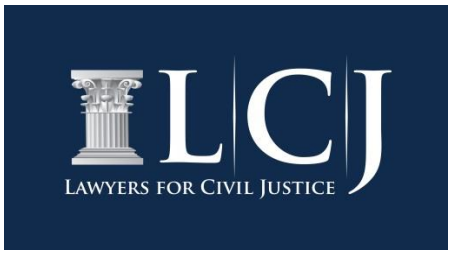

LAWYERS FOR CIVIL JUSTICE

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

TOWARDS REFORM OF RULE 23: EVALUATING THE SUBCOMMITTEE'S PROPOSALS AND SUGGESTING A SIMPLE AND MUCH-NEEDED AMENDMENT TO ADDRESS THE PROBLEM OF "NO INJURY" CASES

November 3, 2015

Lawyers for Civil Justice ("LCJ") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") as it considers the possible Rule 23 amendments proposed by the Rule 23 Subcommittee ("Subcommittee").

I. Introduction

Since the April Committee meeting, the Subcommittee has listened carefully to the opinions of many practitioners, experts and other stakeholders about the Subcommittee's initial sketches of possible Rule 23 amendments. LCJ applauds the Subcommittee for its serious attention to the variety of views about modern class action cases. Although we understand and respect the Subcommittee's decision to focus on incremental changes rather than greater reforms that are more likely to draw debate during the rulemaking process, LCJ nonetheless urges the Committee not to forego this important opportunity to provide much-needed fundamental reform of Rule 23.[1] The rulemaking process generally opens a window of opportunity only intermittently for a

[1] In previous Comments, LCJ has urged the Committee 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. *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), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_class_action_reform_080913.pdf; 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/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_reform_8.13.14.pdf; LAWYERS FOR CIVIL JUSTICE, LOOKING AT THE BIGGER PICTURE: THE CONCEPTUAL SKETCHES IN THE CONTEXT OF MUCH-NEEDED RULE 23 REFORM (April 7, 2015), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_conceptual_sketches_april_2015.pdf.

particular topic such as Rule 23, and the nature of class action practice has changed in many material ways since this Committee last addressed Rule 23. Perhaps the most important change has been the rise of "no injury" classes, a phenomenon that poses serious threats to the integrity of the judicial system, the role of the Federal Rules of Civil Procedure ("FRCP"), and to the rights of consumers and manufacturers/suppliers alike. Consequently, as the Committee undertakes the important task of deciding which, if any, potential Rule 23 amendments to pursue, we address not only the specifics of the Subcommittee's proposals, but also propose a much-needed reform that will prevent the judicial system from the many problems associated with the explosion of cases in which purported class members have no cognizable injury.

II. Preliminary Observations

The Subcommittee's proposals have improved in important ways since its initial sketches[2] in April and in its Dallas Mini-Conference memo[3] in September. LCJ agrees with the Subcommittee's decision to remove the most divisive topics, *cy pres* and issue classes, from its agenda. It is also appropriate to put "on hold" the topic of Rule 68 and offers of full satisfaction in light of the likelihood that the Supreme Court will address that issue this term. On ascertainability, the Subcommittee made the right decision not to go forward with its "minimalist" sketch, although we continue to think that Rule 23 would benefit from an explicit ascertainability requirement such as our earlier proposal.[4]

Settlement class certification – the topic upon which the Subcommittee has no recommendation – should stay off the reform agenda because Rule 23(b)(3)'s predominance requirement is an important due process protection for class members. The predominance requirement serves to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation,"[5] and as LCJ explained in an earlier Comment, "[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."[6] Further, removing the predominance requirement implicates due process concerns because the adequate representation of absent class members that is critical to due process is undermined where individual issues predominate and class claims are therefore predominantly dissimilar. Moreover, taking predominance off the table for settlement is in stark opposition to the Supreme Court's decision in *Amchem.* The Supreme

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[2] *Available at* http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2015

[3] *Available at* http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/civil-rule-23

[4] Courts will certainly continue to find an implicit ascertainability requirement even without an explicit provision in the rule. A modest amendment to Rule 23 requiring that all classes be objectively ascertainable would add a Rule 23(a)(5) as follows: "the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden." Such an ascertainability requirement would go a long way towards fixing a number of other issues the Subcommittee has heard a lot about over the past year, including "front-loading," cy pres, notice and certification of settlement and issue classes.

[5] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

[6] LAWYERS FOR CIVIL JUSTICE, LOOKING AT THE BIGGER PICTURE: THE CONCEPTUAL SKETCHES IN THE CONTEXT OF MUCH-NEEDED RULE 23 REFORM (April 7, 2015), at 9, *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_conceptual_sketches_april_2015.pdf.

Court in *Amchem* held that settlement parties' interests in "a fair compromise" does not satisfy the predominance requirement of Rule 23(b)(3), otherwise, "that vital prescription would be stripped of any meaning in the settlement context."[7] In other words, *Amchem* affirmed the importance of having a meaningful predominance requirement in the settlement context. As the Court explained, the "specifications of [Rule 23(b)]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened attention in the settlement context . . . [because] a court asked to certify a settlement class will lack the opportunity, present when the case is litigated, to adjust the class, informed by the proceedings as they unfold."[8] The predominance requirement, therefore, serves as a check and prevents settlements where individual issues are so divergent that one settlement could not possibly reflect the interests of the entire class, despite the parties' contentions otherwise. Any proposal to eliminate the predominance requirement in the settlement context should not be included in the Committee's reform agenda.[9]

As to the balance of the recommendations, we focus our attention here on the proposals concerning objectors and settlement approval criteria before proposing a simple and much-needed remedy to the problems of "no injury" classes.

III. Handling Objections to Class Action Settlements: The Proposed Remedies Could Make it More Difficult to Resolve Objections.

The Subcommittee's proposals for amendments to deal with problem objectors under Rule 23(e) reflect a significant improvement to the prior drafts. The proposals, however, may still have the unintended consequence of making it more time-consuming and difficult for courts to manage class action settlements and for settling parties to resolve any objections. The simplified objector disclosure requirement in proposed Rule 23(e)(5)(A) could be further improved to address objector standing and to ensure that the district courts' discretion is not inadvertently limited by the rule change. There remains a lingering concern that the approval provisions in the proposal will delay the ultimate resolution of litigation and the distribution of relief to settlement classes. Although much has been written about the mischief wrought by "professional" objectors, the courts, class counsel, and counsel for class action defendants are better equipped than the proposals reflect to deal with objectors on a case-by-case, objector-by-objector basis. We suggest the Committee modify the proposals as explained below prior to recommending them to the Standing Committee for public comment.

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[7] *Amchem* at 623.

[8] *Id*. at 620.

[9] The Subcommittee is now considering – but has not yet offered – an alternative proposal that would appear to allow class settlements to be certified where class members' "interests in settlement" predominate over any questions affecting only individual class members. Any such proposal would likely raise more questions than it answers. What would class counsel need to do to show that class members' "interests in settlement" predominate? Would the class or some portion of it need to be queried? If so, that procedure effectively underscores why a class action likely is not the proper vehicle for redressing the claims in the first place. Would courts be required to take class counsel's word for what the "interests in settlement" of the class are? What right would others (e.g., objectors) have to assess the "interests in settlement" of class members? How could defendants gauge the "interest in settlement" of class members? If class members have "interests in settlement" in common, but not "interests in litigation" in common, does this mean that classes with intraclass conflicts that could never be certified for trial may be nonetheless certified for settlement? If so, we are back to the same concerns about a rule that removed predominance from the settlement certification requirements as addressed here and in our prior comments.

A. The Objector Disclosure Proposal Should Include The Bracketed Language and a Requirement That Objectors Demonstrate Their Status As Class Members.

The Subcommittee's proposed disclosure amendment has been simplified from the prior sketch, and this is a marked improvement. However, because objector disclosure requirements are generally included in most class notices approved by federal district courts in the settlement context, in the absence of the bracketed language, the new sketch adds little to the current paradigm. A change to the current rule that merely adds: "The objection must state the grounds for the objection" would be largely meaningless. District courts have always been at liberty to fashion disclosure requirements as dictated by the needs of the case. Accordingly, the bracketed language requiring objectors to state their objection with specificity and state whether the objection is individualized or applies to the entire class, is essential. Moreover, if adopted, the disclosure amendment should include two additional provisions. First, in order to clarify that the disclosure requirement of Rule 23(e)(5)(A) sets a floor rather than a ceiling, the amendment should include language that explicitly recognizes the district court's authority to require additional disclosures dictated by the needs of a particular case. Second, the amendment should require any objecting class member to demonstrate his or her membership in the class or, at a minimum, that he or she was identified as a class member by the parties and was sent notice of the settlement. Finally, the bracketed language, "[f]ailure to state the grounds for the objection is a ground for rejecting the objection," should be expanded. The rule should provide that the "failure to comply with any of the requirements of this section and any additional disclosure requirements imposed by the district court are grounds for rejecting the objection."

B. The Court-Approval Approach Will Lead to More Litigation.

The proposed court-approval changes are problematic. The idea for such requirements is based on the premise that the 2003 change to Rule 23(e)(5) requiring court approval for the withdrawal of objections has been ineffective, but that assessment is inaccurate. District courts have the discretion they need to address frivolous objections, and to oversee, where appropriate, settlements with objectors.[10] The Subcommittee's approval approach will make it unnecessarily difficult to resolve objections in the district courts and on appeal.

The practical context of this proposal is important. The behavior the Subcommittee aims to police is that of objectors making non-meritorious demands for payment by class counsel in exchange for withdrawing objections and appeals. Such demands almost always involve counsel fees rather than any funds approved for payment to the class. Although the revised committee note sketch no longer provides that "active judicial involvement in measuring fee awards" is "no less important when the question is payment to an objector's counsel rather than to class counsel," this sentiment – which is false – is still reflected in the proposal. Active judicial involvement in measuring class counsel's fee award in the context of a class action settlement is

[10] The Federal Judicial Center advises federal district courts to beware of "canned objections from professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests[,]" and informs judges that Rule 23 already provides the "authority to scrutinize as part of the overall class settlement any side agreements to 'buy out' such objectors." Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 24 (2010).

"singularly important to the proper operation of the class-action process" because the negotiation of the settlement, the negotiation of class counsel's fee, and, it follows, the negotiation of settlement benefits to the class, are inextricably intertwined. There is a relationship between the fee and the relief to the class. That relationship does not exist when the parties are negotiating with objectors and their counsel. Class relief has already been decided. Accordingly, a settlement with an objector is generally a private matter, and public disclosure or court approval of a settlement payment should not be required.[11] To the contrary, parties need the flexibility to negotiate and settle with objectors without onerous procedures that may delay the ultimate resolution of litigation.

The proposal also risks creating unintended consequences by encouraging ancillary litigation over proposed settlements. The approval requirements would also cause delay, and delaying the resolution of settlement objections is harmful both to class members awaiting benefits and to defendants legitimately attempting to resolve disputes.

Although well-intended, the bracketed language in the draft committee note that purports to provide standards for approval of the withdrawal of an objection or objector appeal should not be adopted. Even if some version of the approval proposals is ultimately adopted, district courts and/or the courts of appeal should have wide discretion to approve the withdrawal of an objection or appeal from a class action settlement. The proposed "standards" would encourage collateral attacks on class action settlements, even after objections have been resolved.

Finally, it seems odd for the FRCP to give district courts the power to prevent circuit courts from allowing voluntary withdrawals of appeals. Perhaps it would be more appropriate for the appellate rules to allow circuit courts to refer such questions to the district court that approved the settlement, as the Subcommittee's sketch of Appellate Rule 42(c) reflects. Often, but not always, the district court that approved the settlement would be in a better position than a court of appeals to approve the withdrawal.

IV. Settlement Approval Criteria: Unifying the Standards Is Unlikely to Achieve the Goal of Uniformity, and May Instead Cause Increased Litigation.

The intent behind the Subcommittee's proposals for a rule governing settlement approval criteria is to promote greater uniformity and predictability among jurisdictions in approving settlements, while providing flexibility for courts to consider other factors that may be important under particular circumstances. The Subcommittee acknowledges that it is divided on whether these proposals are likely to change judicial behavior – and we are doubtful that they would. We are concerned, moreover, that the proposed rule revisions will instead have the effect of increasing

[11] Settlements with individuals, that affect only individual rights, are generally private. The proposal to require disclosure of settlement agreements with objectors to a class action settlement, while intended to curb an abuse, is contrary to this long-recognized precept. And the sketches are in conflict conceptually with Federal Rule of Evidence 408, which provides generally that settlement discussions are inadmissible "either to prove or disprove the validity or amount of a disputed claim. . . ." Fed. R. Evid. 408(a).

litigation and confusion.[12] Accordingly, there seems to be little need for, and good reasons to avoid, the changes in these proposals.

The Subcommittee is proposing two alternative amendments, one of which would require courts to approve settlements only upon a finding that they are fair, reasonable and adequate, after due consideration of four proffered criteria (and an additional catch-all criterion) ("Alternative 1"), and another that would require courts to approve settlements only after making a finding that all four criteria are affirmatively met (but also including the catch-all criterion) ("Alternative 2"). Given that Alternative 1 permits courts merely "to consider" the listed settlement criteria in making the required finding that the settlement is fair, adequate and reasonable, it is not likely to create the uniform standard the Subcommittee intended, because it leaves open the possibility (particularly with the "catch-all" provision) that courts may give due consideration to other factors as well. The second alternative is too confining. Approving settlements, which by their very nature are matters of compromise, requires a balancing of considerations, not rigid adherence to formulaic tests. Courts need flexibility to determine how to weigh matters that influence the "fairness" of a given settlement. Moreover, the "catch-all" (under either Alternatives 1 or 2) suffers from a serious flaw, which is that it is not cabined in any way. Far from creating uniformity, an unlimited "catch-all" has potential to import a litany of new and different factors into the settlement approval inquiry. A court could determine, for instance, that a settlement should not be approved because the parties did not designate a charity that the court prefers as the *cy pres* recipient. That would not offend the settlement approval criteria as written, but no one would doubt that it is an inappropriate ground on which to deny settlement approval. The "catch-all" therefore has potential to create new mischief in the consideration of settlements.

On the other hand, if there is no "catch-all" provision under Alternative 2 (and if the list of the first four factors to be considered in Alternative 1 is considered to be exclusive), it is possible that relevant criteria may be overlooked. One criterion that has provided courts some guidance on the fairness of the settlements is the number and strength of objectors to the settlement. In other words, courts have considered in deciding whether to approve or reject settlements whether there are many objectors whose objections are substantive and real, or whether there are no objectors or only weak objections. Consideration of the strength of objections is not reflected in the proposed sketch. If there is no "catch-all" provision under Alternative 2, and a court considers whether to approve or reject the settlement based at least in part upon the existence or lack of strenuous objections, one might argue that this was an impermissible consideration (unless it somehow could be considered to be within one of the other settlement criteria).

If a "catch-all" is to be included under either Alternative 1 or 2, it should be limited. One way to limit it would be to make it clear that any other matter that may be considered in approving the settlement must bear on whether the settlement is "fair, adequate, and reasonable," thereby making reference to the finding required by Alternative 1, and, for Alternative 2, the tests that have evolved to address what that phrase means. But this formulation reverts to the same set of jurisdiction-specific tests that exist today, which is why LCJ's view is that the proposed sketch is unnecessary and unlikely to create uniformity.

[12] LAWYERS FOR CIVIL JUSTICE, FROM CONCEPTUAL SKETCHES TO A FORMAL PROPOSAL TO AMEND RULE 23: THOUGHTS ON THE SUBCOMMITTEE'S IDEAS FOR REFORM (October 9, 2015), *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_to_rule_23_subcommittee_10-9-2015.pdf.

The current rule reflects the reality that courts need flexibility in the factors to be considered in evaluating the fairness of settlements. Although there is clearly variation among the circuits, there is no indication that differences in settlement approval criteria are responsible for the rejection of settlements that should have been approved or the approval of settlements that should have been rejected. Circuits have different criteria for any number of standards under the FRCP, and no reason has been offered for why this particular one is unique and deserving of uniformity. Although the Committee certainly should be concerned with ensuring that settlements are "fair, adequate, and reasonable," it should not move forward with requiring uniformity for uniformity's sake.

The proposals also leave some changes unexplained and therefore lacking in guidance to courts and counsel. For instance, the proposed amendment says that courts should consider the proposed fee award *and the timing of its payment*. The draft committee note does not explain what courts should do with the timing factor. Class counsel sometimes press for what is referred to as a "quick-pay provision" (meaning that class counsel are paid before settlement approval is final) to ward off objectors' counsel who seek to share in the attorneys' fee award. Defendants are unlikely to agree to such a provision unless they are assured a mechanism for the return of quick-paid funds if the settlement is not approved (such as a guarantee from a reputable banking institution). If the parties agree on a quick-pay provision, and defendants have an absolute right to recover the quick-paid amount if the settlement is not approved, the "timing of the payment" of the attorneys' fee should not be an issue that affects the fairness of the settlement. The clause as written could be seen as an impediment to these types of agreements, which does not appear to be what the Subcommittee intended.

The proposal also includes a clause that requires the court to determine (or consider) whether "the proposed method of claims processing is designed to achieve the goals of the class action." The draft committee note does not explain what this means in practice and, if adopted, this language could create several issues. An example may be illustrative. Assume that a class action is filed with a proposed class that never could be certified because of the myriad individual issues that would predominate over common issues. Assume further that the parties nevertheless decide to settle to avoid the expense of continued litigation. But because the class action as filed could never be certified, the parties agree to a claims procedure that provides compensation for only a portion of the class identified in the complaint, or provides compensation for only a portion of the harms alleged. An objector might argue that the claims process was not "designed to achieve the goals of the class action" because the claims process focuses only on a subset of class members or a subset of the original problems alleged. It may be that the settlement is eminently fair because the class is getting more through settlement than it ever could through litigation, but theoretically a court could reject the settlement because the claims process was not "designed to achieve the goals of the class action." Perhaps the solution is for class counsel to file an amended complaint that more closely aligns with the proposed settlement, but the draft advisory committee notes do not address this.

Most importantly, the language of "achieving the goals of the class action" reflects a one-sided bias that is not appropriate for the FRCP. The goal to be achieved by a class action, and *a fortiori*, of a "proposed method of claims processing," should be to compensate injured class members, so it would be more appropriate to ask whether "the proposed method of claims

processing is designed to maximize payments to class members" or something along those lines. The "goals" of too many class action settlements are things that courts should not allow to be achieved, and the rule must contemplate that. Many class-action settlements disproportionately benefit class counsel over the class, and courts should be empowered to dismiss the entire class action if they determine, in the context of analyzing the fairness of a settlement, that the class cannot be certified for litigation purposes. Dismissal, summary judgment and rejection of settlement agreements are all results that may well achieve the goal of justice rather than the "goals of the class action." The rule should not be re-written to favor plaintiffs over defendants.

V. The Committee Should Address the Profound Problem of "No Injury" Classes as Part of Any Rule 23 Reform.

The Committee should seize the present rulemaking opportunity to curtail the profoundly improper interpretation of Rule 23 that is decoupling civil litigation from any requirement that an actual injury has occurred. A simple change to Rule 23 could, in accordance with the purpose of the FRCP and Supreme Court precedent, re-affirm the link between class actions and actual causes of action by inserting the concept of "injury" into Rule 23. By doing so, the Committee could reduce the incidence of "no injury" lawsuits that distort legal outcomes, result in questionable settlements, and waste resources to prosecute and defend to no real benefit to absent class members.

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."[13] (The same principle largely holds true for contract-based actions.) "No injury" class actions contravene this principle under the guise of Rule 23.

When "no injury" cases include an uninjured named plaintiff, courts will usually dismiss the case.[14] As a result, plaintiffs' lawyers have begun to obscure the "no injury" nature of these cases within the broader class-action context. Increasingly, cases are framed in terms of exposure to some unspecified future injury (which should require dismissal on ripeness grounds) and allege an unspecified "economic loss," usually in the form of "diminution in value" or "premium paid" for an allegedly defective product. Some feature a named plaintiff with an

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

[14] *See, e.g., Rivera v. Wyeth-Ayerst Labs*., 283 F.3d 315, 321 (5th Cir. 2002) (plaintiff could not assert inadequate warning claim in pharmaceutical case where he had suffered no injury-in-fact); *Williams v. Purdue Pharm. Co*., 297 F. Supp. 2d 171, 172-73 (D.D.C. 2003) (same); *Briehl v. Gen. Motors Corp*., 172 F.3d 623, 627-28 (8th Cir. 1999) (dismissing class action against automotive company where alleged defect had not manifested in named plaintiff's vehicle); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629 (Ala. 1998) ("[C]ourts have generally concluded that claims based on allegations of inherent product 'defects' that have not caused any tangible injury are not viable . . . .").

idiosyncratic "actual injury" to represent a class that includes a large number of non-injured class members.[15]

These no-injury cases are most common in the products liability sphere, but they appear in other areas as well. Environmental class actions seeking "medical monitoring" damages for asymptomatic exposure to an allegedly toxic substance are one example.[16] "Consumer fraud" cases that attack advertisements or communications that were not seen or relied on by significant percentages of the proposed class are yet another example. Similarly, "data breach" class actions tend to follow a different model, asserting "fear of injury" theories: in other words, the plaintiff claims that she fears she may be injured by the revelation of her credit card number or personal data.[17]

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.

These economic loss no-injury cases are distinct from the kinds of intangible harms that Rule 23 was specifically designed to address. For example, violations of civil rights, while not a tangible harm, fall specifically within Rule 23's ambit.[18]

A. "No Injury" Class Actions Create a Host of Practical Problems for Litigation Under the Federal Rules.

In our prior comments to the Committee[19] and recent testimony to the House Judiciary Subcommittee on the Constitution and Civil Justice,[20] LCJ has outlined the problems posed by "no injury" class actions. In brief:

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[15] *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prod. Liab. Litig*., 785 F. Supp. 2d 925, 932 (C.D. Cal. 2011) (denying motion to dismiss nationwide class, but citing Alabama, North Dakota, Ohio, Pennsylvania, and Wisconsin cases as examples of jurisdictions likely to dismiss such claims); *Wolin v. Jaguar Land Rover N. Am*., LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) (affirming class certification in a case alleging that an alignment defect caused premature tire wear, even though a majority of class members' vehicles did not manifest the tire wear); *Butler v. Sears, Roebuck & Co*., 702 F.3d 359, 362 (7th Cir. 2012) (affirming certification of class alleging latent washing machine defect, even though a majority of class members' machines did not manifest problems), reinstated, 727 F.3d 796, 802 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 414 (6th Cir. 2012) (same), *cert. granted, judgment vacated sub nom, aff'd*, 722 F.3d 838 (6th Cir. 2013).

[16] *See, e.g., Klier v. Elf Atochem N. Am., Inc.,* 658 F.3d 468 (5th Cir. 2011).

[17] According to one study, 78% of data-breach class actions involved incidents that had resulted in no financial loss. *See* Sasha Romanosky, et al., *Empirical Analysis of Data Breach Litigation*, Temple University Legal Studies Research Paper No. 2012-30, Apr. 6, 2013, at 12, available at http://ssrn.com/abstract=1986461 (last viewed Apr. 26, 2015).

[18] *See* David Marcus, *Flawed But Noble: Desegregation Litigation & Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 661 (2011) (noting that "Rule 23(b)(2) was written for [the] very specific purpose)" of allowing class actions seeking desegregation).

[19] *See* sources cited *supra* note 1.

- "No injury" class actions alter parties' substantive rights, thereby violating the Rules Enabling Act, by eliminating the need for individual class members to prove either injury or causation to prevail on their causes of action, even though these are essential elements of individual claims.

- "No injury" class actions create confusion about certification standards, and have led different appellate circuits to approve different kinds of class actions. Even when courts agree on a particular outcome (dismissing a "no injury" lawsuit or allowing it to proceed, certifying the suit or requiring it to proceed individually), they frequently disagree on their justifications for that treatment. As a result, it is clear that courts could use guidance from the Advisory Committee.

- Because of the difficulty in identifying a concrete injury to most class members, "no injury" classes that survive dispositive motions or are certified for class treatment are often settled on terms that most courts and commentators consider abusive. In particular, "no injury" class actions often include minimal compensation to absent class members, peppercorn injunctive relief, large *cy pres* components, and excessive attorneys' fees.

From a policy standpoint, allowing "no injury" class actions leads 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.[21] 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.[22]

B. The Committee 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.

This confusion over no-injury lawsuits highlights an ambiguity in Rule 23 that could be easily addressed by the Committee. By amending Rule 23(a)(3), it could reinforce the meaning of the typicality requirement, bringing it into line with the Supreme Court's jurisprudence, and

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[20] *See* Testimony of Andrew Trask before the Committee on the Judiciary Subcommittee on the Constitution and Civil Justice, United States House of Representatives, Apr. 29, 2015, available at http://judiciary.house.gov/_cache/files/e74c2bdd-6162-48e1-85fc-60dda4fdf36b/trask-04292015.pdf

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

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

curtailing some of the certifications that have resulted in the lower courts. To combat the distorting effects of these no-injury class actions, LCJ proposes the following amendment to Rule 23(a)(3), which is a modest amendment to Rule 23's typicality requirement:

> "One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> …
>
> (3) the claims, or defenses, and type and scope of injury of the representative parties are typical of the claims, or defenses, and type and scope of injury of the class …"

This amended language reflects H.R. 1927, a bill passed by the House Judiciary Committee in June 2015, which is designed to ensure that injured and non-injured plaintiffs are not mixed into the same class. It would ensure that courts make the proper inquiry into whether the named plaintiff's claims actually represent the claims of the rest of the class. The typicality requirement is designed to ensure that the named plaintiff is equipped to bring a representative—rather than an individual—lawsuit.[23] As the Supreme Court has recognized, typicality "serve[s] as a guidepost for determining whether maintenance of class action is economical and whether [a] named plaintiff's claim and class claims are so interrelated that interests of class members will be fairly and adequately protected in their absence."[24]

The proposed language also matches longstanding Supreme Court jurisprudence recognizing that this interrelation reaches to the injury suffered by the class. As the Court recently reaffirmed:

> The class action is an exception to the usual rule that litigation is conducted by and on behalf of individual named parties only. In order to justify a departure from that rule, a class representative must be a part of the class and possess the same interest and suffer the same injury as the class members.[25]

In fact, a number of courts already properly enforce the typicality requirement by refusing to allow injured named plaintiffs to represent uninjured class members.[26] Amending Rule 23(a)(3)

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[23] *See, e.g., Deiter v. Microsoft Corp.*, 436 F.3d 461, 466–67 (4th Cir. 2006) ("The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members. For that essential reason, plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim."); *In re Am. Medical Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996) ("A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.").

[24] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997).

[25] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (q*uoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)).

[26] *See, e.g., Paglioaroni v. Mastic Home Exteriors, Inc.*, No. 12-10164-DJC, 2015 U.S. Dist. LEXIS 126543 (D. Mass. Sep. 22, 2015) ("[N]amed Plaintiffs have not met the typicality requirement for several reasons. First, the named Plaintiffs allege that they suffered failure of their Oasis decks, whereas most class members have not reported any problems with their Oasis decks, so the alleged injury suffered is not common."); *Abbott v. Am. Elec. Power, Inc.*, No. 2:12-cv-00243, 2012 U.S. Dist. LEXIS 111370, *8-9 (S.D. W. Va. Aug. 8, 2012) ("proof of damages will be different for each plaintiff, so the facts proving damages for a named plaintiff will not establish

in this fashion would not affect those class actions properly certified in accordance with the Supreme Court's dictates.

As an alternative, the Advisory Committee could amend Rule 23(b)(3) in the following fashion:

> (3) the court finds that the questions of law or fact common to class members, <u>including but not limited to the type and scope of injury,</u> predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

While admittedly less elegant, amending Rule 23(b)(3) would address the concerns of those who objected to HR 1927 on the grounds that it would prevent courts from certifying legitimate classes asserting real but intangible harms, such as violations of civil rights.[27] While LCJ believes that amending Rule 23(a)(3) would not endanger these lawsuits at all, by situating the amendment in Rule 23(b)(3), which specifically allows class actions for the recovery of damages, it makes clear that class actions seeking either determination of a group's legal rights (covered by Rule 23(b)(1)) or an injunction to protect groups from a known continuing or future harm (covered by Rule 23(b)(2)) would remain unchanged.

Conclusion

Before the Committee decides whether to present a package of proposed Rule 23 amendments to the Standing Committee for approval for public comment, it should consider not only the proposals that the Subcommittee has developed with careful attention, but also should act on the pressing need to address the decoupling of injury and remedy that is taking place under the guise of a procedural rule. LCJ urges the Committee to include in any package of proposed amendments our suggested language that would provide a much-needed restraint on "no injury" classes.

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damages for other purported class members. Thus, the named class members do not satisfy Rule 23(a)'s typicality requirement because the facts needed to establish their individual claims do not prove those of the proposed class members."); *Hillis v. Equifax Consumer Servs., Inc*. 237 F.R.D. 491, 499 (N.D. Ga. 2006) ("The Sixth Circuit has summed up the typicality requirement as follows: 'The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.' Typicality cannot be satisfied when a "named plaintiff who proved his own claim would not necessarily have proved anybody else's claim." *Id*. Here, that is likely to occur.") (*quoting Sprague v. Gen. Motors Corp*., 133 F.3d 388, 399 (6th Cir.1998).).

[27] *See* Testimony of Alexandra D. Lahav, Joel Barlow Professor University of Connecticut School of Law, before the Committee on the Judiciary Subcommittee on the Constitution and Civil Justice, United States House of Representatives, Apr. 29, 2015 at 7 (objecting that "any civil rights cases involve the deprivation of rights but no impact to the body or property of the person"); Letter, Arthur A. Miller to Honorable Trent Franks, Apr. 27, 2015 at 5 (worrying about impact on "constitutional provisions and the many federal laws that define—and permit recovery for—injuries other than to persons and property").