PUBLIC JUSTICE

Via electronic delivery to: rules_support@ao.uscourts.gov

September 8, 2015

Rule 23 Subcommittee of the Judicial Conference Advisory Committee on Civil Rules
Thurgood Marshall Building
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

RE: Public Justice Comments on Rule 23 Subcommittee Rule Sketches

To the Members of the Advisory Committee on Civil Rules and the Rule 23 Subcommittee:

Public Justice, P.C. and the Public Justice Foundation (collectively, "Public Justice") respectfully submit the following comments on the rule amendment sketches set forth in the Introductory Materials for the September 11 Mini-Conference on Rule 23 Issues ("Memo").[1]

We thank the Subcommittee for the opportunity to submit these comments, which focus on the following rule sketches: (1) Guidance on Handling *Cy Pres* Provisions in Class Action Settlements; (2) Amendment Designed to Address "Ascertainability" Within the Context of Class Certification; (3) Provision Regarding Issues Class Certification; and (4) Provision Dealing with "Pick-Off" Offers of Individual Settlement and Rule 68 Offers of Judgment.

I. Guidance on Handling *Cy Pres* Provisions in Class Action Settlements.

Public Justice generally endorses the Subcommittee's rule sketch on handling *cy pres* provisions in class action settlements, subject to a few recommendations set forth below.

Public Justice's original comments contained an extensive discussion of the need for a rule amendment explicitly authorizing *cy pres* awards, and setting forth guidelines for their approval. *See* Public Justice March 27 Comments at 21-31. Although the Subcommittee's approach does not mirror Public Justice's proposal in all respects, we believe that the draft rule sketch would accomplish the most important goal of our proposal, which was to clarify the availability of *cy pres* awards as a mechanism for distributing the leftover proceeds from a class action settlement or judgment. We do, however, have several comments with regard to certain aspects of the rule sketch and the accompanying draft Note.

[1] These comments are intended to supplement Public Justice's original suggestions for amending Rule 23, which were submitted on March 27, 2015. *See* http://www.uscourts.gov/rules-policies/archives/suggestions/public-justice-15-cv-n.

First**,** Public Justice urges the Subcommittee to delete the "[if authorized by law]" language set forth in proposed Rule 23(e)(3). We believe that this language is unnecessary and potentially misleading. As noted in the Reporter's Comments (Memo at 14 n.3), "like many other agreements included in settlements[,] *cy pres* provisions do not depend on...legal authorization, even if binding effect does depend on the court's entry of judgment." We agree with this statement. The "authorized by law" language could become a focal point for arguing that *cy pres* awards are *not* proper absent some form of distinct "legal authorization"—which is exactly the type of argument a rule change is needed to rebut. *See* Public Justice's March 27 Comments at 25-27 (discussing recent attacks on *cy pres* awards as illegal and/or unconstitutional and explaining flaws in the logic underlying such an attack).

Second, we urge the Subcommittee not to include the bracketed phrase in proposed Rule 23(e)(3)(B), allowing a second distribution "to class members whose claims were initially rejected on timeliness or other grounds." *See* Memo at 15. While superficially appealing, we are concerned that this could inject an element of uncertainty into the second distribution process and perhaps cause it to drag out needlessly. In addition, there are rarely enough untimely claims to significantly reduce the residual, and it seems unwise to have open-ended deadlines in circumstances where the defendant is seeking closure.

Third, we urge the Subcommittee not to state, in the draft Committee Note, that proposed Rule 23(e)(3)(C) "deals only with the rare case in which individual distributions to class members are not economically viable." Memo at 17. In our experience, there is a residual in almost every monetary settlement—particularly those involving small individualized damages. Even when all individual damages can be distributed to the class, there are often leftover funds after the claims administrator has been compensated and all taxes have been paid. *Cy pres* distributions are a perfect mechanism for dealing with such residuals, yet the draft Note may create a misimpression that such distributions will only be available in the "rare case." We would urge that this be correctly to reflect that residuals will frequently require disposal via *cy pres.*

Fourth, we strongly urge the Subcommittee to delete the first full bracketed paragraph at the top of page 16, which states that "one alternative to *cy pres* treatment… might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program." Memo at 16. We believe that reversion to the defendant is a particularly problematic method for dealing with leftover settlement funds, for three distinct reasons.

First, allowing reversion of funds to the defendant fails to deter the illegal conduct that the lawsuit sought to bring to an end—one of the core purposes of class actions. *See Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (discussing deterrence as an objective of class actions); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (same); *see also* ALI Principles § 3.07 cmt. b. In contrast, *cy pres* "prevent[s] the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or of the judgment . . .)." *Hughes*, 731 F.3d at 676.

Second, reversion fails to benefit the class in any way, directly or indirectly. The class fund is meant to compensate the class for its injuries. Reversion takes that compensation away from the class, whereas *cy pres* distribution uses that compensation to benefit class members, albeit indirectly. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011).

Third, reversion to the defendant creates perverse incentives to minimize actual payout to the class. If a defendant knows it will get any funds that are not distributed to class members, it is incentivized to reduce the odds that class members will receive and cash their checks, via (for example) imposition of an overly complex claims process. *See id*. at n.91. Attentive courts can check this problem to a certain extent, but a court cannot entirely control the terms of settlement agreements.

In short, allowing a reversion of funds to class action defendants is dramatically at odds with class members' interests and the purposes of the class action device. For all these reasons, Public Justice urges the Subcommittee to remove the bracketed language suggesting that reversion of unclaimed funds is a permissible—and possibly even equally desirable—alternative to *cy pres*.

Further, in light of the serious problems created by a reversion of funds, we would urge the Subcommittee to make clear that reversion of funds to the defendant is not a permissible use of unclaimed settlement funds under *any* circumstances. It is not enough, in our view, for the Note to merely state that "courts should have a bias against reversionary clauses in lump fund class-action settlements." Memo at 18. In our experience, the presence of a reversion provision in a class action settlement is always cause for grave concern, and courts should refuse to approve any settlement that includes such a provision.

II. Amendment Designed to Address "Ascertainability" Within the Context of Class Certification.

Public Justice strongly opposes the rule sketch designed to address "ascertainability" within the context of class certification. *See* Memo at 30-33. Although we appreciate the Subcommittee's willingness to wade into the class certification thicket, we are concerned that this proposal could cause more problems than it solves. In particular, the proposal's focus on "identifiability" at the class certification stage could undermine the use of Rule 23 to vindicate small damages claims. In addition, as explained below (at Point B), we believe that the proposal does not adequately address—and could exacerbate—the problems created by the approach to "ascertainability" adopted in *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013).

A. The Rule Sketch's Focus on "Identifiability" at the Class Certification Stage is Inappropriate and Could Make it Impossible to Pursue Small Damages Consumer Cases.

As written, the draft rule sketch states that "an order that certifies a class action must define the class so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner." Memo at 30.

Our concern is that this language could be misinterpreted as requiring that all members of the class be "identifiable" at some point in the litigation, which could make it impossible to certify many important class actions. We appreciate and understand that the Draft Committee Note attempts to moderate the potential impact of the proposed rule by emphasizing (among other things) that identifiability is only required "when necessary" and that identification "may not be needed for a considerable time, if at all." Memo at 31. *See also id.* at 31 (noting that other aspects of Rule 23 "recognize that identifying all class members may not be possible"). Even

with these qualifications, however, the text of the proposal could give rise to arguments that "identifiability" is a certification requirement in all cases.

In our view, just as identifiability of all class members is not required for the purposes of class notice or the crafting of a class-wide remedy, so too is identifiability not a requirement at the class certification stage: instead, the only requirement should be that the class be defined in objective terms, as we argued in our March 27 Comments.

A. The Proposal Would Not Solve the Problems Created by *Carrera* and Could Actually Make Matters Worse.

Relatedly, we are concerned that the Subcommittee's proposal does not go far enough in addressing and correcting the disastrous approach to "ascertainability" set forth in *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013)—and, indeed, could be misinterpreted as actually embracing *Carrera*'s approach (although we doubt that the Subcommittee intended that result).

Public Justice's original comments to the Subcommittee contained a lengthy discussion of the problems created by *Carrera* and progeny. *See* March 27 Comments at 4-11. There, we argued that *Carrera* confused "ascertainability" with a requirement that class members be "identifiable" in an administratively feasible manner at the class certification stage. Our proposal urged the Subcommittee to solve the problems caused by *Carrera* by amending Rule 23 to require, at the class certification stage, that the class be definable according to objective criteria. We further urged that the amended rule make clear, either in its text or in the accompanying Note, that "the ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage." March 27 Comments at 5.

Our concern is that, even with the qualifying language in the accompanying Note, the Subcommittee's proposal could be read as actually endorsing *Carrera*'s misguided emphasis on identifiability at the class certification stage. Particularly troublesome is the fact that, although the rule merely makes identifiability a requirement "when necessary," it does not explain when identifiability is, and is not, necessary and—again—does not make clear that identifiability is *not* necessary for certification of small damages cases.

In light of these concerns, we respectfully urge the Subcommittee to not pursue the proposal set forth in the most recent memorandum. In our view, any focus on "identifiability" at the class certification stage would be a serious mistake. Instead, we would urge the Subcommittee to reconsider the "ascertainability" proposal set forth in Public Justice's original comments, which we continue to believe that would be important and useful. [2]

[2] The Reporter's Comment asks whether "there is a genuine prospect that the split [on the ascertainability issue] will be resolved by judicial decisionmaking." Memo at 33. In our view, the answer is clearly no. Although some courts have squarely (and correctly) rejected *Carrera*, *see Mullins v. Direct Digital*, ___ F.3d ___, 2015 WL 4546159 (7th Cir. No. 15-1776, July 28, 2015), *Carrera* is still the law in the Third Circuit and most courts of appeals have not yet weighed in.

III. Issue Class Certification.

Public Justice generally endorses the Subcommittee's proposal to clarify that Rule 23(c)(4) permits issue classes to be certified in appropriate cases without the entire case having to satisfy all the requirements of Rules 23(a) and (b). *See* Memo at 39-41. However, in our view, the proposal to add an additional path for immediate appeal is unnecessary and would further delay the already long process of class action litigation.

A. An Amendment Clarifying the Availability of Issue Classes Would Be Both Helpful and Appropriate.

Although the vast majority of courts to have interpreted Rule 23(c)(4) have done so correctly, there remains some confusion surrounding the Rule, and the topic continues to be litigated vigorously. As the Subcommittee's comments recognize, Rule 23(c)(4) is meant to permit courts, where doing so would materially advance the litigation, to certify classes to resolve only certain issues, without regard to whether the case as a whole would meet the requirements of Rules 23(a) and (b).

That reading is based on the text of the Rule itself, which states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." This interpretation is bolstered by the existing comment to the Rule, which states that Rule 23(c)(4) "recognizes that an action may be maintained as a class action as to particular issues only" and goes on to illustrate what that means: "For example, in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove amounts of their respective claims."

Despite the language of the Rule and associated comment, at least one federal appellate panel has indicated that courts may not certify an issue class unless the case *as a whole* satisfies one of the subsections in Rule 23(b). *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). The *Castano* court reasoned that, at least with regard to issue classes in cases in which the plaintiffs were eventually seeking damages, permitting issue-only classes would eviscerate Rule 23(b)(3)'s predominance requirements. *Id.*

Even though it is unclear whether *Castano* is still good law in the Fifth Circuit, *see In re Deepwater Horizon*, 739 F.3d 790, 816-17 (5th Cir. 2014), the issue continues to be litigated. For example, there is a case currently pending in the First Circuit involving whether a Rule 23(c)(4) issue class may be certified where the case as a whole does not meet the requirements for class certification. *See In re Prograf Antitrust Litigation*, No. 15-1290. There, the defendants are urging the First Circuit to follow *Castano*, in reliance on recent U.S. Supreme Court decisions addressing class action certification. Public Justice has filed an *amicus* brief in the case taking the contrary view. An amendment to Rule 23 making clear that true issue classes are permissible under appropriate circumstances would prevent this sort of dispute from erupting elsewhere.

B. Public Justice Specifically Endorses the "Rule 23(b) Approach, Alternative 2," Which Would Amend Rule 23(b) to Allow Certification of Issue Classes Without Meeting the Criteria of (b)(1), (2), or (3)

In Public Justice's view, the "Rule 23(b) Approach, Alternative 2," would be the most effective of the Subcommittee's three proposed alternatives. *See* Memo at 38-40.This alternative would amend Rule 23(b) to add a fourth category of types of class actions (issue class actions). It would permit a court to certify an issue class if "the court finds that the resolution of particular issues will materially advance the litigation, making certification with respect to those issues appropriate."

This approach recognizes that issue classes do not fit comfortably within the existing categories of class actions and makes clear that issue class certification does not require that the full case meet the criteria for Rule 23(b)(3) if it seeks damages, or for Rule 23(b)(2) if it does not. The sketch also properly imports the standard—"materially advance the litigation"—that most courts already use to decide whether an issue class should be certified.

In Public Justice's view, however, the bracketed language referencing the standards in Rule 23(b)(3) should be omitted, because issue classes may be appropriate in cases that arise in a Rule 23(b)(2) context, notwithstanding the ruling in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). *See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (reversing denial of class certification under (b)(2) and (c)(4) in post-*Wal-Mart* race discrimination case). As the *McReynolds* court explained, where a truly company-wide policy is being challenged, *Wal-Mart* does not foreclose it.

The Subcommittee's "Rule 23(b) Approach, Alternative 1" suffers from the same problem as the bracketed language in Alternative 2. By addressing Rule 23(c)(4) only in the predominance requirement of Rule 23(b)(3), Alternative 1 implies that issue classes are appropriate only in Rule 23(b)(3) contexts. Alternative 1 is also insufficient, in our view, because although it eliminates the biggest hurdle—predominance—to Rule 23(c)(4) certification in (b)(3) cases, it does nothing to correct the misconception of some courts and parties that, under (c)(4), the case as a whole, not just the issue class, must meet all the other criteria of (b)(3) besides predominance.

Alternative 3—the "Rule 23(c)(4) Approach"—suffers from the same problems as the Alternative 1. Although Public Justice supports importing into Rule 23 the judge-made standard that certification is appropriate if it "materially advances the litigation," Alternative 3 does nothing to make clear that, to certify an issue class, the case as a whole need not meet all the criteria under Rule 23(b). And by referencing the Rule 23(b)(3) standards, the bracketed language arguably would preclude the use of (c)(4) classes in (b)(2) cases.

C. Public Justice Opposes Amending Rule 23(f) to Allow Immediate Appeal of Decisions on the Merits of Issue Classes.

Public Justice does not support amending Rule 23(f) to permit an immediate appeal of merits determinations on issues certified for class treatment under Rule 23(c)(4). Parties wishing to immediately appeal a significant threshold issue of law are already able to seek interlocutory appellate review under 28 U.S.C. § 1292(b). As in the rule sketch, § 1292(b) requires a certification from the district court and the permission of the court of appeals—thus, under the law as it stands, a party has an avenue for immediate appeal of a merits decision on the certified issue on similar terms to that in the sketch.

But to the extent the proposal would provide an easier route to interlocutory appeal than is currently available under § 1292(b), Public Justice is concerned about injecting an additional mechanism for delay into the class action process. Resolution of class actions is already rife with delay. Creating yet another avenue for appeal could drag out the process even further, creating additional burdens for the litigants and the courts. We would urge the Subcommittee to avoid further complicating the process with an additional appeal mechanism.

III. Pick Off and Rule 68.

Public Justice fully shares the Subcommittee's concerns about the so-called "pick-off" problem associated with Rule 68. In fact, in our March 27 comments, we urged the Advisory Committee to abolish Rule 68 altogether, as it has failed to serve its stated purpose and given rise to unjust and inconsistent results, particularly (but not exclusively) in the class action context. *See* Public Justice March 27 Comments at 11-20.

As the Subcommittee has noted, however, there may not be need for any action at this point in light of several recent judicial developments. *See* Memo at 49. First, the inter-circuit split seem to be evaporating on this issue. *See, e.g., Chapman v. First Index, Inc.*, ___ F.3d ___, 2015 WL 4652878 (7th Cir. No. 14-2772, Aug. 6, 2015); *Hooks v. Landmark Indus., Inc*., ___ F.3d ___, 2015 WL 4760253 (5th Cir. No. 14-20496, Aug. 12, 2015). Second, the U.S. Supreme Court has recently granted review in a case that involves the Rule 68 pick-off problem. *See Gomez v. Campbell-Ewald Co*., 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015). The Rule 68 "pick off" problem may therefore resolve itself in due course.

That aside, barring total elimination of Rule 68 (which Public Justice continues to endorse), we generally support the Subcommittee's first sketch for changes to Rule 23 pertaining to offers of complete relief (the so-called "Cooper Approach"). *See* Memo at 49-50. Under this approach, Rule 23 would be amended to provide that "when a person sues...as a class representative, the action can be terminated by a tender of relief only if (A) the court has denied class certification and (B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim." *Id.* In our view, this proposal would go a long way towards eliminating the problematic practice of defendants attempting to "pickoff" named plaintiffs prior to class certification, in order to avoid a class action.

We would urge the Subcommittee, however, to include a specific provision, such as that proposed by NCLC/NACA in its April 2015 comments, that a court should not impose any conditions, consequences, or costs related to an accepted offer, including any consequences relating to or any costs provided in Rule 68, unless the offeror also offers complete relief and/or allows judgment on behalf of the class defined in the complaint.

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Once again, Public Justice thanks the Subcommittee for the opportunity to submit these comments. We greatly appreciate the opportunity to participate in this important process.

Respectfully submitted,

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