

COMMENT 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**

April 1, 2015

We understand that the Rule 23 Subcommittee (“Subcommittee”) is considering proposals for possible revisions of Federal Rule of Civil Procedure Rule 23 in order to assist the Civil Rules Advisory Committee (“Advisory Committee”) in advance of its upcoming meetings. The National Consumer Law Center and the National Association of Consumer Advocates have prepared draft amendments to Rule 23 that we hope you will consider during your, and the Advisory Committee’s, deliberative process. It is our intention that these drafts will provide a basis for maintaining class actions as a vital component of American jurisprudence in order to preserve and enforce the rights of consumers while improving the efficiency, effectiveness and fairness of the class action procedure in our Federal Court system.

The members of the National Association of Consumer Advocates (“NACA”) are private and public sector attorneys, legal services attorneys and law professors whose primary practice or areas of specialty involve the protection and representation of consumers. NACA’s mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices.

The National Consumer Law Center, Inc. (“NCLC”) is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed and elderly consumers. NCLC is a nationally recognized expert on consumer credit issues, including fringe banking products, and it has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over 45 years. A major focus of NCLC’s work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC publishes a twenty-volume Consumer Credit and Sales Legal Practice Series, including, *inter alia*, *Consumer Class Actions* (8th ed. 2012 & Supp. 2014).

In the mid-1990’s, responding to criticism of consumer class actions, NACA decided to seek and publish a consensus on ethical and effective class action practices. Starting with an initial draft, and incorporating suggestions and comments from many sources, NACA adopted its “Standards and Guidelines for Litigating and Settling Consumer Class Actions” in 1997. *See*, 176 F.R.D. 375 (1997)(“Guidelines”).

The Guidelines have proven helpful to lawyers and courts alike. Through the years, a significant number of courts have referred with approval to the Guidelines, including *Boyle v. Giral*, 820 A.2d 561, 569 fn. 8 (D.C.C.A. 2003); *Braud v. Transport Service Co. of Illinois*, 2010 WL 3283398, at * 14 (E.D. La. Aug. 17, 2010); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1308 (S.D. Fla. 2007); *Henderson v. Eaton*, 2002 WL 31415728, at *6 (E.D. La. Oct. 25, 2002); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197, 204 (D. Me. 2003); *In re Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7-12 Litigation*, 447 F. Supp. 2d 612, 634 (E.D. La. Aug. 31, 2006); *In re*

Mexico Money Transfer Litigation (Western Union and Valuta), 164 F. Supp. 2d 1002, 1028-1030 (N.D. Ill. Dec. 22, 2000); *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 278 F.3d 175, 194 fn. 1 (3rd Cir. 2002); *Milkman v. American Travellers Life Ins. Co.*, 2002 WL 778272, at *7-9 (Pa. Com. Pl. Apr. 1, 2002); *Moody v. Sears*, 2007 WL 2582193, at *5 (N.C. Super. May 7, 2007); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1009-1011 (Vt. 2003); and *Wilson v. DirectBuy, Inc.*, 2011 WL 2050537, at *6 (D. Conn. May 16, 2011).

The Guidelines have formed the basis of expert testimony, both in support of class action settlements and in support of objections to bad settlements. Most important, perhaps, they achieved their primary goal of setting the standard for litigating and settling consumer class actions. Many of the Guidelines have been embraced and adopted by courts, and their principles were reflected in the 2004 changes to Federal Rule of Civil Procedure 23.

In 2006, to reflect both the adoption of these changes to Rule 23, as well as the quickly changing landscape of class action litigation, NACA revised the Guidelines. *See*, 255 F.R.D. 215 (2006). This Second Edition addressed new issues, including specific problems with the class action device in predatory home lending litigation, the exponential growth of forced arbitration, and the use of offers of judgment under Federal Rule 68 and state counterparts to forestall class actions.

On May 13, 2014, in an effort to keep the Guidelines current and relevant, NACA issued the Third Edition of the Guidelines. *See*, 299 F.R.D. 160 (2014). The Third Edition thoroughly updates the law in order to continue to offer assistance and guidance to lawyers and courts alike, as a standard of practice that encourages only the most ethical and thoughtful of consumer class actions.

The proposed draft amendments that we set forth below seek to combine the ethical considerations of the NACA Guidelines with the functional approach adopted by the ALI Principles of the Law of Aggregate Litigation. We also attempted to inform our proposals with the most current jurisprudence available through judicial rulings and legislative enactments at both the federal and state levels.

Specifically, the draft amendments respond, from our perspective and given our experiences, to some of the most critical challenges facing class action practitioners and the courts today. The issues addressed are not intended to be an exclusive or exhaustive list. Rather, for now, we only have focused our attention on what we believe may be key issues under consideration by your Subcommittee. Nor do we view this document as our sole contribution to your efforts. We look forward to participating throughout your deliberative process and, hopefully, thereby constructively contributing to its ultimate outcome.

I. NACA’S AND NCLC’S PROPOSED CHANGE TO THE TIME FOR ISSUANCE OF A CERTIFICATION ORDER – RULE 23(c)(1)(A) AND ITS COMMITTEE NOTES.

Ignoring the United States Supreme Court’s mandate that courts must conduct a “rigorous analysis” of class certification, a number of courts have adopted the practice of considering, and sometimes denying, class certification based solely on the complaint via the vehicle of a motion to strike. In order to eliminate this practice, which NACA and NCLC believe has no support in the text of the Federal Rules, does not allow for proper class certification analysis as now required by *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) and its progeny, and makes the class certification decision an inherently subjective one based on individual judges’ predilections, NACA and NCLC propose an amendment to Rule 23(c)(1)(A).

A. NACA and NCLC propose changing Rule 23(c)(1)(A) as follows:

(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. The determination should not be based solely on the complaint, but rather on class certification briefing and evidence submitted after a reasonable time for discovery.

B. NACA and NCLC propose the following revision to the Committee Notes to the 2003 amendments to Subdivision (c), Paragraph (1):

In the second paragraph, the first sentence should be changed from “Time *may* be needed to gather information necessary to make the certification decision,” to “Time *must* be granted to gather the information necessary to inform the certification *analysis and decision.*” (emphasis added).

C. NACA’s and NCLC’s reasons for proposing the changes:

A motion to strike class allegations at the pleadings stage finds little if any textual basis in the Federal Rules of Civil Procedure. Rule 12(f), which permits a “motion to strike” for “redundant,” “impertinent” or “scandalous” matters, says nothing about purportedly unwinnable class allegations. Yet, many defendants use this rule to presage and influence the litigation from the outset. That courts frequently “strike” class action allegations only emboldens defendants to try this tactic. As a counterpart to this approach, and as a means of avoiding the obvious problems with a Rule 12(f) motion, defendants also file motions under Rule 23(c)(1)(A) or Rule 23(d)(1)(D) at the pleading stage. Some even invoke a court’s inherent power to strike, thus avoiding the Rules entirely. None of these vehicles are directed at evidence or proof. All require a plaintiff to plead Rule 23 elements with heightened particularity and predict the evidence that normally would shape the class certification decision.

Numerous district courts have denied class certification on the pleadings, and been affirmed, without any “rigorous analysis” of the proofs to be forthcoming from future discovery.¹ Yet, the Supreme Court requires the class *determination* to come after a rigorous analysis of the proofs. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551. The Supreme Court has held that it:

may be necessary for the court to probe behind the pleadings before coming to rest on the *certification question*,’ and that certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’... Such an analysis will frequently entail “overlap with the merits of the plaintiff’s underlying claim.” That is so because the “class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’ ...

Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (emphasis added).²

The courts that strike class action allegations cite in support *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982), because it states that sometimes it is “plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claims.” *Id.* However, that statement (which really only addresses typicality and adequacy) does not support denying class certification at the pleading stage, because *Falcon* involved a class certification decision issued after evidence had been collected and presented, *and* it admonished district courts to conduct a rigorous analysis of Rule 23 rather than presuming compliance with Rule 23 based upon the allegations of the complaint. Thus,

¹ *E.g.*, *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *Kennedy v. Unumprovident Corp.*, 50 F. App’x 354, 355 (9th Cir. 2002); *Ross-Randolph v. Allstate Ins. Co.*, 2001 WL 36042162, at *4 (D. Md. May 11, 2001); *Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 832 (N.D. Ill. 2013); *Alqaq v. CitiMortgage, Inc.*, 2014 WL 1689685, at *4–6 (N.D. Ill. Apr. 29, 2014).

² Allowing Plaintiffs time to develop their classwide proofs makes sense: “the class definition put forth in the complaint is often a working definition—one that will serve to identify relevant inquiries in pre-certification discovery.” *Moore v. Walter Coke, Inc.*, 294 F.R.D. 620, 627 (N.D. Ala. 2013) (citing 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1785.4 at n.1 (3d ed. 2009)); *see also, e.g.*, *Glazer v. Chase Home Fin. LLC*, 2014 U.S. Dist. LEXIS 39297, 15 (N.D. Ohio Mar. 25, 2014); *Chaney v. Crystal Beach Capital, LLC*, 2011 WL 17639, at *2 (M.D. Fla. Jan. 4, 2011); *Motisola Malikha Abdallah v. Coca-Cola Co.*, 1999 WL 527835 (N.D. Ga. July 16, 1999). The class definition might get “tweaked as the pre-certification discovery process sheds light on the contours of the potential class.” *Moore*, 294 F.R.D. at 627.

striking class action allegations without a rigorous analysis via negative presumptions actually spins *Falcon* off its axis.

Before 2003, Rule 23(c)(1)(A) required that the determination as to whether to certify a class be made “as soon as practicable after commencement of an action.” Effective December 1, 2003, this language was amended to require instead that “the court must – *at an early practicable time* – determine by order to certify the action as a class action.” Fed. R. Civ. P. 23(c)(1)(A) (emphasis added). According to the Committee Notes, the “as soon as practicable” language was changed because class certification decision-making at the pleadings stage did not reflect prevailing practice and because “[t]ime may be needed to gather information necessary to make the certification decision.” Advisory Committee Notes to 2003 Amendments.

In other words, Rule 23(c) was amended expressly to forestall class action decision-making until *after* the parties have conducted discovery. *See id.* (noting that it might make sense for a court to rule on dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified.). Unfortunately, courts frequently ignore the Committee Notes on this issue and strike class action allegations at the pleading stage.

Rule 23(d)(1)(D) permits orders that “require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.” Fed. R. Civ. P. 23(d)(1)(D). But this provision expressly concerns the “conduct” of a class action *after* a class has been certified under Rule 23, because it is prefaced by the general phrase: “In conducting an action under this rule, the court may issue orders that: . . . (D).” *Id.* Considered in its actual context, subpart (D) merely allows a court to exclude opt-outs, bar uncooperative opt-ins, decertify an existing class, or otherwise cabin an already certified class to precise persons so

all the parties will know who will be bound by a final judgment. By its own terms, Rule 23(d)(1)(D) has no application to a pre-certification decision, and it cannot authorize a self-defeating motion to strike class allegations at the pleadings stage.

II. NACA’S AND NCLC’S PROPOSED CHANGE TO RULE 23(c)(1)(B) TO CLARIFY THE STANDARDS FOR CLASS DEFINITIONS.

Courts have long held that the definitions of certified classes must be sufficiently definite to allow identification of class members after entry of judgment so that persons bound by the judgment, both the class members and the defendants, can know to whom the judgment applies. Traditionally, a class definition was considered sufficiently definite if it described class members by characteristics that allowed them to be identified by objective criteria. Recently, however, the Third Circuit, and certain district courts following its lead, have introduced a completely new concept under the guise of “ascertainability” – that plaintiffs must prove at the time of class certification that it is administratively feasible to precisely identify by name and address or other contact information every member of the class and that self-identification by class member via claim forms somehow deprives defendants of due process and is, therefore, legally insufficient. NACA and NCLC propose an amendment to Rule 23(c)(1)(B) in order to reject these holdings and clarify the appropriate standards for class definitions.

A. NACA and NCLC propose changing Rule 23(c)(1)(B) as follows:

(c) Certification Order; Notice to Class Members; Judgment; Issues; Classes; Subclasses

(1) Certification Order.

(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 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).

B. NACA and NCLC propose adding the following to the Committee Notes to Rule 23(c)(1)(B):

The addition of the language to 23(c)(1)(B) clarifies the judge-made rule of “ascertainability” of class membership in connection with class certification decision-making. Traditionally, a class has been adequately defined or “ascertainable” if the characteristics of class members are adequately defined by the class definition and the class members can be identified by objective criteria (e.g., “all purchasers of widgets during the period 2001-2003”). See, e.g., *Jamie S. v. Milwaukee Pub. Sch.*, 688 F.3d 481, 496 (7th Cir. 2012). The Third Circuit, however, has imposed a further requirement that precise identification (name and contact information) of each and every class member must be demonstrated to be “administratively feasible” at the class certification stage. See, e.g., *Carrera v. Bayer*, 727 F.3d 300, 304, 311 (3d Cir. 2013); *Marcus v. BMW of North America*, 687 F.3d 583, 593-94 (3d Cir. 2012). Other courts have rejected this requirement as extra-textual, contrary to the existing language of Rule 23 and unnecessary to afford due process to defendants. See, e.g., *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 676-77 (7th Cir. 2013) (holding that Rule 23(c)(2)(B) “requires only the ‘the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through *reasonable effort*.’”) (emphasis added)); *Lilly v. Jamba Juice Co.*, No. 13-02998, 2014 WL 4652283, at *4 (N.D. Cal. Set. 18, 2014) (rejecting *Carrera* as not justified by the reasons given in the opinion and because it would foreclose many small claim class actions historically considered appropriate for class certification); *In re ConAgra Foods, Inc.*, No. 11-05379, 2015 WL 1062756 (C.D. Cal. Feb. 23, 2015) (“ConAgra’s argument would effectively prohibit class actions involving low price consumer goods – the very types of claims that would not be filed individually – thereby upending ‘[t]he policy at the very core of the class action mechanism.’” (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997))). This amendment makes clear that objective ascertainability based on the class definition, and not a demonstrated ability to precisely identify all class members, as required by *Carrera* and *Marcus*, is all that is required at the class certification stage.

C. NACA’s and NCLC’s reasons for proposing the changes:

For quite some time, “ascertainability” has been an unwritten requirement for class certification. *See* Manual for Complex Litigation Fourth § 21.222 (Federal Judicial Center 2004) (“Manual”); A. Conte & H. Newberg, NEWBERG ON CLASS ACTIONS § 6:17 (Thompson West 2002) (“NEWBERG”). This historically meant that the members of the class had to be reasonably ascertainable at the end of the litigation, not that the plaintiff had to prove at class certification that all individual class members could be precisely identified. Manual § 21.222 at 270; NEWBERG § 6:17 at 631.

Historically, a class was considered ascertainable or identifiable if the class definition allowed class members to be ascertained by reference to objective criteria and avoided the use of subjective standards (e.g., a plaintiffs’ state of mind) or terms that depended on resolution of the merits (e.g., persons who were discriminated against). Manual § 21.222 at 270. For example, a class could be defined as those persons and companies that purchased specified products or securities from the defendants during a specified time period. *Id.*

Furthermore, the ultimate identification of class members never required 100% indisputable proof of individual class membership. Rather, where class members had not been identified at the time notice was given, notice by publication was commonly allowed, and class members identified themselves by filing of claims, sometimes sworn to under the penalty of perjury. *See* Manual §§ 21.311 at 287-88, § 21.312 at 294 & § 21.66 at 331; NEWBERG § 4:35 at 309 & § 11:34 at 70-71. As the Manual put it, “Class members must usually file claim forms providing details about their claims and other information needed to administer the settlement.” Manual § 21.66 at 331. And, in cases where the precise identity (names and contact information) of class members turned out to be impossible to ascertain, courts distributed litigation or

settlement proceeds for the benefit of the class under the cy pres doctrine. NEWBERG § 6:18 at 633 & § 10:17.

In a trio of cases, the Third Circuit recently rewrote these long-standing ascertainability requirements. *See Carrera v. Boyer*, 727 F.2d 300, 304, 311 (3d Cir. 2013); *Hayes v. Wal-Mart Stores*, 725 F.2d 349, 352-53 (3d Cir. 2013); *Marcus v. BMW of North America*, 687 F.3d 583, 593-94 (3d Cir. 2012). In these cases, the Third Circuit required the plaintiffs to prove at the class certification stage that precise identification (names and contact information) of each class member would be “administratively feasible,” and it rejected the filing of claims by persons falling within the class definition as an insufficient method of ascertaining the precise identity of class members.

Even more remarkable than these unprecedented holdings is the fact that the class rejected by the Third Circuit as “unascertainable” in *Carrera v. Bayer* was nonetheless certified on remand for settlement purposes with the identical class definition of “all persons in the state of Florida who purchase One-A-Day WeightSmart Dietary Supplements and Vitamins.” This demonstrates that the Third Circuit’s “administrative feasibility” requirement for litigation classes merely imposes hydraulic pressure on class proponents to settle cases for *de minimus* amounts. *See Carrera v. Bayer*, No. 08-4716 (D.N.J Dec. 18, 2014) (Order of Preliminary Approval of Class Settlement).

A number of courts categorically have rejected the *Carrera* approach. *See Hughes v. KORE of Indiana Enterprise, Inc.* 731 F.3d 672, 676-77 (7th Cir. 2013) (holding that Rule 23(c)(2)(B) “requires only the ‘best notice that is practicable under the circumstances, including individual notice to all members who can be identified through **reasonable effort.**’”) (emphasis added)); *McCrary v. The Elations Co., LLC*, No. 13-00242, 2014 WL 1779243, at *7-8 (C.D.

Cal. Jan. 13, 2014) (stressing that *Carrera* is not the law in the Ninth Circuit and certifying a class of purchasers of a dietary supplement for joint pain even though consumer affidavits were the only basis to ascertain class membership); *Brazil v. Dole Packaged Foods, LLC*, No. 12-01831, 2014 WL 2466559, *4-6 (N.D. Cal. May 30, 2014) (stating that *Carrera* is not the law and finding consumer affidavits are a reliable means to ascertain class membership where all products contain the same misleading claims and the class period was short, because individuals were likely to be able to accurately identify themselves as purchasers); *In re ConAgra Foods, Inc.*, No. L-05379, 2015 WL 1062756 (C.D. Cal. Fed. 23, 2015) (“*ConAgras’s* argument would effectively prohibit class actions involving low price consumer goods-the very types of claims that would not be filed individually-there by upending “[t]he policy at the very core of the class action mechanism.”) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)).

In a particularly well-reasoned decision, one court rejected the “paramount” reasons that “have motivated courts to require a plan to identify specific members at the class certification stage.” *Lilly v. Jamba Juice*, No. 13-02998, 2014 WL 4652283, at *4 (N.D. Cal. Sept. 18, 2014). That court rejected *Carrera’s* conclusion that self-identification by affidavit compromises defendants’ due process rights because defendants *retain* the ability to challenge liability and total damages. *Id.* The court also dismissed as speculative *Carrera’s* concern that inclusion of inaccurate claims could destroy the *res judicata* effect of class judgments and settlements, and, in any event, it found this possibility insufficient to adopt a standard that forecloses the ability to bring many small claims consumer class actions all together. *Id.*, at *5-6. Finally, the court rejected *Carrera’s* determination that identification of every class member is needed in order to give adequate notice because notice by publication and other methods are generally appropriate. *Id.*, at *5.

NACA and NCLC propose this change to Rule 23(a) and the proposed additions to the Committee Notes to reject the Third Circuit trilogy for the reasons articulated by the Northern District of California in the *Jamba Juice* case. Initially, since defendants can challenge the total amount of damages, their due process rights are protected. A defendant has an insignificant interest in the identities of the individual class members and in what amounts those individual class members receive as long as the total amount it pays is not excessive and it ends up with an enforceable judgment against all class members.

Most important, NACA and NCLC urge rejection of the Third Circuit trilogy because it would completely foreclose a wide range of small dollar class actions that previously have been considered appropriate for class certification. Specifically, it would foreclose certification of cases where: (1) a manufacturer sold a defective or falsely labeled or falsely advertised inexpensive product through many retail outlets, (2) the manufacturer and retailers possess no records of the buyers, (3) and consumers were unlikely to keep the receipts. With the evolution of means of currency and technology, consumers are far less likely to retain receipts for low dollar purchases. This modern development should not be a reason to preclude pursuit of a valid claim. Similarly, no rational consumer would bring an individual lawsuit over the purchase of a defective or falsely labeled or falsely advertised product costing only a few dollars. Thus, by foreclosing class actions under these circumstances, the Third Circuit trilogy would often foreclose all relief to thousands and, sometimes, millions of harmed consumers.

NACA and NCLC believe that such class actions should remain viable as they have been since the adoption of the current class action rule in 1966. Thus, they urge adoption of the rule change and the Committee Notes proposed above, which reject the Third Circuit trilogy.

III. NACA’S AND NCLC’S PROPOSED CHANGES TO THE NOTICE RULES AND COMMITTEE NOTES – RULE 23(C)(2) COMMITTEE NOTES AND RULE 23(E)(1) AND ITS COMMITTEE NOTES.

Rule 23 addresses two types of notice. The first is notice after certification when there is no settlement, which is found in Rule 23(c)(2). The second is notice in connection with a settlement of a certified (or to-be-certified) class, which is found in Rule 23(e)(1). NACA and NCLC propose changes to the Committee Notes to Rule 23(c)(2) and to Rule 23(e)(1) and its Committee Notes in order to incorporate widely-accepted best practices developed by the courts and practitioners and to make clear a court’s ability to be flexible in ordering the provision of notice based upon the latest technology and research.

A. Rule 23(c)(2) provides as follows:

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct an appropriate notice to the class.

(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 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 member under Rule 23(c)(3).”

NACA and NCLC do not propose any changes to the language of this section. They do, however, propose adding the following language to the Committee Notes:

In Rule 23(c)(2)(B), “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,” must be interpreted flexibly to take into account advances in technology for storage of information regarding class members, for delivery of notice to class members and in the understanding of the forms of notice that are most likely to be read and understood by class members. In particular, where individual notice can be given, cases suggesting that notice must be given by U.S. Mail, First Class, if possible, are no longer binding. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

For example, if a defendant keeps both electronic mail addresses and postal addresses for class members, but regularly communicates with class members through electronic mail addresses, or if a defendant only keeps electronic mail addresses, then a district court may order individual notice be given by electronic mail rather than by U.S. Mail, First Class. Furthermore, if evidence supports that class members are more likely to review, comprehend and respond to a post card or summary notice containing directions to or a link to a website, toll free number and/or mailing address where a full notice and other information can be obtained, a district court may order that such post card or summary notice be sent in lieu of sending a full notice, whether such post card or summary notice is sent by postal service or electronic mail. Such post card or summary notice obviously does not, itself, have to contain all of the information required by this Section. Also, in deciding upon the form of individual notice, the district court may consider the number of class members and the cost of notice in comparison to the relief requested in the action in addition to the efficacy of the form of notice.

In cases where individual notice is not practicable, notice by publication in paper magazines and periodicals has traditionally been used. However, if the district court believes that website or social media notices, notices in electronic newspapers, periodicals and/or blogs, banner notices, notices resulting from search engine queries, TV or radio advertising and/or posting of notices in retail locations is likely to achieve notice to class members, the district court may order some combination of alternative means of notice in lieu of or in addition to notice published in paper newspapers and periodicals. Also, in deciding upon the form of publication

notice, the district court may consider the number of class members and the cost of notice in comparison to the relief requested in the action in addition to the efficacy of the form of notice. Publication notice will typically be a summary form of notice containing directions to or a link to a website, toll free number and/or mailing address where a full notice and further information can be obtained. Thus, the publication notice, itself, does not need to contain all of the information required by this Section.

The Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010) provides a useful resource to both practitioners and courts regarding best practices for a notice plan.

B. NACA and NCLC propose amending Rule 23(e)(1) and adding to the Committee Notes as follows:

(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. Whether or not notice previously has been sent under Rule 23(c)(2), such notice shall, for (b)(3) classes, meet the requirements of Rule 23(c)(2)(B). In addition, such notice must clearly and concisely state, in plain, easily understood language, the following additional information:
 - (viii) a detailed description of the settlement, including, if applicable, a detailed description of the allocation of the settlement relief among members of the Class;
 - (ix) if reasonably practicable, class counsel's best estimate of the range of relief and average relief class members will receive, net of fees and costs;
 - (x) a discussion of how the relief obtained by the proposed settlement compares to the likely results of further litigation;

- (xi) if the settlement requires the filing of claims by class members, a detailed statement of the claims process and, if reasonably practicable, a claim form;
- (xii) a statement of either the exact amount or the maximum amount of attorneys' fees that will be sought by class counsel, a brief description of the method of calculation (e.g., a specific percentage of the entire settlement amount or of some particular amount or the amount of any lodestar and multiplier), and a statement of whether the fees will be deducted from the settlement amount or paid by the defendant(s) in addition to the settlement amount;
- (xiii) a statement of either the exact amount or the maximum amount of expenses for which class counsel will seek reimbursement and a statement of whether the expenses will be deducted from the settlement amount or paid by the defendant(s) in addition to the settlement amount;
- (xiv) a statement of the amount each class representative will seek as an incentive award, and a statement of whether the award(s) will be deducted from the settlement amount or paid by the defendant(s) in addition to the settlement amount;
- (xv) a statement that the class member may object to the settlement, or to the amount of attorneys' fees and/or expenses, or to the class representative incentive awards, or all of them, as not fair, adequate and reasonable;
- (xvi) a statement of the deadlines and manners for submitting an objection and for opting out of the settlement and the class; and
- (xvii) a statement that a class member may not opt-out and object, but rather must choose one or the other, or neither, and that if a class member chooses to object and the objection is overruled, the judgment entered pursuant to the settlement will be binding on the objecting class member.

Committee Notes:

The Committee Notes to Section (c)(2)(b) regarding litigation notice apply fully to the settlement notice required by this Section. Class counsel and courts should consider whether communications to class members subsequent to the initial notice should be used to stimulate check cashing or claims filing as part of a notice plan, taking into consideration the size of the class, the amount of the settlement fund and the cost and likely efficacy of such follow-up communications.

C. Reasons for NACA's and NCLC's Proposed Changes:

Through many years of trial and error, courts and practitioners have reached a consensus on the best practices for class action notice, both in the context of litigation classes and settlement classes. Those best practices have been set forth, among other places, in Manual for Complex Litigation, Fourth, §§ 21.311 & 21.312 (Federal Judicial Center 2004), Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (Federal Judicial Center 2010), and NACA Standards and Guidelines for Litigating and Settling Consumer Class Actions, Guideline 11 (National Association of Consumer Advocates, 3d. 2014), reprinted in 299 F.R.D. 160 (2014). Given this consensus, NACA and NCLC believe it appropriate to include these best practices in the Committee Notes to Rule 23(c)(2) and in Rule 23(e)(1) and its Committee Notes.

In addition, since these rules were last amended, the technology for delivering notice to class members has changed dramatically. Before, the United States postal system and publication in paper newspapers and periodicals were the only real options, and United States mail, first class, was the gold standard. Now, however, there are a variety of delivery methods, and the best method(s) of delivery will vary depending upon the class type, size and demographics, the nature of the settlement relief and economic considerations. The Rules and

Committee Notes, accordingly, need to make it clear that district courts have the flexibility to take such matters into consideration in choosing the best available form(s) of notice.

In addition, empirical research has taught much about how the form, contents, and layout of notices affect class members' willingness and ability to read them, their comprehension of them and their response to them. Again, NACA and NCLC believe the Rules and Committee Notes should make clear that district courts are not only able to, but encouraged to, take into consideration such evidence in approving notice plans.

Finally, NACA and NCLC believe that it is important to make clear to district courts and practitioners that a notice plan, in appropriate cases, might need to include not only the notice that complies with the requirements of the Rules and of due process, but additionally other communications designed at driving class participation in settlements, especially those requiring the submission of claims.

IV. NACA'S AND NCLC'S PROPOSED CHANGES TO DEAL WITH OFFERS OF COMPLETE RELIEF (INCLUDING RULE 68 OFFERS) IN THE CLASS ACTION CONTEXT – NEW RULE 23(d)(3) AND THE COMMITTEE NOTES TO SAME.

For a number of years now, the use of Rule 68 offers or offers for complete relief outside the Rule 68 context has plagued class action litigation. No consensus has formed as to how such offers should be handled prior to the issuance of a class certification order. Indeed, courts across the country have handled them in at least three different manners, some of which have stopped potentially valid class actions from reaching the class certification stage through the pernicious tactic of defendants serially “picking off” one class representative after another. NACA and NCLC believe that the Committee should stop this unfair and undesirable tactic and provide for uniform practices in this area across the country.

In addition during the class certification process, courts sometimes find that the class could be certified, but that the particular plaintiff proposed as the class representative does not meet the adequacy requirements of Subsection (a)(4), although other members of the class are known to exist who would probably meet those requirements. Generally courts allow the plaintiff time within which to find a substitute class representative, but this practice is not uniform. The proposed addition to Rule 23(d) would standardize the current practices with regard to such substitutions and clarify how offers of full relief should be handled during them.

A. NACA proposes adoption of the following new subsection (3) to Rule 23(d):

(3) Prior to the issuance of a Certification Order under Rule 23(c)(1)(A)

(A) the court shall not issue orders that:

- (i) dismiss, compromise or terminate the 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; and

(B) If a party makes an offer in compliance with subparagraph (A)(ii), and the offer is not accepted, then

- (i) the court may accept settlement or compromise on behalf of the class, after following the appropriate procedures set forth in Rule 23(e) and the offeror must pay all costs associated with any procedures the court follows; or
- (ii) the offeree must only pay the costs, if any, imposed by Rule 68(d) in the proportion the value of the offeree's claim is to the total value provided in the offer to the class.

(C) If the court determines not to certify the action as a class action based solely on the failure to satisfy the prerequisite set forth in

Rule 23(a)(4) concerning the representative party, and the court finds that a potential representative party exists, 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.

B. NACA proposes that the Committee recommend adoption of the following comments to the new subsection (3) to Rule 23(d):

Note to Subdivision (d)(3). Offers of complete relief to the individual plaintiff in class actions, made at a time before the court recognizes the separate standing of the class to pursue the action, have been used as a tool to avoid class certification. *See, e.g., Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011) (an individual offer of complete relief, even outside the Rule 68 context, will moot the individual case and the class case will be dismissed unless a class certification motion has been made); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011) (fashioned a new rule that, absent undue delay, a plaintiff may move to certify a class and avoid mootness even after being offered complete relief, citing the flexible nature of the mootness doctrine and concerns about buy-offs); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249-50 (10th Cir. 2011) (same); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004)(same); *Russell v. United States*, 661 F.3d 1371 (Fed. Cir. 2011) (an offer that gives the individual plaintiff full substantive relief but does not include payment of court costs or attorney fees and does not include an offer of judgment, moots the individual case but the class case is subject to the rule of the originating circuit). Such decisions have compelled premature motions for class certification, putting into conflict the provisions of Rule 23(c)(1)(a) requiring a ruling on class certification “[a]t an early practicable time”, the need for discovery in order to satisfy the prerequisites of Rule 23, and the provisions of Rule 68 providing a procedure for the early resolution of an action.

The trend up until 2013 of Courts of Appeals rulings was exemplified by *Weiss, supra*, in which a courts held an individual offer would moot the individual case, but permitted the class action to continue so long as the plaintiff moved expeditiously towards class certification. In 2013, the dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), caused a shift in emphasis towards whether the individual case was moot in the first place, thus obviating the need to consider the standing of the class

claims altogether. The majority in *Symczyk* assumed that the individual case was moot and found that in the context of the specific opt-in procedures provided for in Fair Labor Standards Act cases, such individual mootness prior to other plaintiffs opting into the case required dismissal of the whole case, as there was no “class”, whether putative or otherwise, existing. The dissent addressed the question of whether a Rule 68 offer mooted the individual case in the first instance and found that it did not. The dissent’s view was that the consequences of rejecting a Rule 68 offer should be only those specified in the rule itself – payment of costs – not dismissal of the case or entry of judgment for plaintiff on the offer.

Since *Symczyk*, the Ninth and Eleventh Circuits explicitly have adopted the dissent’s approach toward mootness. See *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 952-55 (9th Cir. 2013); *Stein v. Buccaneers L.P.*, 2014 U.S. App. LEXIS 22603, *8, *13 (11th Cir. 2014); see also *Barr v. Harvard Drug Group, LLC*, 2015 U.S. App. LEXIS 1405, *1-*2 (11th Cir. 2015) (relying upon *Buccaneers*).

Subdivision (d)(3)(A) now prohibits the court from taking any action to terminate a case or moot an individual plaintiff’s claims based on individual offers of complete relief made before a decision on class certification, unless such offer provides complete relief and/or judgment to the class as pled in the complaint. If an offer for complete relief is made to the plaintiff and the class as pled, but unaccepted by the individual plaintiff, the subdivision (d)(3)(B) allows the court the discretion to accept the offer on behalf of the class and to follow the settlement or compromise procedures set forth in subdivision (e), with the offerer paying costs associated with such procedures, such as costs of notice to the class and settlement administration as directed by the court.

In addition, under subdivision (d)(3)(B), the offeree can only be subjected to costs, such as the costs set forth in Rule 68(d), in the proportion or percentage of the value of the offeree’s claim compared to the total value provided in the offer to the class. This subdivision is intended to ensure that an offeree is not subjected to or at risk of paying an inequitable or excessive amount of costs, which would thereby create an overwhelming incentive to settle claims even if the offer of individual relief is not complete or sufficient.

Subdivision (d)(3)(C) provides that if a court determines that a class, which otherwise meets all the other prerequisites of

Rule 23(a) and satisfies all the criteria of at least one of the subdivisions of Rule 23(b), cannot be certified based only on the court's determination that an individual is not an adequate representative party under Rule 23(a)(4), and that a potential representative party may exist among members of the putative class, the court must allow a reasonable time within which an adequate class representative can be substituted. In accordance with the rules, a court may order discovery to allow a plaintiff to discover the names and contact information for any potential substituted class representatives. Until the time for such substitution has elapsed, the court cannot take any action based solely upon an offer of settlement or compromise.

C. NACA's and NCLC's reasons for proposing the changes:

The new addition to the rule avoids weakening the usefulness of class actions caused by giving effect to individual offers in a way that, whether through dismissal or judgment on an individual basis, avoids the class issues for which the action was brought. The revised rule would also eliminate the practice required in some courts of filing a class certification motion with the complaint in order to avoid Rule 68 dismissal. The new rule gives the court the flexibility to proceed towards final approval of an offer made to the class even though the individual putative class representatives have rejected the offer.

The proposed rule would not allow the court to take any action with respect to an unaccepted offer of complete relief unless that offer of relief was extended to the class. The court may, where there is an unaccepted offer to the class, treat the proposal in the same way under Rule 23(e) as it would a settlement proposal offered jointly by the parties. If the offer was made pursuant to Rule 68 and the court does not proceed to treat the offer as a settlement proposed by the parties, and the class fails to obtain relief sufficient to avoid the consequences of Rule 68, the representative plaintiff would be subject to the penalties imposed by Rule 68 in proportion to the representative's interest in the offered class recovery. Thus, the new rule prevents awards of costs which potentially would be financially disastrous to the plaintiff and, if

the class counsel has agreed to pay such costs, which discourage the prosecution of class actions by imposing a financial penalty for unsuccessful class actions.

When the class is denied certification because of a defective class representative, and a proper representative may be available, the proposal requires the court to allow a reasonable time for such substitution before taking any action on a settlement offer by defendant. When class certification is denied because the class representative is found wanting, that should not prevent a class action that otherwise meets all the criteria of Rule 23 for certification from proceeding. The new rule allows time within which to find a suitable substitute class representative. The new rule establishes the right to representative substitution and prevents mooting of the case before adequate time for such substitution has been allowed.

V. NACA’S AND NCLC’S PROPOSED CHANGES TO ADDRESS PROFESSIONAL OBJECTORS – ADDITION TO RULE 23(e)(5) AND ADDITION OF RULE 23 (e)(6) AND THEIR COMMITTEE NOTES.

NACA and NCLC are concerned about so-called “professional objectors” or “greenmailers” abusing the current objection process by filing meritless and frivolous boilerplate objections so that they can use the threat of an appeal to extract post-approval payments from the parties in order to avoid delay in the implementation of a settlement. NACA’s and NCLC’s experience with these kinds of unfortunate objections have prompted them to propose changes to the rule designed to emphasize both the obligations of the objecting parties and to provide additional guidance to the courts in considering objections.

While an unreasonable settlement can do substantial damage to class members, a reasonable class action settlement can provide substantial relief to consumers. A single objection, if followed by an appeal, has the potential to delay or derail such relief for years, and thus can have significant consequences for the class. Injunctive relief may become meaningless or

ineffectual over time, and monetary relief may decline in value due to inflation, the time value of money and increased difficulty in locating class members after delays.

As such, NACA believes objections should be thoroughly vetted by the courts and the parties and that changes to the current rules governing objections are warranted.

A. NACA and NCLC propose changing Rule 23(e)(5) and adding Rule 23 (e)(6) as follows:

(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). Objections must be made in writing, state the basis for the objection, and be filed and served on all parties. Objections must include a signed certification that the objecting person is a class member and is aware that he/she/it may be subject to reasonable discovery. An objection may be withdrawn only with the court's approval.

(6) In addressing an objection, the court shall consider whether the objecting person will fairly and adequately present the objection to the court on behalf of class members who may be affected by the elements of the agreement to which the class member objects.

B. NACA and NCLC propose the following Committee Notes:

Subdivision (e) is amended in several respects to ensure more transparency with respect to objections and objecting parties.

Paragraph five is amended to specify the minimal substantive requirements for an objection to be made. This change reflects

prevailing practice regarding the substance of objections and is also intended to ensure that objecting parties are actually class members and are aware of and willing to undertake the obligations that may come with making an objection to a proposed class settlement. The change is also intended to ensure that those who respond to the objection have a fair opportunity to do so. While not every objector will necessarily be subject to discovery, an objection to a settlement has the potential to deny, or delay, potential relief to class members. Accordingly, discovery into the objector's standing, bases for objecting, motives in objecting, and adequacy to present the objection must be allowed.

Paragraph 6 requires that the court consider whether the objecting person is able to fairly and adequately present the objection to the court on behalf of class members who may be affected by the elements of the settlement to which the class member objects. Rule 23 recognizes that certification may be appropriate even in circumstances where individual class members have conflicting individual interests. Class settlements may likewise be appropriate even in circumstances where certain class members' individual interests would weigh against settlement. The change to the rule makes clear that the court should consider any objection in the context of the interests of the affected class members as a whole, and not merely in the context of a given individual.

C. NACA and NCLC propose the changes for the following reasons:

The proposed rule will require objectors to provide a written description of the bases on which they are objecting, just as parties to a lawsuit must provide bases for their suits and defenses. This requirement ensures that all parties have a full and fair opportunity to respond to objections and also clarifies the record for appeal. This requirement will also cure the unfortunate occurrence of objections being filed by individuals who were not, in fact, class members, or by lawyers on behalf of individuals who were unaware that the objection was being made on their behalf.

The proposed rule change also clarifies that objectors may be subject to discovery in appropriate circumstances. Many courts have ruled that it is appropriate for objectors to be required to participate in discovery regarding the "objector's standing as a settlement class

member to assert objections, the underlying basis for his objections, and his relationship with counsel that may be pertinent to informing the court about the nature and merits of the appeal.” *In re Netflix Privacy Litig.*, No. 5-11-CV-00379-EJD, 2013 WL 6173772, at *4-5 (N.D. Cal. Nov. 25, 2013). *See also In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 532-33 (N.D. Cal. 2012) (objector who voluntarily appears in litigation is properly subject to discovery); *In re Magsafe Apple Power Adapter Litig.*, No. 09–CV–01911 JW, 2012 WL 2339721, at *2 (N.D. Cal. May 29, 2012); Fed. R. Civ. P. 26. While NACA does not believe objectors should automatically be subject to discovery, the general rules of discovery should apply, and discovery sought for a proper purpose should be allowed. *See* Fed. R. Civ. P. 26(g)(1)(B)(ii) (forbidding discovery requests meant to “harass, cause unnecessary delay, or needlessly increase the cost of litigation”). Making this clear will deter frivolous objectors who seek to manipulate the process for financial gain.

Finally, the proposed rule change clarifies, for both district courts and practitioners, that even objections which may be meritorious as to a single class member or group of class members must be considered in the context of the overall value of the settlement to the class. Fed. R. Civ. P. 23(c)(2)(B) provides class members with the right to request exclusion from class actions which are certified pursuant to Fed. R. Civ. P. 23(b)(3) for precisely this reason.

NACA and NCLC believe that objections levied by individuals who have interests that diverge from those of the class members who will be affected by the purportedly objectionable provisions should be evaluated accordingly. Just as class representatives must be evaluated based on their ability to “fairly and adequately protect the interests of the class” because their actions may affect the rights of others, objectors should be similarly evaluated, as their actions may also affect the rights of others. Objectors must be able to fairly and adequately present

objections on behalf of class members who will be affected by the elements of the proposed settlement to which the objector objects.

VI. NACA’S AND NCLC’S PROPOSED ADDITION REGARDING CY PRES – PROPOSED RULE 23 (e)(7) AND ITS COMMENT.

NACA and NCLC generally approve of the approach adopted by the American Law Institute in § 3.07 of the Principles of the Law of Aggregate Litigation (“§ 3.07”). Specifically, we endorse the premise that “funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members.” However, *cy pres* awards should be permitted “when direct distributions to class members are not feasible,” and “*cy pres* is preferable to other options available to a court when direct distributions are not viable.” In such circumstances, there “should be a presumed obligation to award any remaining funds to an entity that resembles, either in composition or purpose, the class members or their interests.”

A. NACA and NCLC propose the following addition to Rule 23(e):

We believe, though, that § 3.07, for the practical, legal and ethical reasons discussed below, should be modified before it is adopted as part of a revised Rule 23:

(e) Settlement, Voluntary Dismissal, or Compromise

(7) A court may approve a settlement that proposes a *cy pres* remedy. The court must apply the following criteria in determining whether the proposed *cy pres* award is appropriate:

(A) If individual class members can be identified through reasonable effort, or, if not, can be identified in a claims procedure, and the amount available for distribution to the class is sufficiently large to make distribution to class members economically viable, settlement proceeds should be distributed directly to individual class members. In such situations, only amounts due class members who do not avail themselves of the proceeds, cannot be located or are due such small amounts that individual distribution is not viable, should be considered available for *cy pres*.

(B) 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 a subsequent distribution to participating class members unless (i) the amounts involved are too small to make any subsequent individual distributions economically viable; (ii) an additional distribution would provide a windfall to class members with liquidated damages claims that have been fully satisfied by the prior distributions; or (iii) other specific reasons exist that would make a further distribution impractical or unfair.

(C) If the settlement distribution plan meets the criteria set forth in subsections (A) and (B), 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.

(D) If a proposed settlement includes a *cy pres* distribution but does not identify the proposed recipients, the class representatives and class counsel should recommend, prior to notice of the settlement being given to the class, one or more recipients of *cy pres* funds to the court to be approved after the court weighs relevant considerations, including the nature of the claims, the makeup of the class, the geographic scope of the class, and how the class's interests can best be promoted by a *cy pres* award. The primary consideration in picking the recipient(s) is which recipient(s) will best promote the interests of the class and/or will best promote the purposes of the statutory prohibitions sought to be enforced in the underlying litigation. No *cy pres* payments may be given to any entity in which any defendant has any direct or indirect interest, financial or otherwise.

(E) Unless the amount of funds to be distributed *cy pres* is expected to be de minimis, any *cy pres* plan and the identity of any *cy pres* recipient(s) proposed by the class representatives and class counsel should be disclosed in a notice to the class.

(F) Class counsel may be assigned responsibility for ensuring that the recipient(s) of any *cy pres* award uses the funds appropriately and monitoring the implementation of the approved *cy pres* plan by the recipient(s). If they are given such an assignment, class counsel should be entitled to compensation at standard rates, with no enhancement or multiplier, by reservation of some portion of the residue fund for the work necessary to monitor implementation of the *cy pres* plan.

B. NACA and NCLC propose the following addition to the Committee Notes in connection with the new proposed Rule 23(e)(7):

- (A) Claims procedures often are used in class actions to identify and verify class members. When appropriate, such procedures can and should be utilized to accomplish individual distributions to class members.
- (B) When economically viable, residual funds should be redistributed to identified and participating class members prior to resorting to a *cy pres* remedy, but only up to the extent that such class members do not receive a windfall. *Cy pres* remedies that may benefit unidentifiable or non-participating class members are preferable to creating a windfall for a subset of the certified class.
- (C) Any settlement must be consistent with applicable substantive state law and due process requirements in order to insure that the proposed rule in no way “abridges, enlarges, or modifies any substantive right,” within the meaning of the Rules Enabling Act. The *cy pres* doctrine should apply not only to the distribution of residual funds but also may be used in lieu of entire damage awards when settlement funds cannot otherwise be economically distributed.
- (D) Unless there is an agreed upon *cy pres* provision in a proposed settlement agreement between the parties in a class action case, there should be no role for the defendant or its class counsel in the selection of appropriate *cy pres* recipients. Such a choice solely should be in the province of the class representatives and their counsel on behalf of the absent class members, subject to court approval.
- (E) As a matter of fairness, transparency and due process, absent class members should be given notice regarding a proposed *cy pres* plan and the identity of any proposed *cy pres* recipients, whether included in a proposed settlement agreement between the parties or in a subsequent request presented to the court for approval.
- (F) To insure full accountability, counsel should be enabled to monitor the recipients’ strict compliance with the terms of the court’s order regarding the intended use of the awarded *cy pres* funds. Counsel should be entitled to compensation for the work necessary to supervise implementation of the *cy pres* remedy at standard rates, with no enhancement or multiplier.

C. NACA and NCLC propose these changes for the following reasons:

Consumer protection laws are meant to ensure that the choices given to consumers in the marketplace are unimpaired by fraud or withholding of material information, and that the power differential between consumers and commercial enterprises is equalized. *See Averitt & Lande, Article: Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 *Antitrust L.J.* 713 (1997). They seek to improve the functioning of the marketplace by making it unprofitable to operate dishonestly. *Id.* Thus, when attempting to vindicate rights set forth in a consumer protection statute, a court should focus on the policies of fundamental fairness in the marketplace, deterrence of fraud, and disgorgement of illegally obtained profits.

The class action method of litigation often has been used in order to fully achieve the above objectives, as well as to compensate all injured parties. Class actions ensure that consumers will be protected even when many, if not most, injured parties will not actively participate in the court proceedings. As NACA stated in the introduction to its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 *F.R.D.* 375, 377 (1997):

Consumer class actions serve an important function in our judicial system and can be a major force for economic justice. They often provide the only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class. Frequently, many consumers are harmed by the same wrongful practice, yet individual actions are usually impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit. Without class actions, wrongdoing businesses would be able to profit from their misconduct and retain their ill-gotten gains. Class actions by consumers aggregate their power, enable them to take on economically powerful institutions, and make wrongful conduct less profitable.

Fulfillment of these policy goals means that damage awards should not be confined to the claiming class members. *See also Pray v. Lockheed Aircraft Corp.*, 644 *F. Supp.* 1289, 1302

(D.C.D. 1986) (stating that punitive damages arising from a class action would be more appropriately disbursed to charitable organizations rather than class members, as these organizations would benefit the public “on whose behalf [the wrongdoer] is punished.”) (internal quotation omitted). *Cy pres* awards are procedural devices in class actions that, with court approval, distribute money damages indirectly for the benefit of the general class of persons on whose behalf the litigation was brought rather than directly to class members. A *cy pres* distribution takes place through funding of a project or organization to benefit the members of this broadly defined class.⁴

Cy pres distribution originated in the field of trusts as a way of preventing the failure of a testamentary charitable gift by allowing “the next best use of the funds to satisfy the testator’s intent as near as possible.” *Democratic Central Comm. V. Washington Metro. Area Transit Comm’n*, 84 F.3d 451, 455 n.1 (D.C. Cir. 1996). The equitable *cy pres* doctrine grants the court discretion to shape remedies that direct excess settlement funds to their “next best use.” 4 Newberg on Class Actions, § 11.20 (4th ed. 2002). In the context of a class action in which provision of a direct benefit to class members is impossible or impracticable because members of the class cannot be identified or located, members of the class failed to submit claims or the value of the distributions would be consumed by the costs of claim administration, *cy pres* recovery is ideal because it provides a mechanism through which to provide an indirect benefit to non-claiming class members. *Mace v. VanRu Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997); *see also Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (noting that the *cy pres* doctrine is utilized to prevent defendants “from walking away from the litigation scot-free

⁴ Fluid recovery, although often classified as a form of *cy pres*, primarily has been developed as a state law remedy separate and apart from the traditional *cy pres* distributions described and discussed herein. *See, e.g. State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460 (1986). Fluid recoveries are not included for the purposes of NCLC’s and NACA’s proposed changes to Federal Rule 23.

because of the infeasibility of distributing the proceeds of the settlement ... to the class members.”) .

Courts have allowed parties to establish *cy pres* funds when distribution of any and all funds to the class is infeasible for a variety of reasons, including, when class members cannot be identified, where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case, the class changes constantly, class members’ individual damages are too small to justify the expense of finding them and sending the recovery to them, and/or money remains after payments for damages have been distributed to class members.

The four options usually considered for distribution of residual funds in consumer class action cases are: (i) reversion to the defendant, (ii) distribution to existing claimants, (iii) escheat to the state, and (iv) *cy pres* distribution. *See* A. Conte and H. Newberg, 3 *Newberg on Class Actions* §§ 10.13 – 10.25 (4th Ed. 2002); *see also* Kevin Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything!*, *The Judges’ Journal*, Summer 1996 at 20. Although any one of the alternate methods may be most appropriate in special limited circumstances, in consumer cases only *cy pres* distributions satisfy the deterrence and disgorgement goals of the consumer protection statutes underlying the cases and benefit the absent class members and consumers as a whole.