RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has continued to work on the areas it identified before the Advisory Committee's October, 2014, meeting. This work has included conference calls on Dec. 17, 2014, Feb. 6, 2015, and Feb. 12, 2015. Notes on those calls should be included with these agenda materials.

The Subcommittee continues its efforts to become fully informed about pertinent issues regarding Rule 23 practice today. Besides generally keeping an eye out to identify pertinent developments and concerns, Subcommittee members have attended, and expect to attend a considerable number of events about class action practice that together should offer a broad range of views. These events include the following:

ABA 18th Class Action Institute (Chicago, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C. April 8, 2015).

ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 11-14)

Civil Procedure Professors' Conference (Seattle, WA, July 17)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015).

Association of American Law Schools Annual Meeting (New York, Jan. 6-10, 2016) [Participation in this event has not been arranged, but efforts are underway to make such arrangements.]

As should be apparent, the Subcommittee is trying to gather

information from many sources as it moves forward. Its present intention is to be in a position to present drafts for possible amendments to the full Committee at its Fall 2015 meeting. If that proves possible, it may be that a preliminary discussion of those amendment ideas can be had with the Standing Committee during its January, 2016, meeting, and a final review of amendment proposals at the Advisory Committee's Spring, 2016, meeting. That schedule would permit submission of proposed preliminary drafts to the Standing Committee at its meeting in May or June of 2016, with a recommended August, 2016, date for publication for public comment. If that occurred, rule changes could go into effect as soon as Dec. 1, 2018. But it is by no means clear that this will prove to be a realistic schedule.

For the present, the key point is that **there is no assurance that the Subcommittee will ultimately recommend any amendments. In addition, although it has identified issues that presently seem to warrant serious examination, it has not closed the door on other issues. Instead, it remains open to suggestions about other issues that might justify considering a rule change, as well as suggestions that the issues it has identified are not important or are not likely to be solved by a rule change. Even if the Subcommittee does eventually recommend that the full Committee consider changes to Rule 23, the recommendations may differ from the ideas explored in this memorandum.**

The purpose of this memorandum, therefore, is to share with the full Committee the content and fruit of the Subcommittee's recent discussions. The hope is that the discussion at the full Committee meeting will illuminate the various ideas generated so far, and also call attention to additional topics that seem to justify examination by the Subcommittee.

The time has come for moving beyond purely topical discussion, however. In order to make the discussion more concrete, this memorandum presents conceptual sketches of some possible amendments, sometimes accompanied with possible Committee Note language that can provide an idea of what a Note might actually say if rule changes along the lines presented were proposed. **These conceptual sketches are not intended as initial drafts of actual rule change proposals, and should not be taken as such. By the time the Subcommittee convenes its mini-conference in September, 2015, it may be in a position to offer preliminary ideas about such drafts. But as the array of questions in this memorandum attests, it has not reached that point yet.**

The Subcommittee's work has been greatly assisted by review of the ALI Principles of Aggregate Litigation. Those Principles embody a careful study of some of the issues covered in this memorandum, and occasionally provide a starting point in analysis

of those issues, and in drafting possible rule provisions to address them.

The topics covered in this memorandum are:

(1) Settlement Approval Criteria
(2) Settlement Class Certification
(3) Cy Pres Treatment
(4) Dealing With Objectors
(5) Rule 68 Offers and Mootness
(6) Issue Classes
(7) Notice
Appendix I: Settlement Review Factors -- 2000 Draft Note
Appendix II: Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit

(1) Settlement Approval Criteria

In 2003, Rule 23(e) was amended to expand its treatment of judicial review of proposed class-action settlements. To a considerable extent, those amendments built on existing case law on settlement approval. As amended in 1966, Rule 23(e) required court approval for settlement, compromise, or voluntary dismissal of a class action, but it provided essentially no direction about what the court was to do in reviewing a proposed settlement.[1]

Left to implement the rule's requirement of court approval of settlement, the courts developed criteria. To a significant extent, that case law development occurred during the first two decades after Rule 23 was revised in 1966. It produced somewhat similar, but divergent, lists of factors to be employed in different circuits. The Subcommittee has compiled a list of the factors used in the various circuits that is attached as an Appendix to this memorandum.

Several points emerge from the lists of factors. One is that, although they are similar, they are not the same. Thus, lawyers in different circuits, even when dealing with nationwide class actions, would need to attend to the particular list employed in the particular circuit. A second point is that at least some of the factors that some courts adopted in the 1970s seem not to be very pertinent to contemporary class action practice. Yet they command obeisance in the circuits that employ them even though they probably do not facilitate the court's effort to decide whether to approve a proposed settlement. A third point is that there are other matters, not included in the courts' 1970s-era lists, that contemporary experience suggests should matter in assessing settlements.

The ALI Aggregate Litigation Principles proposed a different approach, which is partly reflected in the conceptual discussion draft below. The ALI explanation for its approach was as follows:

> The current case law on the criteria for evaluating settlements is in disarray. Courts articulate a wide range of factors to consider, but rarely discuss the significance to be given to each factor, let alone why a particular factor is probative. Factors mentioned in the cases include, among others [there follows a list of about 17 factors].

---

[1] From 1966 to 2003, Rule 23(e) said, in toto: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs."

> Many of these criteria may have questionable probative value in various circumstances. For instance, although a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong favorable endorsement.

ALI Aggregate Litigation Principles § 3.05 Comment (a) at 205-06.

There are two appendices at the end of the memorandum that offer further details and ideas. Appendix I is the draft Committee Note developed early in the evolution of Rule 23(e) amendments in 2000-02. It offers a list of factors that might be added to a rule revision, or to a Committee Note. The approach of the conceptual draft of the rule amendment idea below, however, trains more on reducing the focus to four specified considerations that seem to be key to approval, adding authority to decline approval based on other considerations even if positive findings can be made on these four topics.

Appendix II offers a review of the current "approval factors" in the various circuits, plus additional information about the California courts' standards for approving settlements and the ALI Principles approach.

As Committee members consider this conceptual draft and the alternative details in Appendix I and Appendix II, one way of approaching the topic is to ask whether adopting a rule like this would provide important benefits. Balanced against that prospect is the likelihood that amending the rule would also produce a period of uncertainty, particularly if it supersedes current prevailing case law in various circuits. At the same time, it may focus attention for courts, counsel, and even objectors, on matters that are more important than other topics included on some courts' lists of settlement-approval factors.

Conceptual Discussion Draft of Rule 23(e)
Amendment Idea

(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:

* * * * *

(2) If the proposal would bind class members,

Alternative 1

(A) the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The court may make this finding only on finding that:

Alternative 2

(A) the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(i) the class representatives and class counsel have been and currently are adequately representing the class;

(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

(iii) 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

(iv) the settlement was negotiated at arm's length and was not the product of collusion.

(B) The court may also consider any other matter pertinent to approval of the proposal, and may refuse to approve it on any such ground.

Conceptual Sketch of Committee Note Ideas

In 2003, Rule 23(e) was amended to direct that a court may approve a settlement proposal in a class action only on finding that it is "fair, reasonable, and adequate." This provision was based in large measure on judicial experience with settlement review. Since 2003, the courts have gained more experience in settlement review.

Before 2003, many circuits had developed lists of "factors" that bore on whether to approve proposed class-action settlements. Although the lists in various circuits were similar, they differed on various specifics and sometimes included factors of uncertain utility in evaluating proposed

settlements. The divergence among the lists adopted in various circuits could sometimes cause difficulties for counsel or courts.

This rule is designed to supersede the lists of factors adopted in various circuits with a uniform set of core factors[2] that the court must find satisfied before approving the proposal. Rule 23(e)(2)(A) makes it clear that the court must affirmatively find all four of the enumerated factors satisfied before it may approve the proposal.

But this is not a closed list; under Rule 23(e)(2)(B) the court may consider any matter pertinent to evaluating the fairness of the proposed settlement.[3] The rule makes it clear that the court may disapprove the proposal on such a ground even though it can make the four findings required by Rule 23(e)(2)(A). Some factors that have sometimes been identified as pertinent seem ordinarily not to be, however. For example, the fact that counsel for the class and the class opponent support the proposal would ordinarily not provide significant support for a court's approval of the proposal. Somewhat similarly, particularly in cases involving relatively small individual relief for class members, the fact the court has received only a small number of objections may not provide significant support for a finding the settlement is fair.[4]

[Before notice is sent to the class under Rule 23(e)(1), the court should make a preliminary evaluation of the proposal. If it is not persuaded that the proposal provides a substantial basis for possible approval, the court may decline to order notice. But a decision to order notice should not be treated as a "preliminary approval" of the proposal, for the required findings and the decision to approve a proposal must not be made until objections are evaluated and the hearing on the proposal occurs.][5]

---

[2] Is this really accurate? The rule permits the court to refer to "any other matter pertinent to approval of the proposal." Should the point be to offer evaluations of factors endorsed in the past by some courts? See Appendix II regarding the factors presently employed in various circuits.

[3] It might be that a much more extensive discussion of other factors could be added here, along the lines of the material in Appendix I.

[4] Is this discussion of "suspect" factors sufficient?

[5] This paragraph attempts to introduce something endorsed by the ALI Principles -- that preliminary authorization for notice to the class not become "preliminary approval." Whether

The first factor calls for a finding that the class representatives and class counsel have provided adequate representation. This factor looks to their entire performance in relation to the action. One issue that may be important in some cases is whether, under the settlement, the class representatives are to receive additional compensation for their efforts.[6] Another may in some instances be the amount of any fee for class counsel contemplated by the proposed settlement.[7] In some instances, the court has already appointed class counsel under Rule 23(g).[8] The court would then need only review the

---

saying so is desirable could be debated. Whether saying so in the Note is sufficient if saying so is desirable could also be debated. One could, for example, consider revising Rule 23(e)(1) along the following lines:

> **(1)** The court must, after finding that giving notice is warranted by the terms of the proposed settlement, direct notice in a reasonable manner to all class members who would be bound by the proposal.

[6] This factor seems worth mentioning, but perhaps it should not be singled out. It could cut either way. In a small-claim case, it might be sensible to provide reasonable additional compensation for the representative, who otherwise might have had to do considerable work for no additional compensation. The better the "bonus" corresponds to efforts expended by the representation working on the case, the stronger this factor may favor the settlement. The more the amount of compensation reflects some sort of "formula" or set amount unrelated to effort from the representative, the more it may call the fairness of the settlement into question. When the individual recovery is small and the incentive bonus for the class representatives is large, that may, standing alone, raise questions about the settlement, given that the class representatives may have much to lose if the settlement is not approved but little to gain if the case goes to trial and the class recovers many times what the settlement provides.

[7] This factor also seems worth mentioning in the Note. Presumably an agreement that says the court will set the attorney fee, and nothing more, raises fewer concerns than one that says the defendant will not oppose a fee up to $*X*. But the amount of the fee is often included in the Rule 23(e) notice of proposed settlement so that an additional notice is not mandated by Rule 23(h)(1).

[8] This would include the appointment of "interim counsel" under Rule 23(g)(3), and that fact could be mentioned in the Note if it were considered desirable to do so.

performance of counsel since that time. In making this determination about the performance of class counsel in connection with the negotiation of the proposal, the court should be as exacting as Rule 23(g) requires for appointment of class counsel.

The second factor calls for the court to assess the relief awarded to the class under the proposed settlement in light of a variety of practical matters that bear on whether it is adequate. In connection with this factor, it may often be important for counsel to provide guidance to the court about how these considerations apply to the present action. For example, the prospects for success on the merits, and the likely dimensions of that success, should be evaluated. It may also be important for the court to attend to the degree of development of the case to determine whether the existing record affords a sufficient basis for evaluation of these factors. There is no "minimum" amount of discovery, or other work, that must be done before the parties reach a proposed settlement, but the court may seek assurance that it has a firm foundation for assessing the considerations listed in the second factor.[9]

The third factor requires the court to find that the proposed method of allocating the benefits of the settlement among members of the proposed class is equitable. A pro rata distribution is not required, but the court may inquire into the proposed method for allocating the benefits of the settlement among members of the class. [It is possible that this inquiry may suggest the need for subclassing.][10]

The fourth factor partly reinforces the first factor, and may take account of any agreements identified pursuant to Rule 23(e)(3). The court should pay close attention to specifics about the manner and content of negotiation of the proposed settlement. Any "side agreements" that emerged from the negotiations deserve scrutiny. These inquiries may shed light on the second and third factors as well.

Any other factors that are pertinent to whether to approve the proposed settlement deserve attention in the settlement-

---

[9] This paragraph attempts to invite appropriate judicial scrutiny of the possible risks of a cheap "early bird" settlement, but also to ward off arguments that no settlement can be approved until considerable "merits" discovery has occurred, or something of the sort.

[10] Is this bracketed language a desirable thing to include in the Note? The point seems obvious in some ways, but the consequences of subclassing may be to delay, or perhaps derail, a settlement.

review process. The variety of factors that might bear on a given proposed settlement is too large for enumeration in a rule, although some that have been mentioned by some courts -- such as support from the counsel who negotiated the settlement -- would ordinarily not be entitled to much weight.

This rule provides guidance not only for the court, but also for counsel supporting a proposed settlement and for objectors to a proposed settlement. [The burden of supporting the proposed settlement falls initially on the proponents of the proposal. As noted above, the court's initial decision that notice to the class was warranted under Rule 23(e)(1) does not itself constitute a "preliminary" approval of the proposal's terms.][11]

[As noted in Rule 23(e)(4) regarding provision of a second opt-out right, the court may decline to approve a proposed settlement unless it is modified in certain particulars. But it may not "approve" a settlement significantly different from the one proposed by the parties. Modification of the proposed settlement may make it necessary to give notice the class again pursuant to Rule 23(e)(1) to permit class members to offer any further objections they may have, or (if the modifications increase significantly the benefits to class members) for class members who opted out to opt back into the class.][12] [13]

---

[11] This language about the burden of supporting the settlement seems implicit in the rule, and corresponds to language in ALI § 3.05(c).

[12] This paragraph pursues suggestions in ALI § 3.05(e). Are these ideas worthy of inclusion in the Note?

[13] The above sketch of a draft Note says little about the claims process. It may be that more should be said. ALI § 3.05 comment (f) urges that, when feasible, courts avoid the need for submission of claims, and suggests that direct distributions are usually possible when the settling party has reasonably up-to-date and accurate records. This suggestion is not obviously tied to any black letter provision.

The whole problem of claims processing may deserve attention. It is not currently the focus of any rule provisions. It may relate to the cy pres phenomenon discussed in part (3) below. If defendant gets back any residue of the settlement funds, it may have an incentive to make the claims procedure long and difficult. Keeping an eye on that sort of thing is a valid consideration for the court when it passes on the fairness of the settlement. In addition, in terms of valuing the settlement for the class as part of the attorneys' fee decision, the rate of actual claiming may be an important criterion. Cf. 28 U.S.C. § 1712(a) (requiring, in "coupon settlement" cases, that the focus

(2) Settlement Class Certification

The Committee is not writing on a blank slate in addressing this possibility. In 1996, it published a proposal to adopt a new Rule 23(b)(4) explicitly authorizing certification for settlement purposes, under Rule 23(b)(3) only, in cases that might not qualify for certification for litigation purposes. This history may be very familiar to some members of the Committee, but for some it may have receded from view. In order to provide that background, the 1996 rule proposal and accompanying Committee Note are set out. In addition, footnotes call attention to developments since then and contemporary issues that seem relevant to the matter currently before the Committee.

(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 request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

* * * * *

The draft Committee Note that accompanied that proposal was as follows (with some footnotes to mention issues presented by doing the same thing as before).

Subdivision (b)(4) is new. It permits certification of

---

in setting attorney fees be on "the value to class members of the coupons that are redeemed"). If there is a way to avoid the entire effort of claims submission and review, that might solve a number of problems that have plagued some cases in the past.

At the same time, a "streamlined" claims payment procedure may benefit some class members at the expense of others. A more particularized claims process might differentiate between class members in terms of their actual injuries in ways not readily achievable using only the defendant's records.

Altogether, these issues present challenges. Whether they are suitable topics for a rule provision is another matter. Up until now, they have largely been regarded as matters of judicial management rather than things to be addressed by rule. See Manual for Complex Litigation (4th) § 21.66 (regarding settlement administration).

a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 72-73 (2d Cir.1982); In re Beef Industry Antitrust Litigation, 607 F.2d 167, 170-71, 173-78 (5th Cir.1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir.1996); In re General Motors Corp. Pick-Up Trick Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.[14]

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2).[15] As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class.[16] In addition, the predominance and superiority requirements of subdivision (b)(3) must be

---

[14] Obviously resolving that 1996 circuit conflict is no longer necessary given the Amchem decision; the issue now is whether to modify what Amchem said or implied.

[15] Deleting the limitation to (b)(3) classes would speak to that question. In speaking to it, one could urge that, at least where there really is "indivisible" relief sought, it does seem that a settlement class should be possible. Perhaps a police practices suit would be an example. Could the SDNY stop-and-frisk class action have been resolved as a settlement class action? It may be that using a class action would be essential to avoid standing issues. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that plaintiff injured by police use of choke-hold could sue for damages, but not for an injunction because he could not show it would likely be used on him again). Issues of class definition, and particularly ascertainability, may present challenges in such cases. But it may be that recognizing that settlements are available options in such cases as to future conduct is desirable. It is worth noting that Rule 23 currently has no requirement of notice of any sort to the class in (b)(2) actions unless they are settled.

[16] On this score, the application of (a)(2) in Wal-Mart Stores, Inc. v. Dukes may be of particular importance.

satisfied.[17] Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated.[18] Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigants would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation.[19] Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligations to review and approve a class settlement commonly must surmount the information difficulties that arise when the major adversaries join forces as proponents of their settlement

---

[17] This sentence was written before Amchem was decided; the Supreme Court fairly clearly said that predominance remained important, but that manageability (a factor in making both the predominance and superiority decision) did not. Whether to continue to require predominance to be established in (b)(4) class actions is open to discussion and raised by an alternative possible rule change explored below in text.

[18] Choice-of-law challenges might be precisely the sort of thing that could preclude settlement certification under a strong view of the predominance requirement. As Sullivan v. DB Investment suggests, differing state law may be accommodated in the settlement context.

[19] Arguably there is a principled tension among the courts of appeal that is pertinent to this point. The Third Circuit has said several times that class-action settlements are desirable to achieve a nationwide solution to a problem. The Seventh Circuit, on the other hand, has on one occasion at least said that "the vision of 'efficiency' underlying this class certification is the model of the central planner. * * * The central planning model -- one case, one court, one set of rules, one settlement price for all involved -- suppresses information that is vital to accurate resolution." In re Bridgestone/Firestone, 288 F.3d 1012, 1020 (7th Cir.2002).

agreement.[20] Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement.[21] Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could be transformed into certification of a

---

[20] It should be noted that when this draft Note was written Rule 23(e) was relatively featureless, directing only that court approval was required for dismissal. In 2003, it was augmented with many specifics, and part (1) of this memorandum offers a proposal to refine and focus those specifics.

[21] Note that, as added in 2003, Rule 23(g)(3) authorizes appointment of interim class counsel, a measure that may enable the court to exercise some control over the cast authorized to negotiate a proposed class settlement in the pre-certification phase of the litigation. The Committee Note accompanying this rule addition in 2003 explained:

> Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. [The new rule provision] authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

trial class without adequate reconsideration.[22] These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3),[23] but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or -- if the class is certified under subdivision (b)(3) -- whether to request exclusion.[24] One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are not disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

Conceptual Draft of 23(e) Amendment Idea

The animating objective of the conceptual draft below is to place primary reliance on superiority and the invigorated settlement review (introduced in part (1) of this memorandum) to assure fairness in the settlement context, and therefore to remove emphasis on predominance when settlement certification is

---

[22] This comment seems designed to make the point in ALI § 3.06(d) -- that statements made in support of settlement class certification should not be used against a party that favored such certification but later opposes litigation certification. Perhaps that asks too much of the judge.

[23] Needless to say, this comment is not applicable to (b)(1) or (b)(2) certification, if those were included in (b)(4). It could be noted that 23(e) requires notice (but not opt out) in such cases.

[24] Note that, as amended in 2003, Rule 23(c)(2)(B) responds to the sorts of concerns that were raised by the FJC study.

under consideration.

An underlying question is whether such an approach should be limited to (b)(3) class actions. There may be much reason to include (b)(2) class actions in (b)(4) but perhaps less reason to include (b)(1) cases.

Another question is whether it should be required that in any case seeking certification for purposes of settlement under (b)(4) the parties demonstrate that all requirements of Rule 23(a) are satisfied. Arguably, some of those -- typicality, for example -- don't matter much at the settlement stage. Concern that the past criminal history of the class representative might come into evidence at trial (assuming that makes the representative atypical) may not matter then. On the other hand, introducing a new set of "similar" criteria that are different could produce difficulties. This conceptual draft therefore offers an Alternative 2 that does not invoke Rule 23(a), but the discussion focuses on Alternative 1, which does invoke the existing rule. If the Alternative 2 approach is later preferred, adjustments could be made.

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

* * * * * *

Alternative 1

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that the action satisfies Rule 23(a), 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).

Alternative 2

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

should be approved under Rule 23(e).[25]

This approach seems clearly contrary to Amchem, which said that Rule 23(e) review of a settlement was not a substitute for rigorous application of the criteria of 23(a) and (b). It also may appear to invite the sort of "grand compensation scheme" quasi-legislative action by courts that the Court appeared to disavow in Amchem. Particularly if this authority were extended beyond (b)(3),[26] and a right to opt out were not required, this approach seems very aggressive. Below are some thoughts about the sorts of things that might be included in a sketch of a draft Committee Note.

Sketch of Draft Committee Note ideas
[Limited to Alternative 1]

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)

---

[25] ALI § 3.06(b) says that "a court may approve a settlement class if it finds that the settlement satisfies the criteria of [Rule 23(e)], and it further finds that (1) significant common issues exist; (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues."

[26] On this score, note that ALI § 3.06(c) said:

> In addition to satisfying the requirements of subsection (b) of this Section [quoted in a footnote above], in cases seeking settlement certification of a mandatory class, the proponents of the settlement must also establish that the claims subject to settlement involve indivisible remedies, as defined in the Comment to § 2.04.

Needless to say, "indivisible remedies" is not a term used in the civil rules. Attempting to define them, or some alternative term, might be challenging. § 2.04 has three subsections, and is accompanied by six pages of comments and six pages of Reporters' Notes.

amendment proposal was not pursued after that decision.

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

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some reported 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) is not limited to Rule 23(b)(3) class actions. It is likely that actions brought under subdivision (b)(3) will be the ones in which it is employed most frequently, but foreclosing pre-certification settlement in actions brought under subdivisions (b)(1) or (b)(2) seems unwarranted. At the same time, it must be recognized that approving a class-action settlement is a challenging task for a court in any class action. Amendments to Rule 23(e) clarify the task of the judge and the role of the parties in connection with review of a proposed settlement.[27]]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a).[28]

---

[27] This treatment may be far too spare. Note that the ALI proposal limited the use of "mandatory class action" settlement to cases involving "indivisible relief," a term that is not presently included in the civil rules and that the ALI spent considerable effort defining.

[28] This is a point at which Alternative 2, modeled on the ALI approach, would produce different Committee Note language. Arguments could be made that Wal-Mart Stores, Inc. v. Dukes has

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 tools available to them for doing so, provide important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e) an essential component to settlement class certification. Under amended Rule 23(e), the court can make the required findings to approve a settlement only after completion of the full Rule 23(e) settlement-review process. 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).[29]

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.[30]

---

raised the bar under Rule 23(a)(2) too high. The ALI approach is to say that "significant common issues" are presented. See ALI § 3.06(b).

[29] Without exactly saying so, this sentence is meant to counter the assertion in Amchem that Rule 23(e) is an additional factor, not a superseding consideration, when settlement certification is proposed.

[30] This material attempts to address Amchem's assertion that superiority continues to be important. Is it persuasive? If so, should the Note say that it is changing what the Supreme Court said in Amchem, perhaps by citing the passage in the decision where the court discussed superiority?

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4).[31] Under amended Rule 23(e), the court must also find that 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 the parties' statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation.][32]

---

[31] As at other points, adopting Alternative 2 would change this.

[32] The ALI Principles include such a provision in the rule. This suggests a comment the Note. The ALI provision seems to have been prompted by one 2004 Seventh Circuit decision, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 660 (7th Cir. 2004). Carnegie was a rather remarkable case. It first came to the Seventh Circuit in Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir. 2002), after the district judge granted settlement class certification and, on the strength of that, enjoined litigation in various state courts against the same defendants on behalf of statewide classes. The Court of Appeals reversed approval of the proposed settlement in the federal court, "concerned that the settlement might have been the product of collusion between the defendants, eager to minimize their liability, and the class lawyers, eager to maximize their fees." 376 F.3d at 659.

The Court of Appeals (under its Local Rule 36), then directed that the case be assigned on remand to a different judge, and the new judge approved the substitution of a new class representative (seemingly an objector the first time around) and appointed new class counsel. This new judge later certified a litigation class very similar to the settlement class originally certified. Defendants appealed that class-certification

(3) Cy pres

The development of cy pres provisions in settlements has not depended meaningfully on any precise provisions of Rule 23. The situations in which this sort of arrangement might be desired probably differ from one another. Several come to mind:

(1) Specific individual claimants cannot be identified but

---

decision, objecting that the new judge had improperly directed the defendants initially to state their objections to litigation certification, thereby imposing on them the burden of proving that certification was not justified instead of making plaintiff justify certification. The Seventh Circuit rejected this argument because the new judge "was explicit that the burden of persuasion on the validity of the objections [to certification] would remain on the plaintiffs." 376 F.3d at 662.

The Court of Appeals also invoked the doctrine of judicial estoppel, which it explained involved an "antifraud policy" that precluded defendants "from challenging [the class's] adequacy, at least as a settlement class," noting that "the defendants benefitted from the temporary approval of the settlement, which they used to enjoin the other * * * litigation against them." Id. at 660. At the same time, the court acknowledged "that a class might be suitable for settlement but not for litigation." It added comments about the concern that its ruling might chill class-action settlement negotiations (id. at 663):

> The defendants tell us that anything that makes it easier for a settlement class to molt into a litigation class will discourage the settlement of class actions. * * * But the defendants in this case were perfectly free to defend against certification; they just didn't put up a persuasive defense.

Whether this decision poses a significant problem is debatable. The situation seems distinctive, if not unique. The value of a rule provision concerning the "binding" effect of defendants' support for certification for settlement, or even a comment in the Note is therefore also debatable. In any event, it might not prevent a state court from doing what it says should not be done. Recall that in the original Reynolds appeal (described above), there was an injunction against state-court litigation. Whether a federal rule can prevent a state court from giving weight to these sorts of matters is an interesting issue. As a general matter, this subject reminds us of other provisions about the preclusive effect of class-certification rulings or to decisions disapproving a proposed class settlement. That has been an intriguing prospect in the past, but one the Advisory Committee has not followed.

measures to "compensate" them can be devised. The famous California case of Daar v. Yellow Cab, 433 P.2d 732 (Cal. 1967), is the prototype of this sort of thing -- because the Yellow Cab meters had been set too high in L.A. for a period of time, the class action resolution required that the Yellow Cab meters be set a similar amount too low for a similar period, thereby conferring a relatively offsetting benefit on more or less the same group of people, people who used Yellow Cabs in L.A. (Note that competing cab companies in this pre-Uber era may not have liked the possibility that customers would favor Yellow Cab cabs because they would be cheaper.)

(2) Individual claimants could be identified, but the cost of identifying them and delivering money to them would exceed the amount of money to be delivered.

(3) A residue is left after the claims process is completed, and the settlement does not provide that the residue must be returned to the defendant. (If it does provide for return to the defendant, there may be an incentive for the defendant to introduce extremely rigorous criteria class members have to satisfy to make claims successfully.)

Whether all these kinds of situations (and others that come to mind) should be treated the same is not certain. In some places state law may actually address such things. See Cal. Code Civ. Proc. § 384, which contains specific directions to California judges about residual funds left after payments to class members.

Much concern has been expressed in several quarters about questionable use of cy pres provisions, and the courts' role in approving those arrangements under Rule 23. Most notable is the Chief Justice's statement regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013) that the Court "may need to clarify the limits on the use of such remedies." Id. at 9. That case involved challenges to provisions in a settlement of a class action against Facebook alleging privacy claims.

§3.07 of the ALI Principles directly addresses cy pres in a manner that several courts of appeals have found useful. One might argue that the courts' adoption of §3.07 makes a rule change unnecessary. On the other hand, the piecemeal adoption by courts of the ALI provision seems a dubious substitute, and it may be wise to have in mind the Chief Justice's suggestion that the Supreme Court may need to take a case to announce rules for the subject.

The ALI provision could be a model for additions to Rule 23(e):

(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:

* * * * *

(3) The court may approve a proposal that includes a cy pres remedy [if authorized by law][33] even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(A) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement

---

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

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. But one might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is not need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

proceeds must[34] be distributed directly to individual class members;

(B) If the proposal involves individual distributions to class members and funds remain after distributions, the settlement must provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair;

(C) The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class. [The court may presume that individual distributions are not viable for sums of less than $100.][35] [If no such recipient can be identified, the court may approve payment to a recipient whose interests do not reasonably approximate the interests being pursued by the class if such payment would serve the public interest.][36]

---

[34] The ALI uses "should," but "must" seems more appropriate.

[35] There have been reports that in a significant number of cases distributions of amounts less than $100 can be accomplished. This provision is borrowed from a proposed statutory class-action model prepared by the Commissioners on Uniform State Laws. It may be that technological improvements made such an exclusion from the mandatory distribution requirements of (e)(3)(A) and (B) unnecessary.

[36] This bracketed material is drawn from the ALI proposal. It might be questioned on the ground that it goes beyond what the Enabling Act allows a rule to do. But this provision is about approving what the parties have agreed, not inventing a new "remedy" to be used in litigated actions. It may be that in some litigated actions there is a substantive law basis for a court-imposed distribution measure of the sort the bracketed language describes. Claims for disgorgement, for example, might support such a measure. Though the substantive law upon which a claim is based might, therefore, support such a measure, this provision does not seek to authorize such a remedy.

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

As noted above, the ALI proposal has received considerable support from courts. A recent example is In re BankAmerica Securities Litigation, 775 F.3d 1060 (8th Cir. 2015), in which the majority vigorously embraced ALI § 3.07, in part due to "the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases." It also resisted the conclusion that the fact those class members who had submitted claims had received everything they were entitled to receive under the settlement is the same as saying they were fully compensated, which might respond to arguments against proposed (3)(B) above that further distributions to class members who made claims should not occur if they already received the maximum they could receive pursuant to the settlement.

The possibility of Enabling Act issues should be noted, but the solution may be that this is an agreement subject to court approval under Rule 23(e), not a new "remedy" provided by the rules for litigated actions. The situation in California may be illustrative.

Cal. Code Civ. Proc. § 384 directs a California state court to direct left-over funds to groups furthering the proposes sought in the class action or to certain public interest purposes. In a federal court in California, one might confront arguments that §384 dictates how such things must be handled. Reports indicate that the federal courts in California do not regard the statute as directly applicable to cases in federal court, but that they do find it instructive as they apply Rule 23.

An argument in favor of Enabling Act authority could invoke the Supreme Court's Shady Grove decision and say that Rule 23 occupies this territory and the state law provision on cy pres treatment cannot be applied in federal court as a result. If that argument is right, it seems to provide some support for a rule that more explicitly deals with the sort of thing addressed

---

Note that the Class Action Fairness Act itself has a small provision that authorizes something along this line. Thus, 28 U.S.C. § 1712(e) provides: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." This section of the statute deals with coupon settlements more generally, and not in a manner that encourages parties to use them. It is not certain whether resort to the cy pres aspect of CAFA has been attempted with any frequency.

above. But the bracketed sentence at the end of (C) might raise Enabling Act concerns. The bracketed "if authorized by law" suggestion in the draft rule above is a first cut at a way to sidestep these issues.

It may be said that the bracketed language is not necessary because this provision is only about settlement agreements. Settlement agreements can include provisions that the court could not order as a remedy in a litigated case. So there is latitude to give serious attention to adding references to cy pres treatment in the settlement-approval rule. But it can also be emphasized that the real bite behind the agreement comes from the court's judgment, not the agreement itself.

If the rule can provide such authority, should it so provide? Already quite a few federal judges have approved cy pres arrangements. Already some federal courts have approved the principles in the ALI's § 3.07, from which the first sketch above is drawn.

Despite all those unresolved issues, it may nonetheless be useful to reflect on what sorts of things a Committee Note might say:

Sketch of Draft Committee Note ideas

When a class action settlement for a payment of a specified amount is approved by the court under Rule 23(e), there is often a claims process by which class members seek their shares of the fund. In reviewing a proposed settlement, the court should focus on whether the claims process might be too demanding, deterring or leading to denial of valid claims.[37] Ideally, the entire fund provided will be used (minus reasonable administrative costs) to compensate class members in accord with the provisions of the settlement.

On occasion, however, funds are left over after all initial claims have been paid. Courts faced with such circumstances have resorted on occasion to a practice invoking principles of *cy pres* to support distribution of at least some portion of the settlement proceeds to persons or entities not included in the class. In some instances, these measures have raised legitimate

[37] It might be attractive to be more forceful (and probably negative) somewhere about reversionary provisions. For example, the Note might say that if there is a reverter clause the court should look at the claims process very carefully to make sure that it does not impose high barriers to claiming. Probably that belongs in the general Rule 23(e) Committee Note about approving settlement proposals. It seems somewhat out of place here, even though it logically relates to the topic at hand.

concerns.

Subdivision (e)(3) recognizes and regularizes this activity. The starting point is that the settlement funds belong to the class members and do not serve as a resource for general "public interest" activities overseen or endorsed by the court.[38] Nonetheless, the possibility that there will be a residue after the settlement distribution program is completed makes provision for this possibility appropriate. Unless there is no prospect of a residue after initial payment of claims, the issue should be included in the initial settlement and evaluated by the court along with the other provisions of that proposal.[39] [If no such provision is included in the initial proposal but a residue exists after initial distribution to the class, the court may address the question at that point, but then should consider whether a further notice to the class should be ordered regarding the proposed disposition of the residue.[40]]

Subdivision (e)(3) does not create a new "remedy" for class actions. Such a remedy may be available for some sorts of claims, such as disgorgement of ill-gotten funds, but this rule does not authorize such a remedy for a litigated class action. The cy pres provision is something the parties have included in their proposal to the court, and the court is therefore called upon to decide whether to approve what the parties have agreed upon to resolve the case.

Subdivision (e)(3) provides rules that must be applied in deciding whether to approve cy pres provisions. Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the

---

[38] Is this too strongly worded, or too much a bit of "political" justification?

[39] Is this too strong? It seems that addressing these issues up front is desirable, and giving notice to the class about the provision for a residue is also valuable. That ties in with the idea that this is about the court's general settlement review authority, and it may prompt attention to whether the claims process is too demanding.

[40] Note that the Eighth Circuit raised the question whether, in the latter situation, there would be a need to notice the class a second time about this change in circumstances and the cy pres treatment under consideration. It seems that the better thing is to get the matter on the table at the outset, although that might make it seem that the parties expect the claims process to have faults. Probably devising a "perfect" claims process is very difficult, so a residue is not proof that the claims process was seriously flawed.

distributions are large enough to be to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving.[41] Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Paragraph (B) follows up on the point in paragraph (A), and provides that even after the first distribution is completed there must be a further distribution to class members of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.[42]

Paragraph (C), therefore, deals only with the rare case in which individual distributions are not viable. The court should not assume that the cost of distribution is prohibitive unless presented with evidence firmly supporting that conclusion.[43] It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases.[44] [The rule does provide that the court may so assume for distributions of less than $100.[45]] When the court finds that individual distributions would be

---

[41] This responds to an argument made in the Eight Circuit case -- that the funds distributed would be to institutional investors, who were less deserving than the legal services agencies that would benefit from the cy pres distributions.

[42] This is an effort to deal with the "paid in full" or "overcompensation" point.

[43] If we are to authorize the "only cy pres" method, what can we say about the predicate for using it? The Note language addresses cost. How about cases in which there simply is no way to identify class members? Should those fall outside this provision?

[44] This assertion is based on a hunch.

[45] Should we include such a provision? As noted above, smaller distributions are reportedly done now. Suppose a bank fee case in which the bank improperly charged thousands of account holders amounts less than $100. Assuming the bank could easily identify those account holders and the amount of improperly charged fees, why not direct that their accounts be credited?

economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. [Only if no such recipient can be identified may the court authorize distribution to another recipient, and then only if such distribution would serve the public interest.[46]]

[46] This is in brackets in the rule and the Note because, even if the parties agree and the class receives notice of the agreement, it seems a striking use of judicial power. Perhaps, as indicated above in the Note, it is mainly the result of the parties' agreement, not the court's power, which is limited to reviewing and deciding whether to approve the parties' agreement.

(4) Objectors

The behavior of some objectors has aroused considerable ire among class-action practitioners. But it is clear that objectors play a key role in the settlement-approval process. Rule 23(e)(5) says that class members may object to the proposed settlement, and Rule 23(h)(2) says they may object to the proposed attorney fee award to class counsel. Judges may come to rely on them. CAFA requires that state attorneys general (or those occupying a comparable state office) receive notice of proposed settlements, and they may be a source of useful information to the judge called upon to approve or disapprove a proposed settlement.

The current rules place some limits on objections. Rule 23(e)(5) also says that objections may be withdrawn only with the court's permission. That requirement of obtaining the court's permission was added in 2003 in hopes that it would constrain "hold ups" that some objectors allegedly used to extract tribute from the settling parties.

Proposals have been made to the Appellate Rules Committee to adopt something like the approval requirement under rule 23(e)(5) for withdrawing an appeal from district-court approval of a settlement. Since the delay occasioned by an appeal is usually longer than the period needed to review a proposed settlement at the district-court level, that sort of rule change might produce salutary results. But it might be that the district judge would be better positioned to decide whether to permit withdrawal of the appeal than the court of appeals. The Rule 23 Subcommittee intends to remain in touch with the Appellate Rules Committee on these issues as it proceeds with its attention to the civil rules.

Another set of ideas relates to requiring objectors to post a bond to appeal. In Tennille v. Western Union Co., 774 F.3d 1249 (10th Cir. 2014), the district court, relying on Fed. R. App. P. 7, entered an order requiring objectors who appealed approval of a class-action settlement to post a bond of over $1 million to cover (1) the anticipated cost of giving notice to the class a second time, (2) the cost of maintaining the settlement pending resolution of the appeals, and (3) the cost of printing and copying the supplemental record in the case (estimated at $25,000). The court of appeals ruled that the only costs for which a bond could be required under Appellate Rule 7 were those that could be imposed under a statute or rule, so the first two categories were entirely out, and the third category was possible, but that the maximum amount the appellate court could uphold would be $5,000. Other courts have occasionally imposed bond requirements. But the Subcommittee is not presently suggesting any civil rule changes on this subject.

Regarding the civil rules, it is not certain whether the adoption of the approval requirement in Rule 23(e)(5) in 2003 had a good effect in district court proceedings, although some reports indicate that it has. Two sets of ideas are under consideration. One slightly amplifies the Rule 23(e)(5) process by borrowing an idea from Rule 23(3)(2) -- that the party seeking to withdraw an objection advise the court of any "side agreements" that influenced the decision to withdraw. The other follows a suggestion in the ALI Aggregate Litigation principles for imposition of sanctions on those who make objections for improper purposes.

Adding a reporting obligation to (e)(5)

(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

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval, and the parties must file a statement identifying any agreement made in connection with the withdrawal.

Alternative 2

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only after the filing of a statement identifying any agreement made in connection with the withdrawal, and court approval of the request to withdraw the objection ~~with the court's approval~~.

If it is true that the current provision requiring court approval for withdrawing an objection does the needed job, there may be no reason to add this reporting obligation. There is at least some reason to suspect that class counsel may take the position that there is already some sort of implicit reporting obligation. Experience with the efficacy of the existing reporting provision in (e)(3) may also shed light whether adding one to (e)(5) would be desirable.

Objector sanctions

§ 3.08(d) of the ALI Principles says:

> If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel under applicable law.

Comment c to this section says that it "envisions that sanctions will be invoked based upon existing law (e.g., Fed. R. Civ. P. 11, 28 U.S.C. § 1927)."

This proposal raises a number of questions. One idea might be to say explicitly that any objection is subject to Rule 11. That may seem a little heavy handed with lay objectors, and a statement in the class settlement notice appearing to threaten sanctions might do more harm than good. Another idea might be to indicate in a rule that § 1927 is a source of authority to impose sanctions. But that would be a peculiar rule, since it would not provide any authority but only remind the court of its statutory authority. The ALI proposal's "should consider" formulation seems along that line. It does not say the court should do it, but only that the court should think about imposing sanctions.

It seems that a provision along these lines could serve a valuable purpose. In the 2000-02 period, when the 2003 amendments were under consideration, there was much anguish about how to distinguish "good" from "bad" objectors. There is no doubt whatsoever that there are good ones, whose points assist the court and improve the settlement in many instances. But it seems very widely agreed that there are also some bad objectors who seek to profit by delaying final consummation of the deal.

Defining who is a "good" or a "bad" objector in a rule is an impossible task. But there is reason to think that judges can tell in the specific context of a given case and objection. So the goal here would be to rely on the judge's assessment of the behavior of the objector rather than attempt in a rule to specify. Discussion on this topic has only begun in the Subcommittee, but for purposes of broader airing of the issues the following conceptual draft ideas might be informative:

Alternative 1

(5) Any class member may<u>, subject to Rule 11,</u> object to the proposal if it requires court approval under this subdivision (3); the objection may be withdrawn only with the court's approval.

Alternative 2

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. If the court finds that an objector has made objections that are insubstantial [and] {or} not reasonably advanced for the purpose of rejecting or improving the settlement, the court [should] {may} impose sanctions on objectors or their counsel {under applicable law}.

Simply invoking Rule 11 (Alternative 1) may be simplest. But as noted above, it may also deter potential objectors too forcefully. One might debate whether the certifications of Rule 11(b) are properly applied here. Invoking Rule 11(c) in this rule might be simpler than trying to design parallel features here. On the other hand, (e)(5) says that the objector may withdraw the objection only with the court's approval while Rule 11's safe harbor provision seems not to require any court approval but instead to permit (perhaps to prompt) a unilateral withdrawal. Rule 11(c) also requires that the party who seeks Rule 11 sanctions first prepare and serve (but not file) a motion for sanctions, which might be a somewhat wasteful requirement.

Alternative 2 is more along the lines of the ALI proposal. But perhaps a provision like this one should create authority for imposing sanctions. The ALI approach seems to rely on authority from somewhere else. If the rule does not create such authority, it sounds more like an exhortation than a rule. The choice between possible verbs -- "should" or "may" -- seems to bear somewhat on this issue. To say "may" is really saying only that courts are permitted to do what the rules already say they may do; it's like a reminder. To say "should" is an exhortation. Does it supplant the "may" that appears in Rule 11? Perhaps judges are to be quicker on the draw with objectors than original parties. One could also consider saying "must," but since that was rejected for Rule 11 it would seem odd here. In any event, if the rule creates authority to impose sanctions, perhaps it should say what sanctions are authorized.

The description in Alternative 2 of the finding that the court must make to proceed to sanctions on the objector deserves attention. There is a choice between "and" and "or" regarding whether objections that are "insubstantial" were also not advanced for a legitimate purpose. Probably a judge would not distinguish between these things; if the objection is substantial, maybe it is nonetheless advanced for improper reasons. But would a judge ever think so? Does the fact of proposed withdrawal show that an objection was insubstantial? Seemingly not. Objectors often abandon objections when they get a full explanation of the details of the proposed settlement. So for them the use of "and" seems important; they withdraw the

objections when they learn more about the deal, and that shows that they were not interposing the objections for an improper purpose. Could an objector who raises substantial objections but also has an improper purpose be sanctioned? The ALI proposal does not condition sanctions on a finding that the objection is meritless. Maybe the judge will act on the objection even though the objector has tried to withdraw it.

It seems worthwhile to mention another question that might arise if sanctions on objectors were considered -- should the court consider sanctions on the parties submitting a flawed proposal to settle? If it is really a "reverse auction" type of situation -- odious to the core -- should the court be reminded that Rule 11 surely does apply to the submissions in support of the proposal? Should it at least be advised to consider replacing class counsel or the class representative or both to give effect to the adequate representation requirements of Rule 23(a)(4)?

It is obvious that much further attention will be needed to sort through the various issues raised by the sanctions possibility. For the present, the main question is whether it is worthwhile to sort through those difficult questions. The sketches above are offered only to provide a concrete focus for that discussion.

(5) Rule 68 Offers and Mootness

The problem of settlement offers made to the proposed class representative that fully satisfy the representative's claim and thereby "pick off" and moot the class action seems to exist principally in the Seventh Circuit. Outside the 7th Circuit there is little enthusiasm for "picking off" the class action with a Rule 68 offer or other sort of settlement offer. Below are three different (perhaps coordinated) ways of dealing with this problem. The first is Ed Cooper's sketch circulated on Dec. 2.

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
  (A) the court has denied class certification and
  (B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

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

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

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The court may choose instead to hold the way open for certification of a class different than the one it has refused to certify, or for reconsideration of the certification decision. The court also may treat the tender of complete relief as mooting the representative's claim, but, to protect the possibility that a new representative may come forward, refuse to dismiss the action.

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

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

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

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

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

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

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge

for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

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

(e) Settlement, Voluntary Dismissal, or Compromise.

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

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

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

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

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

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

ALI Principles § 3.02 comment (b).

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

(6) Issue Classes

A major reason for considering possible rule amendments to deal with issue classes is that there has seemed to be a split in the circuits about whether they can only be allowed if (b)(3) predominance is established. At a point in time, it appeared that the Fifth and Second Circuits were at odds on this subject. But recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance requirement. If agreement has arrived, it may be that a rule amendment is not in order. But even if agreement has arrived, an amendment might be in order to permit immediate appellate review of the district court's decision of the issue on which the class was certified, before the potentially arduous task of determination of class members' entitlement to relief begins.

Clarifying that predominance is not a prerequisite to 23(c)(4) certification

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

The goal of placement here is to say that predominance, but not superiority, is subject to Rule 23(c)(4). A Committee Note could amplify this point. It might also say that a court trying to decide whether issue certification is "appropriate" (as (c)(4) says it should decide) could consider the factors listed in (A) through (D) of (b)(3). It does not seem there would be a need to consider changing (A) through (D) in (b)(3). In 1996, draft amendments to those factors were published for public comment and, after a very large amount of public comment, not pursued further. The relation between (b)(3) and (c)(4) does not seem to warrant considering changes to the factors.

Allowing courts of appeals to review decision of the common issues immediately rather than only after final judgment

Because the resolution of the common issue in a class action certified under Rule 23(c)(4) is often a very important landmark in the action, and one that may lead to a great deal more effort to determine individual class members' entitlement to relief, it seems desirable to offer an avenue of immediate review. Requiring that all that additional effort be made before finding

out whether the basic ruling will be reversed may in many instances be a strong reason for granting such immediate review. But there may be a significant number of cases in which this concern is not of considerable importance.

§ 2.09(a) of the ALI Principles endorses this objective: "An opportunity for interlocutory appeal should be available with respect to * * * (2) any class-wide determination of a common issue on the merits * * * ." The ALI links this interlocutory review opportunity to review of class certification decisions (covered in ALI § 2.09(a)(1)). It seems that the logical place to insert such a provision is into Rule 23(f), building on the existing mechanism for interlocutory review of class-certification orders:

> **(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, or from an order deciding an issue with respect to which [certification was granted under Rule 23(c)(4)] {a class action was allowed to be maintained under Rule 23(c)(4)} [if the district court expressly determines that there is no just reason for delay], if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. * * *

The Subcommittee has only recently turned its attention to these issues; as a result the above conceptual sketch is particularly preliminary. Several choices are suggested by the use of brackets or braces around language in the draft above.

One is whether to say "certification was granted under Rule 23(c)(4)" or to stick closer to the precise language of (c)(4) -- "was allowed to be maintained under Rule 23(c)(4)." It may be that referring to "class certification" would be preferred because it ties in with the term used in the current provisions of the rule. Rule 23(b) says "may be maintained" but that terminology is not repeated in current 23(f) when addressing the decision that it may be maintained. On the other hand, it is not that decision that would be subject to review under the added provision of the rule. Instead, it is the later resolution of that issue by further proceedings in the district court.

Another choice is suggested by the bracketed language referring to district-court certification that there is no just reason for delay. That is modeled on Rule 54(b). It might be useful to intercept premature or repeated efforts to obtain appellate review with regard to issues as to which (c)(4) certification was granted. For example, could a defendant that moved for summary judgment on the common issue contend that the denial of the summary-judgment motion "decided" the issue?

Perhaps it would be desirable to endow the district court with some latitude in triggering the opportunity to seek appellate review, since a significant reason for allowing it is to avoid wasted time resolving individual claims of class members in the wake of the decision of the individual issue.

On the other hand, if the goal of the amendment is to ensure the losing party of prompt review of the decision of the common issue, it might be worrisome if the district judge's permission were required. It is not required with regard to class-certification decisions, and there may be instances in which parties contend that the district court has delayed resolution of class certification, thereby defeating their right to obtain appellate review of certification.

Lying in the background is the question whether this additional provision in Rule 23(f) would serve an actual need. As noted above, it appears that use of issue classes has become widespread. What is the experience with the "mop up" features of those cases after that common issue is resolved? Does that "mop up" activity often consume such substantial time and energy that an interlocutory appeal should be allowed to protect against waste? Are those issues straightened out relatively easily, leading to entry of a final judgment from which appeal can be taken in the normal course? Is there a risk that even a discretionary opportunity for interlocutory appeal would invite abuse? Are there cases in which the court declines to proceed with resolution of all the individual issues, preferring to allow class members to pursue them in individual litigation? If so, how is a final appealable judgment entered in such cases? If that route is taken, what notice is given to class members of the need to initiate further proceedings?

So there are many questions to be addressed in relation to this possible addition to the rules. Another might be whether it should be considered only if the amendment to Rule 23(b)(3) went forward. If it seems that amendment is not really needed because the courts have reached a consensus on whether issue classes can be certified even when (b)(3) would not permit certification with regard to the entire claim, there could still be a need for a revision to Rule 23(f) along the lines above. Answers to the questions in the previous paragraph about what happens now might inform that background question about the importance of proceeding on the 23(f) possibility.

(7) Notice

Changing the notice requirement
in (b)(3) cases

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-71, emphasis in original):

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

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

(2) Notice

* * * * *

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

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

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. There, the possibility of excusing payouts to class members for amounts smaller than $100 is raised as a possibility, but it is also suggested that much smaller payouts can now be made efficiently using refined electronic means. More generally, it appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

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

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

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

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

to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

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

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

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

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

Appendix I

Settlement Review Factors: 2000 Draft Note

As an alternative approach to factors, particularly not on the list of four the conceptual draft rule endorses as mandatory findings for settlement approval, the following is an interim draft of possible Committee Note language considered during the drafting of current Rule 23(e).

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example. The examples are meant to inspire reflection, no more.

Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement as well as for other purposes.

Recognizing that this list of examples is incomplete, and includes some factors that have not been much developed in reported decisions, among the factors that bear on review of a settlement are these:

(A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

(B) the probable time, duration, and cost of trial;

(C) the probability that the [class] claims, issues, or defenses could be maintained through trial on a class basis;

(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;

(E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(F) the number and force of objections by class members;

(G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under Rule 23(e)(5)(A);

(H) the existence and probable outcome of claims by other classes and subclasses;

(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved – or likely to be achieved – for other claimants;

(J) whether class or subclass members are accorded the right to opt out of the settlement;

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Appendix II

Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit

First Circuit

No "single test." See: In re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197-206-207 (D. Me. 2003) (Hornby, J.):

> "There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement. In making this assessment, other circuits generally consider the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73-74 (2d Cir. 1982). Specifically, the appellate courts consider some or all of the following factors: (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration. [citing cases.] Finally, the case law tells me that a settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." [citing cases.]

Second Circuit

"*Grinnell* Factors"

City of Detroit v. Grinnell, 495 F.2d 448, 463 (2d Cir. 1974):

> ". . (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (5) the risks of establishing damages . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . ."

Third Circuit

"*Girsh* Factors" (adopts *Grinnell* factors)

Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975)

Fourth Circuit

"*Jiffy Lube* Factors"

In re Jiffy Lube Securities Litigation, 927 F.2d 155, 158-159 (4th Cir. 1991):

> "In examining the proposed . . . settlement for fairness and adequacy under Rule 23(e), the district court properly followed the fairness factors listed in Maryland federal district cases which have interpreted the Rule 23(e) standard for settlement approval. See In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (D. Md. 1979).) The court determined that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation. . . .
>
> The district court's assessment of the adequacy of the settlement was likewise based on factors enumerated in Montgomery: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement."

Fifth Circuit

"*Reed* Factors"

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983):

> "(There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent members."

Sixth Circuit

"*UAW* Factors"

Int'l Union, United Auto. Workers, etc. v. General Motors Corp., 497 F.3d 615 (Sixth Cir. 2007):

> "Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. See Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992); Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983).

Seventh Circuit

"*Armstrong* Factors"

Armstrong v. Jackson, 616 F.2d 305, 315 (7th Cir. 1980):

> "Although review of class action settlements necessarily proceeds on a case-by-case basis, certain factors have been consistently identified as relevant to the fairness determination. The district court's opinion approving the settlement now before us listed these factors:
>
> > Among the factors which the Court should consider in judging the fairness of the proposal are the following:
> >
> > "(1) " * * * the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement';
> >
> > "(2) "(T)he defendant's ability to pay';
> >
> > "(3) "(T)he complexity, length and expense of further litigation';
> >
> > "(4) "(T)he amount of opposition to the settlement';"
> >
> > Professor Moore notes in addition the factors of:
> >
> > "(1) * * *
> >
> > "(2) Presence of collusion in reaching a settlement;
> >
> > "(3) The reaction of members of the (class to the settlement;

"(4) The opinion of competent counsel;

"(5) The stage of the proceedings and the amount of discovery completed."

3B Moore's Federal Practice P 23.80(4) at 23-521 (2d ed. 1978)"

Eighth Circuit
"*Grunin* Factors"

Grunin v. International House of Pancakes, 513 F.2d 114, 124 (8th Cir. 1975):

"The district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement. Grunin, 513 F.2d at 124. . . .; Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988)."

Ninth Circuit

"*Hanlon* Factors"

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998):

"Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."

Tenth Circuit

"*Jones* Factors"

Jones v. Nuclear Pharmacy, 741 F.2d 322 (10th Cir. 1984):

"In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate. In assessing whether the settlement is fair, reasonable and adequate the trial court should consider:

(1) whether the proposed settlement was fairly and honestly negotiated;

> (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
>
> (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
>
> (4) the judgment of the parties that the settlement is fair and reasonable."

Eleventh Circuit

"*Bennett* Factors"

Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984) (quoting Cotton v. Hinton, 559 F.2d at 1330-31 (5th Cir. 1977):

> "Our review of the district court's order reveals that in approving the subject settlement, the court carefully identified the guidelines established by this court governing approval of class action settlements. Specifically, the court made findings of fact that there was no fraud or collusion in arriving at the settlement and that the settlement was fair, adequate and reasonable, considering (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved."

D.C. Circuit

No "single test." Courts consider factors from other jurisdictions.

See *In re Livingsocial Marketing and Sales Practice Litigation*, 298 F.R.D. 1, 11 (D.R.C. 2013):

> "There is "no single test" for settlement approval in this jurisdiction; rather, courts have considered a variety of factors, including: "(a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." In re Lorazepam & Clorazepate Antitrust Litig., 205 F. R. D. 369, 375 (D.D.C. 2002) ("Lorazect") (collecting cases)."

Federal Circuit

Dauphin Island Property Owners Assoc. v. United States, 90 Fed. Cl. 95 (2009):

> "The case law and rules of this court do not provide definitive factors for evaluating the fairness of a proposed settlement. Many courts have, however, considered the following factors in determining the fairness of a class settlement:
>
> > (1) The relative strengths of plaintiffs' case in comparison to the proposed settlement, which necessarily takes into account:
> >
> > > (a) The complexity, expense and likely duration of the litigation; (b) the risks of establishing liability; (c) the risks of establishing damages; (d) the risks of maintaining the class action through trial; (e) the reasonableness of the settlement fund in light of the best possible recovery; (f) the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; (g) the stage of the proceedings and the amount of discovery completed; (h) the risks of maintaining the class action through trial;
> >
> > (2) The recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsels' representation of the class;
> >
> > (3) The reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms;
> >
> > (4) The fairness of the settlement to the entire class;
> >
> > (5) The fairness of the provision for attorney fees;
> >
> > (6) The ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity.
> >
> > . . .
>
> Most importantly, this court must compare the terms of the settlement agreement with the potential rewards of litigation and consider the negotiation process through which agreement was reached."

California

Kullar v. Foot Locker Retail Inc., 168 Cal. App. 4th 116, 128

(Cal. App. 2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (Cal. App. 1996):

> "The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

Principles of Aggregate Litigation (ALI 2010)

§ 3.05 Judicial Review of the Fairness of a Class Settlement

(a) Before approving or rejecting any classwide settlement, a court must conduct a fairness hearing. A court reviewing the fairness of a proposed class-action settlement must address, in on-the-record findings and conclusions, whether:

> (1) the class representatives and class counsel have been and currently are adequately representing the class;
>
> (2) the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;
>
> (3) 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
>
> (4) the settlement was negotiated at arm's length and was not the product of collusion.

(b) The court may approve a settlement only if it finds, based on the criteria in subsection (a), that the settlement would be fair to the class and to every substantial segment of the class. A negative finding on any of the criteria specified in subsections (a)(1)-(a)(4) renders the settlement unfair. A settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case.

(c) The burden is on the proponents of a settlement to establish that the settlement is fair and reasonable to the absent class members who are to be bound by that settlement. In reviewing a proposed settlement, a court should not apply any

presumption that the settlement is fair and reasonable.

(d) A court may approve or disapprove a class settlement but may not of its own accord amend the settlement to add, delete, or modify any term. The court may, however, inform the parties that it will not approve a settlement unless the parties amend the agreement in a manner specified by the court. This subsection does not limit the court's authority to set fair and reasonable attorneys' fees.

(e) If, before or as a result of a fairness hearing, the parties agree to modify the terms of a settlement in any material way, new notice must be provided to any class members who may be substantially adversely affected by the change. In particular:

(1) For opt-out classes, a new opportunity for class members to opt out must be granted to all class members substantially adversely affected by the changes to the settlement.

(2) When a settlement is modified to increase significantly the benefits to the class, class members who opted out before such modifications must be given notice and a reasonable opportunity to opt back into the class.

(f) For class members who did not opt out of the class, new notice and opt-out rights are not required when, as a result of a fairness hearing, a settlement is revised and the new terms would entitle such class members to benefits not substantially less than those proposed in the original settlement.

THIS PAGE INTENTIONALLY BLANK

TAB 8B

THIS PAGE INTENTIONALLY BLANK

Notes of Conference Call
Feb. 12, 2015
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Feb. 12, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Elizabeth Cabraser, Robert Klonoff, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Rule 23 Subcommittee).

Settlement Approval Criteria

Since the last call, Prof. Marcus had drafted alternative language to address issues raised during the call and circulated the redraft, which (as slightly modified to add "adequate" into factor (ii)) has two alternative lead-ins before the four criteria are listed:

Alternative 1

(2) If the proposal would bind class members,

(A) the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The court may make this finding only on finding that:

Alternative 2

(2) If the proposal would bind class members,

(A) the court may approve it only after a hearing and on finding that ~~it is fair, reasonable, and adequate.~~ :

(i) the class representatives and class counsel have been and currently are adequately representing the class;

(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the proposal) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

(iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the proposal considered as a whole; and

(iv) the proposal was negotiated at arm's length and was not the product of collusion.

(B) The court may also consider any other matter pertinent to approval of the proposal, and may refuse to approve it on any such ground.

It was noted that this revision of the draft discussed on Feb. 6 was designed to put into the rule (1) an explicit requirement that the court find all four requirements satisfied to approve the proposal, and (2) an explicit recognition that the court may disapprove the proposal on other grounds even if all four listed findings can be made. There was no further discussion of this topic.

Settlement Class Certification

The call began by returning to the settlement class certification (b)(4) subject on which the Feb. 6 call had focused at the end. The question was whether further discussion was needed. One abiding concern is the extent to which (b)(4) treatment should be available for classes certified under (b)(1) or (b)(2). A suggestion was that this should be kept open, as it is with the brackets around the phrase "in an action under subdivision (b)(3)."

A reaction was that, upon reflection, it seems wise to leave this issue open for further consideration. People with experience in employment law litigation would be useful resources about whether settlements of (b)(2) class actions would be assisted by inclusion of those cases within (b)(4). With (b)(1) settlements, there is usually a monetary fund created.

That prompted the question whether one could really compromise on the question whether there is actually a limited fund. The answer was that usually settlements like this involve a discrete fund (such as insurance coverage), as in an interpleader situation. Sometimes there may be a company on the brink of bankruptcy that does not want to file a bankruptcy proceeding. It might be that there are situations in which it is legitimate and important to have a (b)(4) option for (b)(1) type cases.

But it was affirmed that the chief concern underlying this discussion was the (b)(3) class action and particularly the role of superiority in that setting. For present purposes, it seems wisest to go forward with essentially the sort of draft that we

have discussed. That would need some further attention on topics the subcommittee has discussed, but should be suitable for wider examination and discussion.

Cy Pres Treatment

This topic was introduced as involving several issues. One is whether any rule amendment is really needed. Several courts of appeals have endorsed, or even adopted, directions very much like (sometimes explicitly based upon) ALI § 3.07. So one might say that this judicial action is rapidly solving any problem that existed. Another and potentially challenging issue is suggested by the bracketed phrase "if authorized by law." The question has two aspects. One is whether a civil rule could create such a new "remedy." Another is to ask where authority to approve such provisions comes from unless provided by civil rule. Yet another set of issues is whether the provision should have to be inserted into the settlement for the court to be able to approve it. The reason that might not happen is that the parties may not appreciate that the settlement claims procedure will end up leaving a residue, and therefore fail to take account of that possibility. Another question has to do with the possible permission to skip distributions of less than $100. There seem to have been effective distribution programs that involved payouts considerably lower than $100. Is that really a level at which we can assume it costs too much to distribute the funds?

An initial response focused on the last point. It's become much more cost-effective to send checks to class members, at least if defendant has a list of most of them. Some in the claims distribution business say that if it's more than one dollar they can do it at reasonable cost if they have an address list. The goal really should be to dispense with a time-consuming or burdensome claims submission process. So things seem to be improving. At the same time, it seems clear that we need a rule to address these issues. Chief Justice Roberts' statement in the Facebook case makes it clear that something should be done. And the ALI guidelines are cited fairly often by courts, so they offer an initial roadmap for rulemaking. Having guidance in the rules will assist judges. It will also provide some focus and guidance for objectors by indicating what sorts of provisions are subject to challenge. Including cy pres provisions in a settlement agreement is almost certain to draw objections in today's climate. Having a rule would probably channel, and might reduce, that objector activity.

Attention was drawn to (e)(3)(iii) of the draft, which says that when distributions to the class are not economically reasonable it is permissible to distribute instead to someone else "whose interest reasonably approximate those being pursued by the class." Can a civil rule do that?

The reaction was that this is a difficult topic. The "if authorized by law" clause partly addresses that question, by indicating that the rule itself does not purport to create authority to order such a remedy. On the other hand state law or some federal source may do so. For example, in California Cal. Civ. Pro. Code § 384 essentially forbids reversion provisions in class-action settlements and also directs that any residue after distribution to the class should be to an entity pursuing the goals of the class action and, if that is not possible, to an entity providing legal representation to the needy.

It might be an interesting question whether one could seek to have a California federal court enforce the California provision in a class action based on state law. One response would be that the state statute cannot be enforced because Rule 23 applies in federal court and it governs. That is something like the view the Supreme Court adopted in its Shady Grove case, where the majority said that a New York limitation on use of class actions did not apply in federal court -- even though the claim being asserted was based on New York law -- because Rule 23 defines when class actions may be brought in federal court. So if the California statute is held not to apply to federal-court class actions based on California law because that's governed by Rule 23, that may imply that Rule 23 can affirmatively deal with the problem. On the other hand, another aspect of the substance/procedure distinction in the Rules Enabling Act is to guard Congress's right to make substantive federal rules, and a lot of the cases are based on federal claims rather than state law.

An initial reaction to these problems was that the California statute is treated as "procedural" by the California federal courts. Perhaps that is on the notion that it was not intended to be applied by other courts (including federal courts), but perhaps it reflects a view that Rule 23 already covers the subject. On the other hand, it is true that California federal judges have seemed to find § 384 to provide useful guidance in deciding how to handle similar problems. There are more complications if one discusses claims created by Congress. But over all there is a saving grace here -- this is created by settlement, not a "remedy" created by the court.

Another reaction was that the ALI Principles handle cy pres in exactly that way -- something that parties may include in a settlement.

Another thought was that cy pres has equity origins. The sort of judicial authority we are talking about when we address cy pres is something that has been recognized for a long time.

This discussion prompted a question: Shouldn't the Committee Note make it clear that the rule provision does not

purport to create a remedy for a litigated case, but only to provide guidance for a court in evaluating a provision the parties have included in a settlement agreement? So the court authority that is involved here is not in designing "remedies," but the authority that's always been in the rule for reviewing and evaluating settlements. That is what Rule 23(e) is all about, and this is consistent with that longstanding authority.

That raised a question: In how many cases in which cy pres provisions were included in settlement agreements could the court have included a similar provision in a litigated judgment? A response was that probably there would usually have to be a reversionary feature of a litigated judgment. That drew the response that cy pres is probably necessarily confined to the settlement context, and therefore that a rule about that context would not "create a remedy."

At the same time it was also observed that there are legal grounds for disgorgement in some circumstances, and a reversion is inconsistent with the remedy. Thus, it would probably be wise to note that the underlying substantive law of remedies might provide a justification for use of something like a cy pres solution. That remedy would not be created by Rule 23, however. Sometimes, when there is a residue in such circumstances the result is escheat to the state. In Texas, that is the view of state officials.

Another view of the issue was offered: In a way this gets at what the goal of such litigation is. Often, perhaps usually, it is designed for compensation purposes. But sometimes it is a form of public enforcement of legal protections, somewhat like qui tam proceedings.

Another reaction was that "if authorized by law" should be retained for present. However much one might find some instances hard to categorize, there surely are instances (and are surely some cases) in which the parties propose measures that cannot be justified by any sensible cy pres notions. And from the perspective of judges, there is not a lot of law on this subject. That may be something the Chief Justice had in mind in his Facebook statement, when he suggested the Court may need to take up the topic. Even if there may be cases in which the right outcome is debatable, judges would benefit from having rules that exclude lots of improper things.

That view was supported on the ground that such a rule would also provide guidance and ground rules for objections. In recent years, cy pres provisions have been a magnet for objections. It may even happen that settling parties will put a reversion clause into the settlement agreement rather than a cy pres provision just to avoid having the cy pres provision draw objections. Right now, if there is a cy pres provision, the courts have to

figure out on a case-by-case basis what should be allowed. And objectors have no direction about what is and is not a questionable provision or use of cy pres. Both would benefit from sensible rules. Unless cy pres is addressed in the rules, it will continue to generate litigation and burdens for the courts. That might in some instances prompt statutory regulation of the subject. California § 384 was a product of a political compromise. A nationwide statute might be very difficult to design. A rule is a better way to go.

That drew a question: Should a rule say that any cy pres provision must be included in a settlement agreement so it can be approved as part of a settlement agreement? One issue might be a need to re-notice the class after it was determined that there was a residue. Another is that it seems to draw objections (although that might be less of a problem if there were a rule providing guidance). Should the rule require it to be in the settlement agreement?

The response was that including the provision in the settlement agreement is o.k. The judge should know that it's there. The agreement is posted online, and anyone can read it. Relating particularly to what the rule is about, that provision is one of the things approved by the court under Rule 23(e). And putting it in the agreement means there is a way to avoid a reverter provision. Having a reverter provision provides an incentive for the defendant to try to design an arduous claims process.

The resolution was to proceed with a revised version of the draft before the Subcommittee to provide a focus for discussion during the April Advisory Committee meeting. One thing in particular would be to include in the Committee Note the point that this is a rule about provisions of the parties' settlement, not a freestanding "remedy" for the court to use in a litigated case.

Dealing With Objectors

The question was introduced with the drafts before the subcommittee that addressed two general topics -- whether to forbid withdrawal of objections (Alternative 1) and whether to direct the parties to file a statement when seeking permission to withdraw an objection that identifies any agreement made in connection with that objection (Alternative 2). In addition there was a draft of an amendment idea to focus on "standing to object." There was also discussion about the possibility of requiring a bond from the objector who seeks to appeal, and finding a spot in the rules (probably at least partly in the Appellate Rules) for approval of withdrawal of an appeal. The current reality seems to be that Rule 23(e)(5) may solve the problem of objectors who hold the settlement hostage at the

district court level, when the delay is necessarily rather limited, but that there is presently no remedy for the much longer delay taking an appeal can produce. So perhaps the overall reality is that the only real problem is with appeals.

A first reaction was that this is an area where we need to hear from the specialty bars -- employment discrimination litigation, consumer litigation, securities fraud litigation, etc. The bonding technique has been employed by many courts, although the 10th Circuit has recently disapproved it or significantly limited its use. Requiring a bond may be effective in dealing with serial objectors, but not if they are well-funded. In fact, it seems that there is a growing "objector industry," and a significant number of objectors are well funded.

A question was raised: How can a court refuse to permit an objection to be withdrawn? That is what Alternative 1 calls for, and it is also implicit in Alternative 2, augmented by information about side agreements. The response was that this is, in a way, a quandary under the current rule. Rule 23(e)(5) already says that an objection may be withdrawn only with the court's permission. Perhaps an objection can be "abandoned" without invoking this rule provision, and perhaps class counsel and the objector could reach a "side agreement" that the objector would abandon the objection. So the possible amendments don't create this basic problem, which is a feature of the current rule. On the other hand, it is not certain how well the present rule is working. It seems that the current problems relate to appeals, not objections in the district court, so that the current rule is not producing this sort of problems. Maybe (hopefully) it has actually solved problems.

Another reaction was that the current rule is valuable. Having that rule means that class counsel can tell objectors who are trying to extract tribute that they can't go along because the court must approve withdrawal of an objection and the court must now be informed of the terms for that withdrawal. That goes some distance toward solving the hostage problem that can result from an objection, but the basic purpose of all this is to help the court evaluate the settlement. For that purpose, we actually almost want to encourage objectors; as has sometimes been said, there are "good" objectors and "bad" objectors.

Regarding the "bad" objectors, it was asked whether judges sometimes impose sanctions on objectors. An immediate reaction was that the bond requirements imposed on occasion seem somewhat like that, though they are different. On at least one occasion, a court became impatient enough with an objector to bar that person from making further objections in that district.

On the same subject, it was noted that the development of the ALI Principles included consideration of urging punishment

for "bad" objectors. But one concern was that those provisions might also deter "good" objectors.

Another reaction was that it is likely some judges calibrate their handling of the bond requirement in part by asking whether this is one of those notorious serial objectors.

But it was asked whether this is basically a problem with the appeal, not at the district court. That is before the Appellate Rules Committee. That drew agreement: If the only delay issue were in the district court, nobody would care. It's the time required to dispose of an appeal that is the major club "bad" objectors can wield.

That drew attention to § 3.08(d) of the ALI Principles, which was an effort to calibrate an appropriate sanctions regime for abusive objectors. Looking at that might offer ideas for possible rule provisions. Whether any of those would be useful is unclear, but probably they deserve some consideration at this stage.

It was noted that § 3.08(d) resulted from intense consideration of the two-edged potential of sanctions provisions in this area. There is a good chance that some of the most prominent "good" objectors would support something along those lines. They think that judges can differentiate on a case-by-case basis between "good" and "bad" objectors. A rule probably cannot do so in an all-purpose manner, or using specified criteria, but judges can react to it when they see it.

The resolution was that Prof. Marcus should look at § 3.08(d) and consider how or where some provisions along those lines might fit into the civil rules. If a way can be found, Prof. Marcus should circulate ideas to the Subcommittee. More generally, the topic of dealing with objectors should go forward as outlined during the call.

Another question was whether to focus also on "standing to object," as had been suggested in one comment received by the Committee. But the question was raised how a court should react to a very valid objection when offered by a class member whose "standing" is challenged. The court's obligation, after all, is to decide whether the proposal is fair, reasonable, and adequate. If it is not, should it matter that the objection is raised by somebody without standing? Don't we want to encourage good-faith objections? Indeed, some of the objectors who are most likely to be helpful, such as Public Citizen, are not themselves class members.

A reaction was that outfits like Public Citizen almost always present objections on behalf of class members, so standing is not likely to be an impediment for them. On the other hand,

CAFA requires that state attorneys general or comparable officials be given notice of proposed settlements when the class includes citizens of their states. Perhaps the CAFA notice provision implicitly gives these officials "standing" to object. 28 U.S.C. § 1715(d) says that the court may not approve the proposal until 90 days after notice is given to the appropriate officials. Presumably they can *do* something during that 90-day period, and objecting seems like what they would do if they saw problems with the proposal. Maybe their objections are "on behalf of" their citizens and therefore supported by standing, but it seems not to be useful to introduce this issue.

One way of looking at these issues was: "What do we gain by adding the issue of standing?" The real question is whether to approve the proposal, and spending energy scrutinizing the impact of various provisions on specific class members who object seems a distraction. The consensus emerged that this idea had dubious utility and was not worth the effort. Courts surely will listen to arguments that a given objector is just a spoiler looking for a payoff, particularly when supported with convincing proof that the objection is actually contrary to the objector's interest.

Therefore, going forward, the agenda materials will (1) not raise the standing issue; (2) present only what was Alternative 2, not the complete prohibition on withdrawing objections; and (3) explore the possibility of some sanctions provision along the line of ALI § 3.08.

More generally, it would be important for the Rule 23 Subcommittee to maintain contacts with the Appellate Rules Committee to coordinate work on possible methods of addressing the withdrawal of objections or appeals after a notice of appeal is filed. It would be important to contact the Chair and the Reporter of that committee about where we are. Probably it would be preferable to have approval done by the district court if that can be worked out.

Rule 68 and "Picking Off" the Class Rep.

In the 7th Circuit, the "pick off" technique of promptly offering the class rep. the maximum amount he or she could individually recover and thereby mooting the case has evidently had some success. The "solution" to that problem is an "out of the chute" class certification motion before the defendant makes an offer. But it is a rare case in which plaintiff is ready to litigate class certification this early in the litigation. So in some places plaintiffs who make such early motions also move to stay decision on them pending discovery and briefing of the class certification issue. Judges in other parts of the country sometimes seem to be impatient with this tactic, and some have stricken such early motions with comments like "This is not the Seventh Circuit." At least the 11th Circuit seems impatient with

the whole set of issues.

The materials present a variety of methods of dealing with these problems. Whether this is a serious problem anywhere but the 7th Circuit could be debated. The general subject is a focus of a panel at the Impact Fund class-action conference on Feb. 27 that Elizabeth Cabraser and Prof. Marcus intend to attend. For present purposes, the matter should be kept on the Subcommittee's agenda and carried forward using the existing materials to the full Committee in April.

Issues Classes

The materials for the call included two possible approaches to this set of concerns. The first sought to build into Rule 23(b)(3) a recognition that at least predominance should be viewed differently when it is appropriate to use (c)(4). The second went the other way, and would amend Rule 23(c)(4) to provide that issues certification may only be used in cases that independently satisfy Rules 23(a) and (b).

These issues were introduced as raising a somewhat basic question about whether such a rule change is needed. The main opponent to use of issues classes -- and therefore in favor of something like the second approach -- seems to have been the Fifth Circuit, in particular in a footnote in its Castano decision nearly 20 years ago. Since then, panels of that court have seemed more receptive to issues class treatment in some cases. So if one reason for adopting this approach is to reconcile or resolve a circuit split, that reason may be disappearing.

At the same time, a number of what might be called subsidiary issues could be important. Many of them revolve around what should be done once the central issue that supported issue certification is resolved. It does not seem the resolution of that issue leads to entry of judgment on behalf of the class members. Should notice then be sent to them that they must take action to prove their individual entitlement to relief? Can the court award attorney fees to class counsel at that time? If the common fund principle is the basis for an attorney fee award, it does not seem that there is yet a fund to draw upon. Should major efforts be made to determine the amount of individual relief if there is a prospect that the ruling on the issue so resolved will be altered or reversed on appeal?

A slightly different set of questions addressed whether issues classes should apply outside the (b)(3) format. In a (b)(2) case, it may be that there is really nothing more to resolve, or at least no individual issues to resolve, in determining the nature and extent of relief. The class members need not "prove up" their claims in that situation. Given the

Supreme Court's treatment of "incidental" monetary relief in (b)(2) class actions in Wal-Mart v. Dukes, the prospect of time-consuming individual determinations seems to have vanished.

One idea might be to ensure the availability an immediate appeal from the resolution of the common issue. That would at least deal with the risk that the initial district court ruling would be significantly altered after much work had been done on determining individual claim amounts. The ALI spent a great deal of time evaluating this problem, and it was among the most controversial in its Aggregation Principles. It may be that some sort of avenue for discretionary review along the lines of Rule 23(f) is the most suitable course. That might achieve finality with respect to that issue.

The Rule 23(f) model drew support. Another analogy is to Rule 54(b), which calls for an initial certification by the district court. Prof. Marcus should try to develop a possible amendment to enable immediate review.

Discussion returned to the set of problems surrounding how courts actually handle the "mop up" that follows resolution of the common issue, assuming that can be done in a way to achieve adequate finality. What actually happens? The response was that the court retains jurisdiction to resolve the merits of individual claims for relief. This happens in employment cases, and is starting to happen in consumer cases. The damages determination is made under the court's auspices, using either written or oral proof. Practical solutions can be found.

The reaction was that most of the issues raised -- notice to the class, entry of a "final judgment," etc. -- seem to have been resolved by practical lawyers and practical judges. The "big issue" is appellate review. The rulemaking issues should be carried forward, largely in the format already developed. One additional possible question is whether issues classes should be limited to (b)(3) cases. Nothing in the current rule says they are, and the proposed change to (b)(3) does not say that they cannot be used in (b)(1) or (b)(2) cases, so perhaps that change to (b)(3) can go forward with a Committee Note recognizing that this change made no change in the use of issues classes under (b)(1) or (b)(2). That does not say we are affirmatively authorizing such use, but only that we are not trying to alter it.

Notice

This issue was introduced as also seeking a pragmatic solution that takes account of modern realities. Eisen's insistence on notice by first class mail to all class members who can be identified seems truly antique.

The drafts before the Subcommittee included one alternative that would simply remove the current requirement of individual notice in (b)(3) cases, and another that would add "by electronic or other means" to the notice requirement in (c)(2)(B).

An initial reaction was that giving individual notice in many cases, particular certain kinds of consumer cases, has become vastly easier. There are enterprises that specialize in managing claims and distribution in class actions, and the people who run those enterprises know how to do this job. The reality is that they can identify, contact, and even pay class members at a modest cost per capita. That is a reason why the $100 exclusion from individual distributions in the cy pres proposal seems unnecessary. Smaller distributions can often be made fairly readily.

Against this background, the consensus was that Alternative 1 -- removing the requirement of individual notice -- seems like overkill. Something like Alternative 2 -- explicitly recognizing in the rule that electronic means may be used -- is a better way to go. That should be the approach presented to the full Committee in April.

Notes of Conference Call
Feb. 6, 2015
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Feb. 6, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Elizabeth Cabraser, Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Rule 23 Subcommittee).

Logistics

Judge Dow called attention to the list of upcoming events that might involve some or all Subcommittee members:

Impact Fund Class Action Conference (Feb. 26-27, Berkeley): Elizabeth Cabraser is on a panel and Rick Marcus intends to attend.

George Washington University Roundtable on Settlement Class Actions (April 8): All members intend to attend.

ALI May 17 discussion: All Subcommittee members except Judge Dow intend to attend.

AAJ meeting in Montreal (July 11-14): It is uncertain whether there will be events specifically about class actions. Elizabeth Cabraser will inquire. Several members could attend if there were pertinent events.

Civ. Pro. Professors' Conference in Seattle (July 17): Subcommittee participants from the West Coast (Cabraser, Klonoff, and Marcus) will attend if possible. The second day of this event is supposed to focus on aggregate litigation.

Duke Conference (in July?): Plans are not certain about this event. Judge Dow has been in touch with John Rabiej about it.

Subcommittee mini-conference: After discussion, the date for the conference was selected -- Sept. 11, 2015. The tentative location is the Dallas Fort Worth Airport. Subcommittee members should plan to remain until Sept. 12 so that the Subcommittee can have a follow-up discussion of the points made by conferees.

Advisory Committee meeting in Salt Lake City (Nov. 5-6): Assuming that the Subcommittee can convene at DFW on Sept. 12, it does not seem useful to try to schedule a Subcommittee get-together on Nov. 4. It may be useful to

schedule such a meeting on Nov. 7, but that is not certain yet.

AALS Annual Meeting (January, 2016): It would be desirable to be on the agenda for this meeting, perhaps as one of the "hot topics" items for the meeting. There may be a scheduling conflict with the Standing Committee meeting on Jan. 7-8 in Phoenix, but that would not affect most of the Subcommittee. Judge Dow will make contact with Dean Daniel Rodriguez (President of the AALS) about whether and when a time can be found during the annual meeting, which is in New York beginning on Jan. 6, 2016. If something can be set up, it would be useful to suggest including mention of it in newsletters for several sections of the AALS, including civil procedure, litigation, and federal courts. It might also be desirable to mention this event on the Civil Procedure listserv that includes many civil procedure professors.

(1) Settlement approval criteria

Discussion turned to the first of the seven potential amendment topics. It was introduced as presenting the question what should be carried forward now for further discussion with the full Advisory Committee during the April meeting and also for reactions from the roundtable panelists at the GW event on April 8. One approach is the ALI version -- identifying a relatively short list of mandatory topics and leaving open any others that are relevant to a given proposed settlement. Another approach, illustrated by Appendix I to Ed Cooper's circulation, would enumerate a rather long list. That longer list resembled the list that Elizabeth Cabraser developed of current factors articulated in the various circuits, but it also includes some subjects that are not on any court's list, and does not include some things that are on some courts' lists.

Another introductory comment stressed that one way of looking at the present choices is between leaving the rule as it is now and changing it. Any change is likely to cause some difficulties early on, simply because it is different. Adding new factors might be more destabilizing. But adding (or changing) factors might also identify important considerations. An example is to suggest that the court give particular attention to whether public officials have expressed a view on the desirability of the proposed settlement. CAFA invites them to do so, and they may be important sources of independent reactions to a settlement proposal. Several of the factors on the Cooper list are not on the Cabraser list, and vice versa. To the extent any new list is open-ended, and permits reference to other factors, adopting a list might not be worth doing. But if it is important to get courts to think about things they are not currently considering, having a longer list might be preferred.

An initial reaction was that "the factors lists are old." One might even say some are fossilized. Most of these factors come from cases from the 1970s and 1980s. Very few were formulated after Amchem was decided in 1997. And they antedate the current trend to backload the certification decision. Now is a good time to look at all of the factors. The current long lists contribute to settlement reviews that consist of "duly checking off" the circuit's various factors, often with a conclusory one-sentence reference to the factor -- "This does not apply" or "This is satisfied." In addition, the lists are things that objectors focus upon. Shortening the list will narrow the range of things that objectors can bring up. Eliminating unimportant items can be a value then, and can also focus objectors on what really matters.

Attention focused on the additional factors on the Cooper list from 2000 that seemed not to be on the actual existing list. These included:

> Factor (D) -- the maturity of the underlying substantive issues.
>
> Factor (E) -- the participation in the negotiation of the settlement proposal by class members or representatives.
>
> Factor (H) -- the existence and prospects of other pending class actions.
>
> Factor (L) -- the claims processing procedure in the settlement.
>
> Factor (M) -- whether another court has rejected a substantially similar settlement.

Some of these seem to be connected to topics addressed in the 1996 package, such as maturity of claims as a Rule 23(b)(3) factor on certification. Others seem related to the concern considered at length in 2000-01 -- addressing the binding effect of federal-court decisions on whether to approve a given settlement and whether state court could be required to respect those decisions.

A reaction was that maturity might also look to some things that courts do now consider, such as the amount of discovery done in this case. The suitability of the claims process is very important but did not seem to get onto the courts' lists of 30 or 40 years ago. Now there is an FJC Class Action Notice And Claims Checklist, which has detailed advice about how to evaluate such a claims process. Judges use it, and it is very good. It tells judges (and lawyers) what such processes should look like.

Another reaction to the list from 15 years ago is that it

was partly addressed to concerns in mass tort class actions. It is not clear that current concerns are exactly the same.

A different question was about how the court is to employ the list of criteria. That list was drawn from the ALI Principles. That is a sensible beginning. The ALI project involved much consideration of the various lists that had emerged from court decisions, and was an attempt to distill them and leave out some that seemed unhelpful. But the draft does not say in the rule (v. the Note) that a court may not approve a settlement unless it can make those findings. It also does not say that the court may refuse to approve a settlement even though the four findings are satisfied. The ALI Principles also say that there should be no presumption that a proposed settlement is reasonable just because it has been proposed by the lawyers.

One focus for these concerns was on alternative rule language at lines 14-15 of the discussion draft of the rule -- whether the court must "consider whether" or "find that" the four conditions specified in the draft are satisfied. Saying "find that" seems pretty clearly to say that the court may not approve the settlement unless it so finds. Saying that the court "may consider" any other matters seems implicitly to mean that it can refuse to approve even if it can make the findings that are required.

Another participant emphasized that it would be important to be crystal clear about these matters in the text. At least some Supreme Court decisions indicate that Committee Notes don't count for much when rules are applied. Leaving important things only in the Note is risky.

Consensus: A recapitulation was that the consensus of the call seemed to be that (1) the rule should require findings on the four matters; (2) the rule should make clear that a settlement may not be approved if those findings cannot be made; and (3) the court may disapprove a settlement even if it can make those findings.

The third point drew support: "Don't create arguments that somebody is entitled to approval." It should always depend ultimately on the court's informed discretion.

A suggestion was that one way to do it would be "must find and may consider." Reference might be had to § 3.05(b) of the ALI Principles.

Another reaction was that this sort of enumeration would be useful to judges and helpful to practitioners.

Attention was drawn to the draft Note, which says that the rule is designed to "supersede" the lists adopted in the various

circuits, but it then says that other factors may be considered. Is that consistent? One reaction was that the goal is to make clear that the court has authority to refuse approval on grounds that, in a given case, counsel against approval, but that a court may not approve unless the four main criteria are satisfied.

That approach drew support. The goal is to capture the essential point -- the four factors must be established in every case, but in given cases there may well be additional factors specific to the case that matter in that case. A goal is to force lawyers and enable judges to focus on the things that really matter. Although the composite of the current circuit factor lists looks long, it really is not so long; to a significant extent, the various courts use different language to describe essentially the same thing. The basic objective should be to identify the subjects on which the judge must feel comfortable making a finding.

That effort received support emphasizing the use of "just" in Rule 1: The handling of class actions should be consistent around the country. Having a relatively short list will contribute to that outcome.

It was asked why the ALI's formulation had not been much cited by the courts. The cy pres section of the Principles has received much attention, but the settlement approval provisions have not. Does this suggest that the courts do not accept the settlement criteria formulation? A response was the many judges probably feel that they have circuit precedent that tells them they must adhere to and discuss that circuit's list of factors.

That explanation drew agreement. "People address things that don't matter because they are on the circuit's list." People are afraid to deviate from the approved list, and therefore try to shoehorn what matters into the list rather than isolate and emphasize those things that matter. Both sides of the v. will favor having this clarified.

At the same time, the question of having a different list should be kept alive. The solution there would be to include the Cooper factors as an Appendix to this segment of the evolving draft of amendment ideas.

(2) Settlement Class Certification

This subject was introduced as involving at least two major issues: (1) whether to extend beyond (b)(3) classes, and (2) whether to countermand things that Amchem held, and if so whether to say so.

An initial question was whether the Committee can change what the Supreme Court ruled. The answer is that changing the

rule can alter the outcome the Court reached under the rule as it was at the time the Court decided. Probably it would be desirable to make it clear that is the objective, if it is indeed the objective.

One aspect of Amchem that has drawn much attention is the Court's insistence there that predominance be satisfied even for settlement certification. How has that worked out? The answer was that there is a fair amount of jurisprudence about what predominance means in the settlement context, as opposed in a litigation class situation.

The "central question" was put: Is there something in current practice that should be liberated by a rule amendment? The response was that, for the most part, people are plugging along. But the issues presented by Amchem can distract courts from the things that really should matter. For one thing, objectors sometimes seize on the predominance issue. Resolving that question will be helpful. It will probably receive more support from defense lawyers than plaintiff lawyers, but it will help both sides of the bar.

Another issue was whether it would be useful to say that a case can be a settlement class only if it "satisfies Rule 23(a)." The ALI Principles put this differently, by making settlement certification contingent on whether there are significant common issues a sufficiently numerous class. Would that be better?

A reaction was that invoking Rule 23(a) seems simpler, but may raise difficulties. For example, typicality may not matter in the settlement context. Whether or not the named plaintiff would be subject to embarrassing examination at trial due to a criminal record, etc., that does not matter in the settlement context.

Another problem is that Wal-Mart v. Dukes has heightened concerns about involving the common question requirement of 23(a)(2). It may be better to substitute a reference to commonality as in the ALI version. More generally, the ALI approach was to introduce selective reference to matters identified in Rule 23(a), rather than invoking that rule provision wholesale.

Another response was that the real goal should be to put the emphasis on whether the class is cohesive.

A question was raised: How can the defendant support a settlement when approval depends on finding that 23(a) is satisfied and simultaneously oppose certification for litigation purposes on the ground 23(a) is not satisfied?

The response was that "parties don't toss away their

arguments." Defendants make it clear that they are reserving all arguments about litigation certification when they agree to support certification for purposes of settlement.

But, it was asked, isn't there a law of the case problem if the court declines to approve the settlement? That drew the response that this is kind of like an "escrow" situation; the concessions for settlement review are only good if that goes through, and if it does not go through they are all retracted.

The bottom line was that a draft should offer an alternative to invoking and relying on satisfying 23(a). This might be based in part on the approach adopted by the ALI Principles.

Discussion returned to whether a new (b)(4) should be limited to (b)(3) certification. An immediate response was that there are lots of (b)(2) cases that settle. The courts have recognized settlement outside the (b)(3) context.

Another question was whether Amchem has had an impact on settlement of cases brought under (b)(2), to which the answer was that it has.

But that raised the question whether opting out should be a feature of (b)(1) or (b)(2) cases. How can the injunction forbid the defendant from using certain practices with class members but permit it to continue to use challenged practices with those who opted out? Another response was that allowing opting out would completely defeat the purposes of (b)(1) certification.

A further response was that the courts can still permit opting out for equitable reasons in specific cases.

The time for this call had expired; the discussion will resume on Feb. 12.

Notes of Conference Call
Dec. 17, 2014
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Dec. 17, 2014, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter to the Rule 23 Subcommittee).

Judge Dow introduced the call by explaining that discussions after the October Advisory Committee meeting suggested that the Rule 23 amendment possibilities might move forward somewhat more rapidly than had previously been discussed. A plausible goal would be to have an amendment package ready for consideration by the Standing Committee and publication in June, 2016, which would mean approval by the Advisory Committee at its Spring, 2016, meeting. That, in turn, would probably call for relatively advanced drafts to be discussed during the Fall 2015 meeting, and some sort of initial discussion drafts circulated for discussion during the April, 2015, meeting.

This revised timetable depends on the Subcommittee's comfort with the list of possible amendment ideas it has identified. Certainly nothing is entirely off the table even if not on that list, but it does seem that various sources identify these topics, and therefore that this is the right list. For this conference call, then, the goal is to march through the list circulated for the call and see if some should be removed from the list. In addition, it would be important to determine whether there are other topics that should be added to the list.

(1) Settlement Approval Criteria

This topic was introduced as frequently of concern to judges, who probably have to review proposed settlements much more frequently than they certify classes (at least for litigation purposes -- certification for settlement is considered under the next heading). The judges (and the lawyers) may confront very long lists of criteria under the precedent in various circuits. The same sort of message emerged during the ALI work on the Aggregate Litigation project -- that the range of criteria was too large.

The ideas for approaching this set of concerns build from the ALI work. One tension is whether to limit the factors that can be considered. The ALI reported considerable unhappiness with the variety of factors that crop up in the lists used in various circuits. Keeping track of all the various lists may be a concern mainly for lawyers who practice across the country. But having identified the particular ones for a given circuit often does not assist the court or the lawyers much in making the

settlement-approval judgment.

One model for an approach to Rule 23(e) might be the approach of Rule 23(g) to appointment of class counsel. Rule 23(g) says that there are four factors that must be considered whenever the court makes a class-counsel appointment, and that any other pertinent factor may also be considered. A rule might have a closed list, or a mandatory list with authority to consider any other pertinent factor. The 2000 draft of Rule 23(e) possibilities took a somewhat different approach, identifying a very large number of possible factors.

A reaction to these possibilities was that courts would benefit from having a touchstone for making decisions about whether to approve proposed settlements. It was agreed that identifying a few things that the court must consider is useful, but not trying to shut the door on a variety of other considerations that might be important in given cases. On the other hand, some things courts have cited should be removed from consideration. A prime candidate for removal is the opinion of counsel; they have negotiated the deal and are supporting it. That is a make-weight reason for judicial approval, but does show up on some lists of factors. The number of opt-outs, any possible conflict of interest, etc., are all things that may be important in some cases.

Another participant agreed that the variety of factors included on one circuit's list or another is quite daunting. The goal of a rule should be to list the "core factors." It should not try to be a closed list; it would never be possible to list all the factors that could ever matter. A rule cannot disable courts from exercising their discretion about what is a fair settlement, and it should not try to do so. Moreover, it is not really true that the various lists are hugely different; instead, it seems that they vary somewhat in terms of terminology and also in terms of emphasis. At the same time, at least some might best come out, and the opinion of proposing counsel heads the list of those that do not make sense.

It was remarked that the Subcommittee would benefit by having a "spreadsheet" or something like that listing the factors included in the various tests like the Grinnell factors (2d Circuit) and Gerst factors (3d Circuit). An effort could be made to put together such a listing; lawyers who practice in the area have to develop their own, so it should not be too difficult to compile one.

Another idea was that a Committee Note to such a "core factors" rule could say that it supersedes the various items on circuits' lists to the extent that may have been regarded as mandatory "checkoffs" in those circuits. That is not to say they may not be pertinent in given cases, but the "checklist" could be

confined to the ones in Rule 23, not all the others that found their way onto a given circuit's list.

At the same time, it was noted that the circuits' lists are not particularly diverse. Indeed, it seems that circuits have been borrowing from one another. Certainly adopting the core factors of the sort identified by the ALI would not involve overruling the decision of any circuit. To the contrary, it would probably be more like adopting the common features of various lists and including them in the national rule. That idea drew support -- "I like the idea of collecting the law of the land on settlement review."

A caution was noted: It will be important to keep in mind how such a listing of factors ties in with the possibility of certification for settlement only. In addition, it would be useful to keep in mind the possibility of mentioning factors (at least in a Committee Note) that have not been included on any circuit's list.

It was also noted that borrowing directly from the ALI principles could cause difficulties because it was an integrated document that used its own terms. One example is the idea of "indivisible relief" as the sort of thing that at least Rule 23(b)(2) addresses.

A concluding comment was that there is virtually a unanimous desire in the bar for sensible and consistent settlement approval criteria, and also for criteria for settlement class certification.

(2) Settlement Class Certification

This topic was introduced with the 1996 draft (b)(4), which sought to undo a Third Circuit line of cases that permitted settlement certification only if litigation certification would be warranted. After the Supreme Court made its Amchem decision in 1997, this proposal was shelved. It might be time to bring it out again. And one possibility would be to do something that is out of step with Amchem's interpretation of the current rule. Amchem said that 23(e) settlement review is no substitute for rigorous application of the criteria of 23(a) and (b) (except for manageability). A prime sticking point has been the role for predominance in this analysis. So one possibility sketched in the materials for the call was to say (at least with regard to (b)(3) certification) that settlement class certification is permitted if the court approves the settlement under 23(e).

One reaction was that there are a few decisions in which the lower courts have tried to work through what predominance means in the settlement certification setting. One example is Hanlon v. Chrylser, a Ninth Circuit decision. Another might be at least

some parts (particularly Judge Scirica's concurring opinion) in Sullivan v. DeBeers.

This discussion led to a question: Do we want to limit this to (b)(3) classes? Predominance is only required in those class actions. Should mandatory class actions be included also? That would open the prospect of a "stand alone" (b)(4). A reaction to this idea was that it seems "more practical." True, most settled class actions are (b)(3) cases. But the (b)(1) and (b)(2) examples are "remedy driven." They are not, however, cases in which settlement class certification is never a possibility.

One idea that was expressed was that it would be good to have a compilation of the factors used in various courts for settlement class certification. One reaction was that it is likely the various settlement approval criteria are delineated more clearly under current case law than the handling of predominance in settlement class certification.

Another question was to look at the factors for settlement approval and settlement certification to see whether the courts actually are using them or just intoning them because they are "on the list." An example is the approval of counsel factor that was noted before Amchem was decided; now it gets "backhanded." It may be that other factors have really fallen out of use.

(3) Cy Pres

This topic was introduced as getting a lot of attention. Some have very strong views that such methods are simply improper. Among judges, the focus is likely more practical than theoretical. Using that mindset, the ALI approach makes sense. And one thing that seems widely agreed is that in settlement fund situations allowing a reversion to the defendant is not a good idea, leaving the question what to do with amounts left over after claims have been paid. The ALI proposal offers ways to address those questions.

At the same time, there are some Enabling Act concerns that should be kept in mind. On the one hand, to the extent a rule explicitly authorizes this new "remedy," it might be challenged as going beyond the sorts of things that a rule should do. On the other hand, under the law of some jurisdictions, such measures have been a part of practice for a long time, so a rule that disallows them in federal court could be challenged on Enabling Act grounds as well as one that explicitly authorizes them. At least on some occasions, situations like the old California case of Daar v. Yellow Cab really do call for creative solutions. The vitamins antitrust case was probably one of those.

But in most cases, the main concern is the residue after

claims processing. The ALI's proposal is "becoming the standard in the courts." It would be helpful for the rule to provide the factors that should be considered. In the Seventh Circuit, it seems that the courts may approve cy pres arrangements as the sole remedy in some consumer cases.

It was observed that, for some reason, the prominence of cy pres became more significant after 2010, just after the ALI proposal was adopted. Putting something modeled on the ALI's work into the rule would be helpful, and a lot better than "going back to square one." It was suggested that judges probably would favor that approach as simplifying and clarifying their work. These factors are not absolutes, but can focus the controversy.

Again, it was suggested that it would be helpful for the Subcommittee to arrange for cases to be gathered on current practices. A reaction to this suggestion was that the ALI itself is assiduous about keeping track of adoption in the courts of its proposals; it probably can provide a reasonably complete report on cases addressing the cy pres provision in the Aggregate Litigation principles.

The consensus was that the ALI proposal's orientation seems to be where the bulk of people find the law should go, and the topic therefore should not be too controversial to take on. Whether it should include some general "good works" fallback, or escheat to the state, is not certain. Indeed, at least some of the more fervent commentary on the general subject seems ideological, suggesting that it reflects a substantive rather than procedural concern.

(4) Handling Objectors

The set of issues was introduced with the observation that it seems that the present provisions of Rule 23(e)(5), added in 2003, adequately police the withdrawal of objections in the trial court. The problem appears to happen after an appeal is filed, when Rule 23 arguably no longer applies. The Appellate Rules Committee has been looking at those problems. Another issue was raised by Stephen Herman, who urged that the rule limit objections to matters the objector has "standing" to raise. A possible analogy for that would be Rule 23(h)(2), which permits objections to an attorney's fee award by a class member or a party from whom payment is sought, but not by others. Perhaps something like that could serve to screen objecting class members.

A reaction was that the Herman letter identifies a familiar problem. An example was in the DeBeers litigation, where the objection to payment to those from states that had not adopted Illinois Brick repealers was made by somebody who seemed to come from such a state. Thus, the objector's point was, in essence,

that she should not be paid anything and more should be paid to others resident in states with Illinois Brick repealers. This sounded like an objection this person should not be allowed to make.

But, it was responded, if the objector points up something that "really stinks," does that mean the judge can't consider it because it seems that this repellent part of the deal does not adversely affect this particular class member? It was agreed that would probably be going too far, but that it points up the relationship between this factor and the settlement approval criteria.

Regarding the problem on appeal, the suggestion was that the solution was for the court of appeals to send the matter back to the district court. Even now, sometimes those perturbed by bad faith objectors approach the district court and ask that a high bond be set. On the other hand, "we can't make objecting a felony." It may be that nothing need be done.

But it was noted that the Appellate Rules Committee may be receptive to adjustments that facilitate the handling of ill-intentioned appeals. It would be important to keep a way open for the Rule 23 Subcommittee to play a role in that process, perhaps even a lead role. This subject should be pursued with that committee.

(5) Rule 68 Mootness Issues

A starting point was that the Seventh Circuit approach has produced "out-of-the-chute" certification motions in that circuit that make little sense. This "creates makework for all," but is necessary to guard against inappropriate outcomes in the Seventh Circuit. But whether a rule-based solution would be wise is not clear. Perhaps the simplest way would be to add a sentence to Rule 68 saying that it does not apply in class actions and derivative actions. Something like that is already in Rule 41.

That raised the possibility that it may be that additional changes to Rule 68 seem worth pursuing for unrelated reasons that were discussed during the last Advisory Committee meeting.

A further point was that Rule 68 is not really about mooting cases, and that cases can be mooted without a Rule 68 offer. If a small change to Rule 68 were made to deal with this problem there, it might be possible in a Committee Note to say something about the impropriety of seeking to "pick off" class actions with individual settlement proffers to the class representatives (at least before the district court rules on class certification).

The consensus was to carry forward this topic, but without confidence about what should be the resolution.

(6) Issue Classes

The introduction stressed that there are basically two approaches. The first would permit (c)(4) certification without regard to the predominance requirement of (b)(3). That would recognize what seems to be the view of the majority of the circuits. The other would be to implement the Castano 5th Circuit view that (c)(4) is not an end run around predominance by specifying in (c)(4) that it may be used only in cases that satisfy 23(a) and (b).

The discussion focused on whether there really is a split in the circuits on this issue. Some 5th Circuit decisions appear to accept (c)(4) solutions to (b)(3) problems. Most circuits never took the Castano view.

If that's so, the question was whether the rule should be changed. As things now stand, the two rule provisions don't easily fit together. Excusing the predominance requirement when appropriate measures can be taken using (c)(4) could clarify the present confusion. That would largely recognize the majority view among the courts.

Alternatively, (c)(4) could be changed to give teeth to the Castano view. But that would seem to go against the view of most or all the other circuits, and also might be out of step with some 5th Circuit decisions.

This matter would be carried forward.

(7) Notice

The consensus was that this set of issues should be carried forward. Presently, notice is partly "buried" in Rule 23(d). Rule 23(c) notice in (b)(3) cases, meanwhile, can be a major cost but not a major value to class members. The meaning of "individual" notice in the Digital Age might need to be reconsidered. The centrality of first class mail to achieve that notice surely seems ripe for reexamination. Finding practical solutions should be the goal, and finding rule language that would permit or facilitate practical solutions should be the rulemaking goal.

It was suggested that it would be good to collect best practices from around the country. This sort of thing "should not be the subject of argument" once the experience of the courts is on the table.

Another limitation that might be considered is to dispense with individual notice in low-value claims (perhaps those worth less than $100, the amount suggested in the 1976 Uniform Act, an amount whose current value would be nearly $500).

* * * * *

Good progress was made toward developing discussion drafts. The Subcommittee should reconvene by conference call in January, 2015.