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15-CV-D

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**RE: Rule 23 Subcommittee**

Dear Professors Cooper, Klonoff & Marcus,

We understand that the Rule 23 Subcommittee will be considering sketches of possible revisions to Rule 23, with an eye toward sharing them with the Advisory Committee in advance of its upcoming meeting. Attached are some suggested amendments. Both a redlined and a clean version are included. This sketch was assembled in conversation with several law professors, some of whom are cc'd on this email: Joshua Davis (University of San Francisco), Alexandra Lahav (University of Connecticut), Judith Resnik (Yale Law School), and Adam Steinman (University of Alabama).

The purpose of the attached sketch is to respond to some concerns with current Rule 23, in part by aligning the requirements for class certification with the kind of functional approach set forth in the ALI Principles of the Law of Aggregate Litigation. The proposal would eliminate the numerosity, commonality, and typicality requirements from Rule 23(a), leaving the adequate-representation requirement as 23(a)(1) and adding as 23(a)(2) the ALI requirement that a class action would “materially advance the resolution of multiple civil claims in a manner superior to other realistic procedural alternatives.” The familiar categories in current Rule 23(b) remain as a non-exhaustive list of situations that would satisfy the ALI standard.

The notice and opt-out provisions in Rule 23(c) are also revised, in accordance with the ALI project, to focus on whether the class should be mandatory as to particular remedies in order to manage those remedies fairly and efficiently. In addition, language is added to confirm the right of class members to enter an appearance (the ALI principles' "voice" right).

Finally, this sketch aims to provide clarification regarding class definition. It would add new language to Rule 23(c)(1)(B) stating that the definition of the class "shall be stated in a manner such that an individual could ascertain whether he or she is potentially a member of the class."

Thank you for considering these proposals. We are happy to discuss them further or to provide any additional information that would be helpful.

Very truly yours,

Adam Steinman

cc: Prof. Joshua Paul Davis  
Prof. Alexandra D. Lahav  
Prof. Judith Resnik

## **Rule 23. Class Actions**

**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- ~~(1) the class is so numerous that joinder of all members is impracticable;~~
- ~~(2) there are questions of law or fact common to the class;~~
- ~~(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and~~
- ~~(4)~~**(1)** the representative parties will fairly and adequately protect the interests of the class; and
- (2)** a class action would materially advance the resolution of multiple civil claims in a manner superior to other realistic procedural alternatives.

Class actions satisfying Rule 23(a)(2) include, but are not limited to, those described in Rule 23(b).

**(b) Types of Class Actions.** The court must conclude that A class action may be maintained if Rule 23(a)(2) is satisfied and if:

**(1)** prosecuting separate actions by or against individual class members would create a risk of:

**(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

**(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

**(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

**(3)** ~~the court finds that the~~ questions of law or fact common to class members predominate over any questions affecting only individual members, 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:

**(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;

**(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;

**(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

**(D)** the likely difficulties in managing a class action.

(c) Certification Order; Participation, Exclusion, and Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action. In making this determination, the court must grant class certification if the requirements of Rule 23(a) are satisfied.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g). A class definition shall be stated in a manner such that an individual could ascertain whether he or she is potentially a member of the class.

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) Participation, Exclusion, and Notice.

(A) For any class certified under this Rule, a class member may enter an appearance if the member so desires.

(B) If the court finds that the class should be mandatory as to particular remedies in order to manage those remedies fairly and efficiently, then class members may not be excluded from the class.

(C) If the court does not make the finding described in Rule 23(c)(2)(B), then class members may be excluded from the class upon a proper request.

~~(DA) For (b)(1) or (b)(2) Classes.~~ For any class certified under this Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

~~(EB) For (b)(3) Classes.~~ For any claims covered by Rule 23(c)(2)(C) For any class certified under Rule 23(b)(3), the court must direct appropriate notice to the class. members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

**(3) Judgment.** Whether or not favorable to the class, the judgment in a class action must:

~~(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; For any claims covered by Rule 23(c)(2)(C), the judgment shall not be binding on any class member who made a proper request for exclusion and~~  
~~(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.~~

**(4) Particular Issues.** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

**(5) Subclasses.** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

**(d) Conducting the Action.**

**(1) In General.** In conducting an action under this rule, the court may issue orders that:

**(A)** determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

**(B)** require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

**(i)** any step in the action;

**(ii)** the proposed extent of the judgment; or

**(iii)** the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

**(C)** impose conditions on the representative parties or on intervenors;

**(D)** require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

**(E)** deal with similar procedural matters.

**(2) Combining and Amending Orders.** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

**(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:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

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

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ~~If the class action was previously certified under Rule 23(b)(3)~~ For any claims covered by Rule 23(c)(2)(C), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(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.

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(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

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**(D)** For any class certified under this Rule, the court may direct appropriate notice to the class.

**(E)** For any claims covered by Rule 23(c)(2)(C), the court must direct appropriate notice to the class. The notice must clearly and concisely state in plain, easily understood language:

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**(3) Judgment.** Whether or not favorable to the class, the judgment in a class action must include and describe those whom the court finds to be class members. For any claims covered by Rule 23(c)(2)(C), the judgment shall not be binding on any class member who made a proper request for exclusion.

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