

# COMMENTS TO THE CIVIL RULES ADVISORY COMMITTEE

and its

## RULE 23 SUBCOMMITTEE

On Behalf of

### NATIONAL CONSUMER LAW CENTER, INC. AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

September 4, 2015

The National Consumer Law Center and the National Association of Consumer Advocates (“NCLC/NACA”) are pleased to submit responses to certain of the conceptual sketches (“Sketch” or “Sketches”) set forth by the Rule 23 Subcommittee (“Subcommittee”) in its Introductory Materials for the Mini-Conference on Rule 23 Issues scheduled for September 11, 2015. The responses only refer to those conceptual Sketches that have a direct relationship to one of the Comments to the Civil Rules Advisory Committee submitted by NCLC/NACA to the Subcommittee on April 1, 2015 (“Proposal” or “Proposals”). These responses also reference other proposals submitted to the Subcommittee where there are major points of agreement or disagreement. It is hoped that this analysis will assist the Subcommittee in its deliberations by elucidating and explaining key differences between the NCLC/NACA Comments and the Subcommittee’s Sketches.

#### I. CY PRES

Overall, the NCLC/NACA Proposal and the Subcommittee Sketch agree on the key concepts and issues that changes to Rule 23 with respect to *cy pres* awards should address. Both approaches use ALI 3.07 as a model for best practices in *cy pres* awards. Both approaches also would emphasize that courts can use *cy pres* awards in circumstances where direct distributions

to class members are not viable or feasible (although the NCLC/NACA Proposal and the Subcommittee Sketch differ in terms of what that means). Both the NCLC/NACA Proposal and the Subcommittee Sketch also point out possible Enabling Act issues, which would be addressed either in the text of the rule itself or in a Committee Note.<sup>1</sup>

**a. The use of additional funds to locate absent class members.**

NCLC/NACA generally believe that *cy pres* awards only should be utilized when direct distributions to class members are not viable. In accordance with that general belief, NCLC/NACA propose additional language to Rule 23(e), specifying that “if the settlement involves a distribution to class members and funds remain after that distribution, the settlement should provide that such funds be used to locate or contact class members who did not recover a benefit from the initial distribution or as a subsequent distribution to participating class members. . .”

The inclusion of such language is important: settlement funds are presumptively the property of class members, but there are likely to be class members who did not receive notice of the settlement, who did not avail themselves of the proceeds or who received an initial distribution but who have not yet been made whole. Absent class members may be able to participate in the settlement if class counsel can expend additional time and money to locate or otherwise notify these parties. Similarly, in certain circumstances it may be appropriate to

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<sup>1</sup> The Subcommittee Sketch includes the bracketed phrase “if authorized by law” in Section (e)(3). However, Footnote 3 of the Sketch expressly, and correctly, recognizes that *cy pres* provisions that are included in a settlement agreement do not depend upon legal authorizations. The bracketed language is misleading and unnecessary. We therefore strongly believe that it should be omitted. Alternatively, NCLC/NACA in its Proposal specifically included the following language: “the settlement may, consistent with substantive state law and due process, utilize a *cy pres* remedy for the distribution of any or all settlement funds.” Said provision requires that any settlement must be “consistent” with applicable substantive state law and due process requirements and insures that NCLC/NACA’s Proposal avoids any potential criticism that the rule “abridges, enlarges, or modifies any substantive right,” within the meaning of the Rules Enabling Act.

provide a supplemental distribution to class members who received (and availed themselves of) the initial distribution, but who have not yet been made whole.

NCLC/NACA believe that such language is consistent with the purpose of class action settlements and the rationale behind *cy pres* awards. A settlement should provide for as comprehensive a plan for contacting class members as is feasible.<sup>2</sup>

It is widely accepted that *cy pres* awards only are appropriate as a second-best solution when funds remain after the settlement has provided economically viable distributions to claiming class members.<sup>3</sup> Therefore, it is consistent with the policy behind class action settlements that absent and/or non-claiming class members should be contacted prior to a resort to a *cy pres* distribution. Similarly, in certain circumstances it may make sense to use proceeds to fund a subsequent distribution to claiming class members.

**b. How beneficiaries of *cy pres* funds should be selected.**

NCLC/NACA's proposal suggests that the primary two considerations in selecting a recipient of *cy pres* funds should be whether the recipient will best promote the interests of the class, and/or the purposes of the statutory prohibitions that were the subject of litigation.<sup>4</sup> The

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<sup>2</sup> While no other commenters have put forward proposals including explicit language about using leftover funds to locate absent or non-participating class members, some commenters have noted policy considerations in their proposals that suggest that they may agree with mechanisms to strengthen such efforts. For example, Public Justice's and Ingrid Evans' proposals identify *cy pres* as appropriate only after "robust attempts to distribute funds to class members."

<sup>3</sup> See, e.g., *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (approving a *cy pres* award as part of a settlement, but noting that "[w]e caution, however, that direct distributions to the class are preferred over *cy pres* distributions"); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015) (rejecting *cy pres* award because under the circumstances presented because the district court did not apply the correct standard in assessing whether further identification of class members for additional distributions was viable).

<sup>4</sup> Several commenters have offered similar suggestions. Jennie Lee Anderson's proposal closely aligns with NCLC/NACA's in that her proposed 23(e)(6) specifies that a court should take into account whether the *cy pres* recipient has objectives consistent with the statutory provisions that the underlying litigation sought to enforce. Similarly, the Impact Fund's proposal lists as a relevant consideration "whether the mission of the proposed *cy pres* recipient(s) is consistent with the purpose of the litigation and the underlying legal claims." The American Antitrust Institute's proposal notes that "an appropriate *cy pre* recipient will have some relation to the members of the class or to the purpose of the litigation." Additionally, Public Citizen's submission to the Subcommittee states that our proposal, as well as the proposals of Public Justice and the Impact Fund "offer some additional language that would

purposes of the litigation or legal claims to be enforced will often be coterminous with the interests of the class members. NCLC/NACA believe, however, that the additional language they propose which would tie the selection of an appropriate *cy pres* recipient to the subject matter of the lawsuit is critical.<sup>5</sup> Such recipient organizations should do work related to the specific act or practice that injured class members.

Thus, for example, in the context of consumer class actions, clarifying that the interests of a *cy pres* recipient should be related to the subject matter of the lawsuit in addition to the interests of the class members is important in order to ensure that *cy pres* funds are used for a purpose that furthers the disgorgement and deterrence goals of consumer protection statutes and laws.<sup>6</sup>

In contrast, the Subcommittee includes language in its Sketch specifying that a recipient may be appropriate if it merely “serves” the public interest generally.<sup>7</sup> While certainly there may be circumstances in which a recipient with interests aligned with those of the class or underlying statutes cannot be found, and a recipient such as a charity would certainly be a better use of funds than the funds reverting to the defendant, inclusion of this language might be criticized on the grounds that it is not authorized by the Rules Enabling Act, or that it is an example of judicial

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be useful in defining appropriate *cy pres* recipients” although it is unclear if they endorse the entirety of NCLC/NACA’s proposal defining appropriate *cy pres* recipients.

<sup>5</sup> In their Proposal, NCLC/NACA suggested that the choice of an appropriate *cy pres* recipient should, in part, consider whether they would best promote the purposes of the “statutory prohibitions” sought to be enforced in the underlying litigation. In light of subsequent comments, see Fn. 3, *supra.*, the organizations now believe that it is appropriate to extend this consideration to include the purposes of the “underlying legal claims” in order to cover both statutory and common law prohibitions and the public policy goals they seek to achieve.

<sup>6</sup> See, e.g., *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (noting that allowing defendants to retain unclaimed funds is contrary to deterrence and disgorgement goals of the FCLRA); *Simer v. Rios*, 661 F.2d 655, 676 (7th Cir. 1981) (noting that *cy pres* is generally appropriate when the statute to be enforced was predicated on policy considerations of deterrence and disgorgement. See also *In re Airline Ticket Comm’n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002) (describing as appropriate the *cy pres* award in an earlier case that involved the establishment of a scholarship, because “Not only did the scholarship program carry out the plaintiffs’ desire to have scholarships benefit their younger relatives, it addressed the subject matter of the lawsuit—the employment opportunities available to African Americans living near Georgia-Pacific’s facilities in Cosset, Arkansas”).

<sup>7</sup> Proposals from Public Justice and Ingrid Evans also include such language.

overreach. Unfortunately, *cy pres* awards come under attack from parties who do not understand the benefits that can flow from careful, principled use of *cy pres* in settlements, and NCLC/NACA believe that Rule 23 language expressly authorizing the use of *cy pres* awards to generally benefit charitable entities unrelated to the class or the litigation would only invite further criticism in this respect.<sup>8</sup>

**c. Prohibition on the distribution of *cy pres* funds to an entity in which a Defendant has a material financial interest, direct or indirect.**

The Subcommittee in its *Cy Pres* Sketch has not addressed the issue of whether the spirit of *cy pres* awards, and the purposes of consumer class actions more generally, are violated when a *cy pres* award is directed to an entity in which a defendant has a material direct or indirect interest, whether financial or not (as opposed to a mere affiliation with, membership in or prior donations to the entity that do not result in control of the entity or the procurement of benefits that are in the significant self-interest of the member/contributor). In contrast, NCLC/NACA's proposed changes to the language of Rule 23(e) explicitly would prohibit this practice.<sup>9</sup>

NCLC/NACA has negotiated class settlements on several occasions in which defendants have attempted to negotiate a *cy pres* award that would benefit a charity or foundation which they control. As discussed previously, courts have widely accepted and endorsed the proposition that *cy pres* awards should be used for a purpose that resembles or furthers the interests of the class members or the legal prohibitions that the litigation sought to enforce. As a matter of

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<sup>8</sup> For example, the proposal submitted by Lawyers for Civil Justice criticizes *cy pres* awards on the grounds that they are "patronage vehicles to steer money belonging to absent class members to charities favored by class counsel or the approving court" and are used for "political advocacy." Such criticisms may be alleviated by steering the language of Rule 23 away from authorizing *cy pres* to recipients who generally promote the public interest.

<sup>9</sup> Other commenters' proposals pertaining to *cy pres* distributions give a list of factors for courts to consider in whether such a distribution is appropriate; one factor is whether the funds would be free from control by, or used to benefit, a defendant. This language appears in the proposals submitted by Public Justice, Ingrid Evans, Jennie Lee Anderson, and the Impact Fund. NCLC/NACA clearly agree with these commenters that any rule change should address concerns about *cy pres* agreements as vehicles to channel money to entities in which defendants have an interest, but believe that an explicit prohibition on the practice is more in keeping with the policy goals of *cy pres*.

policy, it clearly does not further the interests of the class members for a defendant to direct settlement funds into an entity that it controls. Similarly, if an intended recipient is an organization to which a defendant typically gives an annual donation, caution is necessary to ensure that the defendant cannot claim it has fulfilled its yearly contribution by virtue of the *cy pres* agreement.

Consumer protection laws and consumer class actions are intended to level the playing field between consumers and commercial enterprises, and *cy pres* recipients should be committed to furthering these goals and vindicating the rights of consumers. These policy goals are not fulfilled if defendants can direct settlement funds to a recipient that furthers its own interests.<sup>10</sup> Aside from failing to properly deter defendants, the practice creates perverse incentives for defendants to expend considerably less effort to contact and give notice to class members during the settlement process.<sup>11</sup>

## **II. OFFERS OF COMPLETE RELIEF (including RULE 68 OFFERS)**

In most respects, the Subcommittee's First Sketch for changes to Rule 23 pertaining to offers of complete relief<sup>12</sup> is quite close to the proposal submitted by NCLC/NACA. Both NCLC/NACA's Proposal and the Subcommittee's First Sketch agree that any changes to Rule 23

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<sup>10</sup> The extent of control that defendants may exercise over a *cy pres* award has been widely criticized, such as in the law review note that Rhonda Wasserman submitted to the Committee. While Professor Wasserman concludes that courts should put measures in place to make *cy pres* awards more difficult to include in a settlement, NCLC/NACA believe that this valid criticism would be addressed better by prohibiting defendants from controlling a *cy pres* award. Making *cy pres* agreements harder to approve may simply lead to a greater reliance on provisions in settlements providing for reversion to a defendant, which certainly does not promote the interests of absent class members. The Subcommittee clearly anticipated such a possibility in its February 12, 2015 conference call ("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").

<sup>11</sup> The same reasoning applies, if not moreso, to the consideration of reversion as an alternative method of handling residual funds as noted by the bracketed language appearing in the Subcommittee's Sketch at Pg. 16. Footnote 4, included in that bracketed language asks "is this concern warranted." NCLC/NACA answer that question with a resounding "yes" and strongly recommend that reversions should be rejected outright in all class action settlements rather than merely be "evaluated with caution" as suggested in the Sketch.

<sup>12</sup> "Offers for Complete Relief" include, but are not limited to, Rule 68 offers and all other offers intended to moot putative class action.

should address the problematic practice of defendants attempting to “pick off” named plaintiffs prior to class certification, in order to avoid a class action.

**a. Under no circumstances does an offer of full relief to a named plaintiff of a putative class action moot a case.**

NCLC/NACA proposes the addition of Rule 23(d)(3)<sup>13</sup> which would prohibit the dismissal of a case based on an Offer of Complete Relief to a named plaintiff, prior to class certification. The Subcommittee’s First Sketch pertaining to mootness (“Cooper approach”) generally accords with NCLC/NACA’s overarching goal: that an offer to an individual named plaintiff in a putative class action that would provide relief only to that individual can never moot a case prior to certification.

The Subcommittee’s Third Sketch (“Alternative approach in Rule 23”) does not address this important issue. Its Second Sketch (“Rule 68 approach”) also is insufficient because, as the Subcommittee itself acknowledges, “Rule 68 by itself does not moot anything.” An explicit rejection of Rule 68 being used to moot proposed class actions simply is not broad enough to avoid the problem of complete offers of relief that are intended to achieve that result.

Given that the Subcommittee directly expressed its desire to deal with the problematic tactic of defendants picking off class representatives, the Subcommittee should adopt some variation of the First Sketch Cooper approach, in order to deal with the problem directly.<sup>14</sup> Such

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<sup>13</sup> In pertinent part, NCLC/NACA’s Proposal provides in new Rule 23(d)(3) that prior to the issuance of a Certification Order under Rule 23(c)(1)(A) the court shall not issue orders that (i) dismiss, compromise or terminate an action in any manner based solely on a party’s offer to allow judgment or to otherwise settle, compromise or provide full relief to the offeree; and (ii) impose any conditions, consequences or costs relating to an unaccepted offer, including any consequences relating to or any costs provided in Rule 68 unless the offeror also offers complete relief and/or allows judgment on behalf of the class defined in the complaint.

<sup>14</sup> The importance of a clear and direct prohibition on allowing settlement offers to moot a putative class action when the offer of relief provides complete relief on the individual’s claim only is reinforced by comments and proposals from other legal practitioners who have taken up the issue in their submissions to the Subcommittee. Public Citizen stated in its April 9 submission that it supports a rule change in this respect, and would support an adoption of the Cooper approach, NCLC/NACA’s approach, or a proposal with similar effect. Proposals from Public Justice and Ingrid Evans would go even further and would eliminate Rule 68 entirely.

a variation should include a specific provision, as proposed by NCLC/NACA in its proposal, that a court should not impose any conditions, consequences, or costs relating to an unaccepted offer, including any consequences relating to or any costs provided in Rule 68, unless the offeror also offers complete relief and/or allows judgment on behalf of the class defined in the complaint.

Allowing the pickoff practice encourages an undesirable race for class certification as early as filing the initial complaint, penalizes named plaintiffs who do not accept individual offers, and weakens the usefulness of class actions by ensuring that defendants can buy off named plaintiffs. Additionally, the practice has no textual basis in Rule 68 or in Rule 23. NCLC/NACA believe that the particular problems caused by Offers of Complete Relief with regards to class actions, namely, that they are used as a class action avoidance device by defendants, necessitates a change to Rule 23 that clearly clarifies that Offers of Complete Relief cannot be used in this context.

**b. Giving courts clear time and authority to substitute in another class representative if class certification was denied on the basis that the class representative was not adequate under Rule 23(a)(4).**

Although the Subcommittee's Rule 68 Offers and Mootness Sketches address picking off a named plaintiff by offers of settlement, none of them address the possibility of mandating procedures for when a class is not certified based solely on the named plaintiff's inability to satisfy the adequacy requirements of Rule 23(a)(4). In contrast, NCLC/NACA's proposed Rule 23(d)(3) also would provide guidance for a court to find a substitute class representative if the court denied certification based on a failure to satisfy Rule 23(a)(4).

NCLC/NACA believe that our proposed changes are an important component of a comprehensive scheme to avoid the problems of Offers of Complete Relief in the context of class actions. If the only reason that a class was not certified is because a court determined that



the named plaintiff was not an adequate representative party, the other class members should not be penalized by having an Offer of Complete Relief moot their entire case before an adequate named plaintiff can be substituted.

NCLC/NACA's proposed Rule 23(d)(3)(C) provides that if a court finds a potential representative party to be inadequate, "the court shall set forth a reasonable time within which a new representative may be substituted, and shall take no action based solely upon any offer of settlement or compromise by the party until after such time has elapsed." This provision is in keeping with the practice of many courts, but the explicit addition to the text of Rule 23 would reduce confusion and create uniformity with respect to Offers of Complete Relief made after the denial of class certification that is based solely on a failure to meet the requirements of Rule 23(a)(4).

### **III. OBJECTORS**

The NCLC/NACA Proposal and the Subcommittee Sketch take fairly different approaches in proposed Rule 23 language pertaining to objectors. However, both the NCLC/NACA Proposal and the Subcommittee Sketch have similar objectives: namely, the overall goal of limiting professional objectors that can derail the settlement approval process and hurt class members who would benefit from the settlement.

#### **a. Objections must be made by a class member and subject to discovery.**

NCLC/NACA believe that requiring objectors to provide a signed certification that the objecting person is a class member would deter professional objectors while still ensuring that class members can make valid objections that expose impropriety or unfairness in the settlement.<sup>15</sup> The inclusion of language clarifying that objectors may be subject to discovery

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<sup>15</sup> Commenter Stephen Herman has offered a similar but not identical proposal; he would include a "formal restriction of objections to issues in which the objector actually has an interest" to deter bad faith objections.

similarly would not impede valid claims; such wording would not require discovery, but would allow for discovery in appropriate circumstances if a court believes that inquiring into the basis for the objections and the objector's standing to raise these issues would inform its decision on sustaining objections to a settlement.

NCLC/NACA believe that adding these requirements to the text of Rule 23 would be a less onerous way of limiting frivolous objections than some of the ideas that the Subcommittee has considered, such as requiring objectors to post bond or threatening sanctions. At the same time, NCLC/NACA does not believe that the reporting obligations that the Subcommittee's Sketch would add to Rule 23(e)(5) will do enough to deter this behavior. The Subcommittee extensively discusses how to differentiate between "good" and "bad" objectors; while it might be an imperfect metric, imposing a requirement of class membership should go a long way in preserving "good" objections and eliminating "bad" objections.<sup>16</sup>

**b. Courts should consider if the objector would fairly and adequately represent the objection on behalf of class members who would be bound by judgment.**

NCLC/NACA believe it is appropriate that even valid objections be judged in the context of the benefits of the settlement to the entire class. Judging the objections in this context is important because the interests of individual class members may conflict with one another in certain circumstances. Thus, an objection validly might assert the interests of an individual class member, but could substantially delay or entirely derail a settlement that would provide substantial benefits to most or all other class members. Including such a provision particularly

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<sup>16</sup> Indeed, the Subcommittee itself noted in its February 12, 2015 Conference Call that good-faith objections, even if raised by a third party, are usually made on behalf of class members ("outfits like Public Citizen almost always present objections on behalf of class members, so standing is not likely to be an impediment for them"). Nonetheless, Public Citizen has argued its opposition to adding class membership as a prerequisite to lodging an objection. Specifically, Public Citizen's proposal explained that, "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."

makes sense for Rule 23(b)(3) class actions, where potential objectors previously had the chance to opt out under Rule 23(c)(2)(B).

#### **IV. NOTICE**

Generally, the NCLC/NACA Proposal and the Subcommittee Sketch are in agreement about changes to Rule 23(c)(2); that “best notice practicable” should be amended, either in the text of the rule or in the Committee notes, to clarify that this includes electronic means of communication, and will continue to be defined flexibly, in keeping with technological advances.

However, NCLC/NACA have proposed a host of additional changes to Rule 23(e)(1) and the Committee Notes which further would delineate with clear guidelines the type of information that must be given to class members who would be bound by a proposed settlement. The additional information that NCLC/NACA suggest should be required by the Rule includes a detailed description of the settlement, an estimate made by class counsel of the range of relief and average relief of class members, a description of the claims process, a claims form and a description of the objection process.

NCLC/NACA believe that courts should think more about how to increase class participation in settlements, particularly those involving the submission of claims. There are many reasons why class members who did not opt-out of a settlement will nonetheless fail to claim their share of the proceeds including, but not limited to, the fact that consumers mistakenly may believe that they do not substantially benefit from the lawsuit, that only the attorneys benefit from the class action or that a small individual settlement check is not worth cashing. This apathetic response to a proposed class action settlement unfortunately often is based on erroneous assumptions, incomplete information and a lack of knowledge about the specific case

and class actions in general. As a result, the Subcommittee should consider adding requirements for notice to class members subsequent to the initial notice that help stimulate check cashing or claims filing among the class.

#### **V. STANDARDS FOR CLASS DEFINITIONS AND ASCERTAINABILITY**

The Subcommittee's Sketch on Class Definition & Ascertainability provides that an order that certifies a class action must define the class "so that members of the class can be identified [when necessary] in [an administratively feasible]{a manageable} manner." NCLC/NACA believe that by focusing on "identifiability" at the class certification stage the Sketch does not adequately address, and in fact may exacerbate, the problems created by certain Courts' approaches to "ascertainability" discussed at pages 9-13 of their Proposal relating to proposed changes to Rule 23(c)(1)(B) to clarify the standards for class definitions. Instead, NCLC/NACA strongly recommend that the language of the Sketch be replaced with an explicit provision that provides that: "A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified (by name and contact information)."