LAWYERS FOR CIVIL JUSTICE

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
RULE 23 SUBCOMMITTEE

LOOKING AT THE BIGGER PICTURE: THE CONCEPTUAL SKETCHES IN THE CONTEXT OF MUCH-NEEDED RULE 23 REFORM

April 7, 2015

Lawyers for Civil Justice ("LCJ") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its Rule 23 Subcommittee (the "Subcommittee") concerning the Subcommittee's conceptual sketches of possible Rule 23 amendments.

I. Introduction

LCJ has urged the Subcommittee to examine how the rapid expansion of Rule 23 since 1966 has led to a significantly reduced relationship between class members and their cases, a phenomenon demonstrated vividly by the rise of "no injury" class actions and the invention of cy pres payments to non-parties.[1] LCJ has also suggested meaningful improvements to Rule 23, including clarifying the intended standards for "issue classes" and providing a right to interlocutory appeal on class certification decisions. Unfortunately, these ideas are not reflected in the conceptual sketches, which seem aimed at enshrining into the Federal Rules of Civil Procedure (FRCP) several inventions that have enabled the metamorphosis of class actions into the form they have taken today. The sketches would not only lend the FRCP's imprimatur to case law that has exceeded the purpose of the rule, but also further Rule 23's transformation away from a procedural mechanism for the efficient handling of mass claims and towards an un-

[1] *See,* LAWYERS FOR CIVIL JUSTICE, TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (Aug. 9, 2013) [hereinafter A CALL FOR MEANINGFUL REFORM], *available at* http://www.lfcj.com/class-actions.html; LAWYERS FOR CIVIL JUSTICE, REPAIRING THE DISCONNECT BETWEEN CLASS ACTION AND CLASS MEMBERS: WHY RULES GOVERNING "NO INJURY" CASES, CERTIFICATION STANDARDS FOR ISSUE CLASSES AND NOTICE NEED REFORM (Aug. 13, 2014) *available at* http://www.lfcj.com/class-actions.html .

legislated creation of causes of action and remedies only nominally concerned with securing a remedy for injured plaintiffs.

A useful way to view the sketches is to consider them as one picture rather than as unrelated drawings. Here is what the connected picture looks like:

> A lawyer learns of some issue or event, a design issue, a manufacturing concern or perhaps a data breach. She files a class action on behalf of a large purported class, a significant number of whom have not been affected by the alleged issue. If the reputational risk to the defendant is not in itself sufficient to bring it to the negotiating table, the lawyer seeks to certify an issue class, without any burden to show that any cause of action predominates throughout the class. After the issue is certified, the defendant is compelled to settle, now eager for certification of a settlement class. It now has limited ability to settle with the class representatives, whether they are interested in recovering their damages or not. The lawyers are free to settle the case without meeting any of the (b)(3) requirements for a class action. Due to the difficulty or expense of identifying the class, particularly in contrast to the relatively small amount of remedy per class member, the lawyers agree to provide a cy pres payment to a non-profit group, perhaps one whose work assists in finding new topics for purported class action cases. Class members who object are scared off by the possibility of heavy costs and the difficultly of convincing the judge to hold up a settlement endorsed by counsel. All class members are bound; the defendant has certainty; and plaintiff's counsel is paid a significant portion of the settlement.

This picture is not conceptual, but rather is the reality of how the ostensibly procedural Rule 23 is used today to create un-legislated causes of action and remedies. This is a serious problem for rule-makers—one that transcends the easy-to-dismiss notion that the problem is only that the two sides of the "v" disagree on the societal utility of these law suits. Whatever one's policy view, the solution for the overexpansion of Rule 23 into areas never imagined does not lie in codifying novel practices into the FRCP in an effort to conform the rules to how courts are allowing them to be abused.

II. Any Reform of Rule 23 Must Strengthen the Relationship Between Class Members and Their Law Suits, Not Weaken It

A. The Subcommittee Should Develop Reforms Aimed at "No Injury" Cases

Perhaps nothing better demonstrates the need for Rule 23 reform than the rise, under the auspices of Rule 23, of law suits in which some or all of the class members have not suffered any cognizable injury. Such "no injury" class actions are troublesome because they allow cases to proceed on a substantively different basis from the underlying state law. Eliminating required elements of a cause of action (typically, damages and causation) under the guise of a procedural rule raises due process concerns because defendants face liability for actions for which valid

individualized defenses may exist,[2] as well as obvious Rules Enabling Act problems. Moreover, the widely varying treatment of "no injury" class actions—not just the differing outcomes, but the differing justifications—demonstrate the need to amend Rule 23 to provide clarity.

The absence of this issue from the Subcommittee's conceptual sketches is not due to a lack of achievable reforms. There are a number of clarifications to Rule 23 that would both unify the law in this important area and make class actions more effective when they are actually needed. Such clarifications include:

- Clarifying the role of the merits inquiry in class certification. In particular, Rule 23 should be amended to reflect the Supreme Court's holding in *Wal-Mart Stores v. Dukes* that a court must engage with the merits of a claim if it will affect certification, and that a class in which some class members will recover because they were actually injured, but others will not, lacks the required commonality.

- Clarifying the standard applied in the "rigorous analysis" of Rule 23. Currently, the Supreme Court has stated, albeit in dicta, that this standard is "stringent" and "in practice exclude[s] most claims."[3] Nonetheless, various lower courts persist in holding that Rule 23 should be applied in a "liberal" manner that errs on the side of certification.[4] Clarifying that the "rigorous analysis" required by Rule 23 is "stringent," rather than "liberal," would help guide courts' discretion when faced with the complexities of "no injury" litigation.

- Clarifying the standard used to determine when individualized issues predominate over common issues. (More on this below.)

B. *Cy Pres* Should Not Be Enshrined in Rule 23

Although the conceptual sketch on cy pres may be intended to prevent some of its worst abuses, enshrining the concept of cy pres in the FRCP is the wrong medicine. This is particularly true because the sketch, which is based upon § 3.07 of the ALI Principles of the Law of Aggregate Litigation, omits – without even a mention – the enforcement mechanism that is key to its function: a rule excluding cy pres payments from attorneys fee calculations. (LCJ previously proposed a similar provision as an alternative to outright prohibition of diversion of class action settlement funds from plaintiff class members to uninjured non-parties.) Even more alarming is the suggestion that courts "presume" that cy pres is appropriate where individual damages are less than $100[5] – a provision that would pour gasoline on the open flame, virtually assuring that

[2] *E.g.*, Lindsey v. Normet, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense").
[3] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).
[4] *See, e.g.*, Johnson v. Nextel Commc'ns, Inc., 293 F.R.D. 660, 668 (S.D.N.Y. 2013) (certifying issues class after noting that "Rule 23 should be given liberal rather than restrictive construction and has demonstrated a general preference for granting rather than denying class certification.") (internal quotations omitted).
[5] Advisory Committee on Civil Rules, *Agenda Materials, Washington D.C., April 9-10*, 2015, Report of the Rule 23 Subcommittee, at 266, [hereinafter Agenda Materials, Rule 23 Subcommittee Report], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf. Class action settlements providing recovery to class members of less than $100 are routine. For example of the 37 class action

most consumer class actions will focus on a cy pres remedy notwithstanding the rule's ostensible point to make cy pres a last-ditch option.

1. The Conceptual Sketch on Cy Pres Does Not Address the Numerous Problems Created by the Availability of Cy Pres Distributions

The cy pres sketch unfortunately would not be effective in solving the problems created by the importation of the cy pres doctrine into the area of class actions. For example, the language purporting to put some limit on recipients – that a recipients' "interests reasonably approximate those being pursued by the class"[6] – is merely hortatory. The fact of creating a rule on cy pres would not serve to assuage any of the following problems:

- Cy pres facilitates an avoidance of doing the work, and spending the money, to identify class members (also at times implicating counsel's effectiveness at representing the absent class members adequately).

- Cy pres distributions increase counsel fees without adding value to the class.

- Cy pres awards have been used as patronage vehicles to steer money belonging to absent class members to charities favored by class counsel or the approving court.

- Cy pres awards have been used to perpetuate litigation by funding organizations that encourage or conduct research designed to further additional lawsuits.

- Cy pres awards have been diverted to political advocacy.[7]

These are significant issues, and some courts are recognizing them as such. Two recent appellate decisions have endorsed cy pres reforms. In *Holtzman v. Turza*,[8] Judge Easterbrook rejected a trial judge's unilateral decision to convert the residue of a settlement into a cy pres award to Legal Aid. "The Foundation is a worthy organization, but many courts have expressed skepticism about using the residue of class actions to make contributions to judges' favorite charities."[9] In *Pearson v. NBTY, Inc.*,[10] Judge Posner affirmed exclusion of "the cy pres award . . . in calculating the benefit to the class [for purposes of a fee award], for the obvious reason that the recipient of that award was not a member of the class."[11] In another case, Judge Posner wrote that cy pres settlements created to avoid the expense of identifying class members and to

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settlements listed at the website "Open Class Action Lawsuit Settlements," only 6 paid out, on average, more than $100, while 9 paid out less than $50, with the lowest averaging $1.40.

[6] *Id.* at 266, 271.

[7] A CALL FOR MEANINGFUL REFORM, *supra* note 1, at 11-12.

[8] 728 F.3d 682 (7th Cir. 2013).

[9] *Id.* at 689.

[10] 772 F.3d 778 (7th Cir. 2014).

[11] *Id.* at 781 (following *Redman v. Radio Shack*, 768 F.3d 622 (7th Cir. 2014) (holding, as a general proposition that no part of a settlement that is not "cash in the pockets of class members" constitutes "value to the class" for purposes of fee calculation")).

generate fees "sold [the class] claimants down the river."[12] These decisions show that cy pres conflicts of interest are blatant and widespread, and that some courts are starting to understand. A meaningful rule is needed.

2. The Authority for Cy Pres, and for Enshrining it into the FRCP, is Unclear at Best

There is no generally recognized inherent judicial authority for courts to convert ownership of settlement funds from litigants – absent class members – to non-parties.[13] Except for a couple of state statutes, cy pres has no basis in substantive law. "Rule 23(e) does not mention the district court's discretion − or even its authority − to extinguish the right of recovery of identified class members through a later cy pres order."[14] Not even the American Law Institute, on which the Subcommittee heavily relies, ever identified a source of supposed judicial power to award funds to non-litigants when it included cy pres in its Principles of Aggregate Litigation.[15] Recognizing cy pres by rule is very likely beyond the scope of the Rules Enabling Act.[16] It is not surprising that the sketch's proffered "prototype" for cy pres is a state court decision, not subject either to the Act or to federal case-or-controversy requirements.[17]

The Subcommittee acknowledges the lack of substantive authority for cy pres distributions in a footnote:

> It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject.[18]

The Subcommittee's other rationale, that courts are merely enforcing private agreements, is unsatisfying because judicial enforcement cannot support the taking of class members' property without their consent, or even knowledge.[19] Judicial authority is more than a "touchy subject"; It is an essential prerequisite for any serious proposal. The sketch's remedy – adding the disclaimer "if authorized by law"[20] – puts too fine a fine point on the question. Since only a "few statutes" authorize cy pres distributions, "if authorized by law" would render the sketch applicable to so few cases that it would be trivial.

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[12] Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004).
[13] *See* A CALL FOR MEANINGFUL REFORM , *supra* note 1.
[14] *All Plaintiffs v. All Defendants*, 645 F.3d 329, 333-34 (5th Cir. 2011). *See generally*, Martin H. Redish, et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis,* 62 FLA. L. REV. 617 (2010).
[15] *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §3.07 (2010).
[16] 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right").
[17] *Agenda Materials, Rule 23 Subcommittee Report, supra* note 5, at 22 (citing *Daar v. Yellow Cab*, 433 P.2d 732 (Cal. 1967)).
[18] *Agenda Materials, Rule 23 Subcommittee Repor*t, *supra* note 5, at 23, n.33.
[19] *See* Redish, *supra* note 14. *Cf.* Shelley v. Kramer, 334 U.S. 1, 18 (1948) (judicial enforcement of privately negotiated contracts is state action that can violate the constitution).
[20] *Agenda Materials, Rule 23 Subcommittee Report*, *supra* note 5, at 23.

The Supreme Court is well aware of the serious issues surrounding this questionable doctrine. In *Marek v. Lane*,[21] Chief Justice Roberts, while concurring in denial of *certiorari*, expressed "fundamental concerns" about "when, if ever," cy pres distributions could be permissible in class action settlements:

> [T]he parties earmarked [all the money left over after counsel fees] for a "cy pres" remedy . . . because distributing [it] among the large number of class members would result in too small an award per person to bother. . . .
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> Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a cy pres remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues. Cy pres remedies, however, are a growing feature of class action settlements. In a suitable case, this Court may need to clarify the limits on the use of such remedies.[22]

Given the dubious (at best) authority for the doctrine of cy pres itself, and the likelihood that enshrining it into the FRCP is beyond the scope of the Rules Enabling Act, the Committee should not act to authorize it; *Marek* strongly cautions such caution. Until Congress permits such a remedy,[23] banning resort to cy pres is the only option that will address the many policy concerns it causes.

III. Eliminating the Predominance Requirement for Issue Class Certification is Premature in the Wake of *Comcast*

The Subcommittee offers two conceptual sketches to address issue certification. The first would explicitly subordinate Rule 23(b)(3)'s predominance requirement to Rule 23(c)(4). As drafted, this amendment does far more than reflect the current thinking among appellate courts as to the proper application of Rule 23(c)(4), and would eviscerate the "demanding" predominance requirement.[24] Moreover, it does not address the many difficult questions raised by use of Rule 23(c)(4) to evade the problem of predominant individual issues in a proposed class action.

The use of issue certification under Rule 23(c)(4) has experienced a resurgence in the last two years as a means of attempting to circumvent the Supreme Court's opinion in *Comcast Corp. v.*

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[21] 134 S. Ct. 8 (2013).

[22] *Id.* at 9 (statement of Roberts, C.J. concurring). *See also* In re BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1063 (8th Cir. 2015) (criticizing and severely restricting cy pres in light of Chief Justice Roberts' statement n *Marek*).

[23] The only federal statute of general applicability cited in the draft Subcommittee Report is the provision in the Class Action Fairness Act (28 U.S.C. § 1721(e) dealing with left-over coupons. Had Congress wished to create a similar remedy for undistributed cash, it would have done so. The CAFA provision is further indication both that no inherent judicial cy pres authority exists, and that Congress has not bestowed such power on the judiciary.

[24] Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).

Behrend. As a result, it is far too soon to determine whether the appellate courts currently agree on the proper application of issue certification. First, the majority of appellate circuits that have "approved" the use of issue certification in the wake of *Comcast* have done so in speculative fashion, not by carefully thinking through the implications of the Rule.[25] None of these were essential holdings to the case at hand, and it would be ill-considered to presume that appellate courts have reached a radically new consensus based only on *dicta*.

Second, even those courts that have—in the wake of *Comcast*—provided some indication of how issue certification would work have not had the opportunity to see their ideas play out in practice. The Sixth Circuit affirmed issue certification in *Glazer v. Whirlpool Corp.*[26] The case went to trial and resulted in a defense verdict. The *Glazer* plaintiffs have appealed that verdict, claiming that the trial court impermissibly allowed the jury to consider plaintiff-specific facts.[27] There has been no further reported action on that case at the trial or appellate level.

In short, the Subcommittee does not yet have the necessary information to determine what the effect of such an amendment would be. In particular, it needs the answers to several pressing questions raised by the use of issue classes under Rule 23(c)(4):

- *How will the court notify the class members of the certification?* Certification for specific issues only is a more abstract and more complex proposition than certifying an entire case for litigation. Class members already do not read or understand many of the class action notices they receive.[28] How will the court ensure that notice of an issue certification, which may decide some of a class member's rights but not others, and may require them to take an active role in the case to seek compensation, will be read and understood?

- *Who will litigate any damages trials?* Another issue that requires consideration is how a 23(c)(4) certification would work in a negative-value class action. If the amount for the plaintiff to recover is *de minimis*, then the parties are unlikely to engage in any kind of damages trial. (This is likely to be compounded by the notice problem described earlier: the average class member does not read or understand notices of class actions already, and is unlikely to understand the effect of a bifurcated or polyfurcated trial on their rights.) As a result, bifurcating liability from damages under Rule 23(c)(4) is unlikely to lead to relief actually going to class members.

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[25] *See, e.g.*, Gulino v. Bd. of Educ., 555 Fed. App'x 37, 41 (2d Cir. 2014) (dismissing appeal as moot; notes that 23(c)(4) certification for Rule 23(b)(2) class would have been proper under circumstances); Stephens v. Mahoney, 755 F.3d 959, 967 n.9 (D.C. Cir. 2014) (reversing denial of certification and suggesting in footnote that 23(c)(4) certification might be appropriate if problems persist); In re Deepwater Horizon, 739 F.3d 790, 806 & n.65 (5th Cir. 2014) (mentioning that district court had been prepared to certify issues class under Rule 23(c)(4) and proposing in footnote that bifurcation might accord with circuit precedent); Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc., 725 F.3d 1213, 1220 (10th Cir. 2013) (vacating certification; mentioning possibility of issue certification to address individualized issues).

[26] 722 F.3d 838 (6th Cir. 2013).

[27] Brief of Appellants, Glazer v. Whirlpool Corp., No. 14-4184 (Feb. 12, 2015). The Seventh Circuit affirmed issue certification in Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013).

[28] Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. LITIG. 53, 54-55 (2010).

- *How can the parties settle a class action certified for liability only*? If the class has only been certified for liability purposes, does a settlement that results in compensation require a separate certification? If the class was certified under Rule 23(c)(4) because it could not meet the predominance requirement, how can it be certified for settlement? (To the extent that the Subcommittee was relying on the passage of its proposed Rule 23(b)(4), which would eliminate the predominance requirement from settlement certification, see our discussion there.)

- *How will the court determine attorneys' fees in the absence of any monetary award?* Evaluating non-monetary class settlements for the purposes of determining attorneys' fees has proven surprisingly difficult, and prone to abuse.[29]

- *What are the constitutional implications of a Rule 23(c)(4) order*? The Re-examination Clause of the Seventh Amendment precludes different bodies from hearing the same evidence. If a court certifies specific issues under Rule 23(c)(4) for a jury trial, how will it avoid the problem of having different fact-finders hearing the same facts? Similarly, Rule 23 in general, like all Federal Rules, is bound by the Rules Enabling Act: it may not create any substantive rights that the litigants did not already possess; nor may it strip any rights from those litigants. To the extent that a Rule 23(c)(4) order may bifurcate common "liability" from individualized liability-negating affirmative defenses, it would strip defendants of a valuable protection at trial.

The Subcommittee's conceptual sketch for interlocutory appeal of any issue certified under Rule 23(c)(4) does not address any of these fundamental issues. Far from being an obstacle to certification requiring a solution, the rigorous enforcement of Rule 23(b)(3)'s predominance requirement is an important due process protection for class members.[30] It is too soon for the Subcommittee to state that courts are in agreement about the proper handling of issue certification, and then to enshrine the most radical version of that consensus into Rule 23.

IV. The Conceptual Sketch on Settlement Classes Would Risk Highly Undesirable Unintended Consequences

The Subcommittee's conceptual sketch on issue classes may be motivated by a desire to ease the path to settlement – a concept that has some utility in the abstract – but amending the rule to allow claims which are too individualized to be certified as a class for litigation purposes to be certified as a class for settlement purposes will cause more harm than good. LCJ opposes the idea of adding a new category of certifiable class actions reflected in the sketch of Rule 23(b)(4).

[29] *See, e.g.*, Staton v. Boeing Co., 327 F. 3d 938, 945-46 (9th Cir. 2003); Geoffrey P. Miller and Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMP. PROBS. 97, 111 (1997) (noting incentives to inflate value of non-monetary relief).

[30] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011) (discussing "procedural protections" of Rule 23(b)(3)).

By definition, this proposal seeks to enable the classwide settlement of cases in which individualized issues predominate, and foreclose consideration of those overriding individual differences in the settlement certification process. Such a rule would present serious Constitutional concerns given the United States Supreme Court's past indications that ignoring individual differences has Constitutional implications.[31] Due process must always underlie the procedures a court applies, even when a case travels under the "class action" banner.[32] Even as it currently stands, Rule 23(b)(3) had been called the "most adventurous" departure from the normal due process rule of individual adjudication.[33] Ignoring the potential conflict between further expansion of Rule 23(b)(3) and the Due Process limits on class treatment will also encourage similar, adventurous experiments in state court, where the Due Process limits upon state class action procedures are already being litigated but are not yet fully developed.[34]

As the Supreme Court recently made clear in *Dukes*, the commonality requirement of Rule 23(a) requires proof that at least one key issue which drives the adjudication of the case is susceptible to a common answer.[35] But the predominance requirement takes that a step further in cases involving monetary relief, requiring courts to assess whether individual or common issues would predominate in assessing and adjudicating the claims of every class member and the defenses asserted to those claims.[36] In so doing, predominance tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[37]

Therefore, the aim of the predominance requirement cannot be fulfilled by reliance on the commonality inquiry alone. They are two distinct inquiries, with predominance being a critical test to determine whether the class is "sufficiently cohesive" to warrant class treatment at all. A class that is not "sufficiently cohesive" to warrant representative adjudication in the first place cannot logically be transformed by the handshake of the lawyers into one that is sufficiently cohesive to warrant representative adjudication for purposes of settlement. As the Supreme Court has observed, "it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place."[38]

If one assumes that the conceptual sketch were to achieve its stated goal, and that the predominance of individual issues would then no longer be a concern in certifying settlement

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[31] *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (quoting Martin v. Wilks, 490 U.S. 755, 762 (1989)); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011); Hansberry v. Lee, 311 U.S. 32, 44-45 (1940); Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1915); *see also* Philip Morris USA, Inc. v. Scott, 131 S. Ct. 1, 3-4 (2010) (Scalia, J., in chambers) (granting a stay of the judgment and noting that fraud claims required proof of individual reliance, which defendants were unable to contest because the trial court relied on representative proof).

[32] *See* Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) & the Impact of General Telephone v. Falcon*, 54 OHIO ST. L.J. 607, 609 (1993). In due process terms, the class action device is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550 (2011) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–701 (1979)).

[33] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-15 (1997).

[34] *See, e.g*, Petition for Certiorari in Wal-Mart Stores v. Braun, No. 14- 1124.

[35] 131 S. Ct. at 2556.

[36] 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW & PRACTICE § 5:23 1263 (10th ed. 2013).

[37] *Amchem.*, 521 U.S. at 623.

[38] *Id*.; *accord* Ortiz v. Fibreboard Corp., 527 U.S. 815, 858 (1999) ("A fairness hearing under subdivision (e) can no more swallow the preceding protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3).").

classes, then the logical result would be that virtually any claim could be pursued on a class basis. While the sketch purports to maintain the "superiority" requirement for settlement classes, it fails to articulate what "superiority" would mean once completely divorced from the traditional predominance inquiry. After all, from the narrow perspective of the convenience of the court and abstract efficiency, any class settlement is superior to the prospect of individual litigation by each member of the class. If that alone is the effective meaning of superiority under this sketch—and it seems it would have to be if the predominance of individual issues is expressly removed from the equation for purposes of settlement—then superiority effectively becomes a rubber stamp for settlement classes. It is indeed difficult to imagine any putative class action that could not be certified for settlement purposes if predominance of individual issues is truly no longer a concern. Would common law fraud class actions now be certifiable for settlement purposes despite the necessity of proving individual reliance in litigated individual cases? What about nationwide personal injury class actions? Mental anguish claims? How does the sketch guarantee otherwise?

Similarly, substantial uncertainty would attend interpretation of Rule 23(a)'s adequacy and typicality requirements if an inquiry into the predominance of common issues is removed from the settlement certification analysis. The "safeguards provided by the Rule 23(a) and (b) class qualifying criteria … are not impractical impediments—checks shorn of utility—in the settlement-class context," rather these "standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."[39] In what sense is a proposed representative adequate and his or her claims typical if each individual's claim admittedly turns on predominantly individual and not common facts? In what sense is representation for purposes of settlement "adequate" if the representative would not have the power to assert the claims of absent class members in litigation, and the bargaining leverage that comes with the willingness and ability to use that power? Class judgments can be collaterally attacked for lack of adequate representation.[40] The elimination of the predominance test for certification of settlement classes risks the unintended effect of fostering more collateral attacks on class settlements because it would effectively and inevitably foster representation of absent class members by persons whose claims are not predominately the same as theirs.

The 23(b)(4) sketch would in fact create unavoidable perverse incentives on the part of counsel for both sides. Plaintiffs' counsel would now have undeniable incentives, and indeed implicit permission in Rule 23 itself, to file otherwise uncertifiable class action complaints with the intent and purpose of using the cost and risks of defending them to force a class settlement. This problem already exists to a significant extent under the current version of Rule 23, and has been called the "blackmail effect" of class litigation.[41] The 23(b)(4) sketch would make that problem much worse. The federal courts would surely see substantial increases in class action filings, since by definition it would then be entirely permissible to file suit with the aim and purpose of achieving settlement certification even for an otherwise uncertifiable class. These otherwise

[39] *Amchem*, 521 U.S. at 621.

[40] *See* Hansberry v. Lee, 311 U.S. 32, 45 (1940) ("a selection of representatives . . . whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.").

[41] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011) (citing Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677-78 (7th Cir. 2009)); In re Rhone-Poulenc Rorer, 51 F.3d 1293, 1299-1300 (5th Cir. 1995).

admittedly illegitimate class actions would then very frequently result in class settlements simply because it would very often be cheaper for defendants to settle these cases than litigate them. Indeed, once these cases are filed, both plaintiff's counsel and defense counsel would have clear incentives to disregard individualized variations and differences in favor of a deal that, in the absence of Rule 23(b)(4), would surely have been deemed a collusive settlement. After all, plaintiffs' counsel in these cases would have little to bargain with in negotiating settlement of these cases, since the defendant would face no real threat of classwide liability in litigation.[42] Indeed, if 23(b)(4) became law, it is not hard to imagine that the very fact that the class is *not* certifiable for litigation would become a popular reason for the plaintiffs' counsel to propose, and for the court to approve, a classwide settlement for mere pennies on the dollar.[43] In these and other ways, the adequate representation of absent class members that is critical to due process is inevitably undermined by creating an easy path to settlement certification even where individual issues admittedly predominate and claims are therefore predominately dissimilar. The approach taken in the sketch risks standing the concept of due process on its head.

Placing the burden entirely on the court to ensure the protection of absent class members merely by reviewing the fairness of the settlement's terms is hardly an answer to these problems. The certification of the class and the fairness of a settlement are separate inquiries. In the absence of properly incentivized adversarial advocacy, courts cannot be expected to be fully informed of the important variations in individual claims that may affect both inquiries. The Rule 23(b)(4) proposal largely discourages such advocacy.

There is another problem with the proposal. If the rule were adopted as proposed, it is unclear whether a class certified on this basis would automatically be vacated if the settlement which generated it were disapproved or failed to become effective, or whether a court could deem the parties estopped to challenge certification once they have supported it under the proposed new rule 23(b)(4).[44] This problem would need to be explicitly addressed if any form of the 23(b)(4) sketch were adopted.

If the new settlement certification provision were applied to (b)(1) and (b)(2) as well as (b)(3), a possibility alluded to but not fully developed in the draft comments to the proposed rule, then all of the foregoing problems are only compounded, and still other new problems and uncertainties would be created.

The abstract efficiency of settling numerous claims at once is simply not a reason in and of itself to certify a class where the underlying issues, claims and damages are predominantly individualized and varying rather than common. In terms of ensuring that the rights of absent

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[42] *See, e.g. Amchem*., 521 U.S. at 621 ("if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation [for settlement purposes] despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer…").

[43] *Cf.* City of Detroit v. Grinell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (risk that class certification could not be maintained through trial endorsed as a factor favoring approval of class settlement), *abrogated on other grounds by* Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000).

[44] *Cf.* Carnegie v. Household, Inc., 376 F.3d 656, 660 (7th Cir. 2004) (Posner, J.) (holding that parties who had stipulated to Rule 23(a) factors were met for purposes of settlement were judicially estopped to deny that the class met those same Rule 23(a) requirements for purposes of litigation after the settlement fell through).

class members are fairly represented in proceedings brought by a self-selected class representative, the fees and classwide release that would make such settlement certifications financially attractive to both would-be class counsel and the defendant are hardly a substitute for the identity of interests that the predominance requirement assures. The 23(b)(4) sketch would inevitably be perceived as placing the interests of class action lawyers ahead of the true interests of individual class members, exacerbating the already widespread perception that class settlements primarily benefit lawyers at the expense of clients.[45] It would undermine the credibility of the class action device and the class action bar to have a rule that effectively says on its face that classes which are not cohesive, not susceptible of common proof on the predominating issues, and therefore admittedly uncertifiable for purposes of litigation, can nevertheless be a candidate for certification as a settlement class so long as the opposing lawyers agree to settle it on a class basis.

V. Attempting to Limit Settlements by Class Representatives Would Defy Clear Supreme Court Precedent and Recent Advisory Committee Action

The conceptual sketches designed to limit the use of offers of judgment or individual settlements in class actions contravene the Supreme Court's holdings that class actions are individual lawsuits until such time as they are certified, as well as the Advisory Committee's previous amendments to enable individual settlements. The first sketch proposes amending Rule 68 to make clear that it does not apply to Rule 23, and the second proposes amending Rule 23(e) to require judicial approval of individual plaintiff settlements.

In a series of 9-0 decisions, the Supreme Court has made it clear that class actions are individual lawsuits until such time as they are certified for class treatment.[46] Applying similar reasoning, in 2003, the Advisory Committee amended Rule 23(e) to make clear that named-plaintiff only settlements do not require court approval.[47] The ALI has suggested reinstating judicial oversight, but mainly to prevent plaintiffs from leveraging a class action designation in the complaint into a larger individual settlement.[48]

Amending Rule 68 would needlessly confuse the law about the effect of certification. Currently, it is clear that a class action is an individual lawsuit until the plaintiff obtains certification, a ruling that has important effects at various stages in the litigation. Amending Rule 68 would also create skewed incentives for plaintiffs' attorneys (who, as many courts recognize, are the real

[45] *See, e.g.*, Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) (expressing "fear that class actions will prove less beneficial to class members than to their attorneys[, which] has been often voiced by concerned courts and periodically bolstered by empirical studies").

[46] *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2172 (2008) ("Representative suits with preclusive effect on nonparties include properly conducted class actions"); Smith v. Bayer Corp., 131 S. Ct. 2368, 2380 (2011) (class action denied certification is not "properly conducted" class action); Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013) ("a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified").

[47] FED. R. CIV. P. 23(e)(1)(A) advisory committee's notes (2003).

[48] AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.02 Comment b, Reporter's Notes (2010).

parties in interest in a class action[49]) by giving them free rein to drive up defense costs where individual plaintiffs would be constrained by the cost-shifting provisions of the Rule.[50]

The sketch of an amendment to Rule 23(e) is far more damaging. Currently, one of the only ways for a defendant to rid itself of a class action that was filed in the erroneous belief that a classwide problem exists is to negotiate a named-plaintiff settlement of the individual's claims. Creating impediments to these individual settlements, thus forcing more costly litigation of class actions doomed to fail, serves no one's interests.

VI. Conclusion

The Rule 23 Subcommittee's conceptual sketches do not address the fundamental need for class action procedural reform. At best, they seem aimed at institutionalizing some of the unfortunate ways in which Rule 23 has undergone a metamorphosis since its creation. Even more troubling is the likelihood that such measures would enable a continuation of the direction towards class actions that have very little, if anything, to do with providing a remedy to class members who have suffered a cognizable injury. Instead of proceeding in this direction, we urge the Subcommittee to consider ideas for reforming Rule 23 that would rein in the abusive practices that have developed under the auspices of the rule.

[49] Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002).
[50] Jack Starcher, *Addressing What Isn't There: How District Courts Manage the Threat of Rule 68's Cost-Shifting Provision in the Context of Class Actions,* 114 COLUM. L. REV. SIDEBAR 129 (2014).