TRANSCRIPT OF PROCEEDINGS

In the Matter of:)
)
ADVISORY COMMITTEE MEETING)
ON THE RULES OF CIVIL)
PROCEDURE)

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IN THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

In the Matter of:)
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ADVISORY COMMITTEE MEETING)
ON THE RULES OF CIVIL)
PROCEDURE)

Mecham Conference Center
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C.

Thursday,
February 16, 2017

The parties met, pursuant to notice, at 1:00 p.m.

BEFORE: HONORABLE JOHN D. BATES
Chairman

PARTICIPANTS: (Via Telephone)

ELIZABETH CABRASER
JUDGE DAVID G. CAMPBELL
PROF. EDWARD H. COOPER
JUDGE ROBERT MICHAEL DOW, JR.
JUDGE JOAN N. ERICKSEN
PARKER C. FOLSE
JOSHUA GARDNER, DOJ
DEAN ROBERT H. KLONOFF
JUDGE SARA LIOI
PROF. RICHARD L. MARCUS
JUDGE SCOTT M. MATHESON, JR.
JUDGE DAVID E. NAHMIAS
JUDGE SOLOMON OLIVER, JR.
CHAD A. READLER, Acting Asst. Attorney General, DOJ
JUDGE CRAIG B. SHAFFER
VIRGINIA SEITZ

I N D E X

P R O C E E D I N G S

(1:00 p.m.)

JUDGE BATES: All right. Well, there are many on the phone. And this is Judge John Bates, and we are ready to begin with this hearing, a public hearing done electronically on this conference call. And I give you good afternoon greetings to those of you in this time zone, and good morning to those of you who are further west.

We are going to hear from 11 witnesses today. I believe all the witnesses are speaking about -- I may be surprised, but I believe everyone is speaking about the proposed amendments to Rule 23. But there may be some comments on other rules.

Each witness is being given 10 minutes to present their testimony, and then there may be questions after that. I would ask everyone, to the extent you can, remember to do so, to keep your phones on mute when you're not speaking. It will avoid airport or other noise that may be occurring where you are. I would also ask that everyone identify themselves clearly when they are speaking. That goes first and foremost for the witnesses but then also for anyone who is asking questions or otherwise speaking.

It may be best, just so we're not talking

over each other, if we can all save our questions for the end of the testimony. I think that will make this run a little bit smoother. So, to the extent you can do that, I would appreciate that.

As I said, each witness is going to have 10 minutes for their testimony, and then there will be time for any questions that members of the committee may have. I'm not going to ask everyone to introduce themselves because there are quite a few of you, and we would probably eat up the first half of the afternoon doing that. So we'll just proceed right into the first witness.

And our first witness today is Michael Pennington from the law firm of Bradley Arant Boult and Cummings. Mr. Pennington?

MR. PENNINGTON: Thank you, Your Honor, and thank you, members of the committee. I am appearing today on behalf of DRI. I chair DRI's class action task force and its class action specialized litigation group.

DRI has a few thoughts on the amendments that have been proposed. They are minor in some respects but have potential significance if and when these rules become effective, and DRI is interested in commenting upon these issues in hopes of trying to

avoid unintended consequences.

The first topic I'd like to address is the fact that the committee note associated with Rule 23(e)(1) contains the absolute statement that, "The decision to certify a class for purposes of settlement cannot be made until the hearing on final approval." That's a sweeping prohibition that I don't think is fully explained in the comment.

I think it departs from the current practice of many courts. And while I certainly understand that class certification before the final settlement hearing should not always or normally be necessary under the structure the committee has proposed, I think it behooves us to remember that class actions come in all different shapes and sizes and that to say that class certification on the front end for settlement purposes only is never appropriate seems a bit strong.

Class certification, after all, may have implications for anti-suit injunctions that are sometimes appropriate in more complex class actions and MDLs. It has implications, as we know, under Standard Fire v. Knowles for when class counsel can and cannot bind class members. It also has implications under the laws of various states about,

you know, for when there is an attorney-client relationship that prevents class members from being contacted by others to discuss the litigation.

So for those and other reasons, it seems to me that that statement in the committee note would be well to be softened somewhat. I don't, as I read the proposed amendments, I don't see that that particular sentence is necessary to the proper functioning of the rule, and I think the possible unintended consequences of that broad and sweeping statement counsel in favor of its softening.

Next, I would like to address the concept of claim rate as a factor in judging the fairness of the settlement. Sprinkled throughout the committee note but not in the body of the rule itself are a number of comments suggesting that the rate of claim-in may be an appropriate factor in judging the reasonableness of the settlement itself.

Claim-in, obviously, should never be used simply to diminish payout. It should be justified by affirmative proof or affirmative explanation as to why claim-in is necessary in a given case. But when it's necessary, it's likely to be necessary both for settlement and for a litigated judgment. If notice is the best practical notice under the circumstances and

a court so finds and claim-in is necessary in the context of a given case, whether because class members can't be located and must self-identify, or whether it's because class members have to make an affirmative election in order to have the relief appropriate to that class member provided, or for whatever reason, it seems to DRI that the appropriate measure of whether the settlement is reasonable and adequate is the relief it offers, not the relief that's claimed.

People choose not to make claims in class litigation for many reasons. And the statements sprinkled throughout the official comment here do not provide a court any guidance in how to determine when a claim rate is too low to allow a conclusion that the settlement is reasonable and adequate.

PROF. MARCUS: Judge Bates, this is Rick Marcus. Can I ask a question just at that point?

JUDGE BATES: Yes.

PROF. MARCUS: I think some later speakers will be urging that claims rate be emphasized more and perhaps be put into the rule as a prerequisite for various other decisions the court is to make. I gather you are urging that we go the other way and say less or nothing about it. Is that correct?

MR. PENNINGTON: Yes. I certainly say what

we say now in the official comment leaves a court with very little in guidance. It certainly implies that the mere fact that a claim rate is low is a reason to disapprove the settlement. And the proposition I'm urging is that that's not necessarily true. And if the committee is going to comment on claim rate, it should make clear that the fact that the claim rate is low is not necessarily a reason to disapprove the settlement.

Again, if a claim-in is necessary, then claim rates are going to be less than 100 percent. And the fact that there are less than 100 percent, the fact that they may be low, is not likely to be a function of what the settlement offers. A greater relief would not necessarily increase the claim rate in any given case.

So the committee should at a minimum avoid the implication that a local claim rate counsels in favor of disapproval. And I would submit that the current comment doesn't adequately convey that message.

The next thing I would like to comment upon is what could be viewed as an invitation to objections on behalf of others in the objector rules of 23(e)(5) as they would be amended. 23(e)(5) would state that

the objection must state whether it applies only to one objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

The need for specificity in the grounds of the objection is clear. I think it's less clear why we are inviting objectors to object on behalf of persons other than themselves. I think that's a dangerous practice that could have unintended consequences. I've been involved in class litigation where would-be objectors purport to opt out people other than themselves, as well as assert objections on behalf of persons other than themselves.

It creates confusion as to the extent of opposition to a settlement, which has always been a traditional factor in considering settlement approval. To what extent is a class opposed to settlement? Expressly inviting class members to object on behalf of persons other than themselves leads to arguments that the amount of resistance to a settlement is greater than it actually is and arguments that other class members may have relied on an early class-wide objection and not submitting objections for themselves.

I would urge the committee, and DRI would

urge the committee, not to create that problem and not to imply that objectors have authority to submit objections on behalf of anyone other than themselves. Courts certainly have the ability -- they have always had the ability and the duty -- to look at objections and their merits and decide what implications those objections have for the entire class and for the entire settlement.

But I think the rule should clearly avoid the appearance of giving authority to objectors to object on behalf of persons other than themselves.

The last topic I would like to address briefly is the increased time for governmental entities to file 23(f) petitions. I think that is a good amendment, but I would also urge the committee to consider expanding the time for private parties to file such a petition. Private parties may not need 45 days, as the government does, but on the other hand, 14 days for such an important event can be critically short, particularly in situations where the class certification decision is taken under submission and then comes out at an inopportune time for the lawyers that are actually handling the case.

You may be in trial in another case when the class certification decision comes out or otherwise

unable to immediately react to the decision adequately. Expanding 14 days to 21 days for private parties or 28 days for private parties would not only solve that problem but would lead to better advocacy for the courts of appeal and a better basis for courts of appeal to judge whether or not the petition should be granted.

DRI has previously urged appeal as a right. It submitted a written submission to the committee yesterday that addresses not only appeal as a right --

JUDGE BATES: Mr. Pennington?

MR. PENNINGTON: -- but enough of other issues, but in the meantime, at a minimum, there I would urge the court to consider a little more time for private parties, whether or not --

JUDGE BATES: Mr. Pennington?

MR. PENNINGTON: -- the government is a party.

JUDGE BATES: We need to wrap up your testimony, please.

MR. PENNINGTON: Thank you for the opportunity to speak today.

JUDGE BATES: Thank you very much for speaking to us today. We appreciate your testimony very much. And now I'd like to ask if there are

questions for Mr. Pennington.

DEAN KLONOFF: Hi. This is Bob Klonoff. A quick question on the concern about the claim rate. You would agree, wouldn't you, that a low claim rate could be a red flag for unduly onerous claim procedures? You might have two settlements with the same relief, but in one settlement, you have to fill out 20 pages of forms, and you'd have a low claim rate. So the claim rate could be instructive to a court, couldn't it?

MR. PENNINGTON: It might be instructive to a court, but in the example you just mentioned, those red flags would have been raised at the moment the settlement was proposed. The court is certainly capable of looking at the claim procedures, and ought to be looking at the claim procedures, not only to see if they're too onerous but to make sure that they're necessary and appropriate.

And if the court does that at the front end, that question has been answered. And that's where you're front-loading evidence in other places in this rule, and that decision ought to be front-loaded. Judging it in hindsight based on a claim rate I think is a false analysis. The question is was it necessary in the first place. If it wasn't necessary in the

first place, then notice shouldn't have gone out with that claim procedure in place.

JUDGE BATES: Other questions for Mr. Pennington?

(No response.)

JUDGE BATES: All right. Well, thank you very much, Mr. Pennington, again. We appreciate your testimony.

And we're then ready to move on to the next witness. Our next witness is Ariana Tadler from Milberg. Ms. Tadler?

MS. TADLER: Thank you, Your Honor, and thank you to the members of the committee for the opportunity to address the proposed amendments to Federal Rule 23. My name is Ariana Tadler. I'm a partner at Milberg, LLP, and I appear today in my personal capacity.

I've been practicing law for 25 years, and more specifically, I have been a class action lawyer for 25 years on the plaintiff side. I have litigated many class actions, including some of the largest in history, and they include federal securities fraud cases, consumer cases, including the recent case that was before the Ninth Circuit, Briseno v. ConAgra, addressing the applicability of administrative

feasibility aspects. And I also litigate quite a number of data breach class actions.

And that's important because that also speaks to the fact that I'm a recognized leader in the legal technology field, having built a successful e-discovery practice group and a successful litigation technology support business.

So both as a litigator and as an e-discovery practitioner, I have extensive experience in class actions and in the use of technology as a means of communication and information retrieval. As a regular observer of this committee's work and attendee at most meetings, assuming I can get there, and contributor to much discussion, I have actively followed the Rule 23 amendment package evolve from its conceptualization to its drafting to its posting for public comment.

The committee's hard work and attention to the issues is praiseworthy. The committee held a series of mini-conferences and meetings with various constituents in the Bar, emblematic of its commendable intent to identify and flesh out provisions warranting potential amendment and discarding those that do not.

I gratefully participated at one of the earliest mini-conferences held by the committee, as well as the program held during the 2016 meeting

before the American Association for Justice.

I thank you for your work, and I also regret not having had the opportunity to submit written comments for this particular rule. Unfortunately, in my case, work and those obligations necessarily had to be a priority.

The principal focus of my comments today relate to notice. For reasons that I will explain further, I support the proposed amendment to Rule 23(c)(2)(B) providing for notice by mail, electronic means, or other appropriate means, and ask that the committee clarify that a single "means" or form of notice is not required but rather that certain cases may well warrant multiple forms of notice to effectively reach class members.

The committee has appropriately recognized that now, and more importantly, as can be expected in the future, technology continues to involve and impact the ways in which people communicate, receive, and retrieve information, and the pace of evolution rapidly increases from year to year.

Modes of communication and information retrieval are quite different than just five years ago, let alone with the most recent edition of Rule 23's provision, notice provision, and the Supreme

Court's 1974 ruling in Eisen.

To the extent that some commentators suggest that mail or print should be the go-to or predominant method of notice, I respectfully disagree. Each case must stand on its own, and each class and its constituents must be assessed to determine best practical notice.

The question of what constitutes the best notice that is practicable under a given set of circumstances, like many other aspects of law and life, has been a great deal more complicated in a digital age. Where the range of options once consisted of U.S. mail and print advertising, integrated notice programs can now also include radio, television, social media, electronic banners, and email, and no doubt there's more to come.

The science of media has become infinitely more complicated as rapidly evolving technologies are deployed to reach a highly fragmented audience, accompanied by a dizzying array of tools intended to measure not only whether the message is reaching its intended audience but whether and how millions of individual audience members respond to the messages they receive.

One thing that the submitting experts appear

to agree on for purposes of this rule assessment is that there is no simple answer, no one size fits all solution, all of which makes flexibility of paramount importance, flexibility for a court in each case to approve a notice program based on all the facts and circumstances in the case. To some, an amendment approving the giving of notice by electronic means seems entirely unnecessary, given that courts have for years been approving notice programs, including various electric components.

Some observers may be tempted to read deeper meaning into this amendment, thinking that the committee intends to emphasize electronic means as the default. But that is far from the case. The rulemaking process is such that technological shifts are enshrined only after they became routinely accepted by society at large.

A rule that is to take effect many months after this process is complete must necessarily be flexible to account for such shifts. Nothing in the rule or the comment suggests that traditional mail notice is to be discarded. Rather, the committee has rightly taken a minimalist approach to Rule 23 amendments in general and to the notice provision in particular.

The committee very deliberately adopted wording and emphasized in the committee note that no particular means of notice is favored, that "courts and counsel should focus on the means most likely to be effective in the case before the court."

Some commenters have raised the concern that the recognition of electronic means in general may imply that the Internet banner ads are equivalent to individual emails in terms of notice efficacy. There is simply no basis for this concern. The rule still emphasizes the importance of including individual notice to all members who can be identified through reasonable efforts.

One advantage that has perhaps not received sufficient emphasis is that when electronic means, such as direct notice by email, are employed, communication with class members can be more frequent. Relying on mail notice can cost millions of dollars and may mean that there will only be one or two communications with at least some part of the class. Various electronic means also provide immediate feedback as to who has opened an email, who has clicked on links in an email, who has clicked on a display ad. With this feedback, the message can be refined and displayed in different contexts, making it

more likely to reach its intended audience and to keep the audience informed.

In his written submission, Mr. Weisbrot of Angeion offers tangible examples of how class action notice can be made effectively with a variety of means. His submission is articulate, informed, experiential, and practical, based on first-hand experience in successfully formulating, presenting, and defending notice plans in innumerable class actions.

While perhaps unconventional to emphasize the need for flexibility, and even within a single case, such that multiple forms of notice may well be the right choice, I'd like to offer you the results of my own personal study, certainly not empirically tested or peer-reviewed, but I think you will see that with each technological development, the way in which humans, i.e., e-class members, receive and process information changes may be different depending on the demographics of the class or subgroups within a class.

My grandmother, born in 1916 -- yes, she is 101 -- has never owned a computer, nor has she ever used one. Her primary resources for information are mail, printed news, and television.

My mother was born in 1943. She's 73. She

worked on Wall Street as an executive assistant until she and my father started a family, after which she became the primary caregiver.

She purchased her first computer in 2008. That was after my father passed away. Prior to that, her primary resources for information were mail, printed news, television, and my father, and her children. Since 2008, her primary sources of information have been television, Internet, mail, and email. Approximately two years ago, my mother transitioned her phone to one that has texting capabilities, which she uses in a limited capacity to communicate with her children and her grandchildren.

At about the same time, she purchased an iPad, which she uses to check her email when away from home, search the Internet for news, and read. She does not use Facebook or any other social media. My mother intently watches or listens to the news via television from morning until early evening and watches prime time television on weeknights. Only in the past few years has she made online purchases, and it has transformed her shopping experience, much to the benefit of her grandchildren.

My husband, born 1966, is 50, in the 1990s carried a beeper while others transitioned to cell

phones, and relied on the mail, printed news, and television for information. Thankfully, he has evolved.

Today, he is an active Facebook user and relies on Facebook, searching the Internet, email, and television for his news and important information. He also watches or listens to television news from morning until early evening and watches the nightly news. To the extent he watches a prime time television show, it is more likely that he does so on demand rather than during his usual schedule.

In contrast to myself, he does not feel compelled to open postal mail on a daily basis. He, Jenny Anderson, and many others apparently share this in common. The most significant examples I can offer to you are my two sons, who are only three years apart, and yet the difference is drastic. My eldest son, born in 1997, nearly 20, a sophomore in college, uses Facebook, various social media sites, text, Internet as his primary sources of communication information. He is a prolific writer and news fanatic. He checks his Facebook "hourly," he checks his email "daily," and admits that he tens of thousands of unread emails, which he sorts and searches daily to capture the priorities and

essentials.

He checks his post box once per month. So much for those cookies from his grandmother. Much of his consumer purchasing is done online, but he does search the Internet for deals and is known to actually go to certain stores. He rarely watches prime time television during regular programming but rather watches on demand and is a binge watcher.

My youngest son, born in 2000, is 17. He still has yet to get his driver's license. He needs a license or one can do a ride share using one of the various providers. But, by the way, those providers use some kind of technological app.

Now, remember, my youngest son is only three years younger than his brother, and yet the difference between how they communicate is dramatically different. He has a Facebook account which is dormant. He instead relies on other social media sites and the Internet for information. Instagram and SnapChat are currently his go-to resources for news and both silly and important information.

He has numerous feeds on these apps which he follows, including to stay abreast of national and international news. In other words, these sites allow for newsfeeds. Most of his consumer purchasing is

done online. Mind you, he does not have his own credit card. He rarely answers his phone, and his voice mailbox is always full, thus preventing one from leaving a message.

He communicates with his friends via Instagram and SnapChat and perhaps sometimes via text. Texting is his primary form of communication with his family, which sometimes is a preferred alternative as it necessarily elicits actual words. Remember, he's 17.

JUDGE BATES: Ms. Tadler?

MS. TADLER: He has an email account. Yes?

JUDGE BATES: In hopes that I'm not cutting off other children or grandchildren, we're going to have to ask you to bring your testimony to a close.

MS. TADLER: Certainly.

JUDGE BATES: You can give a conclusion. I'm not totally cutting you off.

MS. TADLER: I appreciate that. Final point there is he has an email account, which he reluctantly uses. My point is that the people of different ages, education, employment experience, and economic backgrounds, to name just a few factors, communicate and retrieve and process information differently. There is nothing in the package that is suggesting

that mail is not to be used.

I do think, though, that the committee needs to consider a clarification of the note as recommended by AAJ to add the language, including mixed notice, or including a mix of different types of notices. Or another alternative might be to add at the end of that sentence, which may include multiple forms of notice in a given case. I thank you for your time.

JUDGE BATES: Ms. Tadler, we thank you very much for your testimony. It's very much appreciated.

And now are there any questions for Ms. Tadler?

PROF. MARCUS: Judge, this is Rick Marcus. Could I ask one?

JUDGE BATES: Absolutely.

MS. TADLER: Thank you.

PROF. MARCUS: This is on the fly, but I wonder, looking at the rule language that we put out for comment, what your reaction would be to adding a bit to the sentence, the notice may be by United States mail, electronic means, or other appropriate means, to say, in addition, one or more of the following, referring then to U.S. mail, electronic means, or other appropriate means. The question is, would that be a useful change in your view?

MS. TADLER: Professor Marcus, that's an interesting question. Had I had more time, one thing that I have been noodling on was whether in that language simply the word "or" should be changed to and/or. And I think that the question you're asking me is not far from what I'm saying. I'm not sure whether your suggestion is better versus mine. I know that the rules committee, of course, aims to keep the rules as tight as possible.

And so, you know, I think what you're suggesting is helpful. I thought that perhaps by putting in the and/or it might accomplish the same. So you would have by mail, electronic means, and/or other appropriate means. I do not recall whether you all are amenable to the and/or in a rule.

PROF. MARCUS: Well, I was going to say I think you have put your finger on -- that's an interesting idea, but I suspect the style consultants might not appreciate that way of doing things.

MS. TADLER: Right. And I'm fine on style, Professor Marcus. It dawned on me with the suggestion that I offered, which may include multiple forms of notice in a given case, that might be more consistent with the style than the concept of including "mixed notice."

PROF. MARCUS: Okay.

JUDGE BATES: Other questions?

And, Ms. Tadler, yours is not the first comment that we've received along these lines with respect to more than one means of notice may be appropriate in a particular case.

Other questions for Ms. Tadler?

(No response.)

JUDGE BATES: All right. Thank you very much again. We appreciate your testimony.

MS. TADLER: Thank you.

JUDGE BATES: And we'll move on to the next witness, who is Timothy Pratt from Boston Scientific Corporation.

MR. PRATT: Thank you, Your Honor. Yes, my name is Tim Pratt. I'm actually here wearing a lot of hats. I'm involved in a number of organizations, none of which I'm representing here today. My day job is I'm executive vice president and general counsel and corporate secretary of one of the largest medical device companies in the world, Boston Scientific. I've been in that job for nine years. Before that, I was in private practice.

I am also the vice president of Lawyers for Civil Justice. I'll be president in a little over a

year. I'm past president of an organization called the Federation of Defense and Corporate Counsel, and I've served on the board of DRI. And I'm here, you know, after taking the opportunity to thank you all for what you do, you know, looking at the rules innovatively, figuring out what works better. Taking the time, I think, is a laudable act on behalf of people who care about justice in America, and I know you all do.

My perspective is a bit different. I'm not a class action scholar, though I've been involved in class actions in the past. I'm not even really a legal scholar. I don't read many judicial opinions. I actually now pay others to read opinions and tell me what they say.

I'm actually more of a practical scholar, and I'm here because I think my voice is one that hasn't been heard a lot, if at all, during the course of these changes, and I did testify before the last rules change, when this committee got together, and appreciate those changes. I think they are having a very laudable impact.

But I'm obviously not a judge. I'm no longer outside counsel. I'm actually a party to litigation and I mean a lot of it. My company has

cases, commercial products, IP cases, all over the United States, and it costs a lot of money to defend them.

To me, Federal Rule of Civil Procedure, one, means a lot. I mean, I think every single change has to be tethered to that basic principle, that we're looking for a just, speedy, and inexpensive determination of disputes on the merits.

So it is laudable, and I commend this committee for the changes you're making in the settlement class. I think that's a change that both the defense community and the plaintiff community will embrace. In those circumstances in which they want to resolve a class by settlement, you've created, I think, a fair mechanism to do that. I know there are different thoughts on some of the details, but I think directionally you've taken a big and important step.

I'll come back to this in a little bit, but I want to comment on a false narrative that I have heard, and that is heard it over the years, and that is that if you're a defendant in a lawsuit, what you really want to do is delay things as long as possible. I'm going to tether that to the right to appeal class certification decisions in a moment. But I think the contrary is largely true.

I think defendants don't want litigation to linger for years and years and years. The sky that sometimes darkens -- and people like investors and analysts look at that -- you want those clouds eliminated. The longer litigation goes, the more it costs me. You know, my goal is that you address the merits as soon as possible so I can resolve things as quickly as possible. That's truly a goal that I think a lot of defendants have in connection with this, including in the class action context.

So I want to comment on two things. One is the discussion that you've heard already about cy près and the note that includes the reference to the ALI, the principles of aggregate litigation. And the second thing I want to talk about is a right to an appeal of a class certification decision.

So let me start with cy près, and I think the first place to start is what's the hubbub all about here. You know, cy près is a lightning rod issue. As you know, it came from the world of charitable trusts. There, I think, it had an admirable place. And there's been really no rule that has extended it to the class action context.

The idea that money that is "unclaimed" gets spread out to some third parties disconnected from the

litigation is not something that a rule provides. And I think this committee has done the right thing. I think you're not creating any substantive cy près rules here. I think to do so would probably be inappropriate under the Rules Enabling Act.

However, I think the committee backed into this lightning rod issue by referencing Section 307 of the ALI, principles of aggregate litigation. And you may say how is that, because that section only deals with circumstances under which the parties agree on what needs to be done with unclaimed funds. It doesn't force the disposition of those funds in a way inconsistent with what the parties have to say. And that is true.

However, reading that section and the notes, it builds in, you know, concepts and principles of policy that are hotly contested and with which I have significant disagreement. For example, it says that independent of any agreement by the parties, this is the discussion about conceptually and philosophically what do you do with unclaimed funds. It says uncategorically that the funds should not be returned to the defendant, which I believe they should. And the reason is because it would undermine the deterrence function of class actions. I don't agree

that class actions are intended to deter conduct of anybody. I don't believe that. This isn't an administrative remedy. It's not a criminal law. I don't believe in the deterrence thing.

And it also said to let those unclaimed funds come back to the defendant would "reward the wrongdoer." And I think there are a lot of defendants in class action litigation who simply would not claim themselves to be wrongdoers. The purpose of class actions, as this panel committee well knows, is to look at a dispute, determine whether the combination of law and facts so predominate that they ought to be combined together and either going to be resolved together on the merits through trials, or it's going to be resolved through settlement.

But I agree with Judge Posner. To take this money that's put into the class action settlement, to take it away from the defendant and give it to someone else is actually punitive. So I believe that if the goal of this committee is simply to say we encourage people to engage in class action settlements, to discuss and decide what to do with unclaimed funds, I agree with that.

I think you can do that without referencing ALI and all of its sort of substantive principles that

are built in through some of the notes, and that's what I would encourage this committee to do.

Finally, I want to talk just a second about the right to appeal. You know, again, as a party, the decision to certify a class is a pivotal event. It turns a snowstorm into an avalanche. You're facing years of litigation, years of class discovery. The numbers are phenomenal. The determination to settle is more difficult. The amount it will take to settle is more significant.

It is one of those pivotal events that can happen in the course of litigation in my view. And it changes the dimension of the litigation. There's a fine gentleman who's an executive director of public justice who testified at the January 4 hearing, and he was arguing against appeal, saying that his typical class action took five to seven years. Some of it took to nine to 13. And that delay, you know, further delayed through an appeal, would cause his clients to have to wait longer for money.

My argument is that's exactly why there needs to be an early review of a single judge's decision to certify or not certify a class. I don't believe it's going to necessarily build in significant delay. I think the decision ought to rest with the

parties, not the court of appeals in terms of whether a certification decision should be reviewed or not. And I don't think it's going to cripple the appellate courts of this country.

I don't think that the appellate courts are -- you know, that there are so many class certification decisions that the appellate courts couldn't, you know, accommodate the onslaught. And I don't necessarily believe it's going to build in delay. I think judges, including appellate courts, are very adept at saying we're going to treat this on a more accelerated basis because it's important for the parties to hear our decision.

So I think I urge the committee to allow for an immediate appeal of decisions that either certify, don't certify, or modify a class.

And the final thing I'll say in the last minute I've got, there's been a discussion about, well, can you really do this without restarting the whole process. I will confess I'm not an administrative law expert. I was once because I took administrative law in law school, and I got the top grade in the class.

But Gerald Ford was president then, and I think things have changed a lot. So I don't purport

to be an expert on it. But my understanding is that the reason for this whole review and comment period is to be sure that people don't get surprised by something. I think if this committee were to say we're going to redefine the word predominate in 23(b)(3) and nobody's talked about it, I think that would be inappropriate.

But I'll just observe for the committee that this issue of right to appeal certification decisions has been in place since comments back to 2015. It's been discussed at every single public hearing, including this one, by both representatives of the defense community and the plaintiffs' committee. You're going to have to decide. You've got more brains on this than I do.

But I think this is a different situation, and I urge you to at least consider the idea of being able to build it into this package and not restart the process just because of this issue being raised at this point.

And that's all I have, Judge Bates. Thank you very much.

JUDGE BATES: Thank you, Mr. Pratt. We appreciate your testimony very much on both those issues.

And do we have any questions for Mr. Pratt on either of those?

(No response.)

JUDGE BATES: Hearing no questions being raised, I thank you again, Mr. Pratt. We appreciate and will take into consideration fully your observations.

MR. PRATT: Thank you. Thank you for the time and the no questions. Thank you.

JUDGE BATES: All right. With that, we'll move to the next witness, Steven Weisbrot, from the Angeion Group.

MR. WEISBROT: Thank you very much, Your Honor. And I wish to thank the committee and each of its members for the opportunity to be here today. I believe many of you have likely read my written comments which I have submitted, but I wanted to introduce myself briefly and then touch upon the main points that I'm hoping to hit in my 10 minutes, and then launch right into it.

So for those of you who do not know me, I am Steve Weisbrot. I am a partner and the executive vice president in charge of notice at the claims and notice administration company, Angeion Group. My reputation in the industry has largely been that I've been

instrumental in bringing about the use of digital notice, big data, behavioral targeting, and all the other digital packets that we're starting to see effectuated in class action notice.

I've reached hundreds of millions of people by utilizing those tactics, along with traditional methods like print media, like mail, and the only notice provider in the country who has fulfilled the IAB, or Interactive Advertising Bureau, certification program specifically designed for digital and media professionals.

Prior to my experience at Angeion, I was at Kurtzman Carson Consultants as a director of class action services there, largely known in the industry as KCC. Prior to that, I was an attorney practicing amongst other forms of law class action litigation. And I have a professional writing background in terms of my undergraduate study.

I'm here today to support the amendment to Rule 23 to include electronic and other means, which I believe is based on common sense, progressive logic, and most importantly, the flexibility to accommodate future communication advancement.

Specifically, what I'm hoping to do with my time here today is to hit on some of the more

practical considerations that I believe only a notice provider who deals with attorneys on both sides of the bay can really speak to. And my main points that I'm hoping to get across is first and foremost that class action notice is advertising.

Make no mistake about it, it is advertising. And the current advertising landscape and the current media landscape is changing at a breakneck speed. I think Ariana did an unbelievable job of explaining this in the context of her children and her family members, and it's even more nuanced than that.

However, the second point that I really want the committee to take home is that the rule provides flexibility for there to be judicial oversight of this process, and with new education opportunities for judges, we can accomplish implementation of this rule that will truly and ultimately guarantee class members the best notice practicable.

Going to my first point about class action notification being advertising, I always find it helpful to explain it in this way, that a brand advertiser, somebody who's advertising cars or soft drinks or coffee mugs or what have you, there's no objectively correct way to advertise that product. There's no objectively correct way to reach that

particular demographic.

What happens is, as a practical matter, you look at what those customers that you're trying to reach look like, and there is no one size fits all. The same is exactly true for class action notice. We need to bring the flexibility, creativity, and most importantly, critical analysis by the judiciary into the process so that we can determine what method or methods best notify the class.

And to read just briefly from my written comments, because I think it's important to discuss the current media landscape today, we now live in a world where 24 percent of people in developed markets reach for their smart phone immediately after waking up, 39 percent within five minutes, 70 percent within 15 minutes, and 93 percent within an hour. Fifty-nine percent of U.S. Internet users profess that they are addicted to their digital devices. U.S. consumers spend over 11 hours a week on average on their smart phone apps and almost seven hours each week on the Internet via their computer.

Mobile advertising influences 45 percent of all U.S. shopping journeys. And notably, this is not just the Millennial generation we're talking about. The *New York Times* recently ran a story about two

weeks ago saying that adults aged 35 to 49 were found to spend an average of six hours and 58 minutes a week on social media networks. And as you get into the article, that actually came from a Pew study on digital usage in the United States of America.

The average mother who's on Facebook checks the site 10 times a day. There's no dispute that newspaper readership is way down. Mail volume has dropped continuously, precipitously, year after year. And email is now a ubiquitous form of communication.

Email. So there has obviously been a lot of discussion throughout the course of this amendment about whether email is an appropriate method of individual notification and what the overlap is there with mail, so I'm going to just take a minute to address that.

I first of all think that email is efficient and inexpensive, and we have the opportunity to use it multiple times throughout the course of settlement notification programs. But more importantly, if you go back to the Supreme Court Case of Mullane and you look at the considerations that were there in Mullane, and that was essentially how did the parties communicate in that case. And in that case, it was mail. And they considered mail to be efficient and

inexpensive.

I don't think going back and looking at Mullane, if you were applying it today and you were looking at email, that there could be any argument that it's not efficient, that it's not inexpensive, and that in a case where it's being used between the parties, it makes perfect sense.

Some of those things include -- some of those situations, I should say, include settlements involving professional service organizations, software services that a class member has signed up for, Internet transactions, apps, all sorts of online transactions. And I said I was going to try to be practical here, so I want to just share a recent experience that we had in the notification of a case, and it was an employment case, and it involved trying to reach front of house servers for a national fast casual retail chain.

So who are we talking about here? Largely college kids who are working as busboys, servers, bartenders, who are entitled to relief. And in the first instance, we reached out to them with direct postal mail. And we started seeing returned, undelivered mail at an incredibly high rate. And the reason we believe that we saw such a high rate of

returned, undelivered mail is that college kids who were working in these restaurants moved from dorm to dorm or college apartment to apartment and never filled out a national change of address form. It's just not high on their radar, and we were not reaching them.

In order to align them and/or reach them and let them know that this settlement was occurring, we ended up running a Facebook notification program that revolved around those people who had liked that particular employer. The reasoning was that the people who liked the restaurant were either good customers of the restaurant and wanted to stay abreast of what was going on, or they were employees.

In the first day that we ran this, when we ran the certification campaign, we received more inquiries to our case website than in the previous 30 days by a factor of 1,000. It was simply a success.

Another interesting example where we've used technology recently -- and I reference it in my submission -- was the TCPA case, where we both mailed and emailed to the potential claimants. In that case, we saw a claims rate of almost exactly double for those who received the email as opposed to those who

received the mail.

We prophesied that the reason for that is it wasn't an incredibly large award, and the work that you have to do as a class member when you receive an email to go through the claims filing web page is drastically simplified as opposed to receiving something in the mail, having to either call or email the claims administrator, or go onto the website. There's just simply more steps, which is not universal.

Now, absolutely unequivocally, it has its benefits, especially for those like I was suggesting for email, currently via applicable means of communication between parties. It's a class that we just know likes mail better, primarily older adults, or maybe lower income class members who don't have universal access to the Internet, in those cases, or maybe the securities cases or other complex financial institution cases.

Those lend themselves to email. But the important point to remember is the way the rule, the proposed amendment is worded, it would give the judge the ability to ask these questions and determine what makes sense in that particular scenario.

Also, I think we've been thinking about this

as an either/or proposition, mail or email. And I just want to touch on some of the things that I think would also be beneficial for the committee to consider. There's very little use of video in class action notice right now, with a notable exception. I know that the Volkswagen settlement case had an excellent settlement website, had excellent use of video to explain the claims process, explain the litigation. And I think it was an absolutely unbelievable program.

But the benefit of video is that you have sight, you have sound, you have motion. And when you take those things into consideration and put them all together, you achieve a lot of goals. One is you get people to act. The other thing that I think is incredibly important is I believe it was Ms. Larkin's and Mr. Rossman's (phonetic) point about readability and how they could never make the notice simple enough for the people in their class action.

And if you're going to use video, it is a lot easier, especially with combining the sight and motion, to make a more understandable notice form. You can embed this video right inside of an email. They can work together. You can put it on a Facebook page. You can put it on a website. There are

multiple uses for video.

Another important technology that is not even being discussed is what's called retargeting or cross-device targeting. What retargeting means in the simplest terms is you go to a website, they identify that you've been there, and when you leave, they show you ads.

So if you, for instance, went to Amazon and looked at a pair of boots and you didn't buy that pair of boots, I'm sure a lot of people notice when they go to different websites they start seeing ads for boots. There's no reason that we can't use that technology -- in fact, Angeion Group has used that technology -- when people are visiting websites to make sure that if they don't consummate a claim, they're aware of the upcoming deadlines and all the information necessary if they want to object or opt out or take any other options under the litigation.

This isn't even in a conversation as far as I'm concerned right now, and I think the flexibility of the language of the rule would allow those progressive practitioners who would like to use similar technology the ability to do it.

Other simple things are ringless voice mails are very big right now. What that means is you could

literally record a message, have it put on most anyone's voice mail on their mobile phone pursuant to order of court, and give them a recording of the notice however it would be approved by the court.

Obviously, the next one is social and digital media, which I'm a huge proponent of. I referenced this in my written submission, but we recently did a Fair Credit Reporting Act settlement where we were emailing the class members in the first instance, and then we were charged with putting together what is known as a custom audience.

What that means is we took the list of all of the emails that we had, we submitted it to Facebook, and Facebook came back and told us how many of those class members used that email as their primary email address on Facebook. We were then able to target those specific individuals. This is not a publication campaign. Only individuals who were known class members would then see ads advertising the settlement.

As an aside, there were 72,676 people in that class; 58,100 of them, the emails were the emails that they used for Facebook. That's 80 percent. I won't make you do the math. So we were reaching 80 percent of the class another three, four, five

times by using that supplementary Facebook campaign. This can be done in virtually any case where we have class member emails.

The last thing I want to talk about are banner ads, which I know has been a pretty hot topic in the notice world.

JUDGE BATES: Mr. Weisbrot?

MR. WEISBROT: I'm sorry. Yes?

JUDGE BATES: This is Judge Bates. I have to ask you to talk about it very briefly and bring your testimony to a close, as I have asked of others.

MR. WEISBROT: Absolutely, Your Honor. Very quickly. I won't read the stats I was going to get into. I just wanted to dispel two myths very quickly. One is we have heard that banner ads that are seen for one second, half a pixel or more, are considered viewable. That has no implication on notice. That's standard. It's what's considered viewable and what a publisher can charge an advertiser. It does not indicate how long a banner ad is on the screen. On average, our banner ads for class action are about 15, 17, 20 seconds, depending on the class action.

And just my very last point is there was an article written in *Forbes* about banner ads. It's been cited to this committee, and it's been referenced as

banner ads are a joke. I wanted to point out that as recently this year, *Forbes* internal numbers say that 70 percent of their ad revenue comes from banner ads.

So I just think that should be considered in talking about banner ads and why there are these kind of prevailing mythologies that may or may not be true. With that, I'll close and just say thank you for the time, and I'm fully confident that the rule as written would provide the flexibility necessary to continue to provide class members the best notice possible.

JUDGE BATES: Mr. Weisbrot, thank you. This is Judge Bates again. Thank you very much for your time and your valuable input.

And with that, are there any questions for Mr. Weisbrot?

PROF. MARCUS: Judge, this is Rick Marcus. Could I ask the same question I asked earlier?

JUDGE BATES: You certainly may.

PROF. MARCUS: Mr. Weisbrot, I asked Ariana Tadler whether it would be a positive change in our proposed rule language to add the notice may be by one or more of the following, and then what we say, United States mail, electronic means, or other appropriate means. That might introduce a greater note of flexibility. What do you think about changing the

rule amendment that way?

MR. WEISBROT: I think it would be a great addition to the rule, and the reason is that frequency of message is so important and so often gets lost in class action notification. Everyone, because of the Federal Judicial Center's guidelines that talk about reach percentage, tend to focus on reach, where frequency is an equally important metric. And if you're encouraging or at least allowing people to reach people multiple times, whether it's through mail, whether it's through the Facebook example that I gave, whether it's through email, I think that you're giving better notice to the class, and I would endorse it.

JUDGE BATES: Other questions?

(No response.)

JUDGE BATES: All right. With that, again, Mr. Weisbrot, thank you very much. We appreciate your taking the time and offering the very useful information that you've provided both orally and in writing.

MR. WEISBROT: Thank you very much.

JUDGE BATES: Our next witness will be Eric Isaacson from the Law Office of Eric Alan Isaacson.

Mr. Isaacson?

MR. ISAACSON: Thank you, Judge. My name is Eric Alan Isaacson, and I am speaking with respect to the proposed amendment to Rule 23(e)(5) regarding approval of the withdrawal of objections and objectors' appeals.

I speak on the basis of 26 years of experience in the plaintiff class action bar. I started back in 1989 as an associate in Milberg Weiss Bershad Hynes & Lerach. In 2004, the West Coast partners of that firm -- most of the West Coast partners left and formed the firm of Lerach Coughlin Stoia Geller Rudman & Robbins, LLC, of which I was a founding member. It currently is known as Robbins Geller Rudman & Dowd. I left that firm in March of last year, a little bit less than a year ago.

Now, in 26 years of practice in the plaintiffs class action bar, I never once saw payments being made for the withdrawal of frivolous objections or the withdrawal of a frivolous appeal, not once.

When class counsel pay objectors to withdraw appeals, it's because they think that the appeal may have substantial merit and they're concerned that they're going to see a reversal that could benefit the class, but it is not in the interest of class counsel. That's why payments are made for the withdrawal of

objections and appeal.

So, to the extent that the committee is operating on the assumption that objections generally are meritless and filed for the purpose of extracting money on the basis of a frivolous appeal, I think that its understanding is wrong and that the amendment to the rules may well be misdirected.

Now the real dynamic of class action litigation is that in a typical class action, a class member has a relatively small claim, particularly true in consumer class action. If a school teacher, say, who gets a class notice that she's going to receive some coupons on account of a statutory violation but sees that the lawyers are going to be paid millions of dollars contacts somebody and asks for help with respect to an objection, retains counsel for an objection, that objector's counsel is going to have to communicate to her any offer that is made by class counsel to settle her objection.

Now, right now, they're not going to do it while the matter is pending in the district court. Right now, they're going to wait to do that when the objection results in appeal most likely. If that school teacher class member who is getting coupons and whose claim might be worth, you know, 20 or $30 or

$100 or even $1,000, is told by her lawyer that class counsel has offered $3,000 to withdraw her appeal, what's she supposed to do?

What is the objector's counsel supposed to do? He's got an ethical duty not running to the class, as I understand it, but an ethical duty running to his client, the class member who filed the objection. The objector doesn't have an ethical duty running to the class as far as I know. She hasn't been appointed class representative. She's not a fiduciary, not like a class representative appointed by the court, not like class counsel, who's making the offer of a substantial sum of money to withdraw an appeal that may have substantial merit.

Now the fact is that a lot of class members put in that position have bills to pay. They've got mortgages. They may want to send their kids through college. We have the kids running up a lot of debt. They may have parents who need home care or have medical bills. It is very difficult for a class member who has filed a valid objection to say no to the offer of a large sum of money.

And the objector's counsel has to represent the interests of that objector. It's the objector who has control over whether to settle the objection under

the rules of professional conduct. It's such a problem that somebody like Theodore Franks, Ted Franks, at the Center for Class Action Fairness of the CEI, who is clearly interested in prosecuting objections for the interest of the class and for the interest of the class only, is not looking to make money, is representing a public interest nonprofit, even he has had his clients take money in exchange for withdrawal of their objections.

He set it out in a declaration in the Seventh Circuit in the Capital One litigation, which I have cited and quoted from in the written comments that I submitted yesterday and that I hope you have received or will receive. The situation is a very difficult one, but the problem is not objectors filing frivolous objections to extract payments on the withdrawal of an appeal. The problem is that class counsel pay large sums for objections that they think may well win and may well benefit the class.

If there's an ethical violation or ethical breach in there somewhere, it's by class counsel who are making the payments and then who revile the objectors and their lawyers as extortionists and serial objectors and whatever else they call them.

PROF. MARCUS: Judge, can I? This is Rick

Marcus. Just a clarification point here. Are you saying that requiring court approval for the making of such payments would be a bad thing or a good thing?

MR. ISAACSON: I'm not saying it's a bad thing. What I'm saying is that you need to clarify what the standards are. Right now, there are no standards. Rule 23(e)(5) says that if an objection is withdrawn, there's got to be court approval of the withdrawal. There's no standard, none at all. And the same is true with respect to the amended rule.

If you want to require that a class member has a duty to the class, you should say so. If objector's counsel has a duty to the class rather than to his individual client, I think you should say so. I think there are serious problems with the system as it is presently, and I think full disclosure is a good idea for what -- should look like.

PROF. MARCUS: Why doesn't this amendment move in that direction, maybe not as far as you would like to go?

MR. ISAACSON: The standard may move in that direction in some respects. It leaves huge loopholes nonetheless. And even with respect to the model that you may be operating on of frivolous objections, what if a judge has a request for approval of withdrawal of

a meritless objection in return for a payment of $10,000? Should the judge say, sure, I approve it so that the case can proceed and we don't have the delay caused by the objection and an appeal? Or should the judge say, no, this is extortion?

The very reason that we have the requirement of approval is to stop that sort of thing. There's no guidance for which way the judge should go. And --

PROF. MARCUS: And am I wrong to think that presently there's no rule requirement of approval by any judge if the payment occurs after the notice of appeal is docketed in the court of appeals?

MR. ISAACSON: That is true. And a requirement of disclosure is definitely a good thing. There's no question about that. And I think a requirement of approval that clarifies the standards for approval would be a very good thing too. But that is not what's proposed currently so far as I can tell.

There's also, I fear, a huge loophole. Rule 23(e)(5) as currently drafted says any class member may object to a proposal -- that's a proposed settlement -- if it requires court approval under this subdivision (e). The objection may be withdrawn only with the court's approval. And then the proposed amendments go to withdrawal of an objection to a

settlement under subsection 23(e)(5).

Go down to the rule, and you see at 23(h)(2) there's a requirement a class member or party from whom payment is sought may object to the motion for attorney's fees. There is no requirement that there be disclosure to the court or approval by a court at any level for withdrawal of an objection to attorney's fees. That is a gigantic loophole in the current rule, and it's one that doesn't seem to be patched up by the amendment.

So I think that it's important for you to focus on what the standards are for approving withdrawal of an objection. I think that it's a very good idea, and you built this into the advisory committee notes, to provide for payments of objector's counsel who are successful in conferring a benefit on the class.

If objector's counsel expects to be paid more by benefitting the class, then they will be paid. If they are benefitting only an individual objector, then they're going to do work to benefit the class. And that's something to think about.

I also want to call attention to the fact that the proposed amendments would withdraw the requirement of court approval unless there is

consideration paid. And I think that's an invitation to harassment by class counsel. In consumer cases particularly, where class members have small claims, if somebody objects, they find they're served with a subpoena duces tecum. They have to appear for a deposition, and the objective of class counsel is to get them to withdraw the objection that may have merit without any payment. I think that, by not having courts pay attention to this, you could well increase the problem.

And I think those are the major points that I wanted to make.

JUDGE BATES: Well, this is Judge Bates. Thank you very much, Mr. Isaacson.

MR. ISAACSON: I also think I'm running up on my 10-minute limit.

JUDGE BATES: Well, you were there, but some of it was taken by Professor Marcus. I would have given you another minute if you needed it, but --

DEAN KLONOFF: Judge Bates? Bob Klonoff. Could I just make a quick comment?

JUDGE BATES: Absolutely. I'm sorry. I had the mute on, and I said to Bob that you certainly can make a comment. But I also said to Mr. Isaacson that if you needed another minute, I'd give it to you

because of some of the time that was taken from you.

But, Bob, why don't you --

MR. ISAACSON: I think I basically made the point.

JUDGE BATES: Bob, why don't you go ahead.

DEAN KLONOFF: So I just wanted to mention, you know, the members of the subcommittee attended a lot of meetings and conferences over the last few years and heard from plaintiffs' lawyers that they had repeatedly paid to withdraw frivolous objections. And that's what we were responding to. Maybe you've just had good luck or it's the particular kind of cases that you handle. But we're basing our approach on really quite overwhelming feedback that we received. So I just wanted to make that point.

MR. ISAACSON: I understand that. But would you expect them to tell you -- if it was the truth, would you expect them to tell you that they had paid money for withdrawal of objections that they thought had merit? Of course, they're going to tell you that they thought the objections were frivolous.

DEAN KLONOFF: Well, in many of the cases, the objections had never even been articulated. And the point was that they didn't even spell out the objections until the appellate level. So that would

tend to support the idea that they're frivolous if the people seeking payment had never even explained what their objections were.

MR. ISAACSON: In 26 years of practice, I never saw that happen.

DEAN KLONOFF: Yeah. Well, like I said, you're very lucky, but I did want you to understand that we have heard extensive comments from plaintiff lawyers that's different from your experience.

JUDGE BATES: And I do think that it's important to add that -- this is Judge Bates speaking -- that several of those lawyers we view as pretty reputable lawyers who were telling us their actual experience, not shading the information in the way that you suggest.

Other questions? Anything else for Mr. Isaacson?

(No response.)

JUDGE BATES: All right. Thank you again, Mr. Isaacson. I think this is very valuable. It's a very important subject, this whole question of objectors and how to deal with these problems that have been raised, and we appreciate your very useful input. Thank you again.

MR. ISAACSON: Thank you very much.

JUDGE BATES: With that, let's move on to the next witness, Gerald Maatman from Seyfarth Shaw.

MR. MAATMAN: Thank you, Judge, and thank you to members of the committee. I'm testifying today in my personal capacity and as a representative of a group of 150 lawyers where I practice at Seyfarth Shaw, LLP, who practice in our class action group, primarily representing employers in labor and employment-related class action litigation.

By way of background, I've been a lawyer for 36 years, and I've defended class actions in approximately 42 states. I represent employers in employment discrimination, wage and hour, civil rights, and workplace statutory class actions. I'm the author of the *Workplace Class Action Report*, which is an annual study of all workplace-related class certification rulings, so I read every decision every morning that's decided in federal and state courts that has anything to do with the workplace.

I also participated in the Dallas meeting in 2015 on proposed amendments. I submitted written comments yesterday and, in the interest of time, wanted to offer some comments and suggestions on three particular points, the first being the issue of a trial plan submitted with motions for class

certification, the next on the right to an appeal of a certification or decertification decision, and lastly on a new evolving area in terms of the application of amended Rule 26, proportionality requirement relative to the scope of pre-certification discovery.

In terms of trial plans, as a person litigating cases in federal courts, I'm often struck with the notion that sometimes cases get certified under the rubric of, well, there may be problems, but we'll certify the case now, and we'll sort that out later in terms of how we might try the case, and a wink and a nod to the notion that most class actions invariably settle and don't get tried, and the issue of what a trial would look like rarely is addressed, adjudicated, or an opinion is written on it.

And our approach or our sense is a modest amendment to the rule could aid all parties, all litigants, the court, and the practitioners in terms of the requirement that an explicit trial plan be submitted along with a motion for class certification that would specifically address the issue of how a case would be tried on a class-wide basis.

PROF. MARCUS: Mr. Maatman?

MR. MAATMAN: Yes, sir.

PROF. MARCUS: Mr. Maatman, this is Rick

Marcus. Could I just interject a question about that?

MR. MAATMAN: Of course.

PROF. MARCUS: Which in a sense has two parts but starts from the beginning of our committee note, which says most of the amendments are about the settlement process. Am I right to think that is not what you are talking about? You are not saying that a trial plan is important if there is a proposal to settle the class action.

MR. MAATMAN: Correct.

PROF. MARCUS: And then related to that, are you saying that what you are talking about is something that we could change at this point in our current package without republishing?

MR. MAATMAN: I believe so, or, again, a placeholder for the notion of what the committee is considering as a whole. And I would agree that a trial plan would not necessarily be necessary in the instance where the parties agree to settle a class action and then litigate preliminary or final approval.

But in terms of all class actions and the ability to even size up a settlement and figure out one's risk, the notion of how a case would ever be tried and whether or not the case could be tried at

least in my experience has been a very important consideration.

The next issue we wanted to talk about was the right to the interlocutory appeal because of the length of the hearing and the excellent comments provided previously by Mr. Pratt from Boston Scientific. I think the written submission was made yesterday in terms of how class certification orders are in essence the holy grail and that most class actions do indeed get settled. The issue of whether or not a party has the right or could have the right to appeal is very critical.

The last issue I'd like to talk about, I as a practicing lawyer in the practical world of which I'm living in these courts, the issue of the discoverability, especially pre-certification, and the new amended Rule 26 certainly does bear on settlement, the notion that before a case is certified or while discovery -- pre-certification discovery is ongoing limits or the proportionality analysis of what discovery should be allowed, the costs that an employer or a defendant will have to undertake to provide discovery, and whether or not it becomes more expensive to defend one's ability to contest the merits of the claim as opposed to settle it, just

because the mere costs of discovery or electronically sort information, viewing it, logging it in, and producing it is such that in essence a settlement is forced just because the costs flow one way towards the defendant, and the plaintiffs are able to foist those costs on defendants and create settlements.

And so, certainly, that's something that maybe should be included or is included in the case law developing under Rule 26. But our sense is that Rule 23 could benefit in the committee looking at this issue, would certainly aid the more fair and efficient adjudication of claims. I think Mr. Pratt even referred to Rule 1, and I'm a big proponent of Rule 1 too as the basis for how all decisions should be made in court.

So, in sum, those are the comments that Seyfarth Shaw had with respect to the amended rules.

JUDGE BATES: Thank you very much, Mr. Maatman. This is Judge Bates. I have a question on the last point. To the extent that Rule 1 and Rule 26 don't already supply the judge with the grounds for or need to examine proportionality, what specifically would you be suggesting even down the line somewhat for inclusion in Rule 23 with respect to proportionality?

MR. MAATMAN: There is a huge tension in the language about a court as soon as practical trying to adjudicate a class certification motion. There's quite a tension there between that notion and the amount of pre-certification discovery on the merits of individual parties' damages and claims that are arguably could be avoided and that is not necessary to certify a case. And so there seems to be a lack of a unified approach, much inconsistency from courtroom to courtroom in the way in which judges view that requirement as soon as practical to get to the class certification issue, and the tension with the amount of discovery that is allowed on things other than a class certification issue.

And so a clarification or a gloss in Rule 23 on that inherent tension, I believe, would be of great assistance to practitioners.

JUDGE BATES: Thank you very much. Thank you, Mr. Maatman.

And now other questions, starting with Professor Marcus.

PROF. MARCUS: I'm sorry. I just wanted to follow up on the Judge's question. I take it you, like Mr. Pratt, feel that the 26(f) change you urge would be a recognition of the very, very large

importance of class certification decisions. And that prompts me to wonder how that bears on proportionality if discovery important to that might be costly nonetheless, is it a really major concern, and shouldn't that affect proportionality?

MR. MAATMAN: It is. And in my experience, however, settlements have been caused or foisted upon defendants because of the costs of other discovery in a class action case unrelated to the class certification issue that are front-loaded upon the defendant and cause them to then have to make a financial decision of whether or not they can even get to the class certification decision because they're loaded down with so much cost and so much time on discovery of issues that don't even involve class certification.

JUDGE BATES: Other questions?

(No response.)

JUDGE BATES: All right. Again, Mr. Maatman, thank you very much. We appreciate your taking the time and your very helpful comments.

MR. MAATMAN: Thank you, sir.

JUDGE BATES: That brings us to the next witness, Professor Judith Resnik from Yale Law School.

Professor Resnik?

MS. RESNIK: Hi. Can you all hear me okay?

JUDGE BATES: I can.

MS. RESNIK: Good, okay. So, first of all, I'm Judith Resnik. I'm the Arthur Liman Professor of Law here. I'm speaking for myself. I'm going to try to talk fast to keep time for questions open.

In addition to being an occasional litigator, a court-appointed expert in some of this, I actually spend a lot of time and have in Ben Kaplan's papers. First, they were in kind of dumpy boxes in Suitland Boulevard, Maryland, in the archives, and now they're in a much more elegant setting at the Harvard -- many of the overlapping materials are now in a special collection and catalogued for him.

So I have a 30-page statement, which I'm not planning to repeat, but I wanted to highlight a few points. First, the reason to think about the federal docket is to look at that while filings have flattened generally, a quarter of the people who come to federal court in civil cases do so pro se, and pending now, of about the 340,000 civil cases, 30 to 40 percent are grouped in multi-district litigation.

So, as a descriptive matter, the federal docket is filled substantially with a group of people with limited resources and then a great many aggregate

processing, which is to say that the courts are importantly dependent on aggregation as a way to function.

Now it's easily said, and you hear from some of the testimony -- I tried to read your transcripts and everybody else's submissions to the last few days came in -- that plaintiffs need class actions. That is the easy point. A defendant sometimes want class actions. Mullane is probably the poster litigant for the proposition that the bank could through its litigation, which was a quasi-legitimate precursor of the class action, find a way to pursue other claimants.

But my central point for wanting to comment is to underscore how much courts and judges need class actions to do in Mullane's terms -- to respond to the vital interests of states in making courts viable and accessible for a host of claims to get to the merits or get to their outcome.

Now the concern, the sense that courts need class action brings to me a concern that the efforts to radically curb class actions will do harm to the courts, which makes it incumbent upon me to raise -- which I'm a little surprised. I've been listening to that -- I'm the first to mention HR985, I believe, in

this hearing. And as I understand from my civil procedure list serve, last night it was voted out of committee.

Called the Fairness in Class Action Act of 2017, I'm mentioning it not to debate it here but rather in the hopes of this committee will prompt a judicial conference to write to Congress, as it has many times in the past, to inform Congress about the importance and the integrity and the utility of the process we're just engaged in now, which is committee-based rule development.

The Chief Justice in his annual state of the judiciary of the year before and again this year referenced both the important contributions made and the centrality and usefulness of the process. In the late '80s, the Civil Justice Reform Act, by then Senator Biden, was being drafted, and as the judicial conference responded to it, some of the mandates that would have been in there turned from shall do various forms of alternative dispute resolution into may, and Rule 16 was then shifted in 1993, revised again in that iteration.

JUDGE BATES: Professor Resnik, Professor Resnik?

MS. RESNIK: Yes, sure.

JUDGE BATES: This is Judge Bates. I just want to make sure you're aware, because it may save you some time --

MS. RESNIK: Yeah.

JUDGE BATES: -- a letter was submitted a few days ago with respect to HR985 from Judge Campbell, the chair of the standing committee, and myself as chair of the advisory committee on civil rules, and there may be more communications from the judiciary on that subject just so you know that that exists.

MS. RESNIK: That's great. I'm delighted to hear it. And I wrote a huge *Law Review* article trying to find every time the judicial conference had lobbied Congress in one way or other or advised or informed -- sorry, not to use the word lobby. And in the context of that, if I can be of help, as I think that would be very important, dialectical interaction between these bodies in cooperative activities, I'd be happy to help because I have 1930s examples as well as more recent ones if that would be useful.

So let me then turn to the importance of what I think needs to be revised. And I'm basically a fan of what you're doing on Rule 23, but I think there is more that can be done on 23(e).

So basically, in the current world we live in, we talk about things as pretrial and posttrial, even though, as we all know, in the vanishing trial, there are very few trials, about 3,000 a year in the federal courts right now, civil side.

So where one would be in the more ambitious -- not in the scope of this rule -- would be that we need rules to help settlement and pre-settlement and post-settlement. But the point here for Rule 23 is that it is the magic place in which the committee embraces, addresses, and the rule structure gives us some information about how people are supposed to behave in settlement and moreover provide public information.

And my view is that you can do more to help, and in contrast to HR1718, as the precursor to filing and certifying, what I think is to have the rule plainly announce that we're doing the best we can with the information that we have at the time of settlement. And we all know well that there will be some numbers of cases in which information is needed that we don't have now but will get as the implementation tail continues because in both civil rights injunction, which is the exemplar, and in economic relief cases, and in between, there's an

important and sometimes very long phase of implementation, and the democratic and participatory values of the need to figure out how to behave in the public to resolve the disputes that could emerge need to be honored after the settlement as well.

So I have a suggestion that -- and I know you've had all this discussion so far today and earlier about the ways in which electronics can increase information, and Elizabeth Cabraser and Sam Issacharoff have an essay on participatory class action. My suggestion is that you go to 23(e), and at pages 213 to 214, under subsection (I), which talks about receiving information about methods to plan for distribution and parties views as their proposed effectiveness, that you actually say in that rule that you invite information knowing that there may be additional information needed after approval, if approval is given, to achieve the aims of the settlement, and moreover, that under subsection (iii), where you talk about fees, you invite the potential for interim or staged fees, which would also alter your notes at page 227, as I read them, because your note mentions the possibility of scrutinizing methods for distribution.

And it seems to me it would be helpful to

say, yes, you want to deal with treating equitably, but in some cases one doesn't have all the information to know there's a significant set of variables that were not totally clear at the time of settlement -- Agent Orange, I guess, is the famous example, but I'm trying to think in more recent instances.

And so you could write words subject to new information developed during the settlement phase into the text of the rule. I, in reading your comments, know that some committee members want to be sure we're in the scope of your notice and distributions for now. The terms that you have welcome the suggestions that I'm making, and that it would be very useful to embrace the role of a court, a fiduciary overseer or participant, in making effective what the plaintiffs and the defendants have come together to want to put in the rule, and not to put it as attacks on the plaintiffs' lawyers but to see it as a joint generative endeavor of the group that has now made and approved a settlement that has to be implemented.

If I have a moment, I also want to be clear that I think it's very important in the tradition of all courts being open and public access that the rules state clearly that the materials developed in the implementation phase are court documents, which is now

a buzz word in the case law to some extent, that are open absent an unusual justification that justifies sealing whatever is a court document can be sealed, because what you're providing under Rule 23 is one of the rare windows into the adjudicatory process and a participatory way to understand both what we're doing right now as an example because we know about this settlement process, the things that you all want to fix. You can't get there if it's all private and no one knows what's going on.

So I want to applaud what the committee is doing, while also saying I think it could go further, and in going further, recognize the reality that, when you settle, it isn't over at that point in many kinds of class actions. And while some you could push a button on some computer machine and everybody gets whatever they get, there's an awful lot where there's more to work out, and you want to invite the mix of individual and group lawyers if MDLs are involved to working together to make it useful for the people who the whole system is for.

And you want to find ways to make them feel connected not just to whatever their lawyer distribution electronics are but actually to the judicial process so that they understand the reason to

be constitutively respectful of the function and role of the courts and helping them in ordinary ways as well as in some of the extraordinary moments that are making the press now.

My last comment, just a word on appeal because I argued the Mohawk case about attorney-client privilege and immediate appealability in the Supreme Court a few years ago and want to say that in my understanding of the case law, first, there are a lot of routes to appeal, and opening more appellate doors does really burden both the trial court and -- and even though they may not be formal stays, which depends on which rule version you look at, there are informal stays. And mandamus has actually been used, as we know from Rhone-Poulenc and elsewhere, as a back door that lets the appellate courts act when they see the need is great.

So I would be leery of expanding, as some people have been urging you, more doors to the appellate court while cases are pending at the district level. I think I get under time, so if you have comments or questions, I'd be happy to respond.

JUDGE BATES: Thank you very much, Professor Resnik, and we appreciate those very valuable observations.

And are there any questions for Professor Resnik?

(No response.)

JUDGE BATES: Hearing none, I thank you again, and we will certainly take both your written and oral comments into full account. We appreciate it very much.

MS. RESNIK: Thank you.

JUDGE BATES: That moves us to the next witness, Peter Martin, from State Farm Mutual Insurance Company.

Mr. Martin?

MR. MARTIN: Thank you, Judge Bates. This is Peter Martin. I'm associate general counsel with State Farm Mutual and its related affiliates. I've been at State Farm since 1998. Prior to that, I had a short career in the Navy JAG Corps and a private firm up in Chicago. And I've been involved in helping defend class actions filed against State Farm since 1999, so I've had the opportunity to be involved in quite a few class actions in that period.

I want to thank you for letting me provide comments on Rule 23 on behalf of State Farm and its policyholders. I think it's important to note that we're not a stock company, though we are a mutual

company, which means we exist for our policyholders. And I'm not here to comment on the current proposed changes but rather on what additional changes we would like to see added to the rule to make it a more fair and just rule.

And some of these have already been commented on today already, but some of them have not been. And we fully support the positions taken in the LCJ written submission. And the additional changes we would like to see -- and I'm going to list them in order of priority -- is first and foremost making 23(f) mandatory as opposed to discretionary appeal of a class certification decision.

The second would be to eliminate classes that have a no-injury component to what's in the class so that all class members have to satisfy an Article III standing requirement. And number three, including an ascertainability requirement. And fourth -- and this is the only one that's not written about in the LCJ submission -- is to alter the issue class rule in 23(c)(4) to make it clear that this rule should be subject to an overall case predominance inquiry, similar to what was set forth by the Fifth Circuit in the 1996 sixth Castano opinion.

So let me get back to my first one, which is

a mandatory 23(f) rule, and I'd like to read something from the Castano opinion which I think highlights why this rule should be mandatory as opposed to discretionary.

In Castano, this is written in the context of a mass tort class action, but I think it's equally applicable to class actions such as insurance claim class actions, and it states that class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely a defendant will be found liable and result in significantly higher damage awards. In addition to skewing trial outcomes, class certification creates insurmountable pressure of defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

And the jurisprudence in addition to this opinion is replete with references to the economic pressure that a class certification decision puts on defendants to settle. So the reality is you have very few certified class action trials. So, if you have a denied 23(f) petition, realistically, there's very

little chance that many of these certified class actions are going to obtain appellate review. And so there's just very few class action, certified class action trials.

In the LCJ case submission, they talk about some percentages of cases that get accepted and don't get accepted. But there's been a more recent study I've seen that takes things back to when CAFA was passed in 2005, and in the couple years after CAFA, the rate of 23(f) acceptance was right around 40 percent. But in recent years, that has now dropped down to about 20 percent, and the rate varies among circuits. In some of the circuits, the chances of getting a 23(f) appeal accepted are very, very low.

In our own recent experience with 23(f) appeals over the last six months, we've had four that we've taken. Two of them were rejected. One was in the Seventh Circuit, and one was in the Eleventh Circuit. And we've had two accepted, and they are both in the Eighth Circuit. But both those dealt with the exact same type of class action. So, if you look at both those together, our recent experience has been just one in three of our 23(f) petitions was accepted.

And we think making 23(f) mandatory is going to create a better, more consistent body of case law

for class actions.

I'll turn to my second one now, the no-injury component, and this is really a fundamental requirement of every case, that there be an injury component for the plaintiff, and it's really a constitutional requirement in Article III that a plaintiff suffered injury. And we think it's important to include in Rule 23 a requirement that every member of the class sustain an injury and meet this requirement. And LCJ submitted some proposed language to that effect.

The third one is ascertainability requirements. This is something that I think the Third Circuit has been out in front in terms of the need to have an ascertainability requirement in class actions, that there be an ascertainable way for objective criteria of identifying every individual class member.

And then, if you're going to need extensive fact-finding or mini-trials to find the class member, then the case shouldn't be certified. And several circuits have followed the Third Circuit, most notably the Fourth, the Ninth, and the Eleventh. But then again, you've got four circuits that have basically rejected that approach: the First, the Fifth, the

Sixth, and Seventh.

PROF. MARCUS: Excuse me. This is Rick Marcus. The Ninth Circuit had a case involving ConAgra in January which addressed ascertainability. Do you read that to say that it is agreeing with the Third Circuit?

MR. MARTIN: No, no. Actually, I haven't read that. The article I had said the Ninth Circuit -- and maybe there was a prior Ninth Circuit decision that agreed with the Third.

PROF. MARCUS: Okay. Thank you.

MR. MARTIN: But I haven't read the most recent one. So maybe they've now joined the Fifth, the Sixth, and Seventh and First in kind of rejecting that requirement. I haven't read that opinion, though.

PROF. MARCUS: Okay. Thank you.

MR. MARTIN: But clearly they have explored in the circuits, so I think it would be important for this committee to consider adding to the rule a requirement that there be an ascertainability requirement. To me, in terms of a fundamental fairness, the parties should know who's in the class and how many members are in the class.

And the last point I'll address is the issue

class in 23(c)(4). And Castano back in 1996 took a look at this. And even if you parsed the certification down to a single element or just a few issues, a multi-cause of action being presented, it said you still need to look at predominance of the case as a whole, so looking at the individual issues and the other elements, you have to look at how you're going to manage that case as a whole, how you're going to try those other individual elements after you had a certified trial over the few elements you're certifying. You have to look at predominance as a whole.

But I think there's been more recent decisions on 23(c)(4) over the last four or five years that have seemed to move away from that requirement by Castano that you look at predominance as a whole. So adding into Rule 23(c)(4) to make it clear that you still have to look at the predominance as a whole in the entire case before you can certify an element under 23(c)(4) would help in that.

Thanks, Judge Bates. That's all I have.

JUDGE BATES: Thank you very much, Mr. Martin. We appreciate it. Let me ask you one question just from your experience since, on behalf of State Farm, you've been involved in class action

matters for, oh, 15 to 20 years, it sounds like.

MR. MARTIN: Yes, sir.

JUDGE BATES: And you mentioned the experience under 23(f). What is State Farm's experience? How many times has State Farm sought an interlocutory appeal under 23(f) with respect to certification, and how many times has that request for appeal been granted by the courts?

MR. MARTIN: You know, over the last 15 to 20 years, I would say we've had -- I don't have the exact numbers for you, but I would say we've only had 10 to 15 of those. I've got the stats over the last two years. We've actually had very few certified class actions, what I'd call contested certified class actions. I think the stats over the last 10 years, from about 200 class actions in that period, we've only had six or seven certified class actions, and virtually every time we've taken a 23(f) appeal.

So I would say between 10 or 12 of those over the last 10 to 15 years, and we've had maybe three or four accepted. And in the last six months, most of those have -- almost half of those have come in the last six months. We've had four 23(f)s in the last six months, and two of those four were accepted.

JUDGE BATES: And of the prior acceptances,

did you succeed on the appeals?

MR. MARTIN: I'm trying to think. I think in most of those where it got accepted we were successful in getting the class certification decision reversed.

JUDGE BATES: But you're not sure? You don't have information at hand?

MR. MARTIN: I don't have those stats.

JUDGE BATES: All right. Other questions for Mr. Martin?

DEAN KLONOFF: This is Bob Klonoff. I was just wondering, you're mentioning a number of ideas, such as ascertainability, standing, issue classes. We addressed those issues. We looked at them as a subcommittee and a committee and decided not to pursue them, and we wrote pretty extensively our thinking on that. I was just wondering, number one, if you had a chance to consider our points, and number two, if you think that any of those things could be done at this point without a new notice and comment. These are pretty major suggestions that you're making at this stage of the process.

MR. MARTIN: Yes, sir. I haven't read the committee's comments on those rules. I understand from the committee rules, though, you do have the

discretion to add things in. And I think somebody made an important point earlier about the 23(f) mandatory provision. That, as I understand it, has been discussed at all these hearings, and a lot of the written submissions have dealt with Rule 23(f).

And that's something that's already in the rule. You would just be changing it from a discretionary to a mandatory appeal. So especially for that one, I think there's been enough commentary out there and enough study on that one that it wouldn't be something you'd have to resubmit for a public comment if you wanted to add that one it.

But as I understand it, that's discretionary for the committee to decide.

DEAN KLONOFF: But you would agree the other ones, it's probably too late in the process to consider those?

MR. MARTIN: I think that's up to your discretion. I don't think it's too late. It sounds like there's been a lot of discussion on those issues already. So it would be something you'd have to resubmit if you felt it was necessary to make the rule more fair and more just.

DEAN KLONOFF: Okay, great. Thank you.

JUDGE BATES: Other questions for Mr.

Martin?

(No response.)

JUDGE BATES: Mr. Martin, thank you very much again. We appreciate your observations and comments, and we'll take them fully into account.

MR. MARTIN: Thank you.

JUDGE BATES: You're welcome. That brings us to the next witness, Theodore Frank, from the Competitive Enterprise Institute.

Mr. Frank?

MR. FRANK: Thank you, Judge Bates, and thanks to the committee for letting me speak today. I speak both for myself and for my organization, the Competitive Enterprise Institute, which absorbed the Center for Class Action Fairness in 2015. Through that organization, I've argued most of the leading Rule 23 cases that have been decided in the last six years.

I'd like to focus on the amendments to Rule 23(e)(2), and in particular, I think it's important to understand how these rules are actually going to be read in practice. The vast majority of class action settlements are decided in ex parte proceedings where it's the settling parties presenting their settlement to the courts and presenting to the courts the

arguments for the legal interpretation of the rules, often without adequate adversarial presentation.

And, of course, district court judges are not trained to be investigators. They don't have the time to be investigators. And they're not used to making decisions without the adversary presentation, plus their own incentives to push settlement through.

And because of that, I think it's important that the committee be clear what the purpose of its rules are as it's crafting the rules. And some recent examples of recent amendments, I think, demonstrate this. In private conversations with members of FJC that I've heard surprise expressed that courts are not consistently using the actual recovery of the class in determining attorney's fees because they felt they spelled that out pretty clearly in the notes to the 2003 amendments creating Rule 23(h).

And in practice, what happens is that attorneys look for the loopholes or look for arguments not to consider Rule 23(h) in that way, and a body of precedents has built up based on those ex parte arguments that's fully adopted by courts that now many courts simply refuse to look at the actual number of claims and even deem the actual recovery of the class to be entirely irrelevant to the fairness of the

settlement.

And I do want to get back to that, but it's worth noting that even when the rule is really explicit, as in Rule 23(h), as requirement that the class be provided notice of a fee request in a reasonable manner, that one's completely unenforced for the first seven years of the rule's existence before the Ninth Circuit stepped in in the Mercury Securities decision. And to this day, there's still several district courts that create unwritten exceptions to the plain language of that rule.

So, in that context, we have concern about Rule 23(e)(2) where it just simply says please consider the claims rate without asking the court to consider why it's considering the claims rate. And we heard somebody express that there's concern about considering in hindsight, and I think that's inaccurate because, in reality, settlement administrators with experience with hundreds of settlements and the parties themselves, they can pretty much predict with actuarial certainty what a claims rate is going to be given a particular settlement structure, based on how notice is given out, whether there's individualized notice or just group notice through publication of some sort, based

on how easy it is to make a claim, based on whether a claim can be made online or whether somebody has to mail something in, based on the length of the claim form, based on whether you have to sign it under penalty of perjury, based on the other documentary proof that has to be provided, based upon the size of the potential cash awarded.

And the parties know what they're going to have to pay out, and when I say actuarial certainty, that's not an exaggeration. There is a third-party provider that actually offers settlement insurance to defendants that offers to completely take the risk that a claim is made, settlement will be somehow oversubscribed, which basically never happens.

We've had settlement administrators testify that they expect the claims rate to be under a third of a percent, or in the cases of individualized notice, even where it's possible for just checks to be mailed to class members, but a claims process is provided instead, that the claims rate will be less than 10 percent, or even when there is direct distribution, just changing the size of the envelope can dramatically affect the number of checks that actually get cashed.

And so, because of this, actually looking at

the actual recovery in a class action settlement where claims are being compromised I think is very important in terms of determining settlement fairness and in determining attorney's fees. And when courts such as the Third and the Seventh Circuit have said we insist that direct payment to the class be considered when attorney's fees are being calculated and we remand the settlement for paying the attorneys many times more than what the class gets, suddenly the attorneys figure out a way to get money to the class members rather than to cy près.

And it's very easy to say this is a $6 million settlement, and oops, we couldn't figure out who the class members are, so we only distributed $300,000 to the class, and it's okay that we're getting $5.7 million because we've made available $50 million for the class even though we knew there was no chance that that $50 million would be distributed.

You know, there might be nothing wrong with having a claims process with throttling the amount of class recovery. A class action settlement is a compromise. But when the attorneys structure a $6 million settlement so that they're getting 95 percent of that for themselves or 60 percent of

that for themselves or some other wholly disproportionate amount that would never be approved in a common fund, that creates problems.

The attorneys are deliberately choosing to throttle the class recovery so that they can take the lion's share for themselves. And I think that's something that needs to be emphasized in (e)(2) if that is the intent of the committee when asking parties to consider claims rate.

As we document in my longer comments, we have concern that creating this list will encourage parties to argue to courts that other things that courts have considered, such as clear sailing agreements and segregated funds and tickers that are just unambiguously bad to the class and just unambiguously self-dealing provisions that benefit class counsel at the expense of the class should not be considered at all, and we spell that out in the comments.

With respect to objectors, I share Mr. Isaacson's concern that without actually having standards, you're going to have these ex parte presentations to the courts where the parties say they created a benefit. Maybe they modified some language on the settlement website. Maybe the benefit that

will be argued is we have stopped the delay that would have resulted from an appeal.

And it's not clear how that's going to shake out when that gets disclosed. It could be that the disclosure shames courts into disapproving especially a large payout and deters objectors, or it could be that people see there's easy money of tens of thousands of dollars being paid to objectors just for showing up and appealing.

As we document in our comments, we're concerned about the specificity requirement, that it doesn't actually add anything to what courts are already doing but that the must language might encourage parties to engage in collateral litigation to strike good faith objections.

And we're repeatedly accused of being bad faith objectors, though we've won over $100 million for class members over the years. And we had a court say that our -- you know, we submitted dozens of pages of detailed, spelled-out objections to the Target data breach settlement and had the district court tell us that he considered us a bad faith objector because he thought our objection was boilerplate, you know, and then imposed a large appeal bond on us as a bad faith objector. Whether or not the Eighth Circuit's

reversal of the settlement approval has changed the judge's mind, I don't know.

But basically every tool that's used to deter bad faith objectors gets turned against good faith objectors, and we've had four district court judges tell us that we're bad faith objectors who have raised frivolous objections and should be deterred with a sizable appeal bond of tens of thousands of dollars. So far, we're four and oh in those cases on appeal, but one day we're going to get hit with an appeal bond we can't afford and have to drop a meritorious case.

I see I'm over my time. I very much look forward to the committee's questions.

JUDGE BATES: Thank you very much, Mr. Frank. I'm sorry. Thank you very much. This is Judge Bates, Mr. Frank. We appreciate your comments, and we'll consider them fully.

But in the meantime, are there questions for Mr. Frank?

PROF. MARCUS: May I, Judge? It's Rick Marcus.

JUDGE BATES: Professor Marcus.

PROF. MARCUS: One of the earlier speakers, Mr. Frank, seemed to say that the idea of bad faith

objectors is a myth. There are no such bad faith objectors. I think what you said was something like everything that's devised to deal with bad faith objectors gets used on good faith objectors like you.

Are you also saying that there's no such thing as bad faith objectors?

MR. FRANK: Well, I think it depends on what you define a bad faith objector to be, and I think also the universe of bad faith objectors, that there's a spectrum of objectors who range from boilerplate, straightforward I don't think the class should be certified and I don't think this is fair and I don't think the relief is adequate and accept relatively small sums by basically spamming the courts with those objections and more sophisticated objectors who are in this to take money away from class counsel without regard to whether or not they're improving things for the class, but to bring more sophisticated objections and do pick and choose the cases that they're objecting to and the appeals they bring with a bit more care.

And the higher, sophisticated attorneys that handle the appeals, if they can't settle their objection, in all honesty, as documented in the Capital One case, there's one such for-profit objector

who retained me in my private capacity when I took private clients, and I argued two appeals for him, and I won two appeals for him. He brought meritorious objections that were rejected. He couldn't find a way to make money off of them, and he just went ahead and let those cases go to appeal.

On the other hand, I've had two cases where my retainer agreement was not crafted strongly enough or my due diligence on my potential client was not careful enough, and I had clients bought out from under me in the course of a meritorious appeal where I'd already written an opening brief that had demonstrated we had a very substantial chance of success on appeal, and class counsel made my clients an offer they couldn't refuse, and that as an attorney I had an ethical duty to convey to my client.

And my clients can't make $25,000 bringing a successful objection, so if somebody goes to them and says I hereby offer you that much money to drop your claim over a $1,000 TCPA telephone call and drop your objection to what you contend to be a $10 million overpayment to the attorneys on the Rule 23(h) request, you know, my clients, who assured me that they were only doing this for the class, you know, suddenly they're put in an impossible situation where

they can't turn that sort of money down.

My retainer agreements are a bit more carefully drafted these days to hopefully preclude some of that while complying with IRS requirements for a nonprofit. I mean, one thing I would like to see -- and we mentioned this in the comments -- is, you know, what's the remedy if somebody isn't complying with the disclosure requirements in Rule 23(e)(5)?

Right now, there's a requirement that a disclosure happens, but, you know, what happens if there's the payment and the appeal just suddenly disappears, and nobody's taking it to court and, you know, will the court investigate, or will they just be happy that this is off of their docket.

And certainly, appeals court administrators have expressed a great deal of frustration with me that I wouldn't accept payouts, payoffs, to make an appeal go away, because they viewed that that's the role of the mediator's office in the courts of appeals.

JUDGE BATES: Other questions for Mr. Frank?

(No response.)

JUDGE BATES: All right. Well, that was Judge Bates, and this is still Judge Bates, thanking you again, Mr. Frank. We appreciate your input both

in your valuable written comments and here today in your testimony.

MR. FRANK: Thank you, Your Honor.

JUDGE BATES: That moves us to the next witness, Richard Simmons, from Analytics, LLC.

Mr. Simmons?

(No response.)

JUDGE BATES: Well, I guess we always viewed this as a possibility. Mr. Simmons, are you not there?

(No response.)

JUDGE BATES: You are not there. All right. We'll move to the witness after Mr. Simmons, who is Patrick Paul from Snell & Wilmer.

MR. PAUL: Well, thank you, Judge Bates and committee members. I am indeed still here, and I will be brief, as much of what I intended to say has been said already. And I'll just simply put an exclamation mark on some of it and will be available to take questions.

JUDGE BATES: Tell us, to start with, whether this is Mr. Simmons or Mr. Paul speaking.

MR. PAUL: Oh, I'm sorry. This is Patrick Paul.

JUDGE BATES: Okay. Go ahead. Thank you.

MR. PAUL: I'm a partner with the Phoenix, Arizona, firm of Snell & Wilmer, where I've been for 21 years, and I've been practicing for 25. I'm a current member of DRI and a past DRI board member. I'm also a past president of Arizona's Defense Lawyer Association.

I'm grateful for the opportunity to speak today to a component of DRI's views on proposed amendments to Rule 23. In that regard, I'd like to confine my comments strictly to Rule 23(f) and more particularly to request that this committee consider further amendment to Rule 23(f) to allow for mandatory interlocutory appellate review of class certification decisions.

The decision to certify a class is one of the most critical in class litigation. As such, we believe that appellate review is a right on decisions to certify, modify, or decertify a class if necessary. Concurrent with the decision to certify a class and the inevitable increase in legal fees is settlement pressure upon defendants.

From the plaintiff's standpoint, as noted in the advisory committee's '98 amendments, an order denying certification could mean that the only path to appellate review would be for the plaintiff to proceed

to final judgment on the merits of an individual claim whose singular value would be far outweighed by the costs of litigation.

Empirical data from the Institute of Legal Reform supports the conclusion that the ability of a party to obtain appellate review of certification determination has become exceedingly limited barring extraordinary circumstances such as a clear abuse of discretion.

Therefore, we strongly support an amendment to Rule 23(f) that would provide for mandatory appellate review following certification decisions. Mandatory appellate review would be equally available and could help alleviate some of the unintended consequences to both plaintiffs and defendants derivative to discretionary review.

Thank you again for the opportunity to have made these comments. I'm happy to take questions.

JUDGE BATES: Thank you very much, Mr. Paul. This is Judge Bates. We appreciate your views and the views, obviously, of DRI very much.

And with that, are there questions for Mr. Paul with respect to Rule 23(f)?

(No response.)

JUDGE BATES: All right. We've heard quite

a bit about Rule 23(f), so I understand that there may not be specific questions right now. And, Mr. Paul, again our thanks.

MR. PAUL: Thank you very much.

JUDGE BATES: I'll give one last call to Richard Simmons from Analytics, if he's back on the line.

(No response.)

JUDGE BATES: Since he's not, I will say that that will conclude this public hearing. We've heard from 10 witnesses, who provided very valuable information for the committee's consideration. I want to thank those witnesses. I also thank the committee participants who have been on the line and our other participants and observers who have joined us for this telephonic public hearing today.

With that, that is the last of our three public hearings on this set of possible rule amendments, primarily focusing on Rule 23 but also including Rules 5, 62, and 65.1. And once again, thanks to all who have participated. And unless there are any observations from those who are on the line, that will bring this hearing to a close.

(No response.)

JUDGE BATES: Hearing no further

observations, I thank everyone very much, and a good day to all of you.

(Whereupon, at 3:11 p.m., the hearing in the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

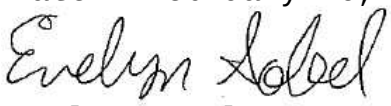
CASE TITLE: Advisory Committee Meeting on the Rules of Civil Procedure

HEARING DATE: February 16, 2017

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: February 16, 2017



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