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March 29, 2000

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Peter G. McCabe
Secretary
Administrative Office of U.S. Courts
Washington, DC 20544

RE: Proposed Amendment to Fed. Rules Civ. Proc. 23(e)

Dear Mr. McCabe:

We submit herein a proposed amendment to Federal Rule of Civil Procedure 23(e) for consideration by the Committee on Rules of Practice and Procedure, if possible, by its April 10 meeting.

The Proposed Amendment, a copy of which is enclosed herein, seeks to:

1. Preserve the important right to appeal for unnamed class members who do not file motions to intervene, but who object to proposed dismissals or compromises in mandatory, non-opt out class actions brought pursuant to Federal Rules of Civil Procedure 23(b)(1) or (b)(2);

2. Eliminate the existing deep split of authority amongst the federal circuits regarding whether class members who are not named plaintiffs have a right to appeal the judicial approval of a proposed dismissal or compromise (settlement) without first filing a motion to intervene under Rule 24(c); and

3. Establish uniformity throughout the United States by preserving the appellate rights of objecting class members in a manner not dependent on class counsel's choice of the circuit in which to litigate the action.

Thank you for your courtesy and cooperation in this matter.

Sincerely,

Dennis W. Dawson

DENNIS W. DAWSON
Deputy Attorney General

For BILL LOCKYER
Attorney General

DWD:sol

Enclosure

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D C 20544

JOHN K RABIEJ
Chief
Rules Committee Support Office

April 3, 2000
Via Fax

MEMORANDUM TO AGENDA AND CLASS ACTION SUBCOMMITTEES

SUBJECT: *Proposed Amendments to Rule 23*

I have attached a proposed amendment to Rule 23 from the State of California's Attorney General. The suggestion has been assigned to the Class Action Subcommittee for its consideration. The assignment will be reflected on the docket sheet containing suggested rule revisions.

John K. Rabiej

Attachment

cc: Honorable Paul V. Niemeyer
Professor Edward H. Cooper

PROPOSED AMENDMENT TO FRCP 23(e)

"Where a class action is maintained under subdivision (b)(l) or (b)(2), a member of the class who files written objection to the proposed dismissal or compromise or who appears and makes oral objection, in the manner directed by the court in the notice of proposed dismissal or compromise, shall not be required to file a motion to intervene in order to have standing to appeal any final judgment, order, or decree regarding the proposed dismissal or compromise."

There is currently a split of authority amongst the federal circuits regarding whether class members who are not named plaintiffs have a right to appeal the judicial approval of a proposed dismissal or compromise (settlement) without first filing a motion to intervene under Rule 24(c). Some of the circuits require an intervention motion as a prerequisite to appeal. (See, e.g. *Croyden Assocs* v. *Alleco, Inc* (8th Cir. 1992) 969 F.2d 675, 680; *Gottlieb* v. *Wiles* (10th Cir. 1993) 11 F.3d 1004, 1009; *Guthrie* v. *Evans* (11th Cir. 1987) 815 F.2d 626, 627; *Loran* v. *Furr's Bishop's Inc.* (5th Cir. 1993) 988 F.2d 554; *Moten* v. *Bricklayers, Masons and Plasterers, Intern Union of America* (D.C. Cir 1976) 543 F.2d 224, 227; *Shultz* v. *Champion Internat'l Corp* (6th Cir. 1994) 35 F.3d 1056, 1061; *Felzen* v. *Andreas* (7th Cir. 1998) 134 F.2nd 873; *Hispanic Society* v. *New York City Police Dep't* (2nd Cir. 1986) 806 F.2d 1147)[1] Other circuits do not impose the intervention requirement prior to allowing an appeal. (See, e.g. *Bell Atlantic Corp* v. *Bolger* (3rd Cir. 1992) 2 F.3d 1304; *Kenny* v. *Quigg* (4th Cir. 1987) 820 F.2d 665; *Marshall* v. *Holiday Magic, Inc* (9th Cir. 1977) 550 F.2d 1173).[2]

The unresolved dispute amongst the various circuits on this important issue affecting unnamed class members' appellate rights has stubbornly persisted for decades. (See, e.g. Comment, *The Appealability of Class Action Settlements by Unnamed Parties* (1993) 60 U.Chi.L.Rev. 933; Kim, *Conflicting Ideologies of Group Litigation Who May Challenge Settlements in Class Actions and*

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[1] There also appears to be uncertainty even within some of the individual circuits. For example, the Second Circuit decision in *Hispanic Society, supra*, required intervention prior to appeal, however, the court's opinion, while noting the general rule that only a party of record in a lawsuit has standing to appeal, observed that a "primary exception" to this rule exists when a non-party has an interest that is affected by the trial court's judgment. (*Hispanic Society, supra*, at 1152.) In *In re Piper Funds, Inc.* (8th Cir. 1995) 71 F 3d 298, the Eighth Circuit, after its 1992 decision in *Croyden Assocs, supra*, which seemed to require intervention before an appeal would be allowed, nevertheless permitted class members to appeal an order enjoining arbitration even though prior intervention had not been sought. The Sixth Circuit decision in *Shultz, supra*, is hard to reconcile with that circuit's longstanding decision in *Cohen* v. *Young* (6th Cir. 1942) 127 F.2d 721, which permitted an unnamed class member to appeal the approval of a settlement even though he did not appeal his motion to intervene, which had been denied. In 1987, the same year in which *Guthrie, supra*, was decided, the Eleventh Circuit decided in *In re Dennis Greenman Sec Litiga* (11th Cir. 1987) 829 F.2d 1539, that a class member could preserve an appeal from a class settlement if during the litigation he had objected to the terms of the settlement. The 1998 Seventh Circuit decision in *Felzen, supra*, expressly overrules that circuit's earlier decision in *Research Corp* v. *Asgrow Seed Co* (7th Cir. 1970) 425 F.2d 1059, which permitted appeal prior to intervention

[2] Even though these circuits (which include the 9th Circuit, the nation's largest) permit appeals without prior intervention, they are not "safe havens" since citizens residing in such circuits are sometimes also unnamed class members in class actions litigated in other circuits, where intervention may be required prior to appeal

Derivative Suits (1998) 66 Tenn.L.Rev. 81; Annotation, *Right of Class Member, In Class Action Under Rule 23 of Federal Rules of Civil Procedure, To Appeal From Order Approving Settlement With Class* (1976) 30 A.L.R.Fed. 846.)

The United States Supreme Court has not resolved the issue. In *California Public Employees Retirement System, et al* v. *Felzen* (1999) __ U.S. __, 119 S.Ct. 720, the Court, without opinion, and by an equally divided court, affirmed a circuit court decision requiring intervention prior to appeal for unnamed class members. Against the backdrop of the inconsistency in circuit court decisions and the absence of guidance by the Supreme Court, the need for resolution of the right to appeal question is immediate and pressing.[3]

Compliance with intervention requirements prior to appeal present serious, if not insurmountable, problems for many unnamed class members. Unnamed class members who seek intervention as of right, pursuant to Fed. Rule Civ. Proc. 24(a) must claim an unconditional right conferred by federal statute or must claim an interest relating to the property or transaction which is the subject of the action and that their interest is impaired or impeded by disposition of the pending action, unless their interest is not adequately represented by the existing parties. However, in many cases, no federal statute confers on the unnamed class member an unconditional right to intervene. Under these circumstances it appears likely that the motion to intervene as of right would be denied.

The unnamed class members seeking permissive intervention pursuant to Rule 24(b) also encounter formidable obstacles. They must rely on a federal statute which confers a conditional right to intervene, but such a statute may not apply to their claim. Alternatively, they must demonstrate not only that their claim and the main action involve common questions of law and fact, but that intervention will not either prejudice or delay the adjudication of the rights of the original parties, or the motion to intervene may be denied.

The denial of a motion to intervene is appealable. *(United Airlines* v. *McDonald* (1977) 432 U S. 385.) However, in those circuits requiring intervention prior to appeal, an unnamed class member objecting to a proposed settlement must appeal the denial of the intervention motion before being viewed as having standing to appeal the approval of the settlement. In these circuits a double layer of appeals is required of unnamed class members, even those with relatively small amounts of individual monetary claims. Such a requirement places unnecessarily difficult burdens not only on unnamed class members, but also on the courts.

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[3] In *Marino* v. *Ortiz* (1988) 484 U.S. 301 at 304, the U S. Supreme Court stated that the "better practice is for . . . a non-party to seek intervention for purposes of appeal." However, the decision in *Marino* focused on an intervention requirement for non-parties, who were not members of the class and whose interests were adverse to the named plaintiffs in that case. *Marino, supra*, is thus not dispositive of the question affecting appellate rights of unnamed class members who, having the same basic interests as plaintiffs, do not attempt to intervene.

On the other hand, there are recognizable benefits of not requiring intervention in this context. If intervention is not required, unnamed class members, adversely affected without their consent, would be spared a procedural burden and financial hardship. Additionally, district courts and appellate courts would not face delays caused by first, the motion to intervene and then, if intervention is denied, the appeal from the denial.

Unlike prospective interveners in other actions, the unnamed class member is no stranger to the action. As a member of the class, he is represented by class counsel and has claims based on law and facts common to the representative parties and other members of the class. At least as soon as the class action is certified, the unnamed class member has an interest in the outcome of the case and, without the burden of prior intervention, should be afforded the same standing as a named member of the class would have to appeal an approved settlement to which he has objected.

Most unnamed class members fail to file a motion to intervene, even when they object in writing, or orally on the record at a fairness hearing, to the proposed settlement. Generally, these class members are not represented by their own attorneys, but by class counsel who are not chosen by unnamed class members. As the court noted in *Greenfield* v. *Villager Industries, Inc.* (3rd Cir. 1973) 483 F.2d 824 at 832, n. 8: "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statement to the contrary is sheer sophistry."

Class counsel may have an adversarial relationship with class members who seek to draw from the same limited fund. Class counsel often are not helpful to class members who may wish to intervene, to object to proposed settlements, or to appeal from decisions approving settlements. Even so, upon receipt of notice of proposed dismissal or compromise pursuant to existing Rule 23(e), relatively unsophisticated class members have either appeared at fairness hearings in district courts to object on the record to the proposed settlement or sent written objections to the attention of the district court. In these instances, class counsel generally oppose the objections set forth by the very members of the class they claim to represent At the same time class members in non-opt out cases have no choice other than to allow their rights to be litigated under these unfavorable circumstances.

In settling non-opt out class actions, defendants are generally concerned with the total amount they will have to pay in a settlement. Class counsel have sometimes been accused of artificially increasing their fees at the expense of higher recoveries for the class; some courts have even suggested that class counsel and defendants' attorneys may exchange a low class settlement fund for high class counsel attorney's fees. (*Bell Atlantic Corp.* v. *Bolger, supra*, at 1310.) At the fairness hearing class counsel may emphasize the claimed strengths of the proposed settlement and slight its defects. Arguably, such conflicts between the unnamed class members and class counsel may undermine the adequacy of representation of the entire class. If it does, the due process rights of the class could be at risk, particularly those of the unnamed class members who do not have effective assistance of counsel and are not adequately informed about their rights and duties relative to the need to intervene if they wish to preserve their right to appeal an approved proposed settlement. The existence of these potential

conflicts and risks, and the unnamed class members' inability to opt out of the action militate against creating obstacles, such as intervention, to effective challenges to class action settlements.[4]

The filing of objections and the development of a record in support of the objections is an unnamed class member's only truly unimpeded avenue for the effective advocacy of his or her rights in these types of lawsuits. No reason exists to subject objectors to intervention requirements, which add nothing to the important, legitimate end already served by these objections, i.e. assisting district courts in their assessment of the fairness and adequacy of proposed settlements. Moreover, if courts require intervention prior to appeal, affording unnamed class members the right to develop a record is meaningless because if they are denied intervention they will lack standing to proceed with subsequent appeals.

In circuits which require intervention prior to appeal, class counsel have little reason to concur even with valid objections raised by unnamed class members and have no incentive to redraft the proposed settlement's provisions because they know that unnamed class members' non-compliance with

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[4]Legal scholars have consistently observed the practical realities of divergent and competing interests between plaintiffs' attorneys and their clients in both class actions and in derivative litigation. These observations include noting the reasons why class members with relatively small individual claims cannot afford to monitor and control their attorneys' conduct. "See Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers. Raising the Cost of Capital in America*, 42 Duke L.J. 945, 948 (1993) (in derivative actions, 'plaintiffs are generally figureheads'); Jonathan R Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation· Economic Analysis and Recommendations for Reform*, 58 U.Chi.L.Rev. 1, 3 (1991) (plaintiffs' class and derivative action attorneys "subject to only minimal monitoring by their ostensible 'clients' who are either dispersed and disorganized (in the case of class litigation) or under the control of hostile forces (in the case of derivative litigation).'); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J.Legal Stud. 189, 190 (1987) ('the interests of plaintiff and attorney are never perfectly aligned'); John C. Coffee Jr., *Understanding The Plaintiff's Attorney· The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Col.L.Rev. 669, 677-78 (1986) (in derivative and class actions client 'generally has only a nominal stake in the outcome of litigation' and cannot closely monitor and control plaintiff's attorney's conduct), Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law A Theoretical and Empirical Analysis*, 71 Corn L.Rev 261, 271& n. 26 (1986) ('Real party in interest is the attorney'); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan.L.Rev. 1183, 1203 (1982) ('as a practical matter, once a class is certified, named plaintiffs generally are neither highly motivated nor well situated to monitor the congruence between counsel's conduct and class preferences'), see generally, Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan.L.Rev. 497 (1991) " (*Bell Atlantic Corp* v. *Bolger* (3rd Cir. 1993) 2 F.3d 1304, 1309, n. 8.)

the intervention requirements will mean that these objections cannot be the basis of an appellate court overturning the settlement since that court will not be able to consider these objections. Yet objectors can sometimes provide the district court and the appellate court with important adversarial evidence, often information not supplied by the parties. Such information can help the courts make their own, independent determination as to whether the proposed settlement is fair and adequate and, therefore should be approved. (See *Bell Atlantic*, supra, at 1310.) Without such objections before them, the courts run the risk of approving settlements which may not be fair and adequate to the class.

Under these circumstances, the prior intervention requirement prevents thorough appellate review and the due process rights of non-intervening class members, who constitute the overwhelming majority of the class, may be contravened Denying unnamed class members access to the appellate courts unless they have previously intervened results in the following anomaly the very same consumers are first treated as parties so that the res judicata effect of settlement approval is imposed on them as members of the class, and then they are denied standing to appeal because they are treated as non-parties.

Consumers whose rights are litigated in circuits requiring intervention prior to appeal are treated differently from consumers whose rights are litigated in circuits not imposing the same intervention requirement. The Proposed Amendment would remedy this disparity. It would equally protect all consumers' rights to appeal from approved settlements in non-opt out cases in all of the federal circuits without the burden of prior intervention. Further, it would recognize that the appellate rights of objecting class members are not dependent on class counsel's choice of the circuit in which to litigate the action.

Clearly in Rule 23(b)(l) or (b)(2) class actions the right to appeal is a substantial one in all circuits; this is particularly true because there is no right to opt out. (*Newberg on Class Actions*, 3rd ed., Dec. 1992, vol. 1, §4.20.) In the limited fund context, the class action is the sole remedy available to consumers to seek compensation for monetary damages they claim. The Proposed Amendment accordingly seeks to remedy the basic unfairness of requiring consumers' rights to be litigated exclusively in a lawsuit which they may not have chosen to file or in which they may have chosen a different course of action while at the same time denying consumers standing to appeal without prior intervention. In addition, the Proposed Amendment's goal of preserving the right to appeal in these cases should promote greater reliability on the finality of the judgment by dispensing with the filing of what may be spurious collateral attacks on the judgment because appeal is not possible. The Proposed Amendment also seeks to improve representation of all class members by affording to those class members who file objections to a proposed settlement in a non-opt out case, without filing the Rule 24(c) motion, the chance to obtain effective legal representation at the time of appeal.

Finally, it should be emphasized that adoption of the Proposed Amendment would not likely result in the filing of multiple appeals by class members. The Proposed Amendment does not extend an open invitation to appeal to any class member who is dissatisfied with the terms of a settlement, but who, with knowledge of the pendency of a proposed settlement and opportunity to object, took no steps

before the district court to object to its terms and to create a record subject to review by an appellate court. The Proposed Amendment would preserve the right to appeal for the unnamed class member who has not filed a motion to intervene, but only if such class member has filed written objection or has appeared and made oral objection to a proposed dismissal or compromise in the manner directed by the district court. In this limited context it should be recognized that the benefit of the Proposed Amendment's goal of ensuring fair and adequate settlements is well worth the cost.

Sincerely,

Dennis W. Dawson

DENNIS W. DAWSON
Deputy Attorney General

For BILL LOCKYER
Attorney General

DWD:sol
Attachment

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Attorney General

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RE: Proposed Amendment to Fed. Rules Civ. Proc. 23(e)

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2. Eliminate the existing deep split of authority amongst the federal circuits regarding whether class members who are not named plaintiffs have a right to appeal the judicial approval of a proposed dismissal or compromise (settlement) without first filing a motion to intervene under Rule 24(c); and

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Thank you for your courtesy and cooperation in this matter.

Sincerely,

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For BILL LOCKYER
Attorney General

DWD:sol

Enclosure

PROPOSED AMENDMENT TO FRCP 23(e)

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

July 3, 2000

Honorable Bill Lockyer
Attorney General
State of California
Department of Justice
110 West A Street, Suite 1100
San Diego, California 92101

Dear Mr. Lockyer:

Thank you for your comments supplementing your March 29 suggestion to amend Civil Rule 23. A copy of your letter was sent to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

We appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Paul V. Niemeyer
Honorable David F. Levi
Professor Edward H. Cooper