FOR THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

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In the Matter of:	)
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Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure	)
	)
Advisory Committee on Civil Rules	)
	)
Civil Rules 5, 23, 62, and 65.1	)
_____	)

Sandra Day O'Connor U.S. Courthouse

401 West Washington Street

Phoenix, Arizona 85003

January 4, 2017

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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared with Computer-Aided Transcription

A P P E A R A N C E S

Committee Members Attending in Person:

HON. JOHN BATES, Chair

JOHN BARKETT, Esquire

ELIZABETH CABRASER, Esquire

HON. DAVID G. CAMPBELL

PROFESSOR EDWARD COOPER

PROFESSOR DANIEL COQUILLETTE

HON. ROBERT DOW

HON. JOAN ERICKSEN

PARKER FOLSE, Esquire

HON. SARA LIOI

PROFESSOR RICHARD MARCUS

I N D E X

WITNESSES:

P R O C E E D I N G S

JUDGE BATES: Good morning. This is the second public hearing we're having on draft amendments to the civil rules that are currently out in public comment, and we've had one hearing in November and this will be the second hearing. This is on rules 5, 23, 62, and 65.1 of the civil rules.

And I want to thank Judge Campbell, the chair of the standing committee, who is here today, for making this facility available to us for this public hearing. And we have many of the members of the advisory committee on civil rules and the standing committee on federal rules here today in attendance, and some more on the telephone.

We're going to hear from ten witnesses, I believe, today. We've allocated 12 minutes to hear the testimony of each of the witnesses, and then some time for questioning that may ensue for at least some of the witnesses. And we'll take one break in the middle of the morning, but other than that I think things should just proceed pretty regularly from one witness to the next using the lectern here in the middle of the courtroom for the presentation of the testimony that the witnesses wish to present.

We are ready to start. So we'll begin with the first witness, and that will be Jennie Lee Anderson.

MS. ANDERSON: Good morning. And thank you for the

09:02:56 opportunity to address the committee. I am -- my name is Jennie Lee Anderson with the law firm of Andrus Anderson in San Francisco, and I am testifying today my on behalf, and also on behalf of the American Association for Justice, where 09:03:09 I serve on the board of governors, and, in the past, chair of the class action litigation group.

I'd like to limit my comments today to two of the proposed amendments, the first being proposed amendments to the notice provision in 23(c)(2)(B), and the second being 09:03:26 amendments to 23(e)(5) addressing objectors. I'll start with the second, objectors.

First, I'd like to say we applaud the committee for trying to address this problem of serial objectors because it affects parties and counsel on both sides of the V, and it's a 09:03:44 perplexing problem.

We also recognize the importance of providing balance and protecting the due process rights of legitimate objectors and respect the importance legitimate objectors have for insuring fairness of the process.

09:04:04 However, the issues created by serial objectors who bog down the settlement and delay relief to the class highlights why reform is needed here.

Specifically, I believe that the court approval provision will have an effect of deterring some serial 09:04:23 objectors and is certainly worth trying. It may not be enough

09:04:27 to fully remedy the situation and as such we believe it is important for the committee to make sure the rules are working as intended and continue to monitor those provisions and recognize they may need some tweaking as we go forward because 09:04:44 they draw on some very creative, wonderfully creative ideas to address this problem. But, therefore, to ensure they're being implemented as intended to keep an eye on that.

It also may require changes to the federal appellate rules, and appellate courts may issue decisions that impact 09:05:06 the implementation of the rules. So we look forward to seeing how that comes into play, but we certainly support the committees's efforts in that respect.

Second, we would also like to lend our support to the proposed amendments to notice provisions in 23(c)(2)(B). 09:05:31 Specifically, we support the allowance of a mixed notice using mail and/or electronic means. This is simply a matter of practicality. The courts need to be flexible, and this encourages flexibility because, as we've seen, technology is ever changing. So to just say it's got to be mail or e-mail 09:05:55 isn't enough. The electronic means gives the flexibility to address changing technologies, and also the demographics of a class.

For example, there may be some classes where the demographics are very young people or where the claims 09:06:12 involved internet transactions. Those may be more appropriate

09:06:16 for e-mail or e-mail with combination of social media. But we also recognize there are still many classes that may benefit from mail notice, and this simply encourages the judge to look at these issues with a flexible approach. And myself and AAJ 09:06:39 definitely support that amendment as well.

So my comments are brief. I am happy to take any questions, but otherwise I'll cede the rest of my time to the others testifying.

JUDGE BATES: John.

09:06:51 MR. BARKETT: I have a question. Did you look at any of the other comments we received?

MS. ANDERSON: Yes.

MR. BARKETT: And did you look at those from Mr. Hilsee?

09:07:03 MS. ANDERSON: Yes, I did.

MR. BARKETT: And I'd be curious as to your reactions to some of his observations on the notice provision.

MS. ANDERSON: Well, I think, if I recall correctly, Mr. Hilsee advocates that mail is still by far the best and 09:07:19 that electronic means may be used as a cheaper way to give notice that may not be as effective.

I don't disagree that under some circumstances, U.S. mail is the best way to go. I just think that the rules need to acknowledge that we live in a changing environment. I 09:07:38 myself don't open half my mail anymore, and sometimes I don't

09:07:42 even open all my e-mail.

We have to be creative to try to reach the class, give them notice and stimulate claims and increase class participation. That may be a combination of any number of 09:07:55 things, and that may be radically changing over time. And I think the judge -- the courts need to have the flexibility and endorsement of the rules and the notes to address that ever changing population and technology.

For example, I know that the use of social media can 09:08:15 be extremely effective for both notification and claim stimulation. I was speaking with some other colleagues, and it was raised that reading our e-mail isn't very pleasant. Sometimes I can't even get through my e-mail for the whole day. But, you know, I take a break and like to go on my 09:08:33 social media, and people spend -- you know, are constantly lamenting, Oh, I need to stop spending so much time on social media, because it is a wonderful way to reach people.

I'm not a notice expert, so I can't say that I have statistical studies or the technological know-how to 09:08:53 effectuate such notice and claims programs on my own. But I do believe as a user of technology that we should be drawing on all resources to reach as many class members as possible, and that that can include U.S. mail, but that we would be shortsighted to think that it must always be limited to mail.

09:09:16 JUDGE BATES: Other questions for Ms. Anderson?

09:09:22 PROFESSOR MARCUS: One of the things that's come up is a subject called banner ads. Have you encountered -- could you tell me what you understand that to be and whether you've encountered that as a means of giving notice to a class of
09:09:37 either class certification or proposed settlement?

MS. ANDERSON: Sure. My understanding of banner ads is when you go to a website, perhaps the website has been identified as a website where class members are likely to go, whether it be a news site or maybe it's something related to
09:09:53 the product at issue, that there's a banner and you click on it and it can bring you to another page where you can gain information. Perhaps the settlement claims page, for example.

And I know that use of banner ads can be one component to increase claims and increase notice, especially
09:10:15 in cases where there are unknown consumers, there's no record of who the class members are, and you want to try to really get word out about the settlement so that people can learn whether they are part of the class or not.

I don't think that a banner ad alone would be
09:10:33 sufficient. But because we have such broad resources on the internet, I wouldn't see why it would be a detriment or not be a good addition to reach class members. Particularly, like I said, if we know that class members are -- they purchased a product that do-it-yourselfers in the home use. An ad on the
09:10:57 Home Depot website may be an effective means of reaching some

09:11:02 of those people and advising them of the settlement.

So I think it is important to consult with people who are really expertise in this area and come up with a plan that really addresses the very specific needs of the class and the 09:11:15 type of claims and how can you most broadly reach, not only for the due process requirement of notice but also to encourage participation in the settlement.

MR. BARKETT: May I ask one more question?

JUDGE BATES: John.

09:11:32 MR. BARKETT: I'm curious whether you've experienced situations where courts, in approving class action settlements, have tied the payment of attorneys' fees to the claims rate and in some fashion where the higher the claims rate the more confident the judge is in awarding fees, and the 09:11:49 lower the claims rate perhaps the judge is a bit more skeptical about awarding fees. Is that something you've experienced in dealing with settlements over time?

MS. ANDERSON: I have not personally had that come up as an issue in my cases. I think that there are a few issues 09:12:09 to consider. One, the law in most jurisdictions is the amount made available, and that is particularly important when there is a non-reversionary fund.

I think when the courts are most concerned is when we have a situation where it's a claims made process that is a 09:12:25 reversionary fund and unclaimed money goes back to the

09:12:28 defendants.

Under those circumstances where it's not reversionary, I think there can be and should be really important *cy pres* relief that has to be well thought of and 09:12:44 really provides a indirect benefit to absent class members who are not able, for whatever reason, whether be it be motivation or they didn't identify themselves as a class member, they didn't make a claim.

Additionally, many settlements are distributed simply 09:13:05 by sending a check to the class members. So those are cases where the class members are known and their damages are known. So there's also a good bulk of settlements that are like that and that still sometimes results in money not being fully distributed. Uncashed checks, addresses that can't be updated 09:13:26 and verified, things of that nature.

So I do know that that is a growing trend. I'm a plaintiffs attorney so I think it's a dangerous trend because I think there are remedial measures and deterrents that are very important and well served by consumer class actions even 09:13:50 where it is very difficult to get the funds directly to the class members because of the difficulty of encouraging people who are class members to make claims. And the claims are frequently, unfortunately, low in cases. All the more reason to encourage the use of technology to stimulate those claims 09:14:11 to the maximum capacity.

09:14:14 JUDGE BATES: Thank you, Ms. Anderson. We appreciate very much you coming today and your testimony.

MS. ANDERSON: Thank you very much for the opportunity.

09:14:20 JUDGE BATES: Our next witness will be Thomas Sobol. Morning, Mr. Sobol.

MR. SOBOL: Morning. Thank you very much for the opportunity to speak to the committee.

JUDGE BATES: Thank you for coming.

09:14:33 MR. SOBOL: My name is Tom Sobol. I'm a partner at the law firm the Hagens Berman Sobol Shapiro. My office is in Cambridge, Massachusetts. I've practiced complex civil litigation for almost 35 years. The first half of my career was at a traditional large Boston law firm, and I represented 09:14:51 primarily corporate and institutional clients. And then for the second half of my career I've been representing primarily consumers, health benefit providers, and others in connection with pharmaceutical pricing matters and other cases that are intended to assist in making health care more affordable and 09:15:11 effective.

I'd like to address three issues today. Two of them are quite specific and the third is general. These are my personal views, not those of my partners or my firm.

So first, the proposed amendments to Rule 23 take an 09:15:30 important step in expressly addressing, I think for the first

09:15:33 time in the rule itself, the effectiveness of distribution of relief to the class members. It is a very good thing that the rules address this issue specifically.

Historically, responsible class lawyers have made 09:15:47 sure that the most effective means of distribution was used to get funds into the hands of class members. Most class counsel continue those efforts long after the settlement has been signed off on and perhaps even the lawyers been paid.

In many courts, many judges take an active role in 09:16:07 assuring that distribution is made to class members. I'll give one example. For instance, I had a case in front of District Judge William Young in Boston and we were trying to distribute tens of millions of dollars to consumers of a medication for whom we did not have a roll of those consumers 09:16:27 handy. He wouldn't pay us until we went out and served subpoenas on large benefit managers and pharmacies and got together lists and scrubbed them and merged them and made sure they were all confidential, and we got a list.

We put together a list. It took a long time and lot 09:16:45 of effort, and we put together a list of those folks and got checks to I think it was about a quarter of a million people rather than, for instance, the 10,000 people who had responded to the claims notice.

Now, that is an example of what I consider to be the 09:17:00 state of the art, and state of the art is used most often.

But the state of the art is uncodified. And so the rule goes -- takes a step in that direction of codifying that there should be state of the art distribution mechanisms.

PROFESSOR MARCUS: Mr. Sobol, to clarify one thing, there was an initial notice which prompted around 10,000 claims to be submitted.

MR. SOBOL: It was a parallel. So we --

PROFESSOR MARCUS: You did both things simultaneously?

MR. SOBOL: Both things simultaneously in order to ensure that constitutional notification had been made to everybody so that everybody had the opportunity to read about the settlement and participate in the settlement. We had constitutionally due notice by publication and that kind of thing, people could file a claim.

In addition, as a function simply of the claims process itself, we did this what we call the subpoena project to generate and create a list of class members to whom we would send checks directly. We did not require those consumers to do any more other than the cash the check they received in the mail.

So as an example, I can't remember exactly what the number was, but I think it was maybe about 1,000 or 2,000 or so people in Hawaii who had never heard about this check, but because of their consumer protection laws, got a check for

09:18:18 $500 each, which for many people is a pretty significant piece of mail.

In execution, however, the proposal you have before you I think is flawed in one respect. Currently, the proposal 09:18:31 reads, quote, The effectiveness of the proposed method of distributing relief to the class including the method of processing class member claims if required.

That's the consideration. This language is capable of two quite different interpretations. On the one hand, the 09:18:47 language suggests that there's some absolute standard of distribution effectiveness, that for all cases there is a general standard of how effective settlement distribution must be, and failing that, the court should reject the proposal.

On the other hand, the language might be interpreted 09:19:07 as requiring consideration of comparative effectiveness of reasonably diligent alternative methods of distributing relief.

The first interpretation, in my view, is quite troublesome. The second, not.

09:19:23 The first, the one for -- of an absolute standard, has no source by which the judiciary might create it, has -- there's little basis to impose one, and it's not in the case law.

In some situations, particularly consumer classes of 09:19:37 elderly or sick people, class membership is quite

09:19:42 ascertainable. You can objectively identify who they are, but very difficult to access them by way of distribution.

Rejecting the proposal because it might not achieve some absolute standard, and thereby denying relief to those 09:19:56 consumers we can reach, would neither be just nor in the interests of any of the parties to the settlement. And it does not appear that that's the intent, I think, of the advisory committee anyway.

Accordingly, I would respectfully suggest a very 09:20:10 simple addition to your rule, which would add the following words: After -- well, the rule would read: "The effectiveness of the proposed method of distributing class -- relief to the class as compared to other reasonably available methods of distribution under the circumstances."

09:20:33 Second, the proposed amendments take an important step in addressing objections to class settlements, both in proceedings before the district court and when pressing an appeal. Objections do serve good and not so good purposes. The proposals seek to achieve the balance needed to protect 09:20:52 legitimate objections and deter self-serving ones.

One proposal requires that the objection to, quote, state whether the objection applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

09:21:13 Now, this -- that change does make some sense in, as

09:21:16 the committee notes, it is intended to provide sufficient specifics to enable to the parties to respond to them. But in my view, it falls short in one very significant way.

Now, let's take a look at something else in the 09:21:33 rules. To gain class certification status, Rule 23 contains very specific requirements to ensure that the proposed class representative and the class lawyers will adequately represent the interests of the class.

Rule 23(a) requires that the claims and defenses of 09:21:50 the representative parties be typical and that the representative, the class rep, if you will, will fairly and adequately protect the interest of the class.

Rule 23(g) contains numerous requirements for the appointment of class counsel, and among them of course also is 09:22:09 a factual showing and a determination by the court that the class lawyers will fairly and adequately represent the interests of the class.

Now, these rules ensure that people who affect the interest of class members, the representatives and the 09:22:27 lawyers, satisfy basic requirements in order to make sure they're acting on behalf of the class and not their self interest. We spent a lot of energy in class practice making sure of that.

Now, contrast that to the situation of an objector. 09:22:44 These detailed rules do not apply to them, yet when an

09:22:49 objection is filed, when it is pressed before the district court and when an objector lodges an appeal, the substantial rights of all of the class members are immediately affected. Objections can incur the expenditure of class resources, they 09:23:04 can delay proceedings, and they can stall the issuance of relief to the class. And they urge changes that are not in the interest of the class either.

But under the rules, merely by filing an objection, an objector or his or her counsel can gain de facto status as 09:23:22 class counsel because they're affecting things, and -- period.

So in my view, what there needs to be is added some requirements to the rule to make sure that there is adequate representation. That if an objector comes forward, the objector will make, at the court's suggestion, a factual 09:23:44 showing that the objector is acting in the best interests of the class, and that if there's objector's counsel, that objector's counsel has to provide the factual showing that that objector's counsel qualifies to represent the interests of the class.

09:24:01 Accordingly, I would respectfully suggest the following addition to your proposed Rule 23(e)(5)(A), which would be as follows:

If an objection applies to a specific subset of the class or the entire class, the court may require the class 09:24:19 member filing such an objection to make a factual showing

09:24:24 sufficient to permit the court to find, one, that the class member is a member of the affected class; two, that the class member will fairly and adequately represent the interests of the class; and, three, that the counsel for such class member 09:24:37 is qualified to fairly and adequately represent the interests of the class.

Absent such a finding, the court may overrule the objection without considering it further.

My third and final comment is this: The nature of 09:24:53 the proposed rule change is that this body is considering evinced to me underlying them certain principles that are not often publicly stated, but which I think are shared on both sides of the V and are shared regardless whether you are a blue state or a red state person.

09:25:14 Rule 23 affords the federal judiciary an administrative tool of enormous power. Our increasingly complex and consolidated economy brings about legal disputes with far-reaching consequences. We need jurists to be empowered to administer and adjudicate these large-scale 09:25:36 disputes fairly and efficiently across large populations. We lean heavily on the judiciary to provide the forum to enforce complex environmental, civil rights, racketeering, consumer and antitrust laws.

Now, as my understanding that proposals not in 09:25:53 your -- your proposed rule, but other comments have come

09:25:57 forward and seek to curtail, perhaps significantly, the power of the federal judiciary to do its job. And what I would submit to this committee is this: That attacks to constrain judicial power must be based upon a clear and convincing 09:26:21 showing that there has been a documented abuse of judicial power. Absent a documented abuse of judicial power, this committee ought not consider rules changes that are intended to curtail the ability of the judiciary and judges in the United States to do their job under Rule 23.

09:26:47 Thank you.

JUDGE BATES: Thank you, Mr. Sobol.

Questions?

JUDGE ERICKSEN: I have a question.

JUDGE BATES: Judge Ericksen.

09:27:00 JUDGE ERICKSEN: What would be the standard by which a court would make the factual sufficiency finding that would be required under your proposed amendment to the proposed amendment of 23(e)(5)(A)?

MR. SOBOL: I think that you would simply bring for 09:27:16 the class -- for the objector, as opposed to the objector's counsel, for the objector, you would bring in the same standards that you've applied to class representatives; i.e., that the objector has a claim that is typical and that the objector has made a documented showing that he or she will 09:27:35 fairly and adequately represent the interests of the class.

09:27:39 It's the same thing to requirements under Rule 23(a) for class representatives would be important to the objector.

JUDGE ERICKSEN: It would be for simply a subcategory; right?

09:27:51 MR. SOBOL: Yes. Yeah. And then for -- obviously for class counsel, if you go and take a look through the rule of 23(g), some of those requirements don't translate as conveniently, if you will, to objector's counsel.

JUDGE ERICKSEN: Right.

09:28:06 MR. SOBOL: But the overall one does, which is that the class counsel has made a factual showing not only that they will act on behalf of the class, but that they are qualified to do so.

JUDGE CAMPBELL: Following up on that point, it's an

09:28:29 interesting idea, but here's the issue that is rather hazily in my head. I'm not sure I can articulate it clearly.

When class counsel and class representatives are approved at the beginning of the case, the judge knows little, if anything, about the nature of class, the nature of the

09:28:54 claims, how the case is going to proceed. It seems to me at that point where you're launching a class action, it's critical that the person representing the class and the lawyer representing the class are adequate to represent the class.

Usually, when you reach the point of settlement,

09:29:11 you're down the road aways, there's been litigation, the judge

09:29:16 has a much better sense of the class, the judge has a clear sense of what the proposed settlement is, and has heard from both sides about why it will benefit the class. It seems to me that at that point in time the judge is much better 09:29:29 equipped to determine whether an objection is or is not in the interest of the class.

Why, then, should the judge at that point say, I'm not going to consider the objection until you prove to me that you're a lawyer who can adequately represent the class, or 09:29:46 class member who can adequately represent the class? Why can't the judge look at the objection in the context that is now much more clear and assess whether or not it is to the benefit of the class?

MR. SOBOL: Sure. So I'm glad you raised that issue. 09:30:01 The proposal that I put out is a "may," not a "shall," from the district court's point of view. So if the district court, if she found herself at a point in the case where there was no real need to go through additional fact-finding regarding an objector or objector's counsel, then the court, under my 09:30:19 proposal, wouldn't exercise its discretion to do so.

However, there may be situations where the court at that point, that far down the road, knowing or being able to -- or believing there might be some issue regarding the objector or the objector's counsel, because the rule provides 09:30:41 this "may," that the court may either challenge the

09:30:46 bona fides, if you will, of the objector, as a member of the class or the -- and challenge the bona fides of the objector's motivations and/or the same thing with counsel. But there are circumstances where that would be the case, where the court 09:31:02 would wanted to that.

And I think the rule embodying that kind of a "may" option provides clarity, I think, that -- and brings home, I think, the reality, right, which is that the objector is affecting the interest of everybody simply by being there and 09:31:22 raising a claim which they have now, under your proposed rule, declared themselves as being something that they intend to affect the class they're a member of.

JUDGE BATES: Parker.

MR. FOLSE: I have a similar concern to 09:31:37 Judge Campbell, but I'll flip it around a little bit.

Are you suggesting that -- one observation I have is that it would provide your proposal one more ground of litigation over objections that are filed. Conceivably, could even lengthen the process even further.

09:31:58 But are you suggesting -- let's take an example where there is an objection that is lodged. Just looking at it on its face within the context of the case and the court's knowledge of it that Judge Campbell alluded to, which should be superior at that point, it is a decent objection, it is one 09:32:19 of concern. One that the court might think ought to be

09:32:23 addressed for the best interest of the class.

Are you saying that the court would have the authority to say, No, I'm not even going to consider this because I've got some suspicion about the motivation behind
09:32:39 the lawyer or the person making the objection? Why should their motivation matter, as opposed to the substance of what they're telling the court as a matter of concern about the proposed settlement?

MR. SOBOL: I think that in the circumstances where
09:32:53 the face of an objection shows a legitimate consideration that the court wants to investigate, that that's sufficient in and of itself to trigger the court's independent obligation on behalf of the class to exercise its fiduciary duty to investigate that issue, regardless of the ad hominem from
09:33:13 where it came from.

Again, that's why I think that the proposal I'm putting forward is instead something where someone is raising an issue and the court does have legitimate interests, legitimate concerns about the bona fides of either the
09:33:28 objector or the objector's counsel, in those circumstances, not in the circumstance where the objection on its face shows it, it's appropriate to undertake this inquiry.

And the inquiry in many situations does occur eventually, though it's not occurring under the auspices of a
09:33:44 rule; right? So the bona fides of objectors or objector's

09:33:48 counsel is litigated from time to time in cases. This is an effort to try to memorialize that in some kind of a way in the rule.

JUDGE BATES: Judge Young. Use the microphone.

09:34:07 JUDGE YOUNG: You think -- if a judge has concern about the bona fides of the objection, you think that the judge lacks or requires some sort of structure to exercise that discretion? Is that what you're trying to do here?

MR. SOBOL: No. I think like many aspects of the 09:34:26 proposed rule changes that are out there, the power is inherent already in the court.

JUDGE YOUNG: Yeah.

MR. SOBOL: And so then the question ends up being in a situation where the power is inherent in the court, what 09:34:40 would the purpose be of a rule change to make that more explicit?

JUDGE YOUNG: If that's what a --

MR. SOBOL: Yeah. Fair enough --

JUDGE YOUNG: -- circumstance where I have the 09:34:48 authority and the concern that I wouldn't exercise my discretion to inquire into the bona fides --

MR. SOBOL: Right. And I think that in -- much like, for instance, the rule change that seeks to make explicit an inherent power of the court with respect to the adequacy of 09:35:06 the distribution mechanism, because the rule change seeks to

09:35:09 embody that now, I think similarly there's a need to embody explicitly the inherent power of the Article III jurist to inquire about the bona fides of either the objector or his or her counsel.

09:35:23 JUDGE YOUNG: But the proposal you make seeks to frame how that inquiry is made, not to restate the obvious, you have the power to do so.

MR. SOBOL: I had intended it to be the latter, to be the -- articulating the power to do so and not to in any way 09:35:42 guide the discretion or to force it -- of the inquiry on the judge.

JUDGE BATES: Parker.

MR. FOLSE: One more quick question. At the end of your comments you alluded to other comments that we've 09:35:56 received that you said -- that you characterized as urging a restriction on the power of the judiciary without documented evidence of abuse of such power, but you didn't -- I wasn't clear what you were talking about. Can you give me an example of what is concerning you and you think ought to concern us?

09:36:20 MR. SOBOL: Sure. So I think that there are comments to the rules committee and efforts before other branches of the federal government to limit the scope of federal jurists with respect to Rule 23. And in particular, to limit the scope of federal jurists to adjudicate class actions where the 09:36:43 damages vary among class members. And that would be a

09:36:47 catastrophe for enforcing the laws and enabling the judiciary to do its job.

And any kind of a Draconian rules change like that or legislative action or executive action undermines what I 09:37:09 consider to be fundamental principles that are shared regardless of whether you are red state or blue state, regardless what side of the V you're on, because this group -- and lawyers take very seriously how to tailor the use of Rule 23. And just sweeping it aside as if it's a nuisance is, 09:37:30 in my personal view, anti-American.

JUDGE BATES: Thank you, Mr. Sobol. We appreciate you coming very much.

MR. SOBOL: Sure.

MR. BARKETT: Are we going to receive written 09:37:42 comments?

PROFESSOR MARCUS: Mr. Sobol, it would be useful if you would supply the exact language you mentioned.

MR. SOBOL: Yes. My partner tells me the one typo I have is in the spelling of my firm's name.

09:37:57 PROFESSOR MARCUS: We'll keep that in mind.

JUDGE BATES: We look forward to your comments as well.

Next witness will be Jocelyn Larkin.

MS. LARKIN: Good morning. My name is Jocelyn Larkin 09:38:08 and I'm the executive director of the Impact Fund.

09:38:10 The Impact Fund is a legal nonprofit providing support for impact litigation to advance economic and social justice. We've been around for about 24 years. We provide support in the form of grants, training to lawyers, consulting help, as well as we litigate some of our own cases, generally in the areas of employment discrimination and civil rights.

I am also a member of the ABA Federal Practice Task Force, which will be submitting comments next month, but I'm here speaking only on behalf of the Impact Fund today.

09:38:46 Before turning to the rule amendments, I wanted to thank the committee for the outreach that was done in connection with the Rule 23 changes. The Impact Fund holds an annual class action conference with about 125 class action practitioners, both from the nonprofit area and from the private bar, and many of these are lawyers who are focused on injunctive relief cases on behalf of the poor, persons with disabilities, foster children and the like.

And a number of members of the Rule 23 subcommittee came and spoke with our committee -- our conference attendees to get their thoughts about changes to Rule 23.

I think it's really important that the committee does hear from a wide range of constituencies, and I very much appreciate that outreach effort that was made.

I also want to say in general we're extremely enthusiastic about the proposed changes, and my comments are

09:39:47 just some suggestions that I think might improve them, but generally we think they are very good.

Focusing first on notice, we very much favor the change that expands the range of methods that can constitute 09:40:02 best practicable notice. We particularly appreciate that the comments recognize that some segments of the population do not have access to electronic methods of communication, hopefully yet, and that that needs to be taken into account, so that the notice obviously needs to be tailored to the actual class 09:40:25 members.

Earlier in my comments I raised a concern -- in comments I submitted to the committee in 2015, I raised concerns generally about the readability of notices. Currently the rule requires that notices be clearly and -- 09:40:43 that notices clearly and concisely state in plain, easily understood language the requirements for notice. It's fair to say that that, despite the very explicit requirement in the rule, it has been a failure. Ordinary people cannot read or understand class notices.

09:41:04 We have conducted focus groups, and generally there's a high level of cynicism about class actions in part because when people receive the notices, they don't understand them.

The new proposed comments add what I would call some sort of tepid commentary or direction to the courts about 09:41:24 giving careful notice to the content in the format of notices

09:41:27 and differentiate between notices that go to sophisticated class members, such as in securities class actions, as opposed to less sophisticated class members. I've read many of those securities class action notices, and no one, no matter how 09:41:41 sophisticated they are, should have to read anything like those.

This is a missed opportunity. And I think it suggests that the status quo is acceptable. And I have to say class notices are just unreadable by anyone who is not a 09:41:56 lawyer.

My suggestions for perhaps augmenting the comments would be that judges should be presented with notices typed exactly as they will appear so that the formatting is not done in extremely small typeface with little margins.

09:42:14 I would suggest that counsel should actually make an affirmative showing that notice is, in fact, readable at the level of a typical class member. I also think that the comments could encourage the use of good design and graphics.

I would like to make another suggestion, which is 09:42:29 that the Federal Judicial Center go back and update its model class notices, which I think were an excellent start. The thing about having that model notice is that there can often be a lot of controversy between the parties about what a notice should say. But when you have a model notice, that 09:42:51 starts as the baseline and the parties negotiate away from

09:42:56 that. So for us it is very helpful to have those model notices.

I think they could be updated significantly from where they were done a number of years ago simply because we 09:43:05 know a lot more and we have the capacity, for example, to include design, graphics, hyperlinks to glossaries, things that would be helpful. I think also those model notices --

PROFESSOR MARCUS: Can I ask a question about that?

MS. LARKIN: Yes.

09:43:25 PROFESSOR MARCUS: Would the sorts of improvements you're talking about be likely to work with first-class mail paper notice?

MS. LARKIN: So hyperlinks definitely would not. Obviously the notices could include links that people could go 09:43:36 to if they did have access to additional information that's online, but there's no reason that a first-class notice couldn't include a graph or different sorts of charts with -- or means of conveying information that would make it easier for people to understand.

09:43:59 PROFESSOR MARCUS: All I'm getting at is the concerns you're raising aren't particularly linked to the manner or mode of giving notice.

MS. LARKIN: They are not. My point is the committee's looking at Rule 23 at the moment, and this is a 09:44:13 moment to remind people they need to do a whole lot more,

09:44:16 given what the notices now look like.

MR. BARKETT: May I interrupt also, since Rick started?

MS. LARKIN: Yeah.

09:44:26 MR. BARKETT: So, Jocelyn, I'm curious. You have, obviously, samples. Why don't you and your colleagues get together and put together forms of model notices that are effective, because the AO has a website, the Federal Judicial Center has this model notice. I don't understand why you 09:44:45 wouldn't be feeding this information directly so that these things could go on the website and judges can see this is what works, this is what doesn't work.

What's going through my mind is what can we do by rule versus what can we do by example that judges can draw on. 09:45:06 And if you've got four or five sample notice forms that have really reached the people that you have described as not being able to read these notices or understand these notices, what are we waiting for? We don't need to wait on a rule to get that onto a website for judges to look at to compare what is 09:45:24 being presented to them.

MS. LARKIN: That's a perfectly good point, and I actually -- as I was putting these together, I was thinking about that.

I think -- there's a couple of things. First of all, 09:45:32 I'm in the area of civil rights. There are a lot of different

09:45:35 notices and there are different, I think, areas that would need to be addressed. I also think it is important, though, for judges to see something that comes from the Federal Judicial Center. So I think we certainly could help, and I'd 09:45:47 be happy to assist in terms of developing those model notices in a number of areas.

So let me turn now actually to the new factors in connection with the decision to approve a settlement notice. One of the factors -- the new factors that's articulated to be 09:46:09 considered is whether the -- or not a particular settlement provides equitable treatment of class members. So 23(e)(2)(D). And I think the inclusion of that factor is really important, and I compliment the committee on including it.

09:46:27 In terms of the calls I get from practitioners, I would say this is the number one question that I'm asked when people are negotiating settlements is, is it okay if different segments of the class are treated differently, and how do I go about, as a lawyer, valuing how -- you know, what one group of 09:46:44 claimants claims are worth rather than others. So I favor its inclusion.

I think the comments are very useful in clarifying the -- what that -- what those considerations should be and how those differences should be taken into account in terms of 09:47:00 the value of claims and also the impact of the release.

09:47:03 I think the rule language is a bit awkward, though. And when I first read it, I was a little troubled by it. It says, "Class members are treated equitably relative to each other." And -- in passive voice, and it is not clear, sort of
09:47:18 equitably treated by whom?

And so my suggestion, which is really just a reformulation, not changing it in any way, would be that the proposal treats class members equitably relative to the value of their claims.

09:47:40 And I will submit written comments with that language in it to make it easier for you.

So finally, I just wanted to bring to you, last month I was invited to speak to about 200 lawyers for the Northern California Federal Bar Association about the Rule 23 rule
09:47:58 changes. And there were two questions that came up in the course of my presentation which don't necessarily affect the Impact Fund, but I thought it was worth bringing them to you because they were interesting.

One of them had to do with the disclosure early on of
09:48:15 side agreements. So in connection with what was formerly known as preliminary approval, now the decision to provide notice. There's one particular kind of side agreement, one that is in agreement between the parties about the number of opt-outs that might occur and whether that would give the
09:48:40 defendants the opportunity to back out of a class settlement

09:48:42 if there were essentially too many opt-outs. I think it's colloquially known as the "blow up" provision. Often, those are filed under seal to avoid anyone who might be opportunistic about opting out a number of class members.

09:48:59 The comments seem to suggest that all of the information that is provided to the court in connection with the decision to give notice should be made available to class members. So someone raised the question with me, Well, does that mean we can no longer put those agreements under seal?

09:49:15 I don't see any reason why they couldn't still be under seal.

So the language in the comment that raises the point, it says: At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the

09:49:26 court with all available materials they intend to submit in support of approval. This would give the court a full picture and, quote, make this information available to members of the class.

So that was the point that was raised.

09:49:38 The second point that came up was the question about what exactly would be the grounds for approving payments to objectors. So I went back and looked at the comments. And it does mention one circumstance, which is the circumstance where an objector's comments had provided some useful information to

09:50:02 the court that had better allowed it to evaluate the

09:50:08 settlement.

But I think the question was that was raised are, are there any other grounds, and how would a judge decide that? I don't particularly have an answer to that question. But it 09:50:18 did seem to make people queasy trying to figure out what might be -- what kind of payment might be approved.

I obviously have no interest in having serial objectors come in and be given payments at all, but the question was what might be the circumstances or the standard 09:50:33 that the judge would use to decide whether a payment should be approved.

JUDGE BATES: Ms. Larkin, let me take this opportunity to extend the committee's reciprocal thanks to you and your organization, and to the others and their 09:50:48 organizations, for your participation in the entire process of the rule amendments conferences and other things that have been invaluable to us in considering and developing those rules.

Any questions for Ms. Larkin?

09:51:04 PROFESSOR MARCUS: I sense that the cases in which -- that the Impact Fund has brought and those on which it consults may be of a different sort from many of the others that we hear about here. I wonder if in the cases that you're familiar with you've encountered a serious problem of what 09:51:25 we've been calling bad faith objectors, holdup artists.

09:51:30 MS. LARKIN: No. No. I mean, in injunctive relief cases, there's simply -- the money is not an issue, and often the attorneys' fees are based on a statutory fee rather than a common fund. So typically no.

09:51:46 JUDGE BATES: Other questions?

Ms. Larkin, thank you very much. We appreciate it.

Our next witness will be Michael Nelson.

Good morning, Mr. Nelson.

MR. NELSON: Good morning. My name is Michael

09:52:11 Nelson. I'm a partner in the law firm of Sutherland Asbill & Brennan, and I chair the firm's class action group. I've testified in front of committees like this on several occasions. In fact, I date myself a bit by recalling testifying on the class action reform initiatives that

09:52:30 ultimately became part CAFA some twenty-some years ago.

I applaud the committee for its work on these kinds of initiatives. It's wonderful to look back after you've seen progress in the rules and think that these processes help bring those kinds of changes.

09:52:51 I'm associated with the Lawyers for Civil Justice, although I'm not speaking on LCJ's behalf. I absolutely support the position that they've taken in their White Paper of October 3rd.

I would like to focus at this point not so much on

09:53:08 one of the proposed rule changes, but what one of the proposed

09:53:14 rule changes should be. Specifically Rule 23(f) as a mandatory appeal.

I think the time has come for us to embrace the idea that 23(f) as it's currently constructed is not working. Very 09:53:29 few interlocutory appeals are granted on this issue. Or petitions to take interlocutory appeal. And some circuits have never, not once, allowed a petition to go forward. There's something wrong when one circuit's never done it.

If we think about what happens in a class action 09:53:58 scenario now, the court, after conducting rigorous analysis, has decided the class is certifiable or not, and then absent Rule 23(f), the case proceeds through the notice process, which we just heard about, is getting more and more complicated all the time.

09:54:18 As a practitioner standing in front of the court trying to argue what the notice should say, who the notice should go out to, the means the notice should go to, meaning how it's going to go to those parties, the administration process, who's going to pay for it, then moving past that, 09:54:40 what that trial's going to look like, and then what the appeal of the trial as merits of the trial looks like, in addition to the appeal of the class certification that the defendants would argue should have never happened in the first place. It's an inefficient process to put review of the class 09:55:02 certification after a trial.

09:55:07 A lot of courts need training on how these elements fit together. Where would we be without *In Re Hydrogen Peroxide* where Judge Sirica in the Third Circuit explained what rigorous analysis was and how to deal with experts and 09:55:32 the extent you look at pleadings as you consider class certification issues. And that was done through the Rule 23(f) procedure.

That would have been a very complicated antitrust case to try absent that Rule 23(f) presentation and the 09:55:57 decision that came down. And then it would have been a much more complicated appeal because we would have been litigating class certification issues at the same point we would have been litigating merits issues.

So I do think that the rule should be changed so that 09:56:18 the rule says "must" or "shall" or "should." I think back to some of the discussions we've had on motions for summary judgment when we got tied up in knots on those words. But mandatory as opposed to completely discretionary.

And as far as the discretionary action expect of 09:56:37 this, the court is allowed discretion that is really unfettered and boundless. The appellate court. There's really no guidance to them, either in the rule or in the comments, as to what they should consider.

Some courts have carved out some rules where things 09:56:57 like death knell is one of the things to consider. I can tell

09:57:03 you as a party that is routinely drafting these type of petitions, trying to explain what a death knell looks like when you're trying not to prejudice your position in litigation to a court is nearly impossible.

09:57:23 And then generally when you do get a written opinion denying the petition, the court says, Well, we're not convinced it's death knell. That's a big company, they can weather the storm. When really, we should be looking at whether or not, not just the corporation, but the absent class

09:57:44 members who are going to be getting notice and are getting wrapped up into this process, are being served justice by being brought through the legal system when class certification wasn't done properly because either the appellate court didn't want to take it, never takes them, or

09:58:07 didn't see it as a death knell.

The time to address this most important part of class certification is when it gets certified. The judge did a great job, fantastic. The court simply says, See that you followed all the rules, did the rigorous analysis, the

09:58:29 plaintiffs demonstrated how this was manageable. We're satisfied.

If the court's already looking at a petition, how much more is it a draw on judicial resources to have them actually review the certification process? And it's

09:58:49 fundamentally fair to both sides. Because if the plaintiffs'

09:58:52 request for certification is denied, I'm sure they'd like to have their day in court on that issue sooner rather than later.

So I do think the time is right to address that now. 09:59:07 I realize that is not in the proposed rule changes. I do believe you have the authority to make these changes now without having to go back and start the process over again.

Those are the comments I have today. I will be following up with separate comments on these points following 09:59:29 this testimony, and I thank you very much for your time.

JUDGE BATES: Thank you, Mr. Nelson.

I have one question. Are there statistics -- I know this doesn't cover the universe, but are there statistics on the number of cases in which an appellate court has declined 09:59:43 to consider an appeal, interlocutory appeal on class certification, but has later decided that the class was improperly certified on an ultimate appeal? Are there any statistics on that?

MR. NELSON: I haven't seen a study that talks about 10:00:01 it from that perspective. I see it from the standpoint of how many petitions have been allowed.

JUDGE BATES: Are you aware of cases in which that has happened?

MR. NELSON: No, I'm not. Because, again, most of 10:00:12 these cases, when certification does happen, frankly, cases do

10:00:16 settle.

JUDGE BATES: I know that, and that's why I say it doesn't cover the universe of cases, but I'm just curious if there are any such cases that you're aware of.

10:00:24 MR. NELSON: As a practitioner, I can tell you within a couple days of receiving certification I'm getting a phone call from plaintiff saying, Okay, how about settlement now? Cases with billion dollar exposures.

JUDGE BATES: Other questions?

10:00:41 MR. BARKETT: So is your proposal in 23(f) where it reads the Court of Appeals may permit an appeal from an order, you're suggesting it should read Court of Appeals must permit?

MR. NELSON: "Must," "shall," "should." Again, that gymnastics of the words has been difficult when it concerns 10:00:57 summary judgment, but it should be not something that is at discretion of the circuit court.

MR. BARKETT: And why do you believe we can make this change now under this package without having to go back to republish it? It strikes me that that's a rather significant 10:01:13 change.

MR. NELSON: That is a significant change.

MR. BARKETT: The appellate rules committee may also be interested in this as well.

MR. NELSON: I imagine they would, and certainly they 10:01:25 would be well served to take some testimony on this as well,

10:01:28 but from the standpoint of the authority, I think the courts have been given the authority by Congress under Class Action Fairness Act to make these sort of changes now without it going through a rule-making process.

10:01:48 MR. BARKETT: I'm sorry, the courts have been given authority?

MR. NELSON: Yes, I think there's statutory allowance for these kinds of changes to Rule 23 now.

PROFESSOR MARCUS: As I recall, not long after 23(f) 10:02:01 came into effect, the Seventh Circuit, in a case called *Blair v. Equifax*, articulated an approach to whether or not to grant a petition that many other courts found useful. Are you urging that this committee should articulate what standards the courts use? "Must," it seems to me, doesn't require 10:02:31 standards. "Should" -- we're not allowed to use "shall" anymore. The other words probably do. And that strikes me as something of a challenge. There's a widely accepted standard already out there. Do you think the standard out there is wrong?

10:02:52 MR. NELSON: Well, the standard fundamentally starts off with the fact that the court has discretion. If you remove that discretion, you make it a mandatory appeal --

PROFESSOR MARCUS: "Must" doesn't need a standard.

MR. NELSON: "Must" doesn't need a standard. If 10:03:08 you're not going to go as far as "must" or "should," then I

10:03:10 think at the very least commentary about what appropriate standards should be considered would be helpful.

And with all due respect to the death knell approach, I can tell you that I think that's just a crazy exercise. And 10:03:26 as a practitioner trying to describe why something is a death knell to a corporation or to the litigation, it's nearly impossible to do that. And it also becomes something where somebody on the other end with absolute discretion can say, I'm just not satisfied. When it really should be about 10:03:51 whether or not the class was appropriately certified.

MR. BARKETT: Will you being submitting comments?

MR. NELSON: Yes.

MR. BARKETT: So when you do, just -- I'd be interested in just seeing the explanation as to why we have 10:04:07 the authority, because even if I agree with you, I'd want to make sure that I was comfortable that we have the authority to act without republishing and without running this by the rules committee, the appellate rules committee.

MR. NELSON: Thank you.

10:04:19 JUDGE BATES: Thank you, Mr. Nelson, we appreciate it very much.

Our next witness is Annika Martin.

Good morning, Ms. Martin.

MS. MARTIN: Good morning. And thank you for the 10:04:29 opportunity to testify today. My name is Annika Martin. I'm

10:04:34 a partner at Lieff Cabraser Heimann & Bernstein in the New York office. My practice focuses on representing plaintiffs in consumer fraud, environmental and product liability class actions and mass torts.

10:04:47 And I would like to first join the others who have thanked the committee for their efforts in considering these rule changes and putting together this package and reaching out to all of the stakeholders and various groups in the bar and embarking on a listening tour, as it was called. And I

10:05:10 was present for a couple of those, and I think they were really great opportunities for us to feel heard. And I'm sure that many others feel that way as well. So thank you for involving us in this process so fully.

And I think the result is a great package of

10:05:29 amendments that really has a lot of consensus, and I think many had expressed enthusiasm for many of the changes in the package.

So I just have two areas that I was going to focus on today. One is changes related to 23(e)(5) regarding

10:05:50 objectors, and they're just little tweaks. It's not a lot of big stuff. And then notice --

MR. BARKETT: Could you speak up.

MS. MARTIN: Sure. Yeah.

So as far as the objector section, there were just a

10:06:06 couple of additions I thought I would suggest to the language.

10:06:10 So in 23(e)(5)(A), I thought one way that judges could have some more information in order to determine -- I don't want to say good objectors and bad objectors, but learn a little bit more about the party that is objecting, would be in that 10:06:31 section to also require disclosure of prior instances in which that party has objected, if any, and what the outcome of that was. It's not particularly burdensome to make such a disclosure. Already there's discretion to allow discovery into objectors. So I think adding that into 23(e)(5)(A) could 10:06:55 provide some useful information to judges when considering objectors and the bases for their objections and their motivation.

PROFESSOR MARCUS: Do you sometimes pursue discovery regarding who is making objections, the people who are making 10:07:15 objections?

MS. MARTIN: Yes. Absolutely.

PROFESSOR MARCUS: And would this addition facilitate additional discovery efforts of that sort?

MS. MARTIN: I think so. I mean, I think making a 10:07:28 disclosure at the outset would educate the parties and the court from the outset as to what prior objection activity that party and/or their counsel has engaged in. And legitimate objectors that may have objected more than once, I don't think that that's particularly burdensome, and I think that you will 10:07:56 see that they have added value to various cases. Even if they

10:08:01 are a repeat objector, that doesn't mean they're not repeatedly adding value when they're objecting. So I think it would be a useful mechanism to educate parties and the court.

JUDGE CAMPBELL: Can I ask a question on what you 10:08:15 just said. You just said "and/or their counsel." So are you suggesting this should require disclosures not only for the class member who is objecting, but also for the attorney representing the class member?

MS. MARTIN: The language as it says now, I believe, 10:08:30 restricts it only to the objector. I would certainly like to have information on the counsel as well. But, you know, if the limitation was just the objector, that would also add value.

MR. BARKETT: I'm sorry, can I just follow up on 10:08:52 that?

MS. MARTIN: Sure.

MR. BARKETT: You said "party." The rule reads any class member may object to the proposal, the objection stated, et cetera.

10:08:57 So when you say "party," you're referring to the class member, referring back to the word "class member" in 23 and 5(a)?

MS. MARTIN: When I said "parties," I meant the parties to the class action that would be educated.

10:09:14 MR. BARKETT: That's objecting.

10:09:18 MS. MARTIN: Yeah.

PROFESSOR MARCUS: Do you think Mr. Sobol's suggestion about a required or suggested screening of counsel for objector at that point is productive?

10:09:33 MS. MARTIN: I think it could be productive and --

PROFESSOR MARCUS: Could that also be the beginning point of additional discovery?

MS. MARTIN: I think so.

As for 23(e)(5)(B), I have one small suggestion on 10:09:54 the language of this proposed change, just to close what I think may be a loophole in it. So right now it refers to payment to an objector or objector's counsel. And I just think that by changing the language -- because right now there are some groups, nonprofit groups, that are related to 10:10:21 objectors or serial objectors or those who represent objectors, and I don't think that they would be covered by the current language, and I think that they should be.

So I think that one way you could change the language easily would just be to say, instead of saying "court approval 10:10:38 required for payment to an objector or objector's counsel," it could just say "for payment related to withdrawing an objection," or something similar. That doesn't limit it to the objector and objector's counsel, but instead allows it to just be payment related to the withdrawal of the objection. 10:10:56 And there's --

10:10:59 PROFESSOR MARCUS: So what you're suggesting, then, is to delete the words "to an objector or objector's counsel"?

MS. MARTIN: Yeah, and replace it with something like "related to an objection," or something similar.

10:11:20 PROFESSOR MARCUS: Well, do you even need those words to achieve your goal?

MS. MARTIN: No, you could just delete it, if you'd like. Sure.

PROFESSOR MARCUS: Well, I'm just trying to get a

10:11:29 feel for what you're --

MS. MARTIN: No, no. My goal is to not limit it to objector and objector's counsel.

So, for example, later in the body of the rule, of the proposed rule, where it says "other consideration may be

10:11:39 provided to an objector or objector's counsel in connection with," there, I think, you can just delete "to an objector and objector's counsel."

But in the first line of the rule of (B), I think you may need something there, otherwise it just says "court

10:11:55 approval required for payment." So that was my thought process in adding "related to withdrawal of an objection" or "related to an objection."

MR. BARKETT: You could say the same thing, "court approval related to withdrawal of an objection."

10:12:13 MS. MARTIN: Sure. My goal is just to avoid limiting

10:12:15 to objector and objector's counsel so that we can also include other organizations that may be benefiting serial objectors.

So those were the two tweaks I had for the section on objectors.

10:12:33 With regards to the notice change, 23(c)(2)(B), for what the rule is right now, it appears to me that the committee's goal was to formally allow in the rule what some judges are already doing in practice, which is to allow notice by electronic means when it's appropriate for the

10:12:56 circumstances of the case, when it meets the standard of best notice practicable, and including individual notice where possible.

I think that in the comments, you have put in a lot of language that confirms the court's discretion to consider

10:13:17 various types of technology, but still to be considering it on the basis of what is best for this particular case and circumstances and the population that you're trying to reach, and I think that the language there is good.

I think that the changes that have been proposed deal

10:13:38 solely with the means, and I think some of the comments deal with more content related aspects of notice.

And I do agree that there could be additions to the language and the commentary that would address content and substance of the notice, but as for what is here just

10:14:06 concerning means and formally allowing courts to consider

10:14:12 electronic means, I think the language that the committee has put in here is good.

And if the committee chooses to expand into commentary about substance, I would support that. But in 10:14:30 terms of expanding means of notice and formally codifying that electronic means can be used, I think the language the committee has chosen is good.

JUDGE BATES: Thank you, Ms. Martin.

Do we have any questions -- or further questions for 10:14:47 Ms. Martin?

Mr. Marcus.

PROFESSOR MARCUS: I'll ask you something I asked earlier. Are you familiar with use of banner ads --

MS. MARTIN: I am.

10:14:57 PROFESSOR MARCUS: -- in conjunction with other means of giving notice or as a sole manner of giving the notice?

MS. MARTIN: I have not used it personally, but I have -- I'm aware of cases where it has been used. I don't know of any cases off the top of my head where is was the sole 10:15:13 means of notice.

I think that certainly there are concerns and, you know, there's developing area here about what kind of actual clicks banner ads may have.

I do think that it may not be the role of the rule 10:15:37 and the commentary to get into the weeds that far in terms of

10:15:42 policing or making a judgment as to specific types of technology. I think that may be why the committee drafted it in a broader way to allow for types of technology that we don't yet know about or -- you know, there are other
10:16:02 electronic means that are not banner ads.

You know, your car can be sent a message from the dealer that it needs to come in for a recall. That could be considered individual notice by electronic means. If you have an app on your phone that can give you notification that you
10:16:19 should collect your $2 that they overcharged you, that could be individual notice by electronic means. It doesn't need to just be e-mail.

And I think the committee was wise in drafting broadly, too, so it's not out of date tomorrow, as technology
10:16:35 changes.

I do think that by allowing the courts discretion and confirming that their authority is to carefully look at what the notice is and how it fits with the case and what is best practicable and to include the individual notice if that's
10:16:58 possible, I think all of those elements are still in there and confirmed in what the committee has here.

So I don't think that getting into the weeds on particular types of technology is necessarily productive, and I think the courts can handle that.

10:17:12 JUDGE BATES: All right. Without any further

10:17:13 questions, thank you very much, Ms. Martin. We appreciate your testimony.

MS. MARTIN: Thank you.

10:17:21 JUDGE BATES: And we're halfway through the anticipated witnesses, so maybe it makes the most sense to take our break for the morning at this point. Why don't we resume at 10:30, which is in approximately 12 minutes. Thank you.

(Recess taken from 10:17 to 10:29.)

10:29:34 JUDGE BATES: Welcome back, everyone. We are ready to resume, and we will now hear from Todd Hilsee.

Good morning, Mr. Hilsee.

MR. HILSEE: Good morning, Your Honor. My name -- morning, all of Your Honors. Thank you for the opportunity. 10:29:53 My name is Todd Hilsee, and I will be playing the role of the monkey wrench on the notice question this morning.

I am a class action notice expert. I appeared before this committee in 2002 in support of plain language amendment to Rule 23(c)(2), and upon the request of the committee, I 10:30:12 assisted the Federal Judicial Center pro bono to develop model notices that have been adopted in hundreds of class actions.

In 2010, I again served the FJC pro bono to develop a judge's checklist of best practices in class action notice and claims processes, which has been increasingly cited and relied 10:30:34 upon in court opinions.

10:30:35 I'm here because I care.

For the reasons detailed in my written comments, I'm respectfully opposed to the proposed new sentence in Rule 23(c)(2)(B) that states, quote, the notice may be by 10:30:48 United States mail, electronic means, or other appropriate means.

And I'm opposed to the committee notes that accompany that sentence, specifically those that suggest electronic means may be, quote, more reliable than postal mail.

10:31:04 That idea is not supported by research or data. In fact, first-class mail notices are more likely to be opened, read, and responded to than electronic notices.

The most basic point I want to make is this: The rule need not change. It requires individual notice when 10:31:22 class members are reasonably identifiable, as it should. It does not specify any means of doing so. It is already flexible.

But the rule should not change. If one of the committee notes is correct, the one stating, quote, Many 10:31:37 courts have read the rule to require notice by first-class mail in every case, then the only reason for the proposed rule change is to encourage means other than first-class mail.

This would be encouraging means that are far less effective and less reliable than properly designed first-class 10:31:57 mail.

10:31:59 In addition to the consistent research and data that I have cited in my written comments, I have now, at my own expense, commissioned a nationwide study so that class members themselves could inform the rule. A statistically significant 10:32:14 study among 3,187 respondents, men and women of all ages from all over the United States indicates to a 95 percent confidence interval, and only a 1.8 percent margin of error that most adults, even millennials, find first-class mail more reliable, more reliable, than electronic means for class 10:32:36 action notice, and overwhelming percentages expect to receive a class action notice by first-class mail when their address is identifiable.

Notably, the respondents were all online adults. Online adults who all use e-mail.

10:32:54 I have boards that I will show at the conclusion of my comments to pass around, and a link to the entire study is included in my written comments. I will be providing additional comments before the deadline of the entire study for the record.

10:33:13 Your Honors, the current rule already allows e-mail in appropriate circumstances. I've been practicing for more than 25 years, and, in fact, the courts regularly approve many different forms of notice under the current rule when mail is not reasonable. But the rule change would promote e-mail in 10:33:31 lieu of postal mail, even when first-class mail is available

and even though e-mail is not better.

Just because we use e-mail with family and friends and colleagues does not mean we open e-mails sent in bulk from unknown vendors that send mass e-mailings on behalf of claims administrators. If those e-mails even get past spam filters that divert them to trash. There is hardly a comparison of reliability.

Data shows that as low as only 7 percent of such bulk e-mails are opened as compared to U.S. Postal Service studies indicating 78 percent of even the mail we perceive to be advertising is read or at least scanned.

All mail must be delivered to us by law, and there is no spam filter on our postal mailbox. People do not grab all of the mail from their mailbox and drop it in the trash without a glance. Not when checks, summonses, jury notices, citations, IRS letters, and other important communications which consumers expect to receive by mail may be in there.

This rule change would also inappropriately legitimize other electronic notice in lieu of available postal mail. Notices that can be targeted to individuals, computers, and mobile devices. Notices called banner ads. These are the small ads, ads with 15 to 20 words that pop up on the internet cites we visit. These are the ads we generally ignore and that almost nobody clicks on.

On average, only 0.04 percent of the banner ad

10:35:11 impressions that are counted towards reaching people are ever clicked. Thus, only those who do click can ever be said to have received a Rule 23 compliant notice. This would be a massive downgrade in class action due process. But the mere 10:35:27 possibility of this rule change has already legitimized such means among vendors seeking to submit a low bid to win notice contracts, and the rule changes make this much worse.

PROFESSOR MARCUS: Just to clarify on that, you're aware of instances in which our preliminary draft has affected 10:35:46 judicial decisions on what form of notice to approve?

MR. HILSEE: I'm aware of affidavits sworn to by affiants in court cases advocating for internet banner notices because of the pending rule change.

JUDGE BATES: Are you aware of any case in which a 10:36:09 judge has adopted internet banner notices as a primary form of --

MR. HILSEE: I'd like to show one, Your Honor.

JUDGE BATES: Okay.

MR. HILSEE: It's like show and tell. It helps, 10:36:21 especially when there's a lot of questions about this.

Would be all right if I approach?

JUDGE BATES: Sure.

MR. HILSEE: I'm going to show you a banner ad down here in the bottom right corner. I'm going to show you the 10:36:36 manner which the average person sees a banner ad, I'll show

10:36:41 you the blowup of an internet page. Now I'm showing it to you very quickly. There's a reason I'm doing that.

JUDGE BATES: I hope the reason is not to quiz us on it later.

10:36:57 JUDGE ERICKSEN: Judges are prohibited from clicking.

MR. HILSEE: I'm showing all the pixels of this banner ad. You are deemed -- by media standards, you are deemed to have been reached if you see half of the pixels of a banner ad for one second. That is the standard for a viewable 10:37:15 banner that will count you as being reached.

You also will be reached, by the way, if this page loads on your computer but you click away from it as you're searching for the information you're seeking, which happens quite regularly. The fact is --

10:37:38 MS. CABRASER: That's the -- that's the *Remington Firearms* banner ad; correct?

MR. HILSEE: Yes, it was, Elizabeth.

That notice was advocated, was counted on, sworn to by a vendor in the case Ms. Cabraser just mentioned in lieu of 10:37:49 mailings to more than a million contact records, in lieu of seeking and searching available lists for millions of others. Hardly anybody filed a claim. As a result, seven and a half million of these products are out there today, could be picked up by a class member and, according to the plaintiff's 10:38:06 complaint and according to the documents the defendants -- the

10:38:09 defendant's documents, could injure and kill family members, the general public.

JUDGE ERICKSEN: With respect to banner ads, would that -- couldn't the argument be made that that just doesn't 10:38:27 qualify as other appropriate means?

MR. HILSEE: It's being advocated as such.

JUDGE BATES: When did this happen?

MR. HILSEE: When?

JUDGE BATES: Yes.

10:38:41 MR. HILSEE: In the particular case I just mentioned?

JUDGE BATES: Yes.

MR. HILSEE: In 2015. And it is happening regularly, Your Honor, in other cases.

JUDGE BATES: But not based on the proposed rule 10:38:54 change. Under the existing language of the rules.

MR. HILSEE: Under the existing language of the rules. Of course. The new rule is not in effect.

MR. BARKETT: If I can interrupt, I think we certainly take your point on first-class mail versus e-mail 10:39:15 and the reliability sentence that's in the notes, and I take your point, but it seems -- I read all of your submissions and they're all quite interesting and informative. It seems like you're describing a problem that currently exists, and maybe it's just in the consumer class action area. I couldn't quite 10:39:38 tell from your comments. Maybe it is broader than that.

10:39:41 But is there anything that you see right now in the notice area landscape that we can fix by rule? Is there something you think we ought to be doing that isn't in this package, or are there things in this package that we can
10:39:58 modify to solve a problem that you're seeing in this notice arena?

MR. HILSEE: I don't think in this package, Your Honor, but --

MR. BARKETT: You're kind. I'm not a judge.

10:40:12 MR. HILSEE: Okay. I don't think in this package now. I don't think this rule helps, I don't think it is needed, and I think it could harm and hurt because of systemic disincentives that are tilting us. We have to face up. We have a reverse auction notice bidding process. We have
10:40:25 vendors who are tripping over each other to propose the lowest cost notice because they want to get selected. That's why these types of programs that I just showed are being presented and approved.

MR. BARKETT: But what you're really saying is the
10:40:42 judges just aren't paying attention.

MR. HILSEE: There isn't any critique. It's not acceptable to critique. None of the vendors -- none of the claims administrators who have all the data are here because they're afraid to be. They're afraid they are going to get
10:40:55 blackballed if they speak up. They have all the information.

10:40:57 They know that first-class mail works the best.

I think we have some systemic problems that need more -- that are not -- can't just be slipped into this package. But I think we really need to work on that.

10:41:13 MR. BARKETT: Well, I read your comments as effectively suggesting that, at least in the consumer class area, what this rule, Rule 23, has created is an economic incentive for lawyers to bring these claims, minimize the effective notice. Lawyers walk away with collecting whatever 10:41:27 fee they collect, and then the class members just don't get very much because you want to reduce the cost of notice to the point that it's really not very effective.

It struck me as though, anyway, it was a criticism of the system that we've created this economic enterprise for 10:41:43 certain law firms to collect fees.

MR. HILSEE: Not really certain law firms, no. I think it's throughout. I mean, I think the claims made settlement accentuates it. I mean, defense counsel want the settlement with the lowest payout. Class counsel want the 10:42:01 settlement.

There is an understanding that, at least in many circumstances, class counsel can be paid based on what some of the testimony you heard this morning, based on the opportunity, the argument is, Hey, we tried. And they have a 10:42:19 cadre of notice vendors who are willing to sign their name to

10:42:26 the lowest cost estimate in order to be selected. And that's a big problem, because judges are not truly getting the best practicable proposals put before them, and then there's nobody else there to say, Hey, that might not be the best. That's 10:42:46 truly a problem.

MR. BARKETT: So what's the solution? What's the solution?

MR. HILSEE: I think notice should not be -- I mean, Jocelyn made an excellent point this morning, we have 10:42:55 excellent model notices. That was a sea change when we developed with the Federal Judicial Center these model notices. It was a sea change from fine-print legalese.

But why are we seeing -- and I'll just pull out another one -- why are we seeing tiny, fine-print notices 10:43:12 today? These are not FJC models. How are these --

This is a case where women have $20,000 claims. We have their addresses for some of them. Why didn't they get a claim form? It would be in their best interest to get a claim form sent to them if they have potentially a $20,000 claim.

10:43:33 Notices should not be negotiated by parties.

I believe courts should exercise their discretion to take over the procedural aspects of settlement processing, including the notice.

I think under our present system, it's unlikely -- we 10:43:53 are unlikely to arrive at the best practicable notice if the

10:43:57 parties are negotiating the notice.

JUDGE BATES: To return for a second to the electronic means issue, in your view, is there a role for electronic means notice in conjunction with first-class mail?

10:44:11 MR. HILSEE: Of course. It hardly costs anything. Do it all. Do it both. But if you can, have or can get addresses reasonably identifiable, we should not be advocating to the courts that it is okay to not do the mailings, because that's what will happen because of economics. Because it

10:44:30 costs so much less. And I was just getting to that, if I --

JUDGE BATES: Well, just to follow up, is there any situation in which you are aware or can imagine that e-mail notice would be preferable to first-class mail?

MR. HILSEE: E-mail notice is preferable -- if there

10:44:50 is -- if there's a direct mail envelope -- direct mail address available and an e-mail address, do both.

JUDGE BATES: I understand that. Here's my --

MR. HILSEE: If you're saying --

JUDGE BATES: Here's my example: A professional

10:45:02 organization -- this is a real life example. A professional organization where the class is the members or former members of that organization, all of whom have been used to communicating with that professional organization through an e-mail process. Is e-mail not at least equal to first-class

10:45:21 mail in that situation?

10:45:23 MR. HILSEE: But here's where the rubber meets the road on that. The devil's in the details. Where is that e-mail going to come from? It's going to come from a bulk center, from a claims administrator on behalf of that 10:45:33 defendant, and not an individual person that that person is used to getting an e-mail about. It's a less-intrusive form of communication. Data shows it.

Realize this: Claims administrators, when they send an e-mail, they know exactly how many e-mails were not opened. 10:45:54 Courts are not asking right now, because they don't understand that they can ask, Hey, tell me -- when you're standing here at final approval, Hey, by the way, Your Honor, we just want you to know that only 7 percent of the e-mails that we sent were opened.

10:46:12 We will know that information. And it is very unlikely, based on data and studies, that that number is going to be a high number. So we need to do both.

JUDGE BATES: Judge Young had a question before I let you --

10:46:31 JUDGE YOUNG: Let him finish. My question -- finish your comments.

MR. HILSEE: I just have a few more comments, then I'm happy to take any additional questions.

So my point is if the rule changes, these means would 10:46:39 routinely win out over first-class mail. Less expensive

10:46:42 means, even though far less effective, would be proposed to courts, even when a dangerous safety defect is involved. Why? Because of these systemic disincentives I've detailed in my written comments.

10:46:53 These disincentives, reverse auction notice bidding, untrained vendor swearing to inflated audience statistics, blackballing of critics should be the focus of rule-making attention.

We are fortunate to have the opt-out class action. I 10:47:05 believe it is a valuable social justice tool and an important way for companies to resolve claims. But it is backwards intuitive for class members. Average people cannot imagine that not clicking a banner or not opening a bulk e-mail could cost them constitutional rights.

10:47:22 In opt-out class actions, inaction represents consent. Notice that is a mere gesture, a fleeting banner ad that is not clicked, cannot be deemed informed consent to being bound by without compensation. That would weaken the legitimacy of class actions already reeling from low response 10:47:41 rates. Low response rates that have led to studies cited in legislation seeking to gut them.

Claims administrators have reams of data on response rates to class action notices. I've worked with the leading administrators on hundreds of cases. That data would show 10:47:56 that sending a first-class mailing with a simple claim form

10:47:59 works best. And I did provide some of that in my written comments. Data that the oldest claims administrator had provided to the Federal Trade Commission showing direct mailing typically exponentially greater response.

10:48:11 On that point, in November, I believe, I hope this news has made it out, the Federal Trade Commission did issue orders under Section 6(b) of the FTC Act compelling the production of claims administrator data.

If not for any of the other reasons I've cited, the 10:48:27 committee should not change Rule 23(c)(2)(B), or at least defer doing so during this cycle, because the outcome of the FTC study will not be known.

Your Honors, it is expensive to reach mass audiences by proper means. But constitutional rights and the integrity 10:48:44 of our courts are worth that expense. Fleeting internet ads are no match for legal notice. E-mails are too easily ignored compared to physical mail.

So I respectfully advise the committee to firmly hold onto the current strength of the individual notice 10:48:57 requirement, the bulwark of the opt-out class action. The proposed change to 23(c)(2)(B) and the notes accompanying that proposed change should not be adopted. Current rule does not limit a court's ability to utilize the best notice that is practicable for a given class action case. In my opinion, the 10:49:13 rule and the committee notes should not be changed to steer

courts in the wrong direction.

JUDGE BATES: Thank you, Mr. Hilsee. We look forward to your further written comments.

Judge Young.

JUDGE YOUNG: It strikes me that your criticism goes to either the fecklessness or the ignorance of trial judges to the facts, the data that you're providing, that the certain forms of electronic communications aren't very effective at all.

Isn't your -- isn't that more readily addressed by judicial education or publishing the data you've collected?

There's inherent power of a sitting trial judge to make all the inquiries to put the parties to the task of showing what their proposed means of communication, how efficacious they are.

So I'm not sure why broadening the range of ways of communicating necessarily is a bad thing if judges are engaged and understand what the facts are.

MR. HILSEE: Well, I think my point, Your Honor, is the rule doesn't broaden the range of what they're able to do. The current rule has the broadest possible range. There are education materials. The Federal Judicial Center has been a big advocate of educating judges. I've been proud to be part of that. We've provided a detailed checklist that judges increasingly do follow and do read.

10:50:46 The problem is there's not a lot of adversarial process during settlement. Most settlement -- most notice occurs during settlement. I think the number when we worked on our checklist was we came up with about 88 percent of the 10:51:03 notice campaigns are during settlement. There is not a lot of adversarial activity. The parties come in lockstep together, This is what we think we should do, Your Honor. There's not a lot of opposition because no notice has gone out yet.

And then, if a weak notice does go out, that 10:51:20 self-perpetuates a lack of objections. And then if there is an objection, objectors call around and say, Hey, we need an expert to come in and study what the parties have done in their case. No expert will take the case.

I mean, it's falling to me. I've stepped away, years 10:51:36 ago, from executing notice campaigns. I'm an expert. That's it. So they all end up calling me saying, Hey, nobody wants to take this case, it is critique assignment.

So judges are not getting critical analysis.

JUDGE BATES: Judge Ericksen.

10:51:59 JUDGE ERICKSEN: Thank you for all your work for the judicial center and in the work you did here.

As I understand it, what you're saying -- I just want to make sure I understand your point. If there were to be no change to 2(b) -- to the notice language, courts would still 10:52:26 have the ability to authorize electronic notice if that turns

10:52:31 out to be the most appropriate, and so there's no need for a rule change in order to make that possible. But by putting the language in about electronic means or other appropriate means, the trial judge will be given the impression that the 10:52:51 rules committee has done extensive work and is now blessing these other means such that the court might be disinclined to do the rigorous inquiries that it might otherwise do if there's no rule change because --

MR. HILSEE: I believe that's correct.

10:53:07 JUDGE ERICKSEN: -- it says right here in the rule that these are equal. You're saying, look, they're not equal, don't make a rule that makes it look like they are all equal.

MR. HILSEE: I believe that is correct. And I believe the notes are problematic in that respect because they 10:53:20 talk about these other means being more reliable.

I'm going to -- this will be in my written comments. I'm happy to look through -- there's a detailed survey, nationwide study. We did notice by first-class mail. Reliable? Definitely. I believe so. Would an e-mail be more 10:53:44 reliable? I don't think so.

JUDGE ERICKSEN: My question isn't really on that. That's the actual facts. And what you're point is about the rule is that if this rule is adopted in its current proposed state, that the public will have the misimpression that 10:54:01 rigorous research has been done and that it shows that all of

10:54:05 those methods are equally valid and, in fact, that rigorous research has not been done, or maybe it's been done by you, and shows the opposite.

MR. HILSEE: That's the case.

10:54:20 JUDGE ERICKSEN: And so in terms of just an interpretation of how this is going to work in trying to make -- well, okay. So it would be an unintended consequence.

MR. HILSEE: Yes, Your Honor.

JUDGE BATES: Just to follow up Judge Ericksen, if we 10:54:35 were to address your concerns with respect to the note, the comment, about more reliable, and you've raised some very important considerations for us, if that were addressed, what would be the problem -- in our effort to have a rule that is sufficiently flexible to keep up with the advances in 10:54:59 technology, what would be the problem of referring along with first-class mail to electronic means in the rule itself if we address the concern that you have with respect to the note and some impression that electronic means is better than first-class mail?

10:55:21 MR. HILSEE: I think even without the note, the rule specifying it will be interpreted as there's a reason they're pointing it out.

JUDGE BATES: Well, if we said in the note it shouldn't be interpreted that way, maybe it wouldn't be as 10:55:34 easily interpreted that way.

10:55:35 MR. HILSEE: Well, I believe my takeaway would be why would we be changing the rule? The rule doesn't mention first-class mail. The rule doesn't say you should do first-class mail. So why? Why would we make a rule that -- 10:55:48 still, the purpose of that change would be to encourage something beyond first-class mail, because that is what -- that is -- I agree that is a perception that courts have, is that that's what they should do.

Just like Mr. Sobol mentioned, when Judge -- in the 10:56:04 *Relafen* case. I believe you're referring to the *Relafen* case. I mean, look at the response. That was the expectation. And that is. That's like -- there was a case in California going to the California Court of Appeals just this July where they had hundreds of thousands of mailing addresses, and they sent 10:56:23 e-mails instead. They got 800 claims.

You know, I mean, we shouldn't be encouraging, we shouldn't be pointing out other means of notice. We should leave the sort of the mind-set that if you can do mailings, you should try hard to do them.

10:56:46 JUDGE BATES: Parker.

MR. FOLSE: You asked a question what about would be the purpose of the sentence that's proposed to be added, other than to encourage courts to use electronic means. You answered an earlier question by Judge Bates by saying, of 10:57:01 course, when you have the ability to send an e-mail in

addition to first-class mail, you should do it.

There are obviously going to be some people who probably would open the e-mail, but wouldn't get the first-class mail, maybe because there's a bad address.

So if the comments -- and I think as the comments are already written, they, I think, take great pains to point out the obligation of the court to determine the best means of communication practicable.

There is a sentence, I think, that you focused on that we may need to look at. We may need to look at some other language as well. But it -- I guess I have the same question that Judge Bates has, what is the problem with the sentence that is being added? Because it doesn't say electronic in lieu of. It doesn't -- there's nothing in that sentence that says it is preferred. But it acknowledges that there are these methods and the courts can select among them or maybe all of them.

I guess I'm kind of coming out in a similar place, which is if the comments, let's just say hypothetically, embrace part of what you've told us, the comments themselves say there -- it's unclear that electronic means are always going to be more effective means of communication. And the court should consider in the context of each case what the facts indicate about the best means of communicating with the class. Maybe they make some comment that the least costly

10:58:49 means doesn't mean the best means.

If we did things like that, what again is the problem that you have with the sentence in the rule, especially given the examples you've shown us where, with or without that 10:59:02 sentence, people are going to propose electronic notice to courts, vendors are going to provide affidavits? Everything that you're talking about has already happened and will continue to happen with or without that change.

MR. HILSEE: Thank you.

10:59:21 I don't believe there is -- there is no problem right now with -- with courts choosing not to send an e-mail in addition to a mail. There's nobody -- that's not a problem that's looking for a solution.

There is no -- the problem is that e-mail would be 10:59:44 used. Electronic means. If there was a sentence in the notice that says "electronic means should not be used in lieu of more reliable first-class mail," that would help. But I don't think that's what you're proposing or suggesting or where it's reasonable to end up, perhaps. But that would be 11:00:07 what would be required, in my opinion. I mean, making it an affirmative. Hey, because all of the data says mail is more reliable and more effective than electronic means.

JUDGE BATES: I think the last question. Elizabeth.

MS. CABRASER: Mr. Hilsee, are you stating a 11:00:28 categorical preference for first-class mail? That seems to be

11:00:33 your message.

MR. HILSEE: When it's available. When it's reasonably identifiable, we shouldn't walk away from it, we should try hard to do that. As we've always done.

11:00:44 MS. CABRASER: Shouldn't courts be interrogating that methodology just like all of these other methodologies? What about a stale mailing list versus a current e-mail list? It would seem to me in that case the mailing list would not be the most -- the best practicable means of notice.

11:01:03 MR. HILSEE: Actually, in most circumstances, it is more likely that an e-mail list is more stale and unupdateable than a mailing address. There's more data -- when someone changes e-mail addresses, there's no repository to go and find out whether they're still using that e-mail in that up -- in

11:01:20 that defendant's former customer list. There is public data that we search for that best practices have for years, and still, it's still the best means of updating a mailing list.

MS. CABRASER: Do you know what the current cost of sending, let's say, a long-form class notice in a first-class

11:01:44 envelope is, all-inclusive?

MR. HILSEE: Well, in fact, just in the *Remington* case that you mentioned, I've cited --

MS. CABRASER: I only mentioned it because you flashed the banner ad and I read the banner ad. I'm not

11:01:55 familiar with the case.

11:01:57 MR. HILSEE: Sure. Okay. Yeah.

It's -- we can comply with what -- in fact, several claims administrators publish literature to their own clients. But sometimes, often lately, they don't include that in their 11:02:11 statements to courts. Unfortunately. They publish to their clients that the best form, the most responsive form of notice is a double postcard with a claim form with return postage applied. And I think I've cited that that can be done for 30 cents.

11:02:31 MS. CABRASER: What does the type size look like on something like that?

MR. HILSEE: Depends on what the words are. If you concisely construct the language, can be and should be much better than the postcards that I pointed out to you.

11:02:45 JUDGE BATES: All right.

Judge Dow, did you have a question?

JUDGE DOW: Parker covered exactly the questions I had.

JUDGE BATES: Mr. Hilsee, thank you very much for 11:02:55 your submissions and your testimony here today. We look forward to a further submission.

And we will now move to the next witness. That will be Paul Bland.

MR. BLAND: My name is Paul Bland. I'm executive 11:03:12 director of Public Justice. I've been handling complex

litigation and class actions principally from the plaintiff -- entirely from the plaintiff side for about 25 years, and then sometimes we represented objectors to settlements that we thought were really poor settlements. And most of class actions I handle are poverty cases, cases against payday lenders, predatory lenders, debt collectors, things of that sort. So we handle some other things, but that is our principal wheelhouse of my experience.

First, I want to echo some of the comments several people have made that I'm just incredibly grateful at the way the committee has gone about the process this time. I've been involved in these rules processes going back to 1997, when we worked on discovery rule proposals. The listening tour, the outreach this committee did, the people came -- people from this committee -- a number of people came to the National Consumer Law Center to the Impact Fund, the ABA, to a whole bunch of different settings, and really -- and asked a lot of questions, people stayed for hours. Professor Marcus in particular questioned tons of people. The amount of effort that's gone into drawing in and being inclusive here is really wonderful, and it is a change and we're very grateful for it. And I think it means a great deal.

And I think that the fact the proposals are ones for which there is by and large a consensus on both sides of the V is really -- reflects that to some extent. I think we're

11:04:31 pretty much in favor of the proposals. Some of tweaks that have been suggested by Tom Sobol and Annika Martin are ones that we agree with. But in general, I think this is a terrific set of proposals.

11:04:42 I do want to apologize, I haven't gotten written comments to you. We will follow up and get those to you fairly shortly.

I want to respond to briefly Mr. Nelson's suggestion that Rule 23(f) be made mandatory. That will inject an

11:04:57 enormous delay into every single class action.

Most of the cases we handle -- we're brought into cases that tend to have some sort of difficult issues, federal preemption issue, a mandatory arbitration issue where there's something -- some flaws or clause or something. But my

11:05:12 typical class case tends to takes five to seven years, and I've had some that have taken nine, some have taken 13 years. If you had in an extra appeal to every single case out there, no matter how large the size of the case, you're going to be extending all class actions by two to three years.

11:05:28 Every single class action, because he feels that there are some federal court of appeals that are not taking cases that they should have heard, I think that that is an enormous increase in cost and delay, and is really harmful to people who do cases involving poor people. Because our

11:05:41 clients tend to be transient. And unlike some of the lawyers,

like, oh, well, the plaintiff's lawyers just want to get paid, they don't care whether their clients get money, I care if our clients get money. But if we represent really low-income people, about 16 percent of them move every year. And the ability to trace them and find them -- if the defendant's able to stretch a case out to seven years instead of it being a two-year case, then the number of people that we find is going to drop way down. And so that the amount that we're going to end up is going to be a cy pres or legal aid, which is still something that's valuable to the class, I think, implic- -- in part, but the number of class members we're going to find drops down.

Similarly, in the consumer setting, the lot of the cases, the biggest relief we're looking for is to get rid of legal debts and to clear people's credit records. That's -- that's -- it tends to be the biggest relief in most consumer class actions.

Your -- the discussion of claims processes and is the relief really -- are enough people making claims and that heavy focus, in most consumer cases that's actually sort of missing the principal relief of actually getting rid of debts and clearing people's credit records.

If you drag everything out by years, then by the time you clear someone's credit record, they've already suffered a lot. People have been unable to get loans in a variety of

11:06:50 different settings.

So for someone to just pop up and say, oh, well, why don't we just extend every class action for an extra couple of years to have an appeal, every defendant is going to take an 11:06:57 appeal and the cases are not going to get resolved for several more years. That is a problem.

I want to respond to something that has been in a number of written comments, and it also was raised several times in your Washington hearing, which is there have been a 11:07:11 number of people who have come before this committee and said, oh, well, you should do something about what they phrase as "no injury class actions," which is a -- I think it's a pejorative phrase. I think the phrase is wildly inaccurate.

And basically they're sort of gumming together two 11:07:23 different things. One is the statutory damages cases or cases involving, for example, privacy statutes of the Fair Credit Reporting Act. And they're saying, Well, no one is bleeding, there's no money loss, so the fact that they lost some privacy or the Fair Credit Reporting Act has been violated, that is 11:07:36 not an injury.

Or also, other people are talking about product cases where the defect of the product hasn't manifested itself yet. It's like in *Remington* case, for example. The gun hasn't actually shot someone yet; it's just prone to do that at some 11:07:50 point. Is -- there -- right now there are laws that say you

11:07:51 can bring claims under warranty and say, Well, if you had known that the gun was prone to shoot, that the value of it is less, you would have paid less. And that is sort of the nature of those product cases.

11:08:00 This committee, with all respect, has no business getting involved in the issues of whether or not the Fair Credit Reporting Act is a lousy statute, whether warranty law in America should be rescinded, and -- you know, basically all of those arguments that are being made to you are arguments

11:08:13 that go to the substance of the law in those areas.

And the Rules Enabling Act says this is a procedural system in which you're allowed to make procedural changes. All this stuff about no injury class actions, I think, is completely out of bounds, and I urge this committee to just

11:08:28 sort of tune all of that out and think back to, you know, whatever interesting other things have crossed your mind. But please do not try and suddenly inject something in here, we're going to try and abolish no injury class actions as an idea of rewriting a bunch of our statutes in America.

11:08:45 I want to touch upon the notice issue. We actually support the notice proposal. You know, the thing I really like about the way this committee's come at the notice issue is that you come at this with an enormous amount of humility, it seems to me. You have not attempted to say that this

11:09:00 technology or this approach is going to be better in every

11:09:03 case for every class for every type of setting. You've left that to district courts to consider based upon the evidence and the facts in the case.

You know this *Remington* case, one thing is that the 11:09:13 judge is still trying to decide what's going to happen in that case, and the judge has said very directly, you know, that he has have grave concerns that the number of people who have made claims is very low, he's not sure at all he's going to approve it. He wanted to hear a bunch of additional evidence.

11:09:27 You know, so Todd came in with his big set of facts, has like a 40-page affidavit saying that the plaintiffs and its experts have done a terrible job and is negligent and don't know what they're doing.

The plaintiffs actually come back with their own 11:09:39 notice experts who did a series of affidavits saying that Todd got a whole bunch of facts wrong, that there's a bunch of things that are false in his testimony, he didn't understand how the internet works in various ways, he doesn't understand how the NRA works, and so forth.

11:09:49 I have no idea who is right. I actually am not involved in the case. Our role in the *Remington* case was that they're originally keeping the documents that show that the guns were dangerous secret, and we came in and broke up the secrecy, and all the documents are on the website now. And 11:10:03 anyone who thinks that they've been shot by a Remington gun

11:10:06 can find all the documents. I think the secrecy aspect of that case worked perfectly.

Who is right about the settlement? You know who would be a really great person to decide that? It would be 11:10:13 the judge in that case. Right? Because this committee has now heard, you know, sort of a partisan view that, you know, here's how that case should come out.

There's another view in that case. If Todd's argument is right, I have every confidence that judge has been 11:10:26 extremely diligent, had a bunch of hearings, asked a bunch of hard questions, has been climbing all over both sides in it. You know, that would be a good way to figure that out.

There are going to be settings in which electronic notice is going to be better. I really liked one of the 11:10:39 examples that Annika Martin gave where she talked about so, for example, there are some apps sometimes that fail, and all of the consumers' interactions with the company are going to be through the app. If something just shows up on your phone and says, you know, We designed this in the way that didn't 11:10:53 work, you are eligible for, you know, a refund of this amount or you're eligible to have your warranty extended, or something like, reaching that person electronically might be better.

I've actually seen in some settings where this phrase 11:11:05 now, "banner ads," it has suddenly become like the worst thing

11:11:08 ever. I saw a class-action settlement involving a cable case, where I was talking to a guy who had a case involving a cable company where they had been allegedly overcharging people. And they had -- they required people, if you wanted to change 11:11:22 your package in various ways, you went online through your phone or through your computer, and so there was a ton of interaction between the consumers in that class.

And so what they started, what they made the company do was put this running crawl across their Web page that says, 11:11:34 you know, We've been alleged to have overcharged you, you may be eligible for a refund in this amount. If you're interested, click here.

And plaintiffs' lawyer in the case said they actually got more responses from that than they got from people who 11:11:46 sent out a piece of mail. It's interesting.

One of the things I think we have to think about, you know -- so you're trying to write a rule that's not going be to be for this year and next year; right? We're not sitting here in January of 2017 saying, hey, why don't we have the 11:12:00 best rule between January and June of 2017.

You want this rule to be around for ten years. I mean, do we know for a certainty the U.S. Postal Service will be here in ten years?

I don't ask that in sarcastic way. I think that's a 11:12:13 serious question.

11:12:14 Communications are changing at light speed in America. And this is a totally serious point. Go back ten years. Twitter did not exist ten years ago.

It used to be in America that a really good way to 11:12:26 win a presidential election would be to have $100 million. Okay? It turns out now that something that didn't exist ten years ago was an incredibly better way of reaching to tens and tens of millions of people and repeat messages to them to get them shared and multiplied many times than $100 million of TV 11:12:43 advertising worked out; right?

The idea you would sit here today and say, wow, with our crystal ball, we can see where technology's going, and I can tell you right now how people are going to be communicating most effectively with each other in 20 years 11:12:56 from now involving cases involving different types of populations and different types of claims, you know, then you're -- you guys are way smarter than me and way smarter than the entire nation's pundit court. Okay?

The idea that this committee would try to say for all 11:13:11 time we know that first-class mail is going to be the best way, and that electronic communications are, you know, for boneheads and is a terrible way of going about things, I think would be an extremely presumptuous act. So I just think that the world is changing in a way that it makes it extremely hard 11:13:28 to predict.

11:13:29 I did want to say something about the -- I agree very strongly with Tom Sobol's suggestions with respect to the part of the Rule 23(e)(2)(C)(ii). And the reason -- I think that first of all, there is a misunderstanding, I think, that's 11:13:46 suggested potentially by that, that most class actions, for example, involves claims processes.

The Consumer Financial Protection Bureau, in looking at the -- in comparing the use of forced arbitration clauses by lenders and class actions looked at 400 class actions, and 11:14:03 in more than 100 of the cases, people had received direct reimbursements, had received checks, had received credits to their account, that sort of thing.

We had also provided to the CFPB a ton of examples of cases in which people had had debts completely eliminated for 11:14:17 them, and where they had gotten relief to their credit records.

So the idea that every class action is something that involves a claims process just simply isn't even true. But also, the idea --

11:14:26 PROFESSOR MARCUS: Can I -- I'm just -- a specific question about that part of (e)(2)(C). It says, "The effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required."

11:14:42 Am I understanding you correctly to say, well, that

11:14:45 really means there has to be a claims submission process?

MR. BLAND: No. But I think --

PROFESSOR MARCUS: I don't think it says that.

MR. BLAND: No, I didn't mean to suggest that. I'm
11:14:55 sorry. I liked what -- what his suggestion was, was to add language that said "as compared to other reasonably available methods of delivering relief."

I think in the comment you do a nice job of saying there are a variety of different ways in which relief gets out
11:15:08 to class members, and then at end of that sentence you reference the ALI report, which I think is sort of code language for there are going to be a lot of cases in which it is going to be impossible to actually find people, but if you have an appropriate cy pres remedy, so for example we have a
11:15:22 class of people who suffer from -- who have been overcharged in mortgages and who are treated badly and the money's going to go to a legal aid which is principally focusing on foreclosure relief, that that is a perfectly acceptable method of relief that should be accepted.

11:15:35 I think the comment -- we're going to suggest some language that -- we'd urge you to bolster that comment language a little bit. I think that -- what I'm concerned about -- so we've talked some about -- I don't think that the language of the rule per se is problematic, but I think it
11:15:47 creates an impression that class actions tend to have a

11:15:52 certain type of relief that is a little misleading.

I think a lot of the significant relief that comes out of class actions is not in that form, and you make that point to some extent in your comment, but your comment is 11:16:04 really brief and cryptic.

And so I felt like I knew what it was talking about, but I had to think about it some. And I think if you -- we're going to suggest some language that'll have you put a few steroids into that comment so it becomes clearer.

11:16:16 I see I've exceeded my time.

JUDGE BATES: Questions?

Parker.

MR. FOLSE: Do you have a reaction to one of the arguments that Mr. Hilsee made that, in effect, the current 11:16:31 system for approving class-action notice creates an economic incentive for choosing what might be in many cases the least effective but also the least expensive means of communication?

I took him to be saying that in claims made settlements, it's actually to the defendant's advantage to 11:16:54 have as few claims made as possible. So no defendant in a case like that is going to be telling a judge, this is a poor means of trying to reach the class members in this case.

Likewise, the plaintiffs' lawyers have no economic incentive to do that either. That the ultimate outcome of how 11:17:11 many claims are made won't affect their compensation as class

11:17:16 counsel, and therefore the judge is left with -- in a -- what is typically an adversarial process, both sides telling him or her the same thing, and no resources and no particular alert going off in his or her head that there might be something wrong with this.

Do you have a comment on that?

MR. BLAND: Yeah. Yeah. So if I can take both parts of that. So first with respect to the defendants, it's pretty rare now to see a class-action settlement that has a claims process and a reversion to the defendant. I think that the vast majority of district courts, in my experience, see that as a fundamentally flawed process.

Where that exists, I do worry about that enormously. I think if you have a claims made settlement and you have a reversion to the defendant, I think the incentives of the defendant to try to suppress claims become very, very high, and is really problematic. I also think it rewards -- you know, a company that's done something really bad can frequently get away about it if it's hard to find the class members.

But most judges won't let do you that, and reversion is disfavored in a lot of courts. And I -- it is interesting, you see this in mediations in particular. So it used to be -- there's a particularly famous mediator in San Francisco, who's famous for settling like every single case. And 12 years ago,

11:18:26 I was in front of him and he said, Well, we're going to have claims process and reverter, and I said, No, actually we'll pass, we'll walk out. We will pack our bag and walk out. And he was yelling at me, screaming at me at the top of his lungs, 11:18:36 I've done this settlement again and again and again. Which at that time was true.

And then, objections to these sorts of settlements started succeeding, and a bunch courts started throwing them out.

11:18:46 And I was in there the other day, and he came in, the same judge, the same former judge, and he said, Well, you know, first of all, it's clear that we're going to have claims settlement, we can never have reverter. So I thought that was -- I enjoyed the feeling of over ten years of seeing some 11:18:58 justice sort of move into the settlement process around that.

With respect to the plaintiffs' counsels' incentives, first of all, I can't remember which earlier speaker, but there had been a question that asked are more and more judges looking at the percentage of people who are making claims -- 11:19:13 or -- or looking at the relief the class is getting. And I think that is something you hear from district judges quite often. And I think there are many district judges who, if they have a sense that you could have done better, that there was a way to reach people and you did not do a very good job, 11:19:31 and very few people made claims, the judges are more alert to

11:19:34 that.

Now, I think that where there is a cy pres that is really clearly linked and there's a strong nexus to the purpose of the case, I think that somewhat mitigates the 11:19:43 feelings of courts, but I think there are judges who are going to slash plaintiffs' fees, and that you simply see that. It happens a lot. I think it's -- I -- there's been a case referred to today where I wouldn't be at all surprised if the plaintiffs' counsel ended up getting whacked significantly if 11:20:00 the claims rate turned out to be really low.

And so I think the idea the plaintiffs' lawyers have no incentives in where -- so first of all, let me back up and say, I think that the plaintiffs' lawyers are ethical -- operating on an ethical basis. They're trying to get money to 11:20:15 their clients. I mean, I am much more interested in getting money to my actual clients than having *a* cy pres or giving money to the attorney general or whatever, something like that. I mean, I think that that's my job. That's who I represent. That's sort of my ethical North Star in the case, 11:20:27 is to try and actually get money to our clients.

But even if I'm just, you know, mercenary in it, trying to get paid, then it's still a pretty big mistake to have a -- to agree to something where your clients aren't going to get paid because I think -- or where very few of your 11:20:40 clients are going to get the money, because most district

judges are looking at that now. That question comes up again and again.

JUDGE BATES: Other questions?

Thank you, Mr. Bland. We appreciate your coming and your comments.

That brings us to James Weatherholtz.

MR. WEATHERHOLTZ: Thank you for the opportunity to be heard. I have enjoyed over the last few weeks getting to learn a little bit more about this process, and I'm honored to play a small part in it by testifying here today.

I'm here on behalf of DRI, the Voice of the Defense Bar. DRI is a national organization of defense lawyers who essentially represent companies in civil litigation.

My practice is out of South Carolina. I've litigated class action in state court and federal court, both inside and outside of South Carolina, and my primary experience is in building products class actions.

I want to make three points here today, and all of them will be focused on the committee notes to the proposed rule changes. I have some suggestions for edits to the language that I think are tied to current practice, and in some cases I think that some of the language is unnecessary and probably takes change a little bit too far, and so I want to talk about those three things.

The first is 23(e)(1). On paragraph 222 of the

11:22:17 proposed amendments, there is a committee note that basically says when a judge is presented with a proposed settlement, he goes through -- he or she goes through this process. And there's a sentence in there that says the judge cannot certify 11:22:31 the settlement class until the settlement reaches final approval.

I feel like that statement takes it a little bit too far.

There are some situations where a certification of a 11:22:45 settlement class at that stage in the process, what we used to call preliminary approval, has some utility. One example would be anti-suit injunctions to preserve the status quo. It may make a difference in a (b)(1) limited fund class or a (b)(2) declaratory judgment class.

11:23:06 I think this is a situation where the rules would probably do better to allow the judge the discretion in certain circumstances to approve or to certify the class at that earlier stage, and then, if on final approval at that hearing, if after notice and after the objection period has 11:23:24 occurred, the judge is satisfied that that was the right decision, then he or she can continue with it. But that's the backstop.

If the judge at that point decides that certification of a settlement class at that earlier hearing was improper, 11:23:39 they can always undo it at that stage of the process. So --

11:23:44 PROFESSOR MARCUS: Just so I'm clear, you're referring to the sentence, quote, The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. Is that 11:23:55 correct?

MR. WEATHERHOLTZ: Exactly, Professor. That is the sentence in my recommendation.

PROFESSOR MARCUS: What you're saying is that that is wrong?

11:24:02 MR. WEATHERHOLTZ: What I'm saying is that I would like to see the committee note strike that sentence and be silent on the issue so that a district court judge would be left with the discretion to certify a settlement class at the earlier hearing, where the settlement proposal was presented 11:24:16 to the judge, and --

PROFESSOR MARCUS: And that, under Rule 23(f), would lead to what, possibility of an immediate petition for appellate review?

MR. WEATHERHOLTZ: Well, to be honest, I haven't 11:24:30 really considered it in the context of how it would play with Rule 23(f). My only point is that during the pendency of the review of that proposed settlement, while the plaintiff and the defendant are getting together, while they're sending out notice, while they're inviting objectors to come and voice 11:24:48 objections, there may be good reasons to have a certified

11:24:51 class in place so that that district court judge could issue injunctions where necessary in limited circumstances.

But I feel like that would give the judge the discretion, the ability to do certain things in the class that 11:25:05 he or she wouldn't otherwise be able to do if we leave that note in there. And it doesn't otherwise undermine what the committee is trying to do with this rule change overall.

So that's my point about 23(e)(1).

I want to move to 23(e)(2). There are a number of 11:25:27 comments under both (e)(1) and (e)(2) in the committee notes that suggest that the claim and rate should be considered as part of the judge's decision whether or not to approve the settlement. And ultimately the judge is going to have to answer the question, is this proposed settlement fair, 11:25:44 reasonable, and adequate?

We've hard a lot of testimony here today about notice programs, the effectiveness of notice programs. My point would be that the judge shouldn't be looking at the claim rate in determining whether or not the proposed settlement is fair, 11:26:01 reasonable, and adequate. Those two things are separate and independent, and they're not always necessarily related.

There are situations, I think, where the relief offered to the class members is good. It's generous. It's enough money it satisfy their claim and to make them whole. 11:26:21 But for some reason or another, the claim rate might be low.

11:26:26 I came prepared today to talk about certain examples, but I'm leaving here with more examples than I started with, just hearing people talk today about what is effective and what works and what doesn't.

11:26:38 If someone receives a class action notice in the mail and they may disregard it. They may be distracted by other things. They may be theoretically opposed to class actions altogether. They may be satisfied with their product.

And in certain claim in class action situations, a 11:26:57 claimant has to actually have a product that manifests a defect for them to qualify for the relief that's set forth in the settlement agreement. They may not qualify. Someone may have a product that simply doesn't have the defect and it will perform its intended function.

11:27:15 My point is that if we're asking judges to look at the claim rate in determining whether or not the settlement itself, the relief offered, is fair, reasonable, and adequate, then we're really undermining the adequacy of the settlement, right, the reasonableness of the relief that's being offered 11:27:34 based on a factor that is not necessarily tied to that.

There are all sorts of reasons someone may not respond to notice. There are number of reasons why the claim rate might be low. And my suggestion would be that the committee notes make clear that the rate of claims in a claim 11:27:58 in class action is not a factor to be considered in

11:28:01 determining whether or not the proposal qualifies.

PROFESSOR MARCUS: Well, can I ask you to address the *Remington* example that's come up already today where it sounds like there's perhaps only potential but serious risk with 11:28:17 these products, and responding through the claims process would apparently provide something that sounds like it's valuable, but there was very low response.

Now, if I understand it, the judge in that case, after hearing partly from Mr. Hilsee, has said, whoa, we 11:28:44 better look into this and try something different.

Am I understanding you to say, no, the judge shouldn't do that?

MR. WEATHERHOLTZ: No, Professor, that's not my point. I'm not as familiar with the *Remington* case, but I 11:28:58 think I can talk about it in terms of what I've picked up during the discussions here today.

I think the adequacy of the notice program and whether or not the word is actually getting to potential class members is a different question than whether or not the 11:29:12 proposed relief is fair, reasonable, and adequate.

I think judges should be encouraged to rigorously analyze whether or not the notice program is adequate. Whether or not class members are receiving the notice of their potential claims and what the relief offered is.

11:29:31 What I'm saying is, I don't think that a low claim

11:29:34 rate should be a reflection of whether or not the relief offered to the class member is fair, reasonable, and adequate. Because the two things aren't tied together. You might have a class that has generous relief, but for a number of reasons, 11:29:48 some of which I've mentioned and others that we've heard about here today, people simply don't make claims.

My third point is the cy pres. This issue has come up in the prior hearing in Washington, D.C. And setting aside for now any arguments about whether the cy pres mechanism 11:30:11 actually has any applicability here, my point would be focusing again on the committee notes and specific comments in the committee notes.

On page 223 of the propose amendments, there is a sentence that says, "Many courts have found guidance on this 11:30:34 subject in Section 3.07 of the American Law Institute Principles of Aggregate Litigation."

And in my reading of the committee notes, that's a tacit endorsement of the cy pres doctrine. And my point would be if this committee has made a decision to remain neutral on 11:30:53 whether or not the cy pres is appropriate for class actions and whether or not to address that directly in the text of these rule changes, if this committee has made a decision to stay out of that, then the committee note is really a departure from that because it's a tacit endorsement of the 11:31:12 cy pres doctrine, and I think it's calling on judges to look

11:31:16 to that, and it's in many ways an endorsement of it. Or it could be read that way. And if that wasn't the committee's intention, I would like to see that removed.

PROFESSOR MARCUS: Can I ask you to look at the 11:31:29 sentence before that sentence, which says, "and because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds."

Do you disagree with that?

MR. WEATHERHOLTZ: No, sir. I don't disagree with 11:31:46 that. I think that's a better way to handle it. I think for the parties to get together on the front end and by agreement decide what is going to happen to the money that doesn't get claimed. We don't know how much it's going to be, we don't know how much is going to be left over, but it's a limited 11:32:02 fund and there's some money left over, let's decide now between the two of us how that is going to be paid out or where it's going to go.

PROFESSOR MARCUS: So the problem you have is with what Section 3.07 of the ALI project urges as an attitude 11:32:19 towards those arrangements, and there simply should be open season for whatever the arrangements are?

MR. WEATHERHOLTZ: My problem is that that sentence, the reference to the ALI Section 3.07, is a blessing of the use of cy pres in leftover money in class actions that is not 11:32:38 claimed. And if the committee has made a decision to not

11:32:40 oppose or endorse the use of cy pres through the changes in the actual rules, then it shouldn't tacitly endorse that mechanism through the committee notes.

MR. BARKETT: I'm sorry, I'm puzzled. Because funds 11:32:57 are frequently left unclaimed, as Professor Marcus has explained, it is important for the settlement agreement to address the use of the funds.

Are you suggesting any guidance to courts as to what to do? Are you saying there should be no guidance to courts 11:33:15 at all?

MR. WEATHERHOLTZ: I'm saying that that should be left to the parties by agreement what should happen to those funds. And if they can't agree that the money either reverts back to the company or, perhaps, gets paid to a charitable 11:33:25 organization, then there is no settlement.

And that -- and my overall point is that if this committee has decided not to adopt or reject the doctrine --

MR. BARKETT: Forget that point.

MR. WEATHERHOLTZ: Okay.

11:33:43 MR. BARKETT: There's money available. We've heard from many people that no matter what you do, there's going to be some money available and wonderfully negotiated settlements.

Is the court to decide up front what's supposed to 11:33:53 happen? Is the court to decide what happens once the court's

advised that there's money left over? Do the parties simply tell the court, This is what we'll do and, Judge, you should accept it?

I'm puzzled because this is not an endorsement. It's simply saying if you're looking for some guidance, this is an area you might want to look at --

MR. WEATHERHOLTZ: I think --

MR. BARKETT: -- knowing there are funds that are now available.

MR. WEATHERHOLTZ: I think -- my position would be that the parties should be encouraged to work that out by agreement, and that the judge should work with the parties to figure out what happens to that money on the back end, and that proposal should be made to the judge and the judge should accept or reject it.

MR. BARKETT: Okay.

MR. WEATHERHOLTZ: If there aren't any further questions, those are --

JUDGE BATES: Oh, okay. You're done.

So are we done? Are there any other further additional questions for Mr. Weatherholtz?

Thank you for coming. We appreciate your testimony.

Oh, Professor Marcus.

PROFESSOR MARCUS: You've heard testimony here about the treatment of objectors under amendments to (e)(5). Do

11:35:00 you, from your experience, have a view on whether the changes and process we have proposed will have good effects or any effect? That is, court approval of consideration to class members who object, objector counsel, or perhaps, as mentioned 11:35:23 earlier today, something broader that would include nonprofit organizations somehow perhaps on the receiving end.

MR. WEATHERHOLTZ: Honestly, I just personally do not have that much experience with the objector process. I have enough to have an opinion that this court is moving in the 11:35:45 right direction with those changes, but I just haven't personally haven't had to work through the objection process and how that plays out to be able to give any response.

PROFESSOR MARCUS: Okay. Thank you.

MR. BARKETT: May I also ask what particular sentence 11:36:00 were you saying we should modify with respect to claims or claim in or claims experience and how they're -- adequacy of -- of the fair and adequate language is not related to relief? Is there a particular sentence you want to point us to?

11:36:14 MR. WEATHERHOLTZ: Yes, sir. The first one comes up on page 222 in the second paragraph at the bottom of the page. About halfway down in that paragraph, it says, "If the notice of the class calls for submission of claims before the court decides whether to approve the proposal under 23(e)(2), it may 11:36:35 be important to provide that the parties will report back to

11:36:38 the court on the actual claims experience."

That is one place where that comes up.

Another is page 226, the paragraph with the heading Paragraphs C and D in bold. There is some discussion in the 11:37:02 middle of that paragraph about how the claims rate should be used in the process of approving the proposed settlement.

And then on page 227, there's some additional language that talks about claims rate and how that may be tied to the attorney fee, but that's an issue I didn't intend to 11:37:21 address in my comments.

JUDGE BATES: All right. Thank you very much again, Mr. Weatherholtz.

MR. WEATHERHOLTZ: Thank you for your time.

JUDGE BATES: And our last witness will be Scott 11:37:32 Burnett Smith.

MR. SMITH: Thank you.

JUDGE BATES: Morning, Mr. Smith.

MR. SMITH: Good morning.

I'm a defense lawyer from Alabama. I'm delighted to 11:37:44 be here. A little less so after I talked to Judge Hull during the break. She told me that what I'm here to talk about in part is a nonstarter. So why don't I start and we'll quickly finish there, Judge Hull.

The idea is to make a class certification ruling pro 11:37:59 certification or denying certification immediately appealable

11:38:04 as of right as a final judgment. Judge Hull is an appellate lawyer -- I mean is an appellate judge, and she would be on the receiving end of that, and I think she has some problems with that.

11:38:18 Mr. Barkett, you asked earlier what would be the authority for that, and Judge Hull, in our conversation at the break, said would that take an act of Congress.

The answer to that is yes, and the act has already been passed. That is 28 U.S.C. 2072(c), and that's the act of 11:38:39 Congress that says that the rules committee has the authority to determine what is and define what is a final judgment for purposes of appeal.

MR. BARKETT: I understand that, but that is a different question from whether or not we have to republish 11:38:56 and consult the appellate rules committee.

MR. SMITH: Right.

MR. BARKETT: The authority is a different point because -- this committee some years ago put the language in 23(f) it had put in there. But it struck me as a fairly 11:39:09 significant change.

MR. SMITH: Right. But the difference between 23(f) as currently written and what I'm proposing is a difference that matters. I mean, defining something as a final judgment is not necessarily giving permission for permissive or 11:39:27 interlocutory appeal. It would make it as of right. And

so --

MR. BARKETT: But you're sill suggesting a change to a rule that we define a class certification decision as a final judgment, which, again, seems to me to be something that would have to go through the advisor committee process, republication and the like.

MR. SMITH: Right.

MR. BARKETT: It just seems to me. Maybe -- maybe it's fairly minor. It sounds fairly major.

MR. SMITH: That's up to you all. I mean, I'm assuming that the appellate rules committee may have something to provide there.

The other thing that it would solve is this issue about 45 days for the government. If you defined it as a final judgment under 28 U.S.C. 2107, the government would have 60 days to file appeal, whereas private parties would have 30.

MR. BARKETT: So why didn't you raise this two years ago? I mean, this is a process that we've been through, you've heard about all the outreach and -- and bringing it up at this point when we're dealing with this package, it just strikes me -- and again, I'm not the expert on whether we have to republish or not, but it seems to me this is a fairly significant change.

MR. SMITH: Yes. If that is where the committee ends up, I would at least urge you to consider extending the time

11:40:50 for private parties when you're extending the time for the federal government. Oftentimes 23(f) appeals are very complex and you've got to go through not only discussions with your client, but also some significant writing and research that 11:41:08 might be necessary to write your 23(f), so I would ask the committee to consider adding 28 days instead of 14 for private parties while you're adding time for the government.

PROFESSOR MARCUS: Excuse me. One of the earlier speakers said, Well, if you were to make that change to 11:41:25 Rule 23(f), then the defendants would appeal in every case.

I gather what you're saying -- if I'm right to think you would more likely be on the defense side -- is that is not so, and it wouldn't happen in every case in which the defendants could appeal.

11:41:46 Is that what you're saying?

MR. SMITH: Yes, Your Honor -- I mean, yes, Professor. I mean, I'm an appellate lawyer, so I file appeals and party -- as an appellee to appeal. Just because someone has a right to appeal doesn't mean an appeal is always filed 11:42:02 whenever there is an adverse ruling.

I mean, there are many reasons why you wouldn't take an appeal, and I think if you created a right of an appeal, it would develop precedent on Rule 23 that is absent right now, and a lot of parties who, in a current case think there's an 11:42:18 opening, would have those openings closed by the appellate

11:42:23 decisions that were in place in that circuit. I think is a non-partisan issue. I think the statistics on 23(f) show that plaintiffs and defendants use 23(f) right now.

But my point, my bigger point, is that this is really 11:42:39 the only final judgment you have in a class action. As a practical matter, it's the only time you have the right to take an appeal.

JUDGE BATES: Judge Campbell.

JUDGE CAMPBELL: If the method for making this 11:42:57 immediately appealable is to declare final judgment, then the defendant has to appeal at that point, don't they? If they wait, they lose to the right to appeal.

MR. SMITH: To deal with the class certification issues, yes.

11:43:09 JUDGE CAMPBELL: Yeah. So if they ever want to challenge the class certification on appeal, they have to appeal then, and this notion that they may wait, we've taken away from them by declaring it a final judgment.

MR. SMITH: Right. But the idea you're waiting for a 11:43:25 final judgment in a class action as a practical matter just rarely happens.

MR. BARKETT: What's the judgment? What's the judgment? I'm having trouble understanding how we could --

Do we have the time for this? It's really off topic.

11:43:43 But I don't understand what the judgment is. The

judgment is that a class has been certified. That's not a judgment. It isn't relief awarded. It's just that a class has been certified.

And so you are saying under 28 U.S.C. 2072, we have the ability to all of a sudden define class certification as a final judgment.

MR. SMITH: Yes.

MR. BARKETT: Final judgment has meaning. It ends the matter, brings it to a close.

MR. SMITH: Same as the denial of qualified immunity. That's the denial of a defense. It has nothing to do with liability, but it's still appealable.

MR. BARKETT: And that is described as a final judgment under the statute?

MR. SMITH: Not under this statute. In circuit precedent it's determined and --

MS. CABRASER: But that is not a purely procedural determination, is it?

MR. SMITH: The denial of qualified immunity?

MS. CABRASER: Yes.

MR. SMITH: It is not, Ms. Cabraser.

MS. CABRASER: Right. And a class certification decision is a purely procedural --

MR. SMITH: Purely procedural, yes.

The other point I wanted to make today has to do with

11:44:44 the *Shady Grove* decision from the U.S. Supreme Court, which is a plurality opinion in which the U.S. Supreme Court held that Rule 23 of the federal rules governs class certification even when the state substantive law at issue in a diversity case
11:45:01 says that you cannot have a class action.

I would urge the committee to consider, again, Mr. Barkett, that's something that's not in the packet, and I apologize for that, but adding to 23(a) a point that a class is only certifiable if the substantive law issue does not
11:45:21 prohibit a class action.

The best analogy I can give the committee is there are state statutes in place that limit punitive damages. And Justice Ginsburg, in the *Gasperini* case, said that those state substantive limits on punitive damages apply in federal courts
11:45:42 in diversity.

The same reasoning applies here when you have a state --

PROFESSOR MARCUS: She did dissent in *Shady Grove*, didn't she?

11:45:54 MR. SMITH: On this same basis, yes, Professor Marcus.

So her point in her dissent in *Shady Grove* is the rule here should be exactly the same. You're modifying state substantive rights for the federal rule, you're violating the
11:46:07 Rules Enabling Act. And so if you added to 23(a)(5) a

provision that said it is appropriate to have a certified class so long as class is not prohibited by the substantive law at issue, I think it would solve the *Shady Grove* problem that we have now.

PROFESSOR MARCUS: Would the same sort of thing which is not before us, not in our packets, would the same sort of thing be true if under state law a class action must be certified in circumstances where Rule 23 does not authorize certification?

MR. SMITH: You mean --

PROFESSOR MARCUS: I'm turning it around, in a sense. If state law is more beneficial to the plaintiff side, should that also be mandatory in federal court?

MR. SMITH: Can you give me an example of that?

PROFESSOR MARCUS: I'm not sure I have one. I don't know that there is one. But my sense of things is that the California state courts probably are said to certify class actions in circumstances where, after *Wal-Mart*, for example, the federal courts might likely not do so, would you then be introducing an argument that the federal courts in California dealing with state law claims must follow California law rather than Rule 23 in making certification decisions?

MR. SMITH: Well, I hadn't thought of that possibility. It sounds like you're talking not about a legislative determination by the state legislature, but state

11:47:44 common law? On a consumer fraud statute --

PROFESSOR MARCUS: Well, gee, I thought *Erie* told us those two -- the rules of decision --

MR. SMITH: I was just trying to make sure that I was
11:47:54 understanding your question.

PROFESSOR MARCUS: Well, I don't know --

MR. SMITH: I think *Erie* solves what you were asking me as long, as I understood the question. That's why I was asking for the premise.

11:48:03 I think *Erie* solves it. But I think *Shady Grove* undermines the whole purpose of *Erie* when you have a legislative determination that a specific state statute should not be certifiable as a class.

JUDGE BATES: Professor Cooper.

11:48:19 PROFESSOR COOPER: Do you have any information on how many times federal courts confront class actions to enforce state created rights when the state law prohibits class enforcement?

MR. SMITH: I mean, in my practice, the *Shady Grove*
11:48:38 issue has come up a lot since the U.S. Supreme Court has decided it. But I don't know of any statistical studies of how often it comes up.

I mean, there are a number of states that have legislative acts that prohibit certification of a class, and
11:48:53 it seems to me an easy fix under 23(a).

11:48:59 MR. BARKETT: Have you identified those -- and I've read your comments, prior comments. Maybe it would be worthwhile, not for this package obviously, but if it's something that you have information on, to collect it and
11:49:07 submit it to the committee.

MR. SMITH: We'll be happy to add that. We'll be turning in some thoughts on these lines by February's deadline.

MR. BARKETT: It's not going to really matter for
11:49:18 this package on this point, but if you've collected information on states where class actions can't be brought, they're brought in federal court because of *Shady Grove*, and you think that is significant for the committee to consider, I encourage you to compile the information and submit it. I
11:49:34 don't think you have to worry about the February deadline because it's not going to affect this package.

MR. SMITH: Okay. Great.

Any other questions, Judge Bates?

JUDGE BATES: Are there other questions for
11:49:41 Mr. Smith?

Thank you very much.

MR. SMITH: Thank you for the opportunity.

JUDGE BATES: Appreciate you coming and your comments.

11:49:47 And for all of you, thank you very much for coming

11:49:50 today and for submitting comments in the past, which we've found to be very, very valuable. And we look forward to any further comments any of you are going to submit relating to this package by the February deadline.

11:50:08 And with that, I think we conclude this public hearing, except that I want to thank not only Judge Campbell, but all those who have been here in the courthouse on the staff helping with the facilities and the presentation. We appreciate it greatly. And thank you all again.

11:50:28 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 17th day of January, 2017.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter