LAWYERS FOR CIVIL JUSTICE

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

REPAIRING THE DISCONNECT BETWEEN CLASS ACTIONS AND CLASS MEMBERS: WHY RULES GOVERNING "NO INJURY" CASES, CERTIFICATION STANDARDS FOR ISSUE CLASSES AND NOTICE NEED REFORM

August 13, 2014

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee") and its Rule 23 Subcommittee (the "Subcommittee") to supplement LCJ's August 9, 2013, Comment "To Restore a Relationship Between Classes and Their Actions: A Call for Meaningful Reform of Rule 23."[2]

I. Introduction and Summary

LCJ's previous Comment highlighted how the relationship between class members and their cases has changed since 1966 and urged the Subcommittee to take much-needed action to reform four key areas of class actions: prohibit or restrict cy pres payments to non-class members; provide a right to interlocutory appeal on class certification decisions; adopt an "opt-in" rule for Rule 23(b)(3) actions; and clarify that judicial estoppel does not apply to class action settlement negotiations.

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has advocated for reform of the federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] LAWYERS FOR CIVIL JUSTICE, TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (Aug. 9, 2013), *available at* http://www.lfcj.com/documents/LCJ%20Comment%20-%20Class%20Action%20Reform%208.9.13.pdf.

In this Comment, LCJ builds upon those recommendations by describing another area of disconnect between class members and class actions: so-called "no injury" class actions, which are cases filed on behalf of class members who have suffered neither an actual out-of-pocket financial injury nor actual physical injury. Separately, we also strongly urge the Subcommittee to amend Rule 23 to resolve an ambiguity that has led to a circuit split on standards for "issue classes"—a situation that has allowed cases to proceed despite the inability to comply with Rule 23(a) and (b) standards. Finally, we ask the Subcommittee to reform the notice provision to allow for the possibility of electronic notice to potential class members when appropriate.

II. The Subcommittee Should Examine the Role of Rule 23 in Allowing "No Injury" Class Actions.

The Rules Enabling Act requires that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify a substantive right."[3] Because Rule 23's purpose is to provide the procedural mechanism for aggregating claims, the Subcommittee should take action where Rule 23 is being used to modify the substantive rights that exist absent aggregation. As the American Law Institute outlined in its *Principles of Aggregate Litigation*:

> Aggregate treatment is . . . possible when a trial would allow for the presentation of evidence sufficient to demonstrate the validity or invalidity of all claims with respect to a common issue under applicable substantive law, *without altering the substantive standard that would be applied were each claim to be tried independently* and without compromising the ability of the defendant to dispute allegations made by claimants or to raise pertinent substantive defenses.[4]

"No injury" class actions violate this principle because they change the substantive standard courts apply. Instead of complying with the long-standing requirement that juries look at the specific facts of a specific incident requiring proof of duty, breach of duty, causation, and resulting injury, courts in "no injury" cases consider only—at most—duty and breach of duty. As one trial court described the difficulty in trying a proposed "no injury" class action: "A personal injury case is . . . tethered to the discrete facts of an identifiable accident involving specific individuals"[5] but a "no injury" case "presents a more difficult and amorphous case for the jury."[6] The difficulty is caused when plaintiffs use "composite" or "averaged" evidence to prove their case instead of focusing on actual incidents or actual claims.[7]

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[3] 28 U.S.C. § 2072 (2014).
[4] AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. d, at 89 (2010) (emphasis added).
[5] Lloyd v. Gen. Motors Corp., No. L-07-2487, 2011 U.S. Dist. LEXIS 63436, at *26-27 (D. Md. June 16, 2011).
[6] *Id.*
[7] Gates v. Rohm & Haas Co., 655 F.3d 255, 266 (3d Cir. 2011) (disapproving use of "composite" or averaged evidence).

A. Background: The Definition of a "No Injury" Case

A "no injury" class action is a case in which the class members (or at least a majority) have not actually experienced the harm alleged in the complaint. It is a longstanding principle of the American legal system that courts decide actual cases or controversies, and, as the Seventh Circuit Court of Appeals stated more than a decade ago in reversing a problematic certification of a "no injury" class, "No injury, no tort, is an ingredient of every state's law."[8] "No injury" class actions contravene this principle under the guise of Rule 23.

An emerging trend among plaintiffs' lawyers has been to obscure the "no injury" nature of these cases within the broader class-action context. Increasingly, cases are framed in terms of exposure to future injury (which in most cases would require dismissal on ripeness grounds) and allege an unspecified "diminution in value" or "premium paid" for an allegedly defective product. Some feature a named plaintiff with an idiosyncratic "actual injury" to represent a class that includes a large number of non-injured class members. Such classes are rarely certified for trial purposes and are almost never litigated to a final judgment. Nonetheless, allowing allegations like these to proceed even to the certification stage can cost significant resources for both the court and the defendant. Such resources would undeniably be better spent protecting against *actual harms* suffered by present and future plaintiffs.

B. "No Injury" Class Actions Alter Substantive Rights, Offending Due Process and the Rules Enabling Act.

"No injury" class actions alter the substance of state law by removing one or more of the elements of their state law causes of action.[9] If each class member does not have to prove she

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[8] *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 (7th Cir. 2002).

[9] One type of "no injury" class action that leads to particularly distorted results is that involving statutory damages. Statutory damages "set a fixed dollar amount as a floor on the recovery that a harmed litigant can recover; they are usually coupled with the capacity for an attorney to recover fees so as to enable individuals to pursue small and ineffable harms." WILLIAM RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 4.83 (2014). Consumer protection acts of about 18 states allow consumers to recover actual or the statutorily prescribed damages, whichever is greater, and there are about a dozen federal statutory damages codified within consumer protection statutes or intellectual property laws. The expressed rationales for such laws include the vindication of individual plaintiffs' rights, judicial expediency, and deterrence. *Emerging Issues in Statutory Damages*, JONES DAY, 1 (2011), *available at* http://www.jonesday.com/emerging_issues_in_statutory_damages/. In the product liability context, allowing class recovery of statutory damages claims potentially permits recovery of the same damages twice – once for the theoretical predicted future loss, and again later when plaintiffs suffer actual harm or damage. Because the purpose of statutory damages is to provide remedies and deterrence in individual cases, aggregation of statutory damages claims into class actions can produce absurd results. The Fair and Accurate Credit Transactions Act (FACTA), for example, requires retailers to redact all credit card numbers except the last five digits, as well as the expiration date, from all receipts. Failing to do so can result in statutory damages of "not less than $100 and not more than $1,000" per violative receipt. In the class action context, this "create[s] devastating liability that would put the defendant out of business simply for failing to redact information from a retail receipt."
A recent example of this is *Kesler v. Ikea U.S. Inc.*, 2008 WL 413268, in which an Ikea store gave the plaintiff a merchandise receipt that included the expiration date of plaintiff's credit card. Less than a month after this occurrence, Ikea corrected its then-faulty credit card machines. Regardless, plaintiff brought a class action for "all consumers in the United States" who received such a receipt. The resulting class included 2.4 million members and resulted in statutory damages ranging from $240 million to $2.4 billion. While the court observed that "the available statutory damages are minimal" for individuals, and thus, a class action was still a justiciable mechanism, it placed the blame for the absurdity of the suit on political actors: "Maybe suits such as this will lead Congress to

was actually injured, then she is absolved of demonstrating injury or damages, and may also be absolved of demonstrating causation as well. This departure from the most fundamental elements of a cause of action offends due process. To the extent Rule 23 allows class actions that ignore a requirement to allege or prove those elements, it violates the proscriptions of the Rules Enabling Act.[10]

Eliminating required elements of a cause of action under the guise of a procedural rule deprives defendants of due process through the pretrial stage of a class action. During that time, the defendant faces liability for actions for which valid individualized defenses may exist. For example, a manufacturer could face nationwide class liability for an idiosyncratic manufacturing defect despite not having an opportunity to expose the plaintiff's lack of evidence that the defect reached any further than the named plaintiff herself.

Moreover, the class-wide pleadings can mask the fact that a plaintiff does not have an actual theory of the case: something that may become clear only when class certification is finally briefed. For example, the plaintiff may have no sound theory of how an alleged defect actually causes any harm to a class member.[11] While this may ultimately result in the dismissal of the case, it does not repay the resources expended by a defendant in responding to the complaint, briefing a motion for dismissal or taking other action to defend its position.

From a policy standpoint, such deprivation of due process can lead to a number of bad outcomes. For instance, compensation for "no injury" cases may deter legitimate behavior by the defendant. Indeed, a number of scholars have pointed out that private enforcement of regulation tends to overdeter legitimate behavior and can hamstring governmental attempts to regulate public risks.[12] Such private enforcement can also disrupt the balance that regulatory agencies strive to achieve through their own regulation and enforcement. In addition, it can create windfall income for uninjured claimants (much of which may be absorbed into attorneys' fees) which needlessly increases costs for consumers.[13]

C. "No Injury" Class Actions Create Confusion about Certification Standards.

Because of the amorphous nature of "no injury" class actions, courts have not been able to agree on how to apply Rule 23 in these cases, leading to a split among appellate circuits. Moreover, the disagreement goes deeper than a mere circuit split: even courts that agree on outcomes—i.e., whether a "no injury" class should be certified or not—disagree on the justifications for those outcomes. Courts tend to classify such cases into three categories: (1) standing; (2) federalism concerns; and (3) no-causation types of classes.

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amend the [FCRA]; maybe not. While the statute remains on the books, however, it must be enforced." Unfortunately, Ikea is not the only victim of these laws.

[10] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 546 (2011) (quoting 28 U.S.C. § 2072(b)); Corder v. Ford Motor Co., No. 3:05-CV-00016, 2012 U.S. Dist. LEXIS 103534, at *20 (W.D. Ky. July 24, 2012) (Rules Enabling Act requires "a full litigation of [element] of the cause of action, and for each putative class member no less").

[11] *See, e.g.*, Burton v. Chrysler Group LLC, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, at *13 (D.S.C. Dec. 21, 2012).

[12] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 633-37 (2013).

[13] *See, e.g.*, Willett v. Baxter Int'l, Inc., 929 F.2d 1094, 1100 n. 20 (5th Cir. 1991).

Courts in the Second, Third, Fifth, Eighth, and Eleventh Circuits generally hold that "no injury" class actions cannot be certified under Rule 23. However, they rely on different reasons to reach that conclusion. Some courts have held that "no injury" class actions lack commonality because all class members must possess Article III standing.[14] Others have pointed out that "no injury" claims would be treated differently under different states' laws.[15] A number of district courts have instead focused on the fact that it is next to impossible to ascertain who rightfully belongs in a class when the court cannot look at how they were injured.[16]

By contrast, courts in the Sixth, Seventh, and Ninth Circuits have all recently ratified the certification of "no injury" class actions.[17] Notably, however, these courts do not agree on their reasons either. The Sixth and Ninth Circuits treat the question of whether absent class members suffered an injury as a merits issue not appropriately addressed when debating certification.[18] The Seventh Circuit treats the question as one of "efficiency,"[19] a concept that, while important, should not trump the substantive law.

The widely varying treatments of "no injury" class actions—not just the differing outcomes, but the differing justifications—demonstrate that the Rule 23 Subcommittee should amend the rule to provide clarity.

D. Relief to Class Members is Difficult in "No Injury" Cases.

It is extremely difficult for courts to assign a proper value to the relief that class members should receive in "no injury" cases. This problem is particularly acute in cases that involve both class members who were actually injured and those who were not.[20]

In the product liability context, for example, if relief is split between monetary damages and injunctive relief (e.g., a judicially ordered repair), it is very likely that uninjured class members will opt for money over the repair. In doing so, they may preclude themselves from receiving

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[14] *See* Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010).
[15] Cole v. Gen. Motors Corp., 484 F.3d 717, 730 (5th Cir. 2007).
[16] Walewski v. Zenimax Media, Inc., No. 6:11-cv-1178-Orl-28DAB, 2012 U.S. Dist. LEXIS 33181 (M.D. Fla. Jan. 30, 2012) (rejecting class defined to include purchasers with "no complaints" about the allegedly defective product); *In re* Canon Cameras, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (rejecting certification where less than 1% of class members reported a malfunctioning camera); *see also* Payne v. FujiFilm U.S.A., Inc., No. 07-385 (GEB), 2010 WL 2342388, at *5 (D.N.J. May 28, 2010); Lewis v. Ford Motor Co., 263 F.R.D. 252, 264 (W.D. Pa. 2009); Sanneman v. Chrysler Corp., 191 F.R.D. 441, 451 (E.D. Pa. 2000); Chin v. Chrysler Corp., 182 F.R.D. 448, 455 (D.N.J. 1998); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 603 (S.D.N.Y. 1982).
[17] *See* Glazer v. Whirlpool Corp. (*In re* Whirlpool Corp. Front-loading Washer Prods. Liab. Litig.), 722 F.3d 838, 854 (6th Cir. 2013) (question of injury is question of "damages," and not necessary before deciding merits of claim) *cert. denied*, 134 S. Ct. 1277 (2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799 (7th Cir. 2013) (large number of unharmed class members "was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears") *cert. denied*, 134 S. Ct. 1277 (2014); Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) (certification was proper regardless of whether any class members actually experienced premature tire wear caused by alleged defect).
[18] *Glazer*, 722 F.3d at 854; *Wolin*, 617 F.3d at 1173.
[19] *Butler*, 727 F.3d at 798.
[20] Purported classes containing both injured and uninjured plaintiffs should be denied certification under the "typicality" requirement of Rule 23(a)(3).

further relief should they become injured later.[21] This practice, which is referred to as "claim-splitting," is very common in "no injury" cases.

The United States Supreme Court has long recognized that mixing injured and uninjured class members in the same case frequently creates insurmountable conflicts within the class. Those class members with manifest current injuries will have different incentives in pursuing relief than those class members who face only the possibility of future harm, yet both are often represented by the same named plaintiffs and the same counsel.[22]

E. The Subcommittee Should Reform Rule 23 to Curtail Abuses Inherent in "No Injury" Cases.

The problems posed by "no injury" class actions stem from the effects that aggregation pursuant to Rule 23 has on the underlying legal claims. Contrary to the Supreme Court, the Rules Enabling Act and the American Law Institute, aggregation under Rule 23 often allows changes to the underlying substantive merits of the claims. Because one justification for class actions is to aggregate low-value claims until they are worth trying, some courts have concluded that class actions also may allow for the aggregation of *no*-value claims. Given the muddied doctrinal justifications for both certifying and refusing to certify "no injury" class actions, 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:

- The Subcommittee should clarify the role of the merits inquiry in class certification. In particular, it should amend Rule 23 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.

- The Subcommittee should clarify 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."[23] Nonetheless, various lower courts have held that Rule 23 should be applied in a "liberal" manner that errs on the side of certification.[24] 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.

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[21] Lloyd v. Gen. Motors Corp., No. L-07-2487, 2011 U.S. Dist. LEXIS 63436, at *26-27 (D. Md. June 16, 2011) (allowing uninjured class members to collect monetary relief for alleged automotive defect would defeat purpose of exception to economic loss doctrine for safety defects).

[22] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-26 (1996); *see also* Dewey v. Volkswagen Aktiengesellschaft, 2012 U.S. App. LEXIS 10932, at *45-46 (3d Cir. May 31, 2012) (rejecting class settlement because of intra-class conflict).

[23] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

[24] *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).

- The Subcommittee should clarify the standard used to determine when individualized issues predominate over common issues. Even after the Supreme Court's guidance in *Comcast Corp. v. Behrend,* courts continue to debate the proper application of the predominance standard. The majority view holds that if an essential element of the class members' claims cannot be proven with class-wide evidence, then individualized issues predominate.

- The Subcommittee should clarify Rule 23(c)(1)(B), which requires that a court enumerate the issues, claims, and defenses that have been certified for class treatment. Among other possible clarifications, the Subcommittee could require that the order contain a trial plan explaining how these claims would be tried before a jury.

III. Rule 23(c)(4) Should be Amended to Clarify that the Prerequisites of Subsections (a) and (b) Must First be Met Before an Issue Class is Considered.

Rule 23(c)(4) currently states:

> (4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

The ambiguous language of Rule 23(c)(4) has led to a circuit split on how the Rule applies to issue class certification. The circuit split, in turn, creates ambiguity and fosters an environment in which some courts have allowed creative plaintiffs to abuse the Rule to create "issues classes" where they otherwise would not be able to maintain a class action. For example, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith,* 672 F.3d 482 (7th Cir. 2012), the Seventh Circuit interpreted Rule 23(c)(4) to allow plaintiffs to sever off common issues for class treatment even though the whole cause of action did not qualify for such treatment. The Second Circuit followed the same approach in *In re Nassau County Strip Search Cases*, stating, "courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy 23(b)(3)."[25] The Ninth Circuit concurred with this reasoning, noting that "Rule 23 authorizes a district court in appropriate cases to isolate the common issues under Rule 23(c)(4) and proceed with class treatment of these particular issues."[26]

In contrast, the Fifth Circuit has found that a district court cannot "manufacture predominance through nimble use" of Rule 23(c)(4) and instead construed the rule as nothing more than a "housekeeping" tool that was to be applied only after the action as a whole satisfied the Rule 23(a) prerequisites (numerosity, commonality, typicality, adequacy of representation) and Rule 23(b) type.[27] The Fifth Circuit recognized the inevitable outcome if issues could be certified without the action as a whole first satisfying the requirements of subsections (a) and (b):

[25] 461 F.3d 219, 227 (2d Cir. 2006).
[26] Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).
[27] *See, e.g.*, Castano v. Am.Tobacco Co., 84 F.3d 734, 745 n. 21 (5th Cir. 1996).

> Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.[28]

A. Clarifying Rule 23(c)(4) Would Resolve the Circuit Split.

To resolve the split among the circuits and stop the proliferation of issue classes when the action as a whole cannot be maintained as a class action, Rule 23(c)(4) should be amended to clarify that the prerequisites of subsections (a) and (b) must first be met before an issue class is considered. This could be done by adding the language in italics:

> (4) **Particular Issues**. When appropriate, an action may be brought or maintained as a class action with respect to particular issues *if Rule 23(a) and (b) are first satisfied.*

B. The Structure of Rule 23 and the History of the 1995/1996 Amendments Support Amending Rule 23(c)(4) to Require Compliance with Rule 23(a) Prerequisites.

The structure of Rule 23 and subsection (c)(4)'s location within it supports the proposed amendment. Subsection **(c)** contains provisions pertaining to (and is therefore titled) "**Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses."** These are all tools or instructions for managing class actions that a court must be mindful of when presiding over existing class actions.

Rule 23 follows a natural and logical progression, first establishing the prerequisites for a class action in subsection **(a) Prerequisites**, then describing the types of permissible class actions in subsection **(b) Types of Class Actions**, and then moving in subsection **(c)** to administrative or managerial matters for classes that have already been certified (**Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses**).[29] The structure of Rule 23 continues to follow the typical life of a case with subsection **(d) Conducting the Action; (e) Settlement, Voluntary Dismissal or Compromise; (f) Appeals; (g) Class Counsel** and then **(h) Attorney's Fees and Nontaxable Costs**. If the drafters of Rule 23 intended 23(c)(4) to be a means around the certification prerequisites of Rule 23(a), as some of the courts are applying it today, it is more likely they would have placed such a caveat in the actual text of Rule 23(a) and not buried as a single statement within a subsection that deals with various administrative matters pertaining to actions that have already been certified. The Advisory Notes for Rule 23(b)(3) and others address a similar issue, but there is no mention in the Advisory Notes as to Rule 23(c)(4)'s role in circumventing certification prerequisites.[30]

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[28] *Id.*

[29] Laura J. Hines, *The Unruly Class Action*, GEO. WASH. L. REV. (forthcoming [date]), *available at* http://ssrn.com/abstract=2327377.

[30] *See* FED. R. CIV. P. 23(b)(3) advisory committee's note (1966).

This interpretation is strengthened by proposed changes that were never effectuated. The 1995 Advisory Committee proposed a change to Rule 23(a) to include the word "issues" in regards to prerequisite class treatment:

> "[I]f, with respect to the claims, defenses, or *issues* certified for class action treatment [the numerosity, commonality, typicality, adequacy are satisfied] and a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[31]

This shows that the Advisory Committee specifically acknowledged the possibility of issue classes used in the beginning stages of a Rule 23(a) analysis. However, the amendments were never effectuated.[32] In fact, in 1996 a new set of amendments were effectuated, not including the 1995 Advisory Committee's proposal.[33] The rule still does not include any such language.[34] Had the Committee intended to allow issue classes before Rule 23(a) application, they would have included such an amendment.

IV. The Subcommittee Should Modernize the Rule 23(c)(2) Notice Requirements to Allow for Modern Electronic Communications as Part of "Best Notice Practicable."

Rule 23(c)(2) provides that "for any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class," and if a class is certified, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[35] The purpose of the "best notice practicable" requirement of Rule 23(c)(2) is to maximize the likelihood that absent class members whose rights will be determined by the judgment of the court will receive notice of proceedings and their rights in accordance with Due Process principles.[36] In *Eisen v. Carlisle & Jacqueline*,[37]the Supreme Court held that individual notice must be provided to those class members identifiable through reasonable efforts, yet failed to define a more prescriptive rule for determining if a party has successfully met this requirement.

Over time, "best notice practicable" has included traditional forms of notice, such as direct mail; however, our modern age undeniably poses additional practicable options. Where notice is necessary to reach members of a class not individually identifiable, the many advantages of the Internet "virtually mandate that cyberspace should be used" as a means of providing the best notice practicable.[38] Courts, in turn, are increasingly allowing parties to include webpages or emails within an overall scheme for providing the "best notice practicable," as on a practical level, this is increasingly a "reasonable effort" for reaching potential class members.[39]

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[31] Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 762 (2003) (citing Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 44 (1996)) (emphasis added).
[32] *Id*. at 762-763.
[33] *Id*.
[34] *See* FED. R. CIV. P. 23.
[35] FED. R. CIV. P. 23(c)(2).
[36] Brian Walters, *"Best Notice Practicable" in the Twenty-First Century*, 7 UCLA J.L. & TECH., 1, 4 (2003).
[37] 417 U.S. 156 (1974).
[38] Walters, *supra* note 49, at 4 (citing Greenfield v. Villager Indus., Inc., 483 F.2d 824, 831 (3d Cir. 1973)).
[39] 84 A.L.R. FED. 2D 103 (2014).

Proactively addressing ways to incorporate modern technology into notice issuance is a mission LCJ believes benefits both plaintiffs and defendants in future class actions.[40]

We note that the Subcommittee has mentioned its interest in addressing this issue.[41] We encourage these efforts and look forward to the Committee's proposals.

V. Conclusion

As highlighted in our previous Comment, Rule 23 has evolved well beyond the vision of its original architects and, as a consequence, the rule has allowed the relationship between class members and their cases to deteriorate in many cases. So-called "no injury" class actions, filed on behalf of class members who have not been injured, demonstrate the perils of Rule 23's expansiveness. To the extent that Rule 23 allows aggregated "no injury" cases to proceed despite the fact that those claims could not proceed independently, the procedural rule is beyond its scope and should be revised. Similarly, ambiguous language of Rule 23(c)(4) that is allowing litigation to proceed as "issue classes," despite the inability to satisfy the prerequisites for class actions, should be clarified not only to resolve the circuit split but also to prevent circumvention of standards. Reform in these areas, and a modernization of the notice rules, are much-needed changes that will help restore a proper connection between the underlying claims and the members of the class.

[40] *See, e.g.*, Robert H. Klonoff, et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 750 (2008).

[41] The March 2012 Subcommittee notes stated, "There seems to be considerable reason for alternative means of notice in (b)(3) cases – often Internet-based – to receive more respect."