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**Via Email and U.S. Mail**

Committee on Rules of Practice and Procedure  
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Dear Distinguished Members of the Committee on Rules of Practice and Procedure:

I understand that the Rule 23 Subcommittee will soon be considering possible revisions to Rule 23 of the Federal Rules of Civil Procedure. I write to offer proposed amendments to Rule 23 for your consideration regarding: (1) issue classes; (2) class definitions; and (3) cy pres. A redline version of Rule 23 reflecting my proposed changes is attached.

I have served as co-lead counsel for plaintiffs in multiple consumer class actions in both state and federal court. In addition, I am the past co-chair of the American Association for Justice Class Action Litigation Group and a member of the American Bar Association Section of Litigation's Class Actions and Derivative Suits Committee. Based on my years of experience litigating class actions, and consistent with my conversations with colleagues who represent both plaintiffs and defendants, I believe clarification of Rule 23 in these three areas will streamline application of the Rule, increase efficiency and reduce the risk of inconsistent rulings.

**1. Issue Classes**

Issue certification allows the district court additional flexibility to resolve the claims before it in the most efficient manner possible. Where a case presents complex issues of liability, justice and efficiency may be best served by resolving those issues once, on a class-wide basis, particularly since the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2541 (2011), as Judge Posner recognized in *McReynolds v. Merrill Lynch*, 672 F.3d 482, 490-491 (7th Cir. 2012).

While the plain language of the current Rule 23(c)(4) permits a court to certify a class as to particular issues, its placement in Rule 23(c) has caused confusion over when an issue class

may be used and how it relates other types of class actions.<sup>1</sup> As a practical matter, an issue class is a *type* of class action that can efficiently resolve core, common issues, advance efficiency and reduce the risk of inconsistent findings on common issues. Thus, including it in Rule 23(b)—where the various types of class actions are described—as Rule 23(b)(4) will reduce ambiguity and encourage the courts to use it to efficiently manage their cases.

## 2. Class Definition

The proposed changes to Rule 23(c)(1)(B) reiterate that a class is properly defined using objective terms that allow a class member to ascertain his or her membership in the class.

These changes will provide needed guidance on how a class must be defined in light of growing circuit splits and inconsistent rulings that threaten consumers' abilities to vindicate their rights. For example, the Third Circuit has recently imposed an unattainable "ascertainability" standard, which, if more broadly applied, threatens any reasonable application of Rule 23 in consumer class actions. *See, e.g., Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013) (vacating a class certification order finding that "ascertainability" had not been demonstrated where there was no evidence that retailers maintained records of all purchasers of the dietary supplement and rejecting class member affidavits as a means of identifying class members). Not only is the Third Circuit's interpretation at odds with Rule 23's efficiency goals, this stricter judicially-created "ascertainability" requirement serves no practical purpose but to immunize the defendant from liability. In consumer class actions where the exact identity of class members is unknown, damages are determined on an aggregate basis and constitutionally sound means of notice will allow consumers to identify themselves and make a claim. Therefore, a heightened "ascertainability" standard should not be a barrier to class certification. Similarly, requiring plaintiffs to prove at class certification the ultimate merits issue of whether every absent class member within the class definition is entitled to recovery is inconsistent with Rule 23's efficiency goals and serves no practical purpose.<sup>2</sup> The proposed amendment to Rule 23(c)(1)(B) will clarify both issues.

## 3. Cy Pres

Recently, cy pres distributions have come under scrutiny where the goals of the cy pres recipients were found to be insufficiently tied to the objectives of the underlying statute, or

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<sup>1</sup> *See, e.g., In re Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (recognizing a circuit split and holding that the court may employ Rule 23(c)(4) as to a specific issue regardless of whether the entire claim satisfies Rule 23(b)(3)'s predominance requirement).

<sup>2</sup> *See, e.g., Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (noting that inclusion of class members who lack injury "is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown.").

where the recipients were perceived as being too closely associated with the defendant.<sup>3</sup> The proposed amended Rule 23(e)(6) seeks to address these fairness concerns, provide additional guidance to the parties and the court, and ensure that undistributed funds go to a next best use for the benefit of the class.

Thank you for your consideration. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

*/s/ Jennie Lee Anderson*

Enclosure

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<sup>3</sup> See, e.g., *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (“[A] district court should not approve a cy pres distribution unless it bears a substantial nexus to the interests of the class members”); *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (“To avoid the many nascent dangers to the fairness of the distribution process, we require that there be a driving nexus between the plaintiff class and the cy pres beneficiaries.”) (internal quotation marks omitted).

## 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) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) 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; ~~or-~~

(4) common issues of law or fact exist with respect to a particular issue or issues.

(c) Certification Order; 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.

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

(C) 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).

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

(2) Notice.

(A) For (b)(1) or (b)(2) Classes, or (b)(4) Classes where the final relief sought is limited to injunctive or declaratory relief. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class. For any class certified under (b)(4) where final relief sought is limited to injunctive relief or corresponding declaratory relief, the court may direct appropriate notice to the class.

(B) For (b)(3) Classes or (b)(4) Classes where final relief sought is not limited to injunctive or declaratory relief. For any class certified under Rule 23(b)(3) or (b)(4) Classes where final relief sought is not limited to injunctive or declaratory relief, the court must direct to 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; 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.~~

(45) 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), 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.

(6) A proposed settlement may include a cy pres distribution of all or part of a class settlement fund if it is infeasible to distribute unclaimed settlement funds, or where class members cannot be located. Factors weighing in favor of approval of a proposed settlement with a cy pres distribution include, but are not limited to, the following:

(A) the objectives of the proposed cy pres recipient will further the purposes and goals of the statutes or laws alleged to have been violated in the case;

(B) the proposed cy pres recipient provides benefits and services in geographic locations that either include, or are not inconsistent with, the needs of absent class members; and

(C) the cy pres recipient is free of any formal connection with or control by any defendant.

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

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).