IMPACT FUND

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

March 25, 2015

Electronic Delivery to rules_support@ao.uscourts.gov

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

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

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

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

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

1. NOTICE

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

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

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

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

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

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

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

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

b. Proposal to Expand Required Notice Information

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

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

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

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

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

c. Use Notice Checklist to Develop Practitioner Protocol

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

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

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

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

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

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

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

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

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

2. CY PRES

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

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

---

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

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

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

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

New Rule 23(e)(3):

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

(a) must consider:

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

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

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

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

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

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

Yours very truly,

Jocelyn D. Larkin
Executive Director