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

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

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

FRONT-LOADING PROPOSAL AND CLASS NOTICE

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

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

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

CY PRES PROPOSAL

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

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

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

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

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

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

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

CLASS DEFINITION AND ASCERTAINABILITY

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

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

ISSUE CLASSES

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

RULE 68 OFFERS

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

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

Yours very truly,

Jocelyn D. Larkin
Executive Director