RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has been quite active since the full Committee's April meeting. In total, it has attended, or at least had representatives participate in, roughly a dozen conferences since late 2014, culminating in the Subcommittee's own mini-conference at the DFW Airport on Sept. 11, 2015. Since April the Subcommittee has also held a number of conference calls and meetings.

This memorandum is designed to summarize the ideas developed during this activity and to present the six rule-amendment ideas that presently seem to hold the most promise for productive effort. In addition, it reports on a variety of other possible rule-revision ideas that the Subcommittee has discussed with the full Committee on occasion since the first full Committee discussion of these issues during the March, 2012, meeting.

Accompanying this memorandum, the agenda book should contain a variety of additional materials developed during the Subcommittee's work. These should include the issues memo for the Sept. 11 mini-conference and notes of the mini-conference. It also should include notes on Subcommittee meetings or conference calls on Sept. 25, 2015, Sept. 11, 2015, July 15, 2015, July 12, 2015, and June 26, 2015. The Subcommittee held other conference calls principally addressed to more logistical matters, and also discussed these issues during the many conferences it has attended. Notes on those events are not included.

It is also worth noting that the Subcommittee has received submissions from many individuals and groups about possible amendments to Rule 23. During 2015, approximately 25 submissions have been received. These submissions are posted at www.uscourts.gov.

Based on the input the Subcommittee has received, it has concluded that some topics that initially seemed to warrant proceeding with rule-amendment preparation no longer seem to support immediate activity. In part, that conclusion is based on relatively recent developments, including developments in the case law. In part, that conclusion recognizes that further developments in the relatively near future may cause the Subcommittee to conclude that further work on some of these topics is justified. So it is possible that some of the topics on which further action has been deferred will return to the full Committee at its Spring 2016 meeting. The Subcommittee is still contemplating a schedule that would permit publication of preliminary drafts of rule amendments in August, 2016.

The list of "front burner" topics has evolved considerably since the April full Committee meeting, which discussed a list of topics that had already evolved quite a lot since the first full

Committee discussion of these issues at the March 2012 meeting. Below are presentations on six topics the Subcommittee currently regards as most suited to immediate work. After introducing those topics, this memorandum will discuss other topics that have received considerable attention during the Subcommittee's work, including some on which it contemplates that further work may be in order.

The topics on which the Subcommittee proposes to focus its immediate attention are:

1. "Frontloading"

2. Excluding "preliminary approvals" of class certification and orders regarding notice to the class about possible settlements from immediate appeal under Rule 23(f)

3. Clarifying Rule 23(c)(2)(B) to state that Rule 23(e)(1) notice triggers the opt-out period

4. Notice to unnamed class members

5. Handling objections by class members to proposed settlements

6. Criteria for judicial approval of class-action settlements

After presenting these topics on which the Subcommittee makes recommendations, the memorandum presents a composite version of the amendment sketches so that Committee members can see how they might fit together.

This memorandum reflects the Subcommittee's present thinking, which has evolved further even since its last conference call on September 25. Thus, one topic on which the Subcommittee was uncertain about proceeding during that conference call has been restored to its list of recommendations. Besides making these recommendations, this memorandum also presents additional ideas that the Subcommittee has examined in detail and discussed with many participants in conferences and meetings it has attended. These issues are presented for discussion in order to support full discussion in Salt Lake City. That discussion will provide a basis for introducing the issues during the Standing Committee's January, 2016, meeting. Meanwhile, the Subcommittee will continue its work on Rule 23, and the rule language and Committee Note language presented in the sketches will surely be refined.

The additional issues presented for discussion can be generally separated into three categories:

Issues "on hold"

Two issues seem not suitable for current rulemaking efforts, although developments may justify reconsidering that conclusion. Fuller explanations of the current situation will be presented later in this memorandum, but it seems useful to introduce these two issues:

Ascertainability: During the full Committee's April meeting, the Subcommittee was urged to look carefully at issues of ascertainability. In part due to a series of decisions by the Third Circuit, this topic appeared to have growing importance. It is clear that the court must include a class definition when it certifies a class. Indeed, as amended in 2003, Rule 23(c)(1)(B) instructs the court to "define the class." Particularly in consumer class actions, much attention has been given recently to whether there is a workable way to identify class members and scrutinize claims submitted by class members, particularly those who do not have receipts for retail purchases of relatively small-value items that sometimes give rise to claims. A key question is the extent to which courts ought to insist, at the certification stage, on a definite game plan for possible later distribution of benefits. The Third Circuit view appears to emphasize this concern. The Seventh Circuit has issued an opinion offering distinctive views supported by provisions presently in the rule, and raising doubts about the need to inquire into the manner of distribution of benefits to the class at the certification stage. [Copies of three recent decisions -- all rendered since the full Committee's April meeting -- should be included in this agenda book, for those who wish to review them.]

Rule 68 and pick-off individual offers of judgment: This set of issues has achieved considerable prominence during recent years, in part because the Seventh Circuit took a position that enabled defendants in some class actions to pick off the class-action aspects of the case by offering the named plaintiff full relief before a motion to certify was filed. A consequence was sometimes that plaintiffs would file "out of the chute" motions to certify, which plaintiffs sometimes asked the courts to stay pending development of a record suitable to deciding class certification. The Seventh Circuit has recently changed its views on these issues, and the Supreme Court has granted certiorari in a case that appears to raise these issues, with oral argument scheduled in October.

Topic the Subcommittee brings
before the full Committee
without a recommendation

Settlement class certification: After the mini-conference, the Subcommittee initially decided that the potential

difficulties of proceeding with a new Rule 23(b)(4) on settlement class certification outweighed any benefits in doing so. Presented below is the material that relates to that conclusion. Further reflection prompts the Subcommittee to bring this question before the full Committee. As an alternative, this memorandum also introduces an idea drawn from the 1999 Report on Mass Tort Litigation for adding reference to settlement to Rule 23(b)(3). Subcommittee members can address these issues during the meeting in Salt Lake City.

Topics the Subcommittee would take off the agenda

Besides deciding that the two issues identified above should be put "on hold," the Subcommittee has also determined that the following issues that it has previously discussed with the Committee should be taken off the agenda for the present Rule 23 reform effort. The notes of the mini-conference and the various Subcommittee meetings and conference calls show the consideration given these issues. Details on what was before the mini-conference can be found in the issues memorandum submitted to participants in that event. All of these items should be included in the agenda book. These issues are:

Cy pres: In his separate statement regarding denial of certiorari in a case involving Facebook, Chief Justice Roberts expressed concern about the manner in which what have been called cy pres issues have been handled in some cases. The ALI, in § 3.07 of its Principles of Aggregate Litigation, addressed these issues, and the courts are increasingly referring to the ALI formulation in addressing these issues. The Subcommittee has concluded that a rule amendment would not be likely to improve the handling of these issues, and that it could raise the risk of undesirable side effects. One point on which many agree is that, when there are lump sum class-action settlements, there often is some residue after initial claims distribution is completed. The topics on which the Subcommittee recommends proceeding, particularly amendments to Rules 23(e)(1) and 23(e)(2), include reference in the Committee Note to the importance of addressing these eventualities in submissions to the court at the beginning of the settlement process and in the handling of final approval of a proposed settlement. The Notes also focus attention on the claims process recommended by the settlement proposal, in an effort to ensure that it is suited to the case.

Issue classes: Considerable discussion has been had of the possible tension between the predominance requirement of Rule 23(b)(3) and the invitation in Rule 23(c)(4) to certify a class with regard to particular issues. Included in this discussion was the possibility of recommending an amendment to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of such issues. Eventually, the

conclusion was reached that there is no significant need for such a rule amendment. The various circuits seem to be in accord about the propriety of such treatment "[w]hen appropriate," as Rule 23(c)(4) now says. And this treatment may sometimes be warranted in actions under Rule 23(b)(2), a practice that might be called into question under some of the amendment ideas the Subcommittee has examined. On balance, these issues appear not to warrant amendment of the rules.

1. "Frontloading"

This issue was not on the list the Subcommittee presented to the full Committee in April. It has emerged from various discussions since then, which emphasized that it is important to ensure that vital information is provided to judges asked to approve class-action settlements, and to ensure that class members can learn enough about proposed settlements to make informed decisions whether to opt out or object.

At the mini-conference, the Subcommittee presented a more elaborate sketch of a "frontloading" rule that enumerated 14 specific topics on which parties must present the court with information when asking the court to authorize notice to the class under Rule 23(e). But there was widespread unhappiness among the conferees with a "laundry list" approach to such a rule even though the idea of getting more important information on the table early in the settlement-review process received considerable support. The sketch below responds to these concerns.

Rule 23. Class Actions

* * * * *

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

(1) After the parties have provided [relevant] {sufficient} information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

Sketch of Draft Committee Note

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then could also satisfy the notice requirements of Rule 23(c)(2)(B) in a class to be certified under Rule 23(b)(3), and trigger the class members' time to opt out. Information about the opt-out rate could then

be available to the court at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. If the court has not previously certified a class, this showing should also provide a basis for concluding that the court will certify a class for purposes of settlement. Although the order to send notice is often called a "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

There are many types of class actions, and class-action settlements are of many types. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each one. Instead, the subjects to be addressed depend on the specifics of the particular class action and the particular proposed settlement. General observations can be made, however.

One key element is class certification. If the court has already certified a class, the only information necessary in regard to a proposed settlement is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, the parties must ensure that the court has a basis for concluding that it will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision that the prospects for certification are warranted without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' submissions in regard to the proposed settlement should not be considered in relation to the later request for certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and nature of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details on the nature of the claims process that is contemplated [and about the take-up rate anticipated]. The possibility that the parties will report back to the court on the

take-up rate after notice to the class is completed is also often important. And because there are often funds left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is often important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal is often important.

The proposed handling of an attorney fee award under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an attorney fee award to the expected benefits to the class, and to take account of the likely take-up rate. One method of addressing this issue is to defer some or all of the attorney fee award determination until the court is advised of the actual take-up rate and results. Another topic that normally should be included in the report is identification of any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions demonstrate the likelihood that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

(2) 23(f) and the Rule 23(e)(1) order for notice to the class

Rule 23. Class Actions

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(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An order under Rule 23(e)(1) may not be appealed under Rule 23(f). An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Sketch of Draft Committee Note

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is often characterized as a "preliminary approval" of the proposed class certification. But it is not a final approval of class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that the court of appeals may not permit an appeal under this rule until the district court decides whether to certify the class. If it approves the settlement as well, that may often lead to entry of an appealable judgment. If it does not approve class certification -- thus leaving class certification for litigation purposes for possible later resolution -- there is no order subject to review under Rule 23(f).

(3) Clarifying that Rule 23(e)(1) notice triggers the opt-out period

Rule 23. Class Actions

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

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(2) *Notice.*

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

Sketch of Draft Committee Note

As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies the giving of notice. This decision is sometimes called a "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is commonplace that notice to the class is sent simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of that practice. Requiring repeat notices to the class can be wasteful and confusing to the class members.

(4) Notice in 23(b)(3) class actions

Rule 23. Class Actions

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

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(2) *Notice*

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(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort. * * * * *[1]

Sketch of Draft Committee Note

Subdivision (c)(2). Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the rule's individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted that requirement to mean that first class mail would be necessary in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. As that technological change has evolved, courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. No longer should courts assume that first class mail is the "gold standard" for notice in Rule 23(b)(3) class actions. As amended, the rule calls for giving notice "by the most appropriate means." It does not specify any particular means as preferred. Although it may often be true that online methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to the Internet.

[1] The alternative language was suggested by a Subcommittee member.

Instead of assuming one size fits all, therefore, courts and counsel should focus on the means most likely to be effective to notify class members in the case before the court. Professional claims administration firms have achieved expertise in evaluating differing methods of reaching class members. There is no requirement that such professional assistance be sought in every case, but in appropriate cases it may be important, and provide a resource for the court and counsel. In providing the court with information supporting notice to the class of a proposed class-action settlement under Rule 23(e)(1), for example, it may often be important to include a report about the proposed method of giving notice to the class, and perhaps a forecast of the anticipated take-up rate, as well as the proposed form of notice and any proposed claims form.

[Careful attention should also be given to the content and format of the notice and any claim form. The ultimate goal of giving notice is to enable class members to make decisions about whether to opt out or object, or to make claims. The rule requires that the court use the "best notice that is practicable." To achieve that goal, attention to format and content are in order. Format and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made of up of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' expectations and capabilities.

Particular attention to the method for class members to make claims is an important ingredient of the process of developing the notice and claims process. Although it is important to guard against groundless claims by purported class members, it is also important to avoid making the claims process unnecessarily burdensome, particularly when the amounts available for successful claimants are relatively small. Submissions to the court under Rule 23(e)(1) often should address the possibility that after initial submission of claims a residue of funds will be left for further distribution. In addition, it may often be desirable for the court to direct that the parties report back at the end of the claims distribution process about the actual pay-out rate. The goal of a notice and claims process in a Rule 23(b)(3) class action is to deliver relief to the class members. A claims process that maximizes delivery of relief to class members should be a primary objective of the notice program.

Attention should focus also on the method of opting out provided in the notice. As with making claims, the process of opting out should not be unduly difficult or cumbersome. At the same time, it is important to guard against the risk of unauthorized opt-out notices. As with other aspects of the notice process, there is no single method that is suitable for all cases.][2]

This amendment recognizes that technological change since 1974 calls for recalibrating methods of notice to take account of current realities. There is no reason to think that technological change will halt soon, and there is no way to forecast what further technological developments will affect the methods used to communicate. Courts seeking "the most appropriate means" of giving notice to class members under this rule should attend to existing technology, including class members' likely access to that technology, when reviewing the methods proposed in specific cases.

[2] This Note discussion draws from comments made to the Subcommittee in numerous conferences. It is supported by the rule's current reference to the "best notice that is practicable." It might be debated whether that rule language, which has long been in the rule, precisely supports this Note language, for the Note is mainly about the changes being proposed for the rule, not what has long been in it. But the amendment addresses "appropriate" notice methods, so a Note that addresses questions of format and content based on experience seems in order.

(5) Objectors

Although the Subcommittee's many conferences and meetings with experienced class-action lawyers have revealed considerable disagreement about many of the topics discussed, this topic is one on which there was widespread agreement, if not virtual unanimity. Even those who have presented objections to class-action settlements in many instances also express chagrin about the behavior of some objectors or objector counsel who exploit the objection process, and the ability to appeal from denial of an objection, to extract unjustified payments from class counsel desirous of completing the settlement and delivering the agreed relief to the members of the class.

The amendment ideas below essentially adopt two methods for dealing with these problems. First, the rule would direct objectors to state the grounds for their objections. The Subcommittee has been informed that, on occasion, objectors submit virtual one-line objections that are placeholders for appeals that in turn present the opportunity to extract tribute from class counsel. Not only does that behavior constitute a sort of a "tax" on successful class actions, it also denies the district court the benefit of a ground for evaluating the objections it receives.

The idea of objector disclosure was suggested to the Subcommittee during the conferences it attended after the full Committee's April meeting, and initially produced a detailed list of items that an objector would have to provide the court. Although a demanding list of disclosure requirements might be an inviting way of dealing with bad faith objectors, such requirements could also constitute an undue obstacle to objections by other class members not intent on extracting tribute. Accordingly, the sketch below is more general about what must be disclosed, and includes bracketed language that might strengthen this aspect of this approach.

The second feature of this amendment approach seeks to remove, or at least to regulate, the apparent inducement for bad faith objections -- the pay off. It builds on suggestions made to the Civil Rules Committee and to the Appellate Rules Committee recommending that there be a complete prohibition of any payment to objectors or objector counsel. The sketch below does not go that far. Instead, it builds on the 2003 amendments to Rule 23, which in Rule 23(e)(5) already require that an objector who wants to withdraw an objection must obtain the court's approval to do so. This approach is designed to put the court in a position to review any such payment rather than prohibit all such payments.

The appropriate court to make the approval decision is not certain. An initial reaction might be that the district court, having recently performed the review required under Rules

23(e)(1) and 23(e)(2) would be in a much better position than the court of appeals, which may be unfamiliar with the case. The Subcommittee has been told that often the "payoff" sort of situation arises shortly after the notice of appeal is filed, or even before it is filed. If that is so, it seems likely that the district court would be much better situated than the court of appeals to evaluate the matter.

On the other hand, it is possible that the question could arise much later in the process. An FJC study several years ago revealed that there is a striking divergence among circuits with regard to the resolution of objector appeals on the merits. The "hold up" paradigm for the sort of objector behavior addressed in this sketch seems to presume an early deal and no resolution on the merits. In two of the circuits studied by the FJC that was what happened in the great majority or all the objector appeals during the period studied. But in another circuit about two-thirds of the objector appeals resulted in an appellate decision on the merits of the objector's appeal. At least in that circuit, it may be that after the appeal has resulted in substantial appellate proceedings, the court of appeals is better equipped to evaluate a proposed dismissal of the appeal than the district court, which may not have seen the case for a year or two.

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

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(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~,~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.]

(B) T~~t~~he objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c)[3] of the

[3] For purposes of discussion at this meeting, one possibility that has been the subject of discussions with the

Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.[4] [5]

Appellate Rules Committee is the addition of an Appellate Rule 42(c), providing as follows:

> **(c) Dismissal of Class-Action Objector's Appeal**. A motion to dismiss an appeal from an order denying an objection made to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure [must][may] be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Rule 23(e)(5)(B) [if the objector or the objector's counsel is to receive any payment or consideration in [exchange for] {connection with} dismissal of the appeal].

The use of "may" above recognizes that the court of appeals may wish to deal with the matter itself. For one thing, if no payment or consideration is to be paid to the objector or objector counsel, there may be no reason for reference to the district court. For another, there may be cases in which the court of appeals concludes that it is better situated to resolve the matter than the district court. If the motion to withdraw the appeal arises shortly after the notice of appeal is filed, and therefore also shortly after the district court has reviewed the proposed settlement and rejected the objection, it would be unlikely the court of appeals would feel itself better equipped to deal with the matter. On the other hand, if the appeal has been fully briefed and argued, the court of appeals may be more familiar with the issues than the district court, for the district court's action might be several years old by then.

[4] The sketch presents in brackets the question whether the rule should be directed only to withdrawal of an objection or dismissal of an appeal, or instead to payment to the objector or objector counsel for withdrawing the objection or appeal. Current Rule 23(e)(5) focuses only on withdrawal of the objection. That may be sufficient. But it would seem that many objections are, in effect, abandoned after the class member obtains a fuller understanding of the issues. Whether one wants to burden that withdrawal with a court-approval requirement could be debated. On the other hand, it may be that the filing of a notice of appeal shows that something more serious is going forward. Then perhaps the focus on payment should be more pronounced. This issue has been discussed by the Subcommittee and it continues to consider the right balance.

[5] Another consideration might be whether to include something like current Rule 23(e)(3), which requires

Alternative 1

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in [exchange for] {connection with} withdrawal of an objection or appeal from denial of an objection.

Alternative 2

(C) The court must approve any payment to the objector in connection with withdrawing the objection or[, if acting on referral from the court of appeals, withdrawing] an appeal from denial of an objection.[6]

[This sketch assumes collaborative work with the Appellate Rules Committee on devising a combination of Civil Rule and Appellate Rule provisions that would suitably implement the regime of judicial review of any dismissal of an appeal from denial of an objection. Communications are under way with the Appellate Rules Committee to develop a coordinated response. The content of any amendments to the Appellate Rules is committed to the Appellate Rules Committee. One possible place for an Appellate Rule would be in Rule 42, which is why that designation is used in the above sketch of a Civil Rules.]

Sketch of Draft Committee Note

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identification of "side agreements" reached in connection with proposed settlements. Perhaps requiring disclosure (not just identification) of such side agreements would be a good idea in connection with proposed withdrawal of an objection or appeal from denial of the objection. That might somewhat sidestep the question of having a rule require court approval for payments themselves, as opposed to court approval for withdrawal of the objection or dismissal of the appeal.

[6] As a matter of form of amendment, it has been suggested that the better way to present an amendment along these lines would be to retain the first portion of the rule ("Any class member may object to the proposal if it requires court approval.") as 23(e)(5), and to make the remainder of (A) new Rule 23(e)(5)(A). Then (B) and (C) might be combined. These drafting possibilities will be kept in mind as the Subcommittee moves forward.

Subdivision (e)(5). Objecting class members can play a critical role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement submitted to the court under Rule 23(e)(1), objectors can make an accurate appraisal of the merits and possible failings of a proposed settlement. By raising these matters, they can assist the court in making its decision whether to approve the settlement.

The amendment therefore directs that objections state [with specificity] the grounds on which they are made. A simple "I object" does not assist the court in evaluating the proposal. [Accordingly, the amended rule specifies that failure to state the grounds for the objection is a reason to reject the objection during the final approval process.] Care must be taken, however, to avoid unduly burdening class members who wish to object. Particularly if they are not assisted by counsel, class members cannot be expected to present objections that adhere to technical legal requirements. Instead, they should only be expected to specify what aspect of the settlement they find objectionable. [In particular, they should state whether they are objecting only for themselves, for the entire class, or for some discrete part of the class.] With these specifics, the court and the parties may suitably address the concerns raised during the final approval hearing.

The rule is also amended to require court approval of any payment to an objector or objector's counsel in exchange for withdrawing an objection or appeal from denial of an objection. Although good-faith objections have provided assistance to courts reviewing proposed settlements, the Committee has been informed that in at least some instances objectors or their counsel appear to be acting in counterproductive ways. Some may submit delphic objections that do not go much beyond "I object," and thus do not assist the court in evaluating the proposed settlement. The requirement that the objection state the grounds [and authority to reject any objection that does not] addresses this problem.

Another problem is that objectors may exploit the delay potential of an appeal to extract concessions for themselves. The 2003 amendments to Rule 23 permitted withdrawal of an objection before the district court only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. But the delay resulting from an objector appeal may enable objectors to extract special concessions in return for

dropping the appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to enable the class to receive the benefits of the settlement.

This amendment therefore extends the requirement of court approval to apply to withdrawal of an appeal as well to withdrawal of an objection before the district court whether or not the objector or objector counsel is to receive a payment or other consideration for dropping the appeal. A parallel amendment to Appellate Rule 42(c) confirms that the Court of Appeals may refer the question whether to approve the dismissal of the appeal to the district court upon receipt of a motion to dismiss the appeal. The district court is likely often to be better equipped to decide whether to approve the payment than the court of appeals because the district court is more familiar with the case and with the settlement.

[In reviewing requests for withdrawal of an appeal -- as with requests for approval of withdrawal of an objection before the district court under current Rule 23(e)(5) -- the court should adopt a standard of reasonableness. Attention should focus particularly on instances in which a payment is to be made to the objector or objector counsel in return for the withdrawal. The request for approval should include details on any agreements made in connection with the withdrawal.

When the payment recognizes that the objector is in a distinctive or unique position that warrants treatment different from the other members of the class, that would ordinarily be a ground for approving the payment. When the objection results in a change in the settlement that affords additional relief to other class members as well as the objector, that would ordinarily be a sufficient basis for approving the payment [unless the amount of the payment is disproportionate to the overall benefits for other members of the class]. Even if the objection does not result in any change to the proposal, it may be that it assisted the district court in evaluating the proposal. For example, it may be that the objection enabled more careful review of certain aspects of the proposal or the value of the entire proposal. Even if the court concluded, after that review of the adequacy of the proposal, that approval was warranted, the value of the objection to the review process may justify a reasonable payment to the objector or objector counsel.][7]

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[7] The bracketed paragraphs are largely about the standards the court might use when passing on requests to withdraw an

(6) Settlement approval criteria

The Subcommittee early focused on the diversity and divergence of settlement-approval "checklists" employed in various circuits. The ALI had expressed concern in its Aggregate Litigation Principles that existing precedent produced an unduly diffuse and unfocused settlement review process, frustrating both judges and lawyers.

In place of that existing process, the Subcommittee presented in April a sketch that emphasized four approval principles and also contained a "catch all" authorization to consider whatever else the court thought important. During the April Committee meeting, it was suggested that a revised sketch for discussion at the mini-conference omit the catch-all provision.

The issues memorandum for the Sept. 11 mini-conference included such a sketch. It produced concern that in given cases other matters not directly invoked among the four factors distilled in the Subcommittee's list could matter enough to mention the possibility that such factors supported rejection of the proposal. Accordingly, both alternatives below offer a version of a "catch all" authorization for consideration of other things. At the same time, it might be argued that the listed four factors suffice for this purpose, and that anything that might trouble a court should bear on one of those four factors. Indeed, as the brackets around factor (B) suggest, it might be that we need only three, and can trust factor (A) to cover the problems that might also be presented under factor (B).

The sketch below also includes two alternative formulations. It could be said that Alternative 2 is more focused, and potentially more confining than Alternative 1. Alternative 1 merely says that the court should consider the listed factors in deciding whether the proposed settlement is "fair, reasonable, and adequate." It may be that this phrase, in the current rule, is so elastic as to encompass virtually any factor ever mentioned by any court considering a class-action settlement. Alternative 2 may be more focused, since it says that the court must find that all four (or three) factors are met. So it could be that in a given case a judge would consider approval forbidden under Alternative 2, even though the proposed settlement would be found

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objection or dismiss an appeal. It might be argued that they go too far beyond the actual provisions of the rule. On the other hand, the rule does require court approval, so Note language about how the court should approach that duty seems legitimate. It could also be noted that the court of appeals may sometimes be able to apply these standards when the appellant moves to dismiss an appeal.

fair, reasonable, and adequate using the more expansive direction in Alternative 1, and would win approval under that alternative.

The Subcommittee is somewhat divided on whether to adopt Alternative 1 or Alternative 2. In part, this division results from debates about the extent to which a rule should constrain courts in their review of proposed settlements. It also results from uncertainty about whether any rule would really constrain courts if it turns on whether the judge thought the settlement "fair, reasonable, and adequate."

There may also be some disagreement on the Subcommittee on whether either of these formulations -- particularly with a "catch all" provision -- would actually change judicial behavior. One view is that they would not, since judges could continue to do exactly what they did before the amendment. Another view is that such a rule change would provide much-needed structure and focus for the settlement-review process. It would also provide a basis for judges in any district to look to decisions in any other district for guidance in that process, without the complication that the other district was employing a different circuit's list of factors.

The Subcommittee is presenting these two alternatives to the full Committee, along with the question whether to include a "catch all" provision. Although it has not reached consensus as between Alternative 1 and Alternative 2, it is persuaded that the choice is not of monumental importance.

Rule 23. Class Actions

* * * * *

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

* * * * *

Alternative 1

(2) If the proposal would bind class members, the court [may disapprove it on any ground the court deems pertinent to approval of the proposal, but] may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

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

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

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

(C) the relief awarded to the class -- taking into account the proposed attorney fee award [and the timing of its payment,] and any ancillary agreement made in connection with the settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; [and]

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

[(E) approval is warranted in light of any other matter that the court deems pertinent.]

[For purposes of simplicity, the draft Committee Note below assumes that Alternative 1 will be adopted.]

Sketch of Draft Committee Note

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

"checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment is designed to provide more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement and deciding whether giving notice to the class is warranted by the prospect that the settlement will win final approval. The submissions to the court under Rule 23(e)(1), supporting notice to the class, should provide class members with more information to evaluate a proposed settlement. Objections under Rule 23(e)(5) can therefore be calibrated more carefully to the actual specifics of the proposed settlement. Rule 23(e)(5) is amended to direct objectors to state the grounds for their objections, which should assist the court and the parties in connection with the possible final approval of the proposed settlement.

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

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

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

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with

what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiating the fee award and the terms of the award.

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

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

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

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

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

[**Paragraph (E)**. Rule 23(e)(5)'s distillation of core settlement-approval criteria does not prevent the court from considering any other matter that, in its discretion, appears pertinent to the overall fairness, reasonableness, or adequacy of the proposal. In order to permit effective evaluation of such matters, the court may direct the parties to provide information that will assist in its review of the settlement.]

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

Composite of possible amendments
that might become an amendment package

In order to facilitate comprehension of the overall package of possible amendments, the following attempts to combine all six sketches above into a single presentation. Before any such package goes forward, it would certainly be modified and refined. Nonetheless, the overall composite may be helpful to Committee members.

Rule 23. Class Actions

* * * * *

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

* * * * *

(2) ***Notice***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort. * * * * *

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

(1) After the parties have provided [relevant] {sufficient} information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

Alternative 1

(2) If the proposal would bind class members, the court [may disapprove it on any ground the court deems pertinent to approval of the proposal, but] may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

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

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

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

(C) the relief awarded to the class -- taking into account the proposed attorney fee award [and timing of its payment,] and any ancillary agreement made in connection with the settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; and

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

[(E) approval is warranted in light of any other matter that the court deems pertinent.]

* * * * *

(5) (A) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~;~~. The objection must [state whether the objection applies only to the

objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.]

(B) T~~t~~he objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c) of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.

Alternative 1

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in [exchange for] {connection with} withdrawal of an objection or appeal from denial of an objection.

Alternative 2

(C) The court must approve any payment to the objector in connection with withdrawing the objection or[, if acting on referral from the court of appeals, withdrawing] an appeal from denial of an objection.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An order under Rule 23(e)(1) may not be appealed under Rule 23(f). An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Topics on which the Subcommittee is not recommending we go forward now

Based on the input it has received, including the mini-conference, the Subcommittee is not bringing forward several topics on which it has spent considerable time. These topics fall into essentially three categories.

(1) The first includes two topics that are "on hold" -- "ascertainability" and "pick-off" offers of judgment or settlement offers. The Subcommittee has concluded that activity on these topics is not warranted at this time, but recognizes that developments in the relatively near future may mean that it may be suitable for the Subcommittee to return to one or the other of these topics in light of developments.

(2) The second category includes one topic -- settlement class certification -- which the Subcommittee initially concluded should be dropped from the agenda, but later concluded should be presented to the full Committee without a Subcommittee recommendation

(3) The third category includes another two topics -- cy pres provisions and issue class certification. The Subcommittee has concluded that these topics should be dropped from the Subcommittee's current agenda because there is no need for current rule-amendment action, or too many questions about what that action might be, to warrant further work at this time.

(1) Topics "on hold"

Ascertainability

During the April, 2015, meeting of the full Committee, the conclusion was reached that the Subcommittee should examine the question of ascertainability. Since then, it has received much advice and commentary about this subject, and it included a segment on ascertainability in the issues memo for the mini-conference that is included in this agenda book. That memorandum presented a sketch of a possible "minimalist" rule change dealing with ascertainability issues that was unfavorably received by a number of participants in the mini-conference. As reflected in the Subcommittee's post-conference meeting, the Subcommittee concluded that the state of the law on this topic was too unsettled, and that any effort to address it now by pursing rule amendments would present great difficulties. Particularly because this issue was discussed during the Committee's April meeting, a rather full discussion is presented here even though the Subcommittee does not presently recommend proceeding with rule-amendment ideas.

In order to provide some examples of ascertainability decisions, included in the agenda book should be three recent court of appeals decisions grappling with the concept: Brecher v. Republic of Argentina, ___ F.3d ___, 2015 WL 5438797 (2d Cir. No. 14-4385, Sept. 16, 2015); Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015); and Byrd v. Aaron's, Inc., 784 F.3d 184 (3d Cir. 2015). All three of these cases have been decided since the Committee's April meeting, and they illustrate the unsettled nature of the law, and the variety of issues that this general topic can encompass.

A starting point in approaching these issues is to recognize that a number of Rule 23 provisions deal with matters that relate to concerns addressed under the heading ascertainability. Thus:

> Rule 23(a) refers to a suit on behalf of "members of a class," implying that one must be able to define who is in the class.
>
> Rule 23(a)(1) says that a class action is proper only if the "class" is so numerous that joinder of all members is impracticable, implying that there must be a way to determine who is in the class.
>
> Rule 23(c)(1)(B) directs the court, upon certifying the class action to "define the class."
>
> Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must direct individual notice to "all members who can be identified through reasonable effort."

> Rule 23(c)(3)(A) says that the judgment in a (b)(1) or (b)(2) class action must "describe those whom the court finds to be class members" and that the judgment binds them.
>
> Rule 23(c)(3)(B) says that the judgment in a (b)(3) class action should specify those "whom the court finds to be class members" and that the judgment binds them.

The list goes on. For decades it is been apparent that the proponent of class treatment must provide a reasonable definition of the proposed class; "all those similarly situated" usually would not suffice.

A recurrent theme has been that the definition must be objective, and eschew reliance on potential class members' state of mind. Another concern has been the "fail safe" class defined as something like "all those injured by defendant's illegal behavior." In that situation, a defendant victory would mean that there are no members of the class.

Thus, a considerable body of case law has developed on Rule 23's expectations about class definition. Recently, in part sparked by a series of Third Circuit decisions, the "implicit" requirement of ascertainability has emerged in the decisions of some courts. In significant measure, cases have focused on problems of identifying all class members, and whether a form of self-identification (e.g., by affidavit) should suffice initially for that purpose. Some have emphasized the need to ensure at the class certification stage that no difficulties will be encountered later in the case when the proceeds of the action are to be distributed to class members. Others have regarded such efforts as premature and unnecessary at the class certification stage.

It seems widely agreed that the most significant category of cases involving ascertainability problems are consumer class actions involving low-value products purchased by retail consumers who probably do not retain receipts. Identifying all such people may prove quite difficult. Verifying that they actually made the purchases might be quite burdensome to the class opponent and the court.

Various of the submissions to the Subcommittee that are mentioned at the beginning of this memorandum illustrate ways that experienced lawyers favored rule amendments to address this issue:

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

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

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

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

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

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

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

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

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

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

The case law, meanwhile, appears fluid. The three recent decisions included in this agenda book illustrate the point. In Brecher v. Republic of Argentina, ___ F.3d ___ (2d Cir. No. 14-4385, Sept. 16, 2015), the court observed (citations omitted):

> Like our sister Circuits, we have recognized an "implied requirement of ascertainability" in Rule 23 of the Federal Rules of Civil Procedure. While we have noted this requirement is distinct from predominance, we have not further defined its content. We here clarify that the touchstone of ascertainability is whether the class is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."
>
> On appeal, Appellee argues that a class defined by "reference to objective criteria . . . is all that is required" to sustain ascertainability. We are not persuaded. * * * [T]he use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.

The court found that, under the rather distinctive circumstances of the litigation before the court on behalf of those with beneficial interests in Argentinean bonds, the ascertainability requirement was not satisfied. The following discussion illustrates the difficulties that persuaded the court that the case was different from ordinary consumer class actions, such as actions on behalf of recipients of gift cards. The court's analysis of this contrast illustrates the fact-bound nature of potential ascertainability analyses:

> Appellee argued that the class here is comparable to those cases involving gift cards, which are fully transferable instruments. However, gift cards are qualitatively different: For example, they exist in a physical form and possess a unique serial number. By contrast, an individual holding a beneficial interest in Argentina's bond series possesses a right to the *benefit* of the bond but does not hold the physical bond itself. Thus, trading on the secondary market changes only to whom the benefit inures. Further, all bonds from the same series have the same trading number identifier (called a CUSIP/ISIN) making it practically impossible to trace purchases and sales of a particular beneficial interest. Thus, when it becomes necessary to determine who holds bonds that opted into (or out of) the class, it will be nearly impossible to distinguish between them once traded on the secondary market.

This analysis suggests some of the challenges that framing an ascertainability rule might present.

In Mullins v. Direct Digital, LLC, 795 F.3d 654 (2d Cir. 2015), the court cited Third Circuit precedent (including the Third Circuit's Byrd v. Aaron's decision included in the agenda materials) and referred to "doctrinal drift" toward what it described as a "heightened" ascertainability requirement that "has defeated certification, especially in consumer class actions.". It explained:

> We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes. The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3). These existing requirements already address the balance of interests that Rule 23 is designed to protect. A court must consider "the likely difficulties in managing a class action," but in doing so it must balance countervailing interests to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."

In particular, the Seventh Circuit pointed out, "some courts have used this requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims," worrying that the Third Circuit approach "effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases." It also noted, regarding the Third Circuit's cases, that "several members of the court [the Third Circuit] have expressed doubts about the expanding ascertainability doctrine," adding that "we agree in essence with Judge Rendell's concurring opinion in Byrd [v. Aaron's, Inc.], which urged "retreat from [the] heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23."

In Byrd v. Aaron's, Inc., 784 F.3d 154 (3d Cir. 2015), the court reversed a district court's denial of class certification on grounds of ascertainability. It explained that "the District Court confused ascertainability with other relevant inquiries under Rule 23." It introduced its discussion as follows (id. at 161-62):

> Before discussing these errors, however, we believe it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated. Our ascertainability decisions have been consistent and reflect a relatively simple requirement. Yet there has been apparent confusion in the invocation and

> application of ascertainability in this Circuit. (Whether that is because, for example, the courts of appeals have discussed ascertainability in varying and distinct ways, or the ascertainability requirement is implicit rather than explicit in Rule 23, we need not say.) Not surprisingly, defendants in class actions have seized upon this lack of precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification.

As noted above, Judge Rendell concurred in the holding that the district court's denial of class certification was wrong, but added the following (id. at 172):

> [T]he lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means, and to explain how this implicit requirement fits in the class certification calculus, indicate that the time has come to do away with this newly created aspect of Rule 23 in the Third Circuit. Our heightened ascertainability requirement defies clarification.

Having received much input about this issue, the Subcommittee has concluded that it is not prepared at present to advance a rule provision that would helpfully address this set of issues. As the discussion above shows, this area is still in a state of considerable flux. It might even receive Supreme Court attention in the near future. In any event, it does seem likely that the courts of appeals and district courts will continue to grapple with issues and that the "common law" of ascertainability will evolve and emerge during the coming months. Part of the reason for the gradual nature of this process is that aspects of this topic touch on very basic principles of class-action jurisprudence. Any attempt to modify the handling of those basic principles will likely produce very considerable controversy. Although that prospect is not an argument against proceeding with needed rule amendments, it is a reason for caution about proceeding before the actual state of the law has become clear enough to make the consequences of rulemaking relatively predictable.

Rule 68 and Pick-Off offers

The Subcommittee does not recommend proceeding with work on an amendment to address the problem presented by "pick off" offers of settlement of judgment or settlement that might moot the claims of proposed class representatives before class certification could be decided.

Until recently, the Seventh Circuit had held that, at least in some circumstances, such offers would moot proposed class actions. See Damasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011). In reaction, plaintiff lawyers inside and outside the Seventh Circuit filed "out of the chute" class certification motions to guard against mootness, because the Seventh Circuit regarded making such a motion as sufficient to cure the potential mootness problem. On occasion, plaintiffs would also move to stay resolution of the class-certification motion until discovery and other work had been done to support resolution of certification.

The issues memorandum for the mini-conference contained three different possible rule-amendment approaches for dealing with these problems. The memo also raised the question whether the problem warranted the effort involved in proceeding to amend the rules. After the mini-conference, the Subcommittee decided that proceeding at this time is not indicated.

In Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015), the Seventh Circuit overruled *Damasco* and a number of its cases following that decision "to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy." Judge Easterbrook noted that "Justice Kagan's dissent in Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523, 1532-37 (2013) (joined by Ginsburg, Breyer & Sotomayor, JJ.), shows that an expired (and unaccepted) offer of a judgment does not satisfy the Court's definition of mootness, because relief remains possible." He added:

> Courts of appeals that have considered this issue since Genesis Healthcare uniformly agree with Justice Kagan. See, e.g., Tanasi v. New Alliance Bank, 786 F.3d 195 (2d Cir. 2015); Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). The issue is before the Supreme Court in *Gomez*, and we think it best to clean up the law of this circuit promptly, rather than require Chapman and others in his position to wait another year for the Supreme Court's decision.

See also Hooks v. Landmark Indus. Inc., 797 F.3d 309 (5th Cir. 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action").

As noted by Judge Easterbrook, the Supreme Court has this issue before it in the *Campbell-Ewald* case. The oral argument in that case occurred on Oct. 14, 2015. It seems prudent to await the result of the Court's decision, and quite possible that the issue will recede from the scene after that decision. It could recede even if the Court did not decide the case, or the decision left some questions open.

(2) Topic which the Subcommittee presents without a recommendation -- adopting a settlement certification rule

Below is introductory material on a topic that the Subcommittee has been considering since it began its deliberations in 2011. As set forth below, the Subcommittee's initial reaction after the mini-conference was that this topic should be taken off the agenda. But some reactions since then have prompted the Subcommittee to conclude that the subject should be presented to the full Committee. Below is the sketch presented to the Dallas mini-conference, the notes on the discussion of this topic during the conference, and the notes on the Subcommittee's discussion of the issue during its meeting after the conclusion of the conference.

After the sketch presented at the mini-conference, there appears an alternative inspired by the 1999 Report on Mass Tort Litigation to the Chief Justice from the Advisory Committee and the Working Group on Mass Torts. It proposes amending Rule 23(b)(3) to authorize certification under that subdivision if "interests in settlement" predominate over individual questions. This alternative approach has emerged only recently and has not been discussed in detail by the Subcommittee.

A. Rule 23(b)(4) Authorization for Settlement Certification

Issues memo for mini-conference

(6) Settlement Class Certification

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

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

* * * * * *

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

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim

class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

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

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

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

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

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

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding

can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

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

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

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

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

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower

courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

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

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

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

Discussion during mini-conference

There was extensive discussion of the Rule 23(b)(4) settlement certification sketch during the mini-conference. A thorough report on that discussion appears on the notes of the mini-conference, included in this agenda book. The discussion included the question whether the Supreme Court's Amchem decision unduly limited settlement certification in practice, and whether adding a new (b)(4) might invite inappropriate class action filings.

Notes on Subcommittee discussion after conference.

The following is an excerpt from the notes of the Subcommittee's meeting after the mini-conference

Topic 6 -- settlement class certification

Initial reactions to the discussion of this topic were that parties are presently able to navigate the issues presented by settlement class certification under current precedents. Another view was that fashioning a rule would be quite difficult, and that it is not clear it is worth the effort.

Concerns include the risk that proceeding with the amendment sketch in the conference materials would encourage abuse of class actions, and invite reverse auctions to an extent not happening under current law.

Another view was that "people are satisfied with current work-arounds." In addition, we have heard concern that a rule like our sketch could lead to undisciplined gathering of claims.

On the other hand, a rule on this subject would bring some discipline to the actual resolution of related claims. One could regard MDL treatment of massed claims as the equivalent of a mandatory class action unregulated by rule. That is a particular problem in certain types of cases. And the volume of MDL actions has grown in recent years. By some calculations they constitute more than a third of all pending civil cases in the federal judicial system.

That drew a skeptical response: "Can we fix the problems with MDL handling of mass claims situations?" We have been advised to leave this problem alone. Maybe a manual of some sort would be desirable, but the Civil Rules are not a manual. A reaction to this point was that MDL proceedings are inherently unique, and that "Judges are just doing it."

The consensus was that a separate settlement class rule should not be pursued at this time.

B. Alternative proposal based on 1999 Report on Mass Tort Litigation

In 1998-99, an ad hoc Working Group on Mass Torts, chaired by Judge Anthony Scirica, studied mass tort issues. It prepared a report that the Advisory Committee submitted to the Chief Justice in 1999. See Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and the Judicial Conference of the United States (Feb. 15, 1999). Ed Cooper, who served as co-Reporter for the Working Group, developed the following possible amendment to Rule 23(b)(3) in the wake of Amchem:

> **(3)** the court finds that the questions of law or fact common to class members, or interests in settlement, predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Cooper, Aggregation and Settlement of Mass Torts, 148 U. Pa. L. Rev. 1943, 1995 (2000).

This approach may offer advantages to the 23(b)(4) approach sketched above, by introducing flexibility without creating a new species of settlement class in Rule 23(b). Indeed, it may recognize what some who have spoken with the Subcommittee have reported -- that the courts are actually taking account of settlement interests in deciding whether to certify classes for purposes of settlement. Moreover, it could involve the court at an earlier point in the negotiation, and perhaps design, of a proposed settlement. To some extent, the court may sometimes become involved when asked to designate interim class counsel under Rule 23(g)(3), but this approach would invite broader attention from the court before the settlement is reached.

This approach also takes account of the many potential benefits of settlement. As Prof. Cooper explained in 2000 (148 U. Pa. L. Rev. at 1994-95):

> There is a powerful shared interest in achieving all of the things that can be achieved only by settlement. Indeed, * * * the greatest charm of settlement is that it enables a disposition that cuts free from the shortcomings of substantive law as well as the fallibility of our procedural institutions. Neither individual litigation nor disposition of an aggregated litigation by adjudication can do as well. From this perspective we would do well to focus on crafting the best settlement procedure possible, and to put aside lingering doubts about the importance of individual opportunities to opt out, the enormous complexities that

charge the professional responsibility of class counsel with almost unendurable pressures, as well as other doubts.

Genuine questions could be raised about this approach as well. Cutting free of the shortcomings of substantive law may be questioned.[8] Here are some: (1) Is it better to have the court involved before the parties reach a settlement? The (b)(4) proposal requires the parties to reach a proposed settlement before certification for purposes of settlement can occur. (2) Should this possibility be limited to (b)(3) classes? One might urge that a similar opportunity should be available for (b)(2) classes.[9] Whether it could be justified in (b)(1) situations might raise difficult questions. (3) If this is "certification" under (b)(3), does it trigger the notice requirements and opt-out rights in Rule 23(c)(2)(B)? If the settlement is not ultimately approved under Rule 23(e), does that invalidate the opt-outs of class members who opted out? Should a second notice be sent if the case is later certified for litigation purposes? (4) Is there a risk that courts would routinely conclude that "interests in settlement" predominate over individual issues? Some with whom the Subcommittee has talked speak of "hydraulic pressure" toward settlement, and this change might increase that pressure.

As noted above, the Subcommittee has only recently given any consideration to this possible approach, and it has not had an opportunity to discuss it at any length. It invites input about this alternative approach.

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[8] For an exploration of these issues, see Marcus, They Can't Do That, Can They? Mass Tort Reform via Rule 23, 80 Cornell L. Rev. 858 (1995).

[9] Indeed, the Report on Mass Tort Litigation itself included a more aggressive idea that would have applied to all class actions, but would depend on major surgery on Rule 23:

> **(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified.** An action may be ~~maintained~~ certified as a class action fur purposes of settlement or trial if the prerequisites of subdivision (a) are satisfied and in addition * * * * *

Report on Mass Tort Litigation, Appendix F-5 (Settlement Classes). This approach seems to equate settlement and trial as co-equal possibilities, but the possibility would exist for (b)(2) and even (b)(1) classes as well as (b)(3) classes. So more aggressive approaches could be considered.

(3) Topics the Subcommittee recommends taking off the current agenda

The Subcommittee has previously brought the following issues before the full Committee, but has now concluded that further work on these issues is not warranted at this time.

Cy pres

Chief Justice Roberts articulated concerns about cy pres provisions in his separate opinion regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013). The ALI Aggregate Litigation Principles, in § 3.07, offered a series of recommendations about cy pres provisions that many courts of appeals have adopted. Indeed, this provision is the one that has been most cited and followed by the courts.

Beginning with several ideas from the ALI recommendations, the Subcommittee developed a draft provision to be added to Rule 23(e) specifically addressing use of cy pres provisions. A fairly lengthy sketch of both a possible rule amendment and a possible Committee Note were included in the issues memo for the mini-conference. That sketch has drawn very considerable attention, and also raised a wide variety of questions.

One question is whether there is any need for a rule in light of the widespread adoption of the ALI approach. It is not clear that any circuit has rejected the ALI approach, and it is clear that several have adopted it.

Another question is whether adopting such a provision would raise genuine Enabling Act concerns. The sketch the Subcommittee developed authorized the inclusion of a cy pres provision in a settlement agreement "even if such a remedy could not be ordered in a contested case." The notion is that the parties may agree to many things in a settlement that a court could not order after full litigation. Yet it might also be stressed that, from the perspective of unnamed members of the class, the binding effect of the class-action settlement depends on the court's decree, not just the parties' agreement. So it might be said that a rule under which a court could substitute a cy pres arrangement for the class members' causes of action is subject to challenge. That argument could be met, however, with the point that the court has unquestioned authority to approve a class-action settlement that implements a compromise of the amount claimed, so assent to a cy pres arrangement for the residue after claims are paid should be within the purview of Rule 23.

At the same time, some submissions to the Subcommittee articulated reasons for caution in the area. Some urged, for example, that cy pres provisions serve valuable purposes in supporting such worthy causes as providing legal representation

to low-income individuals who otherwise would not have access to legal services. Examples of other worthy causes that have benefitted from funds disbursed pursuant to cy pres arrangements have been mentioned. See, e.g., Cal. Code Civ. Pro. § 384(b) (directing that the residue left after distribution of benefits from class-action settlements should be distributed to child advocacy programs or nonprofit organizations providing civil legal services to the indigent, or to organizations supporting projects that will benefit the class).

It seems widely agreed that lump-sum settlements often produce a residue of undistributed funds after the initial claims process is completed. The ALI approach favors attempting to make a further distribution to class members who have submitted claims at that point, but it may be that the very process of trying to locate more class members or make additional distributions would use up most or all of the residue.

It is also troubling, however, that there may be cases in which very large amounts of money are unclaimed, raising questions about the purpose of such class actions. Though deterrence is often cited as a purpose beyond compensating class members, crafting a rule of procedure principally to strengthen deterrence may be questionable.

Ultimately, the Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed and (b) uneasiness about the proper limits of the rulemaking authority cautioned against adopting a freestanding provision on cy pres provisions.

At the same time, it also concluded that emphasizing the importance of considering the possibility of a residue and including attention to cy pres arrangements in the "frontloading" Committee Note would be a desirable way to call attention to the general issues.

Issue classes

The Subcommittee included several sketches of possible amendments to Rule 23(b) or (c) better to integrate Rule 23(b)(3) and 23(c)(4). For a time it appeared that there was a significant conflict among the circuits about whether these two provisions could both be effectively employed under the current rule. But it is increasingly clear that the dissonance in the courts has subsided. At the same time, there have been some intimations that changing the rule along the lines the Subcommittee has discussed might actually create rather than solve problems.

The Subcommittee also circulated a sketch of a change to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of issues on which it had based issue class certification. This sketch raised a variety of potential difficulties about whether there should be a requirement for district-court endorsement of the timing of the appeal, and whether a right to seek appellate review might lead to premature efforts to obtain review.

The Subcommittee eventually concluded that there was no significant need for rule amendments to deal with issue class issues, and that there were notable risks of adverse consequences.