenge class membership" at the class certification stage. 727 F.3d at 307. But the *Carrera* defendant's total liability was capped at $14 million, "no more, no less." *Id*. at 310. This amount, moreover, was based on the defendant's own sales records/data, rather than an artificially-limited fund, so there is no question that the liability amount was based on actual damages. Because the defendant's total payout would be the same regardless of whether individual class members could be identified—or "ascertained"—there was no basis for the panel's refusal to allow the case to proceed on due process grounds.

Carrera also reasoned—equally wrongly, in our view—that its approach was necessary to protect the defendant from the risk of a collateral attack on the judgment by aggrieved class members whose recoveries were substantially reduced by "fraudulent or inaccurate claims." *Id.* at 310. This argument fails, first, because the notion that a significant number of non-class members would submit fraudulent or otherwise faulty affidavits, under penalty of perjury, in the hope of collecting a few dollars, is itself far-fetched. Second, even if there were a substantial number of fraudulent claims, the likelihood that class members' relief would be affected is minimal given that, "in small-claims, consumer class actions, less than twenty percent" of class members actually file a claim. M. Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305, 315 (2010). And third, even if the possibility that class members' claims would be "diluted" by fraudulent claims were substantial, it is "exceedingly rare for court to permit after-the-fact challenges by class members." Alison Frankel, *2nd Circuit: Class Members Deserve Notice*, Reuters, Aug. 25, 2012.

The final error in *Carrera* was its view that a rigid approach to ascertainability is needed to protect *absent class members* from the risk that their recoveries will be diluted by fraudulent claims. *See Carrera*, 727 F.3d at 310. Not only was there no factual basis for this concern (as explained above), but the panel

ignored that, absent a class action, the absent class members would have no practical means of recovering *anything* from the defendant, let alone the full value of their claims. In the end, the supreme irony of *Carrera* is that, in purporting to protect class members by denying class certification on ascertainability grounds, the Third Circuit effectively insured that they would not recover anything at all.

3. *Carrera* Has Engendered Confusion and Disagreement in Other Circuits.

Finally, it is important to note that *Carrera* has engendered widespread confusion and disagreement in other courts. In the wake of *Carrera*, a number of courts have refused to certify class actions on ascertainability grounds, despite the fact that the class was clearly defined based on objective criteria and the damages at issue were too small to support individual litigation.[2]

For example, in *Karhu v. Vital Pharmaceuticals, Inc*., 2014 WL 815253 (S.D. Fla. Mar. 3, 2014), the district court refused to certify a class of consumers who alleged that the dietary supplement Meltdown does not burn fat and promote rapid fat loss as advertised. The court denied class certification on ascertainability grounds, holding that there was no record of Meltdown purchasers, it was unlikely that Meltdown purchasers save their receipts, and affidavits from class members would not be trustworthy. *Id*. at *3. Relying on *Carrera,* the court reached this result despite the plaintiff's argument that the defendant could easily identify many class members by sending subpoenas to the retailers identified in its sales records. *Id. Accord Randolph*, 2014 WL 7330430 (refusing to certify consumer class on ascertainability grounds; following *Karhu* and *Carrera).*[3]

Courts in the Ninth Circuit are particularly conflicted on this issue. In *Lilly v. JambaJuice Co.*, 2014 WL 4652283, at *4 (N.D. Cal. Sept. 18, 2014), for example,

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[2] *See, e.g., In re Clorox Consumer Litig.*, 301 F.R.D. 436, 442 (N.D. Cal. 2014) (refusing to certify class of purchasers of cat litter on ascertainability grounds); *In re Intel Corp. Microprocessor Antitrust Litig.*, 2014 WL 6601941, at *12 (D. Del. July 31, 2014) (refusing to certify antitrust and consumer protection class action on ascertainability grounds); *Langendorf v. Skinnygirl Cocktails, LLC*, 2014 WL 5487670, at*1-*2 (N.D. Ill. Oct. 30, 2014) (refusing to certify consumer class action against maker of premixed alcoholic beverage on ascertainability grounds); *Randolph v. J.M. Smucker Co.*, 2014 WL 7330430, at*4 (S.D. Fla. Dec. 23, 2014) (refusing to certify consumer class action against producer of various cooking oils on ascertainability grounds).

[3] The Eleventh Circuit heard oral argument in *Karhu* on February 6, 2015. *See Karhu v. Vital Pharm., Inc.*, No. 14-11648.

the court affirmatively rejected *Carrera* as having "significant negative ramifications for the ability to obtain redress for consumer injuries. Few people retain receipts for low-priced goods, since there is little possibility that they will need later verify that they made the purchase. Yet is it precisely in circumstances like these, where the injury to any individual consumer is small, but the cumulative injury to consumers as a group is substantial, that the class action mechanism provides one of its most important social benefits."[4]

But in *Jones v. ConAgra Foods Inc.*, 2014 WL 2702726 (N.D. Cal. June 13, 2014), the district court embraced *Carrera* and refused to certify a class of purchasers who allege that ConAgra Foods mislabeled and misbranded canned tomatoes, cooking spray, and hot cocoa in violation of California and federal law. *Id.* at *11. On appeal to the Ninth Circuit, the *Jones* plaintiffs are challenging the lower court's ruling, saying it imposes an ascertainability requirement separate from the demands of Rule 23. *See Jones v. ConAgra Foods Inc.*, Case No. 14-16327.

# # #

These are but a few examples of the disagreement that has emerged in the wake of *Carrera*. To prevent further discord and disagreement, this Committee should act expeditiously to correct the Third Circuit's error and ensure that class actions remain available for the vindication of small money damages claims, as the framers of Rule 23(b)(3) intended.

III. Rule 68 Should Be Abrogated Because It Has Failed to Serve Its Stated Purpose and Given Rise to Unjust and Inconsistent Results, Particularly in the Class Action Context.

Summary:

Rule 68 permits defendants to make offers of judgment to settle plaintiffs' claims and to recover costs from plaintiffs who ultimately obtain a judgment for less than the amount of the offer. This rule has been described as "among the most enigmatic of the Federal Rules of Civil Procedure." *Crossman v. Marcoccio*, 806

[4] *See also Brazil v. Dole Packaged Foods, LLC*, 2014 24665529, at *4-6 (N.D. Cal. May 30, 2014), *class decertified on other grounds*, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014) (declining to follow *Carrera*); *Forcellati v. Hyland's, Inc.*, 2014 WL 1410264, at *5 (C.D. Cal. 2014) ("Given that facilitating small claims is '[t]he policy at the very core of the class action mechanism,' . . . we decline to follow *Carrera*.") (quoting *Amchem Prods.*, 521 U.S. at 617).

F.2d 329, 331 (1st Cir. 1986). Empirical studies have shown that it is ineffective at promoting settlement. *See, e.g.*, David A. Anderson & Thomas D. Rowe, Jr., *Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?*, 71 Chi.-Kent L. Rev. 519, 531-32, 534-35 (1995). At the same time, Rule 68 has been widely criticized for giving defendants an unfair advantage and coercing plaintiffs to settle meritorious claims for artificially low damages.

Perhaps the most coercive aspect of Rule 68 involves defendants' use of unaccepted Rule 68 offers to moot cases on the ground that the offer includes all of the relief to which the plaintiff was legally entitled. Although some courts in these situations enter judgment for the plaintiff in the amount of the offer,[5] other courts reason that if the plaintiff's claim is indeed moot, the court does not have the power to enter judgment upon it; in such cases, the claim is dismissed for lack of subject matter jurisdiction, and the plaintiff receives nothing.[6]

The question of whether an unaccepted Rule 68 offer can moot a case takes on added significance when the plaintiff receiving such an offer seeks to represent others with similar claims in a collective or class action. The Supreme Court addressed this question, but did not provide a clear answer, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The *Genesis* majority assumed without deciding, over a spirited dissent written by Justice Kagan, that an unaccepted Rule 68 offer rendered the plaintiff's individual claims moot, and then went on to hold that her collective action claims under the Fair Labor Standards Act became moot when her individual claims did. *Id.* at 1532. *Genesis* has sparked a flurry of Rule 68 offers to plaintiffs not just in FLSA collective actions but also in Rule 23 class actions, despite the "fundamental[] differen[ces]" between those two claim-aggregating devices that the majority emphasized in its opinion. *See id*. at 1531-32. The goal of these offers is clear: to eliminate class and collective actions by "picking off" the named plaintiffs' claims through Rule 68 offers of judgment. [7]

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[5] *See, e.g.*, *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013); *O'Brien v. Ed Donnelly Enters*., 575 F.3d 567, 575 (6th Cir. 2009).

[6] *See, e.g.*, *Greisz v. Household Bank (Ill.) N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999); *Bradford v. HSBC Mortgage Corp.*, 280 F.R.D. 257, 264 (E.D. Va. 2012); *Johnson v. Midwest ATM, Inc.*, 881 F. Supp. 2d 1071, 1073 (D. Minn. 2012).

[7] To be more precise, in *Genesis*, the Court concluded that the issue was not properly before it because the court below had ruled that the plaintiff's individual claims (but not her collective action claims) were mooted by the unaccepted Rule 68 offer, and the Court could not reach the issue without a cross-petition from the plaintiff. 133 S. Ct. at 1528-29.

Courts throughout the country evaluating these "pick-off" offers have reached different conclusions regarding the ability of an unaccepted Rule 68 offer to moot an individual plaintiff's claim and/or the claims of a class that has not yet been certified. This state of affairs undermines the purposes of Rule 23 by causing putative class actions to be dismissed before their merits can be examined. The Rule 68 "pick-off" phenomenon also undermines the purposes of Rule 68 itself—to promote settlement and discourage protracted litigation—by spurring ever more collateral litigation over what these offers mean and what effect they have.

In short, we believe that Rule 68 has been a failed experiment with pernicious results that are only growing worse, and that it is time for the experiment to end.

Proposed Amendment:

Rule 68 should be abrogated in its entirety. The Rule presently provides as follows (items to be deleted are bracketed):

[Rule 68: Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After An Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.]

A**nalysis:**

A. Rule 68 Is Ineffective at Promoting Settlement and Unfairly Disadvantages Plaintiffs.

Separate and apart from the particular problem of class actions (which is addressed below), Rule 68 is generally considered to have been ineffective in achieving its paramount goal: promoting the settlement of individual litigation. It also imposes a bizarre incentive structure that particularly penalizes plaintiffs. For both reasons, the Rule has failed to perform the job for which it was intended.

Regarding the former, the Supreme Court has held that "[t]he purpose of Rule 68 is to encourage the settlement of litigation." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). However, over 30 years ago the Civil Rules Advisory Committee noted that Rule 68 "has been considered largely ineffective as a means of achieving its goals." *Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts*, 102 F.R.D. 407, 433 (1984).

One widely cited reason for the Rule's ineffectiveness is the one-sided nature of its cost-shifting provision: It allows only defendants to make offers of judgment and thus exposes only plaintiffs to the risk of paying the other party's costs if they ultimately obtain a judgment of lesser value than the unaccepted offer. This asymmetrical structure, according to economists, results in defendants making lower settlement offers than they would in the absence of such a rule; many plaintiffs refuse those discounted offers, and those who accept them are typically the most economically vulnerable litigants who are "least able to withstand the adverse effect of paying the defendant's litigation expenses." George L. Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 Sup. Ct. Econ. Rev. 163, 179 (1982). Thus the Rule's "primary effect is not to encourage settlement but to benefit defendants and harm plaintiffs by shifting downward the relevant settlement range." Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. Legal Stud. 93, 94 (1986).

Some defendants are also disinclined to make Rule 68 offers because the Rule requires that judgment be entered in the offeree's favor in a public court proceeding. In addition to the negative consequences that such judgments have on credit and insurability, many defendants shun them as an implicit admission of

liability, or an invitation to regulatory scrutiny or follow-on lawsuits. *See* Harold S. Lewis Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Opinions and Practices of Experienced Civil Rights and Employment Discrimination* Attorneys, 241 F.R.D. 332, 346, 350 (2007) (hereafter, Lewis & Eaton). For many defendants, a privately negotiated settlement, often with confidential terms and a disclaimer of liability, is a more attractive option than the rigid formula of Rule 68.

Rule 68's ineffectiveness in promoting settlement has also been attributed to the fact that the cost-shifting sanction for an unaccepted Rule 68 offer is triggered only when the offeree prevails—albeit for a lesser amount than the offer. Defendants who are confident of winning outright have little incentive to make an offer and often prefer to take their chances with a motion for summary judgment. *See* Lewis & Eaton, *supra*, at 350.

Rule 68 is problematic for an additional reason: Even where it succeeds in promoting settlement, it does so in a way that is unfair to plaintiffs. Rule 68 is unique among the Federal Rules of Civil Procedure in that it contains a cost-shifting sanction not for litigants who are found to have acted in bad faith, such as by filing frivolous pleadings[8] or failing to cooperate in discovery,[9] or even for parties who lose,[10] but for plaintiffs who prevail and obtain a judgment—just for less than the defendant previously offered. Given the vagaries of jury trials, plaintiffs who do not in fact believe an offer to be fair or reasonable may nonetheless accept it because they are unwilling to risk being slightly less successful at trial than they expected to be. This is particularly true since the Supreme Court's 1985 decision in *Marek v. Chesny*, which held that plaintiffs penalized for rejecting a Rule 68 offer may, under certain statutes, also be deprived of the attorneys' fees that prevailing plaintiffs suing under those statutes would otherwise recover. 473 U.S. 1, 9 (1985). This bizarre incentive structure has led one commentator to observe that the American Rule provides that each party pays its own fees and costs, the British Rule awards fees and costs to the prevailing party, but Rule 68 can best be termed "the Vegas Rule." Bruce P. Merenstein, *More Proposals to Amend Rule 68: Time to Sink the Ship Once and for All,* 184 F.R.D. 145 (1999). Plaintiffs who "settle" because they aren't willing to take this

[8] Rule 11; Rule 26(g).

[9] Rule 30(g) (failure to attend noticed deposition); Rule 37(b)(2)(E), (c), and (d) (refusal to make required disclosures).

[10] Rule 54(d).

gamble are not making a free economic choice; rather, they are being coerced by the punitive terms of the rule and court decisions interpreting it. In light of the Advisory Committee's recognition that "[t]here is no preexisting procedural duty to settle," Minutes of the Advisory Committee on Federal Rules of Civil Procedure (Apr. 1994), 1994 WL 809916, at *19, this is unacceptable.

B. Rule 68 Poses Particular Problems in the Class Action Context and Undermines the Purposes of Rule 23 in Several Respects.

The problems with Rule 68 are magnified in the context of collective and class actions, where defendants are increasingly using Rule 68 offers of judgment as a means of "picking off" lead plaintiffs and rendering the entire action moot. A number of lower federal courts have held that when a defendant makes an offer under the Rule that the court deems sufficient to give the plaintiff all she could have recovered at trial, the offer (whether accepted or not) deprives the court of subject matter jurisdiction over the dispute by rendering it moot. *E.g.*, *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake.") (internal citations omitted). Justice Kagan pointed out the incongruity of this result in her *Genesis* dissent, noting that "[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect" and that "[n]othing in Rule 68 alters that basic principle." 133 S. Ct. at 1533-34. Yet a number of lower courts had held prior to *Genesis* that an unaccepted Rule 68 offer would render a plaintiff's claim moot,[11] and some courts have reached the same result in the years since *Genesis* was decided.[12]

Courts are also struggling with the question of whether, assuming a Rule 68 offer moots the individual claims of a named plaintiff in a putative class action, the claims of absent class members are rendered moot as well. The Supreme Court has held that the mooting of a class representative's claim will not render the class action moot if a class has already been certified, *Sosna v. Iowa*, 419 U.S. 393, 399

[11] *See, e.g.*, *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004); *Krim v. PCOrder.com*, 402 F.3d 489 (5th Cir. 2005); *Russell v. United States*, 661 F.3d 1371 (Fed. Cir. 2011).

[12] S*ee, e.g.*, *Scott v. Westlake Servs. LLC*, 740 F.3d 1124 (7th Cir. 2014); *Doyle v. Midland Credit Mgmt.*, 722 F.3d 78, 81 (2d Cir. 2013); *Silva v. Tegrity Personnel Servs., Inc.*, 986 F. Supp. 2d 826, 834 (S.D. Tex. 2013). *But see Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948 (9th Cir. 2013) (adopting reasoning of Justice Kagan's dissent); *Stein v. Buccaneers Ltd. P'Ship*, 772 F.3d 698 (11th Cir. 2014) (same).

(1975), or if class certification has been sought and denied, *see Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980). But matters are far more uncertain when a class certification motion has not yet been filed or has been filed but not yet ruled upon by the court.

Some courts have held that if a defendant makes a Rule 68 offer before the plaintiff moves for class certification, the motion for class certification will relate back to the date on which the complaint was filed to protect the putative class from the jurisdiction-stripping effects of Rule 68 until the court has an opportunity to rule on the certification motion.[13] But even here, there is some confusion: Courts utilizing this "relation-back" doctrine agree that the certification motion must be *timely* made after the Rule 68 offer, and there is a lack of clear guidance or uniformity about what is considered timely. *See, e.g.*, *Morgan*, 2006 WL 2597865, at *4 ("there is no consistent definition of what constitutes . . . an undue delay warranting dismissal").

Making the situation even more confusing, the Seventh Circuit has rejected the relation-back approach altogether and held that if a putative class representative receives an offer of full relief before a motion for class certification is filed, the class as well as the individual claims become moot. *E.g.*, *Damasco v. Clearwire Corp.*, 662 F.3d 891, 895-96 (7th Cir. 2011) (noting that named plaintiffs in putative class actions can protect themselves against the mootness effects of Rule 68 pick-off attempts by filing a motion for class certification when they file their complaint). Some district courts within the Seventh Circuit had previously afforded plaintiffs in proposed class actions a ten-day "safe harbor" after a Rule 68 offer is made to respond with a protective class certification motion, *see, e.g., Western Ry. Devices Corp. v. Lusida Rubber Prods., Inc.*, 2006 WL 1697119, at *2 (N.D. Ill. June 13, 2006), but it is doubtful whether this practice will survive the Seventh Circuit's ruling in *Damasco*.[14]

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[13] *See, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004); *Bond v. Fleet Bank (RI), N.A.*, 2002 WL 373475, at *8 (D.R.I. Feb. 21, 2002); *see also Morgan v. Account Collection Tech., LLC*, 2006 WL 2597865, at *4 (S.D.N.Y. Sept. 5, 2006) ("[T]he district courts in this Circuit are split as to whether a case should be dismissed for lack of subject matter jurisdiction when a Rule 68 offer for full relief to the named plaintiff is made prior to the filing of a motion for class certification or whether the relation back exception should apply to deem the action live.").

[14] The reason these courts chose ten days as the length of the safe harbor is that, for many years, Rule 68 offers remained open for ten days before expiring by their terms. In a 2009 amendment, that time period was expanded to 14 days.

The upshot of this confusion is that class action litigation will become more chaotic. As one district court has pointed out, all of this jockeying for position, with its inevitable emphasis on speed over quality, will "encourage a race to the courthouse between defendants armed with uninformed offers and plaintiffs with underresearched certification motions." *McDowall v. Cogan*, 216 F.R.D. 46, 51 (E.D.N.Y. 2003). In a recent opinion, the Eleventh Circuit also rejected the weight that other courts have placed on the timing of class certification motions in their Rule 68 mootness analysis, observing that filing a motion itself has no jurisdictional significance and that it is the order certifying the class, rather than the motion seeking certification, that changes the nature of the action under Rule 23. *See Stein*, 772 F.3d at 707. In *Stein*, the Court of Appeals concluded that an unaccepted Rule 68 offer cannot render class claims moot before the court rules on class certification, regardless of whether the Rule 68 offer is made before or after the plaintiff moves to certify the class.[15]

The use of Rule 68 to moot the claims of class representatives and, in some instances, the claims of the entire class, is unacceptable for several reasons. First and foremost, treating named plaintiffs in pre-certification class actions the same as plaintiffs in individual lawsuits for purposes of Rule 68 ignores the special status that a litigant takes on by agreeing to represent a class of similarly situated persons. This special status is at the core of the class action device: The proposed class representative stands in the shoes of many others who were affected by the same illegal conduct and represents the interests, and protects the rights, of those absent class members. The certification prerequisites of Rule 23(a), particularly the requirement for adequacy of representation in Rule 23(a)(4), all strive to ensure that the named plaintiff(s) can fulfill this representative role. This means that class representatives are supposed to be more than competent, they are also supposed to be loyal to the rest of the class members. A key part of that is that the class representatives are not supposed to file potential class actions just to make money for themselves, they are supposed to be standing up for everyone else in the class. This requirement of adequate representation by a loyal class representative is required by the U.S. Constitution. Put another way, a named class representative's interest in representing the class is separate from his personal and individual

[15] *See also Mabary v. Home Town Bank, N.A.*, 771 F.3d 820 (5th Cir. 2014) (subscribing to the relation-back approach but holding that the certification order, rather than the certification motion, would relate back to the filing of the complaint, and that if certification was denied, the unaccepted Rule 68 offer would then render the named plaintiff's claims moot); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011) (also applying relation back doctrine from an eventual grant of class certification to the filing of the class action complaint); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011) (same).

economic interest; he undertakes both a duty and a right to represent the interests of the class. *See, e.g.*, *Lamberson v. Fin. Crimes Servs., LLC*, 2011 WL 1990450, at *4 (D. Minn. April 13, 2011), citing *Johnson v. U.S. Bank Nat'l Ass'n*, 276 F.R.D. 330, 332 (D. Minn. 2011) ("In a class action complaint, the named plaintiff, as the putative class representative, has a special role of assuming responsibility for the entire class of persons.").

The "divide and conquer" argument that Rule 68 offers can be used to bribe class representatives to sell out the class runs in the face of this basic idea. The argument that is coming up repeatedly is that even if a class representative wants to do the right thing—reject an individual pay day for themselves and insist on standing up for the entire class—Rule 68 strips them of that power, and the court must throw out the whole class.

Even if a Rule 68 offer made before the court rules on class certification is not viewed as mooting class claims, the Rule still exerts inordinate settlement pressure on class representatives—pressure that is inconsistent with the purposes of Rule 23. This is because the recipient of such an offer does not know at the time the offer is made whether a class will ultimately be certified. Thus, instead of weighing the risk of paying the defendant's costs against his likelihood of prevailing at trial for a greater amount than the offer—the risk-benefit analysis that an individual, non-class-representative plaintiff confronted with a Rule 68 offer must make—the plaintiff who is a proposed class representative is "forced to balance his personal liability for costs against the prospects of sharing with the class in any recovery." *Gay v. Waiters'& Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500, 502 (N.D. Cal. 1980). This risk of personal liability should class certification be denied creates a conflict of interest between the class representative and the absent class members who do not face a similar risk, a conflict that creates pressure on the class representative to accept the Rule 68 offer. When this "pick-off" tactic is successful, and the proposed class representative accepts the offer, the claims of the class will in many cases also be extinguished, because at the pre-certification stage the court does not have a defined role in evaluating the fairness of the settlement under Rule 23(e). *See, e.g.*, *Potter v. Norwest Mortg., Inc.*, 329 F.3d 608, 611 (8th Cir. 2003) ("[A] federal court should normally dismiss an action as moot when the named plaintiff settles its individual claim, and the district court has not certified a class."). In short, by setting up an inherent conflict of interest between the risk of individual liability if a Rule 68 offer is rejected and the interests of the class in pursuing the litigation, Rule 68 interferes with the ability of named plaintiffs in putative class actions to carry out their representative role and undermines the entire structure of Rule 23.

This is precisely what the Third Circuit was concerned about when it adopted its relation-back strategy in *Weiss*, noting that "[a]llowing defendants to 'pick off' putative lead plaintiffs contravenes one of the primary purposes of class actions—the aggregation of numerous similar (especially small) claims in a single action." 385 F.3d at 345. Unfortunately, because of the cost-shifting mechanism of Rule 68, the courts cannot prevent at least some pick-off offers to named plaintiffs in class actions from succeeding, especially since in many class actions the amount that any named plaintiff is likely to recover is small. And the dismissal of one putative class action through a successful pick-off offer followed by another putative class action challenging the same conduct in turn contravenes the stated purpose of Rule 68 as it "would invite waste of judicial resources by stimulating successive suits brought by others claiming [the same] aggrievement." *Roper*, 445 U.S. at 339.

There is no clear fix for any of this. Some named plaintiffs in putative class actions have sought to minimize the danger of pre-certification Rule 68 offers by first rejecting and then moving to strike them so that they cannot later be used against the plaintiff for cost-shifting purposes. This strategy has met with mixed success, for as with so much else in the realm of Rule 68 and class actions, the courts are split on how to handle these motions to strike.[16]

In short, not only has Rule 68 failed to fulfil its intended goal of promoting settlement, but it has engendered a host of problems in the class action context and caused widespread confusion and disarray in the courts. We accordingly urge the Subcommittee to simply abrogate the Rule in its entirety.

[16] *Compare Johnson*, 276 F.R.D. 330, 331 (D. Minn. 2011); *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384, 384 (S.D. Ohio 2008), *and Zeigenfuse v. Apex Asset Mgmt., L.L.C.*, 239 F.R.D. 400, 403 (E.D. Pa. 2006) (granting motions to strike), *with White v. Ally Fin. Inc.*, 2012 WL 2994302, at *3-*4 (S.D. W.Va. July 20, 2012) ("With nothing to strike, the issue of whether a Rule 68 offer is appropriate in the context of Rule 23 is not ripe."); *Stovall v. SunTrust Mortg., Inc.*, 2011 WL 4402680, at *5 (D. Md. Sept. 20, 2011) (refusing to "strike a matter that is not a part of the record and indeed cannot properly be admitted to the record except in a proceeding to determine costs"), *and Buechler v. Keyco, Inc.*, 2010 WL 1664226, at *3 (D. Md. Apr. 22, 2010) ("The question whether the rejection of a Rule 68 offer warrants imposition of costs is not ripe until a request for costs is made.").

IV. Rule 23 Should Be Amended to Explicitly Adopt Federal Court Standards for *Cy Pres* Distributions.

Summary:

Using *cy pres* distributions to dispense with class action funds that cannot reasonably be distributed to class members is both well-established and the most appropriate solution to the problem of unclaimed or otherwise undistributable class action funds. Though *cy pres* distributions may have been occasionally misused by counsel and courts (by, for example, authorizing awards that do not adequately further the interests of the class), when used appropriately, *cy pres* distribution is the superior option for dealing with otherwise undistributable funds.

To ensure that *cy pres* distributions continue to be used appropriately, we are proposing that Rule 23 be amended to include a list of factors that courts must consider when evaluating whether to approve a proposed *cy pres* distribution. The factors set forth below are based on the uncontroversial best practices that have already been developed by the leading cases addressing *cy pres*. Although these factors have already been established by caselaw, it bears including them in Rule 23 to eliminate any dispute over the propriety of the use of c*y pres* distributions in class actions.

Proposed Amendment:

Rule 23 should be amended as follows (matters in italics are to be added):

Rule 23(f):

(f) A class action settlement or court order may provide for a cy pres distribution of all or part of the funds recovered for the class in appropriate circumstances, including when the funds remaining after distribution are too small to justify the cost of a further distribution directly to class members and when some or all of the class members cannot be located. In determining the propriety of a cy pres distribution, the court

(1) must consider:

(A) whether, if, in lieu of a cy pres distribution, distributing the funds directly to reasonably identifiable class members in amounts consistent with their damages would be feasible, administratively practicable, and fair;

(B) whether the use of the funds by the proposed cy pres recipient(s) is consistent with the underlying legal claims and the interests of the class members to whom the funds cannot be distributed, and if no such recipient can be identified, whether a distribution of cy pres funds to another recipient would benefit the public interest;

(C) whether the location or geographic service area of the proposed cy pres recipient(s) is consistent with that of the class, or the portion of the class to whom the funds cannot be distributed; and

(D) whether the funds, once distributed to the cy pres recipient(s), will be free from any control by or will be used to benefit the defendant(s).

(2) may consider any other matter pertinent to ensuring that the cy pres distribution is appropriate.

The current Rule 23(f), (g), and (h) would be relettered accordingly.

Analysis:

A. *Cy Pres* Distribution Is Widely Recognized as the Best Approach to Dealing With Class Action Funds that Cannot Reasonably Be Distributed Directly to Class Members.

Cy pres distribution is the court-identified best solution for dealing with the recurring problem of what to do when there is money that has been recovered by class but that cannot reasonably be distributed to individual class members. This problem may occur because the per-class member compensation is too small and the distribution too expensive to directly compensate individual class members at all. But even when there have been robust attempts to distribute funds to class members, there is often money remaining because all the funds were not able to be transferred to all class members—either because not all class members filed claims; not all class members could be identified or found; and/or not all class members cashed their checks, perhaps because they had moved or died. When these "left over" funds are too small for a redistribution to the class, then, too, courts and parties must address what to do with that money.

Cy pres—a term roughly meaning "as near as possible"—has long been the preferred solution of courts to this problem. Courts borrowed the concept of *cy pres* from trust law, where it has been used for centuries to deal with testamentary

gifts or charitable trusts intended for purposes that can no longer be carried out. Examples include instances where the purpose has been achieved (such as a cure being found for a disease); where the organizational recipient no longer exists; and where the purpose has become illegal (such as a trust supporting a racially segregated public space). In such contexts, courts allocate the property to a use "as near as possible" to the original intended recipient or purpose.

In the class action context, the use of *cy pres* distributions to deal with class funds that cannot be distributed to the class is well-established and widespread. Federal courts have been making *cy pres* distributions for more than 40 years. *See, e.g.*, *Miller v. Steinbach*, Fed. Sec. L. Rep. P. 94, 350, 1974 WL 350, at *1 (S.D.N.Y. Jan. 3, 1974). And every federal court of appeals to have encountered the question regards *cy pres* as an appropriate way to dispense with fund recovered by the class where the factors discussed in our proposed amendment to Rule 23 have been satisfied.[17] In those circuits that have not yet weighed in, the district courts nevertheless routinely approve class action settlements that provide for *cy pres* distributions.[18]

A number of treatises have recognized the growing consensus among courts that *cy pres* distribution is the most appropriate tool for dealing with class funds that cannot be distributed to class members. Those treatises have incorporated the court-identified best practices into their texts. *See* 4 Newberg on Class Actions §§ 12:14, :26, :27, :28, :32, :33, :34 (5th ed. 2013); American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07 (hereinafter "ALI Principles"); National Association of Consumer Advocates, *Standards and*

[17] *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21 (1st Cir. 2012); *In re Holocaust Victim Assets Litig.*, 424 F.3d 158 (2d Cir. 2005); *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672 (7th Cir. 2013); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012); *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. App'x 429 (11th Cir. 2012) (unpublished); *Nelson v. Greater Gadsden Housing Auth.*, 802 F.2d 405 (11th Cir. 1986); *Democratic Cent. Comm. of District of Columbia v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451 (D.C. Cir. 1996).

[18] *See, e.g.*, *Decohen v. Abbasi, LLC*, 299 F.R.D. 469 (D. Md. 2014); *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466 (W.D. Va. 2011); *Stinson v. Delta Mgmt. Assocs., Inc.*, 302 F.R.D. 160 (S.D. Ohio 2014); *Lessard v. City of Allen Park*, 470 F. Supp. 2d 781 (E.D. Mich. 2007); *In re Crocs, Inc. Secs. Litig.*, ___F.R.D.___, Fed. Sec. L. Rep. P 89, 2014 WL 4651967 (D. Colo. Sept. 18, 2014); *In re Dep't of Energy Stripper Well Exemption Litig.*, 578 F. Supp. 586 (D. Kan. 1983).

Guidelines for Litigating and Settling Consumer Class Actions, 299 F.R.D. 160, Guideline 7, *Cy Pres* Awards (3d ed. 2014) (hereinafter "NACA Guidelines").[19]

In particular, federal courts and treatises have recognized that, where distribution or redistribution to members of the class is not feasible, *cy pres* distribution is generally superior to the other options for dispensing with class funds: reversion to the defendant and escheat to the state. To begin, well-executed *cy pres* distribution is appropriate because, when directly compensating class members is not feasible, *cy pres* distribution indirectly benefits the class in a way that furthers the purposes of the lawsuit. In other words, it is as close as parties and courts can come to providing individual relief to injured class members, the primary goal of any good-faith class action settlement or judgment. *See Klier*, 658 F.3d at 475; ALI Principles § 3.07 cmt. b.[20]

The other options, meanwhile, bear no connection to the purposes of the lawsuit or to the class members the recovered funds are meant to benefit. Reversion of the funds to the defendant is particularly problematic. First, because the defendant ends up with the money, reversion fails to hold the defendant liable for the illegal conduct giving rise to the suit and fails to deter the illegal conduct sought to be prohibited by the suit's legal basis—two of the core purposes of class actions. *See Hughes*, 731 F.3d at 677 (discussing deterrence); *In re Baby Products*, 708 F.3d at 172 (same); ALI Principles § 3.07 cmt. b. In contrast, *cy pres* "prevent[s] the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or of the judgment . . .)." *Hughes*, 731 F.3d at 676.

Second, reversion fails to benefit the class in any way, directly or indirectly. The class fund is meant to compensate the class for its injuries, and it is the compensation that the defendant has been ordered to or pay or has agreed to pay in exchange for settling the case. Reversion takes that compensation—compensation "generated by the value of the class members' claims"—away from the class, whereas *cy pres* distribution uses that compensation to benefit class members, albeit indirectly. *Klier*, 658 F.3d at 474 (class fund proceeds "belong solely to the

[19] "Courts have generally agreed with the ALI Principles[,]" and cite to them frequently. *In re Lupron*, 677 F.3d at 33.

[20] A number of states statutes require courts to dispense with unclaimed class funds in a particular way, such as by a *cy pres* distribution to an organization whose mission relates to the purpose of the lawsuit or to legal aid organizations. *See, e.g.*, Cal. Civ. Proc. Code § 384(d). *See also* Newberg on Class Actions §§ 12:28, :35. If any such state statute applies in federal court, of course it would govern.

class members"); ALI Principles § 3.07 cmt. b (class fund proceeds "are presumptively the property of class members"); NACA Guidelines, 299 F.R.D. 160, Guideline 7.

Third, reversion to the defendant creates perverse incentives to minimize the actual payout to the class. If a defendant knows it will get any funds that are not distributed to class members, it is incentivized to reduce the odds that class members will receive and cash their checks. *See id.* at n.91. For example, a defendant may insist on an overly complex claims process or fabricate reasons why it cannot credit class members' accounts with the amount of their damages. Attentive courts can check this problem to some extent by carefully supervising the distribution process, but a court cannot entirely control what terms parties are and are not willing to agree to in private settlement negotiations.

Escheat to the government is not as counterproductive to class action lawsuits as reversion to the defendant because it still holds the defendant liable and deters illegal conduct. However, it is far less effective at benefitting class members and furthering the law enforcement purposes of a particular lawsuit than *cy pres* distribution. That is because any benefit to the class would be, at best, extremely diffuse and unrelated to the substance of the underlying law at issue in the case. *See In re Baby Products*, 708 F.3d at 172; ALI Principles § 3.07 cmt. b. [21]

For all of these reasons, federal courts have overwhelmingly held that *cy pres* distribution is the superior option for disposing of funds that cannot reasonably be distributed to individual class members.

B. Criticisms of *Cy Pres* as Unconstitutional and Illegal Are Unfounded and Not Endorsed by any Court or Treatise.

Despite the near-universal recognition by federal courts of *cy pres* distribution as an appropriate solution to the problem of dealing with class funds that cannot reasonably be distributed to the class, there are a few outspoken critics who contend that *cy pres* distributions are illegal and unconstitutional. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010). Putting aside the fact that these concerns largely stem from abuses that the factors proposed here are designed to prevent (see discussion below at Part IV.C), we believe that those views are unfounded.

[21] The constitutional and Rules Enabling Act concerns presented by critics of *cy pres*, discussed *infra*, would apply equally to the option of escheat to the government.

Redish (and a few others) argue that court-distributed *cy pres* violates Article III and the constitutional separation of powers. First, the argument goes, *cy pres* distribution is contrary to the Article III case-or-controversy requirement because it introduces an uninjured party into the litigation (the potential *cy pres* recipient) that lacks any real dispute with either party. In so doing, it is argued, the inclusion of a *cy pres* distribution changes what is supposed to be a bilateral process between two parties with a genuine case or controversy into a trilateral process without any true case or controversy. *See id.* at 641-43. The court then awards "damages" to the uninjured third party, allegedly in contravention of Article III. This award of "damages" (they say) is also contrary to the constitutional separation of powers because it is beyond the scope of the judicial power to transfer money and make charitable donations that are not authorized by substantive law. *Id.*

That *cy pres* distributions are "damages" not authorized by the underlying law is also the basis for the critics' argument that, assuming *cy pres* distribution is consistent with Rule 23, *cy pres* is illegal because it violates the Rules Enabling Act by altering substantive law about available remedies.

We believe that none of these concerns has merit. As members of the defense bar have pointed out, the view that *cy pres* distributions are contrary to Article III's case-or-controversy requirement ignores what actually takes place during the resolution of a class action cases—a process that usually involves settlement. Wilber H. Boies, *et al*., *Class Action Settlement Residue and Cy pres Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267, 271 (2014). When the parties enter into a settlement that provides for a *cy pres* distribution, the court's role is to review the settlement agreement—including the *cy pres* distribution—for fairness *to the class*. Rule 23(e)(2); *In re Baby Products*, 708 F.3d at 173; *Dennis v. Kellogg Co.*, 697 F.3d 858, 861 (9th Cir. 2012). Whether the *cy pres* distribution takes place as part of a settlement or is court-ordered, the purpose of the distribution is to benefit indirectly ("as near as possible") those class members who cannot benefit directly. In either circumstance, the only interests that matter to the court's analysis are the parties between which there is a dispute—not the interests of the potential *cy pres* recipient(s). The *cy pres* recipients should only be approved if the award would be beneficial *to the class* or its goal in bringing the lawsuit. Because the legal dispute being addressed and resolved is the dispute between the parties, it is only the parties' interests that are taken into consideration in approving a *cy pres* distribution. Therefore, Article III's case-or-controversy requirement is fully satisfied.

No court has adopted the view that the use of *cy pres* distributions violates Article III, and only one federal appellate judge has expressed any concern about potential constitutional problems with *cy pres* distribution. *See Klier*, 658 F.3d at 480-82 (Jones, C.J., concurring) (stating, in dicta, that *cy pres* may present Article III standing issues). And even Judge Jones, despite her concern that a court ordered *cy pres* distribution might be unconstitutional, seems to agree that a settlement agreement between the parties as to how to dispense with the remaining funds should be determinative. *Id.* at 480; Indeed, given the lack of traction that the constitutional argument against *cy pres* distributions has gained in the federal courts, the rhetoric of the academic articles propounding it has been called "the sound of one hand clapping." Boies, *supra*, at 273.

Meanwhile, the argument that *cy pres* is a violation of the constitutional separation of powers and the Rules Enabling Act because it permits courts to award "damages" not authorized by underlying substantive law has already been rejected by federal courts. *See In re Baby Products*, 708 F.3d at 173. And for good reason. First, when the *cy pres* distribution is a result of a settlement agreement, the court's role is to enforce the terms of the agreement between the parties, not to make decisions about what awards might be appropriate under some other substantive law. *Id.* at 173 n.8.

Second, the funds used for *cy pres* distributions are part of the damages that have been awarded *to the class* in accordance with the underlying substantive law. *See* ALI Principles § 3.07 cmt. b. They are not, as some critics have argued, "damages" awarded to the *cy pres recipient*. Rather, as explained above, *cy pres* distribution is a tool for indirectly using the damages to benefit the *class members* who cannot receive them and ensure that the purposes of the underlying substantive law are furthered. Viewed this way, the role of the court in approving *cy pres* distributions is as administrator of the fund recovered by the class—a role in which the court has broad discretion to exercise equitable discretion. Courts have seen the appropriate approval of *cy pres* distributions as being comfortably within that discretion. *See generally Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989) (treating *cy pres* as within the court's inherent equitable discretion); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir. 1984) (same).

C. To Ensure that *Cy Pres* Awards Are Used Appropriately, Rule 23 Should Include a List of Guiding Factors.

As explained above, *cy pres* distribution is the best option for dealing with undistributed class funds and has been accepted as such by virtually all federal courts. The leading cases and treatises have established a number of factors for

courts to consider when determining whether a particular *cy pres* distribution is appropriate: whether it is reasonable to redistribute funds to identifiable, reachable class members; whether the *cy pres* recipient has a sufficient nexus to the litigation in both subject matter and geography; and whether the defendant retains control over or benefits from the *cy pres* funds. The proposed amendment to Rule 23 seeks to make explicit and uniform those best practices that the courts have already identified and are already applying to proposed class action settlements that come before them.

Despite the overall acceptance of *cy pres* distribution and the factors that ought to be considered in approving *cy pres* distributions, explicitly sanctioning the appropriate use of *cy pres* distributions and articulating those factors remains important. As Chief Justice Roberts has pointed out, the U.S. Supreme Court has never addressed the issue, and there is, as of yet, no binding, national statement regarding *cy pres* distributions—including whether and when they are appropriate. *Marek v. Lane*, 134 S. Ct. 8 (2013) (statement of Roberts, C.J., respecting the denial of certiorari). And as discussed above, regardless of the overall acceptance of *cy pres* distribution in the courts, there are several outspoken critics whose views will continue to fuel litigation about *cy pres* distribution until the matter is definitively closed. Codifying the *cy pres* tool and the best practices for using it would put an end to any remaining uncertainty about *cy pres* distribution, eliminate litigation questioning threshold *cy pres* issues, provide binding guidance to courts in those circuits that have not yet addressed *cy pres* distributions, and, as discussed in detail below, prevent misuses of the *cy pres* tool.

1. Is Distribution or Redistribution Reasonable and Appropriate?

This factor goes to whether any *cy pres* distribution is appropriate, or whether the funds ought to be distributed or redistributed to those members of the class to whom compensation can be gotten. The accompanying note should make clear that where it is feasible to do so, class funds should initially go to members of the class, rather than be part of a *cy pres* distribution. *See In re BankAmerica Corp.*, 2015 WL 110334, at *2; *In re Baby Products*, 708 F.3d at 173; ALI Principles § 3.07(a), (b) & cmt. b. The view that class members have priority over the class funds aligns with the purposes of the class action: It ensures that individuals injured by the defendant's illegal conduct are awarded damages, and it does so in the most direct way possible.

The accompanying note should also make clear that redistribution to class members who already received compensation may be appropriate under some

circumstances even though additional distribution would compensate class members beyond the terms of the original distribution. In practice, class actions, particularly those that end in settlement, rarely compensate class members for 100% of their injuries, and even those that do may not compensate class members for other available remedies, such as treble damages or pain and suffering. *See In re Baby Products*, 708 F.3d at 176 (discussing how the negotiated $5 refund to class members was done in exchange for the release of claims and was not an attempt to fully compensate class members for their injuries); *Klier*, 658 F.3d at 474 ("few settlements award 100 percent of a class member's losses") (quoting ALI Principles § 3.07 cmt. b.).

Finally, this factor means that where it is *not* reasonable to distribute class funds to class members, *cy pres* distributions *are* appropriate, either at the outset or because there is money remaining after one or more rounds of distribution. *See Hughes*, 731 F.3d at 677 (*cy pres*-only settlements may be appropriate because they serve the important deterrent purpose of class actions); NACA Guidelines, 299 F.R.D. 160, Guideline 7. That includes situations in which no distribution to the class is possible because the size of the class is large enough and the fund small enough that the administrative expenses of distribution would effectively swallow the fund or that the amount given to each class member would be so small as to be meaningless. *See, e.g.*, *Hughes*, 731 F.3d at 675 (*cy pres* distribution is likely best solution where maximum liability per class member was $3.57); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1037, 1039 (9th Cir. 2011) (where maximum liability was $2 million and the class included 66 million individuals, individual distribution was cost-prohibitive and *cy pres* distribution appropriate). Such a situation might arise where a defendant engaged in widespread illegal conduct that only caused de minimus damages to each class member. *See id.*; Boies, *supra*, at 285.

2. Nexus: Is the Award Consistent with the Goal of the Litigation?

This is the first of two factors that go to the question whether the *cy pres* distribution truly is "as near as possible" to the purposes of the underlying lawsuit and whether it will indirectly benefit the class. The two nexus-related factors reflect, among other things, the courts' response to the concern that *cy pres* distributions are abused to reward the favorite charity of the judge, counsel, or party.

The accompanying comments should explain that, in deciding whether to approve a *cy pres* recipient, a court should consider whether the award would further the purposes of the litigation or the enforcement of the underlying

substantive statute or common law. *See, e.g.*, *Dennis*, 697 F.3d at 865; *In re Lupron*, 677 F.3d at 33; *Nachshin*, 663 F.3d at 1038-39; *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002). *See also Marek*, 134 S. Ct. 8 (presuming that some nexus is required); ALI Principles § 3.07(c) & cmt. b; NACA Guidelines, 299 F.R.D. 160, Guideline 7. For example, the Ninth Circuit held that there was an insufficient nexus between a false advertising claim regarding cereal and a *cy pres* distribution of food to charities that serve food to the indigent. Although the charities' mission was a worthy cause, it did not have anything to do with stopping deceptive advertising. *Dennis*, 697 F.3d at 866-67. Meanwhile, a *cy pres* distribution to the Center for Responsible Lending, which works on consumer credit issues, was appropriate recipient in a Fair Credit Reporting Act case. *Domonoske*, 790 F. Supp. 2d at 471.

As indicated in the proposed amendment to Rule 23 and as the leading treatises have indicated, if, after diligent search, no recipient that furthers the purposes of the litigation or the underlying law can be found, a *cy pres* distribution to a legal services organization or other charity may be appropriate if it is in the public interest to do so. *See* ALI Principles § 3.07(c) & cmt. b.

3. Nexus: Is the Award Consistent with the Geography of the Class?

This is the second factor that goes to the question of whether the *cy pres* distribution indirectly benefits the class and furthers the litigation: whether the *cy pres* distribution reflects the geography of the class. *See, e.g.*, *In re BankAmerica Corp.*, 2015 WL 110334, at *5; *Nachshin*, 663 F.3d at 1040; NACA Guidelines, at 41. Put simply—and as the explanatory note should state—this means that if the class is national in scope, so too should be the *cy pres* distribution. And, likewise, if the class is local, so too should be the *cy pres* distribution. *See Powell v. Ga.-Pac. Corp.*, 119 F.3d 703, 705 (8th Cir. 1997) (in case alleging workplace race discrimination at a single facility, affirming *cy pres* distribution benefitting black residents in the counties where the facility's employees lived). For example, the Ninth Circuit has rejected a *cy pres* distribution to local Los Angeles charities in the context of a nationwide class. *Nachshin*, 663 F.3d at 1040. Meanwhile, the First Circuit approved a *cy pres* recipient which, while located in only one city, conducted research that would potentially benefit the entire nationwide class. *In re Lupron*, 677 F.3d at 36. This factor attempts to ensure that the class members who are not able to be benefited from a direct distribution have the greatest chance of being indirectly benefited by the *cy pres* distribution.

The explanatory note should explain that, as with the purpose nexus, if no geographically matched recipient can be found after a diligent search, *cy pres* distribution may still be appropriate.

4. Does the Defendant Benefit from or Control the Funds?

This factor is a result of the concern that *cy pres* distributions may be used to disguise what is really a reversion to the defendant. For the reasons discussed above—that reversion fails to hold the defendant responsible for its illegal conduct and fails to deliver any compensation to class members—reversion is an inappropriate method for dealing with the problem of class funds that cannot be directly distributed to class members. Class funds are property of the class, awarded as compensation for their injuries, and the defendant should not control how that property is ultimately used.

Sometimes, this is clear on the face of the *cy pres* distirbution, for example, where the fund is used to create a charity that would have unfettered discretion to award money and would be controlled by a senior employee of the defendant. *Marek v. Lane*, 134 S. Ct. 8 (2013) (statement of Roberts, C.J., respecting the denial of certiorari). In other situations, defendants might use *cy pres* distributions in place of charitable donations they would otherwise be obligated to make—a situation that benefits the defendant, not the class. *See* NACA Guidelines, at 44. *See also Klier*, 658 F.3d at 473 (defendant proposed a *cy pres* recipient—a scholarship fund—that bore the name of the defendant). Such awards are an inappropriate use of funds that are meant to benefit the class members.

# # #

These factors represent the court-articulated best practices for *cy pres* distribution—practices designed to ensure that the class will benefit from the class fund and to prevent counsel and judges from simply giving money to their preferred charities.

Respectfully submitted,

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PUBLIC JUSTICE

Via electronic delivery to: rules_support@ao.uscourts.gov

September 8, 2015

Rule 23 Subcommittee of the Judicial Conference Advisory Committee on Civil Rules
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Washington, DC 20544

RE: Public Justice Comments on Rule 23 Subcommittee Rule Sketches

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

Public Justice, P.C. and the Public Justice Foundation (collectively, "Public Justice") respectfully submit the following comments on the rule amendment sketches set forth in the Introductory Materials for the September 11 Mini-Conference on Rule 23 Issues ("Memo").[1]

We thank the Subcommittee for the opportunity to submit these comments, which focus on the following rule sketches: (1) Guidance on Handling *Cy Pres* Provisions in Class Action Settlements; (2) Amendment Designed to Address "Ascertainability" Within the Context of Class Certification; (3) Provision Regarding Issues Class Certification; and (4) Provision Dealing with "Pick-Off" Offers of Individual Settlement and Rule 68 Offers of Judgment.

I. Guidance on Handling *Cy Pres* Provisions in Class Action Settlements.

Public Justice generally endorses the Subcommittee's rule sketch on handling *cy pres* provisions in class action settlements, subject to a few recommendations set forth below.

Public Justice's original comments contained an extensive discussion of the need for a rule amendment explicitly authorizing *cy pres* awards, and setting forth guidelines for their approval. *See* Public Justice March 27 Comments at 21-31. Although the Subcommittee's approach does not mirror Public Justice's proposal in all respects, we believe that the draft rule sketch would accomplish the most important goal of our proposal, which was to clarify the availability of *cy pres* awards as a mechanism for distributing the leftover proceeds from a class action settlement or judgment. We do, however, have several comments with regard to certain aspects of the rule sketch and the accompanying draft Note.

[1] These comments are intended to supplement Public Justice's original suggestions for amending Rule 23, which were submitted on March 27, 2015. *See* http://www.uscourts.gov/rules-policies/archives/suggestions/public-justice-15-cv-n.

First**,** Public Justice urges the Subcommittee to delete the "[if authorized by law]" language set forth in proposed Rule 23(e)(3). We believe that this language is unnecessary and potentially misleading. As noted in the Reporter's Comments (Memo at 14 n.3), "like many other agreements included in settlements[,] *cy pres* provisions do not depend on...legal authorization, even if binding effect does depend on the court's entry of judgment." We agree with this statement. The "authorized by law" language could become a focal point for arguing that *cy pres* awards are *not* proper absent some form of distinct "legal authorization"—which is exactly the type of argument a rule change is needed to rebut. *See* Public Justice's March 27 Comments at 25-27 (discussing recent attacks on *cy pres* awards as illegal and/or unconstitutional and explaining flaws in the logic underlying such an attack).

Second, we urge the Subcommittee not to include the bracketed phrase in proposed Rule 23(e)(3)(B), allowing a second distribution "to class members whose claims were initially rejected on timeliness or other grounds." *See* Memo at 15. While superficially appealing, we are concerned that this could inject an element of uncertainty into the second distribution process and perhaps cause it to drag out needlessly. In addition, there are rarely enough untimely claims to significantly reduce the residual, and it seems unwise to have open-ended deadlines in circumstances where the defendant is seeking closure.

Third, we urge the Subcommittee not to state, in the draft Committee Note, that proposed Rule 23(e)(3)(C) "deals only with the rare case in which individual distributions to class members are not economically viable." Memo at 17. In our experience, there is a residual in almost every monetary settlement—particularly those involving small individualized damages. Even when all individual damages can be distributed to the class, there are often leftover funds after the claims administrator has been compensated and all taxes have been paid. *Cy pres* distributions are a perfect mechanism for dealing with such residuals, yet the draft Note may create a misimpression that such distributions will only be available in the "rare case." We would urge that this be correctly to reflect that residuals will frequently require disposal via *cy pres.*

Fourth, we strongly urge the Subcommittee to delete the first full bracketed paragraph at the top of page 16, which states that "one alternative to *cy pres* treatment… might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program." Memo at 16. We believe that reversion to the defendant is a particularly problematic method for dealing with leftover settlement funds, for three distinct reasons.

First, allowing reversion of funds to the defendant fails to deter the illegal conduct that the lawsuit sought to bring to an end—one of the core purposes of class actions. *See Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (discussing deterrence as an objective of class actions); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (same); *see also* ALI Principles § 3.07 cmt. b. In contrast, *cy pres* "prevent[s] the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or of the judgment . . .)." *Hughes*, 731 F.3d at 676.

Second, reversion fails to benefit the class in any way, directly or indirectly. The class fund is meant to compensate the class for its injuries. Reversion takes that compensation away from the class, whereas *cy pres* distribution uses that compensation to benefit class members, albeit indirectly. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011).

Third, reversion to the defendant creates perverse incentives to minimize actual payout to the class. If a defendant knows it will get any funds that are not distributed to class members, it is incentivized to reduce the odds that class members will receive and cash their checks, via (for example) imposition of an overly complex claims process. *See id*. at n.91. Attentive courts can check this problem to a certain extent, but a court cannot entirely control the terms of settlement agreements.

In short, allowing a reversion of funds to class action defendants is dramatically at odds with class members' interests and the purposes of the class action device. For all these reasons, Public Justice urges the Subcommittee to remove the bracketed language suggesting that reversion of unclaimed funds is a permissible—and possibly even equally desirable—alternative to *cy pres*.

Further, in light of the serious problems created by a reversion of funds, we would urge the Subcommittee to make clear that reversion of funds to the defendant is not a permissible use of unclaimed settlement funds under *any* circumstances. It is not enough, in our view, for the Note to merely state that "courts should have a bias against reversionary clauses in lump fund class-action settlements." Memo at 18. In our experience, the presence of a reversion provision in a class action settlement is always cause for grave concern, and courts should refuse to approve any settlement that includes such a provision.

II. Amendment Designed to Address "Ascertainability" Within the Context of Class Certification.

Public Justice strongly opposes the rule sketch designed to address "ascertainability" within the context of class certification. *See* Memo at 30-33. Although we appreciate the Subcommittee's willingness to wade into the class certification thicket, we are concerned that this proposal could cause more problems than it solves. In particular, the proposal's focus on "identifiability" at the class certification stage could undermine the use of Rule 23 to vindicate small damages claims. In addition, as explained below (at Point B), we believe that the proposal does not adequately address—and could exacerbate—the problems created by the approach to "ascertainability" adopted in *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013).

A. The Rule Sketch's Focus on "Identifiability" at the Class Certification Stage is Inappropriate and Could Make it Impossible to Pursue Small Damages Consumer Cases.

As written, the draft rule sketch states that "an order that certifies a class action must define the class so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner." Memo at 30.

Our concern is that this language could be misinterpreted as requiring that all members of the class be "identifiable" at some point in the litigation, which could make it impossible to certify many important class actions. We appreciate and understand that the Draft Committee Note attempts to moderate the potential impact of the proposed rule by emphasizing (among other things) that identifiability is only required "when necessary" and that identification "may not be needed for a considerable time, if at all." Memo at 31. *See also id.* at 31 (noting that other aspects of Rule 23 "recognize that identifying all class members may not be possible"). Even

with these qualifications, however, the text of the proposal could give rise to arguments that "identifiability" is a certification requirement in all cases.

In our view, just as identifiability of all class members is not required for the purposes of class notice or the crafting of a class-wide remedy, so too is identifiability not a requirement at the class certification stage: instead, the only requirement should be that the class be defined in objective terms, as we argued in our March 27 Comments.

A. The Proposal Would Not Solve the Problems Created by *Carrera* and Could Actually Make Matters Worse.

Relatedly, we are concerned that the Subcommittee's proposal does not go far enough in addressing and correcting the disastrous approach to "ascertainability" set forth in *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013)—and, indeed, could be misinterpreted as actually embracing *Carrera*'s approach (although we doubt that the Subcommittee intended that result).

Public Justice's original comments to the Subcommittee contained a lengthy discussion of the problems created by *Carrera* and progeny. *See* March 27 Comments at 4-11. There, we argued that *Carrera* confused "ascertainability" with a requirement that class members be "identifiable" in an administratively feasible manner at the class certification stage. Our proposal urged the Subcommittee to solve the problems caused by *Carrera* by amending Rule 23 to require, at the class certification stage, that the class be definable according to objective criteria. We further urged that the amended rule make clear, either in its text or in the accompanying Note, that "the ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage." March 27 Comments at 5.

Our concern is that, even with the qualifying language in the accompanying Note, the Subcommittee's proposal could be read as actually endorsing *Carrera*'s misguided emphasis on identifiability at the class certification stage. Particularly troublesome is the fact that, although the rule merely makes identifiability a requirement "when necessary," it does not explain when identifiability is, and is not, necessary and—again—does not make clear that identifiability is *not* necessary for certification of small damages cases.

In light of these concerns, we respectfully urge the Subcommittee to not pursue the proposal set forth in the most recent memorandum. In our view, any focus on "identifiability" at the class certification stage would be a serious mistake. Instead, we would urge the Subcommittee to reconsider the "ascertainability" proposal set forth in Public Justice's original comments, which we continue to believe that would be important and useful. [2]

[2] The Reporter's Comment asks whether "there is a genuine prospect that the split [on the ascertainability issue] will be resolved by judicial decisionmaking." Memo at 33. In our view, the answer is clearly no. Although some courts have squarely (and correctly) rejected *Carrera*, *see Mullins v. Direct Digital*, ___ F.3d ___, 2015 WL 4546159 (7th Cir. No. 15-1776, July 28, 2015), *Carrera* is still the law in the Third Circuit and most courts of appeals have not yet weighed in.

III. Issue Class Certification.

Public Justice generally endorses the Subcommittee's proposal to clarify that Rule 23(c)(4) permits issue classes to be certified in appropriate cases without the entire case having to satisfy all the requirements of Rules 23(a) and (b). *See* Memo at 39-41. However, in our view, the proposal to add an additional path for immediate appeal is unnecessary and would further delay the already long process of class action litigation.

A. An Amendment Clarifying the Availability of Issue Classes Would Be Both Helpful and Appropriate.

Although the vast majority of courts to have interpreted Rule 23(c)(4) have done so correctly, there remains some confusion surrounding the Rule, and the topic continues to be litigated vigorously. As the Subcommittee's comments recognize, Rule 23(c)(4) is meant to permit courts, where doing so would materially advance the litigation, to certify classes to resolve only certain issues, without regard to whether the case as a whole would meet the requirements of Rules 23(a) and (b).

That reading is based on the text of the Rule itself, which states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." This interpretation is bolstered by the existing comment to the Rule, which states that Rule 23(c)(4) "recognizes that an action may be maintained as a class action as to particular issues only" and goes on to illustrate what that means: "For example, in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove amounts of their respective claims."

Despite the language of the Rule and associated comment, at least one federal appellate panel has indicated that courts may not certify an issue class unless the case *as a whole* satisfies one of the subsections in Rule 23(b). *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). The *Castano* court reasoned that, at least with regard to issue classes in cases in which the plaintiffs were eventually seeking damages, permitting issue-only classes would eviscerate Rule 23(b)(3)'s predominance requirements. *Id.*

Even though it is unclear whether *Castano* is still good law in the Fifth Circuit, *see In re Deepwater Horizon*, 739 F.3d 790, 816-17 (5th Cir. 2014), the issue continues to be litigated. For example, there is a case currently pending in the First Circuit involving whether a Rule 23(c)(4) issue class may be certified where the case as a whole does not meet the requirements for class certification. *See In re Prograf Antitrust Litigation*, No. 15-1290. There, the defendants are urging the First Circuit to follow *Castano*, in reliance on recent U.S. Supreme Court decisions addressing class action certification. Public Justice has filed an *amicus* brief in the case taking the contrary view. An amendment to Rule 23 making clear that true issue classes are permissible under appropriate circumstances would prevent this sort of dispute from erupting elsewhere.

B. Public Justice Specifically Endorses the "Rule 23(b) Approach, Alternative 2," Which Would Amend Rule 23(b) to Allow Certification of Issue Classes Without Meeting the Criteria of (b)(1), (2), or (3)

In Public Justice's view, the "Rule 23(b) Approach, Alternative 2," would be the most effective of the Subcommittee's three proposed alternatives. *See* Memo at 38-40.This alternative would amend Rule 23(b) to add a fourth category of types of class actions (issue class actions). It would permit a court to certify an issue class if "the court finds that the resolution of particular issues will materially advance the litigation, making certification with respect to those issues appropriate."

This approach recognizes that issue classes do not fit comfortably within the existing categories of class actions and makes clear that issue class certification does not require that the full case meet the criteria for Rule 23(b)(3) if it seeks damages, or for Rule 23(b)(2) if it does not. The sketch also properly imports the standard—"materially advance the litigation"—that most courts already use to decide whether an issue class should be certified.

In Public Justice's view, however, the bracketed language referencing the standards in Rule 23(b)(3) should be omitted, because issue classes may be appropriate in cases that arise in a Rule 23(b)(2) context, notwithstanding the ruling in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). *See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (reversing denial of class certification under (b)(2) and (c)(4) in post-*Wal-Mart* race discrimination case). As the *McReynolds* court explained, where a truly company-wide policy is being challenged, *Wal-Mart* does not foreclose it.

The Subcommittee's "Rule 23(b) Approach, Alternative 1" suffers from the same problem as the bracketed language in Alternative 2. By addressing Rule 23(c)(4) only in the predominance requirement of Rule 23(b)(3), Alternative 1 implies that issue classes are appropriate only in Rule 23(b)(3) contexts. Alternative 1 is also insufficient, in our view, because although it eliminates the biggest hurdle—predominance—to Rule 23(c)(4) certification in (b)(3) cases, it does nothing to correct the misconception of some courts and parties that, under (c)(4), the case as a whole, not just the issue class, must meet all the other criteria of (b)(3) besides predominance.

Alternative 3—the "Rule 23(c)(4) Approach"—suffers from the same problems as the Alternative 1. Although Public Justice supports importing into Rule 23 the judge-made standard that certification is appropriate if it "materially advances the litigation," Alternative 3 does nothing to make clear that, to certify an issue class, the case as a whole need not meet all the criteria under Rule 23(b). And by referencing the Rule 23(b)(3) standards, the bracketed language arguably would preclude the use of (c)(4) classes in (b)(2) cases.

C. Public Justice Opposes Amending Rule 23(f) to Allow Immediate Appeal of Decisions on the Merits of Issue Classes.

Public Justice does not support amending Rule 23(f) to permit an immediate appeal of merits determinations on issues certified for class treatment under Rule 23(c)(4). Parties wishing to immediately appeal a significant threshold issue of law are already able to seek interlocutory appellate review under 28 U.S.C. § 1292(b). As in the rule sketch, § 1292(b) requires a certification from the district court and the permission of the court of appeals—thus, under the law as it stands, a party has an avenue for immediate appeal of a merits decision on the certified issue on similar terms to that in the sketch.

But to the extent the proposal would provide an easier route to interlocutory appeal than is currently available under § 1292(b), Public Justice is concerned about injecting an additional mechanism for delay into the class action process. Resolution of class actions is already rife with delay. Creating yet another avenue for appeal could drag out the process even further, creating additional burdens for the litigants and the courts. We would urge the Subcommittee to avoid further complicating the process with an additional appeal mechanism.

III. Pick Off and Rule 68.

Public Justice fully shares the Subcommittee's concerns about the so-called "pick-off" problem associated with Rule 68. In fact, in our March 27 comments, we urged the Advisory Committee to abolish Rule 68 altogether, as it has failed to serve its stated purpose and given rise to unjust and inconsistent results, particularly (but not exclusively) in the class action context. *See* Public Justice March 27 Comments at 11-20.

As the Subcommittee has noted, however, there may not be need for any action at this point in light of several recent judicial developments. *See* Memo at 49. First, the inter-circuit split seem to be evaporating on this issue. *See, e.g., Chapman v. First Index, Inc.*, ___ F.3d ___, 2015 WL 4652878 (7th Cir. No. 14-2772, Aug. 6, 2015); *Hooks v. Landmark Indus., Inc*., ___ F.3d ___, 2015 WL 4760253 (5th Cir. No. 14-20496, Aug. 12, 2015). Second, the U.S. Supreme Court has recently granted review in a case that involves the Rule 68 pick-off problem. *See Gomez v. Campbell-Ewald Co*., 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015). The Rule 68 "pick off" problem may therefore resolve itself in due course.

That aside, barring total elimination of Rule 68 (which Public Justice continues to endorse), we generally support the Subcommittee's first sketch for changes to Rule 23 pertaining to offers of complete relief (the so-called "Cooper Approach"). *See* Memo at 49-50. Under this approach, Rule 23 would be amended to provide that "when a person sues...as a class representative, the action can be terminated by a tender of relief only if (A) the court has denied class certification and (B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim." *Id.* In our view, this proposal would go a long way towards eliminating the problematic practice of defendants attempting to "pickoff" named plaintiffs prior to class certification, in order to avoid a class action.

We would urge the Subcommittee, however, to include a specific provision, such as that proposed by NCLC/NACA in its April 2015 comments, that a court should not impose any conditions, consequences, or costs related to an accepted offer, including any consequences relating to or any costs provided in Rule 68, unless the offeror also offers complete relief and/or allows judgment on behalf of the class defined in the complaint.

# # #

Once again, Public Justice thanks the Subcommittee for the opportunity to submit these comments. We greatly appreciate the opportunity to participate in this important process.

Respectfully submitted,

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September 8, 2015

Doc. No. 497019

TAB 5

COMMENTS OF

DRI: THE VOICE OF THE DEFENSE BAR

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December 30, 2016

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Re: Advisory Committee on Civil Rules

Dear Rules Committee Support Office:

Please accept this letter as an outline of my testimony before the committee at its meeting in Phoenix:

1. The proposed Committee Note associated with amended Rule 23(e)(1) stating that "[t]he decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement" should be reconsidered.

2. The proposed Committee Note associated with amended Rule 23(e)(3) should be revised to make clear that claim-in rates are not an appropriate factor for determining whether a settlement is reasonable.

These topics will be explained in further in DRI's written materials to be submitted in advance of the committee's final hearing in February. I look forward to seeing you in Phoenix.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership

James E. Weatherholtz

JEW:mmm

15-CV-DD

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.

Table of Contents

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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* [1] creates an acknowledged split between the Seventh Circuit, since joined by the Sixth Circuit,[2] 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 an 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,[3] and treat it as a threshold inquiry for class certification.[4]

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[1] *Mullins v. Direct Digital,* No. 15-1776 (7th Cir. July 28, 2015).
[2] *Rikos v. Procter & Gamble,* No. 14-4088 (6th Cir. Aug. 20, 2015).
[3] *Marcus,* 687 F.3d at 592-93.
[4] *EQT Prod. Co. v. Adair,* 764 F.3d 347, 358 (4th 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).[5]

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."[26] 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;[6] and (2) that there is some reliable and administratively feasible method for determining whether putative class members are members of the class as defined.[7] 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.[8] Most courts already refuse to certify classes with fail-safe class definitions.[9] 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.").

[5] *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).

[6] *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.").

[7] *See Byrd v. Aaron's, Inc.,* 784 F.3d 154, 163 (3d Cir. 2015).

[8] *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).

[9] *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.[10] 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.[11] Similarly, some federal district courts in California have also rejected the Third Circuit's approach.[12]

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."[13], 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.[14] 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.[15]

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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[10] *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.").

[11] *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.").

[12] *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*").

[13] *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2550 (2011).

[14] *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.").

[15] *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.[16] Similarly, offloading the administrative burden to third parties through the creative use of the subpoena power should not be an acceptable substitute.[17]

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.[18]

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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[16] *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.
[17] *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."").
[18] *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 (4th)*, § 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 ,[19] (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.

[19] 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	PI Filed, Decided	PI Grants	PI 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
Total	976	889	204	22.9%	501	124	24.8%	376	77	20.5%	12 (3 granted)	74	13

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

	Class certification granted below						Class certification denied below						
Circuit	Affirmed	Reversed	Pending	Dismissed	Unclear	Total	Affirmed	Reversed	Pending	Dismissed	Unclear	Total	Total
1		1		1		2						0	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
Total	24	55	24	22	2	127	30	20	17	8	2	77	204

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 certifications 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,[20] 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.

[20] 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"[21] 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, R*emoval of Class Actions: What Danger Lurks in Shady Grove*, 82 Def. Couns. J. 161, 162 (April 2015).[22]

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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[21] *Shady Grove*, 559 U.S. at 406.

[22] 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 . . . ."); *Prof'l 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,"[23] 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.

[23] *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 inquires, 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 *Kohen 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. at621 ("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. Grinell 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.[24]

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

[24] 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?[25]

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, 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."

[25] 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 fi led 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
Testimony Before The
U.S. House of Representatives Subcommittee on the Constitution and Civil Justice
February 27, 2015
"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 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 109th

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 (7th 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., 1st 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 (7th 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.

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.

LANGER RESEARCH ASSOCIATES

SURVEY RESEARCH DESIGN • MANAGEMENT • ANALYSIS

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 your 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
	NET	Participated	Never participated		
8/19/12	38	15	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

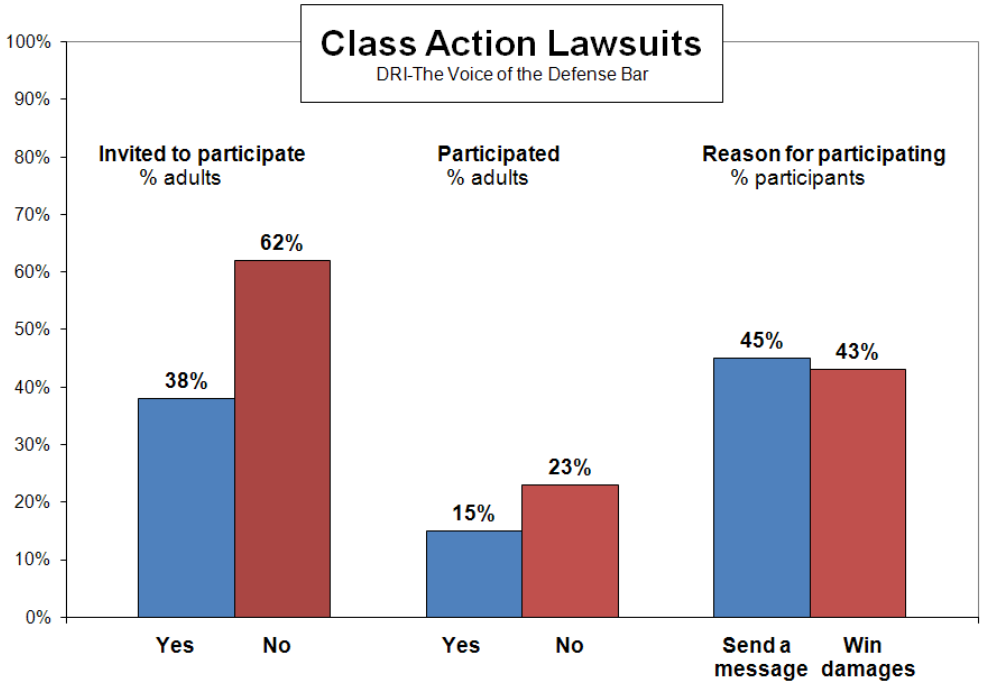
Compare to (2014): 4. Would you support or oppose a law saying that in order to join a class action lawsuit a person has to show that he or she has been actually harmed by a company's products, services or policies, rather than just showing the potential for harm?

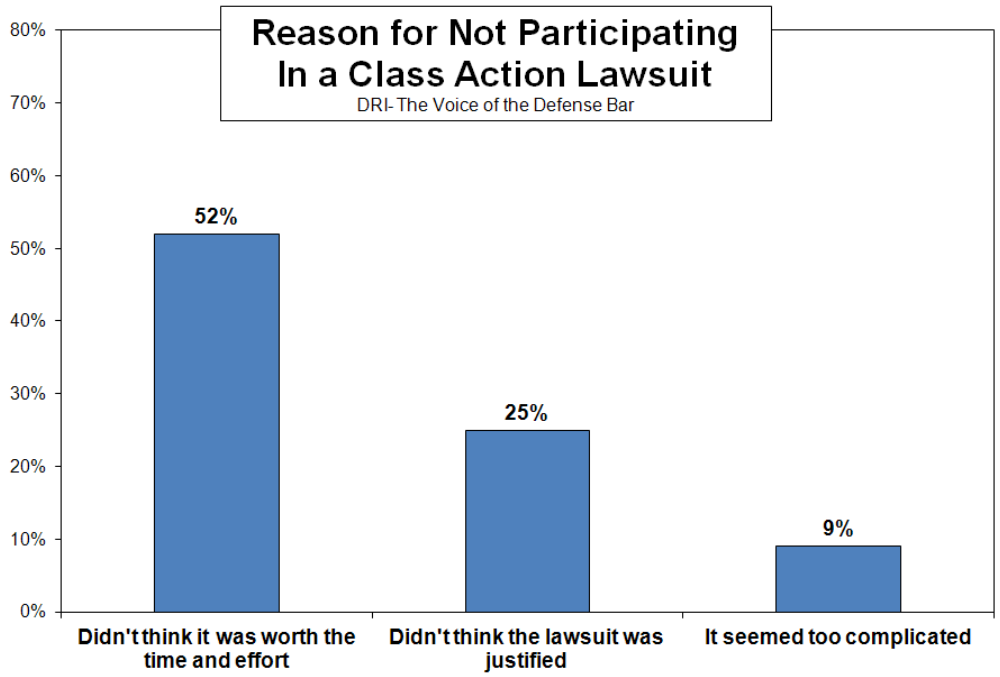
	Support	Oppose	No opinion
9/21/14	78	19	4

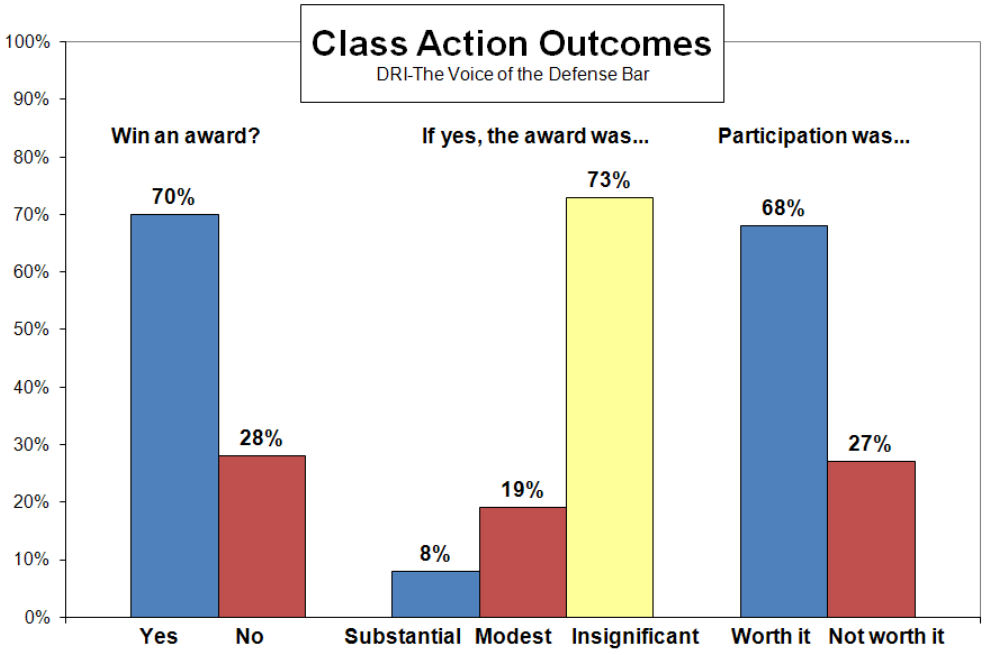
10. Lawyers who file class-action suits often include people who they think are eligible to be plaintiffs without first getting their permission. People who don't want to participate can drop out later. Do you think lawyers should or should not be required to get permission from people before including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

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

Selected Charts




Reason for Not Participating In a Class Action Lawsuit
DRI- The Voice of the Defense Bar
80%
70%
60%
50%
40%
30%
20%
10%
0%
52%
25%
9%
Didn't think it was worth the time and effort
Didn't think the lawsuit was justified
It seemed too complicated


Class Action Outcomes
DRI-The Voice of the Defense Bar
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Win an award?
If yes, the award was...
Participation was...
70%
28%
8%
19%
73%
68%
27%
Yes
No
Substantial
Modest
Insignificant
Worth it
Not worth it

Filing Date	Case Name	Court	Cert/Merit (SCOTUS)
12-Mar-12	*Ticketmaster v. Stearns*	U.S. Supreme Court	C
21-Mar-12	*Genesis Healthcare v. Symczyk*	U.S. Supreme Court	C
18-May-12	*Kia Motors v. Samuel-Basset*	U.S. Supreme Court	C
18-May-12	*Glazer v. Whirlpool Corporation*	Sixth Circuit	
22-Aug-12	*Willis of Colorado v. Troice*	U.S. Supreme Court	C
24-Aug-12	*Comcast Corporation v. Behrend*	U.S. Supreme Court	M
27-Aug-12	*Merrill Lynch v. McReynolds*	U.S. Supreme Court	C
6-Sep-12	*Genesis Healthcare v. Symczyk*	U.S. Supreme Court	M
29-Oct-12	*Standard Fire Insurance Co. v. Knowles*	U.S. Supreme Court	M
3-Dec-12	*IBEW Health & Welfare Fund*	U.S. Supreme Court	C
29-Mar-13	*Sears v. Butler*	U.S. Supreme Court	C
10-May-13	*Willis of Colorado v. Troice*	U.S. Supreme Court	M
9-Sep-13	*Mississippi ex rel Hood v. AU Optronics Corp*	U.S. Supreme Court	M
11-Oct-13	*Halliburton v. Erica P. John Fund*	U.S. Supreme Court	C
6-Nov-13	*Sears v. Butler; Whirlpool v. Glazer*	U.S. Supreme Court	C
6-Jan-14	*Halliburton v. Erica P. John Fund*	U.S. Supreme Court	M

24-Feb-14	*US Foods v. Catholic Healthcare West*	U.S. Supreme Court	C
3-Mar-14	*Allstate Insurance Co. v. Jacobsen*	U.S. Supreme Court	C
16-Jan-15	*Tibble v. Edision International*	U.S. Supreme Court	M
26-Feb-15	*Jimenez v. Allstate Insurance Co.*	U.S. Supreme Court	C
2-Apr-15	*Sandquist v. Lebo Automotive, Inc.*	California Supreme Court	
15-Apr-15	*Braun v. Wal-Mart Stores, Inc.*	U.S. Supreme Court	C
18-Jun-15	*Spokeo, Inc. v. Robins, Thomas*	U.S. Supreme Court	M
9-Jul-15	*Campbell-Ewald Co. v. Gomez*	U.S. Supreme Court	M
Jul-15	*Tyson Foods, Inc. v. Peg Bouaphakeo, et al.*	U.S. Supreme Court	M

Issue	Author	Committee Member
Class Actions - Articles Standing	Mary Massaron, Hilary Ballentine, Josephine DeLorenzo	Y
Collective Actions - Standing FLSA	Jeffrey A. Lamken, Martin V. Totaro, Lucas M. Walker	N
Class Actions (State) - Constitutional Due Process	John P. Elwood, Eric A. White	N
Class Actions - Certification	Mary Massaron, Hilary Ballentine	Y
Class Actions - Securities - State law	Linda Coberly, Gene Schaerr	Y
Class Actions - Certification - Expert Testimony	Carter G. Phillips, Jonathan F. Cohn, Matthew D. Krueger, Eric G. Osborne	N
Class Actions - "Issue" certification	Mary Massaron, Hilary Ballentine	Y
Collective Actions - Standing FLSA	Jeffrey A. Lamken, Martin V. Totaro, Lucas M. Walker	N
Class Actions - CAFA Removal	Paul D. Clement, Erin Morrow Hawley	N
Class Actions - Standing	Timothy S. Bishop, Emily C. Rossi	N
Class Actions - certification - Consumer products	Mary Massaron, Hilary Ballentine	Y
State law securities class actions	Linda Coberly, Gene Schaerr, Marissa Ronk, Steffen Johnson	Y
Class Actions - State AG mass actions - CAFA removal	Mary Massaron, Hilary Ballentine	Y
Class Actions - Securities Fraud	Timothy R. McCormick, Richard B. Phillips, Jr., Michael W. Stockham	N
Class Actions - certification - Consumer products	Mary Massaron, Hilary Ballentine	Y
Class Actions - Securities Fraud	Timothy R. McCormick, Richard B. Phillips, Jr., Michael W. Stockham	N

RICO and breach of contract class actions	John Cohn, David Carpenter, Wen Shen, Kate Comeford Todd, Sheldon Gilbert	N
Class Actions - punitive damages	David Axelrad, Curt Cutting, Felix Shafir	Y
Class action; ERISA; statue of limitations	Scott Smith	Y
Class actions; overtime; commonality	Willy Jay	Y
Class actions; arbitration	Jerry Ganzfried	Y
Wage & Hour Class Actions	Scott Smith	Y
standing; statutory violations	Mary Massaron	Y
Class action mootness	(Linda Coberly)	Y
Class action certification - FLSA - wage and hour	Willy Jay	Y

TAB 6

TESTIMONY OUTLINE OF

SCOTT BURNETT SMITH,

BRADLEY ARANT BOULT CUMMINGS LLP

Scott Burnett Smith
ssmith@bradley.com
256.517.5198 direct

Bradley

December 19, 2016

Rules Committee Support Office
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E, Room 7-240
Washington, D.C. 20544

VIA EMAIL

rebecca_womeldorf@ao.uscourts.gov
frances_skillman@ao.uscourts.gov

Re: Advisory Committee on Civil Rules

Dear Rules Committee Support Office:

Please accept this letter as an outline of my testimony before the committee at its meeting in Phoenix.

1. Rule 23(f) Should Provide an Automatic Right to Appeal Class Certification Decisions, and More Than 14 Days to Seek Appeal Even if the Government is Not a Party

2. Rule 23 Should Prohibit Class Treatment of Claims Under State Statutes Which Expressly Prohibit Class Treatment of State-Created Substantive Rights

These topics will be explained in further in DRI's written materials to be submitted in advance of the Committee's final hearing in February. I look forward to seeing you in Phoenix.

Sincerely,

Scott Burnett Smith

SBS/dc

3/40811477.1

TAB 7

TESTIMONY OF

THOMAS SOBOL, HAGENS BERMAN SOBOL SHAPIRO LLP

Testimony of Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP[1]

Advisory Committee on Civil Rules

Wednesday, January 4, 2017

United States District Court, Special Proceedings Courtroom

Phoenix, Arizona

Good morning. My name is Tom Sobol. I am a partner at the law firm of Hagens Berman Sobol Shapiro LLP. My office is in Cambridge, Massachusetts. I have practiced complex civil litigation for almost 35 years – the first half with a large, primarily defense firm representing institutional clients, and since then I have represented consumers, health benefit providers, and others in class actions involving pharmaceutical pricing and other important issues affecting the delivery of affordable and effective health care.

I wish to address three issues regarding the proposed amendments to Rule 23 – two specific, and one general. These are my views; they are not necessarily those of my firm or my partners.

First. The proposed amendments to Rule 23 take an important step in expressly addressing – for the first time in the text of the rule itself – the effectiveness of distribution of relief to class members as a consideration in approval of a proposed class settlement. This is a very good thing.

Historically, responsible class lawyers have made sure that the most effective means of distribution was used to get funds into the hands of class members. Most class counsel continue these efforts long after the court has signed off on the settlement (and perhaps even released

[1] This submission summarizes the testimony given on January 4, 2017. It is not a verbatim transcript.

funds for payment of class counsel fees). And many courts have been vigilant in working with class counsel to protect class member interests in receiving the benefits of settlement. As just one example, in presiding over a large pharmaceutical settlement seeking to distribute tens of millions of dollars to consumers of a widely sold pain medication, District Judge William Young from the Massachusetts bench pushed class counsel to gain confidential access to electronic drug purchasing records so that check could be sent directly to hundreds of thousands of consumers, bypassing the need for every consumer to submit cumbersome and largely ineffective claims submissions.[2]

This process, and others like it, is now state of the art. But the state of the art remains largely uncodified and often unnoticed. Class actions are vulnerable to criticism – sometimes fairly, sometimes not – in the manner and content of distribution of settlement proceeds. Having the rule codify the importance of distribution puts appropriate focus on this issue by counsel and the courts.

In execution, however, the proposal must be modified in order to avoid an unintended ambiguity. The proposal currently reads that, in determining whether the relief provided for the class is adequate, the court must 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."[3]

This language is capable of two quite different interpretations. On the one hand, the language suggests that there is some absolute standard of distribution effectiveness; that for all cases, there is a general standard of how effective settlement distribution must be and, failing

[2] *See In Re Relafen*, 231 F.R.D. 52 (D. Mass. 2005). (Claims were available both through a traditional publication for notice and claims submissions, and through the "subpoena project" to augment claims participation with a direct mailed check).

[3] Proposed Rule 23(e)(2)(C)(ii).

that, the court should reject the proposal. On the other hand, the language might be interpreted as requiring consideration of the comparative effectiveness of reasonably diligent, alternative methods of distributing relief – given the class involved and facts of the case.

The first interpretation is quite troublesome; the second, not. There is no acknowledged absolute standard of effectiveness, no source by which one might be created, and little basis to impose one. In some situations – particularly for consumer classes of the elderly or sick – class membership is ascertainable but not easily accessed for distribution. Rejecting the proposal because it might not achieve some absolute standard, and thereby denying relief to those consumers who can be reached, would be neither just nor in the interests of any of the parties. And it does not appear to be the intent of the Advisory Committee to impose a new standard of effectiveness.

Accordingly, I respectfully suggest that the proposed amendments to Rule 23(e)(2)(C)(ii) read: "the effectiveness of the proposed method of distributing relief to the class *as compared to other, reasonably available methods of distribution under the circumstances*, including the method of processing class-member claims, if any."

Second. The proposed amendments also take an important step in addressing objections to class settlements, both in proceedings before the district court and when pressing an appeal. Objections can serve good, but sometimes not-so-good, purposes; the proposals seek to achieve the balance needed to protect legitimate objections and deter self-serving ones.

One proposal requires the objection to "state whether [the objection] applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection."[4] This makes sense. As the Committee Note states, objections should

[4] Proposed Rule 23(e)(5)(A).

"provide sufficient specifics to enable the parties to respond to them . . . ."[5] But this requirement does not go far enough, as it does not address a significant inconsistency in the rules relating to objectors.

Contrast the situation for class representative and their lawyers. To gain class certification status, Rule 23 contains specific requirements to ensure that the proposed class representative and class counsel will adequately represent the interests of the class. Rule 23(a) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class" and that "the representative parties . . . fairly and adequately protect the interests of the class."[6] Rule 23(g) has extensive requirements for the appointment of class counsel, including the need to ensure that they will "fairly and adequately represent the interests of the class."[7] These rules ensure that those people who may affect the interests of the class members – representatives and lawyers – satisfy basic requirements to make sure their actions are on behalf of the class, not self-interest. We spend a lot of energy in class practice ensuring the procedural integrity of the system by vetting the players.

These detailed rules do not apply to objectors and their counsel. Yet when an objection is filed, when it is pressed before the district court, and when an objector lodges an appeal, the substantial rights of all class members are affected. Objections can incur the expenditure of class resources, they can delay proceedings, and they can stall the issuance of relief to class members. They may urge changes that are not in the best interests of the class. But under the rules, merely by filing an objection, an objector and his or her counsel gain the *de facto* status of class

[5] Committee Note for Subdivision (e)(5)(A).
[6] Rule 23(a)(3) and (4), respectively.
[7] Rule 23(g)(1)(B).

representative and class counsel. Their acts impact the class just as surely as those of *bona fide* class representatives and counsel who have been vetted by the court under Rule 23(a) and (g).

Rule 23 – even with the proposed amendments – neither imposes nor suggests vetting requirements for objectors or objector counsel to ensure their actions are directed to benefit the interests of the class, rather than some other agenda. To file an objection, an objector simply files a pleading. An objector often professes to be doing so in the interest of the class as a whole. But there is no factual showing required (by declaration or otherwise) that the objector is legitimately a member of the class. Nor is there an explicit requirement that the court, to consider an objection, first determine that the objector is indeed a class member. There is no factual showing required by which an objector's counsel establishes they are qualified to fairly and adequately represent the interests of the class, nor a requirement that the district court first so find in order for an objector's counsel to press for changes to, or rejection of, a proposed class settlement. Yet those actions, again, may as surely impact the class as those of class counsel.

Accordingly, I respectfully suggest that the following be added to the end of the proposed amendment to Rule 23(e)(5)(A): "If an objection applies to a specific subset of the class or to the entire class, the court may require the class member filing such an objection to make a factual showing sufficient to permit the court to find (i) that the class member is a member of affected class or subset of the class, (ii) that the class member will fairly and adequately represent the interests of the class, and/or (iii) that the counsel for such class member is qualified to fairly and adequately represent the interests of the class. Absent such a finding, a court may overrule the objection without considering it further." I note that this process is a "may" process; it codifies the inherent Article III powers of a district court judge; if under the circumstances the court finds no need to conduct the vetting, it need not do so.

Third. My final comment is a general observation. The nature of the proposed changes to Rule 23 are to me most noteworthy for the underlying principles they evince – principles which are not often publicly stated, and which are shared on both sides of the "v" and whether one's political views are red state or blue.

Rule 23 affords the federal judiciary with an administrative tool of enormous power. Our increasingly complex and consolidated economy brings about legal disputes with far-reaching consequences. We need jurists to be empowered to administer and adjudicate these large-scale disputes fairly and efficiently across large populations. We lean heavily on the judiciary to provide the forum to enforce complex environmental, civil rights, racketeering, consumer, and antitrust laws. And we lean on that same judiciary to protect defendants from unwarranted accusations. Rule 23 aids the courts in performing those functions.

These advisory proceedings involve lawyers from all backgrounds, judges from all over the country, academics both conservative and progressive, consumer advocates, and in-house industry counsel. We debate rule changes regarding considerations for class settlements, notice verbiage, and the terms for letting objectors out of a class objection. We see these issues as important to the administration of civil justice. They are.

While we may come out differently on particular rules changes or how particular class actions should have come out, we do *not* debate the importance of the endeavor. We do not debate whether Rule 23 should exist, or if it can apply to classes whose members have different sized claims. Of course it should, and of course it does. We share a belief so fundamental that it almost goes without saying: that Rule 23 procedures are vital to administration of justice, both in enforcing the rights of civil plaintiffs and in protecting defendants from the cost and time of multiple litigations.

Segments from the other two branches of the federal government need not meddle with Rule 23's broad application, carefully enforced by an energetic and capable judiciary. And some comments have been presented to this Committee to undertake rules changes that would work sweeping limitations on the power of the judiciary to exercise Rule 23 powers. Any such suggestion should only be entertained on the basis of clear and convincing evidence that documented abuses have occurred, and that the proposed limitation is narrowly tailored to address only that documented, systemic abuse. None have been shown to the Committee at this time.

Thank you.