INTRODUCTORY MATERIALS
RULE 23 SUBCOMMITTEE
ADVISORY COMMITTEE ON CIVIL RULES
MIN-CONFERENCE ON RULE 23 ISSUES
SEPT. 11, 2015

This memorandum is designed to introduce issues that the Rule 23 Subcommittee hopes to explore during its mini-conference on Sept. 11, 2015. This list of issues has developed over a considerable period and is still evolving. The Subcommittee has had very helpful input from many sources during this period of development. The Sept. 11 mini-conference will provide further insights as it develops its presentation to the full Advisory Committee during its Fall 2015 meeting.

Despite the considerable strides that the Subcommittee has made in refining these issues, it is important to stress at the outset that **the rule amendment sketches and Committee Note possibilities presented below are still evolving. It remains quite uncertain whether any formal proposals to amend Rule 23 will emerge from this process. If formal proposals do emerge, it is also uncertain what those proposals would be.**

The topics addressed below range across a spectrum of class-action issues that has evolved as the Subcommittee has analyzed these issues. They are arranged in a sequence that is designed to facilitate consideration of somewhat related issues together. As to each issue, the memorandum presents some introductory comments, sketches of possible amendment ideas, often a draft (and often brief) sketch of a draft Committee Note and some Reporter's comments and questions that may help focus discussion. This memorandum does not include multiple footnotes and questions of the sort that might be included in an agenda memorandum for an Advisory Committee meeting; the goal of this mini-conference is to focus more about general concepts than implementation details, though those details are and will be important, and comments about them will be welcome.

The topics can be introduced as follows:

(1) "Frontloading" of presentation to the court of specifics about proposed class-action settlements -- Would such a requirement be justified to assist the court in deciding whether to order notice to the class and to afford class members access to information about the proposed settlement if notice is sent?;

(2) Expanded treatment of settlement approval criteria to focus and assist both the court and counsel in evaluating the most important features of proposed settlements of class actions -- Would changes be helpful and effective?;

(3) Guidance on handling cy pres provisions in class-action settlements -- Are changes to Rule 23 needed, and if so what should they include?;

(4) Provisions to improve and address objections to a proposed settlement by class members, including both objector disclosures and court approval for withdrawal of appeals and payments to objectors or their counsel in connection with withdrawal of appeals -- Would rule changes facilitate review of objections from class members, and would court approval for withdrawing an appeal be a useful way to deal with seemingly inappropriate use of the right to object and appeal?;

(5) Addressing class definition and ascertainability more explicitly in the rule -- Would more focused attention to issues of class definition assist the court and the parties in dealing with these issues?;

(6) Settlement class certification -- should a separate Rule 23(b) subdivision be added to address this possibility?;

(7) Issue class certification under Rule 23(c)(4) -- should Rule 23(b)(3) or 23(c)(4) be amended to recognize this possibility, and should Rule 23(f) be amended to authorize a discretionary interlocutory appeal from resolution of an issue certified under Rule 23(c)(4)?;

(8) Notice -- Would a change to Rule 23(c)(2) be desirable to recognize that 21st century communications call for flexible attitudes toward class notice?; and

(9) Pick-off offers of individual settlement and Rule 68 offers of judgment -- Would rule amendments be useful to address this concern?

(1) Disclosures regarding proposed settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) the grounds, including supporting details, which the parties contend support class certification [for purposes of settlement];

(ii) details on all provisions of the proposal, including any release [of liability];

(iii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iv) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(v) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(vi) identification of any agreement that must be identified under Rule 23(e)(3);

(vii) details on any claims process for class members to receive benefits;

(viii) information concerning the anticipated take-up rate by class members of

benefits available under the proposal;

(ix) any plans for disposition of settlement funds remaining after the initial claims process is completed, including any connection between any of the parties and an organization that might be a recipient of remaining funds;

(x) a plan for reporting back to the court on the actual claims history;

(xi) the anticipated amount of any attorney fee award to class counsel;

(xii) any provision for deferring payment of part or all of class counsel's attorney fee award until the court receives a report on the actual claims history;

(xiii) the form of notice that the parties propose sending to the class; and

(xiv) any other matter the parties regard as relevant to whether the proposal should be approved under Rule 23(e)(2).

(B) The court may refuse to direct notice to the class until the parties supply additional information. If the court directs notice to the class, the parties must arrange for class members to have reasonable access to all information provided to the court.

Alternative 1

(C) The court must not direct notice to the class if it has identified significant potential problems with either class certification or approval of the proposal.

Alternative 2

(C) If the preliminary evaluation of the proposal does not disclose grounds to doubt the fairness of the proposal or other obvious deficiencies [such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys] and appears to fall within the range of possible approval,

the court may direct notice to the class.

Alternative 3

(C) The court may direct notice to the class only upon concluding that the prospects for class certification and approval of the proposal are sufficiently strong to support giving notice to the class.

Alternative 4

(C) The court should direct notice to the class if it preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal.

(D) An order that notice be directed to the class is not a preliminary approval of class certification or of the proposal, and is not subject to review under Rule 23(f)(1). But such an order does support notice to class members under Rule 23(c)(2)(B). If the class has not been certified for trial, neither the order nor the parties' submissions in relation to the proposal are binding if class certification for purposes of trial is later sought.[1]

Sketch of Draft Committee Note

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It is not the same as "preliminary approval" of a proposed settlement, for approval must occur only after the final hearing that Rule 23(e)(2) requires, and after class members have an opportunity to object under Rule 23(e)(5). It is not a "preliminary certification" of the proposed class. In cases in which class

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[1] To drive home the propriety of requiring opt-out decisions at this time, Rule 23(c)(2)(B) could also be amended as follows:

(B) *For (b)(3) classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. * * * * *

certification has not yet been granted for purposes of trial, the parties' submissions regarding the propriety of certification for purposes of settlement [under Rule 23(b)(4)] are not binding in relation to certification for purposes of trial if that issue is later presented to the court.

Paragraph (A). Many types of information may be important to the court in deciding whether giving notice to the class of a proposed class-action settlement is warranted. This paragraph lists many types of information that the parties should provide the court to enable it to evaluate the prospect of class certification and approval of the proposal. Item (i) addresses the critical question whether there is a basis for certifying a class, at least for purposes of settlement. Items (ii) through (xiii) call for a variety of pieces of information that are often important to evaluating a proposed settlement, [although in some cases some of these items will not apply]. Item (xiv) invites the parties to call the court's attention to any other matters that may bear on whether to approve the proposed settlement; the nature of such additional matters may vary from case to case.

Paragraph (B). The court may conclude that additional information is necessary to make the decision whether to order that notice be sent to the class. In any event, the parties must make arrangements for class members to have access to all the information provided to the court. Often, that access can be provided in some electronic or online manner. Having that access will assist class members in evaluating the proposed settlement and deciding whether to object under Rule 23(e)(5).

Paragraph (C). The court's decision to direct notice to the class must take account of all information made available, including any additional information provided under Paragraph (B) on order of the court. **[Once a standard is agreed upon, more detail about how it is to be approached might be included here.]**

Paragraph (D). The court's decision to direct notice to the class is not a "preliminary approval" of either class certification or of the proposal. Class certification may only be granted after a hearing and in light of all pertinent information. Accordingly, the decision to send notice is not one that supports discretionary appellate review under Rule 23(f)(1). Any such review would be premature, [although the court could in some cases certify a question for review under 28 U.S.C. § 1292(b)].

Often, no decision has been made about class certification for purposes of trial at the time a proposed settlement is submitted to the court. [Rule 23(b)(4) authorizes certification for purposes of settlement in cases that might not satisfy the requirements of Rule 23(b)(3) for certification for trial.]

Should certification ultimately be denied, or the proposed settlement not approved, neither party's statements in connection with the proposal under Rule 23(e) are binding on the parties or the court in connection with a request for certification for purposes of trial.

Although the decision to send notice is not a "preliminary" certification of the class, it is sufficient to support notice to a Rule 23(b)(3) class under Rule 23(c)(2)(B), including notice of the right to opt out and a deadline for opting out. [Rule 23(c)(2)(B) is amended to recognize this consequence.] The availability of the information required under Paragraphs (A) and (B) should enable class members to make a sensible judgment about whether to opt out or to object. If the class is certified and the proposal is approved, those class members who have not opted out will be bound in accordance with Rule 23(c)(3). This provision reflects current practice under Rule 23.

Reporter's Comments and Questions

The listing in Paragraph (A) is quite extensive. Some language alternatives are suggested, but a more basic question is whether all of the items should be retained, and whether other items should be added. The judicial need for additional information in evaluating proposed class-action settlements has been emphasized on occasion. See, e.g., Bucklo & Meites, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation Mag. 18 (Spring 2015). The range of things that could be important in regard to a specific case is very broad, so Paragraph (B) enables the court to direct additional information about other subjects, and item (xiv) invites the parties to submit information about other subjects.

How often is this sort of detailed submission presently provided at the time a proposed settlement is submitted to the court? Some comments suggest that sophisticated lawyers already know that they should fully advise the court at the time of initial submission of the proposal. Other comments suggest that the "real" briefing in support of the proposed settlement should occur at the time of initial submission, and that the further briefing at the time of the final approval hearing is largely an afterthought. This sketch does not compel that briefing sequence. Would that be desirable, or unduly intrude into the flexibility of district-court proceedings? Then further submissions by the settling parties could be limited to responding to objections from class members.

Do class members already have access to this range of information at the time they have to decide whether to opt out or object? At least some judicial doctrine suggests that on occasion important information has been submitted only after the time to opt out or object has passed. For example, information

about the proposed attorney fee award may not be available at the time class members must decide whether to object.

Are there items on the list that are so rarely of interest that they should be removed? Are there items on the list that are too demanding, and therefore should not be included? For example, information about likely take-up rates (item (viii)) may be too difficult to obtain. But if so, perhaps a plan for reporting back to the court (item (x)) and/or for taking actual claims experience into account in determining the final attorney fee award (item (xii)) might be in order.

How best should the standard for approving the notice to the class be stated? To some extent, there is a tension between saying two things in proposed Paragraph (D) -- that the decision to send notice is not an order certifying or refusing to certify the class that is subject to review under Rule 23(f), and that it is nonetheless sufficient to require class members to decide whether to opt out under Rule 23(c)(2)(B).

(2) Expanded treatment of settlement criteria

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

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Alternative 1

(2) If the proposal would bind class members, the court may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate., considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~[2]

(A) the class representatives and class counsel have [been and currently are] adequately represented the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award and any ancillary agreement made in connection with the

[2] These two alternatives offer a choice whether a rule should be more or less "confining." Alternative 1 is less confining for the district court, since it only calls for "consideration" of the listed factors. It may be that a court would regard some as more important than others in a given case, and conclude that the overall settlement is fair, reasonable, and adequate even if it might not find that all four were satisfied. Alternative 2, on the other hand, calls for separate findings on each of the four factors, and thus directs that the district court refuse to approve the settlement even though its overall judgment is that the settlement is fair, reasonable and adequate. This difference in treatment might also affect the scope of appellate review.

settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; and

(D) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] and the proposed method of claims processing is fair [and is designed to achieve the goals of the class action].

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to direct that the court should approve a proposed settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a "checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment provides more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement in order to decide whether it is appropriate to send notice of the settlement to the class. The disclosures required under Rule 23(e)(1) will give class members more information to evaluate a proposed settlement if the court determines that notice should be sent to the class. Objections under Rule 23(e)(5) can be calibrated more carefully to the actual specifics of the proposed settlement. In addition, Rule 23(e)(5) is amended to elicit information from objectors that should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members, and focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

Paragraphs (A) and (B). These paragraphs identify matters

that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

Rule 23(e)(1) disclosures may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiation of the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Various Rule 23(e)(1) disclosures may bear on this topic. The proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for deferring a portion of the fee award until the claims experience is known may bear on the fairness of the overall proposed settlement. Provisions for reporting back to the court about actual claims experience may also bear on the overall fairness of the proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(b)(2) provides the focus the court should use in undertaking that analysis.

Reporter's Comments and Questions

The question whether a rule revision along these lines would produce beneficial results can be debated. The more constrictive a rule becomes (as in Alternative 2), the more one could say it provides direction. But that direction may unduly circumscribe the flexibility of the court in making a realistic assessment of the entire range of issues presented by settlement approval. On the other hand, a more expansive rule, like Alternative 1, might not provide the degree of focus sought.

Another question revolves around the phrase now in the rule -- "fair, reasonable, and adequate," which receives more emphasis in Alternative 1. That is an appropriately broad phrase to describe the concern of the court in evaluating a proposed settlement. But to the extent that a rule amendment is designed to narrow the focus of the settlement review, perhaps the breadth of that phrase is also a drawback. Changing that phrase would vary from longstanding case law on Rule 23(e) analysis. Will a new rule along the lines sketched above meaningfully concentrate analysis if that overall description of the standard is retained?

At least a revised rule might obviate what reportedly

happens on numerous occasions -- the parties and the court adopt something of a rote recitation of many factors deemed pertinent under the case law of a given circuit. Would the sketch's added gloss on "fair, reasonable, and adequate" be useful to lawyers and district judges addressing settlement-approval applications?

If this approach holds promise to improve settlement review, are there specifics included on the list in the sketch that should be removed? Are there other specifics that should be added?

(3) Cy pres provisions in settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

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(3) The court may approve a proposal that includes a cy pres remedy [if authorized by law][3] even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(A) If individual class members can be identified through reasonable effort, and individual

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[3] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. Thus, the sketch says such a provision may be used "even if such a remedy could not be ordered in a contested case." That phrase seems to be in tension with the bracketed "authorized by law" provision. One might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is no need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

distributions would be economically viable, settlement proceeds must be distributed to individual class members;

(B) If the proposal involves individual distributions to class members and funds remain after distributions, the proposal must provide for further distributions to participating class members [or to class members whose claims were initially rejected on timeliness or other grounds] unless individual distributions would not be economically viable [or other specific reasons exist that would make such further distributions impossible or unfair];

(C) The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class.

(4~~3~~) The parties seeking approval * * *

Sketch of Draft Committee Note

Because class-action settlements often are for lump sums with distribution through a claims process, it can happen that funds are left over after the initial claims process is completed. Rule 23(e)(1) is amended to direct the parties to submit information to the court about the proposed claims process and forecasts of uptake at the time they request notice to the class of the proposed settlement. In addition, they are to address the possibility of deferring payment of a portion of the attorney fee award to class counsel until the actual claims history is known. These measures may affect the frequency and amount of residual funds remaining after the initial claim distribution process is completed. Including provisions about disposition of residual funds in the settlement proposal and addressing these topics in the Rule 23(e)(1) report to the court (which should be available to class members during the objection/opt out period) should obviate any need for a second notice to the class concerning the disposition of such a residue if one remains.

Rule 23(e)(3) guides the court and the parties in handling such provisions in settlement proposals and in determining disposition of the residual funds when that becomes necessary. [It permits such provisions in settlement proposals only "if authorized by law." Although parties may make any agreement they prefer in a private settlement, because the binding effect of the

class-action judgment on unnamed class members depends on the court's authority in approving the settlement such a settlement may not bind them to accept "remedies" not authorized by some source of law beyond Rule 23.]

[One alternative to *cy pres* treatment pursuant to Rule 23(e)(3) might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program. But because the existence of such a reversionary feature might prompt defendants to press for unduly exacting claims processing procedures, a reversionary feature should be evaluated with caution.[4]]

Paragraph (A). Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the distributions are large enough to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving. Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Developments in telecommunications technology have made distributions of relatively small sums economically viable to an extent not similarly possible in the past; further developments may further facilitate both identifying class members and distributing settlement funds to them in the future. This rule calls for the parties and the court to make appropriate use of such technological capabilities.

Paragraph (B). Paragraph (B) follows up on the point in paragraph (A), and directs that even after the first distribution is completed there must be a further distribution to those class members who submitted claims of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.

[As an alternative, or additionally, a court may designate residual funds to pay class members who submitted claims late or otherwise out of compliance with the claim processing

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[4] Is this concern warranted?

requirements established under the settlement.[5]]

Paragraph (C). Paragraph (C) deals only with the rare case in which individual distributions to class members are not economically viable. The court should not assume that the cost of distribution to class members is prohibitive unless presented with evidence firmly supporting that conclusion. It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases. When the court finds that individual distributions would be economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. Although such a distribution does not provide relief to class members that is as direct as distributions pursuant to Paragraph (A) or (B), it is intended to confer a benefit on the class.

Reporter's Comments and Questions

A basic question is whether inclusion of this provision in the rules is necessary and/or desirable. One could argue that it is not necessary on the ground that there is a growing jurisprudence, including several court of appeals decisions, dealing with these matters. And several of those decisions invoke the proposal in the ALI Aggregate Litigation Principles that provided a starting point for this rule sketch. On the other hand, the rule sketch has evolved beyond that starting point, and would likely be refined further if the rule-amendment process proceeds. Moreover, a national rule is a more authoritative directive than an ALI proposal adopted or invoked by some courts of appeals.

A different sort of argument would be that this kind of provision should not be in the rules because that would somehow be an inappropriate use of the rulemaking power. That argument might be coupled with an argument in favor of retaining the limitation "if authorized by law." It could be supported by the proposition that the only reason such an agreement can dispose of the rights of unnamed class members is that the court enters a judgment that forecloses their individual claims. And the only reason the class representative and/or class counsel can negotiate such a provision is that they have been deputized to

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[5] This follows up on bracketed language in the sketch. Would this be a desirable alternative to further distributions to class members who submitted timely and properly filled out claims?

act on behalf of the class by the court.

One might counter this argument by observing that class-action settlements often include provisions that likely are not of a type that a court could adopt after full litigation. Yet those arrangements are often practical and supported by defendants as well as the class representatives. From this point of view, a rule that forbade them might seem impractical.

And it might also seem odd to regard certain provisions of a settlement agreement as qualitatively different from others. Assuming a class action for money damages, for example, one could contend that a primary interest of the class is in maximizing the monetary relief, via judgment or settlement. Yet nobody would question the propriety of a compromise by the class representative on the amount of monetary relief, if approved by the court under Rule 23(e). So it could be said to be odd that this sort of "plenary" power to compromise on monetary relief and surrender a claim that might result in a judgment for a higher amount is qualitatively different from authority to make arrangements for disposition of an unclaimed residue. Put differently, if the class representative and class counsel can compromise in a way that surrenders the potential for a much larger recovery, is there a reason why they can't also agree to a *cy pres* provision that creates the possibility that some of the money would be paid to an organization that would further the goals sought by the class action?

Another argument that might be made is that alternative uses for a residue of funds should be encouraged to achieve deterrence or otherwise effectuate the substantive law. Under some circumstances, a remedy of disgorgement may be authorized by pertinent law. And the law of at least some states directly addresses the appropriate use of the residue from class actions. See Cal. Code Civ. Pro. § 384. Whether a Civil Rule should be fashioned to further such goals might be questioned, however.

The sketch is not designed to confront these issues directly. Instead, it is inspired in part by the reality that cy pres provisions exist and have been included in class-action settlements with some frequency. One could say that the rules appropriately should address practices that are widespread, but perhaps treatment in the Manual for Complex Litigation is sufficient.

A related topic is suggested by a bracketed paragraph in the Committee Note draft -- whether courts should have a bias against reversionary clauses in lump fund class-action settlements. The sketches of amendments to Rule 23(e)(1) and 23(e)(2) both direct the court's attention to the details of the claims processing method called for by the settlement. Fashioning an effective and fair claims processing method is a challenge, and can involve

considerable expense. To the extent that a defendant hoping to recoup a significant portion of the initial settlement payment as unclaimed funds might be tempted to insist on unduly exacting requirements for claims, something in the rules that encouraged courts to resist reversionary provisions in settlements might be appropriate.

A related concern might arise in relation to attorney fee awards to class counsel. Particularly when those awards are keyed to the "value" of the settlement, treating a lump sum payment by the defendant as the value for purposes of the attorney fee award might seem inappropriate. Particularly if there were a reversionary provision and the bulk of the funds were never paid to the class, it could be argued that the true value of the settlement to the class was the amount paid, not the amount deposited temporarily in the fund by the defendant. But see Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (holding that the existence of the common fund conferred a benefit on all class members -- even those who did not submit claims -- sufficient to justify charging the entire fund with the attorney fee award for class counsel).

(4) Objectors

The problem of problem objectors has attracted much attention. Various possible responses have been suggested, and they are introduced below. They have reached different levels of development, and likely would not be fully effective without adoption of some parallel provisions in the Appellate Rules. The Appellate Rules Committee has received proposals for rule amendments that might dovetail with changes to the Civil Rules.

Below are two approaches to the problems sometimes presented by problem objectors. The first relies on rather extensive required disclosure, coupled with expanded court approval requirements designed to reach appeals of denied objections as well as withdrawal of objections before the district court, covered by the present rule. The second is more limited -- seeking only to forbid any payments to objectors or their attorneys for withdrawing objections or appeals, and to designate the district court as the proper court to approve or disapprove such payments.

Objector disclosure

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~.~~ ~~, the objection may be withdrawn only with the court's approval.~~ The objection must be signed under Rule 26(g)(1) and disclose this information:

(A) the facts that bring the objector within the class defined for purposes of the proposal or within an alternative class definition proposed by the objector;

(B) the objector's relationship to any attorney representing the objector;

(C) any agreement describing compensation that may be paid to the objector;

(D) whether the objection seeks to revise or defeat the proposal on behalf of:

(i) the objector alone,
(ii) fewer than all class members, or
(iii) all class members;

(E) the grounds of the objection, including objections to:
(i) certification of any class,
(ii) the class definition,
(iii) the aggregate relief provided,
(iv) allocation of the relief among class members,
(v) the procedure for distributing relief[, including the procedure for filing claims], and
(vi) any provisions for attorney fees;

[**(6)** The objector must move for a hearing on the objection.]

[**(6.1)** An objector [who is not a member of the class included in the judgment] can appeal [denial of the objection] {approval of the settlement} only if the court grants permission to intervene for that purpose.]

(7) Withdrawal of objection or appeal

(A) An objection filed under Rule 23(e) or an appeal from an order denying an objection may be withdrawn only with the court's approval.

(B) A motion seeking approval must include a statement identifying any agreement made in connection with the withdrawal.

Alternative 1

(C) The court must approve any compensation [to be paid] to the objector or the objector's counsel in connection with the withdrawal.

Alternative 2

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

(D) If the motion to withdraw [the objection] was referred to the court under Rule *XY* of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action on the motion.

[As should be apparent, this would be a rather extensive rule revision, and would likely depend upon some change in the Appellate Rules as well. That possible change is indicated by the reference to an imaginary Appellate Rule *XY*[6] in the sketch above. As illustrated in a footnote, such an Appellate Rule could direct that an appeal by an objector from a court's approval of a settlement over an objection may be dismissed only on order of the court, and directing that the court of appeals would refer the decision whether to approve that withdrawal to the district court.]

Sketch of Committee Note Ideas

[The above sketches are at such a preliminary stage that it would be premature to pretend to have a draft Committee Note, or even a sketch of one. But some ideas can be expressed about what points such a Note might make.]

Objecting class members play an important role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement that Rule 23(e)(1) requires be submitted to the court, objectors can make an accurate appraisal

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[6] The Advisory Committee on Civil Rules does not propose changes to the Appellate Rules. But for purposes of discussion of the sketches of possible Civil Rule provisions in text, it might be useful to offer a sketch of a possible Appellate Rule 42(c):

> **(c) Dismissal of Class-Action Objection Appeal.** A motion to dismiss an appeal from an order denying an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure to approval of a class-action settlement must be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Civil Rule 23(e)(7). The district court must report its determination to the court of appeals.

As noted above, any such addition to the Appellate Rules would have to emanate from the Advisory Committee on Appellate Rules, and this sketch is provided only to facilitate discussion of the Civil Rule sketches presented in this memorandum.

of the merits and possible failings of a proposed settlement.

But with this opportunity to participate in the settlement review process should also come some responsibilities. And the Committee has received reports that in a significant number of instances objectors or their counsel appear to have acted in an irresponsible manner. The 2003 amendments to Rule 23 required that withdrawal of an objection before the district court occur only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. At the same time, the disruptive potential of an objection at the district court seems much less significant than the disruption due to delay of an objector appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to finalize the settlement and deliver the settlement funds to the class.

The goal of this amendment is to employ the combined effects of sunlight and required judicial approval to minimize the risk of possible abuse of the objection process, and to assist the court in understanding objections more fully. It is premised in part on the disclosures of amended Rule 23(e)(1), which are designed in part to provide class members with extensive information about the proposed settlement. That extensive information, in turn, makes it appropriate to ask objectors to provide relatively extensive information about the basis for their objections.

Thus, paragraphs (A), (B), and (C) of Rule 23(e)(5) seek "who, what, when, and where" sorts of information about the role of this objector. Paragraph (B) focuses particularly on the relationship with an attorney because there have been reports of allegedly strategic efforts by some counsel to mask their involvement in the objection process, at least at the district court.

Paragraph (D) and (E), then, seek to elicit a variety of specifics about the objection itself. The Subcommittee has been informed that on occasion objections are quite delphic, and that settlement proponents find it difficult to address these objections because they are so uninformative. Calling for specifics is intended to remedy that sort of problem, and thus to provide the court and with details that will assist it in evaluating the objection.

Paragraph 6 suggests, in brackets, that one might require an objector to move for a hearing on the objection. It may be that the ordinary Rule 23(e) settlement-approval process suffices because Rule 23(e)(2) directs the court not to approve the proposed settlement until after a hearing. Having multiple hearings is likely not useful.

Paragraph 6.1, tentative not only due to brackets but also due to numbering, suggests a more aggressive rein on objectors. It relies on required intervention as a prerequisite for appealing denial of an objection. Anything along those lines would require careful consideration of the Supreme Court's decision in Devlin v. Scardeletti, 534 U.S. 1 (2002), in which the Court held that an objector in a Rule 23(b)(1) "mandatory" class action who had been denied leave to intervene to pursue his objection to the proposed settlement nevertheless could appeal. The Court was careful to say that the objector would "only be allowed to appeal that aspect of the District Court's order that affects him -- the District Court's decision to disregard his objections." Id. at 9. And the Court emphasized the mandatory nature of that class action (id. at 10-11):

> Particularly in light of the fact that petitioner had no ability to opt out of the settlement, appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

The Court also rejected an argument advanced by the United States (as amicus curiae) that class members who seek to appeal rejection of their objections must intervene in order to appeal. The Government "asserts that such a limited purpose intervention generally should be available to all those, like petitioner, whose objections at the fairness hearing have been disregarded," id. at 12, and the Court noted that "[a]ccording to the Government, nonnamed class members who state objections at the fairness hearing should easily meet" the Rule 24(a) criteria for intervention of right. Id. The Court reacted (id.):

> Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the government's suggested requirement.

But it is not clear that the Court's ruling would prevent a rule requiring intervention. Thus, the Court rejected the Government's argument that "the structure of the rules of class action procedure requires intervention for the purposes of appeal." Id. at 14. It added that "no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to

appeal from an action that finally disposes of one's rights has a statutory basis. 28 U.S.C. § 1291." Id.

And it may be that reports about allegedly abusive recent experience with objectors would provide a basis for adopting such a rule. Thus, in *Devlin* the Court noted that the Government did not cite the concern with abusive appeals that has been highlighted by commentators (id. at 13):

> It [the Government] identifies only a limited number of instances where the initial intervention motion would be of any use: where the objector is not actually a member of the settlement class or is otherwise not entitled to relief from the settlement, where an objector seeks to appeal even though his objection was successful, where the objection at the fairness hearing was untimely, or where there is a need to consolidate duplicative appeals from class members.

Court approval requirement

As an alternative to the objector disclosure sketch, the following sketch relies entirely on judicial approval of any payment to an objecting class member of the objector's lawyer. It is possible that this simpler approach would be effective in dealing with inappropriate behavior by objectors. But it should be borne in mind that court approval is also an integral feature of the objector disclosure approach.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

Sketch of Committee Note Ideas

Many of the general comments included in the sketch of Committee Note ideas for the objector disclosure draft could introduce the general problem in relation to this approach, but it would emphasize the role of judicial approval rather than the utility of disclosure. The reason for taking this approach would be that the prospect of a financial benefit is the principal apparent stimulus for the kind of objections that the amendment is trying to prevent.

A starting point in evaluating this approach could be the 2003 amendment to add Rule 23(h), which recognized that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." That involvement is no less important when the question is payment to an objector's counsel rather than to class counsel. Although payment may be justified due to the contribution made by the objector to the full review of proposed settlement, that decision should be for the court to make, not for the parties to negotiate entirely between themselves.

The sketch focuses on payments to objectors or their attorneys because that has been the stimulus to this concern; instances of nonmonetary accommodations leading to withdrawal of objections have not emerged as similarly problematical.

The rule focuses on "the benefit of the objection to the class." Particularly with payments to the objector's attorney, that focus may be paramount. If the objection raises an issue unique to the objector, rather than one of general application to the class, that may support a payment to the objector. As the Committee Note to the 2003 amendment to Rule 23(e) explained, approval for a payment to the objector "may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members." But compensation of the objector's attorney would then ordinarily depend on the contractual arrangements between the objector and its attorney.

Ordinarily, if an objector's counsel seeks compensation, that compensation should be justified on the basis of the benefits conferred on the class by the objection. Ordinarily, that would depend in the first instance on the objection being sustained. It is possible that even an objection of potentially general application that is not ultimately sustained nonetheless provides value to the Rule 23(e) review process sufficient to justify compensation for the attorney representing the objector, particularly if such compensation is supported by class counsel. But an objection that confers no benefit on the class ordinarily should not produce a payment to the objector's counsel.

[Objections sometimes lack needed specifics, with the result that they do not facilitate the Rule 23(e) review process. It may even be that some objections raise points that are actually not pertinent to the proposed settlement before the court. Such objections would not confer a benefit on the class or justify payment to the objector's counsel.[7]]

Reporter's Comments and Questions

Both of these rule sketches are particularly preliminary, and should be approached with that in mind. Obviously, a basic question is whether the disclosure approach (coupled with court approval) or the court approval approach should be preferred. Requiring disclosures by objectors may be helpful to the court in evaluating objections as well as determining whether to approve payments to objectors or their lawyers. It may even be that the disclosure provisions would assist good-faith objectors in focusing their objections on the issues presented in the case.

One significant question in evaluating the court-approval approach is whether Rule 23(e)(5)'s current court-approval requirement has been effective. If it has not, does that bear on whether an expanded court-approval requirement, including a parallel provision in the Appellate Rules, would be effective? Perhaps Rule 23(e)(5) has not been fully effective because filing a notice of appeal after denial of an objection serves as something like an "escape valve" from the rule's requirement of judicial approval. If so, that may suggest that the existing rule is effective, or can become effective with this expansion.

A different question is whether the requirements of the disclosure approach would impose undue burdens on good-faith objectors. The Committee gave some consideration to various sanction ideas, but feedback has not favored that approach. One reason is that emphasizing sanctions has the potential to chill good-faith objections. The rule sketch says the disclosures must be signed under Rule 23(g)(1), which does have a sanctions provision. See Rule 26(g)(1)(C). Would that deter good-faith objectors? Except for some difficulty in supplying the information required, it would not seem that the disclosure requirements themselves would raise a risk of *in terrorem* deterrence of good-faith objectors.

Yet another question is whether such an elaborate disclosure regime could burden the court, the parties, and the objectors with disputes about whether "full disclosure" had occurred. Should there be explicit authority for a motion to require fuller

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[7] This point may be worth making if the objector disclosure provisions are not included. If they are included, these points seem unnecessary.

disclosure? Rule 37(a)(3)(A) could be amended as follows:

> **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), or if a class member fails to make a disclosure required by Rule 23(e)(5), any other party may move to compel disclosure and for appropriate sanctions.

But it might be said to be odd to have a Rule 37(a) motion apply to a class member, and also unnerving to raise the possibility of Rule 37(b) sanctions if the order were not obeyed (although one sanction might be rejection of the objection). This approach would have the advantage of avoiding the procedural aspects of Rule 11, such as the "safe harbor" for withdrawn papers, given that Rule 23(e)(5) says that an objection may be withdrawn only with the court's approval.

Alternatively, should the rule simply say that the court may disregard any objection that is not accompanied by "full disclosure"? Should satisfying the "full disclosure" requirement be a prerequisite to appellate review of the objection? Some comments have stressed that delphic objections sometimes seem strategically designed to obscure rather than clarify the grounds that may be advanced on appeal, or as a short cut to filing a notice of appeal without actually having identified any real objections to the proposed settlement, and then inviting a payoff to drop the appeal. Disclosure could, in such circumstances, have a prophylactic effect. Should the court of appeals affirm rejections of objections on the ground that full disclosure was not given without considering the merits of the objections? Could that appellate disposition be achieved in an expedited manner, compared to an appeal on the merits of the objection?

Although not principally the province of the Civil Rules Committee, it is worthwhile to note some complications that might follow from an Appellate Rule calling on the district court to approve or disapprove withdrawals of appeals. The operating assumption may be that the district court could make quick work of those approvals, while the appellate court would have little familiarity with the case. That may often be true, but not in all cases. A 2013 FJC study of appeals by objectors found that the rate of appellate decision on the merits of the objector's appeal varied greatly by circuit. Thus, in the Seventh Circuit, none of the objector appeals had led to a resolution on the merits in the court of appeals during the period studied, while in the Second Circuit fully 63% had. Had the parties in the Second Circuit cases reached a settlement after oral argument, one might argue that the court of appeals would by then be better positioned to evaluate the proposed withdrawal of the appeal than the busy district judge, who may have approved the settlement two years earlier.

Finally, it may be asked whether focusing on whether the objector "improved" the settlement might be useful. It seems that such a focus might invite cosmetic changes to a settlement that confer no significant benefit on the class. And it also may be that some objections that are not accepted may nonetheless impose significant costs on the objector that the court could consider worth compensating because the input was useful to the court in evaluating the settlement.

(5) Class Definition & Ascertainability

Relatively recently, the issue of ascertainability has received a considerable amount of attention. There have been assertions that a circuit conflict is developing or has developed on this topic. The concept that a workable class definition is needed has long been recognized; "all those similarly situated" is unlikely to suffice often. In 2003, Rule 23(c) was amended to make explicit the need to define the class in a meaningful manner. The amendment sketch below builds on that 2003 amendment.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class~~; Appointing Class Counsel~~*. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.

(C) *Defining the Class Claims, Issues, or Defenses.* An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

Initial Sketch of Draft Committee Note

A class definition can be important for various reasons. Rule 23(a)(1) requires that the members of a class be too numerous to be joined, so some clear notion who is included is necessary.. Rule 23(c)(2) requires notice to the class after certification. Rule 23(c)(3) directs that the judgment in the class action is binding on all class members. Rule 23(e)(1) says that the court must direct notice of a proposed settlement to the class if it would bind them. Rule 23(e)(5) directs objectors to provide disclosures showing that they are in fact class members. And Rule 23(h)(1) requires that notice of class counsel's

application for an award of attorney's fees be directed to class members. So a workable class definition can be important under many features of Rule 23.

But the class definition requirements of the rule are realistic and pragmatic. Thus, the rule also recognizes that identifying all class members may not be possible. For example, Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must send individual notice to "all members who can be identified through reasonable effort." And in class actions under Rule 23(b)(2) -- such as actions to challenge alleged discrimination in educational institutions -- there may be instances in which it is not possible at the time the class is certified to identify all class members who might in the future claim protection under the court's injunctive decree.

Under these circumstances, Rule 23(c)(1)(B) calls for a pragmatic approach to class definition at the certification stage. As a matter of pleading, a class-action complaint need not satisfy this requirement. The requirement at the certification stage is that the court satisfy itself that members of the class can be identified in a manner that is sufficient for the purposes specified in Rule 23. It need not, at that point, achieve certainty about such identification, which may not be needed for a considerable time, if at all.

[The rule says that the court's focus should be on whether identification can be accomplished "when necessary." This qualification recognizes that the court need not always provide individual notice at the certification stage, even in Rule 23(b)(3) class actions, to all class members. Instead, that task often need be confronted only later. If the case is litigated to judgment, it may then become necessary to identify class members with some specificity whether or not the class prevails. If the case is settled, the settlement itself may include measures designed to identify class members.]

Ultimately, the class definition is significantly a matter of case management. [It is not itself a method for screening the merits of claims that might be asserted by class members.[8]] As with other case-management issues, it calls for judicial resourcefulness and creativity. Although the proponents of class certification bear primary responsibility for the class definition, the court may look to both sides for direction in fashioning a workable definition at the certification stage, and in resolving class-definition issues at later points in the action. In balancing these concerns, the court must recognize that the class opponent has a valid interest in ensuring that a claims process limits relief to those legally entitled to it,

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[8] Is this a pertinent or helpful observation?

while also recognizing that claims processing must be realistic in terms of the information likely to be available to class members with valid claims. And the court need not make certain at the time of certification that a perfect solution will later be found to these problems.

Reporter's Comments and Questions

Would a rule provision along the lines above be useful? One might regard the sketch above as a "minimalist" rule provision on this subject, in light of the considerable recent discussion of it. It avoids the use of both "ascertainable" and "objective," words sometimes used in some recent discussions of this general subject.

Some submissions to the Advisory Committee have urged that rule provisions directly address some questions that have been linked to these topics,[9] including:

> *Ensuring that all within the class definition have valid claims*: A class definition that is expressed in terms of having a valid claim can create "fail safe" class problems, because a defense victory would seem to mean that the class contains no members. A class definition that "objectively" ensures that all class members have valid claims may routinely present similar challenges.
>
> *Use of affidavits or other similar "proofs":* Another topic that has arisen is whether affidavits or similar proofs can suffice to prove membership in the class. This problem can be particularly acute when the class claim asserts that defendant made false or misleading statements in connection with inexpensive retail products. A requirement that class members present receipts proving purchase of the product may sometimes be asking too much.
>
> *"No injury" classes:* Somewhat similar to the two points above is the question whether the class includes many who have suffered no injury. Such issues may, for example, arise in data breach situations. In those cases, there may be a debate about whether the breach actually revealed confidential information from class members, and what use was made of that information. The Supreme Court has granted certiorari in a case that may present some such issues. See Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (6th Cir. 2014), cert. granted, 135 S.Ct. 2806 (2015).

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[9] In case these submissions might be of interest, an Appendix to this memorandum presents some of the suggestions that the Advisory Committee has received.

The rule sketch above does not purport to address directly any of these issues. There are likely additional issues that have been discussed under the general heading "ascertainability" that this sketch does not directly address. Would that mean a rule change along these lines would not be useful?

If it appears that a rule change requires an effort to confront the sorts of issues just identified, could it be said that those issues can be handled in the same way across the wide variety of class actions in federal courts?

The courts' resolutions of these issues appear to be in a state of rapid evolution. For one recent analysis, see Mullins v. Direct Digital, ___ F.3d ___, 2015 WL 4546159 (7th Cir. No. 15-1776, July 28, 2015). Would it be best to rely on the evolving jurisprudence to address these issues rather than attempt a rule change that could become effective no sooner than Dec. 1, 2018? If the courts are genuinely split, is there a genuine prospect that the split will be resolved by judicial decisionmaking?

(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * * *

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3)] request certification and the court finds that the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).[10]

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new

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[10] The Subcommittee has also discussed an alternative formulation that would invoke criteria proposed in the ALI Aggregate Litigation project:

> (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

This approach does not fit well with the current lead-in language to Rule 23(b), which says that class actions may be maintained "if Rule 23(a) is satisfied." But the reformulation appears either to offer substitute approaches to matters covered in Rule 23(a) ("significant common issues" and "sufficiently numerous") or to call for more exacting treatment of topics also covered in Rule 23(a).

subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to the rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provide important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed

to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation. See Rule 23(e)(1)(D).

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said

that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

(7) Issue Class Certification

This topic presents two different sorts of questions or concerns. One is whether experience shows that a change in Rule 23(b) or (c) is needed to ensure that issue class certification is available in appropriate circumstances. Various placements are possible for this purpose. An overarching issue, however, is whether any of these possible rule changes is really needed; if the courts are finding sufficient flexibility in the rule as presently written to make effective use of issues classes, it may be that a rule change is not indicated.

The second question looks to proceedings after resolution of the issue on which certification was based. Particularly if the class is successful on that issue, the resolution of that issue often would not lead to entry of an appealable judgment. But to complete adjudication of class members' claims might require considerable additional activity which might be wasted if there were later a reversal on appeal of the common issue. So a revision of Rule 23(f) might afford a discretionary opportunity for immediate appellate review of the resolution of that issue.

A. Revising Rule 23(b) or (c)

Rule 23(b) approaches

Alternative 1

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, except when certifying under Rule 23(c)(4), and finds that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: * * * *

Alternative 2

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(4) the court finds that the resolution of particular issues will materially advance the litigation,

making certification with respect to those issues appropriate. [In determining whether certification limited to particular issues is appropriate, the court may refer to the matters identified in Rule 23(b)(3)(A) through (D).]

Rule 23(c)(4) approach

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(4) ***Particular issues.*** ~~When appropriate, a~~An action may be brought or maintained as a class action with respect to particular issues if the court finds that the resolution of such issues will materially advance the litigation. [In determining whether certification limited to particular issues is appropriate, the court may refer to the matters identified in Rule 23(b)(3)(A) through (D).]

Sketch of Committee Note Ideas

[Very general; would need to be adapted to actual rule change pursued]

Particularly in actions brought under Rule 23(b)(3), there are cases in which certification to achieve resolution of common issues would be appropriate even if certification with regard to all issues involved in the action would not. Since its amendment in 1966, Rule 23(c)(4) has recognized this possibility. This amendment confirms that such certification may be employed.

The question whether such certification is warranted in a given case may be addressed in light of the factors listed in Rule 23(b)(3)(A) through (D). A primary consideration will be whether the resolution of the common issue or issues will materially advance the resolution of the entire litigation, or the entire claims of class members. When certifying an issues class, the court should specify the issues on which certification was granted in its order under Rule 23(c)(1)(B) and, for Rule 23(b)(3) classes, include that specification in its notice to the class under Rule 23(c)(2)(B)(iii).

[Resolution of the issues for which certification was granted may result in an appealable judgment. But even if those issues are resolved in favor of the class opponent, that may not mean that all related claims of class members are also resolved. Should resolution of the common issues not result in entry of an

appealable judgment, discretionary appellate review may be sought under Rule 23(f)(2).]

Reporter's Comments and Questions

These sketches are obviously at an early stage of development. At a point in time, it appeared that there was a circuit split on whether (c)(4) certification could be sought in an action brought under Rule 23(b)(3) even though predominance could not be satisfied as to the claims as a whole. It is uncertain whether that seeming split has continued, and whether amendments of this sort are needed and helpful in resolving it.

If a rule change is useful, which route seems most promising? Alternative 1 may be the simplest; it seeks only to overcome preoccupation with overall predominance. It could be coupled with a revision of Rule 23(c)(4) that recognizes that the "materially advances" idea is a guide in determining whether it is appropriate to certify as to particular issues. At present, Rule 23(c)(4) says only that such certification may be granted "when appropriate." Alternatively or additionally, one could refer to the factors in Rule 23(b)(3)(A) through (D). But would they be appropriate in relation to issue certification under Rule 23(b)(1) or (2)?

Is issue certification really a concern only as to Rule 23(b)(3) cases? It may be that, particularly after *Wal-Mart*, Rule 23(b)(2) cases are not suited to (c)(4) certification. Rule 23(b)(2) says that certification is proper only when the class opponent has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." It may be that this definition makes issue certification unimportant. In (b)(1) classes, it may be that there is a common issue such as whether there is a "limited fund" that would warrant (c)(4) certification, but if that produced the conclusion that there is a limited fund certification under (b)(1)(B) seems warranted.

B. Interlocutory Appellate Review

(f) Appeals.

(1) *From order granting or denying class-action certification.* A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders

(2) *From order resolving issue in class certified under Rule 23(c)(4).* A court of appeals may permit an appeal from an order deciding an issue with respect to which [certification was granted under Rule 23(c)(4)] {a class action was allowed to be maintained under Rule 23(c)(4)} [when the district court expressly determines that there is no just reason for delay], if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Sketch of Draft Committee Note Ideas

In 1998, Rule 23(f) was added to afford an avenue for interlocutory review of class-certification orders because they are frequently of great importance to the conduct of the action. That provision is retained as Rule 23(f)(1).

Rule 23(f)(2) is added to permit immediate review of another decision that can be extremely important to the further conduct of an action. Rule 23(c)(4) authorizes class certification limited to particular issues when resolution of those issues would materially advance the ultimate resolution of the litigation. In some cases, the resolution of the common issues may lead to entry of an appealable final judgment. But often it will not, and even though that resolution should materially advance the ultimate resolution of the litigation a great deal more may need to be done to accomplish that ultimate resolution.

Before the court and the parties expend the time and effort necessary to complete resolution of the class action, it may be prudent for the court of appeals to review the district court's resolution of the common issue. Rule 23(f)(2) authorizes such review, which is at the discretion of the court of appeals, as is an appeal of a certification order under Rule 23(f)(1). Such an

appeal is allowed only from an order deciding an issue for which certification was granted. That would not include some orders relating to that issue, such as denial of a motion for summary judgment with regard to the issue.

[But to guard against premature appeals, an application to the Court of Appeals for review under Rule 23(f)(2) must be supported by a determination from the district court that there is no just reason for delay. For example, if the court has resolved one of several issues on which certification was granted, it may conclude that immediate appellate review would not be appropriate.]

Reporter's Comments and Questions

A basic question is whether adding Rule 23(f)(2) would produce positive or negative effects. Related to that is the question "What happens now when an issue is resolved in an issues class action?"

One answer to that second question is that if the defendant wins on the common issue judgment is entered in the defendant's favor and the class action ends. That may not mean that class members may not pursue individual claims, but they would likely be bound by the resolution of the common issue and limited to claims not dependent on it. Cf. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) (after court ruled that there was no general pattern or practice of discrimination in defendant's operation, class members could still pursue claims of individual intentional discrimination but could not rely on pattern or practice proof). But it would ordinarily mean that immediate review is available under 28 U.S.C. § 1291 with regard to the class action.

Another answer is that common issue certification often involves multiple issues, so that even if some are definitively resolved in the district court others may remain to be resolved. Under those circumstances, it may be that the district court would conclude that there is just reason for delay. Is it important to condition immediate review on the district court's determination that there is no just reason for delay? That seems to afford the appellate court useful information about whether to allow an immediate appeal, but may also give the district court undue authority to prevent immediate review.

Yet another answer is that if the class opponent loses on the common issue, that might invariably lead to a settlement essentially premised on that resolution of that issue. It could be that the settlement sometimes preserves the class opponent's right to seek appellate review, but may often be that it does not. Is that an argument for adopting Rule 23(f)(2)? One view might be that it would become a "free bite" for the class

opponent.

Could appellate courts develop standards for decisions whether to grant review under Rule 23(f)(2)? Under current Rule 23(f), they have developed standards for review. But it may be that a similar set of general standards would not be easy to fashion. Would input from the district court be useful in making decisions on whether to permit immediate appeals? If so, is the bracketed provision calling for a district court determination that there is no just reason for delay in the appeal a useful method of providing that assistance to the court of appeals? Would it actually be more of a burden to the district court than boon to the court of appeals?

(8) Notice

This topic has received limited attention in discussion to date. Therefore this memorandum presents the discussion that appeared in the agenda memo for the April 9 Advisory Committee meeting and adds some comments and questions.

April 2015 Agenda Materials

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-74, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]
>
> Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1 **(2) Notice**

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice by electronic or other means to all members who can be identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. It appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods will continue to evolve. The likely suggestion will be that courts should not (as *Eisen* seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the

notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Reporter's Comments and Questions

Recurrent references in cases mainly addressing other issues to use of electronic means for giving notice and giving class members access to information about a class action or proposed settlement suggest that creative work is occurring without the need for any rule change. The sketch of additions to Rule 23(e)(1) in Part (1) above directs that the resulting information be made available to class members, and the likely method for

doing so would be some sort of electronic posting. In at least some cases, electronic submission of claims is done.

No doubt participants in the Sept. 11 mini-conference are more familiar with these developments than those who only read the case reports. But these developments raise the question whether there is really any need for a rule change.

If changes are warranted for Rule 23(b)(3) actions, the question remains whether the time has come for revisiting the question of required notice of some sort in (b)(1) and (b)(2) actions.

(9) Pick-Off and Rule 68

This topic has received limited attention since the April 9 Advisory Committee meeting. Accordingly, the material below is drawn from the agenda materials for that meeting.

One development is that the Supreme Court has granted cert. in a case that may address related issues. Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). Another is the Seventh Circuit decision in Chapman v. First Index, Inc., ___ F.3d ___, 2015 WL 4652878 (7th Cir. No. 14-2772, Aug. 6, 2015). See also Hooks v. Landmark Indus., Inc., ___ F.3d ___, 2015 WL _____ (5th Cir. No. 14-20496, Aug. 12, 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action"). Below in the Reporter's Comments and Questions section, a key inquiry will be whether the present state of the law calls for rule changes.

April 2015 Agenda Materials

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if

(A) the court has denied class certification and

(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.

(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The

court may choose instead to hold the way open for certification of a class different than the one it has refused to certify, or for reconsideration of the certification decision. The court also may treat the tender of complete relief as mooting the representative's claim, but, to protect the possibility that a new representative may come forward, refuse to dismiss the action.

If the court chooses to dismiss the action, the would-be class representative retains standing to appeal the denial of certification. [say something to explain this?]

[If we revise Rule 23(e) to require court approval of a settlement, voluntary dismissal, or compromise of the representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

(e) Inapplicable in Class and Derivative Actions. This rule does not apply to class or derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy

Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **Before certification.** An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) **Certified class.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(A~~1~~) The court must direct notice in a reasonable

manner * * * * *

(3) Settlement after denial of certification. If the court denies class-action certification, the plaintiff may settle an individual claim without prejudice to seeking appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

Reporter's Comments and Questions

The above materials suggest a variety of questions that might be illuminated by discussion on Sept. 11. A basic one is the extent of the problem. One view is that (at least pending the Supreme Court's decision in the case it has taken) this problem was largely limited to one circuit, which has seemingly

overruled the cases that had presented the problem.

But another view might be that the existence of this issue casts a shadow over cases filed in other circuits. It has happened that parties in such cases have felt obligated to file out-of-the-chute certification motions, and some district judges have stricken such motions in the ground they are premature.

Assuming there is reason to give serious consideration to a rule change, there are a variety of follow-up questions. One is whether anything more than "the minimum" change is needed. And if the minimum is all that is needed, would a change to Rule 68 saying that it is inapplicable in actions under Rules 23, 23.1, and 23.2 suffice?

As illustrated by the above sketches, a number of other issues might be addressed. These include:

(1) Undoing the limitation of Rule 23(e) to settlements that purport in form to bind the class. This limitation was added in 2003. Before that, most circuits held that court review was required for "individual" settlements as well as "class" settlements, but that notice to the class was not.

(2) A rule could require court approval of a dismissal and also require that the parties submit details of the deal to the court.

(3) A rule could affirmatively preserve the settling individual's right to seek appellate review of the district court's denial of class certification.

(4) A rule could specify that the parties must seek judicial approval of an individual settlement before certification, but leave notice to the class to the discretion of the court.

There surely are additional possibilities.

APPENDIX
Selected Ascertainability Suggestions

This listing does not purport to exhaust the submissions on this topic.

No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):

> A class definition shall be stated in a manner that such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B)

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.