HERMAN HERMAN & KATZ LLC
ATTORNEYS AT LAW
Est. 1942

820 O'Keefe Avenue
New Orleans, Louisiana
70113-1116

p: (504) 581-4892
f: (504) 561-6024
e: info@hhklawfirm.com

hhklawfirm.com

Harry Herman (1914-1987)
Russ M. Herman*
Maury A. Herman*
Steven J. Lane
Leonard A. Davis*
James C. Klick[1]
Stephen J. Herman
Brian D. Katz
Soren E. Gisleson
Joseph E. Cain

Jennifer J. Greene[2]
John S. Creevy
Aaron Z. Ahlquist[3]
Craig M. Robinson
Adam H. Weintraub[4]
Mikalla M. Kott[5]
Donald A. Mau
Danielle Treadaway Hufft

Of Counsel:
Herbert A. Cade
Morton H. Katz*
Joseph A. Kott, MD, JD

This Firm and its Partners Are Also Partners in Herman Gerel, LLP

* A Professional Law Corporation
[1] Also Admitted in Texas
[2] Also Admitted in Arkansas
[3] Also Admitted in Tennessee
[4] Also Admitted in New Jersey & Pennsylvania
[5] Also Admitted in Colorado

September 29, 2014

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

Re: Potential Amendments to Federal Rule of Civil Procedure 23

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

I am the Managing Partner of Litigation at Herman Herman Katz LLC in New Orleans, Louisiana, where I teach Complex Litigation as an adjunct professor at Tulane Law School and an Advanced Torts Seminar on Class Actions at Loyola University School of Law. I am the author of *America and the Law: Challenges for the 21st Century* and have frequently lectured and published on class actions, complex litigation, ethics and professionalism, and other topics. I have personally represented both plaintiffs and defendants in putative class actions,[1] several of them certified, for both litigation and settlement purposes. I have represented parties advancing objections to class action settlements,[2] and have also defended class settlements against objections and appeals.[3] I personally participated in a significant multi-year class action jury trial,[4] as well as an MDL pre-class

[1] For example, I represented the defendants in Bauer v. Dean Morris, et al, No.08-5013, 2011 WL 3924963 (E.D.La. Sept. 7, 2011) (striking class allegations). I also successfully resolved a putative class action brought against Kirschman's Furniture, and am currently representing the City of New Orleans as a defendant against a certified class in Johnson v. Orleans Parish School Board, No.93-14333 (Civ. Dist. Ct. Parish of Orleans, State of Louisiana).

[2] For example, I represented the certified *Oubre* Class as objectors to the *Orrill* Class Settlement in Orrill v. Louisiana Citizens Fair Plan, No. 09-0566 (La. App. 4th Cir. 12/09/09), 26 So.3d 994, *and*, No. 2009-0888 (La. App. 4th Cir. 4/21/2010), 38 So.3d 457, *writ denied*, 45 So.3d 1035 (La. 2010) (*see also*, Oubre v. Louisiana Citizens Fair Plan No. 2011-0097 (La. 12/16/2011), 79 So.3d 987). I also represented the certified *Andrews* Class (*see* Andrews v. TransUnion Corp., No. 2004-2158 (La. App. 4th Cir. 8/17/2005), 917 So.2d 463, *writ denied*, 926 So.2d 495 (La. 4/17/06)) as objectors to the initial class settlement reached in *In re TransUnion Privacy Litigation*, MDL No. 1350, pending in the Northern District of Illinois. I also represented Self-Funded Plan objectors to the Class Settlement in Central States v. Merck-Medco Managed Care, 504 F.3d 299 (2d Cir. 2007).

[3] *See, e.g.*, In re Oil Spill by the Oil Rig *Deepwater Horizon*, 910 F.Supp.2d 891 (E.D.La. 2012), *aff'd*, 739 F.3d 790 (5th Cir. 2014) (approving Economic & Property Damages Class Settlement) (Co-Lead Class Counsel), *and*, 295 F.R.D. 112 (E.D.La. 2013) (approving Medical Benefits Class Settlement) (Co-Lead Class Counsel).

[4] *See* Scott v. American Tobacco, et al, No. 96-8461 (Civ. Dist. Ct. Parish of Orleans, State of Louisiana, July 28, 2003) (Jury verdict in Phase I trial for class of Louisiana smokers finding tobacco industry liable for fraud, conspiracy, and intentional torts, and responsible for the establishment of a court-supervised medical monitoring and/or cessation program), *and* (May 21, 2004) (Jury verdict in Phase II in the amount of $591 Million for 10-year comprehensive court-supervised smoking cessation program), *aff'd, in part*, No. 2004-2095 (La. App. 4th Cir. 2/7/07), *on subsequent appeal*, No. 2009-0461 (La. App. 4th Cir. 4/23/2010), 36 So.3d 1046 (ordering Defendants to deposit $241 Million, plus interest, into the Registry of the Court), *writ denied*, No. 2010-1358 (La. 9/3/10), 44 So.3d 686, *cert. denied*, 131 S.Ct. 3057 (2011).

settlement bellwether trial,[5] and a thirteen-week 130,000-plaintiff limitation and liability trial in the *Deepwater Horizon* MDL, in which I serve as Co-Liaison Counsel for the plaintiffs.

My primary purpose in submitting this letter to the Committee is to highlight the important distinctions that exist between and among the broad and diverse types of class actions that are proposed, and sometimes certified, under Rule 23 – but which distinctions are often lost or confused in the caselaw.[6]

True Class Actions vs. Aggregation of Claims

In some situations, the litigation will proceed as a certified class action or it will not proceed at all. It is, essentially, one case. Which, from the court's perspective, can be managed largely on a single docket, with a single set of briefs, and a single body of evidence; and, from the parties' perspective, can be litigated from a single file. In the event that class certification is denied, the court is effectively dismissing the action. I refer to this with my students as a "True Class Action".

In other situations, multiple actions are instituted by multiple different plaintiffs. Each of these actions is independently and economically viable. Whether from the court's perspective, or from the litigants' perspective, each of the actions is essentially its own separate case, with its own separate docket or file, its own separate costs, its own separate body of particularized evidence, etc.[7] I refer to this with my students as an "Aggregation" of cases.

While both "True Class Actions" and "Aggregations" of cases are frequently brought, and sometimes certified, under Rule 23, they are fundamentally different in nature. In the former situation, the decision to grant or deny class certification is imbued with overarching merits considerations and policy concerns. In the latter situation, the class action device becomes primarily a case-management tool which can be utilized (or not) by the Courts, as appropriate, to achieve judicial efficiencies and economies.

Litigation Classes vs. Settlement Classes

There is a fundamental difference between classes that are certified for litigation purposes and those that are certified for settlement purposes only.

In the litigation context, the court is primarily concerned with the susceptibility of the action to be managed and tried effectively thru finality, and the protection of defendants from potential

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[5] *See* Hernandez v. Knauf, No.09-6050, *In re Chinese-Manufactured Drywall Products Liability Litigation*, MDL No. 2047, 2010 WL 1710434 (E.D.La. April 27, 2010).

[6] These comments are submitted based on my own personal observations and experience. In offering these comments, I am not purporting to represent or otherwise speak for any association, institution or organization.

[7] In most situations, there will be a common body of factual, scientific and/or economic evidence that is relevant to most or all cases, which can be assembled and managed on a common docket, or with common briefing, in a common file, utilizing common expenditures, etc. Yet, each plaintiff will also have his or her own set of medical records, or purchase records, or repair estimates, or other individualized proofs, that will likely be necessary to successfully establish - or defend against - his or her particular claim.

judgments in favor of absent parties who have shown little interest in the matter and/or might likely be unable to prevail with respect to the merits of his or her own individual case at trial.

In the settlement context, by contrast, the court is not concerned with how the case would be managed and tried, but rather the protection of absent class members from a settlement that might be the product of collusion or might otherwise unfairly impinge or intrude upon absentee rights and interests.

The Problem

Practitioners, whether intentionally for strategic purposes or innocently out of confusion, and courts, whether inadvertently or perhaps because they are fearful of the ways in which their decisions might be cited as precedent in other situations,[8] frequently mix these apples and oranges, relying on Settlement Class decisions in the Litigation context, (or vice-versa), and relying on True Class Action decisions in the Aggregate context, (or vice-versa), without due regard for the significant differences in the interests that are trying to be protected or advanced.

Therefore, and as outlined further herein, I would respectfully urge the Committee and Subcommittee, in considering any potential changes to the Rule, (and/or in formulating additional Comments), to give due regard to the significant distinctions in the application of Rule 23 to Settlement versus Litigation classes, and True Class Actions versus Aggregations of individual claims.

Further, I would respectfully encourage the Committee and Subcommittee to limit the objections of class settlement objectors – and their attorneys – to the particular elements of the proposed class settlement in which they actually have an interest and objection.

The Class Definition

In my experience, a class should be defined separately and distinctly from the subgroup of people or entities expected to actually recover (assuming that the plaintiffs prevail on the common issues) at the end of the day. The class definition will almost invariably serve the interests of notice and due process if the class is defined objectively, and without regard to the legal or factual merits of the litigation. In most cases, this type of class definition will be "over-inclusive" in the sense that the class will be larger than the group of individual persons or entities who are ultimately *eligible* to recover, based on various legal and/or factual parameters, proofs and/or determinations.

In recent years, many courts have increasingly rejected what are arguably "over-inclusive" classes, which places the class proponents in somewhat of a Catch-22: By defining the contours of the class to be coterminous with the exact group of people or entities who will ultimately recover

[8] Courts, for example, sometime seem reluctant to approve class settlements out of a concern that such approval will be used as precedent for the certification of litigation classes by other courts in other cases.

(assuming that the class prevails), you will frequently inject merits, causation and/or other subjective elements into the class definition, and compromise objective ascertainability.

The concern regarding an over-inclusive class definition seems driven by a fear that defendants might unfairly be held in judgment to particular absent plaintiffs who, while included in the class definition, would not be able to recover against the defendant – (either at the Rule 12 level, or at the summary judgment stage, or had the action been put to the test at trial). This concern, however, arises almost exclusively in the True Class Action context, and primarily in the context of Litigation classes.

In the Aggregation context, an individual classmember will almost never recover damages (even if the class as a whole is successful on the class-wide issues) without coming forward with some type of individualized proof. The only effect is a *res judicata* effect. As a practical matter, there is no risk in certifying what is arguably an "over-inclusive" class, as the defendant would almost never be forced to pay damages to a clearly "undeserving" class member.

Similarly, the fear of potential payment to an "undeserving" class member is greatly diminished in the Settlement context – wherein the defendant has agreed to the class definition, and voluntarily decided whom to pay or not pay.

The concern that might arise with respect to an over-inclusive class in the Settlement context would only occur where the settlement creates a capped or limited fund – particularly where the class is defined and agreed to *after* the limitation on the fund has already been established.[9] In this case, however, the court's focus should not be on protecting the defendant, but solely on the interests of absent class members.

Rule 23(a) Prerequisites

Aside from numerosity, the Rule 23(a) pre-requisites are largely irrelevant to Litigation classes, and particularly litigation classes in the Aggregation context.

The elements of commonality, typicality and adequacy are clearly premised on the notion that the Class Representative's action or claim will be litigated to conclusion, and then applied to the actions or claims of the absent class members whom he or she represented at trial.

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[9] One concern is that the "valid" claims of the "deserving" class members may be "watered down" by relief paid to "undeserving" claimants who have more marginal (and perhaps even no cognizable) claims. This concern can, of course, be mitigated or alleviated entirely by the eligibility and/or proof requirements and standards that are built into the distribution model. Courts are sometimes bothered, at the same time, by the release of claims by potentially large numbers of class members who are not receiving any consideration. However, in my personal view, if these individuals or entities do not have a claim that could be realistically prosecuted in the first place, the collective benefits of the settlement overall – as well as the notice and due process benefits of having a clear and objectively ascertainable class definition – will almost always outweigh the downside (if any) to these absent class members who don't really seem to have much of a case anyway.

However, virtually no class action is tried in this way.

A class action trial will almost always be structured to resolve only the common class-wide issues, claims and/or defenses, on a class-wide basis. In some cases, the Class Representative will not even present evidence that is uniquely relevant to his or her own particular claim. Yet even where the Class Representative's action or claim is tried, (perhaps for standing, or efficiency, or "bellwether" purposes), the findings that are unique to the Class Representative – such as specific causation, *quantum* of damages, or an individualized defense – are almost never imputed, extrapolated or applied to the class as a whole.

There are, of course, various securities, antitrust, ERISA, discrimination, and other cases where a formulaic damage model can be established and applied across the class from a database or other common sources of proof. In these True Class Actions the court must be convinced that the class-wide determinations can be fairly and reliably extrapolated to the class as a whole, and closer attention to the Class Representative's qualifications under Rule 23(a) may be warranted in this regard.

But in the Aggregation context, the triable common class-wide issues are, by their nature, common and class-wide. They are based on common and class-wide bodies of evidence, and not the vagaries of the individual Class Representative's facts and circumstances. If the class loses on the necessary common elements, the Class Representative's facts become irrelevant. If the class wins on the necessary common elements, the individual Class Representative might nevertheless still be unable to recover. Yet whether or what the Class Representative is found entitled to receive, it is not that recovery (or lack thereof), but subsequent claim form submissions, or mini-trials, or other proceedings, that will dictate whether and the extent to which absent classmembers will prevail.

Rule 23(b)(3) Requirements

The Rule 23(b)(3) predominance requirement, the primary hurdle to certification of Litigation classes, is largely insignificant in the context of a Settlement class. Because the Class Representative is, at least to some extent, acting for the absent classmembers in proposing the settlement, it makes sense to examine the commonality and typicality prerequisites, and in particular the adequacy of representation. But the Rule 23(b)(3) predominance requirement deals with the ability of the court to efficiently and effectively manage the litigation – *assuming* that the common versus individual issues are actually litigated. Because the individual issues, like the common issues, are proposed to be resolved by the settlement, it is largely irrelevant whether or how they could be effectively tried.

Similarly, the concerns raised by the superiority requirement are largely alleviated in the Settlement context, with the court's separate and independent determination that the class structure leads to an outcome that is fair, reasonable and adequate to the classmembers under Rule 23(e).

Where class certification for Litigation purposes is contested by the defendant, the Rule 23(b)(3) analysis is completely different in the True Class Action versus the Aggregation context.

Where the case is a True Class Action, the court should likely conduct a fairly rigorous analysis, that looks beyond the pleadings, as to the merits of the case, and how it might be tried. Because the denial of class certification is effectively dispositive, the court should consider the extent to which the case has merit, and the centrality or significance of constitutional, legislative or other public policies sought to be enforced or adjudicated.

In general, a better or more significant case on the merits should be reviewed under a less stringent predominance requirement; whereas a weaker or less significant case on the merits should warrant greater demands that it can be managed efficiently.

At the same time, where the True Class Action is intended to be litigated as a class action, (over the defendant's objections and defenses), the court must give careful consideration to the way in which both common class-wide and any lingering individual issues might be tried.

In the Aggregation situation, on the other hand, the court, (or perhaps several different courts), are already tasked with the responsibility of trying numerous cases to completion. The actions and claims – and the individual issues impregnated therein – are going to exist, irrespective of whether class certification is denied or granted. Therefore, the question in this context is not really whether, but rather *how*, this can best be accomplished.

The use of Rule 23 in the Litigated Aggregation context is, more than anything else, a case-management tool, which is available to achieve judicial efficiencies and economies by resolving common issues all at once, despite the existence of individual issues which would need to be resolved anyway.[10]

Because these lingering individual issues are resolved on an individual, rather than a class-wide basis, (even where a class is formally certified under Rule 23(b)(3)), neither the exposure faced by a defendant nor the rights and interests of the individual plaintiff are materially affected by the certification.

Limiting the Standing and Scope of Objectors and Objections

It is very difficult to facilitate the assertion and consideration of objections that are made in good faith to protect or advance the collective interests of classmembers, while at the same time deterring the ability of "professional objectors" or others to hold up class settlements with objections that are made for the purpose of leveraging the interests of the objector and/or the objecting attorney in bad faith. Because the intent of the objector and/or objecting attorney is inherently subjective, it is difficult to determine, establish and regulate.

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[10] It is likely better, at the commencement of the litigation, to conduct test, bellwether, summary jury, or other trials, so that the parties and the court can better understand the factual, legal and evidentiary issues, and how they might unfold, before putting all of the litigation's eggs into a single certified class action common-issue trial basket. If, however, it appears after an appropriate number of trials that many of the cases cannot or will not be resolved amicably, certification at that point gives the court an effective tool for resolving common issues in one proceeding.

Additionally, because the court has an independent duty to ensure that the Rule 23(a), (b) and (e) criteria are satisfied, it is difficult to preclude the court's examination of a potentially legitimate issue, however it is raised.

Nevertheless, one of the hallmarks of a "professional objection" is the inclusion of an objection to an element or multiple elements of a class settlement in which the objector has no genuine interest at stake. In the *Deepwater Horizon* Economic & Property Damages Class Settlement, for example, the class members who were objecting to the Seafood Compensation Program had nothing to gain or lose in the structure or approval of the Seafood Program, as they were only class members by virtue of Coastal Real Property Claims.[11] Arguably, there could be Article III standing limitations, despite the broad provisions of Rule 23(e)(5) (and Rule 23(g)(2)), on the objections that can be advanced by a class member. But a formal restriction of objections to issues in which the objector actually has an interest would help to deter or limit the scope and potential effect of objections that are made in bad faith.

Additionally, an objecting attorney, after securing a classmember's consent to object to the class settlement generally, will frequently advance all of the possible objections that the objecting attorney can divine, irrespective of whether the class member actually objects to that particular element of the settlement. For example, in the *Deepwater Horizon* Settlements, the attorney for the objectors complained about alleged "*cy pres*" distributions that the objectors themselves actually supported.[12] This type of divergence is difficult to police or detect, absent extenuating circumstances; yet perhaps there could be a requirement that both the objector and the objecting attorney submit sworn declarations evidencing that the objecting classmember understands the objections that he or she is advancing, and verifying that he or she actually supports them.

I appreciate the Committee and the Subcommittee's time and consideration of these issues.

Respectfully submitted,

STEPHEN J. HERMAN

[11] *See generally* SUBMISSION BY CLASS COUNSEL ON REMAND OF MEDICAL SETTLEMENT (with Incorporated Motion to Strike, Motion to Dismiss, and Motion for Sanctions), *In re Deepwater Horizon Litigation*, MDL No. 2179, Civil Action No. 10-md-2179, Rec. Doc. 11869 (Nov. 19, 2013).

[12] *Id.*, at pp.15-18.