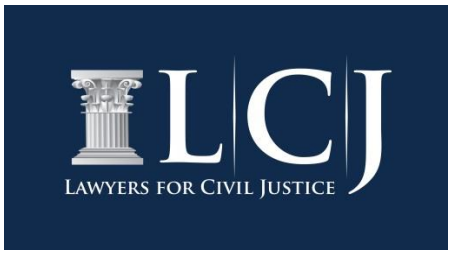

LAWYERS FOR CIVIL JUSTICE

COMMENT
to the
RULE 23 SUBCOMMITTEE
of the
ADVISORY COMMITTEE ON CIVIL RULES

FROM CONCEPTUAL SKETCHES TO A FORMAL PROPOSAL TO AMEND RULE 23: THOUGHTS ON THE SUBCOMMITTEE'S IDEAS FOR REFORM

October 9, 2015

Lawyers for Civil Justice ("LCJ") respectfully submits this Comment to the Rule 23 Subcommittee ("Subcommittee") as the Subcommittee works to refine its conceptual sketches into a formal proposal to amend Rule 23 for presentation to the Advisory Committee on Civil Rules ("Committee") during its Fall 2015 meeting.

I. Introduction

LCJ applauds the Subcommittee for its serious attention to the problems associated with modern class action cases. The Subcommittee has done tremendous work traveling the country to engage with practitioners, experts and other stakeholders and listening to their many views. Although LCJ has urged the Subcommittee to address the need for fundamental reform of Rule 23,[1] we respect the Subcommittee's apparent decision to focus instead on more incremental changes that are perhaps more likely to survive a consensus rulemaking process. Consequently, as the Subcommittee is undertaking the important task of deciding which, if any, potential rule amendments to present to the full Committee for formal consideration in November, we focus

[1] In previous Comments, 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. 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. *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.

this Comment on the specifics of the Subcommittee's sketches as set forth in its report to the Committee in April 2015 ("Initial Sketches")[2] and in its Introductory Materials to the Dallas Mini-Conference ("Mini-Conference memo")[3].

II. Ascertainability and Class Definition: An Explicit Requirement is Needed.

The Subcommittee's discussions with stakeholders have brought to light that the issue of ascertainability is ripe for potential rulemaking. Courts recognize that an appropriate definition of the class is fundamental to class certification, [4] yet nothing in Rule 23 either requires or defines ascertainability. Courts will certainly continue to find an implicit ascertainability requirement even without an explicit provision in the rule. To the extent that the Federal Rules are intended to reflect federal practice, it makes sense for Rule 23 to address and delineate this universally recognized "implicit" requirement. This is true even if the Subcommittee believes that the law is evolving too rapidly as the courts are not going to stop imposing ascertainability requirements simply because the rule is silent. Moreover, an appropriate 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.

A. Rule 23 Needs a Clear Ascertainability Requirement.

The Subcommittee should propose a modest amendment to Rule 23 requiring that all classes be objectively ascertainable. Such an amendment 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." If the Subcommittee believes that this approach unnecessarily sweeps in Rule 23(b)(2) classes that might not require the same level of ascertainability,[5] it could instead amend Rule 23(b)(3) with the same language.

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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] *See, e.g., Brecher v. Republic of Argentina*, F.3d, No. 14-4385, 2015 WL 5438797, at *2 (2d Cir. Sep. 16, 2015) ("Like our sister Circuits, we have recognized an implied requirement of ascertainability in Rule 23 of the Federal Rules of Civil Procedure.") (internal quotation omitted); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) ("We and other courts have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind."); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) ("We have repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'").

[5] This is currently a subject of some debate. *See, e.g., Kenneth R. v. Hassan*, 293 F.R.D. 254, 264 (D.N.H. 2013) ("where certification of a (b)(2) injunctive class is sought, actual membership of the class need not be precisely delimited because notice to the members is not required.") (internal quotation omitted); *Davis v. City of New York*, 296 F.R.D. 158, 164–65 (S.D.N.Y. 2013) ("where the primary relief sought is injunctive rather than compensatory, as here, it is not clear that the implied requirement of definiteness should apply to Rule 23(b)(2) class actions at all.") (internal quotation omitted); *but see Steimel v. Minott*, No. 1:13-cv-957-JMS-MJD, 2014 WL 1213390, at *6 (S.D. Ind. Mar. 24, 2014) (denying certification of Rule 23(b)(2) class in part because "[t]he Court … rejects Plaintiffs' argument that a relaxed ascertainability standard should apply in this case") *(appeal filed).*

This approach recognizes the importance of objective language in the class definition, a principle all courts (except possibly the Fifth Circuit) seem to agree on.[6] It also acknowledges that, in class actions, courts must ensure that it is fair to dispose of claims without individualized proof because the efficiencies which the class device is meant to achieve are not present where identifying the class members devolves into a highly individualized inquiry. Although modest in scope, this amendment would confirm the current state of the law and restrain many of the abusive practices that have caused so much controversy over how Rule 23 is utilized today.

B. The "Minimalist" Sketch Would Needlessly Confuse Settled Law.

Unlike the language suggested above, the Subcommittee's "minimalist" sketch achieves neither the benefits of making the ascertainability requirement explicit nor the benefits of leaving the courts alone. It attempts to locate the ascertainability requirement in Rule 23(c), even though every court to address the issue has held that the ascertainability requirement is at the very least an "implicit" requirement, if not a "threshold inquiry."[7] The sketch emphasizes the use of ascertainability as a case-management tool. By focusing on ascertainability as a tool for the judge instead of a requirement for proper certification, it implies that ascertainability is not a requirement at all. In other words, the minimalist rule is not so much a rule as a guideline, and as a guideline is contrary to the overwhelming majority practice.

Equally important, the minimalist sketch drops the consensus language that most courts use, such as the requirement for "objective" criteria.[8] Doing so opens the door for courts to certify classes using merits-based language, which allows for one-way intervention.[9] It would be better to keep the status quo rather than to amend Rule 23 without including a requirement that classes be defined in an objectively ascertainable manner. The sketch of the Committee Note makes clear that the minimalist sketch relieves the plaintiffs of the burden of defining the class—but neither acknowledges nor explains what a significant departure that is from current class action practice.

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[6] *See In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012) ("our precedent rejects the fail-safe class prohibition").

[7] *See, e.g., Mullins*, 795 F.3d at 659 (calling ascertainability a "well-settled requirement") *Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592–93* (3d Cir. 2012) ("[A]n *essential prerequisite of a class action*, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria.") (emphasis added); *EQT Prod. Co.*, 764 F.3d at358 ("However phrased, the requirement is the same. A class *cannot be certified* unless a court can readily identify the class members in reference to objective criteria.") (emphasis added); *Paglioaroni v. Mastic Home Exteriors, Inc.*, No. 12-10164-DJC, 2015 WL 5568624 at *9 (D. Mass. Sep. 22, 2015) ("Although not explicitly mentioned in Rule 23, an *implicit prerequisite* to class certification is that "the class must be 'definite,' that is, the standards must allow the class members to be ascertainable.") (emphasis added).

[8] *See, e.g., Mullins*, 795 F.3d at 657 (detailing objectivity requirement); *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013) (plaintiffs "must show, by a preponderance of the evidence, that the class is currently and readily ascertainable based on objective criteria.") (internal citation omitted); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 n.19 (1st Cir. 2015) (same).

[9] *See Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal 2011) ("Ascertainability is needed for properly enforcing the preclusive effect of final judgment. The class definition must be clear in its applicability so that it will be clear later on whose rights are merged into the judgment, that is, who gets the benefit of any relief and who gets the burden of any loss."); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) (fail-safe class "is prohibited because it would allow putative class members to seek a remedy but not be bound by an adverse judgment"); *see also In re Nexium*, 777 F.3d at 22 n.19; *Mullins*, 795 F.3d at 659; Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2803–04 (2013) (detailing how allowing fail-safe classes revives one-way intervention).

Like many common law doctrines, the law surrounding the ascertainability requirement is "evolving." However, the case to which the Subcommittee points as proof that the evolving nature of the law requires a "minimalist" rule—*Mullins v. Direct Digital, LLC*—embraces all of the preceding consensus principles, even though it applies some of them in a way contrary to most other courts of appeals. The appellate courts are not shifting away from treating ascertainability as a prerequisite or holding that it requires objective criteria. Instead, they are engaged in a robust debate over the level of administrative feasibility required for a class to be considered "ascertainable." That debate is related to the debate over the level of individualized proof necessary for certification in general. It is likely to be addressed by the Supreme Court in the near future, perhaps in *Mullins* itself, or in the more recent *Brecher* case, which follows a more traditional approach to ascertainability. There is no pressing reason for the Subcommittee to prejudge what the Supreme Court might do. Although a rule like the minimalist sketch would produce more confusion, the language we suggest above would achieve clarity.

III. *Cy Pres*: Any Proposed Rule Should Avoid the Two Most Important Controversies.

Enshrining *cy pres* into the Federal Rules of Civil Procedure would be extremely problematic for several reasons that LCJ has addressed in prior comments.[10] It is also premature and unnecessary because federal courts are in the process of developing common law with respect to *cy pres*, and that process should be allowed to play out. If, however, the Subcommittee is going to present a formal proposal for a rule amendment on this topic to the full Committee, it should modify its latest sketch to avoid the most fundamental problems.

A. *Cy Pres* Should Be Limited to Distributions that Are "Authorized by Law."

The Subcommittee's sketch on *cy pres* includes the bracketed phrase "if authorized by law" that is necessary to address the serious question of whether federal courts have authority to transfer funds owed to absent class members to non-parties who have not suffered damages. Absent the phrase, a proposed rule would present the full Committee with a recommendation to proceed with an amendment that would be ostensibly provide that authority – and therefore be subject to an obvious Rules Enabling Act challenge. The controversy over such authority is acknowledged even in the case cited by the Subcommittee, *In re BankAmerica Corp., Sec Litig.*,[11] which explains:

> Such [*cy pres*] distributions have been controversial in the courts of appeals. Indeed, many of our sister circuits have criticized and severely restricted the practice. These contrary authorities were not even acknowledged by Green Jacobson in urging a *cy pres* distribution in this case, nor by the district court in ordering the requested distribution.[12]

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[10] *See*, LAWYERS FOR CIVIL JUSTICE, A CALL FOR MEANINGFUL REFORM, *available at* http://www.lfcj.com/class-actions.html; and 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, *available at* http://www.lfcj.com/class-actions.html.

[11] 775 F.3d 1060 (8th Cir. 2015)

[12] *Id.* at 1063. *Citing Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689-90 (7th Cir .2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 172-73 (3d Cir.

In re BankAmerica is hardly a reflection of a broad consensus that legal authority exists for *cy pres* settlements. Nor is the American Law Institute, which is the source of the Subcommittee's sketch.[13]

The Subcommittee's sketch of the draft Committee Note properly points out that *cy pres* provisions differ from "private settlement[s], because the binding effect of the class-action judgment on unnamed class members, [from whom any *cy pres* funds are taken,] depends on the court's authority."[14] Private settlements that disburse to non-litigants funds properly belonging to absent class members are thus qualitatively different than settlements in which the litigants themselves merely accept less than the arguable "full value" of their claims. Litigants do not need courts to accomplish the latter. To do the former requires an exercise of judicial power – which must come from somewhere. The Subcommittee should therefore include the phrase "if authorized by law" in any formal proposal on *cy pres* to the full Committee.

B. Excluding *Cy Pres* Payments and Reversionary Funds from Counsel Fee Determinations Would Produce Proper Incentives for Class Compensation.

The Mini-Conference Memo notes that one alternative to *cy pres* would be a "reversionary feature," but appears to reject that option because its "existence . . . might prompt defendants to press for unduly exacting claim processing procedures."[15] A footnote asks "[i]s this concern warranted?"[16] The Subcommittee should also ask: Is the impetus created by a reversionary feature for defendants to reduce settlement recovery by means of onerous claims procedures any different than the corresponding impetus for class counsel to increase the settlement amount by adding a *cy pres* provision? In either case, one side has an economic incentive to reduce payments to actual class members. A rule could address this by excluding both of these settlement features from consideration in the calculation of class counsel fees. If neither side benefits from payments that go elsewhere rather than to class members, then these controversial practices will be minimized, as class counsel will be properly incentivized to resist their inclusion in class settlement.

Precedent exists for doing this. In *Pearson v. NBTY, Inc.*,[17] Judge Posner affirmed exclusion of "the *cy pres* award . . . in calculating the benefit to the class [for purposes of a fee award], for the

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2013); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 29-33 (1st Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038–40 (9th Cir. 2011); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 473-82 (5th Cir. 2011); *In re Katrina Canal Breaches Litigation*, 628 F.3d 185, 196 (5th Cir. 2010); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 434-36 (2d Cir. 2007); *Wilson v. Sw.t Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989).

[13] The current sketch is almost a verbatim adoption of §307 of the American Law Institute's Principles of the Law of Aggregate Litigation. Unlike a Restatement, an ALI Principles Project is not necessarily based on existing law. The only substantive law sources identified in §307 as a basis for *cy pres* are two state statutes dealing with "residual funds." *See* §307, Reporter's Notes to Comment b. Those statutes have no application to federal procedure.

[14] Mini-Conference memo at 15-16.

[15] *Id.* at 15.

[16] *Id.* n.4.

[17] 772 F.3d 778 (7th Cir. 2014).

obvious reason that the recipient of that award was not a member of the class."[18] The ALI recommends that *cy pres* settlement funds be discounted in this situation.[19] Like *cy pres*, settlement funds that revert to defendants provide no benefit to the class and likewise should be excluded in the calculation of counsel fee awards. The greater the extent that such sums are removed from counsel fee calculations, the greater will be the economic incentives that the Subcommittee is seeking in order to prevent artificial reductions in payouts to actual class members. Judge Posner further explained:

> When the parties to a class action expect that the reasonableness of the attorneys' fees allowed to class counsel will be judged against the potential rather than actual or at least reasonably foreseeable benefits to the class, class counsel lack any incentive to push back against the defendant's creating a burdensome claims process in order to minimize the number of claims.[20]

Thus there is both an avenue and good reason for the Subcommittee to incorporate into any *cy pres* proposal a mechanism that would reduce the occurance of controversial *cy pres* features without exposing the proposal to the additional scrutiny should it express bias against reversionary clauses[21] or encouragement of *cy pres* provisions. Excluding both kinds of features from consideration in determining counsel fees will ensure that class counsel will represent the class members' interests by resisting the disposal of settlement funds to non-class-members.

IV. Expanded Treatment of Settlement Approval Criteria: Unifying the Standards for Settlement Approval Is Unnecessary.

The Subcommittee's sketch concerning expanded treatment of settlement approval criteria[22] is intended to create greater uniformity among jurisdictions in approving settlements.[23] Although well intended, the proposed rule change is unnecessary because the particular facts of the settlement drive whether a settlement is determined to be "fair, adequate, and reasonable," whereas jurisdictional differences in settlement approval factors do not account for settlement approvals or rejections.

For example, in *Eubank v. Saltzman,*[24] the Seventh Circuit reversed, on three largely factual grounds, the district court's approval of a settlement of a class of consumers who claimed that

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[18] *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).

[19] Principles of the Law of Aggregate Litigation §3.13, comment a ("Because *cy pres* payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class.").

[20] *Pearson*, 772 F.3d at 783.

[21] Mini-Conference memo at 14-19.

[22] Conceptual Sketch No. 3 in the Subcommittee's April Memo at 247-48 and Conceptual Sketch No. 2 in the Mini-Conference Memo at 9-10.

[23] Insofar as the conceptual sketch is also intended to address forum shopping, forums are shopped more for litigation than settlement advantage. To the extent any forum shopping occurs for settlement purposes, it is usually because factually similar settlements were approved in a particular jurisdiction, regardless of the multi-factored test a court applies.

[24] 753 F.3d 718 (7th Cir. 2014).

the defendant's window casements were defective. First, the appellate court found serious conflicts of interest between class counsel and plaintiff on the one hand, and the class on the other. The lead counsel was the son-in-law of the named plaintiff, and was the subject of ethical proceedings that could have incentivized him to finalize the settlement before those ethical proceedings affected his ability to share in any fee award. Second, the appellate court felt that the attorneys' fees were unreasonable in comparison to the value of the settlement, which, in the appellate court's mind, the district court grossly overvalued. Third, the appellate court held that the settlement was "stacked against the class" because of a complicated claims process and because attorneys were compensated before notice was disseminated and before class members were paid. The Seventh Circuit held that these factual circumstances made the settlement unfair, unreasonable, and inadequate. These facts, rather than rote consideration of any list of factors, are what drove the decision.

Moreover, courts already consider the criteria the Subcommittee proposes to add. The proposed additional factors are whether: (a) the class representatives and class counsel "adequately represented the class"; (b) the settlement was negotiated "at arm's length"; (c) "relief awarded to the class . . . is fair, reasonable and adequate"; and (d) class members are treated equitably relative to each other . . . and the proposed method of claims processing is fair." There are several reasons why these factors are unnecessary. First, Rule 23(a)(4) already requires that the representative parties "adequately represent the interests of the class." Adding it to Rule 23(e)(2) begs the question of whether the other requirements of Rule 23(a) must be satisfied in a class action settlement, particularly because the rules are to be read in a manner that does not render them superfluous. Second, that the settlement was negotiated at "arm's length" is an inherent component of 23(a)(4) and the existing 23(e)(2) analysis. A settlement reached as a result of collusion, or one that favors certain class members or class counsel at the expense of the class, is not "fair," and counsel negotiating such a settlement certainly have not "adequately represented" the class, as controlling authority reflects.[25] Third, whether the relief awarded to the class is "fair, adequate, and reasonable" is the current standard. Fourth, whether "class members are treated equitably relative to each other" is a consideration captured by the typicality analysis required under (a)(3), the adequate representation analysis required under (a)(4), and the "fair, reasonable, and adequate" analysis of current (e)(2). Because the existing framework for evaluating settlements already captures all of the proposed criteria, the Subcommittee's sketch offers little that is new.

Even though the concepts are not novel, adding a list of settlement criteria to the Rule is bound to cause an increase in briefing by the parties and motion practice by objectors, and therefore to increased costs and resources expended by the parties and the courts, in litigating whether, and to what extent, these factors abrogate existing settlement approval criteria and case law precedent. For instance, the conceptual sketch repeats the phrase "fair, adequate, and reasonable" which is the phrase pursuant to which the jurisdiction-specific tests were created in the first place.[26]

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[25] *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 595 (1997) (settlement of class action where class members had disparate interests had "no structural assurance of fair and adequate representation for the diverse groups and individuals affected").

[26] *See, e.g., Churchill Village, LLC v. Gen. Electric*, 361 F.3d 566, 575 (9th Cir. 2004) *(cert. denied sub nom Beckwith Place, Ltd. V. Gen. Elec. Co.*, 543 U.S. 818 (2004) (eight factors are used to determine "the fairness and adequacy" of class action settlements).

Preceding the uniform factors with the phrase "considering whether," as Alternative 1 does, would interject a new and therefore unclear context into the evaluative factors.

Because courts generally evaluate and approve or reject class action settlements based on facts, not abstract factors, and because courts evaluating class action settlement already evaluate settlements using the proposed additional criteria, the marginal benefit, if any, that the conceptual sketches would provide are not worth the expense and confusion they are likely to create. We urge the Subcommittee not to include this sketch in any formal proposal to the Committee.

V. The Front-Loading Laundry List: A Good Concept that Needs a Simpler Rule.

The concept behind a front-loading rule is sound: Providing the court and class members with more relevant information prior to the decision to give notice of a proposed settlement would almost certainly benefit class members and defendants alike by reducing the chances of problems later in the case. The Subcommittee's sketch of a Rule 23(e)(1) is a well-intentioned and thorough attempt to achieve that goal—and to provide clear guidance to judges and practitioners with limited experience handling class action cases. However, due to the idiosyncratic nature of many class action cases and the inherent difficulties of "laundry-list" rulemaking, the sketch is likely to create more problems than it solves unless it is re-written as a simple rule with the categories of information confined to the Committee Note. We encourage the Subcommittee to continue its work to draft a workable rule on this subject.

VI. The "Problem of Problem Objectors": The Remedies Risk Creating the Unintended Consequence of Making it More Difficult to Resolve Objections.

The Subcommittee's latest conceptual sketches for amendments to deal with "[t]he problem of problem objectors" under Rule 23(e) reflect a laudable effort to introduce changes that might minimize frivolous or extortionate objections to class action settlements. The sketches, however, go too far in attempting to ferret out such objections, and will have the unintended consequence of making it more time-consuming and unwieldy for the courts to manage class action settlements and for the settling parties to resolve any objections. The provisions in the sketches would 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 sketches reflect to deal with objectors on a case-by-case, objector-by-objector basis. The disclosure sketches require significant further development and are not ready for full Committee consideration.

A. The Objector Disclosure Approach May Not Add Much More than Complications.

The Subcommittee's sketch of a disclosure amendment to Rule 23(e)(5) is duplicative of similar provisions included in most class notices approved by federal district courts in the settlement context. It is unclear whether a rule change is needed to require such disclosure when courts are at liberty to fashion disclosure requirements as the needs of the case dictate. Moreover, because

the sketch does not assign any consequence to an objector's failure to comply, the utility of such a rule change is murky, at best.

If, however, the Subcommittee moves ahead with a formal proposal to add a disclosure requirement, it should require all objectors to demonstrate standing to object as proposed class members as a prerequisite to the court's consideration of their objections. As drafted, the sketch for Rule 23(e)(5)(A) can be read to allow persons who fall outside of the scope of the proposed settlement class to file objections, so long as they disclose "the facts that bring the objector . . . within an alternative class definition proposed by the objector." This reading does not seem to be the Subcommittee's intent, as it conflicts with plain language in the existing Rule which limits the universe of persons who may file objections to "[a]ny class member."[27] The Rule should not encourage the filing of objections by persons who do not fall within the scope of the proposed class, will not be bound by the settlement if it is approved and who, therefore, lack standing to lodge an objection.[28]

Additionally, the objector disclosures in the Rule 23(e)(5)(A)-(E) sketch are so detailed and complex that the implementation of the disclosure requirements would likely lead to ancillary litigation over objectors' compliance with the disclosure rules. As the Subcommittee observes in its Comments and Questions, objections are often "quite [D]elphic" and "settlement proponents find it difficult to address these objections because they are so uninformative."[29] The addition of complicated disclosure requirements in the rule will not adequately address this issue.[30]

As the Subcommittee notes,[31] proposed Paragraph 6.1 may run afoul of the Supreme Court's decision in *Devlin v. Scardelletti*,[32] at least in non-opt out cases.[33] One state Supreme Court has held after *Devlin* that, where class members are protected by opt-out rights, they have no due process right to appeal the fairness of a class action settlement absent a successful intervention.[34]

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[27] Fed. R. Civ. P. 23(e)(5).

[28] *See Feder v. Elec. Data Sys Corp*., 248 Fed. App'x 579, 580 (5th Cir. 2007) ("[O]nly class members have standing to object to a settlement. Anyone else lacks the requisite proof of injury necessary to establish the 'irreducible minimum' of standing."); *Gould v. Alleco, Inc*., 883 F.2d 281, 284 (4th Cir. 1989) (non-class member lacked standing to object to settlement and "[i]nterjection of the opposing views of non-class members should proceed via intervention under Rule 24"); *Landsman & Funk, P.C. v. Skinder-Strauss Assocs*, CA No. 08CV3610 (CLW), 2015 WL 2383358, at *2 (D.N.J. May 18, 2015) ("Importantly, as Rule 23 confers the right to object upon class members, the Rule itself does not confer standing upon nonclass members.") (internal citation omitted). The bracketed language in the sketch for Rule 23(e)(6.1) creates the same problem by contemplating that an "objector [who is not a member of the class included in the judgment] can appeal . . . if the court grants permission to intervene for that purpose." LCJ opposes any rule change that encourages motion practice or the lodging of objections by non-class members.

[29] Mini-Conference memo at 23.

[30] Consistent with a simplified approach, Paragraph 6 in the Objector Disclosure Approach should be eliminated. The proposed requirement in Paragraph 6 that objectors move for a hearing seems wholly unnecessary and superfluous, and it is unclear what problem this proposal attempts to address.

[31] Mini-Conference memo at 24-25.

[32] 536 U.S. 1 (2002).

[33] *But see In re Gen. Am. Life Ins. Sales Practices Litig.*, 302 F.3d 799, 800 (reciting *Devlin's* holding that an objecting class member may appeal the approval of a class action settlement without first successfully intervening, but noting that *Devlin* involved mandatory class action and questioning, in *dicta*, whether that holding applies in opt-out class actions certified under Rule 23(b)(3)).

[34] *Hunter v. Runyan*, 382 S.W.3d 643, 652 (Ark. 2011) *(cert. denied sub nom Crager v. Runyan,* 132 S. Ct. 243 (2011) (holding that, in Arkansas, "an unnamed class member who does not intervene cannot appeal a settlement

Requiring intervention as a prerequisite to appealing the approval of a class action settlement would provide a new gate-keeping function to the district court that may limit frivolous appeals, and seems worth further consideration.

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

The sketch's changes to court approval are highly 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. While it may be true that Rule 23(e)(5) has not resulted in an avalanche of contested district court proceedings over the withdrawal of objections, this should not be viewed as a negative. District courts have the discretion they need to address frivolous objections, and to oversee, where appropriate, settlements with objectors.[35] The Subcommittee's sketches of amendments to Rules 23(e)(5) and (7) would do more harm than good.

Either proposal would make it more difficult for settling parties to resolve objections by agreement and would encourage 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. The sketch of th Committee Note ideas suggests 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 statement is wholly unsupportable. Active judicial involvement in measuring class counsel's fee award in the context of a class action settlement is "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, "active judicial involvement" in measuring private settlements reached in order to resolve objections is much less important than the question of class counsel's fee award. It would be erroneous for the Subcommittee to conclude that a settlement with an objector is "not for the parties to negotiate entirely between themselves," as its memo states.[36] To the contrary, parties need the flexibility to negotiate and settle with objectors without onerous procedures that may delay the ultimate resolution of litigation.

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approved by the class, even if the unnamed class member objected to the settlement", but finding that an unsuccessful intervenor "does have standing to appeal the denial of his motion to intervene" in which the objector "would receive appellate review of . . . issues related to the settlement")

[35] 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, 3d ed., at 17 (2010).

[36] 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).

VII. Settlement Class Certification: A Class Settlement Without Predominance Fails to Ensure the Necessary Cohesion.

As LCJ previously commented, "[f]ar 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."[37] The purpose of the predominance requirement is to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation,"[38] and as LCJ explained, "[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."[39] Further, removing the predominance requirement raises 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.[40] In other words, if there is no predominance of common issues, we dilute the necessary assurance that class members are being fairly and equitably compensated in a class settlement, and invite a patchwork of cobbled-together compensation.

All of these concerns highlight why eliminating the predominance requirement for settlement class certification is problematic.

Moreover, there are two additional reasons why Rule 23(b)(4) should not be reformed: (1) Eliminating the predominance requirement for settlement purposes incentivizes improper filings; and (2) the Supreme Court in *Amchem v. Prods, Inc. v. Windsor*[41] did not countenance the elimination of the predominance requirement.

First, without the predominance requirement, plaintiffs' attorneys are free to file class actions that could never be certified (but will be expensive to defend), solely to force early settlement. Take, for example, a personal injury class action. It is well settled that personal injury actions are not appropriate for class treatment because of the number of individual inquiries that idiosyncratic medical histories and conditions create. Accordingly, under the current rules, plaintiffs' counsel typically do not file personal injury class actions, because most, if not all, are uncertifiable due to predominance issues, and they may risk Rule 11 sanctions for filing a frivolous lawsuit.

Under the conceptual sketch, however, it may not be a Rule 11 violation to file a class action that is uncertifiable for litigation, because the sketch would create an argument that it can be certified for purposes of settlement. Granted, plaintiffs' counsel are unlikely to admit that predominance is not satisfied, and one might argue in favor of the proposed sketch that the defendant should file an early motion to strike the class allegations if it appears predominance cannot be satisfied and the case was filed solely for settlement. That response raises two problems, however. First,

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[37] 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, at 8.
[38] *Amchem*, 521 U.S. at 623.
[39] Looking at the Bigger Picture: The Conceptual Sketches in the Context of Much-Needed Rule 23 Reform, at 9.
[40] *Id*. at 11.
[41] 521 U.S. 591 (1997).

if defendants are forced to file motions to strike the class allegations, the rule has just added another expense for defendants. Second, courts do not always countenance early motions to strike class allegations and hold them to higher standards.[42] Defendants may be forced to engage in costly discovery before the predominance issue is corrected. Defendants may also be at risk that plaintiffs will use an uncertifiable case to discover a certifiable one, or worse, may be forced due to defense costs to settle claims that never could be certified for trial.

Some defendants may be in favor of the proposed amendment because it helps them avoid having to take inconsistent positions on whether the predominance requirement is satisfied. Under the current rules, a defendant seeking approval of a class action settlement frequently asserts (either implicitly or expressly) that ***predominance is satisfied*** because it is a required element for settlement approval. If the settlement is not approved, however, and the parties continue litigating, the defendant will likely take the position that ***predominance is not satisfied***. Under the sketch, in contrast, since predominance would not be required for settlement approval, the defendant faces no risk of taking inconsistent positions on the issue of predominance.

In practice, however, the risk of inconsistent positions does not appear to be a serious concern. Many class action defense lawyers do not take any position on predominance at the class certification (leaving plaintiffs to vouch for satisfaction of the predominance requirement) or build provisions into the settlement and final approval order to the effect that nothing prevents the defendant from challenging predominance if the settlement is rejected. Additionally, under Rule 408, conduct or statements made during settlement negotiations are inadmissible. Accordingly, the risk that a defendant may be forced to take inconsistent positions on predominance is not so great as to warrant a rule change ripe for abuse. Similarly, settlements are frequently rejected *not* for failure to satisfy the predominance requirement, but because the amounts the settlement provides in compensation to class members is disproportionate to class counsel's fees. In other words, the proposed change does not appear to address a current problem.[43]

The Supreme Court in *Amchem*[44] rejected only the "manageability for trial" requirement in the settlement class action context because settlement obviated that concern. It did not eliminate the core concern surrounding predominance. To the contrary, the Court held that settlement parties' interests in "a fair compromise" do not satisfy the predominance requirement of Rule 23(b)(3), otherwise, "that vital prescription would be stripped of any meaning in the settlement context."[45] Stated differently, *Amchem* affirmed the importance of having a meaningful predominance requirement in the settlement context.

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[42] *See, e.g., Montemayor v. GC Services LP*, 302 F.R.D. 581, 588 (S.D. Cal. 2014) (denying motion to strike class allegations as premature where plaintiffs had not filed a motion for class certification); *Martin v. Ford Motor Co.*, 765 F. Supp. 2d 673, 680 (E.D. Pa. 2011) (denying motion to strike class allegations filed prior to plaintiff moving for class certification because "courts within the Third Circuit . . . [have found] a motion to strike class allegations premature where a motion for class certification has not been made").

[43] To the extent that settlements are rejected because of a lack of predominance of common issues, that is the correct result – not a result that needs correcting. If predominance is lacking, that means the case has no value as a class action in the first place and should be dismissed rather than settled.

[44] 521 U.S. 591 (1997).

[45] *Id*. at 623.

Predominance is important because it protects the interests of class members and limits judicial discretion. Without the predominance requirement, courts theoretically would have the discretion to approve a settlement, like the one in *Amchem*, of a class with divergent interests and individualized questions so long as the court finds the settlement "fair, adequate, and reasonable." As the Court explained in *Amchem*, 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."[46] The predominance requirement serves as a check and prevents settlements where individual issues are so sprawling that one settlement could not possibly reflect the interests of the entire class. There is no alternative to that check in the conceptual sketch. Eliminating predominance therefore cannot be squared with *Amchem*.

If the concern that prompted this conceptual sketch truly is to prevent defendants from having to take inconsistent positions in settlement versus litigation, an alternative rule change may be superior. Rather than removing the predominance requirement in the settlement context, Rule 23 could simply provide that positions taken in seeking class settlement approval are not binding and have no preclusive effect if the settlement is not finally approved. Alternatively, if the Rule is changed as proposed, additional language should be added to encourage the filing of, and expressly require courts to consider, early motions to strike the class allegations. This will allow defendants an early opportunity to police the filing of class actions where predominance can never be satisfied, before unnecessary costs and resources are expended.

VIII. Issue Class Certification: The Predominance Requirement Should Not Be Eliminated.

The role of issue class certification needs to be clarified, not expanded. Any amendments should be made to Rule 23(c)(4) as contemplated by the Subcommittee's second conceptual sketch, and not to Rule 23(b). The proposed changes to 23(b)(3) in the first conceptual sketch are unnecessary and overbroad, would eviscerate the predominance requirement and would create an entirely new type of class action—the "issue class action"—that does not exist in the current rule and goes far beyond what appellate courts have approved. Moreover, the revised Rule 23(b) would not address the difficult questions raised by use of issue certification to evade the problem of predominant individual issues in a proposed class action.

The use of issue certification under Rule 23(c)(4) has increased in recent years in response to the Supreme Court's opinion in *Comcast Corp. v. Behrend*.[47] The Court's ruling in that case—that failure to prove a class-wide method of calculating damages for an antitrust claim defeated predominance—appeared inconsistent with the established lower court practice of certifying (b)(3) classes if common liability questions predominated over individualized damages questions. In the wake of *Comcast*, courts and commentators have turned to 23(c)(4) as an alternative means of certifying classes where damages are not susceptible to class-wide proof,

[46] 521 U.S. at 620.
[47] 133 S. Ct. 1426 (2013).

and several appellate courts have held that "courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)."[48]

The Supreme Court has not yet ruled on this question, however, and its practical implications have yet to be played out in actual class trials. Nor is it necessary to exempt issue certification from the (b)(3) predominance requirement in order to certify classes in which damages are subject to individualized proof. As Justices Ginsburg and Breyer noted in their dissent in *Comcast*, "it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members,"[49] and further "a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings."[50] This is consistent with the Committee Note to 23(c)(4), which suggests that "in a fraud or similar case" an issue class could be certified to adjudicate liability, but class members would have to appear individually to prove the amount of damages. The certification of an issue class in the advisory committee example does not imply a lack of predominance but rather creates a mechanism to litigate the predominant common issues and secondary individual issues in an orderly fashion, similar to the "black letter rule" cited in the *Comcast* dissent.

Post-*Comcast*, appellate courts have relied on the dissent's language to approve certification in cases where damages are not susceptible to class-wide proof. For example, the Sixth and Seventh Circuits in the *Glazer* and *Butler* cases held that *Comcast* did not preclude the certification of liability-only classes, with damages to be determined in individual proceedings. In so doing, however, they did not contend that (c)(4) certification did not require a finding of predominance. To the contrary, both found that "the requirement of predominance had been satisfied."[51] As the Sixth Circuit explained in *Glazer* "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate."[52] While it remains to be seen how such proceedings can be managed in practice, nothing in *Comcast* or its progeny suggests the need for the radical changes contemplated by the Subcommittee's first conceptual sketch.

As currently written, Rule 23(c)(4) provides "when appropriate, an action may be brought or maintained as a class action with respect to particular issues." Rule 23(b), not 23(c), defines the types of class actions. As the Supreme Court has repeatedly held, a class action may only be maintained if the 23(a) prerequisites are met *and* the case falls into one of the subcategories of 23(b).[53] Rule 23(c) creates no new types of class action but rather provides tools to manage the types enumerated in Rule 23(b). Similar to the subclasses provided for in 23(c)(5), issue classes

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[48] *In re Nassau County Strip Search Cases,* 461 F.3d 219, 227 (2d Cir. 2006). *See also McReynolds v. Merrill Lynch, Pierce, Fenner & Smith,* 672 F.3d 482 (7th Cir. 2012).
[49] 133 S.Ct. at 1437.
[50] *Id*. at 1437, n.1.
[51] *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 802 (7th Cir. 2013).
[52] *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) *cert. denied sub nom. Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014), quoting *Comcast* 133 S.Ct. at 1436.
[53] *Amchem*, 521 U.S. at 614 ("In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2) or (3).")

are available to courts when appropriate to overcome obstacles to certification, but do not override the 23(b) requirements.[54]

The sketches contemplated by the Subcommittee would fundamentally alter this scheme. Alternatives (1) and (2) would exempt issue classes from the predominance requirement, and alternative (2) would also exempt issue classes from the superiority requirement, undermining the due process protections of Rule 23(b)(3)[55] and creating a new "type of class action" in which any single common issue could be the basis for class certification where individual issues otherwise predominate. The sketches would allow exceptions to predominance to swallow this fundamental Rule 23 requirement whole. While the relationship between Rule 23(c)(4) and the predominance requirement of Rule 23(b)(3) is subject to ongoing debate, the current state of the law does not support a broad expansion of Rule 23(c)(4) to create this new type of class action. The use of issue classes in practice has largely been limited to bifurcating liability from damages, but the proposed amendments would in theory allow class certification to resolve issues that do not in themselves determine liability, such as particular claim elements or defenses, resulting in the drastic scenario predicted by the Fifth Circuit in *Castano*: "automatic certification in every case where there is a common issue."[56] This unwarranted expansion of issue classes goes far beyond what appellate courts have allowed and would undermine the established rule that a (b)(3) class cannot be certified if there are individualized issues as to *injury*. Indeed, such amendments would venture into uncharted legal territory. As one commentator has noted, "litigating to a final and preclusive judgment pieces of a case that are more discrete than 'liability' (including all claim elements and defenses) is a practice unknown to the Anglo-American legal tradition and thus ought to be avoided in the context of class actions."[57]

Re-writing the Rule to create this new type of class action also raises significant Constitutional and statutory problems. 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 issues from individualized liability-negating affirmative defenses, it would strip defendants of a valuable protection at trial.

Further, the Subcommittee does not yet have the necessary information to determine what the effect of such an amendment would be. It needs the answers to several pressing questions raised by the use of issue classes under Rule 23(c)(4), such as how notice will be handled, who will litigate trials on the severed individual issues, how issue classes may be settled and how attorneys' fees can be determined. Appellate decisions to date provide no guidance on these key procedural issues.

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[54] *Glazer*, 722 F.3d at 861.
[55] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (discussing "procedural protections" of Rule 23(b)(3)).
[56] *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996)
[57] Mark A. Perry, *Issue Certification under Rule 23(c)(4): A Reappraisal*, 62 DePaul L. Rev. 733 (2013).

Thus, to the extent that any changes are called for, they should focus not on creating a new type of class action but on clarifying when issue certification as it is currently described in the rule should be considered. To that end, the second conceptual sketch, which contemplates adding a requirement that a class should only be certified under Rule 23(c)(4) if resolution of the issues would materially advance the litigation, may be helpful. The Third Circuit has considered this question in detail, and requires courts to engage in a robust analysis of the effect that issue class certification would have on litigation as a whole, including consideration of the factors listed in The American Law Institute's Principles of the Law of Aggregate Litigation.[58] Those factors include, among other things, the efficiencies to be gained from issue class certification in light of realistic procedural alternatives, the potential preclusive effect that any class-wide judgement will have, and the impact that issue class certification will have on the constitutional and statutory rights of both plaintiffs and defendants. To the extent that issue class certification is gaining momentum in the lower courts, it makes sense to require such an analysis in place of the ambiguous term "when appropriate." The requirement that resolution of the certified issues materially advance the litigation should not be viewed a substitute for predominance under 23(b)(3), however. Issue certification should remain a tool for streamlining cases that otherwise meet the requirements of Rule 23(a) and (b). [59]

IX. Settlements and Offers of Judgment: Attempting to Limit Settlements by Class Representatives Is Not Timely Based Upon the Present State of the Law and Would Undermine Rules 23 and 68 and Defy Clear Supreme Court Precedent.

The conceptual sketches designed to limit the use of offers of judgment or individual settlements in class actions are not ripe for presentation to the full Committee at this time because the Court's decision in *Gomez v. Campbell-Ewald Co.* may change the legal landscape and either moot or alter the Committee's sketches. In *Gomez*, the Court will address the following questions: "(1) Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim; [and] (2) [w]hether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified."[60] The Supreme Court's decision in *Gomez* is expected to clarify a split among the Circuit Courts as to whether a complete offer of relief to the named plaintiff ends the case or not.

The first sketch proposes amending Rule 23 to add a new provision clarifying that an action can be terminated by a tender of relief only if the court has denied class certification; the second sketch proposes amending Rule 68 to make clear that it does not apply to Rule 23; and the third proposes amending Rule 23(e) to require judicial approval of individual plaintiff settlements reached pre-certification. The proposed changes in all three sketches would undermine the current law that a class action is an individual lawsuit until the plaintiff obtains certification, a

[58] *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 272-73 (3d Cir. 2011). *See* Principles of the Law of Aggregate Litigation §§ 2.02–05, 2.07–2.08 (2010).

[59] The final conceptual sketch, providing for interlocutory appeals of non-final judgments resulting from issue class trials, is also premature as the nature and scope of any such judgments is largely theoretical at this point and there is no reason to believe that existing rules for interlocutory appeals would not insufficient.

[60] *Gomez v. Campbell-Ewald Co*., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S. Ct. 2311 (2015). *See also Chapman v. First Index, Inc*., 796 F.3d 783, 786 (7th Cir. 2015) (agreeing that "[t]he issue is before the Supreme Court in *Gomez*.").

ruling that has important effects at various stages in the litigation. The mere designation of a case as a class action in a pleading does not provide an escape clause around the application of Article III or the Federal Rules of Civil Procedure which are applicable at every stage of a case, regardless of how the case was originally labeled. 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.[61] 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.[62] 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.[63]

Amending Rule 68 would needlessly confuse the law about the effect of certification, would undermine the purpose of Rule 68, and would not achieve the Committee's stated goals. Importantly, amending Rule 68 would create skewed incentives for plaintiffs' attorneys (who, as many courts recognize, are the real parties in interest in a class action[64]) by giving them free rein to drive up defense costs as a form of blackmail where individual plaintiffs would be, and should be, constrained by the cost-shifting provisions of the Rule in all other contexts.[65] The cost-shifting mechanism offered by Rule 68 is an essential deterrent to frivolous class actions, and often serves to focus the parties on essential issues and to conserve judicial resources. This amendment would also fail to accomplish the stated goal of the Subcommittee because the defendant could still make a non-Rule 68 offer that resulted in the same argument over whether the named plaintiff, and therefore the class action, was moot.

The sketches that propose to add a section under Rule 23(x) and to amend Rule 23(e) are even more damaging. The Rule 23(x) sketch would eliminate any way for the parties to resolve the named plaintiff's claims by tender of relief prior to denial of class certification. In effect, this would mandate that the parties undertake the extraordinary costs associated with litigation of a class certification motion, even when neither party wishes to proceed. Moreover, if Rule 68 is also amended as proposed, defendants would be required to carry the financial burden of this forced litigation. Currently, one of the only ways to resolve a class action that was filed in the erroneous belief that a class-wide 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. Under current law, the named-plaintiff controls the class, not his attorneys, and therefore the named-plaintiff should be permitted to settle if he chooses to do so. If the named-plaintiff had identified an actual class-wide issue, then another affected plaintiff will file the same case. The Fifth Circuit recently agreed "that '[a] plaintiff seeking to represent a class should be permitted to accept an offer of

[61] *See Taylor v. Sturgell*, 553 U.S. 880, 894 (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, 1346 (2013) ("a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified").

[62] FED. R. CIV. P. 23(e)(1)(A), Committee Note (2003).

[63] AMERICAN LAW INSTITUTE, *Principles of the Law of Aggregate Litigation* § 3.02, Comment b, Reporter's Notes (2010).

[64] *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002).

[65] 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).

judgment on her individual claims under Rule 68, receive her requested individual relief, and have the case dismissed.'"[66]

The conceptual sketches at issue involve disputes over fundamental Article III principles and the construal of the Federal Rules of Civil Procedure and are subject to controversies currently pending in front of the Supreme Court of the United States. Therefore, they are not ripe for consideration by the Rules Committee at this time.

Conclusion

To summarize, LCJ recommends:

- Amending Rule 23 to add a subsection (a)(5) that would say "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."

- Maintaining "if authorized by law" in any proposed rule amendment regarding *cy pres*, and adding that neither *cy pres* amounts nor reversionary funds shall be considered in awarding class counsel's fees.

- That the Subcommittee not amend the rules with respect to unifying settlement approval criteria, frontloading disclosures (unless simplified), requiring objector disclosures and permission to withdraw, removing predominance from the settlement approval criteria, and clarifying issue certification.

- If, however, the Subcommittee moves ahead with a formal proposal to add an objector disclosure requirement, it should require objectors to demonstrate standing to object as a proposed class member as a prerequisite to the court's consideration of the objection.

- If the Subcommittee would like to avoid forcing defendants to take inconsistent positions in settlement versus litigation, Rule 23 could be amended to provide that positions taken in seeking class settlement approval are not binding and have no preclusive effect if the settlement is not finally approved. Alternatively, if the Subcommittee is going to recommend an amendment similar to the sketch, it should include additional language to allow the filing of, and expressly require courts to consider, early motions to strike the class allegations.

- Any amendments regarding issue certification should be made to Rule 23(c)(4) as contemplated by the Subcommittee's second conceptual sketch, and not to Rule 23(b). To that end, the second conceptual sketch, which contemplates adding a requirement that a class should only be certified under Rule 23(c)(4) if resolution of the issues would materially advance the litigation, may be helpful.

LCJ appreciates the Subcommittee's serious attention to the concerns of the various stakeholders

[66] *Hooks v. Landmark Indus., Inc*., 797 F.3d 309, 315 (5th Cir. 2015).

in modern class action cases, including ours, as it refines its sketches into a formal proposal to amend Rule 23. Although we would prefer the Subcommittee to address the much-needed and more fundamental reforms we have mentioned in earlier comments, we hope that the recommendations in this Comment will be helpful as the Subcommittee prepares for the rulemaking process ahead.