PUBLIC HEARING ON

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Telephonic Hearing
February 16, 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

Telephonic Hearing
February 16, 2017 – 1:00 P.M.

	Witness Name	Organization	Testimony/Comments Received
1.	Michael R. Pennington	Bradley Arant Boult Cummings LLP	Tab 1 Testimony dated 2/7/2017
2.	Ariana J. Tadler	Milberg, LLP	Tab 2 Outline of Testimony dated 2/16/2017
3.	Timothy A. Pratt	Boston Scientific Corporation	No testimony or comment received
4.	Steven Weisbrot	Angeion Group	Tab 3 Comment dated 2/6/2017
5.	Eric Isaacson	Law Office of Eric Alan Isaacson	Tab 4 Testimony dated 2/16/2017
6.	Gerald L. Maatman, Jr.	Seyfarth Shaw LLP	Tab 5 Comment dated 2/15/2017
7.	Professor Judith Resnik	Yale Law School	Tab 6 Comment dated 2/6/2017
8.	Peter Martin	State Farm Mutual Insurance Co.	No testimony or comment received
9.	Theodore H. Frank	Competitive Enterprise Institute	Tab 7 Outline of Testimony dated 2/6/2017 Comment dated 2/15/2017
10.	Richard Simmons	Analytics LLC	Tab 8 Comment dated 2/15/2017
11.	Patrick J. Paul	Snell & Wilmer LLP	No testimony or comment received

TAB 1

TESTIMONY OF

MICHAEL R. PENNINGTON OF
BRADLEY ARANT BOULT CUMMINGS LLP,
ON BEHALF OF DRI

Michael R. Pennington
mpennington@bradley.com
205.521.8391 direct

February 7, 2017

Advisory Committee on Civil Rules
c/o 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, DC 20544

VIA EMAIL:
rebecca_womeldorf@ao.uscourts.gov
frances_skillman@ao.uscourts.gov

RE: Rule 23 Hearing February 16, 2017

Dear Members of the Committee:

Thank you for the opportunity to present testimony on the proposed amendments to Rule 23 at your hearings on February 16, 2017. On behalf of DRI, I plan to comment primarily upon the following topics:

A. Settlement Class Certification Before Final Hearing

First, the proposed Committee Note associated with amended Rule 23(e)(1) contains the statement 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." That sweeping prohibition is not fully explained, and departs from the current practice of many courts. While it certainly makes sense that class certification before a final settlement hearing should not normally be necessary, nothing in Rule 23 as it currently exists requires a court to give class members notice and an opportunity to object before certifying the class for either settlement or litigation purposes. Likewise, the proposed amendments to Rule 23 would not impose any such requirement for litigation classes. Class actions come in many different sizes, shapes, and circumstances, and to say that class certification for settlement purposes is never appropriate before a final settlement hearing seems too strong. Class certification before final approval may facilitate needed temporary anti-suit injunctions to preserve the status quo, especially in 23(b)(1) limited fund class actions and 23(b)(2) injunctive class actions, but also in 23(b)(3) class actions. *See In re Managed Care*, 756 F.3d 1222, 1233 (11th Cir. 2014). It may also be important to establish class counsel's attorney client relationship with absent class members for various purposes, such as who may communicate with or speak for absent class members. See, e.g., *The Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345 (2013)(would-be class counsel cannot bind class before certification); The Law of Class Action: A Fifty State Survey 2015-16 (American Bar Association 2016)(cataloguing varying state laws regarding ability to communicate with class members before class certification). Class certification may in certain circumstances be both appropriate and desired by all named parties on the front end, and with adequate showings of the Rule 23(a) and (b) factors, it is difficult

to understand why class certification for settlement purposes before the final settlement approval hearing can *never* be appropriate. Such a categorical statement is not necessary to the proper functioning of the procedure reflected in the amendments. DRI recommends softening that statement to allow for the possibility of settlement-only certification on proper evidence before the final hearing. After all, any such up-front certification would always be subject to change at any time before final judgment, and therefore it is difficult to see the harm from leaving the possibility open.

B. Claim Rate as a Factor in Judging Fairness of Settlement

Third, there are a number of references in the proposed Committee Note associated with amended Rule 23(e)(2) suggesting that for settlements which include claim-in relief, the actual or anticipated claim-in rate is somehow an appropriate measure of whether the settlement itself is reasonable. While some courts view the actual or anticipated claim-in rate may be an appropriate factor with regard to setting attorneys' fees, DRI does not believe it is an appropriate factor for determining whether a *settlement itself* is reasonable. The proposed Committee Note should be revised to make clear that it is not. To be sure, a claim-in process should be based on the need for information from the class members that is critical to providing the proper relief called for by the settlement and which is not otherwise available to the parties. Claim-in may be justified by the absence of class member addresses or contact information, the need for an affirmative election or other critical information available only from the class member, or similar demonstrable genuine necessity. It should never be available simply in order to diminish payouts.[1] However, when a court determines that a claim-in process is indeed appropriate in a given case, and when the court finds a particular notice to be the best practicable under the circumstances and approves it accordingly, how many people choose to take advantage of the relief offered should have no bearing on whether the relief offered represents a fair, adequate and reasonable compromise of the proposed settlement. *Cf. Waters v. International Precious Metals Corp.,* 190 F.3d 1291, 1295-96 (11th Cir. 1999); *Masters v. Wilhelmina Model Agency Inc*., 473 F.3d 423, 437-38 (2d Cir.2007); *Poertner v. The Gillette Co*., 618 Fed. Appx. 624 (11th Cir. 2015)(all concluding that the value of a class settlement is the relief it offers, not just what is claimed).

Class members may choose not to file a claim for many reasons—because they did not pay attention to the notice, because they do not like class litigation as a matter of principle, because they have better things to do, or because they happen to be satisfied with their product or service. They can refuse to submit a claim in response to a litigated class liability judgment for all the same reasons, and if a claim-in process is required to distribute settlement funds, that process is very likely to be necessary in distributing litigated relief as well. Claim-in settlements should be limited to circumstances in which courts find them reasonable and appropriate, but, when a claim-in process is appropriate, the approval of the settlement should not depend on how many people choose to submit claims. In a settlement, there is no admission of liability, and the object of Rule 23 is not to deter defendants from allegedly wrongful conduct or extract a minimum

[1] See MANUAL FOR COMPLEX LITIGATION § 21.66 at 331-32 (4th ed. 2004); Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* at 19-20 (Federal Judicial Center 3d ed. 2010).

amount of tribute. The objective of Rule 23's settlement approval process is simply to ensure that the settlement proposed is fair, reasonable and adequate in what it offers to class members in exchange for classwide release it provides.

C. Invitation to Classwide Objections

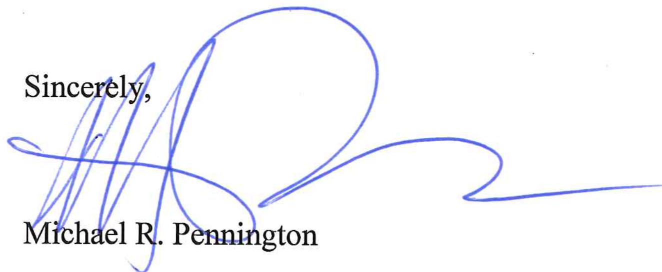
Next, the proposed amendment to Rule 23(e)(5) regarding class member objections would state that "the objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." DRI agrees that the grounds for the objection should be stated with specificity, but questions whether it is desirable to affirmatively invite class members to object on behalf of persons other than themselves. A court is certainly capable of determining whether an objection which has merit has ramifications for persons other than the objector, but the fact remains that an objector has no legal authority to object (or opt out) on behalf of anyone but himself or herself. The rule should not confer any such legal authority, whether actual or apparent. Expressly inviting objections on behalf of class members other than the filing objector can lead to needless uncertainty and side-disputes over the true extent of opposition to a proposed settlement, and could be seen as indirectly lending credence to the generally rejected practice of one objector attempting to opt out groups of class members. There is no need to inject that kind of uncertainty into the rule, especially where there is no empirical need to have objectors instruct a district court how to interpret their various objections.

D. Time to File 23(f) Petition

Finally, DRI agrees with the proposal to amend rule 23(f) to give all parties 45 days to file a 23(f) petition whenever the government is a party to the case. However, even when the government is not a party to the case, a 23(f) petition is a major and potentially outcome determinative event for the private parties. The current 14 day time period for a petition to appeal from the decision on class certification is too short—so short, in fact, that it hinders providing the best advocacy for the client, and results in less than the best possible advocacy for the appellate court to consider on the important issue of class certification. Allowing a bit more time will not increase the workload of the federal courts, but it will allow them to exercise their discretion with better information. Both sides of the "v." would appreciate having a little more time, since either side may be the one seeking a 23(f) interlocutory appeal in a given case. Class action practitioners on both sides would almost certainly welcome even just a little more time. Indeed, the practical reality of class action practice is that the class certification decision may come at a time when the lawyers most important to preparing the 23(f) petition effort are facing trial or other conflicting obligations. While lawyers routinely handle such problems in the face of 28-day deadlines, scheduling conflicts are much more difficult to manage under a 14-day deadline that often starts running with no advance warning weeks or months after class certification briefing or argument. For these and other reasons, DRI asks the Committee to grant all parties at least 28 days to file a 23(f) petition even when the government is not a party.

Thank you again for the opportunity to appear, and for the hard work of the Committee on these and other amendments.

Sincerely,



Michael R. Pennington

MRP/ls

TAB 2

OUTLINE OF TESTIMONY

ARIANA TADLER OF MILBERG LLP

MILBERG LLP

NEW YORK
LOS ANGELES

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February 16, 2017

VIA E-MAIL
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RULES_SUPPORT@AO.USCOURTS.GOV

Committee on Rules of Practice and Procedure
Administrative Office of the
United States Courts
Thurgood Marshall Federal Judiciary Building
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Washington, DC 20544

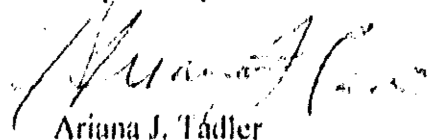
Re: Comments on Proposed Amendments to Rule 23: Notice

To Whom it May Concern:

In anticipation of my scheduled testimony before the Rules Committee on Thursday, February 16, 2017, please be advised that I intend to focus my remarks on the proposed amendments to Rule 23(c)(2)(B). More specifically, I support the proposed amendment to Rule 23(c)(2)(B) providing for notice "by mail, electronic means, or other appropriate means," but ask that the Committee clarify the Committee Note to express that a single "means" or form of notice is not required; rather, each case is to be assessed on its own to determine the best practicable notice to effectively reach those that comprise the class, and some cases may well warrant multiple forms of notice to effectively reach class members.

I look forward to the opportunity to present my remarks to the Committee.

Respectfully submitted,



Ariana J. Tadler

AJT:nb

TAB 3

COMMENT OF

STEVEN WEISBROT OF ANGEION GROUP

February 6, 2017

VIA E-Mail
Committee on Rules of Practice and Procedure
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Re: Comments on Proposed Notice Changes to Rule 23

I am a Partner and Executive Vice President of Notice & Strategy at Angeion Group, a national class action notice and claims administration company. My notice work comprises a wide range of class action settlements, including settlements surrounding product defects, false advertising, fair labor standards, antitrust violations, tobacco, banking, insurance, and other statutory matters. [1] For several years, I have been instrumental in infusing digital and social media, as well as big data and advanced behavioral targeting, into class action notice programs. I have collectively reached hundreds of millions of people via a variety of media, including direct mail, e-mail, social media, and digital banner advertisements[2]. Notably, I am the only notice expert in the country who has fulfilled the professional certification program offered by the Interactive Advertising Bureau (IAB) in Digital Media Sales. The IAB certification program is accredited by the American National Standard Institute (ANSI) and is the only globally recognized, accredited, professional certification program created *specifically* for digital media sales professionals.

I write in support of the proposed amendment to the notice portion of Rule 23, expanding individual notice to include "electronic means, or other appropriate means." The new proposed rule is rooted in commonsense and progressive logic that mirrors the current media landscape, yet remains flexible enough to accommodate the changes in technology and media that currently shape, and will inevitably continue to inform, advertising performance for years into the future.

Historically, notification relative to class action lawsuits has employed traditional advertising and marketing models to reach class members. It is through this lens, in conjunction with relevant Supreme Court precedent, that the proposed rule should be evaluated. Just as each brand advertiser utilizes different advertising strategies to reach their desired customers, each settlement has its own unique media fingerprint that should guide the preferred dissemination of notice, including individual notice. This is particularly true given the breakneck

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[1] A list of Angeion Group's representative cases can be viewed at http://www.angeiongroup.com/cases.htm

[2] Attached as Exhibit "A" is a list of selected judicial recognition of my notice work.

speed with which advertising is changing vis a vis targeted e-mails, digital advertisements, social media and cross device tracking capabilities. Class notice cannot be an afterthought; nor can it have a "one size fits all" solution that ignores modern communication realities. Class notices should be tailored to the needs and interests of each particular case, and overseen by a judge with an understanding of the wealth of options that are available in that case.

As advertising evolves, and the role of U.S. mail and e-mail changes, it is essential to maintain the level of flexibility that the new rule thoughtfully provides. It is however critical to note that the proposed amendment will be counterproductive without performance of a more rigorous judicial analysis of any proposed notice plan during the preliminary approval process. This new analysis should not be a one-dimensional, inquiry relying solely on a proposed media plan's reach percentage[3], nor should it rely solely on U.S. mail "because that is the way it has always been done". Rather, each plan must be subject to a careful and holistic judicial review based upon the distinctive facts of the settlement under review, the currently available class member data, and other factors, including but not limited to, the type and amount of relief to which class members are entitled, the class members' relationship to the defendant, as well as the scope of the underlying release.

Recently, I met with representatives of the Federal Judicial Center, along with three prominent practicing class action attorneys (both plaintiff and defense) and an esteemed former Federal Judge. We offered our collective pro bono assistance regarding how to best inform the judiciary about the various tools that are available to disseminate notice (tools that include, among other things, both electronic means and U.S. Mail), and how notice programs need to be tailored on a case-by-case basis, using those tools, to achieve maximum effectiveness. We suggested a comprehensive approach to fashioning a robust class notice program at the preliminary approval stage of litigation – using guidelines and best practices that will likely increase efficiency and reduce grounds for objections, thereby improving the process for all stakeholders.

I am confident that the proposed amendment, when combined with rigorous judicial analysis, will safeguard class members' right to receive the best notice practicable. The new proposed rule will further aid in dismantling the cookie-cutter, reflexive approach to class action notification that has remain unchanged for decades.

The paradigm of class member notification is not easily expressed in rules of thumb; it contains myriad considerations and is reliant on informed research and sound methodology; however, the one constant, is that there is not just one objectively correct way to reach class members in all cases – just like there is no single "correct" way for advertisers to advertise for their brand. Notification should be approached as an art, rather than an exact science. Flexibility,

[3] For an in-depth analysis of the practical realities of reach percentage analysis, please see my article "Is Digital the New Print in Class Action Notification Programs?" available at http://apps.americanbar.org/litigation/committees/classactions/articles/winter2015-0215-is-digital-the-new-print-in-class-action-notification-programs.html

creativity, and critical thought are necessary to craft the proper notice program for the requisite class.

U.S. mail is not *always* the gold standard as it relates to individual notice, nor is a digital campaign *always* a more cost-effective option to reach class members. Rather, the reality is that each class action settlement is unique, and possesses its own set of distinctive facts that should affect what method of notice is most appropriate in each case. Failure to critically examine these factors, in favor of a one-dimensional rules-based system, will not ensure that class members receive the best notice practicable in this new media environment — in fact, it may have the opposite effect. While it is certainly true that means of communication will continue to change, and that one cannot today forecast the future, that is not a reason to continue with a notice standard that may be antiquated and thus, at times, only lends an ineffectual nod to due process.

Likewise, the committee need not be concerned that mass media communications will supplant individual notice, as the district court's gatekeeper function will always be governed by Supreme Court precedents, including *Mullane v. Central Hanover Trust & Bank Co.*,[4] which astutely warned against notice as a "mere gesture." To the contrary, judges will be armed with detailed expert reports, decades of supreme court precedent, and new educational opportunities that will allow them to critically analyze modern, effective, and appropriate notice programs. The fact that there is novel, albeit ever-evolving, information available and a new media paradigm in place, is not a reason to delay modernizing class action notice. To the contrary, it is evidence that class action notification has remained inert for *far* too long and that the time is ripe to collectively reexamine how to effectuate the best notice practicable, considering all the tools currently available, with flexibility to accommodate inevitable future advancements in advertising technology.

The Current Media Landscape

We now live in a world where 24% of people in developed markets reach for their smartphone immediately after waking up; 49% within 5 minutes; 70% within 15 minutes, and 93% within an hour.[5] Additionally, 59% of US internet users profess that they are addicted to their digital devices.[6] U.S. Consumers spend over 11 hours a week on average on their smart phone apps, and almost 7 hours each week on the internet via their computer[7] Mobile advertising now influences 45% of all US shopping journeys and half of connected devices in U.S. homes are mobile devices.[8] Notably, it is not just the Millennial generation at issue here. Adults aged 35 to

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[4]Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306 (1950)

[5] Deloitte, "Global Mobile Consumer Trends: 1st Edition," May 17, 2016.

[6] CivicScience as cited in company blog, July 12 2016.

[7] Nielsen, "The total Audience Report: Q! 2016" June 27, 2016.

[8] comScore Inc., "Home Sweet Digital Home," July 8, 2016.

49 were found to spend an average of 6 hours and 58 minutes a week on social media networks.[9] The average U.S. mother who is on Facebook checks the site 10.1 times a day[10]. Consumer Packaged Goods Manufacturers spent about $6 Billion in digital advertising in 2016 (U.S. Financial Services Service Companies spent 8.37 Billion and Media and Entertainment brands spent 7.34 Billion).[11]

The E-mail vs. Mail Debate

Critics of the proposed amendment argue that U.S. postal mail is the most reliable and effective methodology to effectuate individual notice — and, in *some* cases, they are correct. This is neither an absolute rule, nor is it a valid reason to enshrine postal mail as the legislatively-favored method of class action notification. That being said, e-mail is not ideal in all notice situations and is subject to deliverability and open rate issues in certain circumstances.[12] Yet, as *Mullane* made clear in 1950, the policy behind why mail was considered "reasonably calculated"— at that time – was that the Court felt, "…the mails today are recognized as an efficient and inexpensive means of communication." The same can obviously be said of e-mail communications today. Moreover, when endorsing individual notice over publication notice, the Court found in *Mullane* that "The trustee periodically remits their income to them, and we think that they might reasonably expect that, with or apart from their remittance is, word might come to them personally that steps were being taken affecting their interests." In other words, the court endorsed using the means of communication then applicable between the parties.

As previously noted, consistent with *Mullane*, a flexible, dynamic approach to notice as promulgated in the proposed rule, will give judges the necessary discretion to make that determination on a case by case basis, including consideration of the parties' business relations, and with deference to what "inexpensive means of communication" *currently* exist.

For example, in today's media environment, cases involving defendants who routinely communicate with class members via e-mail, are particularly well suited for notice via e-mail. Consider cases where class members have signed up to use a software service, or downloaded an app, regularly receive e-mail billing statements from a defendant, or purchased a product from an online retailer. Class members in those scenarios have come to rely on, and indeed *expect,* e-mail communications from those defendants. Given their business relationship, class members are therefore more likely to receive and open those e-mails. Alternatively, cases involving financial transactions or insurance claims, may be better suited for direct mail than say, a food mislabeling case, because class members routinely receive U.S. mail relating to complex financial transactions from their bank, broker or insurance agent, and indeed, some may be wary of

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9 The New York Times "*Generation X More Addicted to Social Media Than Millennials, Report Finds",* Jan 27, 2017.

10 Edison Research, "Moms and Media 2016" sponsored by Triton Digital, May 5 2016.

11 eMarket, March 2016

12 These issues can be minimized with proper planning, including utilizing professional, white-listed servers and proper e-mail design.

communicating sensitive personal or financial information online. These are the precise types of issues that the judiciary is well suited to evaluate when determining whether a notice plan should be approved by the court.

It is important to remember that while U.S. mail has been a standard-bearer for years in class action notice, U.S. mail is becoming less customary in our society. The Postal Service's own data confirms that both consumers and advertisers are consistently moving away from the use of U.S. postal mail. Specifically, there has been a steady decrease in total mail volume, from 2006-2015; total mail volume was reported as 213.1B in 2006 and 154.2B in 2015. Likewise, during that time, First-Class volume dropped from 97.7B to 62.4B. Similarly, Standard Mail (advertising mail) dropped from 102.5B to 80B. One of the only categories to show an increase during the same period was *online* revenue, which increased from $454M to $1.05B.[13]

Conversely, the use of e-mail over the same period has risen to the level of ubiquity, especially in relation to advertising. To illustrate this point, consider a recent worldwide marketing study that asked professional marketers what software and services they implemented in marketing campaigns — unsurprisingly, e-mail marketing was the single most common answer, being utilized by 88% of respondents.[14] In another 2016 marketing study, respondents were asked to identify tactics that drove Customer Acquisition and Customer Retention in the retail space. Significantly, e-mail marketing led the responses in both categories with 81% and 80% respectively.[15]

By way of example, on a recent national Telephone Consumer Protection Act (TCPA) settlement that Angeion Group is administering, with a potential damages award of approximately $15.00-$30.00, we are seeing a significantly higher claim filing rate amongst those who were noticed by e-mail (almost exactly *double* the claims rate than those who received traditional mail notice). I attribute this result to the relatively low value of the award. Whereas, to claim this amount of money, class members are inclined to click through a relatively simple process from the e-mail notification to the claims filing webpage to finalize their claim (this can be effectuated via their mobile phone or computer in a matter of minutes.) Yet, many class members seem reluctant to take the extra steps required of them, when they are notified by postal mail, to make a claim to secure the same amount of damages. However, this result is certainly not universal; we often see increased amounts of paper claims filed when damages amounts are high, or when large amounts of supporting documentation are required to submit a claim.

Accordingly, I submit that it should be left to the Judge's sound discretion, based on

[13] United States Postal Service — A Decade of Facts and Figures. Available at https://about.usps.com/who-we-are/postal-facts/decade-of-facts-and-figures.htm

[14] Dotmailer, "The 2016 Marketing Technology Adoption Survey Report" May 24, 2016.

[15] WBR Digital and emarsys "Adapting to the pace of omnichannel commerce," June 7, 2016.

detailed reports from experienced notice experts, on how to effectuate the best notice practicable in each case, taking into consideration the following: 1) how the defendant typically communicates with the class members (e-mail, postal mail, fax, SMS, etc.); 2) class member demographics (such as class members' likely gender, age, and education); 3) class member psychographics (consumers' attitudes about social issues, known brand usage, personal interests, and shopping habits); 4) the amount of the overall settlement in relation to the cost of the notice; and, 5) the age and media habits of the class member (the degree to which an audience uses a particular medium relative to the general population). In this realm, common questions that judges should be inclined to ask include some variation of the following: 1) Is this a class of young people who are likely to spend a lot of time on the Internet? 2) How does the defendant typically communicate with class members? 3) What type of information must be submitted to file a valid claim? 4) How much is a typical damages award? 5) Lastly, is the class member being asked to relinquish substantive rights? Such information is routinely available through the parties' own records, on the face of the settlement agreement, as well as through syndicated data sources. All available information should be brought to the judge's attention as part of the preliminary approval process to safeguard absent class member rights and craft the most appropriate notice.

However, to be clear, this is not an either/or proposition. Notice programs often use multiple, integrated, methods of direct notice, and these are frequently supplemented with publication notice, digital notice, and, in some cases, social media notice. Each case is unique, and the data available to the parties to effectuate notice varies widely relative to different settlements.

In cases involving millions of class members, where both e-mail addresses and U.S. postal addresses are available, notice is often effectuated by a combination of e-mail and direct notice - and, in some cases, multiple times via each medium. Since the parties can monitor how many individual e-mail notices are ultimately delivered, they can sometimes reduce costs (which may be necessary in certain settlements) by only mailing to those class members to whom the e-mail transmission failed. To present the class notice options as an "either/or" situation does not account for the many well-planned integrated notice campaigns that are commonplace under today's notice rubric. Nor does it account for the fact that the number of available e-mail and mailing addresses in a settlement can vary wildly, even within a discrete class.

E-mail Notice is Not *Just* Sending an E-mail

As previously noted, notice is not a zero-sum game where you either e-mail or mail a class member a notice. Notice providers can initially mail a notice form to a class member and subsequently use e-mail as a point of constant contact providing reminders of impending deadlines, updates on the underlying litigation, and generally keeping class members informed for a fraction of the cost of a postage stamp.

While the traditional benefits of e-mail are well known (cost, speed, personalization, frequency), some of the lesser known, strategic advantages of e-mail may not be as obvious, yet

they have substantial implications under the proposed amended rule. There is a virtual treasure trove of data tied to an individual's e-mail address as the individual travels across the web, reading webpages, searching the likes of Google, shopping online, researching products, watching videos, listening to podcasts, sharing on social media and "liking" on Facebook. This data can be mined and utilized to target custom audiences on varying media platforms, such as through Facebook or through programmatic digital banner ads.

By way of example, in a recent Fair Credit Report Act (FCRA) settlement, we were provided a list of class member information, including e-mail address. The notification process in that case includes e-mailing to all available e-mail addresses, and creating a "custom audience" to serve Facebook advertisements. The custom Facebook audience is effectuated by manually uploading the list of class member e-mails to Facebook. Facebook then processes the e-mail list and can identify which e-mail addresses are linked to Facebook profiles. We can then serve a stream of advertisements reminding those class members, about the settlement. These advertisements can be monitored in real time for effectiveness.

Furthermore, we can also tweak the message, the aesthetic, or any other variable to improve the ads, keep serving ads that are performing well, and remove underperforming ads, if the data shows they are not resonating with class members. We can also use that initial e-mail list to find those class members where they shop online, via twitter and across millions of web properties, and serve those class member ads on their computers and smart phones as they move along with their day. Keep in mind, we are not serving ads to individuals based on a demographic profile as a notice provider would do as part of a *publication* campaign, we are serving ads to actual known class members. Therefore, we are increasing the frequency of known class members' exposure to a message, thereby augmenting their likelihood to act, and all for less than a single U.S. mailing would cost. These are the exact type of technological advancements that will help propel notice into the 21st century, instead of relying exclusively on a single mailing to the last known address of a class member.

Professional notice planners also can deduce (and update) e-mail addresses from known data points such as phone numbers and physical addresses by utilizing reputable data aggregation companies. This is valuable, for instance, in a TCPA case where the only records a defendant possesses are a spreadsheet of phone numbers that were, for example, automatically dialed in contravention of the statute. Instead of having to rely on a broad publication campaign to notify these class members, we can generate a list of affected e-mails and direct *individual* notice to the class members at issue via e-mail, and reach those people on Facebook, Twitter, and across thousands of popular websites. And, that is just the *beginning*.

Programmatic Digital Advertising

In my article, "Is Digital the New Print in Class Action Notification Programs? "I note that John Wanamaker, the namesake of the famous Philadelphia department store, is credited with uttering the famous ad-world aphorism: "Half the money I spend on advertising is wasted. The trouble is, I don't know which half." Given the advent of programmatic placement of digital

banner ads, Wanamaker's conundrum has effectively been solved, and notice providers have the tools at their disposal to determine what ultimately works and what doesn't. This eliminates waste and improves efficacy.

The intricacies of behavioral advertising and programmatic internet purchasing are complex and likely beyond the scope of this comment. However, the committee would benefit from a brief account of some of the most common forms or targeting being used today to identify class members in class action settlements.

Keep in mind, currently, these targeting methodologies are overwhelmingly being implemented as part of *publication* notice geared towards unknown class members, not in lieu of direct notice to identifiable class members. To be clear, I do not suggest that they are necessarily an appropriate substitute for direct notice, today. However, as technology continues to develop, cross device marketing expands the identifiable device grid, and other data mining and probabilistic marketing models mature, it is likely that we will soon be able to reliably identify specific individuals via these methods, and provide them with direct notice. The language of the proposed rule would allow notice providers the flexibility to do so, when the technology has properly developed to the point where we can reliably reach identifiable class members as part of an individual notice campaign.

What follows is an extremely general primer as to some of the most important targeting methods being utilized today.

> **Behavioral targeting.** Behavioral targeting looks at a user's online behavior and creates an anonymous online profile for that user. These anonymous profiles (no names, addresses, e-mail addresses, or telephone numbers are stored) allow digital planners to deduce age, gender, and possible purchase interests, and to link that information to an Internet provider address. The information is aggregated and stored so that digital planners can access the data to target specific demographic profiles. So, if someone's online behavior indicated that that person was viewing an abundance of new parent websites, purchased a bassinet, reviewed women's maternity fashion online, and had purchased nail polish, it would be reasonable to assume the user is female and either a new parent or an expecting parent. That user's Internet provider address would be stored per the user's demographic profile and could be targeted in the future with banner ads should a class action involving baby products, for instance, require publication notice. This is similar to using targeted magazine advertisements but with the bonus of being able to tell if the notice was viewed. Currently there is an increasing amount of shopper data available to digital planners, so we are nearing the point where we can accurately target specific individual purchasers of class products.
>
> **Contextual Targeting.** This breed of targeting ensures that content of a digital banner ad directly correlates to the content of the web page the user is viewing. This means that a user on a sports-related website could be served ads by, for

example, a sports ticketing service, like Stub Hub. It has been reported that ads running on sites with related content were 61 percent more likely to be recalled than ads running on sites with unrelated content.

Geo-targeting. Much like it sounds, geo-targeting is a method of determining the geolocation of an Internet user and serving up ads relative to that user's location. Like the information gathered via behavioral targeting, this information is also anonymous and linked to an Internet provider address. Consider the sports tickets example above---if geo-targeting was concurrently being employed, that ad would have offered up tickets for the specific team playing in the city where the user was located. So, for example, if a user was surfing the internet from his apartment in the Bronx, he would see an advertisement for available Yankees tickets. This technology is particularly useful in state-specific class actions or cases with state-specific subclasses.

Cross Device Tracking. Notice providers now have an increasing ability to connect a consumer's activity across her smartphones, tablets, desktop computers, and other connected devices, which is particularly useful to advertisers and notice professionals. An archetypal example of this functionality is when a consumer purchases a pair of shoes on their work computer, and an advertiser shows an ad for a matching belt on her smartphone. Likewise, a consumer may purchase a ticket to Hawaii on her home computer and later see an ad for a Honolulu resorts on her tablet. Another example of cross device tracking, is when upon logging into one's bank account on a public computer, the customer is required to receive an authentication code on another device (usually a smart phone) before being allowed to log in because that public computer is not recognized as being part of her unique device grid. One of the major implications this raises for class action notice, is that we can now track when a class member reaches a case website, and even track what pages they reviewed. If it is determined that they did not file a claim, we can cause ads to be served across all their different devices reminding them of the pendency of the settlement.

Conclusion

The proposed amendment will allow class action practitioners to effectively reach individual class members in the most targeted, rational and effective method possible. The rule provides the much-needed flexibility to account for the amorphous nature of technology and the speed with which it changes. The role of the judiciary will safeguard class member rights and ensure, through rigorous inquiry, that individual notice remains within the sound mandates of *Mullane* and its progeny.

In sum, I am confident that the proposed amendment, when combined with rigorous judicial analysis, will not only safeguard class members' right to receive the best notice practicable, it will also increase efficacy and efficiency, to the collective benefit of all stakeholders.

Respectfully Submitted,

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Exhibit A

Selected Judicial Recognition

***IN RE LG FRONT LOADING WASHING MACHINE CLASS ACTION LITIGATION*- Civil Action No. 08-Sl(MCA)(LDW)**
Honorable Madeline Cox Arleo (June 17, 2016) *This Court further approves the proposed methods for giving notice of the Settlement to the Members of the Settlement Class, as reflected in the Settlement Agreement and the joint motion for preliminary approval. The Court has reviewed the notices attached as exhibits to the Settlement, the plan for distributing the Summary Notices to the Settlement Class, and the plan for the Publication Notice's publication in print periodicals and on the internet, and finds that the Members of the Settlement Class will receive the best notice practicable under the circumstances. The Court specifically approves the Parties' proposal to use reasonable diligence to identify potential class members and an associated mailing and/or email address in the Company's records, and their proposal to direct the ICA to use this information to send absent class members notice both via first class mail and email. The Court further approves the plan for the Publication Notice's publication in two national print magazines and on the internet.*

FENLEY V. APPLIED CONSULTANTS, INC.—CIVIL ACTION NO. 15-259
Honorable Mark R. Hornak (June 16, 2016*) The Court would note that it approved notice provisions of the settlement agreement in the proceedings today. That was all handled by the settlement and administrator Angeion. The notices were sent. The class list utilized the Postal Service's national change of address database along with using certain proprietary and other public resources to verify addresses. the requirements of Fed.R.Civ.P. 23(c)(2), Fed.R.Civ.P. 23(e)(l), and Due Process....*

The Court finds and concludes that the mechanisms and methods of notice to the class as identified were reasonably calculated to provide all notice required by the due process clause, the applicable rules and statutory provisions, and that the results of the efforts of Angeion were highly successful and fulfilled all of those requirements.

FUENTES, et al. v. UNIRUSH, LLC d/b/a UNIRUSH FINANCIAL SERVICES et al. 15-CV-8372 (JPO)
Honorable J. Paul Oetken (May 16, 2016) *The Court approves, as to form, content, and distribution, the Claim Form attached to the Settlement Agreement as Exhibit A, the Notice Plan, and all forms of Notice to the Settlement Class as set forth in the Settlement Agreement and Exhibits B-D, thereto, and finds that such Notice is the best notice practicable under the circumstances, and that the Notice complies fully with the requirements of the Federal Rules of Civil Procedure. The Court also finds that the Notice constitutes valid, due and sufficient notice to all persons entitled thereto, and meets the requirements of Due Process. The Court further finds that the Notice is reasonably calculated to, under all circumstances, reasonably apprise members of the Settlement Class of the pendency of the Actions, the terms of the Settlement Agreement, and the right to object to the settlement and to exclude themselves from the Settlement Class. The Parties, by agreement, may revise the Notices and Claim Form in ways that are not material, or in ways that are appropriate to update those documents for purposes of accuracy or formatting for publication.*

***IN RE: WHIRLPOOL CORP. FRONTLOADING WASHER PRODUCTS LIABILITY LITIGATION*- MDL NO. 2001**
Honorable Christopher A. Boyko (May 12, 2016) *The Court, having reviewed the proposed Summary Notices, the proposed FAQ, the proposed Publication Notice, the proposed Claim Form, and the proposed plan for distributing and disseminating each of them, finds and concludes that the proposed plan for distributing and disseminating each of them will provide the best notice practicable under the circumstances and satisfies all requirements of federal and state laws and due process.*

SATERIALE, ET AL. V R.J. REYNOLDS TOBACCO CO., **CASE NO. CV 09 08394 CAS**
Honorable Christina A. Snyder (May 3, 2016) *The Court finds that the Notice provided to the Settlement Class pursuant to the Settlement Agreement and the Preliminary Approval Order has been successful, was the best notice practicable under the circumstances and (1) constituted notice that was reasonably calculated, under the circumstances, to apprise members of the Settlement Class of the pendency of the Action, their right to object to the Settlement, and their right to appear at the Final Approval Hearing; (2) was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and (3) met all applicable requirements of the Federal Rules of Civil Procedure, Due Process, and the rules of the Court.*

FERRERA ET AL. V. SNYDER'S-LANCE, INC., **CASE NO. 0:13-CV-62496.**
Honorable Joan A. Lenard (February 12, 2016) *The Court approves, as to form and content, the Long-Form Notice and Short- Form Publication Notice attached to the Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement as Exhibits 1 and 2 to the Stipulation of Settlement. The Court also approves the procedure for disseminating notice of the proposed settlement to the Settlement Class and the Claim Form, as set forth in the Notice and Media Plan attached to the Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement as Exhibits G. The Court finds that the notice to be given constitutes the best notice practicable under the circumstances, and constitutes valid, due, and sufficient notice to the Settlement Class in full compliance with the requirements of applicable law, including the Due Process Clause of the United States Constitution.*

IN RE: POOL PRODUCTS DISTRIBUTION MARKET ANTITRUST LITIGATION MDL **NO. 2328**
Honorable Sarah S. Vance (December 31, 2014)*: To make up for the lack of individual notice to the remainder of the class, the parties propose a print and web-based plan for publicizing notice. The Court welcomes the inclusion of web-based forms of communication in the plan....The Court finds that the proposed method of notice satisfies the requirements of Rule 23(c)(2)(B) and due process.*

The direct emailing of notice to those potential class members for whom Hayward and Zodiac have a valid email address, along with publication of notice in print and on the web, is reasonably calculated to apprise class members of the settlement.

Moreover, the plan to combine notice for the Zodiac and Hayward settlements should streamline the process and avoid confusion that might otherwise be caused by a proliferation of notices for different settlements. Therefore, the Court approves the proposed notice forms and the plan of notice.

SOTO, ET. AL. V THE GALLUP ORGANIZATION, INC. **CASE NUMBER 0:13-61747-CIV-MGC/EGT**
Honorable Marcia G. Cooke (June 16, 2015): *The Court approves the form and substance of the notice of class action settlement described in ¶ 8 of the Agreement and attached to the Agreement as Exhibits A, C and D. The proposed form and method for notifying the Settlement Class Members of the settlement and its terms and conditions meet the requirements of Fed. R. Civ. P. 23(c)(2)(B)and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled to the notice. The Court finds that the proposed notice is clearly designed to advise the Settlement Class Members of their rights.*

OTT V MORTGAGE INVESTORS CORPORATION OF OHIO, INC., **NO. 3:14-CV-00645-ST**
Honorable Janice M. Stewart (July 20, 2015) *The Notice Plan, in form, method, and content, fully complies with the requirements of Rule 23 and due process, constitutes the best notice practicable under the circumstances, and is due and sufficient notice to all persons entitled thereto. The Court finds that the Notice Plan is reasonably calculated to, under all circumstances, reasonably apprise the persons in the Settlement Class of the pendency of this action, the terms of the Settlement Agreement, and the right to*

object to the Settlement and to exclude themselves from the Settlement Class.

TAB 4

COMMENT OF

ERIC ISAACSON OF
LAW OFFICE OF ERIC ALAN ISAACSON

Written Testimony of Eric Alan Isaacson*
Concerning Proposed Revisions to Federal Rule of Civil Procedure 23(e)(5):

"A Real-World Perspective on Resolving Objections to Class-Action Settlements and Attorneys' Fee Awards"

Presented to the Advisory Committee on Civil Rules

February 16, 2017**

I. Introduction

The Advisory Committee is proposing certain amendments to Rule 23(e)(5) to deal with problems believed to surround objections to proposed class-action settlements and their withdrawal by objectors in exchange for payments from class counsel.[1] I seek to address the proposed amendments in light of my practical knowledge from decades of legal practice as a member of the plaintiffs' class-action bar.[2]

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* Member of the California bar; J.D., 1985, Duke University School of Law.

** This written testimony was submitted on February 15, 2017, in advance of the Advisory Committee's February 16, 2017, hearing at which Mr. Isaacson is scheduled to testify.

[1] *See* Memorandum re *Report of the Advisory Committee on Civil Rules* from John D. Bates, Chair of the Advisory Committee on Civil Rules, to Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (May 12, 2016, revised July 1, 2016), and *Proposed Amendments to the Federal Rules of Civil Procedure*, in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE at 193-232 (August 2016) (hereafter cited as "PRELIMINARY DRAFT"). The proposed revisions to Rule 23(e)(5) appear at pages 215-17 of the PRELIMINARY DRAFT, and the corresponding Advisory Committee Notes at pages 228-31.

[2] *See infra* at 4-14 (describing my background in the plaintiffs' class-action bar).

It appears to me that the Advisory Committee may be operating under the impression that patently meritless objections to proposed class-action settlements often are filed solely for the purpose of noticing frivolous appeals from orders overruling those objections, and with the intention of "extorting" payments from plaintiffs' class-action counsel in return for voluntarily dismissing the appeals.[3] I do not believe this is a serious real-world problem. In my 26 years of practice in the plaintiffs' class-action bar not a single case came to my attention in which class counsel paid objectors to withdraw frivolous objections or appeals. When class counsel pay objectors to drop an appeal it is not because they believe the appeal is frivolous, but because class counsel fear the objection and appeal may in fact have substantial merit.[4]

The current requirement that district courts approve the withdrawal of an objection to a proposed settlement is extraordinarily ineffective, mainly because it provides no standard for district courts to apply.[5] But neither do the proposed amendments currently under consideration.[6] And they may, in certain respects, make things even worse.

I fear the proposed revision eliminating judicial review under Rule 23(e)(5) when objections are withdrawn without the payment of any consideration will be an invitation to harassment of objectors by class

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[3] *See* Memorandum re *Report of the Advisory Committee on Civil Rules* from John D. Bates, Chair of the Advisory Committee on Civil Rules, to Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (May 12, 2016, revised July 1, 2016), in PRELIMINARY DRAFT at 194 ("the amendments respond to widespread concern about the behavior of some objectors or objector counsel"); *see also infra* at 21-22, 38.

[4] *See infra* at 25-31.

[5] *See infra* at 31-33.

[6] *See infra* at 37-38.

counsel – who even now employ deposition subpoenas to harass and bully absent class members into withdrawing good-faith objections.[7]

Moreover, though the proposed revisions to Rule 23(e)(5) would require district-court approval of any payments made in exchange for the withdrawal of an objection or the voluntary dismissal of an objector's appeal, the proposed rule neither provides nor references any standards to guide the district court.[8] One judge might conclude that it is wrong to reward objectors who withdraw ostensibly meritless appeals in exchange for payments, and therefore withhold approval. Another court might on identical facts conclude that it is best to approve such payments in order to obviate whatever delays and costs extended appellate proceedings might entail. Even more problematic – what standards should govern an objector's dismissal, for payment, of appeals that may have merit? It might make sense for a district judge asked to approve a large payment in exchange for dismissing an objector's appeal to stop and reconsider settlement approval in light of the proposed transaction. But the proposed revisions do not permit this.[9]

I close with several recommendations. I believe review of objections withdrawn without the payment of consideration should be strengthened, not abandoned, and that class counsel who bully and harass absent class members should be checked. Clear standards should be articulated to govern the withdrawal or dismissal of objections and appeals in return for consideration – recognizing that frivolous objections and appeals are not the real problem. The real problem is that class counsel pay objectors to drop objections and appeals that may have real merit and could benefit the class. Currently court-appointed class representatives and class counsel have a duty to act as fiduciaries for the class, but objectors and their counsel do not. If the Advisory Committee intends to change the rules to require that

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[7] *See infra* at 19, 35-37 & n.110.

[8] *See infra* at 37-39.

[9] *See infra* at 38-39.

objectors and their counsel act for benefit of the class, it should say so clearly.

II. My Professional Background and Experience with Class-Action Litigation

A. My Experience as a Member of the Plaintiffs' Class-Action Bar

I speak from my experience of 26 years as a member of the plaintiffs' class action bar, first as an attorney with Milberg Weiss Bershad Hynes & Lerach LLP from 1989 to 2004, and then as a founding partner of Lerach Coughlin Stoia Geller Rudman & Robbins LLP, known since 2010 as Robbins Geller Rudman & Dowd LLP.

Those two firms, though at times subjects of considerable controversy, are major players in the securities class-action plaintiffs' bar. Before its West Coast partners departed in 2004 to form the firm now known as Robbins Geller, the Milberg Weiss firm was generally recognized as the "largest plaintiffs' firm specializing in complex field of securities and derivative litigation," being dubbed by FORTUNE MAGAZINE the "'king of the class action domain.'"[10] Robbins Geller subsequently took Milberg Weiss's place as the leading plaintiffs' securities class-action firm.[11]

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[10] John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation,* 48 LAW & CONTEMP. PROB. 5, 20 n.49 (1985) (quoting *Lawsuit Fever,* FORTUNE, Nov. 26, 1984, at 151); *see also* James P. McDonald, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar,* 58 DUKE L.J. 505, 506 (2008); Lonny Hoffman & Alan F. Steinberg, *The Ongoing Milberg Weiss Controversy,* 30 Rev. Litig. 183, 184 (2011) ("Milberg was . . . the top securities class action firm in the country (so far ahead of its competitors that for many years there was not a close second to speak of)").

[11] *See* ELLEN M. RYAN & LAURA E. SIMMONS, SECURITIES CLASS ACTION SETTLEMENTS: 2011 REVIEW AND ANALYSIS 17 (Boston: Cornerstone Research, 2012) (noting that in the field of securities class actions, Robbins Geller "was the most active firm for the period from 2010 to 2011, involved in 35 percent of settled cases"

I began working as an associate at Milberg Weiss in 1989, and became a partner in 1994. In 2004, in the midst of a federal criminal investigation concerning the firm's under-the-table incentive payments to named plaintiffs, most of Milberg Weiss's West Coast partners left to form Lerach Coughlin Stoia Geller Rudman & Robbins LLP, of which I was a founding partner.[12] The new firm's name changed to Coughlin Stoia Geller Rudman & Robbins LLP in 2007, when our leading partner, William S. Lerach, left the practice of law to deal with criminal charges related to the Milberg Weiss scheme of concealed payments to named plaintiffs.[13] Lerach, after pleading guilty to a federal felony charge, was barred from practicing law.[14] In addition to a two-year prison sentence, he agreed to pay a $250,000 fine and $7.5 million forfeiture, which barely put a dent in his personal net worth, then estimated at "upward of $700 million," which was of course derived mainly from court-approved class-action attorneys' fee awards.[15] In all, four former

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and "is likely to continue to maintain the largest market share for settlements in future years").

[12] *See* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 76 (Cambridge, Mass.: Harvard University Press, 2015) (noting that "in 2003-2004, a longstanding federal criminal investigation of Milberg, Weiss and its partners intensified"); Troy Wolverton, *Securities Lawyer Lerach Departs Firm*, THE MERCURY NEWS, June 1, 2007.

[13] *See* Jenny Anderson, *Lawyer Quits Firm to Focus on Inquiry,* NEW YORK TIMES, Aug. 29, 2007; Molly Selvin, *Lawyer under Cloud to Retire: William Lerach says he's stepping down to focus on the fraud case that implicates him,* LOS ANGELES TIMES, Aug. 29, 2007.

[14] *See* PATRICK DILLON & CARL M. CANNON, CIRCLE OF GREED: THE SPECTACULAR RISE AND FALL OF THE LAWYER WHO BROUGHT CORPORATE AMERICA TO ITS KNEES 164-65, 307, 393-94 (New York: Broadway Books, 2010)

[15] *See id.* at 3, 451; *see also* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 71 (Cambridge, Mass.: Harvard University Press, 2015) (noting that by 2007, when Lerach pleaded guilty to felony obstruction of justice and was disbarred, he had "by some estimates . . . amassed a personal fortune of over $700 million"); Ann Woolner, *Convicted King of Class Actions Builds Aviary, Regrets Nothing*, BLOOMBERG BUSINESS, Oct. 11, 2011 ("The San Diego Business Journal estimated in 2007 that he was worth $900 million.").

Milberg Weiss partners served time in prison and were disbarred for their part in their secret scheme.[16]

In 2008 Lerach's firm, whose name had changed to Coughlin Stoia upon his departure, nonetheless collected a $688 million attorneys' fee award from settlements in the *Enron* securities litigation, a substantial portion of which the firm's Executive Committee passed on to Mr. Lerach despite his felony conviction and disbarment.[17] The firm's name thereafter changed again, to Robbins Geller Rudman & Dowd LLP in early 2010, following Patrick J. Coughlin's departure from active management.[18] It remains, I think, America's largest securities-fraud class-action law firm.[19]

Although I worked on some state-court proceedings,[20] my decades of practice with these firms focused primarily on federal civil appeals in securities and other class actions. In the course of 26 years I personally

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[16] *See* COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 12, at 76 (noting that four "partners of Milberg, Weiss – [Melvyn I.] Weiss, [William S.] Lerach, [David] Bershad, and [Steven] Schulman – went to prison"). The judge who sentenced Lerach found it "painfully evident that the paid plaintiffs were motivated to abandon their fiduciary duties to the absent class members and take actions or make decisions in [their class-action] cases in order to maximize the award of attorneys' fees, all at the expense of the absent class." DILLON & CANNON, CIRCLE OF GREED, *supra* note 14, at 450 (quoting Judge John F. Walte's remarks at Lerach's sentencing hearing).

[17] *See infra* at 11-12.

[18] Petra Pasternak, *Firm Name Changing at Coughlin Stoia,* The Recorder, Feb. 25, 2010; Zach Lowe, *Coughlin Stoia Changes Name as Coughlin Steps Down,* The AmLaw Daily, Feb. 24, 2010.

[19] *See* RYAN & SIMMONS, *supra* note 11, at 17.

[20] *See, e.g., Mangini v. R.J. Reynolds Tobacco Co.,* 7 Cal. 4th 1057, 31 Cal. Rptr. 2d 358, 875 P.2d 73 (1994); *Mirkin v. Wasserman,* 5 Cal. 4th 1082, 23 Cal. Rptr. 2d 101, 858 P.2d 568 (1993); *Kuykendall v. State Board of Equalization,* 22 Cal. App. 4th 1194, 27 Cal. Rptr. 2d 783 (1994).

briefed and argued appeals before the First,[21] Second,[22] Third,[23] Fifth,[24] Sixth,[25] Seventh,[26] Eighth,[27] Ninth,[28] Eleventh,[29] and District of

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[21] *See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762 (1st Cir. 2011).

[22] *See, e.g., Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), overruled by *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S.Ct. 1318 (2015); *Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406 (2d Cir. 2008); *In re NYSE Specialists Securities Litigation (California Public Employees' Retirement System (CalPERS) v. New York Stock Exchange, Inc.)*, 503 F.3d 89 (2d Cir. 2007); *In re Elevator Antitrust Litigation (Transhorn, Ltd. v. United Technologies Corp.)*, 502 F.3d 47 (2d Cir. 2007); *In re WorldCom Securities Litigation (California Public Employees' Retirement System (CalPERS) v. Caboto-Gruppo Intesa, BCI)*, 496 F.3d 245 (2d Cir. 2007).

[23] *See, e.g., In re Constar International Inc. Securities Litig.*, 585 F.3d 774 (3d Cir. 2009); *Alaska Electrical Pension Fund v. Pharmacia Corp.*, 554 F.3d 342 (3d Cir. 2009); *California Public Employees' Retirement System (CalPERS) v. The Chubb Corp.*, 394 F.3d 126 (3d Cir. 2004).

[24] *See, e.g., Owens v. Jastrow*, 789 F.3d 529 (5th Cir. 2015); *Fener v. Operating Eng. Constr. Ind. and Misc. Pension Fund (Local 66)*, 579 F.3d 401 (5th Cir. 2009).

[25] *See, e.g.*, *Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498 (6th Cir. 2013), vacated sub nom. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, No. 13-435*, 2015 U.S. LEXIS 2120 (U.S., Mar. 24, 2015); *In re Vertrue Inc. Marketing and Sales Practices Litig.*, 719 F.3d 474 (6th Cir. 2013); *Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935 (6th Cir. 2009); *Fidel v. Farley*, 392 F.3d 220 (6th Cir. 2004), overruled in part, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *New England Health Care Employees Pension Fund v. Ernst & Young*, LLP, 336 F.3d 495 (6th Cir. 2003).

[26] *See, e.g.*, *City of Livonia Employee Retirement System v. Boeing Co.*, 711 F.3d 754 (7th Cir. 2013); *Beck v. Dobrowksi*, 559 F.3d 680 (7th Cir. 2009); *Illinois Municipal Retirement Fund v. CitiGroup, Inc.*, 391 F.3d 844 (7th Cir. 2004); *Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003).

[27] *See Romine v. Acxiom Corp.*, 296 F.3d 701 (8th Cir. 2002).

[28] *See, e.g., Makaeff v. Trump University, LLC*, 715 F.3d 254 (9th Cir. 2013), *en banc rehearing denied,* 736 F.3d 1180 (9th Cir. 2013); *Sanford v. MemberWorks, Inc.,* 625

Columbia Circuits.[30] I took part in the merits briefing of several cases before the United States Supreme Court.[31] I wrote and filed numerous amicus curiae briefs on behalf of institutional investors, academics, and others, addressing critical issues in class-action litigation.[32] I also was

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F.3d 550 (9th Cir. 2010); *Hatfield v. Halifax PLC,* 564 F.3d 1177 (9th Cir. 2009); *Sanford v. MemberWorks, Inc.,* 483 F.3d 956 (9th Cir. 2007); *Sanchez v. County of San Diego,* 464 F.3d 916 (9th Cir. 2006), *en banc rehearing denied,* 483 F.3d 965 (9th Cir. 2007) (with eight judges dissenting); *In re Daou Systems, Inc., Sec. Litig. (Sparling v. Daou),* 411 F.3d 1006 (9th Cir. 2005); *Deutsch v. Turner Corp.,* 324 F.3d 692 (9th Cir. 2003); *Chaset v. Fleer/Skybox Int'l,* 300 F.3d 1083 (9th Cir. 2002); *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385 (9th Cir. 2002); *Ronconi v. Larkin,* 253 F.3d 423 (9th Cir. 2001); *Hertzberg v. Dignity Partners, Inc.,* 191 F.3d 1076 (9th Cir. 1999); *Yourish v. California Amplifier, Inc.,* 191 F.3d 983 (9th Cir. 1999); *Chappell v. Robbins,* 73 F.3d 1078 (9th Cir. 1995).

[29] *See Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Financial Corp*., 762 F.3d 1248 (11th Cir. 2014).

[30] *City of Harper Woods Employees' Retirement System v. Olver,* 589 F.3d 1292 (D.C. Cir. 2009).

[31] *See* Brief for Respondents, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,* 135 S.Ct. 1318 (2015) (Counsel of Record); Brief for Respondents, *Matrixx Initiatives, Inc. v. Siracusano,* 131 S.Ct. 1309 (2011); Brief for Respondents, *Dura Pharmaceuticals, Inc., v. Broudo,* 544 U.S. 336 (2005).

[32] *See, e.g.,* Brief for Amicus Curiae NECA-IBEW Welfare Trust Fund in Support of Respondent, *Campbell-Ewald Corp. v. Gomez,* 136 S. Ct. 663 (2016); Brief for Amici Curiae Civil Procedure and Securities Law Professors in Support of Respondent, *Amgen Inc. v. Connecticut Retirement Plans & Tr. Funds,* 568 U.S. 2 (2013); Brief for Employees' Retirement System of the Government of the Virgin Islands as Amicus Curiae Supporting Respondent, *Janus Capital Group, Inc. v. First Derivative Traders,* 564 US 135 (2011); Brief for Amici Curiae MN Services Vermogensbeheer, B.V., et al., in Support of Petitioners, *Morrison v. National Australia Bank, Ltd.,* 561 U.S. 247 (2010); Brief for Amici Curiae Change to Win and the Change to Win Investment Group in Support of Respondents, *Merck & Co. v. Reynolds,* 559 U.S. 633 (2010); Brief for Amici Curiae Legal Scholars, *et al.,* in Support of Respondent, *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) (law professors' brief); Brief for Amicus Curiae National Association of Securities and Commercial Law Attorneys ("NASCAT") in Support of Respondent, *Central Bank v. First Interstate Bank,* 511 U.S. 164 (1994); Brief for National Association of Securities and Commercial Law Attorneys ("NASCAT") in Support of Petitioners, *Musick, Peeler & Garrett v. Employers Insurance of Wausau,* 508 U.S. 286 (1993);

responsible for several pro bono amicus curiae briefs filed on behalf of religious organizations supporting equal rights for LGBT people and religious liberty for all.[33] In my spare time, I also author or coauthored articles relating to issues in securities class actions,[34] and even a few concerning civil rights and religious liberty.[35]

Brief for Amicus Curiae Amalgamated Bank, as Trustee for the Longview Funds, in Support of Plaintiff-Appellee, *Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital Inc.,* 531 F.3d 190 (2d Cir. 2008); Brief for Amicus Curiae The Regents of the University of California, in support of Plaintiffs-Appellants, *Simpson v. AOL Time Warner, Inc.,* 452 F.3d 1040 (9th Cir. 2006), *vacated and remanded for reconsideration, sub nom. Avis Budget Group, Inc. v. California State Teachers' Retirement System,* 552 U.S. 1162 (2008), *on remand sub nom. Simpson v. Homestore.com, Inc.,* 519 F.3d 1041 (9th Cir. 2008).

[33] *See, e.g.,* Brief for Amici Curiae California Council of Churches, et al., *Obergefell v. Hodges,* 576 U.S. ___, 135 S. Ct. 2584 (2015) (California religious organizations' brief supporting marriage equality); Brief for Amici Curiae California Council of Churches, et al., *Hollingsworth v. Perry,* __ U.S. __, 133 S. Ct. 2652 (2013) (same); Brief of Amici Curiae California Faith for Equality, et. al., *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012); Amicus Curiae Brief of California Faith for Equality, et al., *Perry v. Brown,* 52 Cal. 4th 1116, 265 P.3d 1002 (2011) (California religious organizations' brief on question of standing certified by the Ninth Circuit); Brief of Amici Curiae Unitarian Universalist Legislative Ministry California, et al., *Perry v. Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (California religious organizations' brief supporting marriage equality); Brief of Amici Curiae California Council of Churches, et al., *Strauss v. Horton,* 46 Cal. 4th 364, 377-78, 207 P.3d 48, 93 Cal. Rptr. 3d 591 (2009) (California religious organizations' brief opposing Proposition 8); Brief of Amici Curiae Unitarian Universalist Association of Congregations, et al., *In re Marriage Cases,* 43 Cal. 4th 757, 773-78, 183 P.3d 384, 76 Cal. Rptr. 3d 683 (2008) (Interfaith brief supporting marriage equality); Brief for Amici Curiae California Faith for Equality, et al., *Pickup v. Brown,* 728 F.3d 1042 (9th Cir. 2013) (religious organizations' brief supporting constitutionality of California statute barring healthcare professionals from subjecting minors to "Sexual Orientation Change Efforts"); Brief for Amici Curiae Forum on the Military Chaplaincy, et al., *Log Cabin Republicans v. United States,* 658 F.3d 1162 (9th Cir. 2011) (opposing "Don't Ask Don't Tell"); Amici Curiae Brief of the Unitarian Universalist Association of Congregations, et al., *Winkler v. Gates,* 481 F.3d 977 (7th Cir. 2007) (opposing government support for the Boy Scouts of America's discriminatory program).

[34] *See, e.g.*, Eric Alan Isaacson, *The Roberts Court and Securities Class Actions: Reaffirming* Basic *Principles,* 48 AKRON L. REV. 923 (2015); Patrick J. Coughlin,

In my 26 years as a member of the plaintiffs' class-action bar, I frequently consulted on proceedings involving class counsel's attorneys' fee applications.[36] I also frequently consulted with my colleagues concerning formal objections filed against our firms' class-action settlements and attorneys' fee applications.[37] I personally defended appeals that were filed by objectors to class-action settlements or that

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Eric Alan Isaacson & Joseph D. Daley, *What's Brewing in* Dura v. Broudo*? The Plaintiffs' Attorneys Review the Supreme Court's Opinion and its Import for Securities-Fraud Litigation,* 37 LOYOLA U. CHIC. L. J. 1 (2005); William S. Lerach & Eric Alan Isaacson, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893 (1996); Patrick J. Coughlin & Eric Alan Isaacson, *Securities Class Actions in the United States,* in LITIGATION ISSUES IN THE DISTRIBUTION OF SECURITIES: AN INTERNATIONAL PERSPECTIVE (William G. Horton & Gerhard Wegen, eds.; London: Kluwer International/International Bar Association, 1997); Alan Schulman, Eric Isaacson & Jennifer Wells, *Pleading Standards Under the Private Securities Litigation Reform Act of 1995: The Central District of California's* Chantal *Decision*, CLASS ACTIONS & DERIVATIVE SUITS, Summer 1996, at 14; Patrick J. Coughlin & Eric Alan Isaacson, *Commencing Litigation Under the Private Securities Litigation Reform Act of 1995 ("PSLRA")*, in SECURITIES LITIGATION 1996 (Jay B. Kasner & Bruce G. Vanyo, eds.; New York & San Francisco: Practicing Law Institute 1996).

[35] *See, e.g.,* Eric Alan Isaacson, *Free Exercise for Whom? – Could the Religious-Liberty Principle that Catholics Established in* Perez v. Sharp *Also Protect Same-Sex Couples' Right to Marry?,* 92 U. DET. MERCY L. REV. 29 (2015); Eric Alan Isaacson, Goodridge *Lights A Nation's Way to Civic Equality,* BOSTON BAR JOURNAL, Nov. 15, 2013; Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?,* 8 STAN. J. C. R. & C.L. 123 (2012); Eric Alan Isaacson, *Assaulting America's Mainstream Values: Hans Zeiger's* Get Off My Honor: The Assault on the Boy Scouts of America, 5 PIERCE L. REV. 433 (2007) (review essay); Eric Alan Isaacson, *Traditional Values, or a New Tradition of Prejudice? The Boy Scouts of America vs. the Unitarian Universalist Association of Congregations,* 17 GEO. MASON U. C.R.L.J. 1 (2006); Eric Alan Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment,* 23 LOYOLA L.A. L. REV. 535 (1990).

[36] *See, e.g., In re Washington Public Power Supply System Litig.,* 19 F.3d 1291 (9th Cir. 1994) (attorneys' fee appeal).

[37] *See, e.g., Powers v. Eichen,* 229 F. 3d 1249 (9th Cir. 2000).

otherwise involved class-action attorneys' fee awards.[38] I also represented institutional investors who opted out of a federal securities class action in the belief that individual litigation would better serve their interests.[39]

Some of the matters involving objections to settlements and attorneys' fee awards on which I worked, or with which I was otherwise familiar, were resolved on undisclosed terms with appeals voluntarily dismissed by the objectors.[40] The *Enron* securities-fraud class action was one such matter.

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[38] *See, e.g., Fidel v. Farley,* 534 F.3d 508 (6th Cir. 2008) (objector's appeal concerning class notice and attorneys' fees); *Morris v. Lifescan, Inc.,* 54 F. App'x 663, 664 (9th Cir. 2003) (objector's appeal concerning attorneys' fees); *see also In re Trans Union Corp. Privacy Litig.,* 664 F.3d 1081 (7th Cir. 2011) (fee dispute); *In re Trans Union Corp. Privacy Litig.,* 629 F.3d 2011 (7th Cir. 2011) (earlier fee dispute).

[39] *In re WorldCom Securities Litigation (California Public Employees' Retirement System (CalPERS) v. Caboto-Gruppo Intesa, BCI),* 496 F.3d 245 (2d Cir. 2007) (briefed & argued for pension funds that opted out of *WorldCom* class action to file individual suits; successful appeal from ruling that the pension funds' individual actions were untimely filed), *rev'g In re WorldCom Inc. Sec. Litig. (State of Alaska Dept. of Revenue v. Ebbers),* 294 F. Supp. 2d 431 (S.D.N.Y. 2003), *and In re WorldCom Inc. Sec. Litig. (California Public Employees' Retirement System (CalPERS) v. Ebbers),* 308 F. Supp. 2d 214 (S.D.N.Y. 2004); *Illinois Municipal Retirement Fund v. CitiGroup, Inc.,* 391 F.3d 844 (7th Cir. 2004).

[40] *See, e.g., Newby v. Enron Corp.,* No. 08-20648 (5th Cir. Sept. 16, 2009) (stipulated dismissal of objectors' appeal from $688 million attorneys' fee award representing a multiplier of 5.2 times the lawyers' claimed reasonable hourly rates: "Pursuant to the joint stipulation of the parties this appeal is dismissed this 16th day, September, 2009, see Fed. R. App. P. 42(b)."); *N.Y. State Teachers' Ret. Sys. v. Alaska Elec. Pension Fund,* No. 07-1197, Rule 42(b) Mandate (11th Cir. Feb. 22, 2008) (stipulated dismissal of objector's appeal from $17,625,000 attorneys' fee award representing a multiplier of six times the lawyers' claimed reasonable hourly rates); *Schwartz v. TXU Corp.,* Nos. 06-10040, 06-10041, 01-10042, Entry of Dismissal (5th Cir. June 11, 2007) (stipulated dismissal of objectors' appeals from settlement approval and $33,244,500 attorneys' fee award: "Pursuant to the joint motion of the parties this appeal is dismissed this 11th day of June, 2007, see FED. R. APP. P. 42(b).").

In 2008 my firm, by then known as Coughlin Stoia Geller Rudman & Robbins LLP, given William S. Lerach's departure,[41] collected a $688 million attorneys' fee award from class-action settlements in *Enron* – a substantial portion of which the firm's Executive Committee passed on to Mr. Lerach despite his felony conviction and disbarment.[42] I cannot say how much, as the firm's partnership agreement prohibited ordinary equity partners such as myself from reviewing the firm's financial records or learning how its revenues and profits are distributed.[43]

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[41] *See* Jacqueline Bell, *Enron Plaintiffs Want Lerach Off the Docket,* Law360, Oct. 2, 2007) ("Plaintiffs in the multidistrict securities litigation over the implosion of Enron Corp. have asked a federal judge to withdraw former powerhouse plaintiff's lawyer William Lerach as attorney of record after he left his firm and pleaded guilty to conspiring to obstruct justice. . . . In pleading guilty, Lerach, a former name partner at Milberg Weiss, admitted that he and other partners at the firm secretly paid individuals to serve as lead plaintiffs in class action suits. Lerach also admitted that the plaintiffs who received the payments lied under oath about the existence of the kickback arrangement.").

[42] *In re Enron Corp. Sec. Litig.,* 586 F. Supp. 2d 732, 814 n.94, 828 (S.D. Tex. 2008) (rejecting objection to awarding fees to "awarding fees to convicted criminal William Lerach" on the basis of "more than adequate briefing demonstrating the propriety of any fee sharing with Mr. Lerach before and after he left the firm and after his indictment, guilty plea, and sentencing" and then awarding attorneys' fees of "approximately $688 million, plus interest accrued").

[43] *See* Partnership Agreement of Lerach Coughlin Stoia & Robbins LLP, May 1, 2004, §3.02(a) ("none of the books or records of the Partnership shall at any time be available for inspection by any Partner (other than members of the Executive Committee") (copy on file with the author). A similar provision in the Milberg Weiss partnership agreement is, I believer, what enabled that firm's Executive Committee members to pay themselves secret bonuses and make under-the-table payments to class representatives, without disclosing the scheme to the rest of the firm's partners. *See* DILLON & CANNON, CIRCLE OF GREED, *supra* note 14, at 164-65 (New York: Broadway Books, 2010) ("[David] Bershad and [Melvyn I.] Weiss devised the scheme. Those who were part of it, the inner circle of very senior partners (and Lerach was one of them), would award themselves annual bonuses. The bonuses would more or less match the amount the firm spent on referrals and indierectly reward the serial plaintiffs in their stable. . . . [I]t meant that in order to pay for plaintiffs, all the attorneys at Milberg Weiss would contribute, directly or indirectly, whether they knew it or not."); *see also id.* at 307 (noting that because of a federal criminal investigation, "a painstakingly meticulous federal prosecutor would soon know more about Milberg Weiss's complicated and long-standing system

Some *Enron* class members thought the $688 million attorneys' fee award, representing more than five times the attorneys' claimed reasonable hourly rates, was just a bit too much, so they filed objections – which the district court ultimately rejected.[44] Eleven objectors then noticed an appeal that was resolved in September 2009 with a "Stipulated Dismissal of Appeal Pursuant to Federal Rule of Appellate Procedure 42(b)."[45] The "Stipulated Dismissal" recited that the objectors' appeal was being dismissed by agreement among the parties, "with an agreed upon amount in fees and costs to be paid to [the Objector-]Appellants as provided in a letter agreement separately entered into" on behalf of the Lead Plaintiff and Objector-Appellants,[46] but that was not attached to the "Stipulated Dismissal" or otherwise include in the public record.

We can only guess what its terms might have been. I had worked on some other aspects of the case.[47] But I was not privy to the terms of that letter agreement. And given the confidentiality that currently surrounds mediated settlements of federal appeals, I could not in any

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of kickbacks to named plaintiffs than all but a handful of the firm's senior partners").

[44] *See id.*, at 803-28.

[45] Stipulated Dismissal of Appeal Pursuant to Federal Rule of Appellate Procedure 42(b), *Newby v. Enron Corp.,* No. 08-20648 (5th Cir. Sept. 10, 2009).

[46] *Id.* at 1.

[47] *See, e.g., The Regents of the University of California v. Credit Suisse First Boston,* 482 F.3d 372, 376 (5th Cir. 2007) (class-certification appeal), *cert. denied sub nom.* The Regents of the University of California v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 552 US 1170 (2008) (petition for a writ of certiorari); *In re Barclays PLC, et al.,* Nos. 03-20178, 03-20185, 03-20187 (5th Cir. Mar. 6, 2003) (consolidated opposition to defendants' three mandamus petitions); *see also* DILLON & CANNON, CIRCLE OF GREED, *supra* note 14, at 411 (regarding a motion to recuse a Fifth Circuit judge in the class-certification appeal: "Speed was essential, and Isaacson finished in two days.").

event say whether or how much the objectors might have been paid to drop their appeal from the $688 million fee award.[48]

I do, however, think I have a good idea of how and why such agreements most often are entered by class counsel in order to secure the dismissal of objectors' appeals. And it most certainly is not because class counsel believe the objections are frivolous, as some judges and commentators seem to assume.[49]

B. My Recent Experience on the Objectors' Side of the Table

I also have some experience on the class-action objectors' side of the table.

After more than two decades in the plaintiffs' class-action bar, in March of 2016 I struck out on my own, seeking to establish an independent class-action and appellate practice. Since then have represented objectors in several matters.[50] I also have personally

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[48] *See generally* Robert J. Niemic, Mediation & Conference Programs in the Federal Courts of Appeals 12 (Federal Judicial Center, 2d ed., 2006) ("All of the [mediation] program offices operate with confidentiality . . . . Local rules usually prohibit mediators, the parties, and the parties' attorneys from disclosing the substance of a conference to any judge or non-party. Generally not considered confidential, however, are the fact that the mediation took place and the bare results of the mediation (for example, settled, not settled, or continued)."); *see, e.g.,* First Circuit Rule 33.0(c); Second Circuit Rule 33.1(e); Third Circuit Rule 33.5(c); Fourth Circuit Rule 33; Fifth Circuit General Order Governing the Appellate Conference Program; Sixth Circuit Rule 33(b)(4)(D); Eighth Circuit Rule 33A(c); Ninth Circuit Rule 33-1(c); Tenth Circuit Rule 33.1(D); Eleventh Circuit Rule 33-1(c)(3).

[49] *See, e.g.,* John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What To Do About Them?,* 39 FLA. ST. U. L. REV. 865, 865 (2012) ("Professional objectors are attorneys who, on behalf of nonnamed class members, file specious objections to class action settlements and threaten to file frivolous appeals of district court approvals merely to extract a payoff.").

[50] *See, e.g., Chieftain Royalty v. Enervest,* Nos. 16-6022, 16-6025 (10th Cir.) (appeal challenging class counsel's attorneys' fee award; argued Jan. 17, 2016, before the Honorable Judges Hartz, Gorsuch & Holmes, Cir. JJ.); *In re BioScrip, Inc. Sec.*

appeared as an objector in one proceeding, challenging a proposed class-action settlement and fee award in a case alleging that Godiva Chocolatier violated the Fair and Accurate Credit Transaction Act ("FACTA") by printing too many digits of customers' credit-card numbers on their receipts.[51]

Although the statutory violations were undisputed in that case, and although Godiva's potential exposure exceeded $300 million, a named plaintiff with a criminal record for fraud who had alleged no injury to himself entered a class-action settlement purporting to release other class members' claims for their actual damages – in return for just $6.3 million. His lawyers, who had conducted no formal discovery and who refused to say how much time they had devoted to the case let alone what their hourly rates might be, requested a third of that sum as common-fund attorneys' fees. They asked the district court to award their class-representative client, who had himself suffered no injury and who had declined to sit for a deposition, an incentive award of $10,000 as compensation for his personal services in securing a class action settlement barring other class members' ability to seek relief for their actual damages.[52]

My objection in the *Godiva* case focused first on the failure to comply with the rule of *Mercury Interactive Corp. Securities Litigation*[53] and *Redman v. RadioShack Corp.,*[54] which hold that Rule 23(h) requires

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Litig., No. 13-cv-6922 (S.D.N.Y.) (objection to class counsel's attorneys' fee award; argued June 13, 2016).

[51] *Muransky v. Godiva Chocalatier, Inc.,* No. 0:15-cv-607-WPD (S.D. Fla.), *appeal pending* No. 16-16486 (11th Cir.).

[52] *See* Motion for Final Approval of Class Action Settlement, *Muransky v. Godiva Chocolatier, Inc.,* No. 15-cv-60716-WPD, DE74 (S.D. Fla. Sept. 12, 2016); Plaintiff's Motion for Award of Attorneys' Fees and Expenses, *Muransky v. Godiva Chocolatier, Inc.,* No. 15-cv-60716-WPD, DE76 (S.D. Fla. Sept. 12, 2016).

[53] 618 F.3d 988 (9th Cir. 2010).

[54] 768 F.3d 622 (7th Cir. 2014).

the deadline for filing objections to attorneys' fee applications to be placed *after* rather than *before* the date when class counsel will file the fee motion that the objections challenge.[55] It seems pretty obvious: class members and their lawyers should be able to see class counsel's fee application before being required to frame whatever objections to it they might have. I further objected that the proposed $2.1 million attorneys' fee award to class counsel, who apparently had devoted little time to the case and who refused to provide any information concerning their hours or billing rates, was inadequately supported and excessive. Eleventh Circuit precedents governing common-fund fee awards mandate that even in setting a percent-of-fund attorneys' fee award, the district court first consider "the time and labor required," starting with the "hours claimed or spent on a case" which "are a necessary ingredient to be considered" in any award of common-fund attorneys' fees.[56] As for the $10,000 incentive bonus to a class representative with a criminal record who had suffered no injury and who refused to be deposed in the case, I observed that the Supreme Court's seminal common-fund precedents appear to flatly proscribe such payments to class representatives for personal services that they rendered in securing a common fund.[57]

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[55] Objection to Proposed Settlement and Notice of Intent to Appear, *Muransky v. Godiva Chocolatier, Inc.,* No. 0:15-cv-60716-WPD, DE59 (S.D. Fla. Aug. 21, 2016); *see Redman,* 768 F.3d at 638-39 ("There was no excuse for permitting so irregular, indeed unlawful, a procedure."); *Mercury Interactive,* 618 F.3d at 994-95 ("a schedule that requires objections to be filed before the fee motion itself is filed denies the class the full and fair opportunity to examine and oppose the motion that Rule 23(h) contemplates"); *accord In re National Football League Players Concussion Injury Litig.,* 821 F.3d 410, 446 (3d Cir. 2016) ("We have little trouble agreeing that Rule 23(h) is violated in those circumstances.") (dictum).

[56] *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717 (5th Cir. 1974); *see Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768, 771 & n.3, 775 (11th Cir. 1991) (noting that application of the *Johnson* factors starts with an evaluation of "the time and labor required," and then holding that "the *Johnson* factors continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases").

[57] The seminal common-fund decisions, allowing for payment of attorneys' fees from recoveries benefitting a class, are two late nineteenth-century class actions prosecuted for the benefit of bondholders: *Trustees v. Greenough,* 105 U.S. 527

(1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885). The common-fund doctrine established by these decisions permits an award of attorneys' fees to a representative plaintiff whose efforts created a common fund benefitting a larger class, but they hold that an award for the class representative's personal services was wholly unwarranted and "illegally made," as the Court explained in *Greenough*:

> But there is one class of allowances made by the court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant. . . . . The reasons which apply to his expenditures incurred in carrying on the suit, and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. . . . It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support.
>
> We are of opinion, therefore, that the allowance for these purposes was illegally made, and that to this extent the orders should be reversed. We refer to the allowance in the last order, of $15,003.35 for private expenses, and of $34,625 for personal services.

105 U.S. at 537-38. The Court reiterated the point in *Pettus,* when Justice Harlan wrote for the Court:

> In *Trustees v. Greenough,* 105 U.S. 527, we had occasion to consider the general question as to what costs, expenses and allowances could be properly charged upon a trust fund brought under the control of court by suits instituted by one or more persons suing in behalf of themselves and of all others having a like interest touching the subject-matter of the litigation. That suit was instituted by the holder of the bonds of a railroad company, on behalf of himself and other bondholders, to save from waste and spoliation certain property in which he and they had a common interest. It resulted in bringing into court or under its control a large amount of money and property for the benefit of all entitled to come in and take the benefit of the final decree. His claim to be compensated, out of the fund or property recovered, for his personal services and private expenses was rejected as unsupported by reason or authority. "It would present," said Mr.

The last time I checked, the Supreme Court's decisions on a point of law are binding on lower courts until revisited and overruled by the Supreme Court itself.[58] I was under the impression, moreover, that class counsel have a duty to call such authority to the district court's attention.[59] I also was troubled by the notion that a class representative who suffered no injury should be able to evade the burden of demonstrating his own Article III standing under *Spokeo Inc. v. Robins*[60] when entering a class-action settlement that purports to release other class members' claims for actual damages. It seems to me that a litigant who invokes federal jurisdiction to settle and bar other

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> Justice Bradley, speaking for the court, "too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interests of creditors, and that, perhaps, only to a small amount, if they could calculate upon the allowance of a salary for their time and having all their private expenses paid."

Pettus, 113 U.S. at 122.

[58] *See, e.g., Bosse v. Oklahoma,* No. 15-9173, slip op. at 2, 580 U.S. ___ (Oct. 11, 2016) (reiterating the rule that it is the Supreme Court's "prerogative alone to overrule one of its precedents'") (quoting *United States v. Hatter,* 532 U.S. 557, 567 (2001) (quoting *State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997))); *Hohn v. United States,* 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484 (1989) (even if a Supreme Court precedent "appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions"); *see generally,* BRYAN A. GARNER, *ET AL.*, THE LAW OF JUDICIAL PRECEDENT 28-33 (St. Paul: Thomson Reuters, 2016).

[59] *See* ABA Model Rule of Professional Conduct 3.3(a)(2) ("A lawyer shall not knowingly: . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;"); *see generally* Elaine Bucklo, *The Temptation Not to Disclose Adverse Authority,* 40:2 LITIG. 1 (2014).

[60] 136 S. Ct. 1540 (2016).

people's claims should have to satisfy the requirements of Article III jurisdiction. Such are my contentions as an objector in *Godiva.*[61]

To my surprise class counsel, who had served no merits discovery at all in the case, responded to my objection with a deposition subpoena – making me the first and only person deposed in the litigation. Although my membership in the class was not contested, and although my objections related to questions of law and the existing record in the case, class counsel insisted that being an absent class member who had filed an objection, I was obligated to produce documents from other cases and to sit for a deposition. Mind you, my personal stake in the *Godiva* class action was rather small – the statutory damages sought came to just $1,000 per class member, and although the class notice falsely informed class members that we could expect to receive $235 apiece from the proposed settlement, class counsel's subsequent filings admitted that the real recovery per class member would be far less – maybe forty dollars, if I was lucky.[62] Though it was a waste of everyone's time, I in fact sat for the first and only deposition that class counsel bothered to take in the case.

When I later filed a notice of appeal from the district court's order rejecting my objections and granting settlement approval and attorneys'

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[61] *See* Objection to Proposed Settlement and Notice of Intent to Appear, *Muransky v. Godiva Chocolatier, Inc.,* No. 0:15-cv-60716-WPD, DE59 (S.D. Fla. Aug. 21, 2016); Class Member Eric Alan Isaacson's Supplemental Brief, *Muransky v. Godiva Chocolatier, Inc.,* No. 0:15-cv-60716-WPD, DE88 (S.D. Fla. Sept. 16, 2016); Objection to Magistrate's Report and Recommendation on Attorneys' Fees, *Muransky v. Godiva Chocolatier, Inc.,* No. 0:15-cv-60716-WPD, DE92 (S.D. Fla. Sept. 26, 2016); Fairness Hearing Transcript, *Muransky v. Godiva Chocolatier, Inc.,* No. 0:15-cv-60716-WPD, DE115, at 30--56 (S.D. Fla. Nov. 30, 2016).

[62] *Compare* Postcard Notice of Class Action Lawsuit and Proposed Settlement, *Muransky v. Godiva Chocolatier, Inc.,* No. 1:15-cv-60715-WPD, DE59-1 (S.D. Fla. Aug. 21, 2016) ("Class Counsel estimate that a Settlement Class Member who submits a valid claim form . . . may receive a payment of around $235 subject to pro rata distribution."), *with* Motion for Final Approval of Class Action Settlement, *Muransky v. Godiva Chocolatier, Inc.,* No. 1:15-cv-60715-WPD, DE74 at 7 (stating class members "will receive approximately $60," before deducting a third for attorneys' fees).

fees, class counsel naturally filed a motion asking the court to require the posting of "an appeal bond totaling $115,934.00" should I desire the Eleventh Circuit to consider my objections.[63] The district court thought that was excessive. But even though an appellee's taxable costs seldom exceed a few hundred dollars,[64] the district court ultimately required a $2,500 bond to appeal – which was itself many times my stake in the case as an absent class member.[65]

This, I have learned, is how things are done in many consumer class actions. Class counsel far too often put more effort into harassing objectors, and into seeking exorbitant bonds as a condition for appeal, than they do into actually litigating claims on behalf of the class.

III. The Problem Posed by "Professional Objectors" and by Offers to Pay Objectors to Drop Objections or to Forego Appeals

Based on my experience as a longtime plaintiffs' class-action lawyer, I wish first to address concerns that "professional objectors"

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[63] Amended Motion to Require Posting of Appeal Bond and Incorporated Memorandum of Law, *Muransky v. Godiva Chocolatier, Inc.,* No. 1:15-cv-60715-WPD, DE107 at 2 (S.D. Fla. Nov. 2, 2016).

[64] *See* MARY LEARY, THE COMPARATIVE STUDY OF THE TAXATION OF COSTS IN THE FEDERAL CIRCUIT COURTS OF APPEALS UNDER RULE 39 OF THE FEDERAL RULES OF APPELLATE PROCEDURE 3-4 (Federal Judicial Center, April 2011) ("Leaving out the larger awards that were identified as outliers in several circuits, the data show that across all circuits average costs awarded to appellees under subsection 39(a)(1) ranged from $84.15 to $198.08 ($153.68 median average award); under subsection 39(a)(2) average costs awarded to appellees ranged from $18.20 to $345.04 ($219.06 median average costs) . . . ."); *In re MagSafe Apple Power Adapter Litig.,* 571 Fed. Appx. 560, 563 (9th Cir. Apr. 24, 2014) (unpublished) (in appeal of class-action settlement, vacating bond of $15,000 because appeal costs "rarely exceed more than a few hundred dollars when taxed against an appellant").

[65] *See Muransky v. Godiva Chocolatier, Inc.,* No. 1:15-cv-60715-WPD, Order Adopting Report of Magistrate Judge; Overruling Objections; Requiring Posting of Appeal Bond, DE121 at 4 (S.D. Fla. Jan. 9, 2017).

present a serious problem by filing frivolous objections and appeals, and then "extorting" money from class counsel in return for withdrawing the objections and dismissing the appeals. In my 26 years in the plaintiffs' class-action bar, I never saw that happen. Not once did I witness payments made in return for the withdrawal of a frivolous objection or appeal. My own experience as a member of the plaintiffs' class-action bar strongly corroborates the Public Citizen Litigation Group's observation: "Our experience leads us to believe that objectively frivolous objections are not a serious problem."[66]

Thus, to the extent that proposed revisions of Rule 23 are designed to deal with the problem of "professional objectors" who file frivolous objections in order extort money from class counsel, they are apt to be seriously misdirected.

The view seems, however, to be fairly widespread that frivolous objections and appeals currently present a serious challenge to efficient class-action litigation. Professor Brian T. Fitzpatrick paints the picture of lawyers working as "professional objectors" who induce "class members to file wholly frivolous objections and appeals for no other reason than to induce . . . payments from class counsel," noting that "[c]ourts and commentators believe that [such] objector blackmail is a serious problem."[67] As Professor John E. Lopatka and Chief Judge D. Brooks Smith of the United States Court of Appeals for the Third Circuit describe the problem:

> Professional objectors are attorneys who, on behalf of nonnamed class members, file specious objections to class action settlements and threaten to file frivolous appeals of

[66] Scott L. Nelson & Allison M. Zieve, *Comment to the Rule 23 Subcommittee of the Civil Rules Advisory Committee on Behalf of Public Citizen Litigation Group,* at 3 (April 9, 2015).

[67] Brian T. Fitzpatrick, *The End of Objector Blackmail?,* 62 VAND. L. REV. 1624, 1624 (2009).

> district court approvals merely to extract a payoff. Their behavior amounts to a kind of lawful extortion.[68]

Professor William Rubenstein suggests that this view of "professional objectors" was behind the 2003 addition to Rule 23 of subdivision (e)(4)(A)'s current mandate that "an objection may be withdrawn only with the court's approval."[69] It appears to be motivating the currently proposed further revisions, requiring court approval for whenever payments are made for an objector either to withdraw an objection or to voluntarily dismiss or otherwise forego an appeal.[70]

Strange as it may seem, however, in my 26 years of practice in the plaintiffs' class-action bar, no instance ever came to my attention of a payment made in return for the withdrawal of a clearly meritless objection, or the voluntary dismissal of a frivolous appeal. I have to agree with the conclusion of the Public Citizen Litigation Group: "Truly frivolous objections are unlikely to impede settlement approval or to be appealed."[71]

Frivolous objections by definition have little prospect of success, either before the district court in the first instance, or before the court

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[68] John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What To Do About Them?,* 39 Fla. St. U. L. Rev. 865, 865 (2012).

[69] 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §13:34 (St. Paul: Thomson Reuters, 5th ed., 2014).

[70] *See* Memorandum re *Report of the Advisory Committee on Civil Rules* from John D. Bates, Chair of the Advisory Committee on Civil Rules, to Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (May 12, 2016, revised July 1, 2016), in PRELIMINARY DRAFT at 194 ("the amendments respond to widespread concern about the behavior of some objectors or objector counsel since the 2003 amendments to Rule 23 went into effect").

[71] Scott L. Nelson & Allison M. Zieve, *Comment to the Rule 23 Subcommittee of the Civil Rules Advisory Committee on Behalf of Public Citizen Litigation Group,* at 3 (April 9, 2015).

of appeals.[72] After a genuinely frivolous objection is rejected by s district court, a resulting appeal can typically be resolved without expenditure of much time or effort. "This is so because appellate courts may on motion dismiss frivolous claims at the outset (that is, before substantial fees are incurred)."[73] Indeed, "[t]he traditional countermeasure for an appeal thought to be frivolous is a motion in the appellate court to dismiss, which is available at the outset of the appeal and before expenses thereon begin to mount."[74] "Moreover, upon sustaining such a challenge, an award of fees and double costs would be warranted,"[75] since Federal Rule of Appellat Procedure 28 provides: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."[76]

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[72] *See Neitzke v. Williams,* 490 U.S. 319, 325 (1989) ("an appeal on a matter of law is frivolous where '[none] of the legal points [are] arguable on their merits'") (quoting *Anders v. California,* 386 U.S. 738 744 (1967); *Chevron U.S.A. Inc. v. M&M Petroleum Servs.,* 658 F.3d 948, 952 (9th Cir. 2011) ("A frivolous case is one that is groundless ... with little prospect of success . . . .") (quoting *Rodriguez v. United States,* 542 F.3d 704, 709 (9th Cir.2008)); *Orr v. Bank of America,* 285 F.3d 764, 784 n.34 (9th Cir. 2002 ("An appeal is frivolous 'if the result is obvious or the appellant's arguments are wholly without merit.'") (citation omitted); *Cash v. United States,* 261 F.2d 731, 745 (D.C. Cir. 1958) ("'Frivolous' has a colloquial meaning of trifling or silly. It also has an established meaning in law, when applied to appeals, of 'manifestly insufficient or futile,' 'without merit and futile.'") (citations omitted); Robert G. Bone, *Modeling Frivolous Suits,* 145 U. Pa. L. Rev. 519, 533 (1997) ("A suit is frivolous (1) when a plaintiff files knowing facts that establish complete (or virtually complete) absence of merit as an objective matter on the legal theories alleged, or (2) when a plaintiff files without conducting a reasonable investigation which, if conducted, would place the suit in prong (1).").

[73] *Pedraza v. United Guaranty Corp.,* 313 F.3d 1323, 1333 n.14 (11th Cir. 2002).

[74] *In re American President Lines, Inc.,* 779 F.2d 714, 717 (D.C. Cir. 1985).

[75] *Pedraza,* 313 F.3d at 1333 n.14 (citing *Geaneas v. Willets,* 911 F.2d 579, 582 (11th Cir. 1990)).

[76] Fed. R. App. P. 38; *see, e.g., Wachovia Securities, LLC v. Loop Corp.,* 726 F.3d 899, 910 (7th Cir. 2013); *Gallop v. Cheney,* 642 f.3d 364, 370 (2d Cir. 2011); *Horoshko v.*

In the Ninth Circuit frivolous appeals from orders approving settlements also may be dealt with by means of motions for summary affirmance – which are regularly granted when objectors' appeals fail to present genuinely substantial issues.[77] Although orders dismissing such appeals typically are unpublished, their existence is well publicized and widely known to members of the plaintiffs' class-action bar.[78] *The National Law Journal,* for example, reports that class counsel employing motions for summary affirmance have been "able to effectively dispose of" appeals asserting insubstantial objections "without expending significant resources or incurring substantial delay."[79]

In truth, however, relatively few objections are genuinely frivolous. Far more raise serious issues that are quite serious, but that given the

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Citibank, N.A., 373 F.3d 248, 250 & n.1 (2d Cir. 2004); *Grove Fresh Distributors, Inc. v. John Labatt, Ltd.,* 299 F.3d 635, 642 (7th Cir. 2002).

[77] *See, e.g., Klee v. Khosravi,* No. 15-56201, DE176, Order (9th Cir. Dec. 9, 2015) (summary affirmance in objectors' appeal in the Nissan Leaf class-action litigation: "A review of the record and the opposition to the motion for summary affirmance indicates that the questions raised in this appeal are so insubstantial as not to require further argument."); *Dennings v. Clearwire Corp.,* No. 13-35038 (9th Cir. Apr. 22, 2013) (summary affirmance in objector's appeal from settlement approval in Clearwire Internet-service class action); *In re Wal-Mart Wage & Hour Employment Practices Litig.*, Nos. 09-17648, 09-17682, 09-17683 (9th Cir. Aug. 10, 2010) (summary affirmance in three consolidated objectors' appeals from settlement of employment-practices class action).

[78] *See, e.g.,* Anna C. Haac, *Ninth Circuit Grants Summary Affirmance In Objectors' Appeal from Class Action Settlement: A Case Study in Dealing with Serial Objectors,* THE NATIONAL LAW REVIEW, December 12, 2013 ("One tool that can be used against such serial objectors on appeal is the motion for summary affirmance, which asks the appellate court to affirm the final approval of the settlement quickly, without the delay that normally accompanies full appellate briefing and argument. Proceedings following a recent settlement of three class actions against Clearwire, which was approved by the United States District Court for the Western District of Washington, demonstrate the effectiveness of the summary affirmance procedure.").

[79] *Id.*

abuse-of-discretion standard of review to which orders approving settlements or attorneys' fee awards generally are subject, still may be unlikely to prevail on appeal. In my experience, however, class counsel have little to gain by paying objectors off to drop such appeals, and are quite willing to defend them through oral argument and judgment – as I indeed have.[80] The prospect of defending such appeals is a cost of doing business, and of honoring due process that allows class members to present objections to judgments that will bind them.

Any notion that weak appeals somehow engender systematic "extortion" by objectors and their counsel of payments from class counsel is quite simply preposterous. Class counsel have little incentive to pay for the voluntary withdrawal of objections, or the dismissal of objectors' appeals, that they believe are meritless. Well-capitalized class counsel – that is to say, any counsel who are equipped to adequately represent a class – generally will have the financial wherewithal to negotiate "so-called 'quick-pay' provisions in their settlement agreements so that counsel receive their fees at final judgment, not after all appeals, taking the sting out of counsel's having to defend objector appeals."[81] "With the consent of the defendants, class counsel insert provisions into class action settlements that permit counsel to receive whatever fees district courts award them as soon as those courts approve the settlements, regardless of whether the settlements are appealed," with class counsel to refund the fees if the award is reversed on appeal.[82] Thus, as Professor Brian T. Fitzpatrick explains, "objectors who bring meritless appeals can no longer delay the point at which class counsel receive their fees" and "class counsel have

[80] *See, e.g., Fidel v. Farley,* 534 F.3d 508 (6th Cir. 2008) (objector's appeal concerning class notice and attorneys' fees); *Morris v. Lifescan, Inc.,* 54 F. App'x 663, 664 (9th Cir. 2003) (objector's appeal concerning attorneys' fees).

[81] 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §13:34 (St. Paul: Thomson Reuters, 5th ed., 2014); *see generally id.,* §13:8 (discussing quick-pay provisions); Brian T. Fitzpatrick*, The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (same).

[82] Fitzpatrick, *supra* note 81, at 1625.

little incentive to pay objectors a premium to avoid this delay."[83] "Quick-pay provisions are not only already in use," Professor Fitzpatrick adds, "they are already in wide use."[84]

For class counsel who choose to pay nuisance value to obtain the dismissal of weak appeals, moreover, the payments are just that – a mere nuisance, rather than a serious problem requiring much attention. Focusing on such payments misses the greater problem: Class counsel who pay objectors to drop meritorious objections and to abandon appeals having a strong chance of success. In my twenty-six years in the plaintiffs' class-action bar, I never became aware of a case in which class counsel paid objectors to dismiss appeals that they believed to be frivolous or of insubstantial merit. The payments I knew of all were made to induce objectors to abandon appeals that class counsel feared the objectors were apt to win.

When class counsel make substantial payments to induce objectors to withdraw objections and appeals they do so, in truth, not because the objections are frivolous, but because class counsel fear that the objections have substantial merit and may well be sustained on appeal. In so doing, class counsel place their own interests over those of the class whose interests they purport to represent, paying objectors to drop appeals that threaten to benefit the class but that could reduce class counsel's fee awards, or even eliminate them altogether – as in cases where class counsel labors under an irresolvable conflict of interest, or has obtained class certification in violation of fundamental principles of due process, or in violation of Article III standing requirements. The fault, when such payments are made, lies not with objectors who owe no duty to the class, or with objectors' counsel whose ethical obligations run to their own clients (the objectors), but with class counsel who do in fact have fiduciary duties running to the class whose interests they purport to represent.[85]

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[83] *Id.*

[84] *Id.* at 1626.

[85] *See generally* Katherine Iketa, *Silencing the Objectors,* 15 GEO. J. LEGAL ETHICS 177, 196-200 (2001) (arguing that class counsel who pay objectors to drop

Class counsel place the objectors' lawyers in a box by offering payments far beyond the value of the objecting class members' individual claims. When a class member whose individual claim in a class action might be worth a few dollars is offered thousands, or tens of thousands, or even hundreds of thousands of dollars to drop her objection, she may well be tempted to do so. Her counsel can advise against it, and urge her to pursue her objection through appeal in order to benefit the class – but the decision whether to press the objection or withdraw it is the client's, not the lawyer's. Rules of professional conduct command: "A lawyer shall abide by a client's decision whether to settle a matter."[86] And the objector, in all likelihood, has bills to pay. She may have a mortgage or educational debt; her parents may have medical bills; she may hope to finance her own children's college education so that they may avoid the specter of crushing educational debt. Such considerations are apt to weigh heavily when an objecting class member is told that class counsel has offered to pay her a large sum to abandon her objection in a case where her personal stake, as a member of the class, is by comparison quite modest. And there is little to that the objector's lawyer can do to stop her.

If class counsel offers cash in return for withdrawing an objection or dismissing an appeal, the objector's counsel must of course communicate class counsel's offer to his or her client, the objector.[87] If the client decides to accept the payment, then class counsel who made it can be expected to revile the objector's counsel – who may well have

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substantial objections or appeals thereby breach their fiduciary duties to the class they were appointed to represent).

[86] ABA Model Rule of Professional Conduct 1.2(a); *accord, e.g., Attorney Grievance Comm'n v. Thaxton,* 415 Md. 341, 1 A.3d 470, 471 n.1, 477, 480 n.12 (Md. 2010); *Rizzo v. Haines,* 555 A.2d 58, 500-01 & n.9 (Pa. 1989).

[87] *See* ABA Model Rule of Professional Conduct 1.4, comment [2] ("a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance"); *accord, e.g., see, e.g., Attorney Grievance Comm'n v. Thaxton,* 415 Md. 341, 1 A.3d 470, 471 n.4, 478, 481-82 & n.14 (Md. 2010); *Rizzo v. Haines,* 555 A.2d 58, 500-01 (Pa. 1989).

advised his client against accepting the payment yet was powerless to stop the transaction – for filing the objection in order to "extort" the payment. This has given objectors' counsel a very bad name in some circles.[88] But any fault lies, in truth, with class counsel who offer objectors large sums to drop objections and appeals because they are likely to benefit the class at the expense of class counsel's fees.

As things currently stand, such payments are for the most part invisible and undocumented – most often made under the auspices of appellate-court mediation programs whose rules typically prohibit public disclosures concerning the substance of any communications or agreements entered in the course of the mediation.[89] This gives class counsel the opportunity to offer, and objectors the opportunity to accept, substantial payments without fear of public disclosure. But a declaration that Theodore ("Ted") Frank and his nonprofit Center for Class Action Fairness filed in the Seventh Circuit *Capital One* appeal provides a glimpse of how class counsel too often operate. [90] Even Frank and the Center have had to abandon objectors' appeals that they

[88] Professor Edward Brunet notes that some in the plaintiffs' bar revile objectors and their counsel as "warts on the class action process" and "bottom feeders." Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors* 2003 U. CHIC. L. FORUM 403, 409.

[89] *See generally* Robert J. Niemic, Mediation & Conference Programs in the Federal Courts of Appeals 12 (Federal Judicial Center, 2d ed., 2006) ("All of the [mediation] program offices operate with confidentiality . . . . Local rules usually prohibit mediators, the parties, and the parties' attorneys from disclosing the substance of a conference to any judge or non-party. Generally not considered confidential, however, are the fact that the mediation took place and the bare results of the mediation (for example, settled, not settled, or continued)."); *see, e.g.,* First Circuit Rule 33.0(c); Second Circuit Rule 33.1(e); Third Circuit Rule 33.5(c); Fourth Circuit Rule 33; Fifth Circuit General Order Governing the Appellate Conference Program; Sixth Circuit Rule 33(b)(4)(D); Eighth Circuit Rule 33A(c); Ninth Circuit Rule 33-1(c); Tenth Circuit Rule 33.1(D); Eleventh Circuit Rule 33-1(c)(3).

[90] *See* Declaration of Theodore Frank in Support of Motion to Intervene, *In re Capital One Telephone Consumer Protection Act Litig.,* Nos. 15-1400 & 15-1490, DE60-2, ¶¶17-18, 80-81 (7th Cir. June 10, 2015) (hereafter cited as "Frank Decl.").

earnestly desired to press, but that their clients directed them to drop when class counsel offered large sums of money.[91]

Frank's *Capital One* declaration explains that the Center is a nonprofit public-interest group organized to provide legal representation for objectors, so that it "cannot and does not settle its objections for *quid pro quo* cash payment to withdraw."[92] That is a fine aspiration. But the rules of professional ethics say that it is up to the client, not the attorney, to decide whether to accept a settlement offer.[93] The result is that class counsel, who wish to dispose of strong appeal based on a meritorious objection often can induce the objecting class member to abandon the appeal against his or her lawyer's wishes. Frank's declaration in *Capital One* explains:

> In a 2010 case, I represented a client with a meritorious Ninth Circuit appeal of approval of a settlement where the attorneys received $4 million and the class received zero. The appeals court ordered mediation, though I indicated to the mediator that my clients did not want to settle. After we filed our opening brief, class counsel offered an extraordinary sum to my clients to dismiss their appeals. (Unfortunately, the offer was confidential, and I cannot disclose it absent a court order.) One of my clients, an attorney friend, apologetically indicated that the offer was too good to refuse. I withdrew as attorney for the two appellants, and they settled and dismissed the appeal. Neither the Center nor I received any compensation as part of that settlement.[94]

As a consequence of that experience, Frank's declaration explains, the Center now insists on retainer agreements in which objecting class members pledge not to take payments in return for abandoning

[91] *See id.*

[92] Frank Decl. ¶15.

[93] *See supra* at 26-27 & nn.86-87

[94] Frank Decl. ¶¶17.

objections.[95] Even with these provisions in its retainer agreements, however, the Center cannot control clients who decide to accept payments from class counsel – as demonstrated by what happened in *Capital One* itself, where an objector who retained the Center to represent him and who agreed *not* to abandon his objections in return for an individual payment, nonetheless ultimately accepted a class counsel's offer of $25,000 to dismiss his appeal.[96]

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[95] *See id.,* ¶18. Frank's *Capital One* declaration explains:

> Since that time, the Center's retainer agreements contain multiple clauses relating to the motivations of the Center's clients and the possibility of settling objections for money. Among other provisions, the Center discloses that retaining the Center might deprive clients of the most financially advantageous outcome; clients promise that they are not seeking to settle their objections for money; and clients authorize the Center to move for an injunction prohibiting them from doing so. The Center also very carefully screens its clients to ensure their good faith in objecting and, when possible, uses Center attorneys or board members who are class members to object. We do not represent clients who do not agree to these terms.

Frank Decl. ¶18.

[96] *See id.,* ¶¶34-82. Frank's declaration explains that in *Capital One* a class member and objector (Jeffrey Collins) who had initially appeared *pro se* retained the Center to represent him in objection to class counsel's attorneys' fee application. "The objection was partially successful, and the district court reduced the $22.6 million attorney-fee request of class counsel by about $7 million." Frank Decl. ¶43; *see In re Capital One Tel. Consumer Protection Act Litig.,* 80 F. Supp. 3d 781, 794-809 (N.D. Ill. 2015). Believing the attorneys' fee award should be further reduced, the Center filed a notice of appeal on behalf of Mr. Collins. With the matter on appeal, class counsel communicated an offer: "Mr. Collins must dismiss his appeal by close of business June 8, 2015, with $25,000 payable to Mr. Collins upon the appeal's dismissal." Frank Decl. ¶74. Under the settlement offer from Lieff Cabraser Partner Jonathan D. Selbin, class counsel would pay Collins $25,000 in return for dismissing his appeal and withdrawing his pending fee petition in the district court. Frank Decl. ¶80. Frank was in a pickle, for when the offer was communicated to his client, an objector who had agreed not to accept such payments in return for withdrawing his objection,

> Mr. Collins indicated to me that he now wished to accept the offer notwithstanding his earlier agreement and statements. Research

When class counsel offer a substantial sum to an objecting class member whose individual claim is worth only a few dollars, or even several hundred dollars, the objector's lawyer is at his or her client's mercy. Though the plaintiffs' class-action bar may rant about "extortion" by "professional objectors,"[97] when the truth is that class counsel seek to buy off objectors even when – indeed, *especially when* – the objector's counsel would rather press the objection for the benefit of the class.

The lawyers whose objector clients accept such payments, though denigrated as so-called "professional objectors" and "extortionists," are not at fault in these transactions. Their duty runs to their client, not to the class, however much they may wish to press an objection for the benefit of the class.[98] It is class counsel who have a fiduciary duty to the class – a duty they breach by making self-interested payments in order to do away with objections and appeals that, if successful, stand to benefit the class.[99]

> indicated that legal ethics rules required me to accept an unethical settlement offer, notwithstanding the retainer agreement and my reliance upon it . . . and I wrote Mr. Selbin to indicate that Mr. Collins accepted the offer.

Frank Decl. ¶81.

[97] *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors,* 2003 U. CHIC. L. FORUM 403, 409 (2003) (noting that some in the plaintiffs' class-action bar revile objectors and their counsel as "warts on the class action process" and "bottom feeders"); Bruce D. Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949, 987 n.150 & 994 (2010) (complaining of "groundless objections" and objectors' "motives of extortion," and denouncing "the scourge of extortionate and dilatory objections").

[98] *See supra* at 26-27 & nn.86-87, 29-30 & n.96

[99] *See generally* Katherine Iketa, *Silencing the Objectors,* 15 GEO. J. LEGAL ETHICS 177, 196-200 (2001) (arguing that class counsel who do this breach fiduciary duties to the class they were appointed to represent).

IV. Dealing with Class Counsel's Payments to Objectors – The Current Framework and Proposed Revisions to Rule 23(e)(5)

As currently framed Rule 23 is, without doubt, extremely ineffective in dealing with payments to objectors in exchange for their withdrawal of objections. Rule 23(e)(5) currently states that "[a]ny class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval." Yet no standard is stated in the rule, or anywhere else for that matter, to guide the district court's determination. And, as things currently stand, "[o]nce an objector appeals, control of the proceeding lies in the court of appeals," placing it beyond the district court's power to monitor.[100]

The current rule's greatest shortcoming is that it establishes no standard at all for approving the withdrawal of an objection – a shortcoming that the revision currently under consideration does nothing to correct.[101]

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[100] Fed. R. Civ. P. 23(e), 2003 Advisory Committee Note. The Advisory Committee Note adds: "The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement." *Id.* But in practice, the appellate courts have not done this.

[101] The proposed amendment now under consideration would strike Rule 23(e)(5)'s current requirement that an objection to settlement approval "may be withdrawn only with the court's approval," to instead provide, with respect to objections to settlement approval:

> (A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). . . .
>
> (B) *Court Approval Required For Payment to an Objector or Objector' s Counsel.* Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

Should a district judge approve payment for withdrawal of an objection that it believes is meritless in order to avoid the delay that the objection's full prosecution might otherwise cause? Or should the court refuse to approve withdrawal of an apparently meritless objection in return for a payment from class counsel – thereby inducing the objector to file and prosecute a presumptively meritless appeal? What is the standard for withdrawal of an objection that the district court is inclined to reject, but that an appellate court may find has substantial merit? Should withdrawal of such an objection ever be approved? Under what circumstances?

Rule 23(e)(5) currently provides no answers to any of these questions. Neither do the Advisory Committee Notes to the 2003 Amendments that created it. The leading treatise on class actions advises: "'The Rule itself does not set forth the circumstances under which such approval may be given, nor is there any controlling authority on the issue.'"[102] Perhaps that is why, in practice, the requirement of court approval for withdrawal of objections to settlements generally is ignored – although many objections are withdrawn, one seldom sees district courts actually passing on the propriety of the withdrawals. The paucity of meaningful precedent, given the large number of objections that are withdrawn, is truly remarkable.

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

Proposed Rule 23(e)(5), in PRELIMINARY DRAFT, *supra* note 1, at 215-17.

[102] 4 William B. Rubenstein, Newberg on Class Actions §13:34 (Thomson Reuters, 5th ed., 2014).

Rule 23's loophole for objections to attorneys' fees is even more remarkable. Rule 23(h) authorizes class members to object to an attorneys' fee application, just as Rule 23(e)(5) authorizes objections to settlement approval. But where Rule 23(e)(5) requires court approval for withdrawal of an objection to a settlement, Rule 23(h) contains no parallel requirement of court approval for withdrawal of an objection to class counsel's attorneys' fee application.[103] Thus, it appears that class counsel may freely pay objectors to drop objections to attorneys' fee awards without disclosure to, let alone approval from, the district court.

The proposed amendment to Rule 23(e)(5) does little, if anything, to help.

Rule 23(e)(5)'s current requirement that an objection to approval of a settlement "may be withdrawn only with the court's approval," would be stricken and replaced with a new requirement of approval only when an objector or objector's counsel receives payment in return for the withdrawal of an objection to approval of a settlement; it would further provide that if such an objection is withdrawn after an objector's appeal has been docketed, the required approval can be sought pursuant to the provisions of Rule 62.1, allowing for limited remands for district courts to entertain a motion over which a pending appeal would otherwise deprive it of jurisdiction.[104] Yet the amendments still

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[103] Rule 23(e)(5) currently provides: "Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval." Fed. R. Civ. P. 23(e)(5). In contrast, Rule 23(h)(2) currently authorizes objections to attorneys' fee awards without requiring court approval for withdrawal of such objections. It simply states: "A class member, or a party from whom payment is sought, may object to the motion." Fed. R. Civ. P. 23(h)(2).

[104] Rule 62.1 provides:

> (a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> > (1) defer considering the motion;

would not require court approval for the withdrawal of objections to attorneys' fees that are authorized by Rule 23(h)(2).

I see at least two fundamental problems with this proposal. First, by striking the requirement that district courts approve all withdrawals of objections, it invites class counsel's harassment of objectors.[105] Second, it provides no guidance at all as to what standards a district court should apply in determining whether or not to approve the withdrawal of an objection or appeal in return for a payment.[106]

A. Dispensing with Court Approval when No Consideration is Paid for an Objection's Withdrawal May Encourage Harassment of Objectors by Class Counsel

The proposed amendment under consideration would strike Rule 23(e)(5)'s current requirement that "the objection may be withdrawn only with the court's approval," while adding new text requiring judicial approval only if payment or consideration is provided to the objector or

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(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Fed. R. Civ. P. 62.1.

[105] *See infra* at 35-37.

[106] *See infra* at 37-39.

its counsel.[107] The Committee Note explains that with respect to objections to settlement approval:

> The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.[108]

Striking the general requirement of judicial approval for the withdrawal of any objection to the approval of a settlement is apt to encourage abuse. While it is true that an objector should be free to withdraw on concluding an objection is in fact not justified, a district court still should inquire to ensure that this really is the reason the objector seeks to withdraw the objection.

Far too often, objections are withdrawn not because objectors believe they lack merit, but on account of bullying and harassment by unscrupulous class counsel. In most class-action cases the great majority of class members have rather small stakes. Yet objectors with small claims who take the trouble to inform the court of concerns about a proposed settlement or fee award may find themselves swiftly subpoenaed to produce documents and be deposed – as I was when I had the audacity to object to the proposed settlement and attorneys' fee award in the *Godiva* FACTA litigation.[109] The costs of complying with such subpoenas are apt in many instances to greatly exceed objectors' stake in a class action, inducing them to drop even sincere and likely meritorious objections.

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[107] *See supra* at 32-33 & note 101.

[108] Adv. Comm. Note to Subd. (e)(5)(A), in PRELIMINARY DRAFT, *supra* note 1, at 228.

[109] *See supra* at 19. As noted above, my deposition as an objector turned out to be the *only* deposition that was taken in the case, in which class counsel had served no formal merits discovery at all on the defendants.

The practice of bullying objectors with subpoenas and discovery has become widespread in consumer class-action litigation.[110] As things currently stand, district courts are asking *too few* questions about objections withdrawn without the payment of any consideration, rather than too many. They should be required to review *every* withdrawal of an objection – though under the current rule, they seldom really do so, very likely because no standards currently exist to guide their review.

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[110] Consider, for example, the withdrawal of an objection to the proposed settlement and attorneys' fee award in *Home Depot Breach Litig.,* No. 1:14-md-02583-TWT (N.D. Ga.), Docket Entry 255, entered Aug. 2, 2016), in which the *pro se* objector informed Judge Thomas Thrash:

> I withdraw my objection to the proposed settlement of Case No. 14-md-02583-TWT (The Home Depot, Inc. Customer Security Breach Litigation). I still believe that my objection has merit, but wish to avoid the cost and inconvenience of a deposition (including travel and missing work). As discussed with Mr. Theodore Maya of Ahdoot & Wolfson, PC, (1) I am notifying him by e-mail and the court by U.S. mail, (2) he will withdraw the subpoena that was delivered to me, and (3) he will cancel the deposition that had been scheduled for August 5, 2016. I am receiving no money or other consideration for withdrawing my objection.

Home Depot Breach Litig., No. 1:14-md-02583-TWT (N.D. Ga.) Docket Entry 255, Aug. 2, 2016); *see also* Docket Entry 245-3, Declaration of John R. Bevis in Suppport of Final Approval ¶4, July 29, 2016 ("On July 28, 2016, Mr. Weinstein represented to Consumer Counsel that he is withdrawing his objection and is sending a copy of his withdrawal to the Court."). Mr. Weinstein probably was not the only objector harassed by class counsel into withdrawing his objection. The case drew multiple objections from class members who complained that notice was inadequate, because they received it only after the time for filing objections had run – but who then withdrew their objections without explanation: "At the final approval hearing, the parties informed the Court that the following untimely objectors wished to withdraw their objections and opt-out of the Settlement; and pursuant to the parties' stipulation they will be included in the opt-out list and not bound by the terms of the Settlement: Michael Dwyer, Timothy Haley, and Peter Scoolidge." *Home Depot Breach Litig.,* No. 1:14-md-02583-TWT (N.D. Ga.) Docket Entry 260, at 12 (filed Aug. 23, 2016).

B. Requiring District Court Approval for Payments while Providing No Standards for Approval, and Without Permitting Reconsideration of a Settlement Previously Approved, Likely Will Not Do Much Good

The proposed revision to Rule 23(e)(5) would require district-court approval not only for payments made in return for the withdrawal of an objection to a settlement, but also for payments made the withdrawal of any appeal from the denial of such an objection. But, much like the current Rule 23(e)(5), the proposed revision provides no guidance at all concerning what the appropriate standard for approval might be.

Should the court approve of a modest payment to be made in return for the withdrawal of a relatively weak appeal? Should it approve a large payment? Or should it withhold approval, and insist that the objector proceed with the weak appeal?

On the one hand, the Advisory Committee Note to the proposed revision of Rule 23(e)(5) seems to suggest that district courts should approve payments made for the dismissal of weak appeals simply in order to avoid the delay that appellate proceedings may cause: "Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court approval requirement to apply in the appellate context."[111] On the other hand, the Advisory Committee Note also appears to say that the amendments are motivated by the view that such payments are to be condemned: "At least in some instances, it seems that objectors – or their counsel – have sought to extract tribute to withdraw their objections or dismiss appeals from judgments approving class settlements."[112] So what is a district judge to do? Approve a payment for dismissal of a really weak appeal in order to avoid the delay occasioned by full appellate proceedings? Or deny approval because the payment is some taboo "tribute"? Neither the

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[111] Advisory Committee Note to Proposed Rule 23(e)(5)(B)(i), in PRELIMINARY DRAFT, *supra* note 1, at 230.

[112] *Id.* at 229.

proposed revisions nor their Advisory Committee Notes provide clear guidance.

What if class counsel has offered an objector a *very large* payment in return for abandoning a supposedly "meritless" appeal? Should the district court perhaps reconsider whether the objection has merit, so that it should be sustained rather than withdrawn? That might make sense, if the interest of the class were what mattered – but the proposed amendments do not appear to permit such reconsideration.

By its terms, a new Rule 23(e)(5)(C) requires judicial approval of payments made to induce the dismissal of a pending appeal by providing: "If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending."[113] But Rule 62.1 provides that "[i]f a timely motion is made for relief that the [district] court lacks authority to grant because of an appeal that has been docketed and is pending, the [district] court may: (1) defer considering the motion, (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." And then: "The district court may decide the motion if the court of appeals remands for that purpose."[114]

Thus, it appears that the district court receives jurisdiction to decide only "the motion" in question – concerning to approve a payment proposed to be made in exchange for voluntary dismissal of an objector's appeal. The proposed revision does not authorize the district court to consider anything more than this. While a large payment might signal that the appeal has merit, and that the district court should perhaps reconsider the objection to settlement approval itself, the court would lack authority to do so.

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[113] Proposed Fed. R. Civ. P. 23(a)(5)(C), in PRELIMINARY DRAFT at 216-17. The Advisory Committee Note to this revision adds: "Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies." *Id.* at 231.

[114] Fed. R. Civ. P. 62.1(c).

Of course, the district court that originally rejected an objection probably is not the best judge of whether an appeal from its own order has merit. Responsibility for approving such transactions would be better vested in the appellate court or another district judge, who can evaluate the matter more objectively, than remanded to the judge who personally rejected the objection in the first instance.

V. Recommendations

I think it makes sense to require searching judicial inquiry and approval before any class members' objection is withdrawn or compromised. Thus, the current requirement of judicial approval for any withdrawal of an objection should be retained and strengthened, rather than abandoned whenever no consideration is paid.

District courts should be wary when good-faith objections are withdrawn without the payment of consideration, and they should be swift to punish class counsel who serve subpoenas on objectors for purposes of harassment and intimidation.[115] Class counsel who engage in such programs of harassment clearly do not have the class's best interests at heart – they likely should be disqualified as incapable of adequately representing a class in all future cases.

Unfortunately, district courts cannot be expected to engage in productive inquiries concerning withdrawals of objections when there are no clear standards to be applied. Currently there are none. Top priority should be given to study of how the system currently works, in order to frame standards that will operate to benefit class members by facilitating potentially meritorious objections and appeals while barring

[115] *See, e.g., In re Classmates.com Consol. Litig.*, 2012 WL 3854501 at *9-11 (W.D. Wa. 2012) (reducing class counsel's attorneys' fee award by $100,000 on account of aggressive behavior towards an objector and his counsel, which included serving subpoenas on the objector, and was "conduct that was plainly not in the interests of the class").

class counsel from paying money to terminate them. The real problem is not that objectors secure payments from class counsel in order to abandon frivolous objections and appeals. It is that class counsel pay objectors to drop objections and appeals that have merit and could benefit the class.

Expanding the requirement of district-court approval to encompass voluntarily dismissal of appeals without first providing clear standards could well produce chaos. Disclosure and transparency are surely are to be desired, and class counsel who seek to pay objectors to withdraw appeals should not be able to hide behind letter agreements and appellate-mediation confidentiality rules. But clear standards should be developed before the requirement of judicial approval is expanded.

Rhetoric condemning objectors, and their counsel, for pursuing their own interests rather than those of the class, raises serious questions about whether objectors and their lawyers are deemed to have any duties running to the class. The Advisory Committee Note to the proposed revisions to Rule 23(e)(5)(B) say that "[g]ood-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). . . . But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process."[116] The Advisory Committee Note further states that if consideration paid for the withdrawal of an objection or voluntary dismissal of an appeal "involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees."[117]

As things currently stand class representative, and its lawyers, are supposed to act as fiduciaries to the class they represent. An objector, as an absent class member, currently owes no such duty. And an objector's counsel, as Ted Frank learned, is obligated to represent its

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[116] Advisory Committee Note to Proposed Rule 23(e)(5)(B), in PRELIMINARY DRAFT, *supra* note 1, at 229.

[117] *Id.* at 230.

objector client's interests rather than those of the class in the event that the objector client to chooses to abandon the class's interests in order to pursue its own.[118] If the Advisory Committee wishes to change the rules, and to impose fiduciary duties running to the class on objectors' and their counsel, it should say so clearly.

Once clear standards have been promulgated, transparency and full disclosure of class counsel's payments to secure the withdrawal of objections should be expanded to encompass objections to attorneys' fees authorized by Rule 23(h)(2), as well as objections to settlement approval authorized by Rule 23(e)(5). The existing loophole for objections to attorneys' fee awards should be closed.

Finally, recognizing that objectors' counsel may be influenced by financial self-interest, it would be helpful to promulgate rules under which objectors' counsel can expect to be paid at least as much for successfully prosecuting an objection benefitting the class as they can expect when an objection is instead abandoned or an appeal dismissed. Financial incentives should be structured to encourage assertion of objections for the benefit of the class, rather than their abandonment in return for a payment by class counsel that benefits only the individual objectors and their counsel.

VI. Conclusion

The proposed amendments to Rule 23(e)(5) fail to take account of the practical realities of class-action practice. In my 26 years in the plaintiffs' class-action bar, I have never seen class counsel make a payment in return for the withdrawal of a frivolous objection. But class counsel will pay large sums to induce objectors to drop potentially meritorious objections that could well benefit the class. Any fault in such transactions rests with class counsel, who owe a fiduciary duty to the class as such, rather than to the objector's counsel who owes no such duty but is, to the contrary, obligated to represent the objector's interest as an individual should he or she decide to accept a settlement offer.

[118] *See supra* at 29-30 & n.96.

Judicial review of the withdrawal or compromise of an objection should be strengthened, whether or not consideration is paid to the objector. But most of all, clear standards are needed to guide district courts' review when consideration is offered. The currently proposed amendments offer none.

TAB 5

COMMENT OF

GERALD MAATMAN, JR. OF SEYFARTH SHAW LLP

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February 15, 2017

Committee on Rules of Practice and Procedure
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
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Re: Seyfarth Shaw LLP's Public Comment To The Advisory Committee On Civil Rules On Needed Reform To Rule 23

Seyfarth Shaw LLP[1] ("Seyfarth Shaw") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") regarding the Committee's proposed amendments to Rule 23 ("Proposed Amendments").

I. Introduction

Seyfarth Shaw is a law firm with more than 850 attorneys and 14 full-service offices in the United States and internationally. We recognize firsthand the serious problems that have developed as a result of inconsistent application of Rule 23 in federal courts. Indeed, courts have fashioned a body of law that simultaneously creates inconsistencies and gaps in the scope and interpretation of Rule 23, leaving practitioners on both sides of the bar struggling to discern the proper application of the Rule. While we support the current proposed amendments to Rule 23, we believe that they do not go far enough in addressing a number of the practical difficulties regularly encountered in class action litigation.

Accordingly, this Comment proposes four areas in need of reform and guidance from the Committee, which are not addressed by the pending proposed rule amendments. First, Rule 23 should be amended to require the presentation of viable trial plans in conjunction with motions for class certification. Second, Rule 23 should be amended to provide a right to interlocutory appeal of decisions to certify, modify, or de-certify a class. Third, Rule 23 should provide guidance regarding

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[1] This submission – from members of Seyfarth's class action defense group – is a joint effort of practitioners in our group, including Thomas Ahlering, Kate Birenbaum, Matthew Gagnon, Hilary Massey, Jennifer Riley, Tiffany Tran, Julie Yap, and Kevin Young.

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the predominance analysis as applied to certification of a settlement class, as opposed to class action litigation. Fourth, Rule 23 should provide guidance regarding the application of Rule 26's proportionality requirement to the scope of pre-certification discovery.

II. Rule 23 Should Be Amended To Add An Express Requirement That A Party Seeking Class Certification Must Submit A Viable Trial Plan

The 2003 amendments to Rule 23(c)(1)(A) changed the requirement that class certification must be determined "at an early practicable time" rather than "as soon as practicable."[2] This change reflected the acknowledgment that "[t]ime may be needed to gather information necessary to make the certification decision" which "often includes information required to identify the nature of the issues that actually will be presented at trial."[3] The Advisory Committee also noted:

> Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." *A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.*[4]

It is generally undisputed that trial plans help facilitate a court's determination of whether a case is capable of class-wide adjudication. Specifically, a trial plan is essential to determining whether the case is "manageable" and can be tried on a class-wide basis, or whether individualized issues (such as choice of law or individualized proof or damages inquiries) are insurmountable and render the class action unmanageable.

Accordingly, as acknowledged by the Advisory Committee, "an increasing number of courts *require* a party requesting class certification to present a trial plan"—and for good reason.[5] If a

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[2] Fed. R. Civ. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

[3] Fed. R. Civ. P. 23 Advisory Committee Note (2003).

[4] *Id.* (emphasis added) (citing Manual for Complex Litigation, Fourth, § 21.213 at 44; § 30.11, 214; § 30.12, 215 (3d ed. 1990)).

[5] *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (district court's request for a trial plan from the plaintiffs' attorney as "a reasonable request given the difficulty of trying a class action" (citations omitted)); *Haley v. Kolbe & Kolbe Millwork Co., Inc.*, 2015 WL 9255571, *16 (W.D. Wis. 2015) (requiring plaintiffs "to submit a plan for trial, in which they describe in detail the issues likely to be presented at trial, discuss whether and how those issues are susceptible to class-wide proof and explain how individual inquiries could be handled" noting that plaintiffs "will not be successful if they rely on the same vague and conclusory statements that they made in support of [their class certification] motion."); *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001), opinion amended on denial of reh'g, 273 F.3d 1266 (9th Cir. 2001) ("Because Zinser seeks certification of a nationwide class for which the law of

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party seeking class certification is unable to present a trial plan demonstrating that the case can be manageably tried on a class-wide basis, this alone demonstrates that the requirements of Rule 23 cannot be met. On the other hand, other courts have recognized that the Advisory Committee Notes indicating the usefulness of trial plans in determining whether a class action meets the requirements of Rule 23, do not mean that a party seeking class certification is *required* to submit a trial plan.[6]

A simple change to Rule 23 requiring the presentation of viable trial plans in conjunction with a motion for class certification makes sense from both a legal and practical perspective and would almost certainly prevent unwieldy and unmanageable class actions from proceeding past the class certification stage to trial.

Specifically, Rule 23 should be amended to embrace the approach adopted by the California Supreme Court in *Duran v. U.S. Bank Nat. Assn.*, which explicitly held that "[c]lass certification is appropriate only if [] individual questions can be managed with an appropriate trial plan."[7] In *Duran*, the California Supreme Court vacated a $15 million judgment in a wage-hour class action on the ground that it was based on a flawed statistical sampling methodology. While the California Supreme Court did not foreclose the possibility of using statistical sampling to establish class-wide liability, it made clear that: (1) a trial plan that includes the proposed sampling should be presented to the trial court before class certification, (2) the proposed sampling should be statistically reliable, and (3) the trial plan should not deprive defendants of their due process right to present affirmative defenses. Significantly, the California Supreme Court noted that the court must consider at the certification stage whether a trial plan has been adequately developed:

> A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. *Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.*[8]

The California Supreme Court's rationale in *Duran* should be applied to *all* class actions including those brought pursuant to Rule 23—and regardless of whether a party is seeking class certification based on statistical sampling—because it requires that a trial court certify a class action *only after* sufficiently analyzing whether the case can be tried on a class-wide basis at the class certification stage. Absent such an analysis, class action defendants remain susceptible to expensive

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forty-eight states potentially applies, she bears the burden of demonstrating 'a suitable and realistic plan for trial of the class claims.'") (quoting *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 454 (D.N.J. 1998)).

[6] *See, e.g.*, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 n.4 (9th Cir. 2005) ("[N]othing in the Advisory Committee Notes suggests grafting a requirement for a trial plan onto the rule"); *Olson v. Tesoro Refining and Marketing Co.*, 2007 WL 2703053, *7 (W.D. Wash. 2007) ("[T]he Court rejects defendant's contention here that a trial plan is required for class certification.")

[7] 59 Cal. 4th 1, 27 (2014).

[8] *Id.* at 32 (emphasis added.)

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and unwieldy class action litigation and also run the risk of forfeiting their right to litigate affirmative defenses.

Perhaps most importantly, such a modest amendment makes sense as a practical matter. The submission and evaluation of a trial plan at the class certification stage, rather than on the eve of trial, will prevent the significant waste of resources of all parties involved in the litigation (including the courts) in the event that the trial court finds that the class action is unmanageable for trial.[9] This is especially true in light of the Advisory Committee Notes acknowledging that the parties have often engaged in significant discovery at the class certification stage, including "information required to identify the nature of the issues that actually will be presented at trial."[10] In other words, there is no reason that a court should wait until the eve of trial to evaluate a trial plan because a party seeking class certification should have the information they need to present a viable trial plan at the class certification stage.

III. Rule 23(f) Should Be Amended to Provide a Right to Interlocutory Appeal of Decisions to Certify, Modify, or Decertify a Class

A district court's decision on a motion for class certification can determine the outcome of the litigation. For defendants, class certification can create a "hydraulic pressure…to settle, avoiding the risk, however small, of potentially ruinous liability." *In re Visa Check/Mastercard Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2011); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (noting that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"). Plaintiffs are not immune from a similarly enormous impact, as a class certification denial can leave them with "an individual claim that, standing alone, is far smaller than the costs of litigation." Fed R. Civ. P. 23(f) Adv. Comm. Note to 1998 Amdt.

With its adoption in 1998, Rule 23(f) was an attempt to blunt the razor-sharp edge of class action certification decisions by providing a new avenue for appellate review and promoting more uniform class certification standards.[11][12] The rule states that "[a] court of appeals *may permit* an

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[9] *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, No. 09-CV-625-BBC, 2011 WL 2009967, at *4 (W.D. Wis. May 23, 2011), *amended*, No. 09-CV-625-BBC, 2011 WL 2132975 (W.D. Wis. May 27, 2011), and aff'd, 705 F.3d 770 (7th Cir. 2013) (decertifying a collective and class action on the eve of trial and noting "[i]t is unfortunate that this case must be decertified at this stage, on the eve of trial and after the large investment of resources by the parties…However, I cannot allow this case to proceed to a jury trial under plaintiffs' proposed [trial] plan.").

[10] Fed. R. Civ. P. 23 Advisory Committee Note (2003).

[11] Before Rule 23(f), there were only two such avenues, each widely viewed as inadequate: (i) ask a district court to certify its own order for immediate review under 28 U.S.C. § 1292(b) and hope the appeals court would take the appeal, or (ii) petition the appeals court for a writ of mandamus. *See* Brian Anderson, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, 11 No. 3 Andrews Class Action Litig. Rep. 21 (2004). These avenues rarely succeeded: from 1987 through 1996, there were only 18 published decisions by appeals courts reviewing class certification decisions on an interlocutory basis. *See id.* (internal citations omitted).

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appeal from an order granting or denying class-action certification...."[13] Such appeal is not mandatory, however, but is instead left to the "unfettered" discretion of the appeals court.[14]

Unfortunately, Rule 23(f) has not effectively served its purpose. The path to appellate review that the rule aims to provide is incredibly narrow. Though the available data is imperfect, a widely-cited study found that just 558 Rule 23(f) petitions were filed from December 1998 through October 2006, which amounts to just 6.4 per appellate court, per year.[15] Of those 558 petitions, the appellate courts ruled on whether to permit appeal in 476 cases (with the remainder dismissed or withdrawn) and agreed to hear only 168 petitions—less than two per court per year.[16]

Not only is the path to a Rule 23(f) appeal narrow, but it is much rockier in some parts of the appellate landscape than others. In the overwhelming majority of petitions actually decided (which, as noted above, is not many to begin with), appellate courts summarily rule on the petition without issuing a published decision. *Id.* With the resulting dearth of authority to anchor or steer future decisions, along with the "unfettered" discretion afforded by the rule, some circuits have effectively shut off the Rule 23(f) safety valve. The study noted above, for example, found that one circuit failed to grant a single Rule 23(f) petition at any point over the course of the nearly eight-year study, and another granted only five. *Id.*

Rule 23(f) should be amended to provide an appeal from a class certification order as a matter of right. In today's litigation arena, these orders—be it one granting certification, denying certification, or ruling on decertification—often leave one party or the other with no practical alternative to settlement. As such, a class certification order can have the same effect as an order granting summary judgment, given that both spell the end of a case. Rule 23(f)'s current approach of allowing interlocutory appeal only on a discretionary basis has failed to open a meaningful avenue for reviewing these decisions.

IV. Further Consideration Should Be Given To Amendments That Consider The Practical Application of Class Certification For Settlement Classes

Another issue of concern for practitioners on both sides of the bar is the standard for class certification in the context of settlement. The proposed amendments and commentary do not address this concern directly or otherwise provide guidance, except to note that "the standards for certification differ for settlement and litigation purposes." The Rule 23 Subcommittee initially considered addressing these different standards, but has since tabled the issue.[17] The Supreme

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[12] See Brian Anderson, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals,* 11 No. 3 Andrews Class Action Litig. Rep. 21 (2004).
[13] Fed. R. Civ. P. 23(f) (emphasis added).
[14] *See* Fed. R. Civ. P. 23(f) Adv. Comm. Note.
[15] *See* Barry Sullivan and Amy K. Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 283-85 (Jan. 1, 2008).
[16] *Id.*
[17] *See* Introductory Materials, Rule 23 Subcommittee, Advisory On Civil Rules, Mini-Conference On Rule 23 Issues, 9/11/15, at 34-38 (noting at 35 that "[c]oncerns have emerged about whether it might sometimes

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Court, however, has squarely held that "[s]ettlement is relevant to a class certification" and that a district court "[c]onfronted with a request for settlement-only class certification ... need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial."[18] This reasoning potentially differentiates application of the predominance requirement for class certification at the settlement stage as opposed to certification for litigation. At the same time, however, the Court stressed that in the settlement context "other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention."[19]

Manageability is a critical factor that is related to a court's predominance analysis.[20] For example, in a class action governed by the laws of multiple states, variations in state law may well swamp any common issues and defeat predominance in a Rule 23 analysis.[21] For purposes of certifying a settlement class, however, the issues that arise in managing the trial of such a class disappear, rendering the settlement class more-easily certified.[22] It is clear, then, that the presence or absence of manageability issues in a class action vary significantly between a court's analysis of predominance with regard to class action settlement versus litigation.[23] To the extent that a finding of predominance is primarily driven by the ability of a court to effectively manage the litigation through a trial, Rule 23 should provide guidance with respect to predominance about differences in the certification of a settlement class as opposed to a litigation class.

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be difficult to obtain certification solely for purposes of settlement" and that "the (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes").

[18] *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997) (citing Fed.R.Civ.P. 23(b)(3)(D) (one of the "matters pertinent" to a finding of predominance is "the likely difficulties in managing a class action.")).

[19] *Id.*

[20] *Id.*at 615 (noting that manageability is one of the four considerations in the "nonexhaustive list of factors pertinent to a court's close look at the predominance and superiority criteria" (internal quotation marks omitted)).

[21] *See, e.g., Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007).

[22] *See, e.g., Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 302-03 (3rd Cir. 2011) (en banc) (while differences in varying state regulatory schemes would relate to the predominance analysis with regard to certification of a litigation class, for purposes of inquiring into the predominance of questions of law and fact relevant to a settlement class, manageability issues that are of obvious concern for anticipated litigation consideration are not similarly relevant); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3rd Cir. 2004) (the difference between litigation classes and settlement classes is key because "when dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class."); *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 746-47 (7th Cir. 2001) ("Given the settlement, no one need draw fine lines among state-law theories of relief.").

[23] *See, e.g. Sullivan*, 667 F.3d at 304 n. 29 (noting that, with the elimination of the manageability factor, the court is "more inclined to find the predominance test met in the settlement context."); *cf. In re IPO*, 226 F.R.D. 186, 195 n. 51 (S.D.N.Y. 2005) ("[A]lthough litigants frequently conceive of 'predominance' and 'manageability' as separate requirements of Rule 23(b)(3), they are not;" noting that for purposes of certifying a settlement class,"[i]n this case, the removal of [the manageability] factor from consideration alleviates the predominance defect").

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V. Rule 23 Should Provide Guidance To Courts Regarding How "Proportionality" Applies To Precertification Class Discovery

Disputes about precertification discovery often involve requests for a wide variety of information based on conclusory allegations that have little to no factual support. In employment class action cases, for instance, plaintiffs regularly request class lists, contact information, and other information about potential class members, *prior to* any showing regarding the merits of plaintiff's individual claim or that the case is appropriate for class treatment. Courts, in turn, have taken varying approaches to resolving these precertification discovery disputes. In some courts, plaintiffs bear the burden at the precertification stage of either making a *prima facie* showing that Rule 23 class action requirements are satisfied or that discovery is likely to produce substantiation of the class allegations.[24] In other courts, even those within the same circuit, the law remains unsettled, with some courts taking a sweeping approach to precertification discovery and granting plaintiff class contact information outright.[25]

Effective December 1, 2015, Rule 26(b)(1) was amended to require that discovery be "proportional to the needs of the case."[26] The proportional standard directly affects Rule 23 and class action procedures since courts must apply the standard when resolving disputes about the scope of permissible discovery.[27] Class action plaintiffs are not exempt from this requirement to tailor their discovery requests to account for the significance of the information requested, and the cost and burden imposed for gathering responsive information. This relatively new standard has precipitated the need for additional guidance regarding the scope of precertification discovery under Rule 23.[28]

While the types of precertification discovery at issue will vary by type of case, further guidance regarding the interplay between the proportionality standard and the scope of

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[24] *See, e.g.*, *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).
[25] *See, e.g.*, *Acevedo v. Ace Coffee Bar, Inc*, 248 F.R.D. 550, 554 (N.D. Ill. 2008) (district court in Seventh Circuit finding the plaintiff's need and due process right to discover class contact information outweighs any privacy concerns of the putative plaintiffs); *Boice v. M+W U.S., Inc.*, 130 F. Supp. 3d 677, 698 (N.D.N.Y. 2015) (noting that courts in the Second Circuit disagree about proper scope of precertification discovery).
[26] Fed. R. Civ. P. 26(b)(1).
[27] *See, e.g.*, *Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-CV-05061-JMC, 2 017 WL 279768, at *3 (D.S.C. Jan. 23, 2017) (denying plaintiff's motion to compel documents that would identify members of Rule 23 class because the discovery was not proportional to the needs of the case); *Tillman v. Ally Fin. Inc.*, No. 2:16-CV-313-FTM-99CM, 2017 WL 73382, at *6 (M.D. Fla. Jan. 6, 2017) (denying in part plaintiff's motion to compel list of putative class members and requiring plaintiff to serve amended discovery requests focused instead on Rule 23 burden: "In comparison to Plaintiff's need, the alleged burden that Plaintiff's [requests] impose on Defendant is heavy, because they seek . . . the identities and phone numbers of possibly all putative class members.").
[28] Rule 23 precertification discovery issues are further complicated in employment cases filed pursuant to both Rule 23 and the Fair Labor Standards Act, which has its own well-developed case law concerning the appropriate scope of discovery at various stages of the proceedings. *Boice v. M+W U.S., Inc.*, 130 F. Supp. 3d 677, 698 (N.D.N.Y. 2015) (noting differences between standards for Rule 23 and FLSA discovery).

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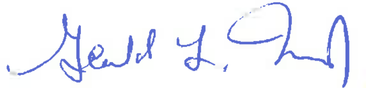
precertification discovery will help alleviate uncertainty associated with the varying standards that currently plague the federal circuits, and act to prevent costly disputes at the outset of litigation.

VI. Conclusion

Seyfarth Shaw appreciates the Committee's recognition that amendments to Rule 23 are necessary to address the serious problems that have evolved with the inconsistent application of Rule 23 in recent years. Indeed, this Comment reflects a collective concern from our legal practitioners who regularly face uncertainty and inconsistencies regarding federal courts' interpretation of Rule 23. We urge the Committee to enact substantive amendments that are not currently addressed by the proposed amendments. These amendments include requiring viable trial plans in conjunction with a motion for class certification, providing a right to interlocutory appeal of decisions to certify, modify, or decertify a class, providing guidance on predominance with respect to class action settlements as opposed to class action litigation, and providing guidance regarding how proportionality applies to the scope of precertification discovery.

Very truly yours,

SEYFARTH SHAW LLP



Gerald L. Maatman, Jr.

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TAB 6

COMMENT OF

PROFESSOR JUDITH RESNIK OF
YALE LAW SCHOOL

Rule 23 Proposed Revisions, 2017

Comments for the

Telephonic Hearing on Proposed Amendments

to the Federal Rules of Civil Procedure

Advisory Committee on Civil Rule

of the

Judicial Conference of the United States

February 16, 2017

Professor Judith Resnik[1]
Arthur Liman Professor of Law,
Yale Law School

submitted electronically, February 6, 2017
to the Rules Committee Support Office
Administrative Office of the United States Courts

I appreciate the opportunity to provide commentary on the proposed revisions of Rule 23. My focus is on proposed changes to Rule 23(e), addressing the role of judges in the settlement of class actions. I support the Advisory Committee's consideration of new rulemaking to improve the settlement process. I believe the current proposals are steps in the right direction, but that more needs to be done.

My concern – and hence the reason to add to the comments that have been posted and to the discussion in the transcripts of the two earlier hearings – is about the relationship of litigants to the court *after class action settlements are approved*. At the time of settlement, a good deal of information about the challenges of implementation of both injunctive and monetary relief may not be available. The Rule ought to add to the tasks it has assigned to judges by obliging them, after settlements are approved, to oversee implementation and to respond to problems that may arise during the remedial phase.

The reasons to do so are to respect both the participatory and distributional interests of litigants and of the public. During the past century, the constitutional commitment to due process has been interpreted as central to enabling those whose interests are affected by court judgments to have means of participating in decisions adjudicating those interests. In practice, this aspiration is complex to instantiate but remains important to recognize. Moreover, as the law has permitted aggregation (as well as dealt with sets of claimants through administrative adjudication), concerns have emerged about how to ensure fair distribution of remedies across similarly-situated litigants.[2] Further, the legitimacy of judicial decision-making is embedded in its long historical practice of welcoming public access through the open doors of courthouses.

These are the basic values that inform my view of why Rule 23 needs to look forward to the post-settlement implementation phase, and to detail the ongoing obligations of both litigants and judges. To preview what is explained below, I suggest that the Rule 23 (e) revisions require litigants to provide more information on the proposed remedy. Rule 23's text should require parties to inform courts about the mechanisms being considered for the implementation of the relief provided through settlement. That requirement ought not be used as a back-end method of imposing "ascertainability" at certification or as a way to derail approval of a settlement.[3]

Rather, the request for information and opportunities to return to court respect the fact that, at settlement, not all relevant information is likely available. As we have learned most vividly in the context of structural injunctions in civil rights litigation, lawsuits do not end with court approval of settlements. Time is needed to implement decrees, whether they be seeking reforms of prison conditions or distributing funds when monetary relief is ordered. Further, at settlement, the parties and the court may well not know whether notice to class members will reach them and whether allocations of remedies for various sets of claimants are keyed to fair and workable criteria. To respond, the rule should require periodic reporting, post approval, to obtain information on the progress made when injunctive relief is provided and on the distribution process when monetary remedies are put into place. Adjustments of settlement terms, in the appropriate cases, may well have to follow.

Subject to appropriate limitations related to individuals' privacy, reports related to post-settlement implementation processes and outcomes should become part of court records, accessible as "judicial documents" to the public. Further, because issues may emerge about the differential impact of remedies after a settlement has been approved, the rule should be clear that, in addition to whatever internal dispute resolution mechanisms are provided in settlements, courts retain jurisdiction to address disputes involving categories of claimants.

I am mindful that, as Committee members have raised in the hearings to date, proposals to alter the circulated draft could require a new opportunity for the public to comment. I believe that my proposals on Rule 23(e) build on what the Committee has said in its suggested text and note and therefore fall within the scope of what the Committee has circulated. Given that this Committee has received submissions arguing for restrictions class actions, I have prefaced my discussion of Rule 23(e) with an overview of the role played by class actions in the federal courts today. In 1966 and in 2003, the revisions of Rule 23 responded to problems in the world at large. As I detail below, class actions make vital contributions to the federal courts themselves, constitutionally authorized to respond to allegations of unlawful action falling within their jurisdiction. Indeed, given the number of pending cases and the limited resources of many litigants, the federal courts *need* class actions and other forms of aggregation to ensure that, in some cases, lawyers with resources are able to clarify the

claims advanced and that both sides of disputes have the ability to respond constructively to redress the harms identified.

One other word by way of introduction is in order. My suggestions are informed by my understanding of the challenges that the federal courts currently face, the criticisms leveled against class actions, my research on the history and use of Rule 23, and my participation in class action litigation. In the 1980s, when writing articles addressing Rule 23 and federal adjudication more generally, I reviewed files, then housed in the National Records Center, on the history of the 1966 revisions.[4] More recently, I have used both the microfiche, which the Congressional Information Service compiled from the National Archive Records,[5] and Benjamin Kaplan's papers, which became available in 2014 at the Harvard Law Library. Further, I have functioned as a lawyer in class actions and in multi-district litigation and as a court-appointed expert.

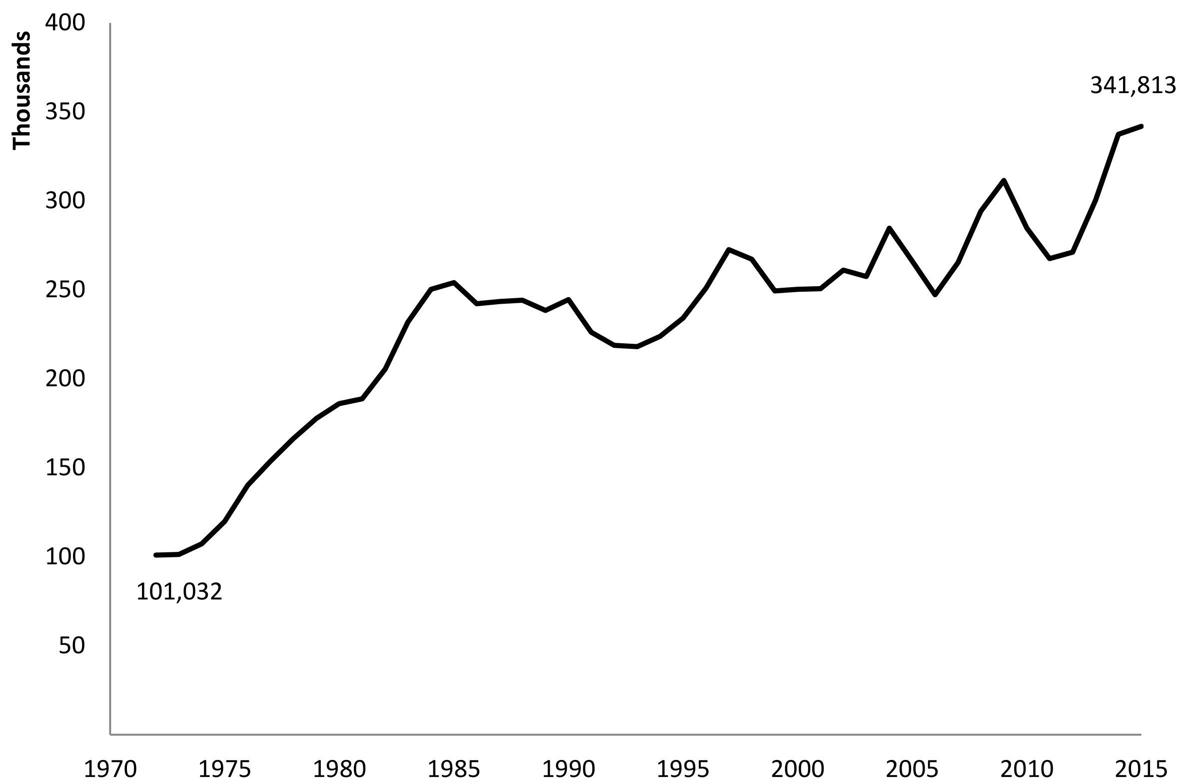
I. The Federal Courts Rely on Aggregation to Respond to Docket Demands

As I noted, rule-makers write in the context of problems to be solved. A brief overview of structural aspects of the current docket makes plain the contribution of rule revisions to reinforcing the ability of litigants to use class actions and to improving class-based settlements. Hence, a bit of data is in order on filings, pending cases, the expanded use of multi-district litigation, the increasing use of dispute resolution through mechanisms such as alternative dispute resolution (ADR), and the law limiting class actions.

First, filings in the federal court system, which had more than doubled between 1970 and 1985, have experienced little growth in the last three decades. The details are in Figure 1, U.S. District Court Filings, 1970-2015,[6] below.

Looking at the past fifteen years, civil and criminal filings ranged from about 300,000 to 360,000 cases per year. In 2015, 279,036 civil cases were filed, and the federal government brought more than 60,000 criminal cases,[7] a significant proportion of which involved multiple defendants.[8]

Second, a remarkable amount of civil litigation in the federal courts is clustered together, consolidated under the 1968 "multi-district litigation" (MDL) statute[9] and distributed in an uneven pattern to specific district court judges around the United States. In contrast to flattened *filings* in the last decades, the number of *pending* civil cases, tracked in Figure 2, has grown — more than tripling between 1970 and 2015 and increasing from about 300,000 cases in 2010 to 341,813 cases in 2015.

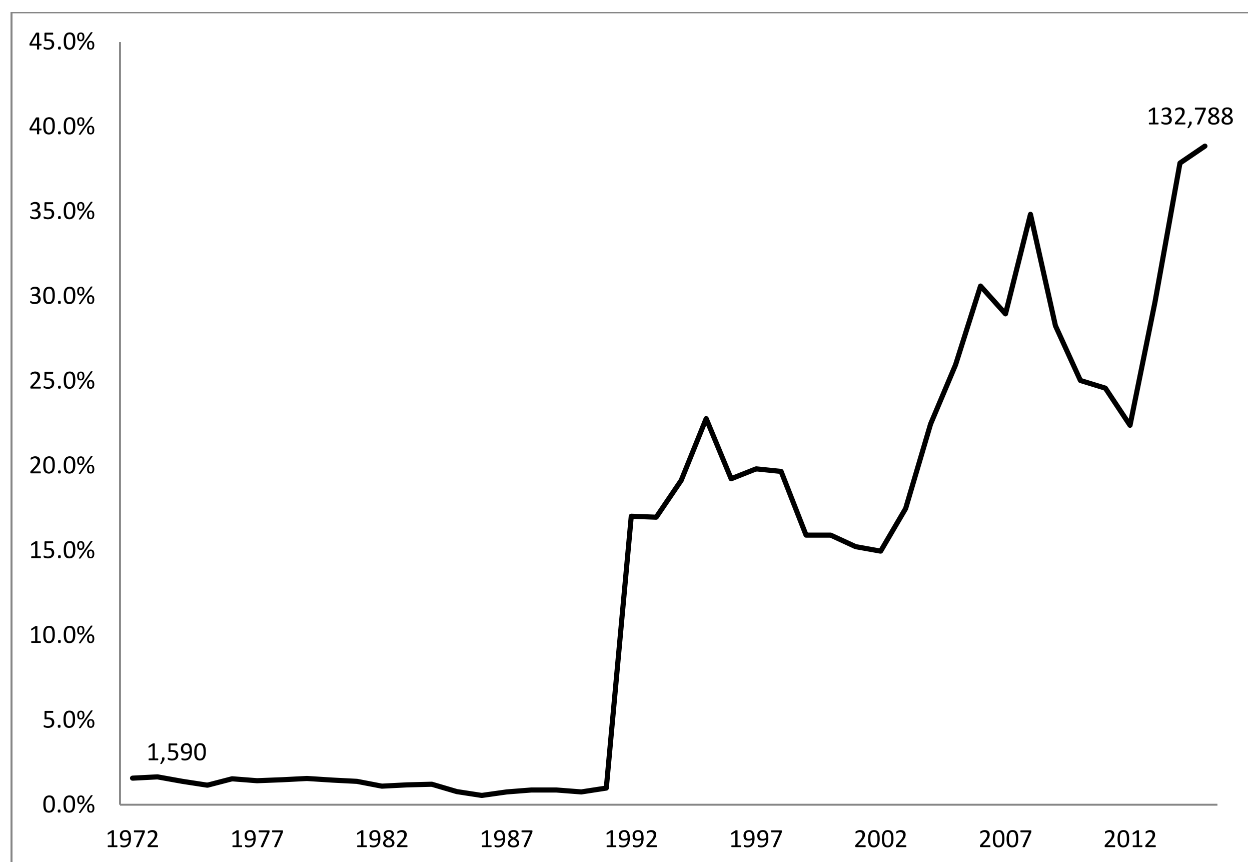


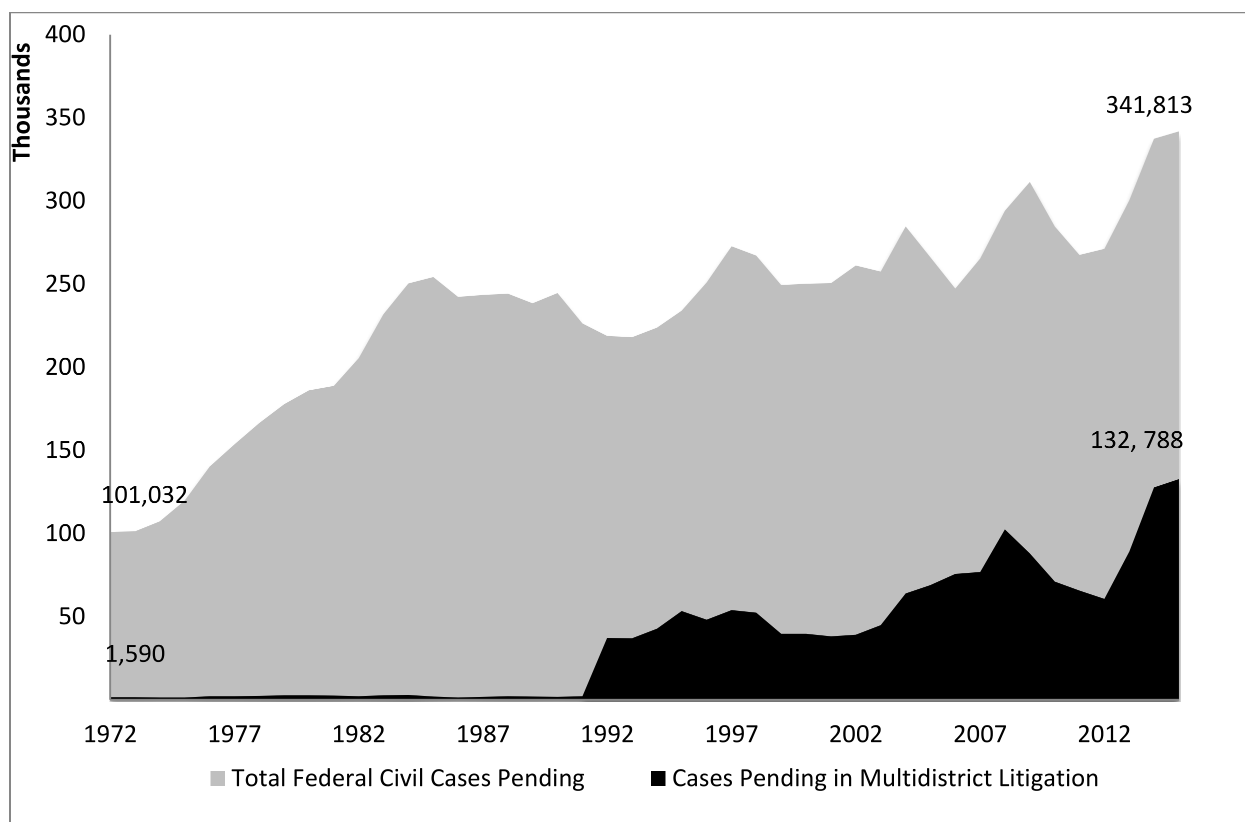
But thousands of these cases are not dealt with individually. Rather, as of the fall of 2015, almost forty percent of federal civil cases were part of MDLs,[10] created when the statutory criteria for pre-trial aggregation were met. As you know, in 1968, Congress enacted the MDL statute, and authorized the Chief Justice to designate seven jurists to form the MDL panel, which, in turn, decides to grant MDL status and selects a district court judge to preside over the group of cases. As long as that panel concludes that MDL status is appropriate because the statutory criteria ("civil actions involving one or more common question of fact . . . pending in different districts") are met, litigants become part of mandatory, non-opt out, pre-trial aggregates, which are run by court-appointed lead lawyers (Plaintiff Steering or Plaintiff Executive Committees (PSC/PEC)) functioning as ad hoc law firms that speak for claimants who had filed individual lawsuits.[11]

This Committee's focus is, of course, on Rule 23. But thinking about the interaction between class actions and MDLs is useful, not only because many MDLs include class actions, but also because the revisions of the class action rule will become

an important benchmark against which to think about MDLs. Rule 23 revisions will contribute to "best practice" models, the Manual on Complex Litigation, and case law developments.

The growth in the aegis of MDL is significant, as is charted in Figures 3 and 4. In 1991, fewer than 2,232 cases (or about one percent of the civil docket) were part of MDL proceedings.[12] By September 2015, of 341,813 federal civil cases pending,[13] 132,788 were concentrated in 247 proceedings, each aggregated before a single judge.[14] The practice of random assignment of cases to individual district judges (and in some districts also to magistrate judges "on the wheel"), which has been in place for several decades,[15] is undone for this large segment of the docket.[16] In 2015, more than 150 judges were assigned one MDL, twenty-eight had two MDLs each, and ten had three or more, some of which involved different manufacturers of a product alleged to be harmful.[17]

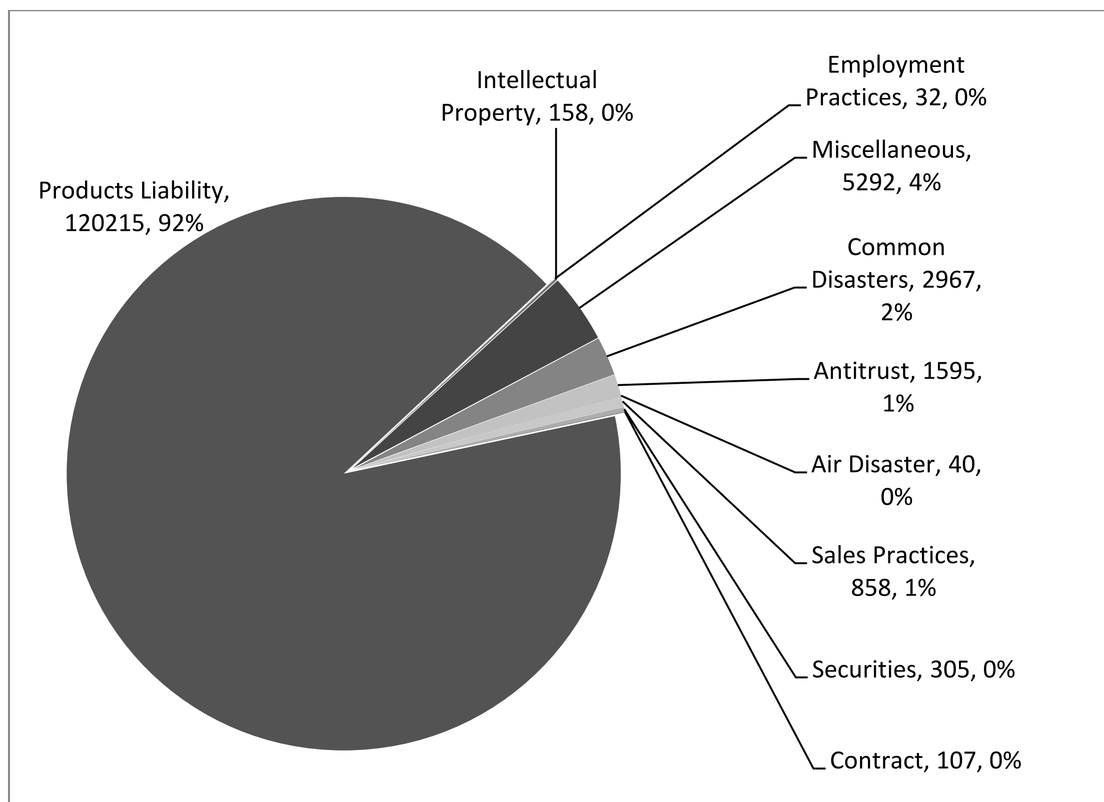




As is also familiar, the 1966 note to Rule 23 stated that "a 'mass accident' . . . is ordinarily not appropriate for a class action . . . ."[18] But in the decades that followed, federal judges certified some of what we now call "mass torts" as class actions, and bankruptcy proceedings involving asbestos and the Dalkon Shield made plain the need for the contributions to be made by aggregation in tort. Moreover, while in its first few decades, the MDL panel shared the Rule 23 1966 Committee's skepticism about tort aggregation (with the five rejections of proposed MDLs for asbestos as the exemplar),[19] that approach was abandoned.

Product liability cases were, as of July 2015, about twenty-four percent of the 287 then-pending MDLs; adding air crashes brings the total proportion of tort MDLs to approximately a quarter of the MDL portfolio. Moreover, as Figure 5 (with thanks to Professor Sam Issacharoff for permitting me to use it[20]) details, when moving from the level of the MDL to the cases within them, mass torts represented more than ninety percent of the pending MDL cases.

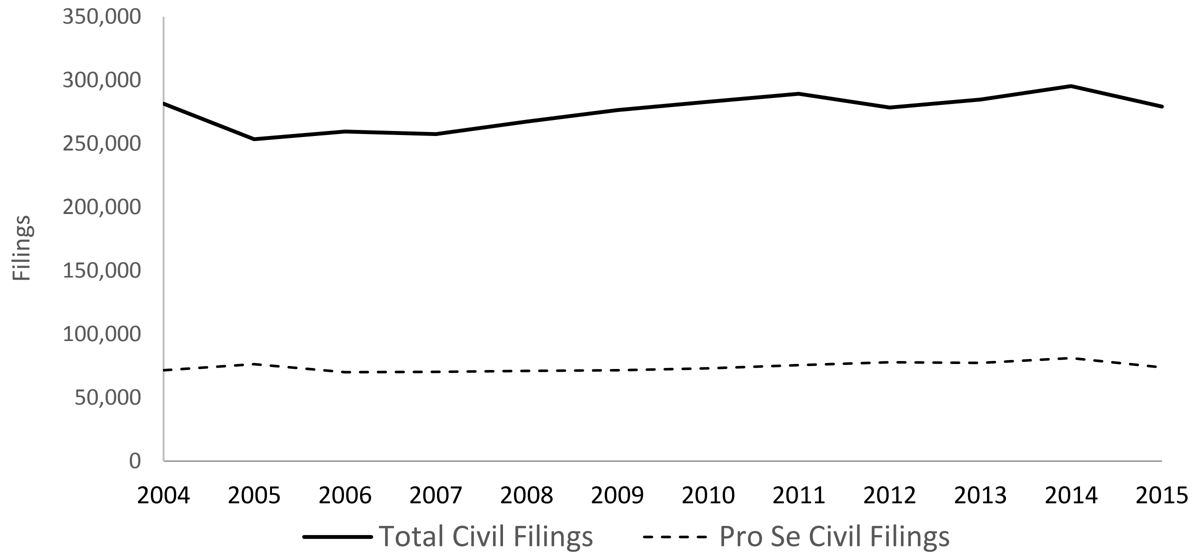
Distribution of Pending MDL Actions by Type as of July 15, 2015

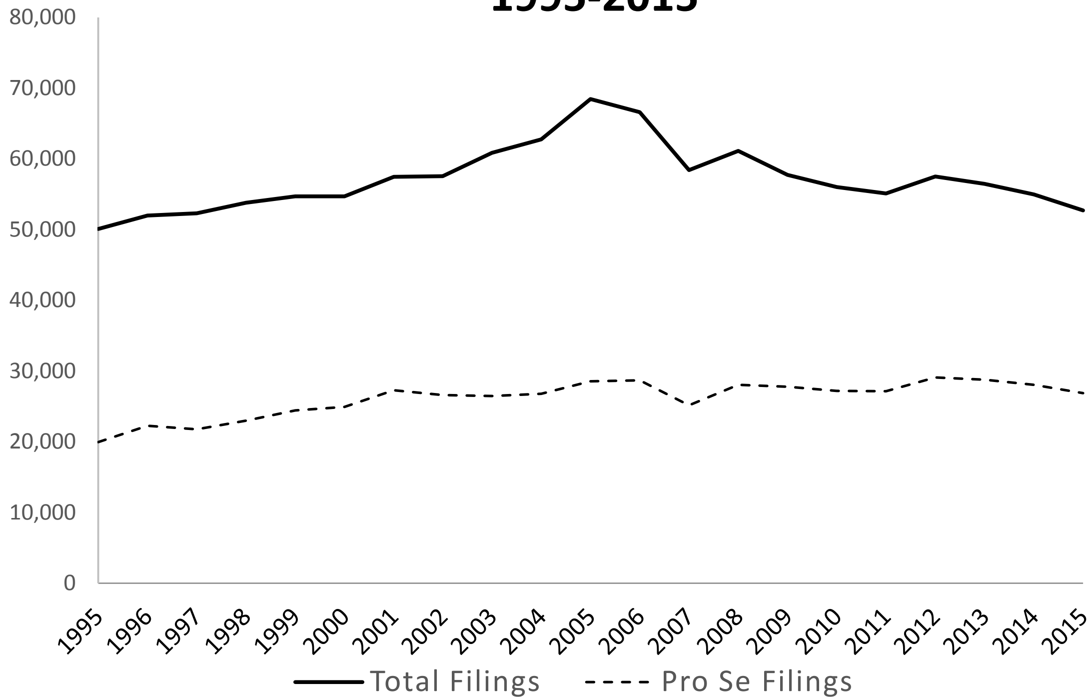


Another distinction drawn in the 1960s - between class actions as enabling new cases and MDLs as only expediting cases already filed - has also dissipated.[21] Under the MDL, the practice has emerged of what are called "direct filings," in which a case is brought into an MDL after the MDL exists, thus cutting the administrative costs of going to another "transfer" court first and then "tagging along."[22] For example, in February of 2012, the MDL panel assigned a federal district judge in West Virginia some 150 cases related to failures of transvaginal mesh, used for pelvic surgery repairs. By the fall of 2015, some 70,000 pending cases were part of the seven transvaginal mesh MDLs (organized by product manufacturer), of which thousands had been filed directly in that court.[23]

The third structural fact about the federal courts, illustrated in Figure 6, is the absence of lawyers in a significant portion of the federal docket. More than twenty-five percent of the plaintiffs filing civil cases in federal courts do so without counsel at the trial level.[24] On appeal, more than fifty percent of litigants do.[25] Disaggregated by circuits, the range runs from about a third to sixty-four percent of the

filings.[26] These numbers include both thousands of prisoner filings and many cases brought by people who are not incarcerated.[27]





Fourth, the oft-cited fact of the "vanishing trial" is but a piece of a larger phenomenon of the privatization of process, in which the methods by which cases and disputes are resolved move them outside the public purview. As of 2015, about one in one hundred civil lawsuits filed began a trial before either a judge or a jury.[28] In terms of numbers, 2,852 civil bench and 1,882 civil jury trials were completed in 2015; the count on the criminal side was 5,027 bench trials and 1,807 jury trials.[29] (Data on dispositions in almost a million civil cases in state courts put the rate of civil trials as the mode of disposition in about four percent of the cases analyzed.[30])

Which cases make it to trial in the federal system is not readily knowable. I am in the midst of a research project to try to understand more about the 2,000 to 3,000 cases that are tried yearly — in terms of whether the litigants are pro se or represented, in classes or MDLs, the subject matter and stakes of the claims, and their distribution across the United States.[31] Many assume that no class actions go to trial, and that for cases that are tried, lawyers are a prerequisite. But an initial evaluation of the 2,973 cases identified as terminating with a trial (in a database provided to me by the Federal Judicial Center)[32] between October 1, 2014 and September 30, 2015, forty-three (or under two percent of tried cases) were identified as class actions.[33] Of these, at least twenty-nine cases actually proceeded to trial as class actions, and some concluded with bench or jury verdicts, while others ended with a settlement after some phase of trial had begun.

If this one-year picture is not aberrational, then the image of class actions as "too big to try" needs to be tempered with the fact that some cases make their way to that form of adjudication. (The size of the subset is not known, as public data do not track what cases are styled or certified as class actions.)[34] At the other end, about 450 (or more than fifteen percent of) cases in this one-year snapshot of trial data were categorized as having at least one party pro se, and eighteen (0.6 percent) had at least one party on both sides unrepresented.[35]

Of course, judges do a good deal of adjudication without trials. Thus, another measurement is what some researchers call "bench presence," the hours that judges spend in court. After reviewing statistics gathered by the AO of the U.S. Courts, researchers reported a "steady year-over-year decline in total courtroom hours" from 2008 to 2012 that continued into 2013, resulting in less than two hours a day on average in the

courtroom, or about "423 hours of open court proceedings per active district judge."[36] To the extent judges are interacting with litigants and their lawyers in chambers in forms of alternative dispute resolution, those exchanges are generally outside the public realm.[37]

The rarity of trials makes all the more important the attention that the Committee has given to Rule 23(e), for it is the all-too-unusual opportunity for the public adjudication. Indeed, the distinction drawn in the 1960s between aggregation for trial (class actions) and aggregation for pretrial (MDL) has dissipated. The "pretrial" is now what federal litigation is, and aggregate resolutions are the route for almost everyone. As of 2015, about nineteen out of twenty cases in an MDL closed before being remanded to a district for trial.[38]

Turn then to the non-trial functions of the federal courts. Rule 23 is a lone example of the civil rules providing direction to judge and litigants about the procedures for settling cases. (A proposal for another time is to commend that this Committee draft rules to elucidate the process for settlement in non-class actions and go beyond the language of Rule 16 and Rule 68 to explain to parties and judges how, under Rules 41 and 58, to do so.) What Rule 23(e) offers contrasts to local rules and standing orders on alternative dispute resolution. Courts have promulgated hundreds of rules governing ADR and, unlike Rule 23, those rules rarely protect rights of the public to know much about either the processes or the results. As I discuss below, my hope is that Rule 23(e) will be amplified to provide more public access to information.

Fifth, as is familiar, the use of class actions has been limited by interpretations of Rule 23, by federal statutes, and by decisions about the 1925 Federal Arbitration Act (FAA) which permit enforcement of consumer and employee documents that prohibit the use of aggregate procedures.[39] Legal services lawyers are precluded from bringing class actions, and certification has become more difficult in light of rulings such as *Amchem*, *Ortiz*, and *Wal-Mart*. Thus, an irony of the class action "wars" (as some term the intensity of debates on class actions[40]) is that the federal judiciary should be included in an accounting of those "injured" by the imposition of such limits on class actions. Simply put, in the twenty-first century, the courts are reliant on collectivity in a segment of their docket in order to function.

II. **Additional Articulation of the Obligations of Judges and of Litigants, Post-Settlement**

A classic rationale for class and MDL litigation has been to conserve the time of lawyers and judges. But more time, not less, is needed during the remedial phase of aggregates to make the outcomes effective, to ensure that decisions are tied to legal entitlements, that relief is fairly distributed across a set of claimants and, therefore, that the courts' decisions are legitimate exercises of judicial authority. A significant portion of that work belongs rightly to judges under whose watch large-scale relief is provided.

Given the low likelihood of exiting (if ever it was an option[41]) from group-based resolutions, we need to find ways to fulfill obligations to individuals within the aggregate so as to honor due process and First Amendment values even as forms of litigation and the modes of disposition shift. Doing so entails articulating a role for judges to superintend both plaintiff and defense counsel who ought to be charged with making sure that settlements achieve their goals and redound to the benefit of those found entitled to relief. Judicial oversight at class certification and again at settlement is familiar, even as both phases are replete with challenges.[42] Yet, judges – and oversight – are needed thereafter, as remedies are made material.

Fifty years of experience with class actions and MDLs provide instruction, for it is plain that effectuating relief is a challenge in both the context of injunctions and damages. Civil rights class actions have generally relied on special masters and compliance monitors and on repeated trips to court. Indeed, the Prison Litigation Reform Act of 1996 required plaintiffs' lawyers to remain (exhaustively) involved; the statute licenses an array of individuals to challenge the need for continuing court authority — potentially returning cases every two years to court.[43]

Money class actions have likewise spawned a retinue of actors. Escrow agents and claims facilities have, however, been subjected to less public scrutiny, in part because defendants, who have tried to buy "peace" (if not always global) have few incentives to raise questions about the distribution of remedies. In some cases (securities litigation provides an exemplar), distribution may be relatively easy, as the records of the sales and losses are accessible, and technology can lower the transaction costs of disbursing sums.

Yet in other kinds of cases, the complexity of distribution results in some instances when plaintiffs do not recoup, either because the time and effort required to do so are greater than the likely recovery, or the information demanded to obtain relief is unlikely to be readily accessible, let alone kept. More generally, the lack of court involvement in the phase after settlement has resulted in a paucity of information on the public record about the success of class action notice, the ways in which remedies have been implemented, the personnel involved, and the costs of administration. These problems are evident from the submissions to the Committee; individuals have adverted to their personal use of electronic media and of the U.S. Postal Services, as well as to their practices of their children. But little systematic information informs the discussion.

Thus, while judges have long described themselves in class actions as serving as "fiduciaries" for the absentees,[44] they have not (outside the context of structural injunctions) taken that obligation past the approval of settlements into the implementation phase. Nor have courts insisted on public mechanisms for responding to conflicts that emerge during distributions or for documenting the remedies provided. Indeed, in some instances, such as in the Dalkon Shield litigation, co-claimants were barred from learning what others had received.[45]

As some of the materials submitted to this Committee reflect, class action critics use the challenges of implementation as arguments to prevent certification.[46] Various claims are advanced arguing that class actions provide little or no benefit to class members.[47] Not surprisingly, such commentary has elicited sharp disagreement.[48] Recent new empirical work, for example, comes from a 2015 publication by the Consumer Financial Protection Bureau (CFPB), which focused on 419 federal consumer financial class action settlements from 2008 through 2012; the CFPB concluded that the settlements resulted in benefits for at least 160 million consumers, providing $2.0 billion in cash relief and $644 million in in-kind relief.[49] The CFPB study found an average claims rate of twenty-one percent across 105 settlements,[50] as well as 133 of the 419 settlements reporting automatic distributions.[51] Academics have likewise sought to document the impact, such as an analysis by Brian Fitzpatrick that identified evidence of payouts of seventy percent in some class action settlements.[52]

Yet, despite such efforts, systematic information deficits shadow the analyses. Nicholas Pace and Bill Rubenstein have described the "veil of secrecy" falling over class action

litigation that begins "the moment the judge signs off on the agreement."[53] Their research, based on court records in thirty-one class settlements and on interviews with participants in fifty-seven cases, identified data in "fewer than one of five closed cases."[54] While the information was known to parties or claims administrators, it was not available to the public. More recently, Lynn Baker, Michael Perino, and Charles Silver recounted the work entailed in opening the "black box" of federal court class action securities settlements, numbering seventy to eighty yearly.[55] Likewise, Deborah Hensler has detailed how little we know about class actions in general, from filing to disposition and remedies.[56]

I believe rule-drafting can respond. The practice of aggregate settlement should be put into the context of both First Amendment and due process obligations. Distributional debates inside a claims resolution system should, as a matter of the rules not be left to the private decision-makers authorized under such settlements without a subsequent opportunity for a return to public courts. A line of cases recognize a First Amendment right to have access to government proceedings, from criminal to civil litigation.[57] But the doctrine needs to be amplified to govern post-decision implementation, to clarify that those rights apply to filings that should be required about the distributions made through class and MDL settlements. Lower courts have debated, for example, whether reports by monitors appointed to oversee injunctions are "judicial documents" to which access is constitutionally obliged.[58]

Rulemaking can and should provide guidance. This Committee's proposals direct judges, when considering approval of class settlements, to consider whether class members are "treated equitably relative to each other";[59] to assess "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required";[60] and to require some form of disclosure about "side settlements," which can be used to buy off potential objectors.

The suggested text is a step forward but, as currently drafted, it only calls for judges to learn about the proposed system of "distributing relief" rather than tasking them expressly with requiring information on implementation, permitting post-settlement that subsets of litigants could petition the court for assistance. Further, the current draft does not create a presumption of disclosing on the record underlying agreements; instead, parties seeking approvals of settlements are only to "file a statement identifying any

agreement made in connection with the proposal."[61] Moreover, while the proposed note comments that it "may be important to provide that the parties will report back to the court on the actual claims experience,"[62] the draft rule does not put the onus on either the parties or the court to gather and to put such experiences or distribution data on the record. Thus, proposed revisions do not organize a system of oversight of distribution, create mechanisms for litigants to bring claims to court if conflicts emerge, or require that data on implementation become public.

Hence, I suggest that the current proposal be edited to require, before courts approve settlements, that settlement agreements provide regular reporting about distribution decisions and that, if conflicts about distribution across sets of claimants emerge, the settlement should include a method of returning to court. The Rule should mandate periodic reports (without naming individuals when appropriate) about the remedies, from structural relief to dollars and how parties receive distributions and the sums paid.

Guidance for doing so could be drawn from some cases – such as the BP and VW litigations – in which websites have been created to share (without charge) some information about distributions.[63] Decisions under the Fair Labor Standards Act (FLSA) provide another model. Courts have concluded that employees are not authorized to waive others' rights to the statute's remedies, that either the Department of Labor or judges ought to oversee settlements,[64] and some judges prohibit the sealing of FLSA settlements.[65] Agencies may also offer useful models, even as some are criticized for their opacity.[66] When the Securities and Exchange Commission settles cases entailing recoveries for individuals, its distribution process includes a set of publicly-accessible forms.[67] And the Federal Trade Commission has a "Class Action Fairness Project," which in 2016 ordered eight claims facilities to report data on distributions.[68]

The data that I provided above on the numbers of pro se litigants in the courts serve as a reminder that any new procedural aspirations need to be accompanied by provisions for lawyers. Getting lawyers involved, in turn, requires creating incentives to do more work on behalf of clients, post resolution. One could borrow from the practice of paying "peace premiums" to settle by imposing sliding-scale fee awards, with higher percentages paid to lawyers who distribute funds successfully and economically. In addition, given that some

class actions overlap with MDLS, one could use the individually retained plaintiffs' attorneys (IRPAs, as Denny Curtis, Deborah Hensler, and I once called them[69]) as a resource in the post-settlement phase. These lawyers could be used as a means of recognizing the individual needs of litigants. The time spent building relationships with them could be acknowledged and rewarded through structured fee awards that link fee payments to IRPAs to work done in implementing remedies.

Further, one could extrapolate from congressional interest in regulating lawyers in securities litigation through the Private Securities Litigation Reform Act of 1996. The statute aims to link lawyers' fees to the amount actually distributed to class members. Congress stated that the fees for plaintiffs' lawyers "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[70]

But the problem with the congressional approach is that it is one-sided, putting the onus on plaintiffs' attorneys rather than structuring a system in which the settling parties have a mutual obligation to make the settlement effective. In addition to realizing that plaintiffs' attorneys may need interim fees and a sequence of payments keyed to performance on implementation, some method of enlisting defendants and their counsel is needed. In the materials submitted to this Committee, for example, the Honorable William Young is described as insisting on direct payments to consumers in a case involving a pharmaceutical company and having the parties find methods to identify the relevant recipients.[71]

III. The Need for Enabling Revisions

Neither judges, litigants, nor the public fare well in a lawyer-less world, where economic disparities among disputants vitiate the potential for access to a fair process, or access to any process at all. What the federal docket, circa 2017, teaches is that federal courts themselves benefit from class and other forms of aggregate proceedings. But the individuals affected and the public at large have too attenuated a relationship with the resulting remedies. Moreover, information about process and results has been impoverished because of the lack of a developed practice of post-settlement class action court-based public activities.

In the 1950s, the Supreme Court paved the way to revise our understanding of what due process required. In *Mullane v. Central Hanover Bank & Trust Company*,[72] the Court approved aspects of N.Y. State Banking Law, providing for trustees to obtain judicial clearance of potential claims through settling the accounts of beneficiaries of pooled trusts in the aggregate. Not only did the Court permit binding individuals whose "whereabouts could not with due diligence be ascertained,"[73] but the Court also revised its jurisdictional rules to permit a state to close off the rights of individuals from other states. Moreover, the Court structured its notice requirements so as not to impose an undue burden that would make provision too costly. As Justice Jackson explained,

> "[t]he vital interest of the State in bringing any issues as to fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impracticable obstacles in the way could not be justified."[74]

In the 1960s, a new substantive "vital interest" - facilitating civil rights and small consumer claimants - came to the fore, and aggregate litigation was again enlisted through revisions of Rule 23 as a mechanism for doing so. Now, fifty years later, the questions are what "vital interests" of the state require revisiting Rule 23. Rulemaking is again in order to enable, to constrain, and to legitimate the decision-making process that occurs after settlements are approved in class actions. Responding entails ambitions comparable to those shaping the 1966 revisions through elaborating different understandings of both what due process and the First Amendment require of courts when presiding over the settlement of aggregates.

The need for aggregation is plain. Yet the forms that it could take to honor constitutional obligations of openness in courts, of litigant involvement with processes determining their rights, of accountability of judges, and of equal treatment of litigants have only begun to be developed. I appreciate this Committee's leadership and hope that it will expand its efforts to illuminate the decision-making in class action settlements and the results.

[1] My institutional affiliation is provided for identification only, as these remarks are my own views. Thanks are due to a wonderful group of Yale Law students with whom I have learned a great deal – Matt Butler, David Chen, Kyle Edwards, Clare Kane, Marianna Mao, Urja Mittal, Heather Richard, Regina Wang, and Emily Wanger; and to Bonnie Posick, for her expert editorial assistance.

[2] *See generally* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV.L. REV. 78 (2011).

[3] This Committee appropriately did not go forward with proposals to add new impediments to certification, for the problem is not that courts ought, *ex ante*, to require (as members of Congress have suggested) "that each proposed class member suffered the same type and scope of injury as the named class representative or representatives." Fairness in Class Action Litigation Act, H.R. 1927, 114th Cong. (2015). Indeed, that approach would, as Geoffrey Shaw has detailed, undermine the very purpose of the class action — gathering those who do not themselves know that legal harms may have occurred. See Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354 (2015). Rather, as this Committee has identified, revisions are needed *ex post*, when remedies are provided.

[4] *See* Record Group No 116, Accession No 82-0028. I did so with the help of James Macklin and Ann Gardner of the AO; the unpublished materials were then located in boxes housed at the National Records Center in Maryland.

[5] Thereafter, the AO put a subset of materials from the rules committees on its website. *See Records and Archives of the Rules Committees*, ADMIN. OFF. U.S. CTS., http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees. These records include the agenda books, rules comments, rules suggestions, committee reports, Federal Judicial Center (FJC) studies and related publications, meeting minutes, past members of the rules committees, special projects of the rules committees, style resources, superseded rules pamphlets, and transcripts. The database, which includes appellate, bankruptcy, civil, criminal, evidence, and standing committee materials, is searchable by committee and by year. Currently, the database includes Civil Rule Committees' agenda books (with memos) beginning in 1992; rule comments beginning in 2001; rule suggestions beginning in 2000; committee reports beginning in 1937, meeting minutes beginning in 1935; past members beginning in 1964 (with an additional list from 1961); superseded rules pamphlets beginning in 2004; and transcripts beginning in 2013. The database also includes rules committee, AO, and FJC studies and publications on a variety of issues and links to four special projects: the September 9, 2011 Dallas Conference on Preservation/Sanctions, the 2010 Civil Litigation Conference, the Mini-Conference on Waiver of Attorney-Client Privilege and Work-Product Doctrine, and the September 11, 2015 Dallas Civil Rule 23 Mini-Conference.

[6] Figure 1, Federal District Court Filings, 1970-2015, is drawn from data in Tables C & D of the respective yearly reports accessible at Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics (Jan. 4, 2016), http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics. While the number of filings is a function of multiple

variables, based on the increase in population and new federal causes of actions, one would expect an increase in filings. The stagnancy instead observed therefore suggests a decline in federal filing, a phenomenon other scholars have noted, alongside a shift in the mix of cases. Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177 [hereinafter Moore, *The Federal Civil Caseload*]; *cf.* Marc Galanter, *The Life and Times of the Big Six, or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 (1988).

[7] Table D, U.S. District Courts — Criminal Cases Commenced, Terminated, and Pending (Including Transfers) During the 12-Month Periods Ending September 30, 2014 and 2015, Judicial Business of the United States Courts, ADMIN. OFFICE OF THE U.S. COURTS (2015).

[8] Aggregation is prevalent in criminal prosecutions. In 2015, the U.S. government commenced prosecutions against 80,069 defendants, meaning that at least 24% of all defendants were prosecuted in a multi-defendant case. Table D-1, U.S. Courts — Criminal Defendants Commenced, Terminated, and Pending (Including Transfers), During the 12-Month Period Ending September 30, 2015, Judicial Business of the United States Courts, ADMIN. OFFICE OF THE U.S. COURTS (2015).

[9] 28 U.S.C. § 1407 (2012).

[10] Specifically, 132,788 cases out of 341,813 pending cases were in MDLs. Annual Reports of the Judicial Panel on Multidistrict Litigation, http://www.jpml.uscourts.gov/statistics-info. Data are from the year ending on June 30.

[11] *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 NYU L. Rev. 71 (2015); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. (forthcoming 2017); Howard M. Erichson, *Symposium: Multidistrict Litigation and Aggregation Alternatives: Foreword*, 31 SETON HALL L. REV. 877 (2001); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996).

[12] The data for Figure 4 come from Annual Report of the Judicial Panel on Multidistrict Litigation, available at http://www.jpml.uscourts.gov/statistic s-info. Data are from year ending on June 30.

[13] *See* TABLE C-1. U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2015, ADMIN OFFICE OF THE U.S. COURTS (Sept. 30, 2015), http://www.uscourts.gov/file/19511/download. The pending cases use the end date of September 30, while the MDL reports on the fifteenth of each month.

[14] MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT, U.S. JUD. PANEL ON MULTIDIST. LITIG. (Sept. 15, 2015), http://www.jpml.uscourts.gov/sites/ jpml/files/Pending_MDL_Dockets_By_District-September-15-2015.pdf. *See also* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 KAN. L. REV. 775 (2010); Emery G. Lee, III, Catharine R. Borden, Margaret S. Williams, & Kevin M. Scott, *Multidistrict Centralization: An Empirical Examination*, 12 JELS 211 (2015).

[15] The image of assignments as random — at both trial and appellate levels — is not always reflected in practice in other areas. *See* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 8 (2015).

[16] It should be noted that a few MDLs have played a disproportionate role in contributing both to the federal docket and to the number in MDL. Specifically, the asbestos MDLs, at their height, numbered 59,227 in 2007. *Statistical Analysis of Multidistrict Litigation Fiscal Year 2007*, U.S. JUD. PANEL ON MULTIDIST. LITIG. (2007), http://www.jpml.uscourts.gov/statistics-info. In 2015, the product liability litigation on transvaginal mesh — in seven MDLs before the Honorable Joseph R. Goodwin in the Southern District of West Virginia — numbered 73,080. Statistical Analysis of Multidistrict Litigation Fiscal Year 2015, U.S. JUD. PANEL ON MULTIDIST. LITIG. (2015), http://www.jpml.uscourts.gov/statistics-info. Each of the seven MDLs corresponded to a different defendant: *In re: C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation*, MDL-2187; *In re: American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation*, MDL-2325; *In re: Boston Scientific Corp., Pelvic Repair System Products Liability*, MDL-2326; *In re: Ethicon, Inc., Pelvic Repair System Products Liability Litigation*, MDL-2327; *In re: Coloplast Corp. Pelvic Support Systems Products Liability Litigation*, MDL-2387; *In re: Cook Medical, Inc., Pelvic Repair System Products Liability Litigation*, MDL-2440; and *In re: Neomedic Pelvic Repair System Products Liability Litigation*, MDL-2511. If, as of 2015, one were to remove asbestos (numbering 856 pending cases) and vaginal mesh litigation from both the numbers of MDL cases and the federal civil docket, the number of pending federal civil cases would be 267,877 and the number of pending cases in an MDL 58,852. Thus, the percentage of the federal pending cases that fall under the MDL rubric would be 17.2%, rather than almost 40 percent.

[17] To calculate the number of MDLs per judge, we relied on the Summary By Docket of Multidistrict Litigation Pending as of September 30, 2015, Or Closed Since October 1, 2014. *Statistical Report, Statistical Analysis of Multidistrict Litigation Fiscal Year 2015*, U.S. JUDICIAL PANEL ON MULTIDIST. LITIG.(2015), http://www.jpml.uscourts.gov/statistics-info. After tabulating the numbers presented in the Report in an Excel spreadsheet, we were then able to generate a Pivot Table wherein we could filter the data for active MDLs only and then calculate the number of MDLs each judge was assigned. One judge was assigned seven cases involving mesh used in pelvic surgeries.

[18] 1966 Advisory Committee Note to Rule 23(b)(3), 39 F.R.D. 69, 103. The 1966 Advisory Committee note (and the memos circulated among the committee members during 1963 when they were working on Rule 23) also made reference to the predecessor of MDL, "the Coordinating Committee on Multiple Litigation in the United States District Courts," which in the 1960s was "charged with developing methods for expediting" cases involving damages (mass accidents as well as antitrust cases seeking damages). *Id.* The 1966 Advisory Committee stated that work by such committees — rather than changes in the federal rules — should be the vehicles for dealing with the burdens that mass accidents placed on federal court caseloads.

Additional details can be found in the Kaplan papers, which are archived at the Harvard Law Library. In a memo co-authored by Al Sacks in December of 1963, Kaplan wrote that "no single device . . . [would] `solve'

the question of questions of procedure and management posed by massive litigation affecting numerous parties." Rather, "a variety of devices" needed to be invented, and rather than "stiff rules," "play in the joints" was "imperatively required."

[19] Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 111 (2013).

[20] Figure 5, Distribution of Pending MDL Actions by Type as of July 15, 2015, was provided by Prof. Issacharoff. Samuel Issacharoff, Snapshot of MDL Caseload Statistics (Oct. 8, 2015).

[21] *See* Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991).

[22] Much of this is done via stipulations (via case management orders, or by parties and especially by defendants who need to waive defenses of wrong jurisdiction/venue). *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 795-801 (2012).

[23] As of end of fiscal year 2015, 28,939 cases were filed directly in the transferee court. U.S. Judicial Panel on Multidist. Litig., Statistical Analysis of Multidistrict Litigation Fiscal Year 2015 at 3 (2015), available at http://www.jpml.uscourts.gov/statistics-info.

[24] The federal district court database details pro se filings back to 2005. Every year with data has seen at least 25 percent of civil cases filed by pro se plaintiffs. *See Judicial Business*, U.S. COURTS, http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D (last visited May 23, 2016).

[25] U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL FACTS AND FIGURES, PRO-SE CASES FILED, BY NATURE OF PROCEEDING tbl.2.4 (Sept. 30, 2014), http://www.uscourts.gov/statistics/table/24/judicial-facts-and-figures/2014/09/30. In 1995, about 40 percent of the total of about 50,000 appeals were pro se. In 2014, 51 percent of some 55,000 appeals were pro se. Thus, more than 28,000 appeals were lawyer-less on at least one side, and about 12,000 of those appellants were not prisoners. Prison petitions remained relatively stable with about 13,000–14,000 in 1995 and in 2014. Hence the rise in pro se cases in 2014 comes from non-prisoner petitions.

[26] As of September 30, 2015, fifty-one percent of cases commenced in the U.S. courts of appeals were pro se at the time of filing. *Table B-9. U.S. Courts of Appeals — Pro Se Cases Commenced and Terminated, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2015*, Admin. Office of the U.S. Courts (2015), http://www.uscourts.gov/statistics/table/b-9/judicial-business/2015/9/30. Disaggregating by circuit, the D.C. Circuit had the lowest percentage of pro se filings (thirty-three percent), while the Fourth Circuit had the highest percentage (sixty-four percent).

[27] About eight percent of the twenty-five to thirty percent of the pro se filings at the district court level during the last decade were not prisoners. In 2014 and 2015, non-prisoners filed 24,274 and 25,117 cases pro

se, respectively. *See Judicial Business*, tbl.C-13, ADMIN. OFFICE OF U.S. COURTS (Feb. 25, 2016), http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%. The categories of cases for which pro se filers are recorded were "Criminal, U.S. Prisoner Petitions, Other U.S. Civil, Private Prisoner Petitions, Other Private Civil, Bankruptcy, Administrative Agency Appeals, Original Proceedings and Miscellaneous Applications." On appeal, non-prisoner, non-criminal cases consisted of forty-four percent of all pro se cases filed. See Table B-9. U.S. courts of Appeals—Pro Se Cases Commenced and Terminated, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2015, Admin. Office of the U.S. Courts (2015), http://www.uscourts.gov/statistics/ table/b-9/judicial-business/2015/9/30. Non-prisoner, non-criminal cases consist of the following categories, "Other U.S. Civil," "Other Private Civil," "Bankruptcy," "Administrative Agency Appeals," and "Original Proceedings and Miscellaneous Applications."

[28] In arriving at this figure, we examined data released by the Federal Judicial Center on all civil cases. Federal Judicial Center, Federal Court Cases: Integrated Data Base (2015), available through http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36110. This dataset tracks 4.6 million civil cases brought between 1996 and 2015. Within this dataset, we counted 69,200 cases commencing a jury or bench trial by picking cases with values 6, 7, 8, 9 in the "PROCPROG" column. *See* Federal Judicial Center, *Civil Codebook* at 21 (explaining the "PROCPROG" field). Therefore, 1.5 percent of cases in the dataset proceeded to trial.

[29] *Table T-1. U.S. District Courts—Civil and Criminal Trials Completed, by District, During the 12-Month Period Ending September 30, 2015 (2015)*, Admin. Office of the U.S. Courts (2015), http://www.uscourts.gov/sites/default/files /data_tables/B09Sep15.pdf

[30] *See* NAT'L CTR. FOR STATE COURTS & STATE JUSTICE INST., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 20-22 (2015).

[31] Thanks are due to Emery Lee for providing access to a data set from the Federal Judicial Center, to Jonah Gelbach for directing us to this and another data set, and to Deborah Hensler, as all advised us on how to access and use the materials. That set, to be posted sometime in 2017 on a new www.fjc.gov website, is hereinafter referenced as FJC FY 2015 Termination Data. Caveats are immediately in order. The information comes from court clerks, who use civil cover sheets and other materials prepared by lawyers and complete forms (JS5 and JS6) transmitted at least quarterly to the AO. Apparently, various useful kinds of data, such as motions made and decided, are not routinely collected. Moreover, no independent methods of verifying uniformity or accuracy are undertaken centrally. More caveats about the FJC Termination Data are detailed below.

[32] FJC FY 2015 Termination Data, *supra* note 31. To identify cases on class actions, we filtered the civil cases database for cases with a value of 1 in the "CLASSACT" field. To obtain cases with pro se parties, we filtered the civil cases database for cases with a value of 1, 2, or 3 in the "PROSE" field.

[33] *Id.* We learned that the labeling did not always correspond to the individual cases tracked down thereafter. Moreover, records are incomplete in some instances. For example, an initial review identified 50 cases but with

subsequent analyses, we learned that 43 class actions in FY 2015 appeared to have gone to trial.

[34] In the FJC FY 2015 trial data set, another 14 (0.5 percent) of the cases had a tag denoting that they were remanded from MDL proceedings. To obtain cases with recorded MDL docket numbers, we filtered the civil cases database for cases with some recorded MDL docket number in the "MDLDOCK" column. *See* Federal Judicial Center, *Civil Codebook*. To obtain information about MDLs, we examined data released by the Federal Judicial Center on all civil cases. Federal Judicial Center, *Federal Court Cases: Integrated Data Base* (2015), available through http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36110. For each case, a multidistrict litigation docket number may be recorded. *See* Federal Judicial Center, *Codebook for Civil Terminations Data With Docket Numbers, PLT and DEF Containing Original Values*, available at http://www.icpsr.umich.edu/cgi- bin/file?comp=none&study=36110&ds=4&file_id= 1192536&path=NACJD [hereinafter Federal Judicial Center, *Civil Codebook*].

[35] Understanding agency adjudication is challenging. *See* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004). Efforts are underway to understand more about that work, where tens of thousands of trial-like proceedings take place, some of which are aggregated. See Federal Administrative Adjudication Home, Adjudication Research (January 22, 2017), https://acus.law.stanford.edu/; Michael Sant'Ambrogio & Adam Zimmerman, *Inside the Agency Class Action*, 126 YALE L. J. (forthcoming 2017).

[36] Jordan M. Singer & Hon. William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565–66 (2014).

[37] Details can be found in Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015).

[38] In the twelve months ending in September 30, 2015, 1,934 cases were remanded, while 30,695 cases were closed by the transferee court. U.S. Judicial Panel on Multidist. Litig., Statistical Analysis of Multidistrict Litigation Fiscal Year 2015 (2015), http://www.jpml.uscourts.gov/statistics-info. In 2010, the numbers were parallel; 99 out of 100 MDL cases terminated before remand. U.S. Judicial Panel on Multidist. Litig., Statistical Analysis of Multidistrict Litigation Fiscal Year 2010 (2010), http://www.jpml.uscourts.gov/statistics-info.

[39] Obtaining data on the use of class actions over the years is difficult, particularly the numbers of *proposed* class actions as compared to cases in which a class is certified. For some research done as a "snapshot" by the FJC, *see* Emery G. Lee, III & Thomas E. Willging, Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules, FEDERAL JUDICIAL CENTER (Apr. 2008), file:///Users/reginawang/Downloads/fourth_interim_ report_ class_action_1.pdf]. For a more comprehensive effort, see DEBORAH R. HENSLER, NICHOLAS M. PACE, BONNIE DOMBEY-MOORE, ELIZABETH GIDDENS, JENNIFER GROSS & ERIK MOLLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000), http://www.rand.org/pubs/monograph_reports/MR969.html.], and for an arena-specific inquiry, see Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015), on prisoner class actions.

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[40] This imagery was used in 1979 by Arthur Miller, a defender of class actions, describing a "holy war" being waged against class actions. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 664 (1979).

[41] *See* John Fabian Witt & Samuel Issacharoff, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 571 (2007).

[42] The difficulties of evaluating classes and settlements has spawned a substantial literature. Indeed, judicial authority to do so is its own puzzle. *See* Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43. After the Court's ruling in *Amchem* and *Ortiz*, questions of certification and settlement returned to the fore. See, e.g., Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835 (1997).

[43] *See* 18 U.S.C. § 3626(b)(1)(A)(i).

[44] Judges often invoke that term when considering whether to approve settlements. *See, e.g.*, Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 652–53 (7th Cir. 2006) (In the past, we have gone so far as to characterize the court's role as akin "to the high duty of care that the law requires of fiduciaries."); Rodriguez v. Disner, 688 F.3d 645, 655 (9th Cir. 2012) ("In serving this 'fiduciary role for the class,' the district court must consider whether class counsel has properly discharged its duty of loyalty to absent class members.").

[45] A $2.3 billion settlement fund was established through the A.H. Robins bankruptcy to compensate those injuries from that intrauterine device. The Trust and Claims Resolution Facility decided not to disclose awards, and argued that it did so because of claimants' privacy interests. *See* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 617-18 (1992); Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, L. & CONTEMP. PROBS. (Autumn 1990) at 105-10.

[46] *See, e.g.*, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP 1-2 (Dec. 2013), http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClass ActionsBenefitClassMembers.pdf [http://perma.cc/DT6J-T2YE] [hereinafter Mayer Brown Review of Selected Cases].

[47] *Id.* Using information drawn from 148 putative class actions filed during 2009, the Mayer Brown review described its "empirical study" as aiming to replace "anecdotes" with analyses, through selecting 2009 federal court consumer and employee class actions that had closed by 2013. The report stated that 33% of the class actions studied resulted in settlement, "half the average settlement rate" for individual litigation. *Id.* at 2. Of the 148, the review chose an odd subgroup to support its claim of almost no benefit to class members (the term "sample" would not be apt from an empirical research perspective); picked eighteen cases resolved by "claims-made settlement," and reported it has found "meaningful data" on six. *Id.* at 7. (Not discussed among class action beneficiaries were members of settlements with automatic distributions, which had accounted for thirteen of the forty cases identified as settled. *Id.* at 8.) The report's "bottom line" was that class actions did not "provide anything close to the benefits claimed by proponents," while

lawyers were "enrich[ed]." *Id.* at 2. Thus, Mayer Brown concluded that "for practical purposes," lawyers were "the only real beneficiaries of the class actions."

[48] The National Association of Consumer Advocates and the American Association for Justice analyzed the same class actions described in the Mayer Brown materials and drew very different conclusions. National Association of Consumer Advocates and American Association for Justice, *Class Actions Are a Cornerstone for our Civil Justice System: A Review of Class Actions Filed in 2009* (February 27, 2015), http://www.consumeradvocates.org/sites/default/files/Class%20Action%CC20Report%202-27-15.pdf (last visited Oct. 10, 2016). That report cited class action returns provided of $219 million to retirement funds devastated by Bernie Madoff's Ponzi scheme, awards of $27.8 million to property owners who suffered damages due to a 2008 spill of coal ash sludge from the Tennessee Valley Authority coal plant, and a $4.8 billion provision of debt relief for consumers victimized by the National Arbitration Forum, among others. *Id.* at 4-5, 9. Further, the report argued that, given the ongoing relations between financial institutions and class members, direct payments were and could be relatively easy. *Id.* at 25.

[49] Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a), Consumer Fin. Protection Bureau § 1, at 11; § 8, at 4, 16 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [http://perma.cc/P5B9-JPSZ]. Of the 251 settlements reporting data, $1.1 billion had been paid or was scheduled to be paid in cash, debt forbearance, and cy pres payments for the benefit of class members. *Id.* at § 8, at 4 n.5.

[50] *Id.* at § 1, at 17.

[51] *Id.* at § 8, at 20.

[52] *See, e.g.*, Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767 (2015) (finding that between 1% and 70% of class members received compensation in settlements in fifteen related small-stakes consumer class action lawsuits, and that the settlements with the highest compensation rates automatically disbursed payments without requiring class members to file claim forms); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010) (finding that of $33 billion in class action settlements in 2006 and 2007, $5 billion was awarded to class action lawyers). In work from 1999, Deborah R. Hensler, joined by Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross, and Erik Moller found that between 30 and 100 percent of settlements funds were paid to class members in ten illustrative class action settlements. *See* CLASS ACTION DILEMMAS, *supra* note 39, at 21.

[53] *See* Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* at 3, RAND INSTITUTE FOR CIVIL JUSTICE WORKING PAPER (July 2008), billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf. *See* Stephen Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?*, *in* CONFIDENTIALITY, TRANSPARENCY AND THE U.S. CIVIL JUSTICE SYSTEM 143 (Joseph Doherty, Robert Reville, & Laura Zakaras eds., 2012).

[54] Pace & Rubenstein, *supra* note 53, at v.

[55] Lynn A. Baker, Michael A. Perino & Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1375-81 (2015). They examined 431 securities class action settlements from January 1, 2007 to December of 2012. *Id.* at 1380.

[56] Forthcoming, U. PA. L. REV., Rule 23 Symposium, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?* (2017).

[57] *See, e.g., Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013), *cert. denied* 134 S.Ct. 1551 (2014); *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 290 (2d Cir. 2011).

[58] *Compare* U.S. v. Erie County, 763 F.3d 235 (2d Cir. 2014) (requiring access to a monitor's report related to jail conditions), *to* IDT Corp. v. eBay, 709 F.3d 1220, 1224, n.1 (8th Cir. 2013) (declining to require access) *and* SEC v. American International Group, 712 F.3d 1 (D.C. Cir. 2013) (holding that reporters had no common law or First Amendment right of access to reports ordered to be provided by an independent consultant, dispatched pursuant to a court decree).

[59] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*, Rule 23(3)(2)(D), ADMIN. OFF. U.S. COURTS (Aug. 2016), http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment [hereinafter Proposed 2016 Amendments to Federal Rule 23].

[60] *Id.* at Rule 23(e)(2)(C)(ii).

[61] *Id.* at Rule 23(e)(2)(C)(iv).

[62] *Id.* at Rule 23 Comm. Note.

[63] The Deepwater Horizon Economic & Property Damages Settlement responded to economic loss and property damage claims related to what is commonly called the BP oil spill in the Gulf of Mexico. Compensation is paid to claimants in twelve categories (the Seafood Compensation Program, Individual Economic Loss, Individual Periodic Vendor or Festival Vendor Economic Loss, Business Economic Loss, Start-up Business Economic Loss, Failed Business Economic Loss, Coastal Real Property Damage, Wetlands Real Property Damage, Real Property Sales Loss, Subsistence Loss, VoO Charter Payment, and Vessel Physical Damage). The website for the settlement provides notice to all potential and actual class members about the terms of the settlement and includes copies of all of the public court documents associated with the settlement. While all claims information was to be confidential, status reports, including the claims filed in categories and the proportion resolved, as well as whether appeals were had and compensation changed) were filed by the claims administrator and were made available on the settlement website.

A parallel court-authorized website exists for the Medical Benefits Class Action Settlement, which compensates qualifying individuals who were clean-up workers or residents in certain defined beachfront areas and

wetlands during certain time periods around the oil spill. *See* Deepwater Horizon Claims Center: Economic & Property Damage Claims (Official Court-Authorized Website), http://www.deepwaterhorizoneconomicsettlement.com; Seafood Compensation Program Residual Distribution, Deepwater Horizon Claims Center: Economic & Property Damage Claims (Official Court-Authorized Website), http://www.deepwaterhorizoneconomicsettlement.com/docs/DHECC_Alert_Residual_Final_Portal_note.pdf.; "Court Documents," Deepwater Horizon Claims Center: Economic & Property Damage Claims (Official Court-Authorized Website) http://www.deepwaterhorizoneconomicsettlement.com/docs.php; Deepwater Horizon Medical Benefits Claims Administrator (Official Court-Authorized Website), https://deepwaterhorizonmedicalsettlement.com.

In 2016, the German automaker Volkswagen (VW) entered into settlements with owners and lessees of its cars and with the government. Under its settlements with the EPA, FTC, and State of California and a class action, Volkswagen agreed to buy back, terminate leases, or provide approved emissions modifications for nearly 475,000 diesel cars in the United States, provide cash payments to owners and lessees, pay for environmental remediation, and promote zero emissions vehicle technology. The website for the settlement provides copies of the court documents related to the litigation, including the class action settlement agreement, the company's consent decree with the Department of Justice, the FTC consent order, and reports by the claims administrator. As of this writing, an initial report by the claims supervisor has been filed and provides aggregate statistics about the number of consumers who have submitted claims, VW's compliance and response rate to consumers who have filed claims, and the remedies chosen by these consumers. The website also permits a car owner to identify the exact payment s/he can receive for his/her VW car by entering his/her Vehicle Identification Number. Again, individuals are not identified. Volkswagen/Audi Diesel Emissions Settlement Program (Official Informational Website), https://www.vwcourtsettlement.com/en.; First Report of Independent Claims Supervisor on Volkswagen's Progress and Compliance Related to Resolution Agreements Entered October 25, 2016 (Nov. 25, 2016), https://www.vwcourtsettlement.com/en/docs/Reports/Independent%20Claims%20Supervisor%20-%20First%20Report%2011.29.16.pdf.; Settlement Payments to Owners, Volkswagen/Audi Diesel Emissions Settlement Program (Official Informational Website),https://www.vwcourtsettlement.com/en/docs/PO/Settlement%20Payment%20Table%20for%20Owners.pdf.

[64] *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945); Lynn's Food Stores, Inc. v. United States, 679 (F.2d 1340 (11th Cir. 1982). *See generally* Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109 (2013).

[65] *See, e.g.*, Stalnaker v. Novar Corp., 293 F. Supp. 2d 1260, 1263-64 (M.D. Ala. 2003).

[66] *See* Adam S. Zimmerman, *Distributing Justice*, 86 NYU L. REV. 500 (2011).

[67] For example, after JPMorgan Chase & Co. paid $200 million in civil penalties, the SEC established a fund for investors, and provided a claims mechanism system. *See, e.g.*, http://jpssecfund.com/frequently-asked-questions.

[68] In 2002, the Chair, Tim Muris, of the Federal Trade Commission created a "Class Action Fairness Project," described as including amicus briefs when settlements were proposed in class actions that identified concerns for consumers. *See* Joshua D. Wright, Commissioner, Federal Trade Commission, Remarks at The Economics of Access to Civil Justice: Consumer Law, Mass Torts, and Class Actions Conference (March 16, 2014), https://www.ftc.gov/system/files/documents/public_statements/293621/140316civiljustice-wright.pdf. The FTC also launched a study of "consumer perception and understanding of class action notices and the options they provide to consumers" and the Deciding Factors Study, which will consider the "factors that influence consumers' decisions to participate, opt out of, or object to a class action settlement." In November 2016, the FTC issued orders to eight claims administrators requiring them to provide information on procedures for notifying class members about settlements and response rates. FTC Seeks to Study Class Action Settlements, FED. TRADE COMM'N (Nov. 14, 2016), https://www.ftc.gov/news-events/press-releases/2016/11/ftc-seeks-study-class-action-settlements. As of this writing, the results are not available.

[69] Resnik, Hensler & Curtis, *supra* note 11, at 300; *see e.g., In re* Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 605 (1st Cir. 1992); *In re* Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 300 (1st Cir. 1995).

[70] 15 U.S.C. § 78u-4(a)(6).

[71] In Re Relafen, 231 F.R.D. 52 (D. Mass. 2005). The decision has been praised in submissions to this Committee. See *Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules*, 13 (Jan. 4, 2017) (Statement of Jennie Lee Anderson).

[72] 339 U.S. 306 (1950).

[73] *Id.* at 317.

[74] *Id.* at 313-314.

TAB 7

OUTLINE OF TESTIMONY AND COMMENT

THEODORE H. FRANK OF
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February 6, 2017

Rebecca A. Womeldorf
Rules Committee Support Office
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room 7-240
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VIA EMAIL:

rebecca_womeldorf@ao.uscourts.gov

Re: Outline of Testimony for February 16, 2017 Public Hearing

Dear Ms. Womeldorf:

Below please find an outline of my remarks regarding proposed amendments to Rule 23 of the Federal Rules of Civil Procedure for presentment to the Advisory Committee on Civil Rules during the telephonic public hearing scheduled for February 16, 2017.

I. The proposed amendments to Rule 23(e)(2) will continue to permit approval of "selfish" class action settlements where class counsel are the primary beneficiaries.

    A. Because class action settlements are presented *ex parte* to the court by the settling parties, if the proposed amendments do not *explicitly* require the court to consider whether class counsel's requested fees are disproportionate to *actual* class relief, then the future Rules will be distorted to promote self-dealing settlements.

        1. The proposed amendments do not resolve the circuit split regarding valuation of settlement relief when assessing fairness and attorneys' fee awards but instead, the amendments risk reversing the legal precedents that protect class members from self-dealing settlements.

        2. Just as the Committee Notes to the 2003 Amendments to the Civil Procedure Rules did not effectively stop disproportionate 23(h) awards, the Committee Notes to the proposed amendments will also be ignored.

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B. The proposed amendments should also *explicitly* require district courts to consider whether class counsel failed to adequately represent the class by negotiating self-dealing settlement structures.

1. The proposed amendments should explicitly prohibit inclusion of clear-sailing and reversion clauses.

2. In considering class counsel's adequacy for purposes of assessing settlement fairness, the proposed amendments should explicitly require district courts to consider class counsel's use of *cy pres* awards.

II. The proposed amendments to Rule 23(e)(5) will permit settling parties to improperly insulate self-dealing settlements and will continue to permit bad-faith objectors to receive "objector blackmail."

A. The proposed changes to Paragraph (A) requiring specificity should be deleted because they are unnecessary and will be abused to protect bad settlements, but at a minimum, Paragraph (A) should be revised to require notification, prevent technical rejection of objections, and ensure preservation of objectors' appellate rights.

1. Paragraph (A) as proposed creates unnecessary collateral litigation regarding whether an objection is sufficiently specific that class counsel will use to protect self-dealing settlements.

2. If Paragraph (A) is adopted as proposed, additional language should be inserted to protect class members including notifying absent class members of the new specificity requirements, preventing technical rejection of objections, and preservation of objector's appellate rights.

B. Proposed Paragraphs (B) and (C) should be deleted because they will not effectively end extortionate payments to bad-faith objectors; the Rules should be revised to acknowledge that objectors are entitled to attorneys' fees if they demonstrate that the class realized a benefit and the Rules should be further revised to provide an enforcement mechanism to recover the extortionate payments to bad-faith objectors.

1. Paragraphs (B) and (C) should be deleted because rather than effectively ending objector blackmail, the Proposed Amendments will only increase extortionate payments to bad-faith objectors.

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2. The Rules should be revised to explicitly recognize that objectors are entitled to attorneys' fees if they can demonstrate that their objection realized a benefit to the class.

3. The Proposed Amendments should identify an enforcement mechanism for failure to satisfy Paragraphs (B) and (C).

We intend to submit written comments to the Rules Committee early next week. If you have any questions, please do not hesitate to contact me.

Sincerely,

<u>/s/ Theodore H. Frank</u>
Theodore H. Frank

cc: frances_skillman@ao.uscourts.gov

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February 15, 2017

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules and Practice
and Procedure of the Administrative Office of the
United States Courts
One Columbus Circle, NE
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Re: CEI Comments to Proposed Amendments to Federal Rule Civil Procedure 23

Ms. Womeldorf:

On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit these comments regarding proposed amendments to Rule 23 of the Federal Rules of Civil Procedure presently under consideration by the Civil Rules Advisory Committee and its Rule 23 Subcommittee.

Please contact Mr. Frank at (202) 331-2263 or ted.frank@cei.org if you have any questions.

Sincerely,

/s/ Theodore H. Frank
Theodore H. Frank

/s/ Melissa A. Holyoak
Melissa A. Holyoak

COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS

COMMENTS
to the
CIVIL RULES ADVISORY COMMITTEE
AND ITS RULE 23 SUBCOMMITTEE

Competitive Enterprise Institute (CEI) respectfully submits these comments regarding the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure presently under consideration by the Civil Rules Advisory Committee and its Rule 23 Subcommittee ("Proposed Amendments").[1] CEI is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise. The authors of these comments are CEI Senior Attorney and Director of the Center for Class Action Fairness, Theodore H. Frank, and CEI Senior Attorney Melissa A. Holyoak.

Interest of the Commenters

CEI's Center for Class Action Fairness represents class members *pro bono* against unfair class action settlements and procedures. Since the Center's inception in 2009,[2] it has won numerous appellate landmark decisions protecting class members' rights, and has secured over $100 million for class members that otherwise might have gone to trial attorneys or unrelated third parties. The *New York Times* calls Mr. Frank the leading critic of abusive class-action settlements. *See* Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal,* N.Y. TIMES, Aug. 13, 2013, at A12.

Summary

It is important to understand that, in practice, rules relating to class-action settlements will most often be litigated in *ex parte* circumstances where settling parties will seek interpretations favorable to themselves at the expense of absent class members. If rules do not explicitly bind settling parties, courts will tend to adopt interpretations and create precedents permitting abuse. The Proposed Amendments to Rule 23(e)(2) therefore do not adequately protect the class from self-dealing settlements where class counsel is the primary beneficiary. Settlements will continue to be approved where attorneys' fees are disproportionate to the relief *actually* received by the class. The

1 Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure ("Proposed Amendments"), available at http://www.uscourts.gov/sites/default/files/2016-08preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf.

2 On October 1, 2015, the Center merged with the non-profit Competitive Enterprise Institute.

Advisory Committee tried to fix this problem in 2003 when Rule 23(h) was created, but Rule 23(h) failed to explicitly require courts to determine whether class counsel's fee request was proportionate to relief actually received and the Advisory Committee's intent went ignored. Now courts are split as to whether fees may be awarded based on actual relief and the Rules risk undoing the precedent that requires courts to determine whether fees are proportionate. To end the circuit split and avoid repeating the deficiency of the 2003 Amendments, the Rules should explicitly require that district courts consider the proportion of fees to relief actually received by class members, and explicitly reject the line of precedent that permits parties to value settlements based on the fiction of maximum possible relief, when in practice parties can predict with actuarial certainty the claims rate of a settlement structure. Indeed, the Rules should provide additional protections by requiring district courts to consider whether class counsel negotiated clear sailing, reversion, or *cy pres* awards that prioritize relief to third parties when assessing adequacy of class counsel.

The Proposed Amendments to Rule 23(e)(5) should be deleted. Proposed Paragraph (A) requiring specificity for objections is unnecessary because district courts and parties can already effectively manage non-specific objections and will instead create collateral litigation. Paragraph (A) will only serve as a mechanism for class counsel to eliminate objections that may derail their self-dealing settlements.

Proposed Paragraphs (B) and (C)—requiring court approval for settlement of objections—will, as conferences discussing the amendments have shown, be ineffective in ending objector blackmail (extortionate payments to objectors in exchange for dismissal of their appeals) because the Rules fail to adopt a standard that objectors must satisfy for approval of their settlement with class counsel. The Proposed Amendments do nothing to address the real problem: objectors are more motivated to bring bad-faith objections than good-faith objections because there is a greater chance of payment in objector blackmail than in successfully litigating an objection. The Rules need to eliminate the incentive for objector blackmail by eliminating the possibility of receiving consideration for dismissal of appeal and instead, create incentives for good faith objections by explicitly recognizing that objectors who realize a benefit for the class are entitled to attorneys' fees. Under current law, only non-profit organizations have the ability to consistently see through meritorious objections.

I. Amendments to Rule 23(e)(2) as Proposed Will Permit Approval of Unfair Class Action Settlements.

The Proposed Amendments to Rule 23(e)(2) incorporate factors a district court must consider in determining whether a proposed class action settlement is fair, reasonable and adequate:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) class members are treated equitably relative to each other.

See Proposed Amendments at 213-214.

As the Committee Notes to the Proposed Amendments observe, circuit courts have developed lengthy, "distracting" lists of factors to consider in approving class action settlements. *See id.* at 224-225. The Proposed Amendments are intended to focus the court on the "core concerns" in deciding whether a class action settlement should be approved. *Id.* at 224. The Proposed Amendments correctly identify the adequacy of class counsel and the award of attorneys' fees as a core concern when assessing whether the settlement relief is fair. *See id.* at 214 (Paragraph 23(e)(2)(C)(iii)). As drafted, however, the Proposed Amendments are not explicit enough to protect the class from attorneys' fee requests that may be disproportionate to the relief *actually* received by the class as well as other unfair settlement provisions that often cost class members millions of dollars.

A. Because of the *ex parte* nature of the settlement approval process in most cases, if the Proposed Amendments do not explicitly require the court to consider whether the requested fees are disproportionate to actual class relief, then the future Rules will be distorted to promote self-dealing settlements.

When negotiating a class action settlement, class counsel and defendants are both incentivized to bargain effectively over the size of the settlement. But defendant only cares about the "bottom line" and will take the deal that drives down the total cost to defendant, with "no reason to care about the allocation of its cost of settlement between class counsel and class members." *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014). Class counsel, on the other hand, are incentivized to seek as large a portion of the relief as possible for themselves, and may accept bargains that are worse for the class in exchange for a larger piece of the pie. *Id.* at 783-84.

Together, class counsel and defendants have a mutual interest in creating the illusion of relief rather than actual relief to the class: the optimal settlement for class counsel maximizes attorneys' fees, while the defendant is seeking only to minimize its total expenditure with indifference to where the settlement money actually goes. *See Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014) (Posner, J.); *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.) ("From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees."). *See generally*, Howard Erichson, *Aggregation As Disempowerment: Red Flags in Class Action Settlements*, 92 N.D. L. REV. 859 (2016); Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL'Y 769 (2016).

The classic example of illusory relief is the coupon settlement, which "provides class counsel with the opportunity to puff the perceived value of the settlement so as to enhance their own compensation." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1179 (9th Cir. 2013). The Class Action Fairness Act (CAFA), 28 U.S.C. § 1712, sought to preclude parties from taking credit for 100% of the face value of coupons when the actual redemption rates are typically less than 1%. But even with this bright-line principle, district courts' application remains inconsistent because the settling parties often refuse to admit that a settlement is offering "coupons" to the class members. *E.g., Redman*, 768 F.3d at 635 (rejecting class counsel's argument that settlement "vouchers" were not coupons under CAFA).

The problem is that the settling parties' *ex parte* presentation of the class action settlement deprives the court of an adversarial system. As Judge Posner explained:

> A trial judge's instinct, in our adversarial system of legal justice, is to approve a settlement, trusting the parties to have negotiated to a just result as an alternative to bearing the risks and costs of litigation. But the law quite rightly requires more than a judicial rubber stamp when the lawsuit that the parties have agreed to settle is a class action. The reason is the built-in conflict of interest in class action suits.

See Redman, 768 F.3d at 629.[3] District courts depend on an adversary system, one that involves independent, unconflicted counsel. District courts have neither the time nor the resources to step into that adversarial role and unearth the illusory relief, the self-dealing settlement structure and provisions, and the self-interested interpretations of the Civil Rules and legal precedent.

When the district courts are presented with a settlement that will take a years-old case off their dockets, and both parties are telling the judge that the settlement is a good deal for their clients and complies with the Rules, district courts will bend over backwards to approve settlements, even when they are unfair for absent class members. Take for example, *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013), *rev'd* No. 13-55373, 599 Fed. Appx. 274 (9th Cir. Mar. 19, 2015).

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3 *See also* Ted Frank, *Class Actions, Arbitration, and Consumer Rights*, Legal Policy Report No. 16 at 6-11 (Manhattan Institute 2013); Lester Brickman, LAWYER BARONS 335-72 (Cambridge U. Press 2011); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1347-48 (1995); Coffee, 54 U. CHI. L. REV. at 883-84; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-8 (1991).

Plaintiffs claimed that defendants' gift- and flower-delivery websites violated state and federal law by enrolling customers in rewards programs after luring them with the promise of worthless coupons. Class counsel negotiated a settlement where 0.2% of the class received cash ($225,000) and the remaining class members received low-value coupons, while $8.85 million went to plaintiffs' lawyers and $3 million to *cy pres* including class counsel's alma maters. The district court agreed with the parties that the settlement "e-credits" were not "coupons," and valued them at full face value for determining settlement fairness and fees—even though the "e-credits" were called coupons in the Rule 8 complaint, they expired in a year, could only be used to purchase flowers and other gifts, were neither transferable or usable in conjunction with other coupons, and could not be used in the weeks before or of Valentine's Day, Mother's Day, and Christmas. 921 F. Supp. 2d at 1048-49. The Ninth Circuit vacated the settlement approval and remanded for further consideration. 599 Fed. Appx. at 275. But even on remand, the district court repeated its finding. In 2016 U.S. Dist. LEXIS 105152 (S.D. Cal. Aug. 9, 2016). The Civil Rules must be explicit and drafted to limit district courts from adopting class counsel's self-interested interpretations.

Claims-made settlements are no different economically from coupon settlements. In both types of settlements, the defendant "makes available" a certain amount of relief, but can expect to pay only a fraction of that amount because of low claims rates. But like coupon settlements, class counsel exploit their conflict of interest by seeking fees based on the amount "available" and not what the class will *actually* receive. The circuit courts of appeals to have considered the issue are split. The Proposed Amendments do not resolve the split and worse, they may undo the progress some circuits have made in protecting absent class members. The Rules must be explicit regarding the valuing of settlement relief when assessing the attorneys' fee award.

1. The Proposed Amendments do not resolve the circuit split regarding valuation of settlement relief when assessing fairness and attorneys' fee awards but instead, the Amendments risk reversing the legal precedents that protect class members from self-dealing settlements.

Several courts have recognized the inherent conflict between class counsel and the class during settlement negotiations and have required an additional inquiry beyond the typical multi-factors tests for fairness: Have the class attorneys engaged in self-dealing to structure the settlement so that they are receiving preferential treatment vis-à-vis the clients to whom they have a fiduciary duty? *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (looking beyond Sixth Circuit's seven-factor test to find settlement unfair when it constitutes "preferential treatment" for class counsel); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (failure to consider "the degree of direct benefit provided to the class" reversible error, though not in Third Circuit's nine-factor test). These appellate courts have employed doctrinal tests to correctly align the incentives of class counsel with those of the absent class members. Most notably, the Seventh Circuit has held that it will compare the attorney award only to the amount *actually* realized by the class: "the ratio that is relevant ... is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781, *Redman*, 768 F.3d at 630.

Pearson involved claims regarding the marketing of glucosamine nutritional supplements. 772 F.3d at 779. While there were over 12 million class members, only 30,245 class members claimed $865,284; the settlement also provided a $1.13 million *cy pres* award and an injunction against certain marketing practices. *Id.* at 780, 784. Class counsel requested $4.5 million and the district court awarded $1.93 million in fees. *Id.* at 780. The Seventh Circuit reversed settlement approval, finding

that the "problem with the district judge's decision is not that it leans too far in favor of the objectors, as class counsel contend, but that it doesn't lean far enough." *Id.* The Seventh Circuit held that the district court correctly excluded the *cy pres* award in calculating the benefit to the class "for the obvious reason that the recipient of that award was not a member of the class" and that the court properly valued the injunction at zero. *Id.* at 781. Seventh Circuit held that the district court erred, however, in valuing the settlement with the "maximum *potential* payment" that class members could receive. *Id.* at 780.

The Third Circuit and the Ninth Circuit have reached similar conclusions. *Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015) (reversing approval because although $1.125 million was 25% of gross fund, "economic reality" was that fee request was three times more than what class would actually receive); *In re Baby Prods. Litig.*, 708 F.3d 163, 169-70, 179 (3d Cir. 2013) (rejecting settlement that gave $3 million to class, $14 million to attorneys' and $18.5 million to *cy pres* and administrative expenses because class members were not "foremost beneficiaries of the settlement").

By contrast, a settlement nearly identical to *Pearson* (but with even *worse* results) was upheld in the Eleventh Circuit. In *Poertner v. Gillette Co.*, the Eleventh Circuit affirmed a settlement involving claims regarding marketing of a line of Duracell batteries. 618 Fed. Appx. 624, 625 (11th Cir. July 16, 2015) (unpublished). Under the settlement, class members received less than $345,000 (and over 99 percent of the class got zero), defendant would give $6 million in batteries to a third-party charity (*cy pres* award) and defendant agreed to an injunction preventing marketing of a discontinued line of batteries. *Id.* at 626. Class counsel requested over $5 million in fees based on an estimated settlement value of $50 million. *Id.* But class counsel based it on the assumption that *every* class member would file a claim, even though they were fully aware that only a tiny fraction would. *Id.* at 626 n.1. The Eleventh Circuit upheld the settlement—even though the attorneys received ***nearly 15 times more*** than their "putative clients"—because its Rule 23(e) precedents allowed vague notions of the settlement's overall value in direct conflict with other circuits' rules. *Id.* at 630. Predictably, similarly structured settlements are flowing into Eleventh Circuit courts relying on the *Poertner* decision. *See, e.g., Braynen v. Nationstar Mortg.*, LLC, No. 14-CV-20726, 2015 WL 6872519, 2015 U.S. Dist. LEXIS 151744, *55-57 (S.D. Fla. Nov. 9, 2015) (approving claims-made settlement and $5 million fee without claim-rate or actual recovery information); *Marty v. Anheuser-Busch Cos.*, No. 13-cv-23656-JJO, 2015 WL 6391185, 2015 U.S. Dist. LEXIS 144290, *4-*5 (S.D. Fla. Oct. 22, 2015) (approving $3.5 million fee and rejecting objection that court should consider the actual amount of claims paid).

Like the Eleventh Circuit, the Sixth Circuit upheld a settlement where class counsel received a disproportionate fee award. Though the settling parties had the addresses of the class members and knew precisely what each class member was entitled to under the terms of the settlement, the settlement was structured as a claims-made settlement, with the settlement administrator testifying under oath that this structure could be expected to pay less than ten percent of the class's claims. The class received less than $1.6 million (49,808 claims of the 600,000 class members) but class counsel sought to justify their $2.39 million fee request by arguing to the district court that the settlement value was $15.5 million because that was the total *available benefit* to the class. *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 277 (6th Cir. 2016). The district court decided to split the difference—without any economic explanation why an unclaimed award is worth anything to a class member, much less 50% of its unclaimed value—and held that the class benefit should be valued at $8.5 million. *Id.* at 288. The Sixth Circuit affirmed in a split decision, with the majority opinion citing

a law-review article suggesting there was nothing problematic if 100% of settlement benefit went to class counsel. *Id.*[4]

That class counsel should be given credit for making the entire maximum available—because they somehow have "no control" over the amount that is claimed—is one of the greatest fictions presented by class counsel. When class counsel structures a claims-made settlement, they are fully aware that 99% of the class will go uncompensated because those class members will not submit claims. In *Poertner,* class counsel attempted to defend the low number of claims by presenting a study of hundreds of class-action settlements that showed that the median settlement pays only 0.23% of the class. *See* Daniel Fisher, *Odds of a Payoff in Consumer Class Action? Less Than a Straight Flush*, FORBES (May 8, 2014) (discussing evidence presented in *Poertner*); Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, REUTERS (May 9, 2014) (noting that median claims rate in such cases is "1 claim per 4,350 class members").

Not only can class counsel accurately predict the claims rates, they can manipulate them with actuarial certainty. Risk Settlements, a company that offers post-lawsuit insurance for class action settlements, market their services to prospective clients by explaining that class-action defendants can save millions of dollars if they use claims-made settlements instead of common funds. *See* http://risksettlements.com/case-studies/case-study-a (saving client $7.5 million by restricting from common fund to claims-made settlement). But as Risk Settlements explains, each claims-made settlement can be "individually design[ed]" to reduce cost by using "historical database and risk assessment predictive system." *See* http://risksettlements.com/case-studies/case-study-a; *see generally* Theodore H. Frank, *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, OpenMarket blog (Aug. 31, 2016), available at https://cei.org/blog/settlement-insurance-shows-need-court-skepticism-class-actions; *cf. also* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions,* 11 N.Y.U. J. OF LAW AND BUSINESS 767, 783 (2015) (empirical data showed that a higher percentage of class members received compensation in settlements with direct payments compared to settlements with a claims process and that class members negotiated postcard-sized checks less often than standard-sized checks). Parties can structure the claims process to ensure that very little money actually reaches the class. *E.g., Dry Max Pampers,* 724 F.3d at 718; *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014); *Pearson v. NBTY*, 772 F.3d 778 (7th Cir. 2014).

When class counsel's fee award is compared to the amount *actually* received by the class, the comparison "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Pearson*, 772 F.3d at 781. Conversely, "[w]hen the parties to a class action expect that the reasonableness of the attorneys' fees allowed to class counsel will be judged against the potential rather than actual or at least reasonably foreseeable benefits to the class, class counsel lack any incentive to push back against the defendant's creating a burdensome claims process in order to minimize the number of claims." *Id.* at 783.

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4 CCAF has petitioned for writ of certiorari. *See Blackman v. Gascho*, No 16-364 (U.S.). Attorneys General from seventeen states filed an *amici* brief in support of CCAF's position that fees must be awarded and settlements must be judged based on the actual relief received. *Id.*

The idea that class counsel will respond to these incentives by more carefully working to ensure settlement money gets to class members is more than theoretical, and has been borne out by the Center's experience. On remand from the *Baby Products* reversal, the parties determined that they had access to a list of class members, arranged for direct distribution of settlement proceeds, and paid an additional $14.45 million to over one million class members—money the parties initially directed to *cy pres* before the successful objection led to an "exponential increase" in class recovery. *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015). After the Center objected to a claims-made settlement in a settlement over alleged false advertising of aspirin, the parties used subpoenaed third-party retailer data to identify over a million class members (instead of the 18,938 who would have been paid $5 each in the original claims-made structure), and paid an additional $5.84 million to the class. Order at 4, *In re Bayer Corp. Litig.,* No. 09-md-2023, Doc. 254 (E.D.N.Y. Nov. 8, 2013). And on remand in *Pearson*, the parties renegotiated to give class members at least $4 million more in cash, with any reduction in attorneys' fees now going to class members rather than back to defendants. Settlement ¶¶ 7-8, No. 11-cv-07972, Doc. 213-1 (N.D. Ill. May 14, 2015). In short, as *Pearson* predicted, if courts require lawyers get money to clients in order to get paid, that is *exactly* what happens.

The Proposed Amendments should resolve the circuit split and adopt the Seventh Circuit's requirement that fees be compared to what the class *actually* receives and the Committee Notes should specifically reject the approach adopted by the Eleventh and Sixth Circuits. The Seventh Circuit approach aligns the interests of class counsel and the class: class counsel will be incentivized to get as much money as possible in the class members' pockets.[5] As currently drafted, the Proposed Amendments do not resolve the split. Instead, class counsel will argue that Paragraph (e)(2)(C)(iii)—requiring the court to simply "take into account" the fees in considering the adequacy of class relief—does not affect the circuit split and courts may employ the Eleventh and Sixth Circuit's approach to consider the relief made *available* in awarding fees.

Worse yet, settling parties may argue that the newly adopted Rule 23(e) (and factors set forth in Rule 23(e)(2)(C)) supersede the legal precedent in the Third, Seventh, and Ninth Circuits requiring district courts to consider what the class *actually* receives in awarding fees.[6] **If the Proposed Amendments do not explicitly require courts to consider the actual relief awarded, the legal**

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5 This would also solve many of the problems associated with *cy pres* awards. "A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members." *Pearson*, 772 F.3d at 784 (rejecting $1.13 million *cy pres* award because distribution was possible to class members); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063-64 (8th Cir. 2015) (rejecting $2.7 million *cy pres* award where third distribution to class members was possible). If class counsel is only paid for money delivered to the class (and not third parties), class counsel is incentivized to negotiate settlements that prioritize payments to class members rather than third-party *cy pres* recipients. *See, e.g., Pearson,* 772 F.3d at 781 (comparing class counsel's fee award only to amounts delivered to class and not the $1.13 million *cy pres* distribution when assessing settlement fairness).

6 The Committee Notes to the Proposed Amendments explain that the "goal" of 23(e)(2)(C) is not to "displace" the factors contained in the various multi-factor tests. *See* Proposed Amendments at 224. Although this would support an argument that the legal precedents in the Third, Seventh, and Ninth Circuits are not superseded by the future adopted Rules, as further explained below, the Committee Notes have largely been ignored and may not prevent the reversal of those precedents that protect absent class members.

precedents protecting class members may be reversed. In the future, during the settling parties' *ex parte* presentation of a class action settlement, class counsel will replace the "superseded" precedent with a self-interested interpretation of the newly adopted Rules that follows the Eleventh and Sixth Circuit approach.

2. Just as the Committee Notes to the 2003 Amendments to the Civil Procedure Rules did not effectively stop disproportionate 23(h) awards, the Committee Notes to the Proposed Amendments will also be ignored when unfavorable to settling parties.

The guidance contained in the Committee Notes to the Proposed Amendments are not sufficient to address the concerns regarding self-dealing settlements. Consistent with the Seventh Circuit's approach, the Committee Notes to the Proposed Amendments observe that "the ***relief actually delivered*** to the class can be an important factor in determining the appropriate fee award." *See* Proposed Amendments at 227 (emphasis added). Mr. Frank has had conversations with Federal Judiciary Center members who were surprised that this guidance did not resolve the controversy in favor of requiring consideration of actual recovery. But like the Committee Notes to the 2003 Amendments, the guidance in the Notes to the Proposed Amendments will be ignored.

In 2003, the Rules were amended to include Rule 23(h), which permits a court to award "reasonable attorney's fees" in connection with a class action settlement. *See* Fed. R. Civ. P. 23(h). The Committee Notes to the 2003 Amendments directed courts to consider the relief *actually* received by the class in determining the reasonableness of class counsel's fee award:

> Courts discharging this responsibility have looked to a variety of factors. **One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members**. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§77z–1(a)(6); 78u–4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, **results achieved is the basic starting point**.
>
> In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. **In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class**. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

See Notes of Advisory Committee on 2003 Amendments to Rule 23 (emphasis added).

The Federal Judicial Center (FJC) expected the parties to adhere to the Committee Notes to the Rule 23(h) amendments: "In cases involving a claims procedure…, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered." Federal Judicial Center, Manual for Complex Litigation (Fourth) § 21.71 (2004).

The Advisory Committee and the FJC anticipated the district courts to follow the Notes, but unfair class action settlements that awarded attorney fee awards disproportionate to class relief were consistently approved for over a decade after 23(h)'s adoption. The landmark appellate rulings recognizing that district courts must look at the results *actually* achieved—the same approach the Committee advocated in 2003—were not decided until CCAF challenged the misapplication of the Rules a decade after they were adopted. *See Baby Prods*, 708 F.3d 163 (3d Cir. 2013); *Pearson* 772 F.3d 778 (7th Cir. 2014). (Unfair results persisted for so long based in part on the fact that the Rules do not provide incentives for good faith objectors to challenge settlements. *See* § II.B below.)

The problem was that the language in Rule 23(h) did not *expressly* include the requirement that fees be awarded based on relief actually delivered. The Committee Notes were ignored because the settling parties' *ex parte* presentation misapplied the Rules and in turn created precedent for future settlements to be rubber-stamped that endorse that same abuse of the Rules.

For example, in *Masters v. Wilhelmina Model Agency, Inc*., the Second Circuit held that the district court should have computed class counsel's attorneys' fees based on the amount made available and not the amount actually delivered to the class. 473 F.3d 423, 436-37 (2d Cir. 2007). In reaching its decision, the Second Circuit distinguished the Advisory Committee Notes to Rule 23(h) and held that the fee restrictions described in the 2003 Committee Notes only applied to securities class actions. *Id*. at 437-38.

The 2003 Committee Notes state that the Private Securities Litigation Reform Act (PSLRA) requires a fee award to not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." *See* Notes of Advisory Committee on 2003 Amendments to Rule 23 (quoting 15 U.S.C. §§77z–1(a)(6)). But the 2003 Committee Notes used the PSLRA as an *example* of why fees should be based on actual relief delivered. The Second Circuit's limitation of the 2003 Notes to securities cases makes no sense because (1) there would be no need for the Notes to provide guidance on fees in securities class actions when the PSLRA statute expressly requires fees to be based on amounts "actually paid;" and (2) it contradicts a plain reading of the 2003 Notes.

The same thing will happen again. Even if the Committee Notes to the Proposed Amendments direct district courts to consider the amounts class members actually receive when assessing the relief provided and class counsel's fee award, those Notes will once again be ignored or distorted to promote class counsel's self-interest.

* * *

To protect class members from unfair settlements with disproportionate fee awards, Proposed Rule 23(e)(2)(C) should adopt the Seventh Circuit approach and include the additional bolded, underlined language:

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment, **and, if class members are being required to compromise their claims, the ratio of (a) attorneys' fees to (b) the amount of relief actually delivered to class members**; and

(iv) any agreement required to be identified under Rule 23(e)(3); ….

The above provision would alert the district court to the most fundamental problem of fairness in class actions: class counsel structuring the settlement so that they receive the lion's share of the actual relief obtained.

B. The Proposed Amendments should also explicitly require district courts to consider whether class counsel failed to adequately represent the class by negotiating self-dealing settlement structures.

In assessing the fairness of a class action settlement, Proposed Amendment Rule 23(e)(2)(A) requires a district court to consider "the class representatives and class counsel have adequately represented the class." *See* Proposed Amendments at 213. This inquiry should not just ask whether the attorneys have zealously prosecuted the litigation, but whether they have disregarded their fiduciary duties by negotiating a settlement that provides preferential treatment to class counsel. *Dry Max Pampers*, 724 F.3d at 717-18; *Pearson*, 772 F.3d 778.

Although a disproportionate fee award is the most fundamental problem of fairness in class action settlements, there are other problematic features of class settlements that "benefit defendants and plaintiffs' lawyers without providing value to class members" including "spurious injunctive relief, nontransferable or non-stackable coupons, unjustified *cy pres* remedies, burdensome or unnecessary claims procedures, reversions, excessively broad releases, expanded class definitions, class representative bonuses, revertible fee funds, and clear sailing agreements." *See* Erichson, *supra*.

Some of these features were identified by the Ninth Circuit in its partial list of warning signs that class counsel had engaged in self-dealing. *In re Bluetooth Headset Prod. Liab. Litig.,* 654 F.3d 935, 947-49 (9th Cir. 2011) (recognizing disproportionate fee awards, clear-sailing and reversion as warning signs of self-dealing settlements). Unfortunately, many courts interpret this list narrowly to hold that these factors are irrelevant if there is no actual collusion or if they are otherwise satisfied with the size of the settlement—even though "clear sailing" clauses, reversion provisions and the other problematic features are inherently tacitly collusive and prejudicial to the class.

1. The Proposed Amendments should explicitly prohibit inclusion of clear-sailing and reversion clauses.

The Proposed Amendments should prohibit, or at the very least warn district courts, against inclusion of clear-sailing and reversion clauses.

Class actions may be negotiated as a common fund structure (where the parties negotiate a single pot of money from which class counsel would later seek fees) or a segregated fee structure

(where the parties negotiate the class benefit first and negotiate the fees later). The segregated fee structure is often sold to the district courts as a "good deal" for the class because defendant is "responsible" for the fees and the payment won't affect class compensation. Courts have debunked the myth that a segregated fee agreement benefits the class:

> Class counsel claim that often they negotiate for the benefits to the members of the class first, selflessly leaving for later any consideration of or negotiation for their award of attorneys' fees. That claim is not realistic. For we know that an economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel. Caring only about his total liability, the defendant will not agree to class benefits so generous that when added to a reasonable attorneys' fee award for class counsel they will render the total cost of settlement unacceptable to the defendant. We invited class counsel to explain how, therefore, negotiating first for class benefits could actually benefit a class, and were left without an answer.

Pearson, 772 F. 3d 778, 786-87 (7th Cir. 2014) (Posner, J.); *cf Bluetooth*, 654 F.3d at 948 (separation of fee negotiations from other settlement negotiations does not demonstrate that a settlement with disproportionate fee proposal is fair).

Where plaintiffs' counsel and defendants are negotiating fees separate from recovery, "[l]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Bluetooth*, 654 F.3 at 847 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)); "Clear-sailing" clauses (where the defendant agrees not to challenge the fee) and "kicker" clauses (where any reduction in the fee award reverts to defendants rather than the class) combine together to insulate fee requests from scrutiny.

Courts have repeatedly held that the reversion to defendant is part of a constructive common fund and reflects money that a defendant would have been willing to pay class members to settle, whether it was negotiated separately or not. *Pearson*, 772 F.3d at 786-87; *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014); *Bluetooth*, 654 F.3d at 948-49; *Johnston*, 83 F.3d at 245-46. "It is the duty of attorneys under fiduciary principles, the law of agency, and the rules of ethics to achieve the best possible results for their clients." *See* Letter to Standing Committee on Ethics and Professional Responsibility from Lester Brickman, et al. (Sept. 17, 2007) at 10-11 ("Ethics Committee Letter");[7] *see also* Lester Brickman, *Lawyer Barons* 522-25 (2011). By structuring a segregated fee structure, class counsel may sacrifice the best possible result and breach their fiduciary duty because of the potential reversion or "kicker" to the defendant if the district court awards less than what the parties had agreed (clear-sailing agreement). *Cf. Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000) ("If … class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class.").

For example, if the settling parties agree to $10 million in fees, but the district court awards only $5 million, the unawarded difference ($5 million) would revert back to the defendant. If the

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[7] *Available at* http://is.gd/BrickmanLetter or https://cardozo.yu.edu/sites/default/files/ABA%20Ethics%20Letter%20September%2017%202007%20Edited(1).pdf.

defendant is willing to pay $10 million, then class counsel—as fiduciaries for the class—should have structured the settlement to capture the unawarded fees for their clients rather than returning to defendant. Negotiating a settlement structure with a reversion is a breach of class counsel's fiduciary duty. As Judge Posner explained, the *Pearson* panel could not "think of a justification for a kicker clause; at the very least there should be a ***strong presumption of its invalidity***." 772 F.3d at 786-87 (emphasis added); *see also* Lester Brickman, LAWYER BARONS 522-25 (2011) (reversionary kicker should be considered *per se* unethical).

When class counsel negotiate settlements with these provisions, they breach their fiduciary duty to the class. These provisions are costing class members millions of dollars, but if they are not explicitly included in the Proposed Amendments, district courts will not appreciate the dangers they pose. As explained above, settling parties' *ex parte* presentation will argue that any previous legal precedents warning of these provisions (e.g., *Bluetooth*, *Pearson*) are superseded by the "core concerns" set forth in Paragraph 23(e)(2)(C). *See* § I.A above.

2. In considering class counsel's adequacy for purposes of assessing settlement fairness, the Proposed Amendments should expressly require district court's to consider class counsel's use of *cy pres* awards.

Class counsel or representatives do not adequately represent the class when class counsel structures a settlement to include *cy pres* awards that prioritize benefits to third parties (including third parties related to class counsel!) over payments to the class. Two appellate courts have endorsed the approach set forth in Section 3.07 of the ALI Principles regarding *cy pres* awards: "A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members." *Pearson*, 772 F.3d at 784 (rejecting $1.13 million cy pres residual when distribution possible to 4.7 million class members); *accord BankAmerica*, 775 F.3d at 1063-64 (rejecting cy pres of $2.7 million residual in lieu of third distribution to class members) (explicitly adopting ALI Principles § 3.07); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011).

It is particularly problematic when class counsel has a preexisting relationship with the recipients of the *cy pres* award. One Academic recently classified "the ugliest *cy pres* settlements" as "those that direct funds to organizations with which class counsel or the judge is affiliated." Erichson, *supra*; *see also Nachshin*, 663 F.3d at 1039 (criticizing *cy pres* where "the selection process may answer to the whims and self interests of the parties [or] their counsel"). For example, in one class settlement where class counsel was scheduled to receive $27 million, *cy pres* was designated to a charity run by class counsel's ex-wife; the conflict was never disclosed to the district court, which approved the settlement. *See In re Chase Bank USA NA "Check Loan" Contract Liti*g., No. 09-md-02032 (N.D. Cal.)). Defendants' pre-existing relationships with *cy pres* recipients present additional problems. When the defendant is already a regular contributor to the proposed *cy pres* recipients, there is no demonstrable value added by the defendant's agreement to give money to that institution. *See Dennis v. Kellogg*, 697 F.3d 858, 867-68 (9th Cir. 2012), 697 F.3d at 867-68. The settling parties will hide such conflicts in their *ex parte* presentation of the settlement unless the Proposed Rules expressly require disclosure of such conflicts and pre-existing relationships.

* * *

The Proposed Amendments should prohibit clear sailing and reversion provisions in class action settlements. At a minimum, however, the Proposed Amendments to Rule 23(e)(2)(A) regarding class counsel's adequacy in analyzing the fairness of a proposed settlement should explicitly consider whether class counsel negotiated some of the problematic self-dealing features and insert the following bolded, underlined language:

> (A) the class representatives and class counsel have adequately represented the class **or whether they negotiated settlement provisions or structures intended to benefit class counsel and not the class including, but not limited to, disproportionate fee awards, clear-sailing and reversion, *cy pres* awards that prioritize relief to third parties rather than class members, and *cy pres* recipients that have preexisting relationships with the parties or their attorneys**;

II. Amendments to Rule 23(e)(5) Will Continue to Permit Settling Parties to Improperly Insulate Self-Dealing Settlements and Will Continue to Permit Bad-Faith Objectors to Receive Objector Blackmail.

Proposed Rule 23(e)(5)(A) requires greater specificity of objections but the new requirements will only create unnecessary collateral litigation over whether objections are "specific" enough and lead to the technical rejection of meritorious objections. And while Proposed Rule 23(e)(5)(B) and (C) are intended to eliminate payments to bad-faith objectors (those who seek only personal gain, i.e., payment in exchange for dismissal of the objection or appeal), these paragraphs will not eliminate payments to bad-faith objectors but could potentially *increase* the practice of extorting money from the settling parties and worse, be used to insulate class counsel's self-dealing settlements.

A. The proposed changes to Paragraph (A) requiring specificity should be deleted because they are unnecessary and will be abused to protect bad settlements, but at a minimum, Paragraph (A) should be revised to require notification, prevent technical rejection of objections, and ensure preservation of objectors' appellate rights.

Proposed Paragraph 23(e)(5)(A) inserts the following (bolded) language:

> **In General**. Any class member may object to the proposal if it requires court approval under this subdivision (e)~~the objection may be withdrawn only with the court's approval.~~ **The objection must state whether it 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**.

See Proposed Amendments at 215-16. This change is unnecessary because district courts and parties already effectively manage non-specific objections. Instead, Paragraph (A) will create unnecessary collateral litigation and will serve as a mechanism for class counsel to eliminate legitimate objections.

1. Paragraph (A) as proposed creates unnecessary collateral litigation that will be abused to protect self-dealing settlements.

The Comments to the Proposed Amendments indicate that the specificity requirement of Paragraph (A) was added "to clarify that objections must provide sufficient specifics to **enable the parties to respond to them and the court to evaluate them**." *See id.* at 228 (emphasis added). Although the supposed reason for the change is to assist the parties and the court, there is no evidence that parties or courts suffer any costs from non-specific objections.

No settlement has ever been derailed by a non-specific objection; courts invariably dismiss them out of hand. District courts can require objectors at the fairness hearing to clarify their objections, or, if the objector cannot provide sufficient specificity beyond "general unfairness," district courts can approve the proposed settlement over the objections. *Int'l Union v. GMC,* 2008 U.S. Dist. LEXIS 92590, *83-84 (E.D. Mich. July 31, 2008) ("In sum, the objections that do not specify any grounds beyond general unfairness provide no basis for rejecting the settlement.") (citing 7B Wright, et al., Fed. Prac. & Proc. § 1797. 1 ("Only clearly presented objections…will be considered.")); *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, No. 71-1335, 1973 U.S. Dist. LEXIS 14862, at *6 (S.D.N.Y. Feb. 20, 1973) (rejecting objections based on "conclusory allegations" of "general unfairness"); *cf. Dennis v. Kellogg*, 697 F.3d 858 (9th Cir. 2012) (holding that district court "must give 'a reasoned response' to all non-frivolous objections").

Because the proposed Paragraph (A) is unnecessary, the only thing the Rules will realize is additional collateral litigation regarding whether objections are sufficiently "specific." The Comments to the Proposed Amendments indicate that "[f]ailure to provide needed specificity may be a basis for rejecting an objection." *See* Proposed Amendments at 229. Rejection of objections—where objectors lose appellate rights—is a draconian measure if the purpose of Proposed Paragraph (A) is to simply help the court and parties discover the actual concerns of vague objections. In practice, Paragraph (A) will be used to provide a means for eliminating objections that get in the way of settling parties' settlements. Settling parties will argue that objections are waived based on failure to satisfy Paragraph (A). Thus, setting aside the underlying merits of the objections, the settling parties and objectors will engage in additional litigation over what level of specificity is required to satisfy Paragraph (A).

Indeed, faced with this new specificity standard, settling parties will interpret the Rules to unduly burden objectors. Settling parties will point to other similar Federal Civil Rules and argue that the specificity requirement is akin to Rule 9's "heightened pleading" requirement of a "specific allegation." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 410 (7th Cir. Ill. 2010) ("The basic requirement for a complaint ('a short and plain statement of the claim showing that the pleader is entitled to relief') is set forth in Rule 8(a)(2) of the Federal Rules of Civil Procedure. Rule 9 requires heightened pleading (that is, a specific allegation) of certain elements in particular cases, such as fraud and special damages."). While it is fundamentally unfair to place a higher burden on absent class members than placed on the named plaintiffs, settling parties will endorse such an interpretation to eliminate objections that potentially block settlement approval. Just as the parties will present a self-interested interpretation of the Rules for approval of a settlement, *see* § I.A above, the settling parties will present a self-interested interpretation of the Rules to protect that settlement.

Rather than taking away the carrot, the Proposed Amendments are giving class counsel a stick to fight against bad-faith objectors. But this stick will also be used against good-faith objectors.

Unlike professional objectors, CCAF does not settle appeals for *quid pro quo* payments and brings objections in good faith to overturn unlawful settlements. While CCAF has won over a dozen landmark decisions, the vast majority of the time, settling parties file briefs in response to CCAF's objections that attempt to lump CCAF in with decisions criticizing so-called "professional objectors," and/or accuse us of filing "boilerplate" because there was overlap in precedents we cited in previous objections.

For example, in *In re Target Corporation Customer Data Security Breach Litigation*, CCAF objected on behalf of an absent class member, arguing that our client was part of an uncertified subclass that had been frozen out of recovery. *Target I,* 14-md-2522, Dkt. 513 (D. Minn.) ("*Target I*"), remanded and vacated in part with appeal pending, No. 15-3912 (8th Cir. Feb. 1, 2017) ("*Target II*"). Despite CCAF's thorough analysis of the claims process and settlement structure, the district court adopted class counsel's characterization that CCAF's objection was "boilerplate" and CCAF was a "professional objector" (though CCAF submitted a declaration proving otherwise), and sanctioned CCAF with an unlawful appeal bond. *Target,* 14-md-2522, Dkts. 645, 701, 713; *Target II*. Good-faith objectors will suffer similar results with increasing frequency if class counsel is armed with the new requirements under Paragraph (A); if nothing else, the rule will raise costs to good-faith objectors faced with collateral litigation over whether the objection was "specific" enough—with the class counsel then using the time on the frivolous motion to strike the objection to burnish their lodestar.

Class counsel will use any means available to insulate their bad settlements on appeal. For example, in *In re Magsafe Apple Power Adapter Litigation*, CCAF objected to a settlement where class counsel received $3 million, but the value of the class relief was unknown. 571 Fed. Appx. 560, 565 (9th Cir. 2014). Class counsel sought appeal bonds of $200,000 per objector and the district court awarded $15,000 per objector. *Id.* at 563. The Ninth Circuit reversed and remanded for consideration under the appropriate legal standards, and was especially critical of the abusive appeal bond. Just like abusive appeal bonds, the Proposed Amendments give class counsel an additional mechanism for blocking appellate review. **Class counsel will utilize Paragraph (A)'s specificity requirements to insulate bad settlements on appeal**.

If class counsel can eliminate objections for technical reasons under Paragraph (A), there is a risk that the merits of those objections will not be considered by the district court or on appeal. Class counsel's self-dealing settlements that are approved at the expense of the class will go unchecked because objectors are divested of their essential role. As Judge Posner recognized when striking down the "selfish deal" the settling parties had negotiated, because of the "acute conflict of interest" between the class and class counsel, "objectors play an essential role in judicial review of proposed settlements of class actions and why judges must be both vigilant and realistic in that review." *Pearson*, 772 F.3d at 787. Preventing review of the merits punishes the class because the class members benefit when the settlement is corrected on review. (Even some of the most-frequently criticized "professional objectors" have obtained success for the class in appeals courts. *E.g., In re Groupon Mktg. & Sales Practices Litigation*, 593 Fed. Appx. 699 (9th Cir. 2015); *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014); *Dennis v. Kellogg*, 697 F.3d 858 (9th Cir. 2012).)

In sum, district courts and parties are already equipped to handle non-specific objections. Rules that require objections to be "specific" will be abused to create an unfair level of burden on legitimate objectors as settling parties encourage courts to shift the goalposts through collateral litigation. Paragraph (A) does nothing to help district courts because it will only burden the district courts with this additional litigation. The Rules will also be used to deprive good- and bad-faith

objectors of their appellate rights and insulate self-dealing settlements from correction on appeal. Accordingly, the proposed Paragraph (A) amendments should be rejected.

2. If Paragraph (A) is adopted as proposed, additional language should be inserted to protect class members including notifying absent class members of the new requirements, preventing technical rejection of objections, and preservation of objector's appellate rights.

If the proposed changed to Paragraph (A) are adopted, at a minimum, additional language should be inserted to protect class members. *First*, the Rules should be amended to require that absent class members be notified in the class notice of the new requirements. Most class members are unaware of the Federal Rules. Requiring class members to comply (or risk rejection of their objections) is fundamentally unfair if absent class members are not notified of the requirements.

Second, Paragraph (A) should be amended to instruct courts not to reject objections for technical failures. The Committee Notes instruct district courts "to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards." *See* Proposed Amendments at 229. As explained above, this instruction will likely be ignored as district courts disregard the Committee Notes when class counsel present a self-interested interpretation of the Rules. *See* § I.A above. Thus, Paragraph (A) must explicitly direct courts that objections should not be rejected for technical deficiencies.

Third, Paragraph (A) should be amended to recognize that failure to satisfy the requirements of Paragraph (A) does not constitute waiver so that objectors may still appeal the district court's order approving the settlement. If a district court finds that the objection was waived (even if the "waiver" was because of an unduly burdensome procedure established for objecting), some courts of appeal hold that the class member lacks standing to appeal without a formal motion to intervene, notwithstanding the Supreme Court's command in *Devlin v. Scardelletti*. *See, e.g., In re Deepwater Horizon*, 739 F.3d 790, 809 (5th Cir. 2014) (dismissing appeal because objector had "forfeited and waived" objections by failing to comply with preliminary approval order); *In re UnitedHealth Group S'holder Derivative Litig.*, 631 F.3d 913, 917 (8th Cir. 2011) (dismissing appeal because objector failed to "file a timely objection pursuant to district court procedure"); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1257-58 (10th Cir. 2004) (dismissing appeal where objector failed to follow proper procedure for filing objection).

* * *

The Proposed Amendments to Rule 23(e)(5)(A) should be deleted, but at a minimum, Paragraph (A) should be revised to protect absent class members by inserting the additional bolded, underlined language:

(A) **In General**. Any class member may object to the proposal if it requires court approval under this subdivision (e)~~the objection may be withdrawn only with the court's approval.~~ The objection must state whether it 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. **The notice to the class must notify class members of the requirements contained in this paragraph. An objector's failure to**

satisfy technical standards is not a basis for dismissal of an objection. An objector does not waive an objection nor any rights to proceed on appeal for failure to meet the requirements of this paragraph.

In the alternative, language requiring that the class notice inform class members of Paragraph (A) could be added to Federal Rule 23(c)(2) regarding notice to the class.

B. Proposed Paragraphs (B) and (C) should be deleted because they will not effectively end extortionate payments to bad-faith objectors; the Rules should be revised to acknowledge that objectors are entitled to attorneys' fees if they demonstrate that the class realized a benefit; and the Rules should be further revised to provide an enforcement mechanism to recover the extortionate payments.

The Proposed Amendments insert the following paragraphs to Rule 23(e)(5):

> (B) Court Approval Required For Payment to an Objector or Objector's Counsel. Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:
>
> (i) forgoing or withdrawing an objection, or
>
> (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.
>
> (C) Procedure For Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

See Proposed Amendments at 216-17. These additional changes will not effectively address the problem of extortionate payments to bad-faith objectors but will make the matters worse by increasing unlawful payments, increasing litigation, and permitting class counsel to insulate self-dealing settlements from correction on appeal. Proposed Paragraphs (B) and (C) should be removed. Instead, the Rules should be revised to encourage good faith objections by explicitly recognizing an objector's entitlement to attorneys' fees if an objector can demonstrate that their objection resulted in a benefit to the class.

1. Paragraphs (B) and (C) should be deleted because rather than effectively ending objector blackmail, the Proposed Amendments will only increase extortionate payments to bad-faith objectors.

Paragraphs (B) and (C) were added to address bad-faith or professional objectors: those who file objections, appeal the settlement approval and then seek extortionate payments from the settling parties in exchange for dismissal of their appeals. The problem is that the status quo of the class action system actually *encourages* professional objectors. The threat of an appeal can be a valuable weapon and objector blackmail can be quite lucrative. Fitzpatrick, Brian T., *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1634, 1637 n.67 (2009). On the other hand, when objectors are

successful and achieve a benefit for the class, their efforts often go uncompensated. *See* § II.B.2 below. Losing an objection and settling on appeal is a much more profitable business model than successfully litigating an objection.

Traditionally, commentators and courts have wrongly focused on creating sticks to combat objector blackmail. *See, e.g.,* Lopatka, John E. & D. Brooks Smith, *Class Action Objectors: What to do About Them?*, 39 Fl. Law Rev. 865, 890-906 (discussing sanctions, prohibiting appeals, and appeal bonds as means for eliminating objector blackmail). But the focus should shift to the carrots. The Rules should eliminate the carrot of bad faith objections (remove the possibility of blackmail on appeal) and establish the carrot for good-faith objections (explicitly require attorneys' fee awards for objections that improve class settlements). The only way to truly end objector blackmail is by taking away the possibility of an extortionate payment on appeal.

While the proposed Rules may be intended to eliminate extortionate payments by requiring court approval, the Rules as drafted will serve only to *legitimize* objector blackmail. After proposed Paragraph (B) is adopted, the motivations of class counsel and the objectors will remain unchanged: class counsel want to eliminate the threat of appeal and the objectors want a payday. (Even if the objection has merit, objectors know that they have a better chance of being paid by settling than by successfully litigating the objection.) Proposed Paragraph (B) requiring court approval does not contain a standard that objectors must satisfy to receive a payment. Without any explicit standard for approval of such a settlement, class counsel and the settling objector need not demonstrate anything beyond the fact that they have settled. Like a class action settlement, class counsel and the settling objector will submit an *ex parte* presentation of their settlement with no adversarial response. *See* § I.A above. Objector blackmail will not change but simply transformed from an undisclosed settlement to a rubber-stamped order. Just as meritless M&A class actions justify attorney fees for $0 settlements with immaterial supplemental disclosures (*In re Walgreen Co. Shareholder Litig.*, 832 F.3d 718 (7th Cir. 2016)), bad-faith objectors colluding with class counsel will claim entitlement to fees for immaterial changes to the settlement website, a modest *cy pres* payment, or even for the right of the objector to opt out and negotiate a separate settlement of his claim. (Though it smacks of a joke about *chutzpah*, we have even seen class counsel claim that a shareholder class benefits simply from the settlement of litigation brought by the class counsel against the defendant corporation. *E.g., Gordon v. Verizon*, 2017 NY Slip Op 742 (N.Y.A.D. 1st Dept. Feb. 2, 2017) (agreeing that this was a benefit meriting settlement approval); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012) (rejecting argument).

Further, the proposed Paragraph (B) will actually *expand* the cottage industry of professional objectors. Currently objector blackmail is not disclosed to the court. But when a settlement between an objector and class counsel or defendants is on the docket and publicly disclosed, other entrepreneurial attorneys will soon catch on. Newcomers to the objector blackmail market will see that they too can file a boilerplate objection with conclusory allegations and be paid to go away.

And worse, class counsel can utilize Paragraph (B) as a mechanism to insulate their self-dealing settlements. While objector blackmail can be costly for class counsel, objector blackmail can *save* class counsel money by preventing their self-dealing settlements from being corrected on appeal. Appellate courts have rejected selfish settlements, knocking down millions of dollars in fees. *See, e.g., In re Baby Products Antitrust Lit.*, 708 F.3d 163 (3d Cir. 2013)(rejecting settlement that paid $14 million attorneys' fees and $3 million to class). Class counsel can protect their settlements by paying off objectors at a fraction of the millions they risk losing. *Cf.* Schmitt, Richard B., *Objecting to Class-Action*

Pacts Can be Lucrative for Attorneys, WALL ST. J., Jan.10, 1997 at B1. If class counsel utilizes proposed Paragraph (B) to insulate their settlements from appeal, class members are robbed of the benefit they would receive from correction on appeal.

The Rules should be revised to eliminate any payments or consideration to an objectors for dismissal of their appeal.

2. The Rules should be revised to explicitly recognize that objectors are entitled to attorneys' fees if they can demonstrate that their objection realized a benefit to the class.

In addition to removing the carrot motivating objector blackmail, the Rules should create a carrot for good faith objections by explicitly recognizing that objectors who realize a benefit for the class are entitled to attorneys' fees. The Comments to Rule 23(h) direct that fees may be awarded to those "whose work produced a beneficial result" including "attorneys who represented objectors." *See* Notes of Advisory Committee on 2003 Amendments to Rule 23. But too often, even when objectors realize a substantial benefit, objectors go uncompensated.

For example, in *Fraley v. Facebook, Inc.*, the district court denied CCAF's request for attorneys' fees where CCAF's objection realized $300,000 for the class. 638 Fed. Appx. 594, 600 (9th Cir. 2016). The district court claimed that it was "commonsense" that fees should be awarded based on net settlement value rather than gross settlement value *Id.* Of course it was not "commonsense" to class counsel who requested fees based on gross settlement value and class counsel suffered no consequence for presenting a fee request that contradicted the "commonsense" approach. In his dissenting opinion, Judge Bea explained: "[O]bjectors must decide whether to object without knowing what objections may be moot because they have already occurred to the judge." *Id.* (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002)).

Another way objectors are shortchanged is when the judge argues that an objector's time should be sliced apart to award fees for arguments adopted by the court. For example, in *In re Transpacific Passenger Air Transportation Antitrust Litigation*, the district court reduced class counsel's request for attorneys' fees and expenses by over $5.1 million, for the benefit of the class. 2015 U.S. Dist. LEXIS 106943, *13-14, No. 3:07-cv-05634-CRB (N.D. Cal.), *pending appeal*, No. 15-16280 (9th Cir.). Despite the benefit CCAF's objection created, class counsel argued that the district court should reduce CCAF's fee request to solely the lodestar CCAF spent on the issues adopted by the court. Such a reduction is arbitrary as it is unreasonable to allocate time spent to various issues. Much of the time of objection is spent analyzing the settlement, engaging in the compliance costs of confirming and documenting class membership to have standing to object, and preparing for the fairness hearing; to say that only a page of the objection made a difference to the class and the attorneys should only be compensated for the time spent on that page misunderstands the nature of proximate cause. It is also inequitable to hold objectors to a different standard than class counsel. Courts do not dissect class counsel's lodestar to assign values to their success in litigating the separate claims or issues. If class counsel is concerned that "obvious" objections may result in disproportionate payout to successful objectors, the solution is to avoid settlements and fee requests that have obviously objectionable issues.

While CCAF does not bring objections to earn fees, CCAF's fee requests are often denied or reduced; despite CCAF's unprecedented success in improving class-action settlements in dozens of

cases, and despite CCAF paying non-profit level salaries a fraction of what our attorneys could be making in private practice, fee awards fund only a small fraction of CCAF's expenses. Under the status quo, no objector is incentivized to litigate a good-faith objection because they risk receiving nothing (or being nickel-and-dimed) when they could simply receive a payment to dismiss an appeal with a fraction of the work. The Rules should be revised to explicitly recognize that objectors are entitled to attorneys' fees when they realize a material benefit for the class.

Further, requiring objectors to demonstrate a material benefit also prevents objectors and class counsel from settling objections based on illusory relief, e.g., that objector is providing a benefit to the class by "getting out of the way" or that objector somehow created a benefit by a 10-word immaterial change to the class notice.

***

The Proposed Amendments to Rule 23(e)(5)(B) & (C) should be revised to eliminate the ability of objectors to dismiss their appeal for consideration by the settling parties and should include the additional bolded, underlined language recognizing an objector's entitlement to fees:

> (B) Court Approval Required For Payment to an Objector or Objector's Counsel. **<u>The court may approve an objector's request for an award of reasonable attorney's fees and nontaxable costs after a hearing and on a finding that the objection realized a material benefit for the class. An objector may not receive payment or consideration in connection with:</u>**
>
> ~~agreement. The following procedures apply: Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:~~
>
> (i) forgoing or withdrawing an objection, or
>
> (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.
>
> (C) Procedure For Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

3. The Proposed Amendments should identify an enforcement mechanism for failure to satisfy Paragraphs (B) and (C).

If Paragraphs (B) and (C) are adopted, the Rules should further be amended to provide an enforcement mechanism for failure to obtain court approval: disgorgement. Disgorgement is an equitable remedy within the inherent power of the court. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) ("unless otherwise explicitly restricted by statute, District Courts may exercise all inherent equitable powers to fashion relief, including ordering the payment of money."). The Rules should permit disgorgement of objector-appellants' profit from misuse of the class action process to extract private gain. "The object of restitution [in the disgorgement context] . . . is to eliminate profit

from wrongdoing while avoiding, so far as possible, the imposition of a penalty." Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (2010).

Courts have rightly criticized the appellate settlements where objectors "get paid to go away" because such payments "benefit only the [objectors] at the expense of all other parties to the litigation." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). All class action payments ultimately derive from resolution of the underlying claims. *Pearson*, 772 F.3d at 786 (defendant cares only about total liability). The Rules should provide for a means of recouping any consideration objectors receive for dismissing their appeal in contradiction of Paragraphs (B) and (C).

***

The Proposed Amendments insert the following paragraphs to Rule 23(e)(5):

> **(D) Enforcement. Any party or class member may initiate an action to enforce Paragraph (B) and (C) by filing a motion for disgorgement of any consideration received by an objector in connection with foregoing or dismissing an objection or appeal**.

TAB 8

COMMENT OF

RICHARD SIMMONS OF ANALYTICS

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February 15, 2017

To: The Advisory Committee on Civil Rules of the Judicial Conference of the United States and Members of the Rule 23 Subcommittee

Re: **Comment on Proposed Amendments to Rule 23 Regarding Class Notice**

Dear Committee and Subcommittee Members:

I am writing to you regarding the proposed amendments to Rule 23 as they relate to "Notice by Electronic Means".

As an active class action consultant with over 26 years of experience designing and implementing class notification and claims programs[1], the use of digital notice, where appropriate, is common practice. As noted by other experts submitting comments regarding these proposed amendments, courts have increasingly approved the usage of digital forms of notice (especially email and internet banner advertisements).

Summary

Digital notice provides fundamentally different opportunities and challenges than traditional notice. Existing practices, rules, and guidance that have been used to evaluate whether or not a notice program provides the "best practicable" notice are still necessary – but are **no longer sufficient** to address the complexities of digital media. The lack of clear standards associated with digital notice raise concerns that notice programs will be proposed and approved that diminish the ability for class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims.

To address evolving methods of providing notice (both now and in the future), the rules and draft advisory committee notes should be modified to recommend that courts take account not only the likelihood that members of a class receive a message when delivered by a certain mechanism, but

[1] My biography is attached as **Exhibit A**.

also the extent to which members of a class are likely to act in response to messages delivered by different means.

Data Regarding the Effectiveness of Class Notice

The best sources of data regarding effectiveness of various forms of notice are the notice and claims administrators that implement them. This data is frequently reported on in affidavits and declarations, but more often than not the details and mechanics are outside the scope of this process. They key elements being reported on include the fact that the best practicable notice was proposed – and then was provided as designed without omission or incident. Consequently, most data are not publicly available.

In 2016, the Federal Trade Commission issued 6(b) Orders to class action claims administrators requesting data regarding various forms of notice. What this data will show is unknown, but to the best of my knowledge this will be the first independent analysis of the effectiveness of alternate forms of class notice.

In writing this letter, I draw upon my own experiences and have attempted to generalize them to provide some insight into the factors that influence class member participation. These statements will be generally true, but there will be special cases and counter-examples. When representations are made regarding the effectiveness of alternate forms of notice based on a single matter (rather than from repeatable events) - they should be treated as special cases and with some skepticism.

Best Practicable "Traditional" Notice

With traditional forms of notice – the standard for providing class members with the "best notice practicable" was straightforward[2]. If the identities of class members were known, they received a mailed notice (and claim form if necessary). If the identities of class members were unknown, a media campaign targeting class members was conducted. As one appellate court summarized it - "It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements to class members of both Fed. R. Civ. P. 23(c) and the due process clause."[3]

This notice process contains four elements that drive class member education and participation:

1. The notice must effectively reach the class;
2. The notice must come to the attention of the class (designed to be "noticed");
3. The notice should be informative and easy to understand; and,
4. All of the rights and options should be easy to act on.

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[2] See, for example, the Federal Judicial Center's "*Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*" (2010).
[3] Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985).

The qualitative standards outlined above are inherent in the design of a traditional notice campaign. Once incorporated in the design, they are provided at little to no cost to the class. These standards being met, the metrics for evaluating class notice have so that the "best practicable" notice is the notice that:

1. reaches a minimum acceptable percentage of class members (ensuring due process); and,
2. is provided at the lowest possible cost (protecting class member funds).

Missing from these criteria are any consideration for the stated goals of the rule amendments:

> *The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims.*

Under these metrics, the following forms of notice could be considered interchangeable:

- A mailed notice and claim form
- A postcard notice
- An emailed notice
- A text message with the link to the notice
- A single appearance of a notice in a magazine or newspaper; and,
- A single banner advertisement on a website.

Based upon information produced outside the context of discussions regarding these amendments, is this true?

Direct Notice: Form Impacts Participation

The form of notice has a direct impact on participation rates in class action settlements. Put another way, communicating the same settlement information *via* different media or formats results in different participation rates. This is consistent with a marketing piece produced by a competitor (and still being used in December 2016):

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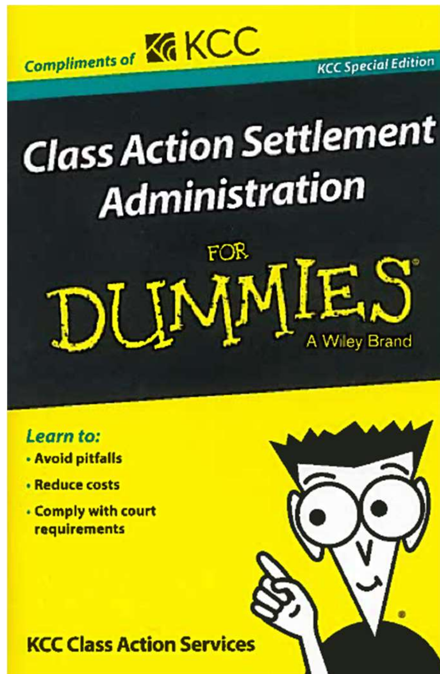
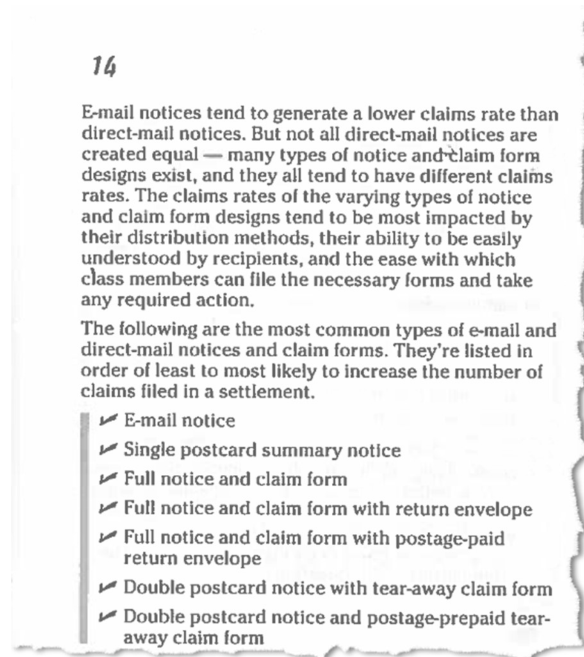




14

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

Current Criteria are Necessary, But Not Sufficient

Out of tradition, the criteria being used to evaluate "traditional notice" is applied without regard for opportunities and challenges that digital notice provides. From a market perspective, the "best practicable" notice is notice that is provided at the lowest possible cost (protecting class member funds) that:

1. effectively reached the class (ensuring due process).

With "traditional notice", the three additional criteria outlined in the FJC checklist are not empirically measurable – are included by tradition - and are provided at little to no additional cost:

2. The notices must come to the attention of the class (designed to be "noticed");
3. The notice should be informative and easy to understand; and,
4. All of the rights and options should be easy to act on.

With digital media, the last three criteria are driven by data, are conscious decisions, and carry additional expense. Driven by economics – and a judicial focus on a single metric (the percentage of class members receiving an opportunity to view a notice) - market forces lead to the lowest cost notice regardless of any other considerations.

Without an analysis of the last three criteria, the following programs are indistinguishable:

- a notice and claims program that meets the initial metric and provides the highest likelihood of a class member making "informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims"
- a notice and claims program that meets the initial metric but is designed to discourage or minimize the likelihood of a class member taking those same actions.

Digital notice provides both the opportunity – based on data – to maximize class member engagement. It also provides, more nefariously, the opportunity to minimize class member engagement and interaction with a settlement in ways that are readily apparent under casual review.

Why Digital is Different

Digital notice is fundamentally different from traditional notice because of: 1) the limitless ways that it can be targeted, calibrated, limited, or expanded; and 2) because of the data that it can provide regarding how recipients interact with the notice materials.

Know-Nothing Notice

There is one school of thought that states that digital capabilities should be ignored. A notice plan is designed, implemented as proposed, and reported on. While information regarding how a program performed is interesting, it is not necessary to the process (or could be used to impugn the notice that was provided). Better alternatives may exist, but they are irrelevant to the process. Testimony regarding notice programs that reflect this school of thought are characterized by a lack of information about how the notice program actually performed. Depending upon the specifics of the notice program, the **questions that aren't asked or answered** include, for example:

- How many emails were opened?
- How many links were clicked?
- What websites did the notice actually appear on (as opposed to what network of sites)?
- Of those individuals who visited the settlement website, how many submitted claims?

Analysis Driven Notice

The second school of thought is that the transformative nature of digital media needs to be embraced. A notice plan should be designed, <u>and subject to the constraints of due process</u>, allow for specifics to vary depending upon the how class members actually respond to the notice. Of the available options, this seeks out alternatives that are empirically provable to have superior performance. Testimony regarding notice programs that reflect this school of thought are characterized by the analysis of how the notice program actually performed. Depending upon the specifics of the notice program, issues that could be examined include:

- Keeping the content of the notice the same, do different email subject lines increase class member responsiveness to information regarding the settlement?

- Keeping the content of the notice the same, does changing the format of the information increase class member responsiveness to information regarding the settlement?
- Are there some websites where the notice appears, but class members ignore the advertisements (relative to other web properties)?
- What can be done to decrease the abandon rate – the rate at which class members either don't complete on-line claims, or the rate at which they visit a settlement website and don't submit a claim,

The difference between these two approaches is best demonstrated by the divergence – driven by market forces – between programs designed to retain mass tort clients (and assist them in securing their rights) and programs designed to inform class members of the existence of a settlement:

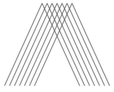
- **Mass Tort**: Market forces, competition between firms, and ethics constraints result in sophisticated campaigns built around e-commerce best practices – including placement of advertisements, website design, and sophisticated response mechanisms. The ultimate metric relied upon by market participants is return on investment.
- **Class Action**: Market forces and legal constraints can result in campaigns designed around the lowest cost per class member without regard for class member participation. Without consideration of effectiveness – the metric relied upon by market participants is percentage of class members reached.

Because of this, the rules and guidance should be modified to ensure that: 1) the notice and method of processing class-member claims, if required, is the best method that is practicable under the circumstances; and 2) that courts should take account the extent to which members of a particular class are likely to take action in response to messages delivered by different means.

"Best Practicable Notice" by Electronic Means

Issues associated with defining and providing the "best practicable notice" are shown in the attached examples. These issues are generally associated with two factors: the willingness to collect information performance (as noted above) and the increased expenses associated with implementing the best practicable notice:

- **Availability of Information**: The mechanisms outlined below require collecting and acting on information regarding the internal performance of a notice campaign: determining what works, what doesn't work, and then modifying the program to accommodate the new evidence. This approach – standard in e-commerce – means that you identify what plans don't perform as intended and then correct them.
- **Increased Expenses**: The mechanisms outlined below require active management of a notice campaign and occasionally changes the scope of the campaign or supplemental notice – all of which often comes at an additional expense - which is allowed but not required unless you take into consideration the extent to which members of a class are likely take action in response to messages delivered by different means.



As shown in the attached examples – the same message regarding the same settlement delivered in different formats – can have profound impacts on class member participation – in some cases increasing them by a factor of 2x to 4x.

While a certain approach may be the least expensive alternative – or provide fewer challenges regarding implementation – it may not be the "best" notice practicable.

Conclusion

As noted above, if the objective of the amendments is to maintain or expand class member engagement in the notice and settlement process, the amendments and supporting notes are necessary **but no longer sufficient** with the advent of digital notice campaigns.

Sincerely,

Richard W. Simmons

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Email Notice

Emailed notices are proposed as a one-to-one replacement for direct mailed notice. The economic incentives driving this is straightforward: emails are essentially free while the first-class postage for a mailed notice will range from $0.25 (postcard) to $0.40.

What distinguishes email notice from direct mailed notice is the availability of information regarding what a class member actually did with the notice. Using commercially available systems, the following data are obtainable regarding events in the "lifecycle" of an email notice:

- Whether or not the email is delivered (either "bounces" or is rejected);
- Whether or not (with certainty) images are displayed in an email;
- Whether or not (with a high degree of certainty) an email is opened; and,
- Whether or not (with certainty) the links to a website in an email are clicked.

A/B Testing

Unlike traditional mailed notice, email provides us with the opportunity to test email content and subject lines to determine which emails perform the "best" – as measured by percentage of recipients either opening the email or clicking through to the website. This "A/B" testing is commonly employed in e-commerce to ensure that the "best" marketing message is delivered. A sample of class members can receive alternate forms of the notice (all complying with legal standards), but the "best" notice is distributed to all class members.

Based upon my experience, and proven out by A/B testing, a change as simple as inserting a "Submit Your Claim" button in an email can improve the rate at which class members participate in the settlement. In the example below, presented with the same information, the rate at which class members opened the notice **increased by 170%,** the rate at which they "clicked through" to the settlement website **increased by 380%.**

Traditional Format

Gogo Class Action Settlement
Sent: Tuesday, December 22, 2015 at 4:33 PM
To: Richard W. Simmons

Class Action Settlement Notice

If you purchased Gogo in-flight Internet service you may be entitled to benefits from a class action settlement.

To submit a Claim Form on-line, click here and enter the following Class Member ID: TESTID

For more information, visit www.gogoclassactionsettlement.com.

WHAT IS THIS CASE ABOUT? The case alleges that customers who purchased a monthly pass to Gogo in-flight Internet service were charged recurring monthly fees without being provided adequate disclosures by Gogo. The defendants in the case, Gogo LLC and Gogo Inc., deny all liability.

WHO IS INCLUDED? You may be eligible to receive benefits if:

1. you subscribed to a Gogo in-flight service Monthly Pass between April 1, 2010 and December 31, 2012, but only used the Gogo Service during the first month of your Subscription Period; or
2. you subscribed to a Gogo in-flight service Monthly Pass between January 1, 2013 and March 31, 2015 but only used the Gogo Service during the first month of your Subscription Period.

WHAT DOES THE SETTLEMENT PROVIDE? Class Members who submit a valid claim and are eligible for settlement benefits will receive compensation in the form of one or more Gogo Passes. If you are an Eligible Class Member and purchased a Monthly Pass from Gogo between April 1, 2010 and December 31, 2012, but only used the service during the first month of the subscription, you could receive one of the following forms of compensation:

- if you had 1 to 4 months of unused Gogo Service, you will receive 1 One-Day Pass.

"Best" Format

Gogo Class Action Settlement
Sent: Tuesday, January 12, 2016 at 2:23 PM
To: Richard W. Simmons

Email not displaying correctly? View it in your browser.

Class Action Settlement Notice

If you purchased Gogo in-flight Internet service you may be entitled to benefits from a class action settlement.

To submit a Claim Form on-line, click here and enter the following Class Member ID: [%GogoClassMemberID%]

Submit Your Claim

For more information, visit www.gogoclassactionsettlement.com.

WHAT IS THIS CASE ABOUT? The case alleges that customers who purchased a monthly pass to Gogo in-flight Internet service were charged recurring monthly fees without being provided adequate disclosures by Gogo. The defendants in the case, Gogo LLC and Gogo Inc., deny all liability.

WHO IS INCLUDED? You may be eligible to receive benefits if:

1. you subscribed to a Gogo in-flight service Monthly Pass between April 1, 2010 and December 31, 2012, but only used the Gogo Service during the first month of your Subscription Period; or
2. you subscribed to a Gogo in-flight service Monthly Pass between January 1, 2013 and March 31, 2015 but only used the Gogo Service during the first month of your Subscription Period.

WHAT DOES THE SETTLEMENT PROVIDE? Class Members who submit a valid claim and are eligible for settlement benefits will receive compensation in the form of one or more Gogo Passes. If you are an Eligible Class Member and purchased a Monthly Pass from Gogo between April 1, 2010 and December 31, 2012, but only used the service during the first month of the subscription, you could receive one of the following forms of compensation:

Both emails met the standard of providing adequate notice – and both contained the same content - but one had substantially higher class member engagement rates:

- If the likelihood class members take action in response to messages is not considered, then either provide adequate notice.
- If the likelihood class members take action in response to messages ***is*** considered, then only the improved format provides adequate notice.

If you do not test the content of email notice - or rely upon e-commerce best practices – how do you know that you provided the "best practicable" notice?

Note: This directly addresses Major Checklist Item 2: "Will the notices come to the attention of the class?" In this example, the degree to which the notices come to the attention of the class is empirically verifiable and testable. This is consistent with e-commerce practices.

Supplmental Notices

As noted above, it is possible to know who opens an email notice (with a high degree of certainty) and who clicks on links within an email notice (with certainty). To the degree that a class member receives an email notice, views its contents (or visits the settlement website), and chooses not to act, the best notice possible was provided.

In the instances where my firm has either: 1) provided both email and mailed notice to all class members; or, 2) provided email notice to all class members for whom an email address was available and then mailed notice if the email bounces or it could not be shown that the class member opened the email, the participation rate was higher than either a mailed-only program or an email-only program.

If there is a policy preference for class member participation – what do you do with class members where you know that they didn't open the initial email?

Note: This directly addresses Major Checklist Item 2: "***Will notice effectively reach the class?***" In this example, whether or not the email notice is opened is known with certainty. This is consistent with e-commerce practices.

Banner Advertisements

Banner advertisements are historically treated as a replacement for published notice. What distinguishes banner advertisements from notices printed in magazines or newspapers is the availability of information regarding what a class member actually did with the notice. Using commercially available systems, the following data are knowable regarding events in the "lifecycle" of a banner advertisement:

- Whether or not the viewer clicked on the advertisement; and,
- Whether or not the viewer who clicked on the advertisement submitted a claim.

Banner advertisements can be managed with regard to performance. This can occur in one of three ways: 1) determining where advertisements are run; 2) limiting the number of times an individual has the opportunity to see a notice; and, 3) analyzing the content of the notice with respect to class member reaction[4].

Website Selection

From an implementation perspective, using standard e-commerce tools it is possible to not only target specific audience, but also to manager the placement of the advertisement with respect to the sites on which they appear. The process of selecting websites on which a digital notice appears occurs on a spectrum of strategies.

- **Run of Network or Remnant**: At one end of the spectrum, advertisements can appear on a network of sites targeting an audience. You have no information regarding on what websites the notice appeared. This approach provides the lowest cost advertisements, but forgoes any possibility of managing the notice campaign.
- **Direct Purchases**: Advertisements appear on known sites and networks targeting an audience. You know where notices appeared, and have the ability modify the program in response to class members propensity to click on the notice. This approach costs more, but allows for the possibility of managing the notice campaign
- **Big Data Targeting:** At the far end of the spectrum, third party data regarding offline – real world purchases is used to target consumers who purchased relevant products. In general, this is the most expensive, but highly targeted, form of digital notice

Constrained by the need to provide notice targeted to class members, ads can be placed on properties where class members are likely to respond. When advertising placements are managed properly, we have seen click through rates **increase by 100%**.

It can be argued that all three strategies meet the standard of providing adequate notice – but do so at different costs. If there is a policy preference for class member participation – and you do not

[4] This analysis necessarily oversimplifies the process of implementing a digital notice campaign.

manage the advertisements with respect to response - how do you know that you provided the "best practicable" notice?

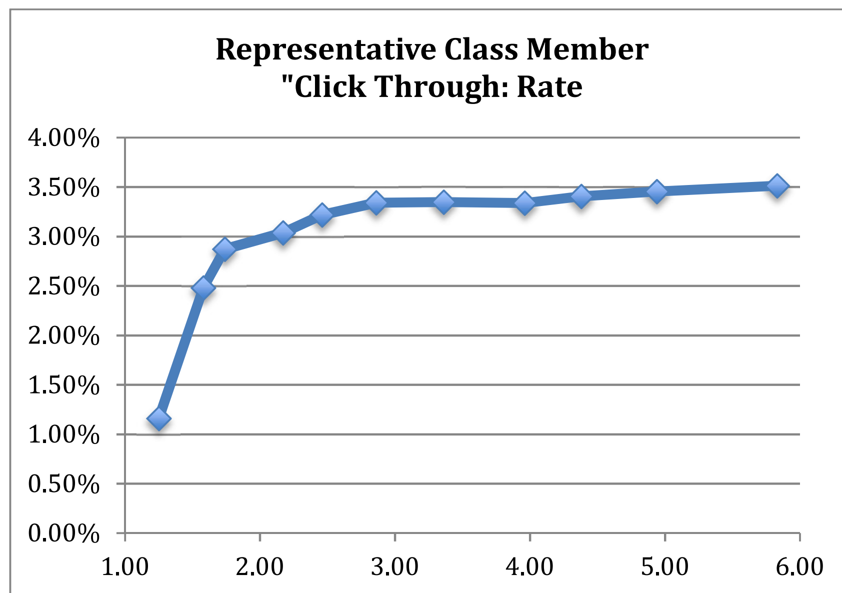
Note: This directly addresses Major Checklist Item 2: "***Will the notices come to the attention of the class?***" In this example, notices can be unmanaged – or managed to appear on websites where class members will respond to the advertisement. This is consistent with e-commerce practices.

How Many Advertisements are Displayed?

As a standard e-commerce tactic to prevent consumers from being overwhelmed by an advertisement, digital campaigns implement "frequency caps" to control the number of times an ad is displayed to an individual. This allows advertisers to optimize website visitors' opportunities to see an ad, but not ''waste'' repeated advertisements on a single individual while neglecting others.

In some notice campaigns, efforts are made to limit class members opportunity to see an advertisement to a single time. Assuming this can be done, the economic incentive is to provide the widest possible distribution of notice. Digital notice campaigns are, generally speaking, linearly more expensive. Decreasing program from a frequency cap of 2 to a frequency cap of 1 eliminates 66% of the notice expense. This is in spite of evidence – from both e-commerce and legal notice programs - that a single exposure limits the likelihood that a class member will click on the advertisement.

Data from a relatively recent campaign show the diminishing returns to the number of times and individual is exposed to a notice:



It has been argued that all levels of digital exposure to a notice meet the standard of providing adequate notice – but do so at different costs.

If there is a policy preference for class member participation – and the percentage of the class that is exposed to an advertisement is "literally true" but capped so as to limit participation – is what was provided the "best practicable" notice?

If there is a policy preference for class member participation – and class members are exponentially more likely to respond to an advertisement if they see it multiple times, should that be the standard?

Note: This directly addresses Major Checklist Item 2: "***Will the notices come to the attention of the class?***" In this example, the frequency which advertisements are displayed to class members can adjusted to limit, or increase, the degree to which they come to the attention of the class. This is consistent with e-commerce practices.

A/B Testing of Notices

As with email notice, different versions of a digital notice (each containing legally sufficient content) can have different response rates. In practice, we have **seen some advertisements perform 60% better than others**. Changing ad sizes, word selection, and including a court logo on the advertisement are all examples of changes that influence change response rates and engagement.

If there is a policy preference for class member participation – and you do not test the advertisements - how do you know that you provided the "best practicable" notice?

Note: This directly addresses Major Checklist Item 2: "***Will the notices come to the attention of the class?***" In this example, the degree to which the banner advertisements come to the attention of the class is empirically verifiable and testable. This is consistent with e-commerce practices.

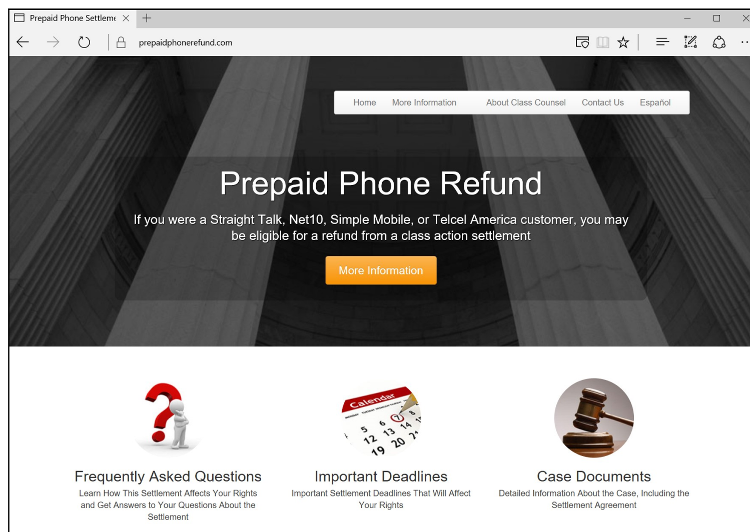
Settlement Website

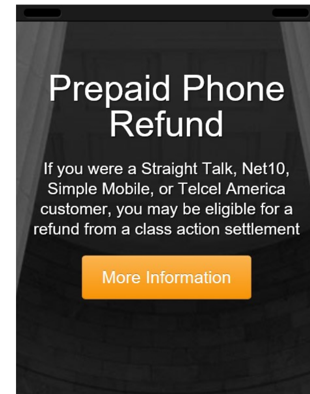
A settlement website is an extension of a notice campaign and is frequently the class members' portal to making regarding whether or not to take action regarding a settlement. The structure of a settlement website directly impact participation in a settlement.

Using commercially available – and free – systems data is easily knowable regarding how class members interact with a settlement website, the documents that they choose to read, and whether they submit a claim.

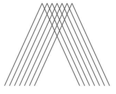
By structuring a settlement website around the consumer experience – with clear and conspicuous calls to action that are viewable on multiple devices (computers, tablets, or phones) **consumer participation in settlements can increase by up to 300%** among those who visit the settlement website. This mirrors e-commerce practices and as well as marketing techniques adopted by technically savvy law firms.

Desktop | **SmartPhone**





Note: This directly addresses Major Checklist Item 3: "***Are all of the rights and options easy to act upon***?" In this example, the degree to which the settlement website itself is a barrier to participation is empirically verifiable and testable. Ease of use results in higher participation rates. This is consistent with e-commerce practices.



ANALYTICS

Exhibit A

ANALYT_ICS

Richard W. Simmons

BIOGRAPHY

Richard W. Simmons is the President of Analytics Consulting LLC[1]. Mr. Simmons joined Analytics in 1990, and has more than 26 years of experience developing and implementing class action communications and settlement programs in more than 1,000 separate settlements.

Mr. Simmons' first legal notice consulting engagement was the *Schwan's Salmonella Litigation* settlement (*In Re: Salmonella Litigation*, Case No. 94-cv-016304 (D. Minn.)). Since then, he has:

- Developed and implemented notice campaigns ranging in size up to 45 million known class members (and 180 million unknown class members);
- Testified regarding legal notice in building products, civil rights, consumer products, environmental pollution, privacy, and securities litigation settlements;
- Managed claims processes for settlement funds ranging up to $1 billion in value.

As part of Analytics' ongoing class action notice consulting practice, Mr. Simmons has:

- testified regarding the adequacy of notice procedures in direct notice cases (including the development of class member databases);
- testified regarding the adequacy of published notice plans;
- been appointed as a Distribution Fund Administrator by the Securities and Exchange Commission tasked with developing Distribution Plans for court approval;
- been retained as an expert by the Federal Trade Commission to testify regarding the effectiveness of competing notice plans and procedures

In addition to his class action consulting work, Mr. Simmons has taught a college course in antitrust economics, was a guest lecturer at the University of Minnesota Law School on issues of statistical and economic analysis, was a charter member of the American Academy of Economic and Financial Experts, and was a former referee for the Journal of Legal Economics (reviewing and critiquing peer reviewed articles on the application of economic and statistical analysis to legal issues). Mr. Simmons is a published author on the subject of damage analysis in Rule 10b-5 securities litigation.

Mr. Simmons graduated from St. Olaf College with a B.A. in Economics, pursued a PhD. in Applied Economics (with a concentration on consumer/behavioral economics) at the University of Minnesota[2], and has received formal media planning training from New York University.

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[1] In October 2013, Analytics Consulting LLC acquired Analytics Incorporated (d/b/a BMC Group Class Action Services ("BMC Group")). I was formerly the President/Managing Director of BMC Group. References to Analytics herein include the prior legal entities.

[2] Mr. Simmons suspended work on his dissertation to acquire and manage Analytics.

APPLICATION OF TECHNOLOGY TO CLASS ACTION SETTLEMENTS

Mr. Simmons has been a visionary in the application of the Internet to class action notice campaigns and the management of settlements:

- In 1995, Mr. Simmons was the first in the nation to support class action settlements with an online presence, that included the ability to check online, the status of their claims.
- In 2000, Mr. Simmons invented online claims submission in class action litigation, filing a patent application governing *“Method and system for assembling databases in multiple-party proceedings”* US20010034731 A1.
- In 2002, Mr. Simmons established an online clearinghouse for class action settlements that provided the public with information regarding class action settlements and provided them with the ability to register for notification of new settlements. This clearinghouse received national press attention as a resource for class action settlements.
- From 2003 through 2013, Analytics’ incremental changes in Internet support included class member verification of eligibility, locater services that identified retail outlets that sold contaminated products, secure document repositories, and multi-language support.
- In 2014, Mr. Simmons was the first to utilize and testify regarding product based targeting in an online legal notice campaign
- In 2014, Analytics, under Mr. Simmons’ leadership, released the first class action settlement support site developed under e-commerce best practices.

SPEAKER/EXPERT PANELIST/PRESENTER

Mr. Simmons has presented to panels of judges and lawyers on issues regarding class notice, claims processing, and disbursement:

- Mr. Simmons served as a panelist for the Francis McGovern Conferences on “Distribution of Securities Litigation Settlements: Improving the Process”, at which regulators, judges, custodians, academics, practitioners and claims administrators participated.
- In 2011, Mr. Simmons was a panelist at the Federal Judicial Center’s workshop/meetings regarding class action notice and settlement administration.
- In 2014, Mr. Simmons was invited to be interviewed by the Consumer Financial Protection Bureau as an expert on notice and claims administration in class action litigation as part of their study on arbitration and consumer class litigation waivers
- In 2016, Mr. Simmons presented results of research regarding the impact of forms of notice on fund participation rates to the Federal Trade Commission.

Mr. Simmons’ speaking engagements regarding class notice include:

- C*lass Action Administration: Data and Technology*, presented by Richard Simmons, Harris Martin Target Data Breach Conference in San Diego (2014);

- *Developments in Legal Notice*, accredited CLE Program, presented by Richard Simmons and Christian Clapp at at Susman Godfrey in Dallas (2014)
- *Developments in Legal Notice*, accredited CLE Program, presented by Richard Simmons and Christian Clapp at Shook Hardy & Bacon, LLP in Kansas City (2013),
- *Developments in Legal Notice*, accredited CLE Program, presented by Richard Simmons and Christian Clapp at Halunen & Associates in Minneapolis (2013),
- *Class Actions 101: Best Practices and Potential Pitfalls in Providing Class Notice*, CLE Program, presented by Brian Christensen, Gina Intrepido, and Richard Simmons, to the Kansas Bar Association (March 2009).

Mr. Simmons' writings regarding class notice include:

- Co-Author with Christian Clapp, Crafting Digital Class Notices That Actually Provide Notice **-** Law360.com, New York (March 10, 2016).

JUDICIAL COMMENTS AND LEGAL NOTICE CASES

In evaluating the adequacy and effectiveness of Mr. Simmons' notice campaigns, courts have repeatedly recognized Mr. Simmons' work. The following excerpts provide recent examples of such judicial approval in matters where the primary issue was the provision of class notice.

Judge Edward J. Davila*, **In re: Google Referrer Header Privacy Litigation** (March 31, 2015), 10-04809 (N.D. CA):*

> *On the issue of appropriate notice, the court previously recognized the uniqueness of the class asserted in this case, since it could potentially cover most internet users in the United States. On that ground, the court approved the proposed notice plan involving four media channels: (1) internet-based notice using paid banner ads targeted at potential class members (in English and in Spanish on Spanish-language websites); (2) notice via "earned media" or, in other words, through articles in the press; (3) a website decided solely to the settlement (in English and Spanish versions); and (4) a toll-free telephone number where class members can obtain additional information and request a class notice. In addition, the court approved the content and appearance of the class notice and related forms as consistent with Rule 23(c)(2)(B).*
>
> *The court again finds that the notice plan and class notices are consistent with Rule 23, and that the plan has been fully and properly implemented by the parties and the class administrator.*

Judge Terrence F. McVerry, ***Kobylanski, et al. v. Motorola Mobility, Inc.,*** *et al.* (October 9, 2014), 13-01181 (W.D. PA):

> *The Court finds that the distribution of the Notice to Class Members Re: Pendency of Class Action, as provided for in the Order Granting Preliminary Approval for the Settlement, constituted the best notice practicable under the circumstances to all Persons within the definition of the Class and fully met the requirements of due process under the United States Constitution.*

Judge Marco Roldan, ***Mary Plubell v. Merck & Co*** (March 15, 2013), 04CV235817-01 (Jackson County, MO):

> *Under the circumstances, the notice this Settlement provided to Class Members in accordance with the Notice Order was the best notice practicable the proceedings and matters set forth therein, including the proposed Settlement, to all Persons entitled to such notice, and said notice fully satisfied the requirements due process and Missouri law.*

Judge James P. Kleinberg, ***Janet Skold, et al. v. Intel Corporation, et al.*** (March 14, 2013) 05-CV-039231 (County of Santa Clara, CA)*:*

> *The Court finds that Plaintiff's proposed Notice plan has a reasonable chance of reaching a substantial percentage of class members.*

Judge Thomas N. O'Neill, Jr., ***In Re: CertainTeed Fiber Cement Siding Litigation*** (March 20, 2014), MDL Docket No. 2270 (E.D. PA):

> *Settlement class members were provided with notice of the settlement in the manner and form set forth in the settlement agreement… Notice was also provided to pertinent state and federal officials… The notice plan was reasonably calculated to give actual notice to settlement class members of their right to receive benefits from the settlement or to be excluded from the settlement or object to the settlement. The notice plan met the requirements of Rule 23 and due process.*

Judge Robert G. Gettleman, ***In Re Aftermarket Filters Antitrust Litigation*** *(October 25, 2012),* MDL Docket No. 1957 (N.D. IL):

> *Due and adequate notice of the Settlement was provided to the Class… The manner of giving notice provided in this case fully satisfies the requirements of Federal Rule of Civil Procedure 23 and due process, constitutes the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons entitled thereto. A full and fair opportunity was provided to the members of the Class to be heard regarding the Settlements*

Judge J. Phil Gilbert, ***Greenville IL, et al. v. Syngenta Crop Protection, Inc. et al.*** *(October 23, 2012), 10-00188 (S.D. IL):*

> *The Notice provided to the Class fully complied with Rule 23, was the best notice practicable, satisfied all constitutional due process requirements, and provides the Court with jurisdiction over the Class Members. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177-78 (1974); Phillips Petroleum v. Shutts, 472 U.S. 797 (1985).*

ANALYTICS

Partial List of Legal Notification and Settlement Administration Experience

Antitrust	*All Star Carts and Vehicles, Inc., et al. v. BFI Canada Income Fund, et al.* 08-CV-1816 (E.D. NY)
	In Re: Aftermarket Filters Antitrust Litigation No. 1:08-cv-4883, MDL No. 1957 (N.D. Ill.)
	In Re: Aluminum Phosphide Antitrust Litigation Case No. 93-cv-2452 (D. Kan.)
	In Re: Beef Antitrust Litigation MDL No. 248 (N.D. Tex.)
	In Re: Bromine Antitrust Litigation MDL No. 1310 (S.D. Ind.)
	In Re: Industrial Silicon Antitrust Litigation Case No. 95-cv-2104 (W.D. Pa.)
	In Re: Workers Compensation Insurance Antitrust Litigation Case No. 4:85-cv-1166 (D. Minn.)
	Red Eagle Resources Corporation, Inc., et al. v. Baker Hughes Inc., et al. Case No. 91-cv-627 (S.D. Tex.)
	Rob'n I, Inc., et al. v. Uniform Code Counsel, Inc. Case No. 03-cv-203796-1 (Spokane County, Wash.)
	Sarah F. Hall d/b/a Travel Specialist, et al. v. United Airlines, Inc., et al. Case No. 7:00-cv-123-BR(1) (E.D. S.C.)
Business	*American Golf Schools, LLC, et al. v. EFS National Bank, et al.* Case No. 00-cv-005208 (D. Tenn.)
	AVR, Inc. and Amidon Graphics v. Churchill Truck Lines Case No. 4:96-cv-401 (D. Minn.)
	Buchanan v. Discovery Health Records Solutions Case No. 13-015968-CA 25 (Miami Dade County, FL)
	Buchanan v. Discovery Health Records Solutions Case No. 13-015968-CA 25 (Miami Dade County)
	Do Right's Plant Growers, et al. v. RSM EquiCo, Inc., et al. Case No. 06-CC-00137 (Orange County, Cal.)
	F.T.C. v. Ameritel Payphone Distributors Case No. 00-cv-514 (S.D. Fla.)
	F.T.C. v. Datacom Marketing, Inc. Case No. 06-cv-2574 (N.D. Ill.)

Partial List of Legal Notification and Settlement Administration Experience

Business	*F.T.C. v. Davison & Associates, Inc.* Case No. 97-cv-01278 (W.D. Pa.)
	F.T.C. v. Fidelity ATM, Inc. Case No. 06-cv-81101 (S.D. Fla.)
	F.T.C. v. Financial Resources Unlimited, Inc. Case No. 03-cv-8864 (N.D. Ill.)
	F.T.C. v. First American Payment Processing Inc. Case No. 04-cv-0074 (D. Ariz.)
	F.T.C. v. Group C Marketing, Inc. Case No. 06-cv-6019 (C.D. Cal.)
	F.T.C. v. Jordan Ashley, Inc. Case No. 09-cv-23507 (S.D. Fla.)
	F.T.C. v. Medical Billers Network, Inc. Case No. 05-cv-2014 (S.D. N.Y.)
	F.T.C. v. Minuteman Press Int'l Case No. 93-cv-2496 (E.D. N.Y.)
	F.T.C. v. Netfran Development Corp Case No. 05-cv-22223 (S.D. Fla.)
	F.T.C. v. USA Beverages, Inc Case No. 05-cv-61682 (S.D. Fla.)
	Garcia, et al. v. Allergan, Inc. 11-CV-9811 (C.D. CA)
	Law Offices of Henry E. Gare, P.A., et al. v. Healthport Technologies, LL No. 16-2011-CA-010202 (Duval County, FL)
	Number Queen, Ltd. et al. v. Redgear Technologies, Inc. et al. Case No. 14-0064 (W.D. MO)
	Physicians of Winter Haven LLC v. STERIS Corp. Case No. 1:10-cv-00264 (N.D. Ohio)
	Sue Ramirez et al. v. Smart Professional Photocopy Corporation No. 01-L-385 (Peoria County, IL)
	Todd Tompkins, Doug Daug and Timothy Nelson v. BASF Corporation, e Case No. 96-cv-59 (D. N.D.)
	United States of America v. $1,802,651.56 in Funds Seized from E-Bulli Case No. 09-cv-01731 (C.D. Cal.)

Partial List of Legal Notification and Settlement Administration Experience

Business	*Waxler Transportation Company, Inc. v. Trinity Marine Products, Inc., e* Case No. 08-cv-01363 (E.D. La.)
Civil Rights	*Bentley v. Sheriff of Essex County* Case No. 11-01907 (Essex County, MA)
	Cazenave, et al. v. Sheriff Charles C. Foti, Jr., et al. Case No. 00-cv-1246 (E.D. La.)
	Garcia, et al v. Metro Gang Strike Force, et al. Case No. 09-cv-01996 (D. Minn.)
	Gregory Garvey, Sr., et al. v. Frederick B. MacDonald & Forbes Byron 3:07-cv-30049 (S.D. Mass.)
	McCain, et al. v. Bloomberg, et al. Case No. 41023/83 (New York)
	Nancy Zamarron, et al. v. City of Siloam Springs, et al. Case No. 08-cv-5166 (W.D. Ark.)
	Nathan Tyler, et al. v. Suffolk County, et al. Case No. 1:06-cv-11354 (S.D. Mass.)
	Nilsen v. York County Case No. 02-cv-212 (D. Me.)
	Richard S. Souza et al. v. Sheriff Thomas M. Hodgson 2002-0870 BRCV (Superior Ct., Mass.)
	Travis Brecher, et al. v. St. Croix County, Wisconsin, et al. Case No. 02-cv-0450-C (W.D. Wisc.)
Consumer	*Andrew J. Hudak, et al. v. United Companies Lending Corporation* Case No. 334659 (Cuyahoga County, Ohio)
	Angela Doss, et al. v. Glenn Daniels Corporation Case No. 02-cv-0787 (E.D. Ill.)
	Angell v. Skechers Canada 8562-12 (Montreal, Quebec)
	Anthony Talalai, et al. v. Cooper Tire & Rubber Company Case No. L-008830-00-MT (Middlesex County, NJ)
	Arnett v. Bank of America, N.A. No. 3:11-CV-01372-SI (D. OR)
	Ballard, et al. v. A A Check Cashiers, Inc., et al. Case No. 01-cv-351 (Washingotn County, Ark.)

Partial List of Legal Notification and Settlement Administration Experience

Consumer	*Belinda Peterson, et al. v. H & R Block Tax Services, Inc.* Case No. 95-CH-2389 (Cook County, Ill.)
	Boland v. Consolidated Multiple Listing Service, Inc. Case No. 3:19-cv-01335-SB (D. SC)
	Caprarola, et al. v. Helxberg Diamond Shops, Inc. Case No. 13-06493 (N.D. IL)
	Carideo et al. v. Dell, Inc. Case No. 06-cv-1772 (W.D. Wash.)
	Carnegie v. Household International, Inc. No. 98-C-2178 (N.D. Ill.)
	Clair Loewy v. Live Nation Worldwide Inc. Case No. 11-cv-04872 (N.D. Ill.)
	Clements, et al. v. JPMorgan Chase Bank, N.A., et al. No. 3:12-cv-02179-JCS (N.D. CA)
	Conradie v. Caliber Home Loans Case No. 4:14-cv-00430 (S.D. IA)
	Covey, et al. v. American Safety Council, Inc. 2010-CA-009781-0 (Orange County, FL)
	Cummins, et al. v. H&R Block, et al. Case No. 03-C-134 (Kanawha County, W.V.)
	David and Laurie Seeger, et al. v. Global Fitness Holdings, LLC No. 09-CI-3094, (Boone Circuit Court, Boone County, Ky.)
	Don C. Lundell, et al. v. Dell, Inc. Case No. 05-cv-03970 (N.D. Cal.)
	Duffy v. Security Pacific Autmotive Financial Services Corp., et al. Case No. 3:93-cv-00729 (S.D. Cal.)
	Edward Hawley, et al. v. American Pioneer Title Insurance Company No. CA CE 03-016234 (Broward County, Fla.)
	Evans, et al. v. Linden Research, Inc., et al. Case No. 4:11-cv-1078-DMR (N.D. CA)
	F.T.C. and The People of the State of New York v. UrbanQ Case No. 03-cv-33147 (E.D. N.Y.)
	F.T.C. v. 1st Beneficial Credit Services LLC Case No. 02-cv-1591 (N.D. Ohio)

ANALYTICS

Partial List of Legal Notification and Settlement Administration Experience

Consumer	*F.T.C. v. 9094-5114 Quebec, Inc.* Case No. 03-cv-7486 (N.D. Ill.)
	F.T.C. v. Ace Group, Inc. Case No. 08-cv-61686 (S.D. Fla.)
	F.T.C. v. Affordable Media LLC Case No. 98-cv-669 (D. Nev.)
	F.T.C. v. AmeraPress, Inc. Case No. 98-cv-0143 (N.D. Tex.)
	F.T.C. v. American Bartending Institute, Inc., et al. Case No. 05-cv-5261 (C.D. Cal.)
	F.T.C. v. American International Travel Services Inc. Case No. 99-cv-6943 (S.D. Fla.)
	F.T.C. v. Bigsmart.com, L.L.C., et al. Case No. 01-cv-466 (D. Ariz.)
	F.T.C. v. Call Center Express Corp. Case No. 04-cv-22289 (S.D. Fla.)
	F.T.C. v. Capital Acquistions and Management Corp. Case No. 04-cv-50147 (N.D. Ill.)
	F.T.C. v. Capital City Mortgage Corp. Case No. 98-cv-00237 (D. D.C.)
	F.T.C. v. Certified Merchant Services, Ltd., et al. Case No. 4:02-cv-44 (E.D. Tex.)
	F.T.C. v. Check Inforcement Case No. 03-cv-2115 (D. N.J.)
	F.T.C. v. Chierico et al. Case No. 96-cv-1754 (S.D. Fla.)
	F.T.C. v. Clickformail.com, Inc. Case No. 03-cv-3033 (N.D. Ill.)
	F.T.C. v. Consumer Credit Services Case No. 96-cv-1990 (S.D. N.Y.)
	F.T.C. v. Consumer Direct Enterprises, LLC. Case No. 07-cv-479 (D. Nev.)
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