LAWYERS FOR CIVIL JUSTICE

PUBLIC COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

AMENDING RULE 23: A CALL FOR MUCH-NEEDED REFORM OF CLASS ACTION PROCEDURE

October 3, 2016

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") concerning the proposed amendments to Rule 23 ("Proposed Amendments") contained in the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure. As the Committee undertakes the important task of listening to public comments about its proposed amendments, we urge the Committee to make meaningful use of this rulemaking opportunity by providing much-needed substantive reform of Rule 23. Accordingly, in this Comment we propose reforms that will remedy some of the most serious problems associated with modern class action cases, and we address the Proposed Amendments with specific suggestions for improvement.

I. Introduction

Rule 23, and particularly subsection (b)(3), has become something that was not envisioned when adopted. The class action mechanism was intended to be a device for efficient litigation when the rights of the parties could be fully adjudicated in a single binding lawsuit, with representative members serving as the champions of the class members' interests. Today, however, a significant fraction of class action cases demonstrates that the Rule has fostered a type of lawsuit that differs in fundamental ways from what existed in our legal culture prior to 1966. Some common features of today's class action cases include: (1) very large classes whose members may not have been injured; (2) class members who, despite receiving notice, have very little if any idea what is happening to their legal rights; (3) lawyers who make decisions about prosecuting and resolving cases without any meaningful input from any client; (4) lawyers

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 29 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

whose focus is trained on the entrepreneurial aspects of their cases rather than on the interests of class members; (5) sparse and inconsistent appellate review (and therefore case law providing guidance) concerning class certification decisions, which are often the most important legal determination in the case; (6) insufficient judicial scrutiny of settlements and fee requests to protect the interests of the absent class members; and (7) settlements containing constitutionally suspect cy pres payments from defendants to non-parties that have never been harmed by the defendants. Courts have interpreted Rule 23 to allow all of these features to exist.

II. The Committee Should Use this Rulemaking Opportunity to Adopt Much-Needed Rule 23 Reforms.

As the Committee considers public comment on its package of Proposed Amendments, it should seize the opportunity to address some of the fundamental problems related to Rule 23 listed above. A number of modest and workable options exist. LCJ has suggested several,[2] and we focus here on three: providing a right to interlocutory appeal of decisions to certify, modify or de-certify a class; bringing Rule 23's typicality requirement into line with the Supreme Court's jurisprudence; and clarifying that Rule 23 contains an explicit ascertainability requirement.

A. Rule 23(f) Should Be Amended to Provide a Right to Interlocutory Appeal of Decisions to Certify, Modify or De-Certify a Class.

The current Rule 23(f) was adopted in 1998 to provide increased opportunity for an immediate appeal to obtain appellate review of the all-important decision to certify a class action.[3] Rule 23(f) has not achieved its intended goal of increasing uniformity of district court practice regarding certification decisions. Analytical data indicates that the number of petitions filed is relatively modest and that the number of actual written opinions is very small.[4] For instance, one study indicates that only 476 petitions required decision over the almost seven years of data (thus an average of 5.2 petitions per Circuit per year).[5] Only a fraction of those petitions accepted for

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[2] *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), 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), 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* (Apr. 7, 2015), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_conceptual_sketches_april_2015.pdf; Lawyers for Civil Justice, *From Conceptual Sketches to a Formal Proposal to Amend Rule 23: Thoughts on the Subcommittee's Ideas for Reform* (Oct. 9, 2015), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_to_rule_23_subcommittee_10-9-2015.pdf.

[3] Certification decisions, although vitally important, are not subject to immediate appellate review. The courts have deemed "final" only a slim set of "collateral orders" that share these characteristics: They "are conclusive, [they] resolve important questions separate from the merits, and [they] are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers Cnty Comm'n*, 514 U.S. 35, 42 (1995)). "[O]rders relating to class certification" in federal court, it is settled, do not fit that bill. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978).

[4] Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(1): A Note on Law and Discretion in the Courts of Appeal*, 246 F.R.D. 277, 290 (2008).

[5] *Id.*

review ultimately result in opinions (a total of 47 opinions over almost 7 years – or, on average, less than a single opinion per Circuit). Notably these numbers indicate that only 28 percent of those petitions actually accepted result in an opinion (47 opinions out of 169 petitions granted over all Circuits over the nearly 7 year time period). These data demonstrate not only how little judicial review is occurring, but also indicate why there is a paucity of meaningful case law being developed to provide clear and uniform standards to courts and litigants.

The reason for so few appeals is that interlocutory review is available under Rule 23(f) in the "sole discretion of the court of appeals."[6] The Committee Note characterizes that discretion as "unfettered."[7] The Note predicted that appellate courts would likely "develop standards for granting review that reflect the changing areas of uncertainty in class litigation."[8] No standards were included in the rule—the appellate courts can grant or deny petitions for leave to appeal on "any consideration that the court of appeals finds persuasive."[9]

The federal appellate courts have, as the drafters of Rule 23(f) anticipated, sought to describe their discretion by adopting lists of criteria for determining whether or not to grant certification appeals. But the criteria adopted continue to be so flexible that they provide little if any guidance different from "unfettered" decision-making. One scholar commented that "between the courts' 'unfettered discretion' and their opaque decision-making processes, what happens behind the courts' closed doors has been something of a mystery . . . ."[10] After examining available data, Sullivan and Trueblood concluded that "[a]t best, the circuits may be described as inconsistent—in terms of petition volume, as to whether the court of appeals adheres to an articulated standard of review, the frequency with which the circuits publish their opinions explaining why they accept or deny Rule 23(f) petitions, and of course, the frequency with which Rule 23(f) petitions are granted."[11] In fact, as of the date of their data (December 1998 to October 2006), one Circuit had failed to grant even a single Rule 23(f) petition and another Circuit had granted only five. The grant percentages for the Circuits varied wildly from 0% to 86% even though the data covered almost seven total years. Further, there was not much middle ground – six Circuits were 28% or below and four Circuits were 54% or higher.[12] Even more troubling, available data suggested inconsistent success rates between plaintiffs' petitions and those brought by defendants.[13] These inconsistencies raise concern about whether litigants are being provided a process that conforms to traditional notions of due process and judicial decision-making.

A simple remedy exists that would ensure Rule 23(f) achieves the Committee's stated goal of providing clear and uniform standards for class certification: provide appeals as a matter of right of decisions to certify, modify or de-certify a class.

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[6] FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 280–81.
[11] *Id.* at 284.
[12] *Id.* at 290.
[13] *Id.* at 286.

B. The Committee Should Bring Rule 23's Typicality Requirement Into Line with the Supreme Court's Jurisprudence as a means of Addressing No-Injury Class Action Cases.

1. No-Injury Class Action Cases Are Inefficient and Highly Problematic.

A ground-breaking empirical study conducted by Professor Joanna M. Shepherd of Emory University School of Law (the "Shepherd study")[14] reveals that no-injury class action cases resolved in the last decade resulted in approximately $4 billion worth of settlements and judgments, yet provided a mere 9 percent—or less—of that amount to class members. The Shepherd study analyzes 432 class action cases that were resolved between 2005 and 2015. It provides compelling evidence of the need to amend Rule 23 to address the fundamentally flawed phenomenon of no-injury cases.

A procedure that collects $4 billion dollars but delivers only 9 percent of that sum to the ostensibly aggrieved parties is indefensible. In addition, the average of 37.9 percent of total proceeds going to class counsel[15] demonstrates that no-injury cases are extraordinarily inefficient from a transaction-cost perspective. These data describe a *rulemaking* problem because Rule 23 is the mechanism that allows them to proceed. No-injury cases are subverting the constitutional requirement that courts decide only actual cases or controversies. 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."[16]

No-injury cases cause serious problems to the judicial system. As described in our prior comments to the Committee[17] and in recent testimony to the House Judiciary Subcommittee on the Constitution and Civil Justice,[18] the damage that no-injury class actions are doing to the machinery of justice is profound:

- The difficulty in identifying a concrete injury to most class members, together with the lack of interlocutory review of decisions to certify classes, often force the settlement of no-injury classes that survive dispositive motions on terms that most courts and commentators consider abusive. Not only—as the Shepherd study proves—do no-injury class actions provide only minimal compensation to absent class members and excessive attorneys' fees, but they also result in scattershot injunctive relief.

- No-injury class actions alter parties' substantive rights, thereby violating the Rules Enabling Act, by eliminating, in the class action context, universal legal requirements that individual plaintiffs prove either injury or causation to prevail on their causes of action.

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[14] The Shepherd study is attached hereto.
[15] *See* Shepherd study at 20.
[16] In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1017 (7th Cir. 2002).
[17] *See* sources cited *supra* note 2.
[18] *See Fairness in Class Action Litigation Act of 2015: Hearing on H.R. 1927 Before the Committee on the Judiciary Subcommittee on the Constitution and Civil Justice*, 114th Cong. 82-91 (2015) (Statement of Andrew Trask, counsel, McGuire Woods London LLP), https://judiciary.house.gov/wp-content/uploads/2016/02/114-24_94410.pdf.

- No-injury class actions create confusion about certification standards, and have led to inconsistency among federal circuits in decisions to approve or disapprove 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, courts need guidance from the Committee.

Moreover, no-injury class actions are counterproductive as a policy matter. 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.[19] Unchecked private enforcement can disrupt the balance that regulatory agencies strive to achieve through their own regulation and enforcement. No-injury classes create windfall income for uninjured claimants, and inevitably inflate attorneys' fees, both of which needlessly increase costs for consumers.[20] The Shepherd study underscores this point by demonstrating the enormous amounts of money that are going into lawsuits in which no actual injury exists.

A simple change to Rule 23 would reduce the incidence of inefficient no-injury lawsuits—those that fail, as the Shepherd study demonstrates, to deliver compensation despite imposing significant costs. The following 12-word amendment (underlined text below) to Rule 23(a)(3) would do so by reinforcing the meaning of the typicality requirement:

> "One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
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> …
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> (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 amendment reflects H.R. 1927, a bill the House of Representatives passed in January 2016, which would 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.[21] 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

[19] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 633–37 (2013).
[20] *See, e.g.*, Willett v. Baxter Int'l, Inc., 929 F.2d 1094, 1100 n.20 (5th Cir. 1991).
[21] *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.").

claim and class claims are so interrelated that interests of class members will be fairly and adequately protected in their absence."[22]

This is a modest amendment; it would not affect those class actions that may be properly certified in accordance with the Supreme Court's dictates.[23] Rather, it would address only so-called "unicorn plaintiff" cases, those in which a plaintiff who has suffered actual injury seeks to bring an action on behalf of a large class that has not suffered any actual injury. Several notable cases have seen classes certified despite the problems with typicality and superiority such plaintiffs create. Such cases foreclose the rights of uninjured class members from suing in the future should they ever suffer the same injury as the plaintiff. Those cases often misallocate resources so that those who are injured recover less than the full value of their claims while those who have not been injured receive so minimal a recovery that it is not worth the time to submit a claim. Meanwhile, the class counsel receive huge fees based on an artificially expanded class size. The Committee should adopt this proposed amendment to alleviate these fundamental injustices by ensuring that class members' injuries are of a similar type and scope.

C. The Committee Should Add an Explicit Ascertainability Requirement to Rule 23.

Courts recognize that an appropriate definition of the class is fundamental to class certification,[24] yet nothing in Rule 23 either requires or defines ascertainability. Although courts will almost certainly continue to find an implicit ascertainability requirement even without an explicit provision in the rule, it nevertheless makes sense for Rule 23 to address and delineate this universally recognized "implicit" requirement. Moreover, an appropriate ascertainability requirement would go a long way towards fixing a number of other issues the Committee seeks to address via the Proposed Amendments, including "front-loading," cy pres, notice and certification of settlement and issue classes.

A simple amendment to Rule 23 requiring classes to 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." Or, if the Committee prefers to avoid affecting Rule 23(b)(2) classes that might not require the same level of ascertainability,[25] it could instead amend Rule

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

[23] 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, including but not limited to the type and scope of injury, 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.

[24] *See, e.g.*, Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 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.'").

[25] This is currently a subject of some debate. *See, e.g.*, Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan, 293 F.R.D. 254, 264 (D.N.H. 2013) ("[W]here certification of a (b)(2) injunctive class is sought, actual membership of

23(b)(3) with the same language.

This approach recognizes the importance of objective language in the class definition, a principle all courts (with the possible exception of the Fifth Circuit) seem to agree on.[26] 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 considerable controversy over how Rule 23 is utilized today.

III. The Committee Should Improve its Proposed Amendments Before Submitting Them to the Standing Committee.

A. The Committee Should Remove the Reference to Cy Pres Awards from Its Proposed Note.

Cy pres is a controversial mechanism by which courts order money to be paid to individuals or institutions who are not parties to the litigation and who were not alleged to have been injured by the defendant's behavior. Because cy pres raises significant constitutional questions regarding Article III's case-or-controversy requirement, the Subcommittee wisely decided not to proceed with its earlier "sketch" that would have enshrined cy pres into the FRCP. Now, however, the Committee proposal includes two sentences that would have a similar effect of communicating policy preferences in favor of allowing cy pres and utilizing a particular method of handling cy pres awards. The proposed Note states:

> And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Legal Institute, Principles of Aggregate Litigation (2010).[27]

Although this text does not explicitly purport to permit cy pres, the implicit endorsement of the practice is clear. The Committee should remove this proposed Note language because cy pres has no basis in the FRCP. "Rule 23(e) does not mention the district court's discretion—or even its authority—to extinguish the right of recovery of identified class members through a later *cy*

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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) ("[W]here 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"), *aff'd sub nom.* Steimel v. Wernert, 823 F.3d 902 (7th Cir. 2016).

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

[27] Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, USC-RULES-CV-2016-0004-0002 (Aug. 11, 2016), https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0002

pres order."[28] Courts that resort to cy pres do so either in reliance on vague "equitable" judicial powers or on the tautology that cy pres powers exist because the settling parties created them by contract, even though disadvantaged class members were not party to the negotiations that transferred their property to others. Neither justification provides the Committee an appropriate basis to endorse the practice (let alone the ALI's suggestion for administering it) in an FRCP Committee Note.[29]

If the Committee is going to say anything about cy pres in the Note, it should instead clarify that Rule 23 is not a legal basis for cy pres awards. In the absence of statutory authorization, imposing punishment for private wrongs is not a proper power of the judicial branch (let alone the FRCP). Punishment is a creature of the criminal or administrative law, and fines should be paid to the government, not to uninjured private entities. In civil litigation, punitive damages are constrained, both constitutionally and as a matter of substantive law, by the requirement of a ratio to compensatory damages. Cy pres awards circumvent that requirement by allowing what can only be categorized as punishment, but in situations where plaintiffs cannot prove damages or causation. The Committee should clarify that Rule 23 does not provide a basis for such circumvention.

Another reason for the Committee to clarify that Rule 23 is not a legal basis for cy pres awards is that cy pres awards pose a potential for conflicts of interest between class counsel and inaccessible class members.[30] For example, cy pres settlements have been proposed where identification of absent class members and calculation of their damages is possible, but expensive. A cy pres remedy in such a case could create financial incentives for class counsel to avoid the expense of proving causation and damages, but instead to assert that such proof is too difficult or to erect barriers to class members' participation in settlement programs. The victims are the injured members of the class, the very people who are entitled to collect their damages.[31] Cy pres settlements thus run the risk of cheating unknown class members by paying settlement proceeds to entities who are not members of the class and who were not adversely affected by the conduct that was the subject matter of the litigation.[32] The availability of a cy pres remedy therefore causes tension with class counsel's obligation to provide legal representation to the

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[28] All Plaintiffs v. All Defendants, 645 F.3d 329, 333–34 (5th Cir. 2011).

[29] Rule 23 would be an appropriate mechanism for banning cy pres distribution of settlement funds because Rule 23 should embody the jurisprudential limitations inherent in the Rules Enabling Act and other limits on judicial authority. LCJ has urged the Committee to include in its proposed amendments to Rule 23 a prohibition on the use of cy pres relief or fluid recovery in a class action proceeding in federal court, in the form of either an award or settlement approved by the court, except where the substantive legislation enforced in the class proceeding expressly provides for the possibility of such relief. *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), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_class_action_reform_080913.pdf.

[30] In re Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) ("[I]nclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class."); *Id.* at 179 ("[C]lass counsel, and not their client, may be the foremost beneficiaries of the settlement.").

[31] Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (holding a cy pres settlement to avoid litigation expense and gain a fee "sold [the class] claimants down the river").

[32] *Baby Prods.*, 708 F.3d at 169; Dennis v. Kellogg Co., 697 F.3d 858, 863 (9th Cir. 2012) (8% of settlement to be paid to actual class members); *Mirfasihi*, 356 F.3d at 783–84 (none of settlement funds paid to members of one class).

entire class. The Committee should clarify that Rule 23 should be employed to avoid class conflicts and is not a basis for cy pres payments that may create or exacerbate them.

B. The Committee Should Abandon the Settlement Approval Criteria Amendment because Unifying the Standards Is Unlikely to Achieve the Goal of Uniformity and May Instead Cause Increased Litigation.

The laudable intent behind the Committee's proposed amendment to Rule 23(e)(2) 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. We are doubtful that the proposal is likely to change judicial behavior, and we are concerned that the proposed rule revisions will instead have the effect of increasing litigation and confusion.[33] Accordingly, there seems to be little need for, and good reasons to avoid, the proposed amendment.

Given that the proposed amendment would permit 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 Committee intends. On the other hand, because there is no "catch-all" provision, 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 amendment. If a "catch-all" is to be included, 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 required finding. But this formulation reverts to the same set of jurisdiction-specific tests that exist today, which is why the proposed amendment is unnecessary and unlikely to create uniformity.

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 there is no reason 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, proposed amendment Rule 23(e)(2)(C)(iii) says that courts should

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[33] Lawyers for Civil Justice, *From Conceptual Sketches to a Formal Proposal to Amend Rule 23: Thoughts on the Subcommittee's Ideas for Reform* (Oct. 9, 2015), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_to_rule_23_subcommittee_10-9-2015.pdf.

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 Committee intended.

Similarly, the "method of processing class-member claims, if required" (Rule 23(e)(2)(C)(ii)) is vague and ambiguous and is not explained in the Note. Does the new requirement mean that parties should state whether class-member claims will be processed by a third-party administrator or something else? Is there an implicit bias in the rule that settlements where class-member claims are processed by a third-party administrator are inherently more fair? There may be some instances where having a defendants or plaintiffs process claims is eminently fair, more efficient, and cheaper. If the request for settlement approval provides that a third-party administrator will be hired to handle the processing of class-member claims, is any further information required to be provided under the proposed rule? These questions will need answers, and that means litigation.

In Rule 23(e)(3), the Committee has added "Identification of Side Agreements" as a header. The comments say this "addition is intended to be stylistic only," but the use of the term "side" is likely to raise questions. For instance, if the parties agree to pursue settlement approval in a particular jurisdiction where the case law is clear and predictable, is that a "side agreement" requiring a filed statement? Parties reach many agreements during the course of settlement negotiations and would not know which are to be considered "side" agreements requiring a filed statement. Historically the rule has been interpreted that any formal agreements between parties should be filed, so the introduction of the word "side" without explanation is likely to cause confusion. The word "side" should be deleted.

Conclusion

Rule 23 is a significantly different rule than the Committee envisioned when drafting it. Although class action cases serve an important function, their abuse poses great risks to our judicial system. LCJ applauds the Committee for undertaking an examination of Rule 23, and we urge the Committee to fulfill the promise of this effort by achieving meaningful and much-needed reform. Accordingly, we respectfully suggest that the Committee take much-needed action to reform three key areas of class actions: providing a right to interlocutory appeal of decisions to certify, modify or de-certify a class; bringing Rule 23's typicality requirement into line with the Supreme Court's jurisprudence; and preventing the award of *cy pres* funds to non-class members. We also suggest the Committee's proposed amendments be modified as described above.