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COMMENT TO THE RULE 23 SUBCOMMITTEE OF THE CIVIL RULES ADVISORY COMMITTEE ON BEHALF OF PUBLIC CITIZEN LITIGATION GROUP

April 9, 2015

Public Citizen Litigation Group (PCLG) is writing to provide some brief thoughts for the Rule 23 Subcommittee of the Advisory Committee on Civil Rules on proposals for changes to Rule 23 that are currently under consideration or have been suggested by others.

PCLG is a strong proponent of the proper use of class actions to allow consumers, workers, and others to litigate claims collectively in circumstances where individual actions are likely to be ineffective or impractical, and where greater benefits can be achieved through class proceedings than would be possible in piecemeal litigation. Our interest in preserving the efficacy of class actions is illustrated by our active engagement in appellate litigation in a number of circuits involving claims that Rule 68 offers of individual relief to proposed class representatives moot their individual claims and their efforts to obtain class certification.[1]

PCLG has also sought to ensure that settlements of class actions treat class members fairly and has represented objectors to settlements in instances where particular settlements were not fair and adequate as well as where cases were not suitable for class resolution because the individual interests of litigants in controlling their own claims outweighed the interest in a class resolution.[2]

Both the Subcommittee itself and a number of outside commenters have offered proposals on a number of subjects concerning Rule 23 that deserve serious

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[1] *See*, *e.g.*, *Walker v. Fin. Recovery Servs.*, 2015 WL 1383233, __ F. Appx. __ (11th Cir. 2014); *Keim v. ADF Midatlantic, LLC*, 586 F. Appx. 473 (11th Cir. 2014); *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820 (5th Cir. 2014) (opinion withdrawn); *Hooks v. Landmark Indus., Inc.*, No. 14-20496 (5th Cir.) (pending); *Mey v. N. Am. Bancard, LLC*, No. 14-2574 (6th Cir.) (pending).

[2] *See*, *e.g.*, *Batman v. Facebook, Inc.*, No. 13-16819 (9th Cir., pending); *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *reh'g denied*, 709 F.3d 791 (9th Cir. 2013); *cert. denied*, 134 S. Ct. 8 (2013); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010); *Rodriguez v. West Publishing Co.*, 563 F.3d 948 (9th Cir. 2009); *True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010); *In re TD Ameritrade Accountholder Litigation*, 266 F.R.D. 418 (N.D. Cal. 2009).

and respectful consideration. Below, we offer our preliminary views on some of those issues.

Settlement Classes. The Subcommittee and some outside commenters have suggested variations on a revision that was previously considered and rejected concerning a new subdivision of Rule 23(b) applicable only to settlement classes. The revision would dispense with some of the requisites for certification that would otherwise be applicable under Rule 23(b)(3).

PCLG does not think that a case has been made for a rule change on this subject. It does not appear to us that desirable class settlements have been prevented or deterred by existing Rule 23 requirements as applied to certification for settlement purposes in light of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The Court recognized in *Amchem* that the application of Rule 23(b)(3) must reflect recognition that when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems." *Id*. at 620. Thus, consideration of superiority in a proposed settlement class already focuses on whether a class settlement, rather than a class trial, would be superior to individual litigation. In our experience, certification standards currently pose no obstacle to desirable class settlements, and, of course, federal courts regularly certify such classes.

The alternative proposals suggested by the Subcommittee, as well as by outside commenters, would go further by dispensing with Rule 23(b)(3)'s specific requirements that superiority analysis consider the interest of individuals in controlling their own claims and the extent of already-pending litigation separate from the proposed settlement class. *See* Rule 23(b)(3)(A) & (B). Those considerations remain critical to whether certification is appropriate in settlements and should not be eliminated.

In addition, the proposals for settlement class certification would eliminate the requirement that common issues predominate. PCLG disagrees with this proposal as well. Predominance poses no obstacle to certification in most cases that are otherwise appropriate for settlement on a class basis, so it is unclear what problem such a change would address. On the other hand, in some cases, the predominance requirement is essential to ensuring that the class is sufficiently cohesive to make any proposed classwide resolution acceptable. *See Amchem*, 521 U.S. at 623. For example, if one segment of a class has viable claims under applicable law and a larger segment does not, or if the claims of different parts of the class are significantly different in other respects, the absence of predominance may be the critical reason why a class settlement that lumps all members together is improper.

In short, we are not aware of evidence that the predominance requirement has blocked significant numbers of otherwise desirable settlements, but the requirement

functions as an important protection against, and deterrent to, improper attempts to settle cases on a classwide basis.

We note, finally, that both alternative proposals offered by the Subcommittee (at page 258 of Committee's April 9-10, 2015 report) appear to have some drafting issues: Although both already incorporate satisfaction of Rule 23(a)'s prerequisites because they are subject to the introductory sentence of subdivision (b), Alternative 1 redundantly repeats the requirement, and Alternative 2 confusingly requires satisfaction of one Rule 23(a) requirement (numerosity) and also adds a sentence on class definition that probably belongs elsewhere. In addition, if a settlement class rule were added, Rule 23(c)(2) would need to be amended to make clear that its notice and opt-out requirements apply to such a class.

Objectors. We agree strongly with the Subcommittee's current inclination not to suggest any civil rule change on the subject of appeal bonds for objectors. Such bonds would likely deter legitimate appeals in the very cases where appeals may be most justified: where class members receive small or no benefits from settlements, but the aggregate value of the settlement is said to be very high, and the settlement includes substantial attorney fees. Many appeals in which courts of appeals have overturned district court settlement approvals would likely never have been taken if appeal bonds had been required.[3]

Other proposals to deter or punish objectors for supposedly frivolous or unfounded objections, including the Subcommittee alternatives applying Rule 11 to objectors and one commenter's suggestion that "vexatious" objectors be required to post a bond at the district court level, are also unwarranted.[4] Our experience leads us to believe that objectively frivolous objections are not a serious problem. Truly frivolous objections are unlikely to impede settlement approval or to be appealed. However, in our experience, settlement proponents frequently characterize objections, including our own, as frivolous. In light of the aggressiveness of settlement proponents in responding to objectors, and the understandable tendency of district courts to look with favor on settlements of complex matters on their dockets, adding the possibility of new bases for sanctions against objectors unnecessarily risks deterring or punishing legitimate objections.[5]

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[3] Examples include *Amchem* and *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

[4] The proposal appears in the submission of the Committee to Support Antitrust Laws.

[5] Application of Rule 11 in this context would pose particular difficulties. First, in order to avoid excessive Rule 11 motions practice, Rule 11 as currently written requires that a party threatening sanctions must first serve a proposed motion on the alleged violator and give that party an opportunity to withdraw a pleading before the motion is filed. Because an objector is not permitted to withdraw an objection without leave of court, the safe harbor provisions of Rule 11 could not practically be applied to objectors, leaving them singularly disadvantaged relative to other parties subject to the rule. In addition, settlement notices would have to advise class members, who often

Placing additional requirements on objectors, such as requiring signatures or certifications of class membership, also strikes us as an unwarranted measure to address problems that do not exist. We have seen no evidence that objections by persons who are not actually class members have been a significant problem, and proponents of such requirements have not explained why objectors, unlike other litigants, should be deprived of the right to conduct litigation in the federal courts through counsel. *See* Rule 23(c)(2)(B)(iv); 28 U.S.C. § 1654. Such requirements, moreover, are less likely to deter so-called "professional objectors" than ordinary class members, who are more likely to forgo presenting legitimate objections if the rules place more obstacles in their way.

To the extent that the Subcommittee has concern about objections that, while not objectively frivolous, are improperly motivated by a desire to extract some special benefit in return for the withdrawal of an objection, a possible remedy would be to require specifically that any agreement or consideration provided in connection with an objector's withdrawal of an objection must be considered by the district court as part of the settlement, subject to approval under the standards of Rule 23(e). In this way, like special benefits provided to named class representatives, consideration provided for withdrawal of an objection would be assessed from the standpoint of fairness to the class as a whole. Such a requirement would go beyond the current requirements in Rules 23(e)(3) and (5) that side deals be disclosed and that withdrawal of objections be approved by the court, as the current rule on withdrawal does not set forth a standard for approval of withdrawal of an objection and does not suggest that such approval is contingent on whether the consideration for withdrawal could be approved as fair from the standpoint of the class as a whole if it were part of the settlement itself. Concomitantly, any fees paid to counsel for an objector, whatever their source (including from class counsel), could be made subject to the approval of the court under Rule 23(h). Such provisions would likely deter hold-up efforts by objectors because they would prevent pay-offs that provide objectors and their counsel special benefits not realized by other class members unless such benefits could be justified (by, for example, evidence that the objectors had claims that other class members did not share that would otherwise be extinguished by the proposed settlement).

Offers of judgment/mootness. We agree with the Subcommittee that the rules should address the subject of Rule 68 offers of judgment to putative class representatives, and their possible impact on the ability of the named plaintiff to proceed with seeking class certification. As the Subcommittee's report recognizes, two distinct issues are posed by this subject: (1) whether or how Rule 68's cost-

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submit objections to proposed settlements without the assistance of counsel, that doing so may potentially subject them to sanctions and would have to provide some basic explanation of Rule 11 standards. In addition to being difficult for lay class members to understand, such notices could intimidate class members into silence and, as a result, mislead the court about the extent to which class members have objections.

shifting mechanisms apply to actions brought as class actions, and (2) whether offers of complete individual relief to named plaintiffs provide a basis for terminating an action before class certification may be considered. As the Subcommittee notes, rules aimed at one issue will not necessarily address the other. In particular, rendering Rule 68's cost-shifting rule inapplicable to class actions, limiting its application, or even eliminating it entirely will not address the question whether an offer to consent to a judgment in favor of the named plaintiff is a basis for terminating a proposed but uncertified class action, as the argument that such offers have the effect of "mooting" a class action does not depend on the cost-shifting provisions of Rule 68.

As to the question whether Rule 68's cost-shifting mechanisms apply to class actions, we believe that both the Subcommittee alternative of providing that Rule 68 does not apply to Rule 23 actions and the National Consumer Law Center/National Association of Consumer Advocates (NCLC/NACA) proposal that Rule 68's application be modified to provide that a Rule 68 offer in a proposed class action must offer relief on a classwide basis to trigger the cost-shifting mechanism are worthy of consideration. The Subcommittee's alternative proposal is simpler. Moreover, it appears that Rule 68 offers in class actions are generally made as attempts to moot the case rather than for true Rule 68 cost-shifting purposes, so little would be lost by making Rule 68 inapplicable to class actions.

On the other hand, if Rule 68 does have a role to play in class actions, we strongly agree with NCLC/NACA that an offer of judgment should have potential cost-shifting consequences in a proposed class action only if it is made to the entire class, and that whether the offer is more favorable than the judgment ultimately obtained should be determined on a classwide basis. We further agree with NCLC/NACA that where cost-shifting occurs in a class case, the named plaintiff should bear only a proportionate share of the costs and absent class members no costs. It does not seem either feasible or fair to impose on absent class members a share of costs attributable to an offer that was likely turned down before the class was even certified, and certainly without consulting them. Because the named plaintiff's share is likely to be small, it may be that the complexity of applying the rule to class actions in a sensible way is not worth whatever benefits the rule might have. If so, that consideration would point toward the Subcommittee's alternative approach.

As to the "mootness" issue, we recognize that the rules cannot themselves resolve a question that goes to a federal court's Article III subject-matter jurisdiction. The rules can, however, affect the answers to such questions by making clear the consequences that the rules attach to particular circumstances. We believe that it would be highly beneficial for the rules to make clear that they do not provide any authority for terminating an action based on an unaccepted offer of individual relief to a named plaintiff, whether or not the offer would have provided complete relief, if the action is brought as a class action. (By contrast, in an individual action, a defendant's unconditional consent to entry of judgment for all the relief the

individual seeks—unlike a mere conditional and unaccepted offer—can provide a basis for termination of the action, not because the consent "moots" the action and deprives the court of jurisdiction, but because the entry of a consent judgment for all the relief sought by a plaintiff is a proper way of resolving a case or controversy over which the court has jurisdiction.)

The "Cooper" approach outlined by the Subcommittee would accomplish the result of making clear that an unaccepted offer to the named plaintiff only does not provide a court with authority to enter judgment on an individual basis and pretermit a class action. The NCLC/NACA proposed language prohibiting a court from dismissing, compromising, or terminating an action based solely on a party's offer to allow judgment or provide full relief to the named plaintiff would have similar effect. We would support either proposal or other language with similar effect. (In the NCLC/NACA proposal, we would add the words "or consent" following "offer" to make clear that the provision is not limited to "offers" that are contingent on acceptance.)

These changes, would not, to be sure, themselves foreclose the argument (which we believe to be baseless for the reasons stated by Justice Kagan in her dissenting opinion in *Genesis Healthcare Corp. v Symczyk*, 133 S. Ct. 1523 (2013)), that an unaccepted offer of relief, by its mere existence, destroys an Article III case or controversy. But the changes would make clear that a court lacks authority to terminate a named plaintiff's claims over his or her objection by entering judgment on an offer that he or she did not accept, and then foreclose class certification on the theory that there is no longer an ongoing case or controversy between the named plaintiff and the defendant.

Class definition. Several commenters have suggested to the Subcommittee that Rule 23 be amended to make clear that a class definition need not allow precise individual identification of class members at the time of certification, as long as it describes the class using objective criteria.[6] We agree with the thrust of these proposals, and the Subcommittee should be able to resolve the minor variations among the wording of various suggestions on this point.

In addition, we believe that if class definition is to be further addressed, the Subcommittee should adopt the proposal of at least one commenter that the rule also state that the plaintiffs need not prove at the time of certification that all members falling within the class definition will be entitled to recovery (or, we would add, that all of them have suffered injury).[7] A requirement of such proof, which some defendants have advocated, leaves plaintiffs with an impossible choice between a class definition that uses objective criteria but will almost inevitably encompass some

[6] *See*, *e.g.*, proposals submitted by NCLC/NACA; Public Justice; Jennie Lee Anderson.

[7] The proposal was submitted by Jennie Lee Anderson.

members who do not have viable claims, and an improper "fail-safe" definition limited to persons who are ultimately entitled to recover.

Cy pres. We agree that, to the extent consistent with the Rules Enabling Act, it may be helpful to define the circumstances in which cy pres awards may be approved as part of settlement agreements, as well as the procedures that should be employed in considering possible awards. The draft language in the Subcommittee's report is a useful starting point, but we believe that the proposals of Public Justice, the Impact Fund, and NCLC/NACA offer some additional language that would be useful in defining appropriate cy pres recipients, and that the NCLC/NACA proposal proposes well-considered procedural requirements that should also be considered for inclusion in any rule.

Other issues. Among other important issues raised by various commenters, we wish to call the Subcommittee's attention to the Committee to Support Antitrust Laws' proposals clarifying that predominance under Rule 23(b)3) need not be established for each element of a claim, and that common issues may predominate even if not all class members suffered a relevant injury, if injury is widespread among class members. These proposals seek to ensure that class actions remain realistically available in cases where class treatment is likely to yield significant benefits and be a superior method of adjudication, even though it is impossible to resolve all issues in the case on a classwide basis or to ensure that every class member has exactly the same claims. Requiring that a class action be perfect to be certified is another way of abolishing class actions. Likewise, we support the proposals of a number of commenters[8] that Rule 23(c)(4) be clarified to provide that an issue class may be certified even where common issues do not predominate for the case as a whole, as requiring case-wide predominance essentially makes Rule 23(c)(4) meaningless.

Thank you for considering these comments.

Respectfully submitted,

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[8] *E.g.*, proposals of Jennie Lee Anderson; Gary E. Mason.