15-CV-DD

COMMENT

to the

RULE 23 SUBCOMMITTEE,

ADVISORY COMMITTEE ON CIVIL RULES

September 10, 2015

DRI: The Voice of the Defense Bar

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ORGANIZATIONAL OVERVIEW

DRI – The Voice of the Defense Bar is pleased to provide the following comments to the Advisory Committee on Civil Rules' Rule 23 Subcommittee. For more than 50 years, DRI has been the voice of the defense bar, advocating for 22,000 defense attorneys and corporate counsel members and defending the integrity of the judiciary and the civil justice system. A thought leader, DRI provides world-class legal education, deep expertise for policymakers, legal resources and networking opportunities to facilitate career and law firm growth.

In a Word
Our members defend businesses in civil suits. If a company or corporation is ever the target of such a suit, there is a great likelihood that one of our member attorneys will be representing them. Their expertise and advocacy is the best defense against a potentially ruinous, and many times frivolous, lawsuit.

Focus
DRI focuses on six primary areas.

- Justice: DRI strives to improve the civil justice system.

- Judicial Balance: DRI acts as a counterpoint to the plaintiffs' bar to seek balance in the minds of all participants in the judicial system and in all areas of dispute resolution.

- Education: DRI provides outstanding educational opportunities to improve the skills of the defense lawyer.

- Law Practice Administration: DRI assists its members in dealing with the economic realities of the defense practice in an increasingly competitive legal marketplace.

- Professionalism and Ethics: DRI urges members to practice ethically and responsibly, keeping in mind the lawyer's responsibilities that go beyond the interest of the client to the good of society as a whole.

- Expertise: DRI acts as an expert resource on legal and judicial issues for the media, policymakers and the general public.

Services
Seminars/Webinars: Drawing upon leading expertise in various areas of substantive law, DRI provides numerous outstanding Continuing Legal Education seminars and webinars each year and makes materials from previous years' seminars available to its membership.

Publications: DRI produces the leading professional defense bar publications, including our flagship monthly journal *For The Defense*, *In-House Defense Quarterly*, and others.

Amicus Briefs: DRI regularly files amicus briefs in federal and state courts on such landmark cases as *Dukes v. Wal-Mart*; *Erica John Fund v. Halliburton*, *Glazer v. Whirlpool*, *Comcast. v. Behrend*, *Greenwood v. CompuCredit Corp* and others to provide guidance to the courts and advocacy on issues vital to the defense bar and its clients.

Testimony: DRI provides expert testimony before legislative bodies and regulators on judicial reform and other issues of concern to the defense bar.

Studies: DRI provides in-depth monographs and white papers of various issues critical to the legal profession, on topics such as jury duty, judicial funding, and judicial independence.

Center for Law and Public Policy
The Center for Law and Public Policy was created by DRI to provide thoughtful and expert analysis and commentary on issues of great import to the defense bar, the judiciary, the legal profession, and the country. The Center operates through three committees: Issues and Advocacy, Amicus, and External Policy Groups.

Because our judicial system is an adversarial system embodied in a plaintiff bar and a defense bar, each voice has a unique perspective. Therefore, both voices need to be heard on critical issues affecting DRI individual and corporate members, the civil justice system and judicial reform. DRI performs that function for the defense bar through its Center for Law and Public Policy.

The DRI National Poll on the Civil Justice System
DRI conducts the only annual national poll focused exclusively on the civil justice system. The poll surveys public opinion on such issues as trust in the judicial system, class action, potential juror bias, and judicial funding. All of DRI's polls have been accepted by the Roper Center at the University of Connecticut, a poll repository used for scholarly research.

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I. DRI Proposal to Address "No Injury" Classes

The testimony of DRI on the issue of "No Injury" Classes submitted to the House Judiciary Committee was summarized orally for the Rule 23 Subcommittee at the DRI Class Actions Seminar held July 23-24, Washington, D.C. The written statement of testimony is attached, along with a list of DRI amicus briefs submitted in class actions and a summary of the issues in those cases. At the DRI Class Action Seminar, the Rule 23 Subcommittee requested DRI to submit proposed language changes to Rule 23(b)(3) that would address DRI's concerns on this issue. Proposed language amending Rule 23(b)(3) follows:

> (3) the court finds that each class representative and each proposed class member suffered actual injury of the same type; that the existence, type and extent of each class member's injury, as well as the amount of monetary relief due each class member, can be accurately determined for each class member on the basis of classwide proof, without depriving the defendant of the ability to prove any fact or defense that defendant would be entitled to prove as to any class member if that class member's claims were adjudicated in an individual trial; that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings of predominance and superiority include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

In order to have standing, plaintiffs must have suffered an "injury in fact." Yet, defendants today face suits brought by plaintiffs who admit they have not been harmed on behalf of a proposed class of similarly unharmed individuals. Under current law, consumers who have suffered no harm and may in fact, be very happy with their purchases, can still participate in a class action suit and receive damage awards if the plaintiff side prevails. To participate in a class action, individuals need only show there was a potential for harm.

This practice artificially inflates the size of certified classes, sometimes to millions of participants. When statutory damage provisions are combined with the aggregate power of the class action device, defendants can face significant and potentially ruinous exposure for conduct that harmed no one. Permitting aggregated actions by unharmed individuals places enormous pressure on defendants to settle claims that would be valueless if tried on an individual basis.

The DRI National Poll on the Civil Justice System that showed that 78 percent of Americans would support a law requiring a showing of actual harm rather than potential harm in order for an individual to participate in a class action suit: Large majorities support this reform across 12 demographic categories, including men, women, Republicans (86%), Democrats (71%), Liberals (73%), and Conservatives (85%).

Large majorities of the American public find it makes little sense to pay damages to people who have suffered no harm. They support reform. It's just common sense to them ... and should be to us.

II. DRI Proposal to Address Ascertainability

DRI proposes that Rule 23(a)(1) be changed to read as follows:

> ~~the class is so numerous that joinder of all members is impracticable;~~ the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden, and as so identified are sufficiently numerous that joinder of all class members is impractical;

This approach recognizes that inefficiencies and the necessity for highly individualized proof are precisely what class actions are meant to avoid, and if even identifying the class members devolves into a highly individualized or inefficient inquiry, then the objectives of the class action device cannot be achieved.

Recent decisions of the Sixth and Seventh Circuits have created a clear need for the ascertainability issue to be addressed. The case of *Mullins v. Direct Digital, LLC* [1] creates an acknowledged split between the Seventh Circuit, since joined by the Sixth Circuit,[2] and the Third and Eleventh Circuits, among others, as to the existence and proper application of the ascertainability requirement under the current version of Rule 23. How this split is ultimately resolved may one day resolve the question of the proper interpretation of the text of the current rule, but that begs the real question: What should be the ascertainability prerequisites to class certification? The very fact that there is a debate about whether and to what extent this requirement already implicitly exists demonstrates that the Subcommittee should address the issue explicitly.

The Subcommittee should adopt an express ascertainability requirement that ends the debate, and one that recognizes that the various subsections of Rule 23(a), Rule 23(b), and Rule 23(c) are not mere standalone silos, but integrated parts of an procedural mechanism designed to ensure that class treatment is reserved for those cases in which individualized inquiry is unnecessary.

The case for an ascertainability requirement is clear. Class actions that bog down in individualized inquiries and adjudications necessary to determine class membership are no less inefficient than class actions that bog down in individual inquiries and adjudications necessary to determine liability. Defendants' due process interests and the Rules Enabling Act both require that the defendant have a full and fair opportunity to litigate individual issues pertaining to both. For these reasons, even in the absence of any express provision in Rule 23, most courts already consider ascertainability is an "essential" prerequisite for a class action,[3] and treat it as a threshold inquiry for class certification.[4]

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[1] *Mullins v. Direct Digital,* No. 15-1776 (7th Cir. July 28, 2015).
[2] *Rikos v. Procter & Gamble,* No. 14-4088 (6th Cir. Aug. 20, 2015).
[3] *Marcus,* 687 F.3d at 592-93.
[4] *EQT Prod. Co. v. Adair,* 764 F.3d 347, 358 (4th Cir. 2014) ("We have repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'"); *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 395 (S.D.N.Y. 2008) ("Rule 23 contains the additional, implicit requirement that an ascertainable

Even the leading treatise on civil procedure addresses the question before it begins its discussion of the express requirements of Rule 23(a).[5]

The Fourth Circuit has expressed what could be the explicit rule in its simplest form: "However phrased, the requirement is the same. A class cannot be certified unless a court can readily identify the class members in reference to objective criteria."[26] There is compelling evidence that this rule has sound footing in the overall rationale of Rule 23. Whatever their other differences, until the recent Sixth and Seventh Circuit decisions almost all courts had agreed that the ascertainability inquiry requires the court to find: (1) that it can determine whether someone is in the class using objective criteria;[6] and (2) that there is some reliable and administratively feasible method for determining whether putative class members are members of the class as defined.[7] The disagreement of the Seventh and Sixth Circuit is largely based on the absence of explicit language in the Rule itself, not on the soundness of the policy that an explicit ascertainability rule would reflect.

An explicit objective ascertainability rule would also reduce the problem of one-way intervention, also sometimes referred to as the "fail-safe" or "merits-based" class. In a fail-safe class, until the verdict, there is no way to tell whether the class has thousands of members or none at all. If the plaintiffs prove their case, then the class is populated and bound. If they do not, then the class has a population of zero; it never existed, which means the defendant's "victory" is hollow because no absent class member is bound by the defense judgment.[8] Most courts already refuse to certify classes with fail-safe class definitions.[9] An explicit rule requiring that the class be readily and objectively identifiable at the time of certification prevents this unfair abuse of the class action device.

The concept of "ready ascertainability" focuses on administrative feasibility. The Third, Fourth, and Eleventh Circuits have held that, in showing that identifying class members is feasible, the plaintiffs must provide evidence of an actual method of objectively identifying class members in an

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class exists and has been properly defined.").

[5] *See* 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1760 at 142–47 (3d ed. 2005) ("Further, the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated; rather it must be restricted to individuals who are raising the same claims or defenses as the representative. The class definition also cannot be too amorphous.") (Internal footnotes omitted).

[6] *EQT Prod. Co.,* 764 F.3d at 358 ("However phrased, the requirement is the same. A class cannot be certified unless a court can readily identify the class members in reference to objective criteria.").

[7] *See Byrd v. Aaron's, Inc.,* 784 F.3d 154, 163 (3d Cir. 2015).

[8] *Randleman v. Fidelity Nat. Title Ins. Co.*, 646 F. 3d 347, 352 (6th Cir. 2011) ("The class the district court initially certified was flawed in that it only included those who are 'entitled to relief.' This is an improper fail-safe class that shields the putative class members from receiving an adverse judgment. Either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment."); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) ("The new class definition, if allowed, would result in a 'fail-safe' class, a class which would be bound only by a judgment favorable to plaintiffs but not by an adverse judgment."); *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal 2011) ("Ascertainability is needed for properly enforcing the preclusive effect of final judgment. The class definition must be clear in its applicability so that it will be clear later on whose rights are merged into the judgment, that is, who gets the benefit of any relief and who gets the burden of any loss."); *see also* Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2803–04 (2013) (arguing that allowing fail-safe classes revives one-way intervention).

[9] *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015) (noting "the inappropriateness of certifying what is known as a 'fail-safe class'–a class defined in terms of the legal injury"). The Fifth Circuit is the lone exception to this rule: it has held that the presence of a fail-safe class definition does not preclude certification. *In re Rodriguez,* 695 F.3d 360, 370 (5th Cir. 2012) ("our precedent rejects the fail-safe class prohibition").

administratively feasible way, such as through existing corporate records.[10] The Sixth and Seventh Circuits, however, have very recently held that ascertainability merely requires that the class be identifiable at some point in the litigation, even if the identification procedure is expensive, burdensome, or requires self-identification or individualized inquiries.[11] Similarly, some federal district courts in California have also rejected the Third Circuit's approach.[12]

If the plaintiffs cannot define their class without reference to the merits, or if they do not have any feasible way of identifying class members for purposes of sending notice in advance of litigation, the class should not be certified. Class actions are not the goal, and they should not be the rule. They are the "exception" to the normal due process expectation "that litigation is conducted by and on behalf of the individual named parties only."[13], and make sense when they can efficiently achieve collective adjudication. There is no reason that inefficiencies in the class identification process should militate any less against class certification than inefficiencies in the adjudication of liability.

"Administrative burden" does not mean that *any* evidentiary inquiry into identifiability would necessarily defeat certification.[14] But it does mean that any individual or third party inquiries necessary to establish membership in the class should be tolerated only if they inject minimal inefficiency into the class adjudication process. If the inquiry requires separate analysis for each and every class member, vast numbers of affidavits or third party subpoenas, or checking multiple records and deciding multiple legal issues for large segments of the class, the burden is too great.[15]

Nor is self-identification an appropriate short-cut to ascertainability. Given both the potential discovery burdens and the due process concerns associated with self-identification (through, say, affidavits) without affording the defendant a right of cross-examination, and the inefficiencies of allowing such cross-examination, courts have generally held that self-identification imposes too large

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[10] *Carrera v. Bayer Corp.,* 727 F.3d 300, 308–09 (3d Cir. 2013) (class not ascertainable where it would rely on purchase receipts that were likely not retained); *EQT Prod. Co*., 764 F.3d at 357 (plaintiff "must present evidence that the putative class complies with Rule 23"); *Karhu v. Vital Pharms., Inc*., 2015 U.S. App. LEXIS 9576, *6-7 (11th Cir. Jun. 9, 2015) ("A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible."); *EQT Prod. Co.,* 764 F.3d at 359 ("As the record in this case highlights, numerous heirship, intestacy, and title-defect issues plague many of the potential class members' claims to the gas estate. In our view, these complications pose a significant administrative barrier to ascertaining the ownership classes.").

[11] *Mullins v. Direct Digital, LLC*, No. 15-1776 (7th Cir. Jul. 28, 2015) (slip op.) ("Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes"); *Rikos v. Procter & Gamble Co.,* No. 14-4088 (6th Cir. Aug. 20, 2015) slip op. at 33 ("We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts.").

[12] *In re ConAgra Foods, Inc.*, 2015 U.S. Dist. LEXIS 24971, *93 (C.D. Cal. Feb. 23, 2015) (rejecting administrative burden argument because it would "effectively prohibit class actions involving low priced consumer goods—the very type of claims that would not be filed individually—thereby upending the policy at the very core of the class action mechanism.") (Internal quotation omitted); *see also Randolph*, 303 F.R.D. at 686 (noting "[c]ertain California district courts have vehemently rejected *Carrera*").

[13] *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2550 (2011).

[14] *Bowerman v. Field Asset Servs., Inc.,* 2015 U.S. Dist. LEXIS 37988, *22 (N.D. Cal. Mar. 24, 2015) ("That the class may have to be ascertained through a combination of evidentiary sources does not necessarily mean that ascertaining it is administratively infeasible.").

[15] *EQT Prod. Co.,* 764 F.3d at 359 ("As the record in this case highlights, numerous heirship, intestacy, and title-defect issues plague many of the potential class members' claims to the gas estate. In our view, these complications pose a significant administrative barrier to ascertaining the ownership classes.").

a burden to justify certifying a class.[16] Similarly, offloading the administrative burden to third parties through the creative use of the subpoena power should not be an acceptable substitute.[17]

Finally, a strong ascertainability requirement would also indirectly reduce the need to resort to *cy pres* remedies, another problem the Subcommittee is examining. The so-called need for *cy pres* relief most often arises when the parties cannot readily identify the members of the class. Were Rule 23 to explicitly require that a court find it is possible to readily and objectively identify class members, the need for this controversial form of relief would diminish, as would the problems and abuses associated with it.[18]

III. DRI Proposal to Provide for Automatic Right to Appeal of Class Certification Decisions

Decisions on class certification motions should be subject to immediate and mandatory appellate review.

DRI proposes that Rule 23(f) be amended to provide for mandatory appellate review of certification decisions. "[W]hen a trial court commits an error of law that has an outsized impact, the availability of immediate appellate review should not depend on the subjective value judgments of a single appellate panel deciding a petition for discretionary review." Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1662 (2011). Although we are sensitive to the workload of our federal appellate judges, we believe that the practical effect of the current discretionary appellate review regime effectively deprives parties of appellate review of what is generally considered the seminal decision in class action litigation. DRI proposes amending that Rule to provide as follows:

> (f) APPEALS. A party may obtain interlocutory appellate review of an order ~~court of appeals may permit an appeal from an order~~ granting or denying class-action certification under this rule, provided that a timely notice of appeal of such order is ~~if a petition for permission to appeal is~~ filed ~~with the circuit clerk within 14 days after the order is entered~~ in accordance with Federal Rules of Appellate Procedure 3 and 4. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Authority for this change exists under 28 U.S.C. § 1292(e). DRI believes this change will have a number of beneficial effects for all parties, as well as leading to a more efficient judicial system.

DISCUSSION

The class certification decision is generally considered the seminal event in class litigation. Jurists have long recognized the coercive effect of a district court's decision to certify a class on a

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[16] *Marcus,* 687 F.3d at 594; *Karhu,* 2015 U.S. App. LEXIS 9576 at *8-9; *Jenkins,* 2015 U.S. Dist. LEXIS 22241 at *15.
[17] *Randolph*, 303 F.R.D. at 690 (rejecting suggestion that plaintiffs could subpoena third-party retailers to determine purchasers of cooking oil); *In re Clorox Consumer Litig.,* 301 F.R.D. 436, 440 (N.D. Cal. 2014) ("In a consumer class action, like this one, where Plaintiffs intend to rely on retailer records, Plaintiffs must produce sufficient evidence to show that such records can be used to identify class members."").
[18] *See generally* Martin H. Redish, et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 623 (2010).

defendant's decision to settle the case rather than risk a bet-the-company trial. *See,* Charles Silver, *"We're Scared To Death": Class Certification and Blackmail,* 78 New York University Law Review 1357 (1978). Indeed, the Advisory Committee for the 1998 Amendments to the Federal Rules of Civil Procedure which added Rule 23(f)'s discretionary appellate review provision noted that:

> [S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

These concerns – which affect all parties to the case – can only be addressed if the parties actually obtain appellate review. As we will discuss, placing certification appeals under the permissive appellate procedure as opposed to the appeal as of right procedure has effectively foreclosed that review in too many circumstances.

A petition for a discretionary appeal of a certification decision must be filed within 14 days of the order from which review is sought, F.R.Civ.P. 23(f), with the contents of it as set by Rule 4(b) of the Federal Rules of Appellate Procedure. In contrast, an appeal as of right need only be noticed within 30 days, F.R.App.P. 4(a), which allows the party seeking appellate relief significantly more breathing space to review and prepare the appropriate challenge to the district court's certification decision.

In addition, whereas a mandatory appeal allows for full consideration of the questions presented, there are varying standards as to whether a circuit court will even grant permission. The Manual for Complex Litigation states that a "rough consensus" has emerged which limits interlocutory review of class certification decisions to situations where one or more of the following factors are evident: "(1) the certification order represents the death knell of the litigation for either the plaintiffs (who may not be able to proceed without certification) or defendant (who may be compelled to settle after certification; (2) the certification decision shows a substantial weakness, amounting to an abuse of discretion; or (3) an interlocutory appeal will resolve an unsettled legal issue that is central to the case and intrinsically import to other cases but is otherwise likely to escape review." David E. Herr, *Manual for Complex Litigation (4th)*, § 21.28 at 314 (2005).

While those factors are definitely an improvement over no right to appeal, a recent study conducted by Skadden Arps on behalf of the Institute for Legal Reform looked at Rule 23(f) filings from October of 2006 through December of 2013. *See, Rule 23(f) Review of Certification Declining; Certification Disfavored on Appeal, Study Says, Class Action Litigation Report* (BNA May 2, 2014) with the underlying data found at http://www.skadden.com/newsletters/OUTCOMES_TABLE.pdf ,[19] (last accessed September 8, 2015). That study found that less than one quarter of petitions for interlocutory review under Rule 23(f) have been granted.

[19] See Summary Tables of 23(f) on the following page.

Appendix A

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

Summary Table of 23(f) Petitions Filed and Granted in Each Circuit

Circuit	Petitions Filed	Number Decided	Number Granted	Total Grant Rate	Def Filed, Decided	Def Grants	Def Grant Rate	PI Filed, Decided	PI Grants	PI Grant Rate	Cases Where Both Parties Petitioned	Dismissed/ Withdrawn	Pending
1	39	37	2	5.4%	25	2	8.0%	12	0	0.0%	0	1	1
2	129	111	28	25.2%	67	17	25.4%	42	10	23.8%	2 (1 granted)	14	4
3	73	67	24	35.8%	36	14	38.9%	29	9	31.0%	2 (1 granted)	5	1
4	12	12	4	33.3%	9	2	22.2%	3	2	66.7%	0	0	0
5	34	28	13	46.4%	13	9	69.2%	14	4	28.6%	1 (0 granted)	5	1
6	48	44	11	25.0%	28	6	21.4%	16	5	31.3%	0	3	1
7	119	113	32	28.3%	63	23	36.5%	48	8	16.7%	2 (1 granted)	6	0
8	59	56	8	14.3%	37	7	18.9%	18	1	5.6%	1 (0 granted)	2	1
9	330	304	57	18.8%	157	23	14.6%	144	34	23.6%	3 (0 granted)	24	2
10	55	54	11	20.4%	31	9	29.0%	23	2	8.7%	0	1	0
11	65	53	13	24.5%	30	11	36.7%	22	2	9.1%	1 (0 granted)	11	1
DC	13	10	1	10.0%	5	1	20.0%	5	0	0.0%	0	2	1
Total	976	889	204	22.9%	501	124	24.8%	376	77	20.5%	12 (3 granted)	74	13

Note: Cases in which both parties filed petitions are reflected under Petitions Filed, Number Decided and Number Granted, but are not reflected in the data specific to plaintiffs and defendants. So as not to overstate how frequently class certification decisions were successfully challenged, they are treated as cases where a single petition was filed.

Appendix B

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

Outcomes of 23(f) Appeals Heard by the Courts

	Class certification granted below						Class certification denied below						
Circuit	Affirmed	Reversed	Pending	Dismissed	Unclear	Total	Affirmed	Reversed	Pending	Dismissed	Unclear	Total	Total
1		1		1		2						0	2
2	4	4	4	4	2	18	4	1	3	1	1	10	28
3	3	7	5			15	5	1	1	2		9	24
4		2				2		1	1			2	4
5	1	7		1		9	3	1				4	13
6	1	3		2		6	4	1				5	11
7	8	13	1	2		24	1	7				8	32
8	1	3	1	2		7	1					1	8
9	5	5	8	5		23	11	7	10	5	1	34	57
10	1	4	2	2		9			2			2	11
11		5	3	3		11	1	1				2	13
DC		1				1						0	1
Total	24	55	24	22	2	127	30	20	17	8	2	77	204

All cases in which class certification orders were affirmed in part are counted as "Affirmed."

The "Unclear" cases are those for which we could not find a disposition.

Two Second Circuit cases affirmed in part and vacated in part the district courts' grants of class certification. *Brown v. Kelly*, 609 F.3d 467 (2d Cir. 2010); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29 (2d Cir. 2009).

Three Ninth Circuit cases affirmed in part and reversed in part the district courts' denials of class certification. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011); *Kelley v. Microsoft Corp.*, No. 2:07-cv-00475-MJP (9th Cir. Sept. 14, 2010); *Edwards v. The First Am. Corp.*, No. CV-07-03796-SJO-FFM (9th Cir. June 21, 2010).

Of those petitions, review was granted in 24.8% of defendant petitions and 20.5% of plaintiff petitions. In contrast, an earlier study found that overall 36% of Rule 23(f) petitions were granted from December 1, 1998 through October 30, 2006, with 45% of defendant petitions and 22% of plaintiff petitions being granted. Barry Sullivan and Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277 (2008). In other words, the Courts of Appeals are becoming less receptive to interlocutory class certification review.

The study further showed that, as of its closing date, the overwhelming majority of granted petitions resulted in the reversal of a decision to certify a class (55 reversed, 24 affirmed at least in part) while the majority of class certification denials were affirmed (30 affirmed, 20 reversed). The study also showed great variation among the Circuits in the grant ranged from 5.4% in the First Circuit (only 2 grants out of 37 decisions on a Rule 23(f) petition) to 46.4% in the Fifth Circuit (13 grants out of 28 decisions of a Rule 23(f) petition).

DRI believes that these numbers suggest that – at least from the defendant's perspective – the promise that Rule 23(f) would reduce settlement pressure has not been met because the bulk of class certification decisions evade interlocutory review requiring the defendant to try a case involving a certified class to verdict in order to obtain review. We further believe that appellate review of class certifications decision is important precisely because of the burdens a certification decision can place on a defendant. *See*, Richard A. Nagareda, *Class Certification In The Age Of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 104 (2009) (highlighting the considerable room for "appellate oversight of class certification determinations, with the appellate courts cast in their familiar role of de novo reviewers…"). But as the 1998 Advisory Committee noted, the burdens placed on parties by an erroneous certification decision cut both ways.

As a result, we believe that Rule 23(f) should be amended to provide for mandatory appellate review of class certification decisions as described above. This proposal will:

(1) Ensure that what is often the most important legal determination in the case will not escape appellate review because of the pressure to settle. Rule 23 is, after all, a procedural device and a defendant's right to seek review of the procedural decision to certify a class should not be effectively eliminated by requiring a trial to final judgment in order have an erroneous certification decision reviewed.

(2) Ensure that the settlements that do occur are not mispriced as a result of uncertainty over the soundness of the district court's decision. *See*, Pollis at 1673-74.

(3) Avoid any uncertainty over the availability of Supreme Court review of certification decisions such as those raised by the denial of a discretionary appeals as discussed in *Dart Cherokee Basin Operating Company, LLC v. Owens*, 135 S.Ct. 547 (2014).

IV. DRI Proposal to Address "Shady Grove"

Section IV. addresses the issues created by the Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010).

BACKGROUND

In *Shady Grove Orthopedics Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 397 (2010), Shady Grove, a medical provider, brought a class action suit against Allstate for its refusal to pay interest on overdue benefits. Shady Grove alleged that it had treated Sonia E. Galvez for injuries she suffered in an automobile accident, and as partial payment for the care, Galvez had assigned Shady Grove her rights to insurance benefits under a policy issued in New York by Allstate. *Id.* Shady Grove tendered a claim for the assigned benefits to Allstate. *Id.* Under New York law, Allstate had 30 days to pay the claim or deny it. *Id.* According to Shady Grove, Allstate's payment on the claim was untimely and it refused to pay the statutory interest that accrued on the overdue benefits. *Id.*

Shady Grove filed a diversity suit in the Eastern District of New York to recover the unpaid statutory interest. *Id.* The District Court dismissed the suit, however, for lack of jurisdiction, reasoning that N.Y. Civ. Prac. Law Ann. § 901(b), which precludes a suit to recover a "penalty" from proceeding as a class action, applies in diversity suits in federal court, despite Federal Rule of Civil Procedure 23. *Id.* The District Court found that the statutory interest owed by Allstate was a "penalty" under New York law and thus the class action was prohibited by § 901(b). *Id.* And, because Shady Grove's individual claim fell short of the amount in controversy requirement, the District Court held that subject matter jurisdiction was lacking and the case should be remanded to state court. *Id.* The Second Circuit affirmed, holding that § 901(b) was substantive within the meaning of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and thus must be applied by a federal court sitting in diversity. *Id.* at 398.

The Supreme Court, in a plurality opinion,[20] reversed the decision of the Second Circuit, holding that § 901(b) does not preclude a federal district court sitting in diversity from entertaining a class action under Rule 23. *Id.* at 416. A majority of the Court held that if Rule 23 answers the question in dispute, it governs unless it exceeds its statutory authorization or Congress's rulemaking power. *Id.* at 398. The Court found that Rule 23(b) answered the question in dispute – whether Shady Grove's suit may proceed as a class action – because it stated that "[a] class action may be maintained" if certain conditions are met. *Id.* Because § 901(b) attempted to answer the same question, in stating that Shady Grove's suit "may not be maintained as a class action" because of the relief it seeks, the Court held that § 901(b) cannot apply in diversity suits unless Rule 23 is ultra vires. *Id.* at 399.

[20] Only Parts I and II-A of Justice Scalia's opinion reflect the views of a five-person majority. Part I describes the case and the basic question presented, *see id.* at 397-98, while Part II-A concludes that Rule 23 answered the "question in dispute" – whether a class action may be maintained in the case before it. *Id.* at 398-406. Justice Ginsburg wrote the dissenting opinion, in which three justices joined. *Id.* at 437-459.

ANALYSIS

A. The Problem Created by the Court's Decision in *Shady Grove*.

The problem created by the Supreme Court's decision in *Shady Grove* was acknowledged by the Court itself – namely, that the holding "keep[s] the federal-court door open to class actions that cannot proceed in state court" and therefore "will produce forum shopping." *Shady Grove*, 559 U.S. at 415. The holding of Shady Grove is particularly problematic because it provides no policy reason for treating class actions removed to federal court differently on a substantive basis than those that are not. As Justice Stevens noted in his concurring opinion, Justice Scalia's broad finding that Rule 23 "unambiguously authorizes *any* plaintiffs, in *any* federal civil proceeding, to maintain a class action if the Rules' prerequisites are met"[21] goes too far, allowing a federal procedural rule to "displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove*, 559 U.S. at 423. In that instance, Justice Stevens wrote, the federal procedural rule "cannot govern." *Id.* Simply put, "[i]f a district court follows Justice Scalia's approach, then the decision to remove a putative class action to federal court would result in the loss of the very grounds – a state law prohibiting class certification – that would otherwise defeat class certification in state court." Martin A. Stern & Taylor E. Brett, R*emoval of Class Actions: What Danger Lurks in Shady Grove*, 82 Def. Couns. J. 161, 162 (April 2015).[22]

B. The Reasoning Behind the Proposed Change to Rule 23.

Justice Scalia's own language suggests a necessary change to Rule 23 to resolve the issue posed by *Shady Grove*:

> Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. But that is exactly what Rule 23 does: It says that if the prescribed preconditions are satisfied "[a] class action may be maintained"-- not "a class action may be permitted." Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's "may" is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 automatically applies "in all civil actions and proceedings in the United States district courts." *Shady Grove*, 559 U.S. at 399-400.

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[21] *Shady Grove*, 559 U.S. at 406.

[22] Moreover, the *Shady Grove* decision appears to be in tension with a long line of cases holding that whether to certify a class is within the discretion of the court. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) ("The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court. On the facts of this case, we cannot conclude that the District Court . . . abused that discretion . . . ."); *Prof'l Firefighters Assn. of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012) ("The district court is accorded broad discretion to decide whether certification is appropriate, and we will reverse only for abuse of that discretion."); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 416 (6th Cir. 2012) ("The district court has broad discretion to decide whether to certify a class . . . . We review class certification for an abuse of discretion." (Citation omitted)); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004); *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001) (noting the norm that the district court has "broad discretion" to certify class); *Hartman v. Duffy*, 19 F.3d 1459, 1471 (D.C. Cir. 1994). *See also* William Hubbard, *Optimal Class Size, Dukes, and the Funny Thing About Shady Grove*, 62 DePaul L. Rev. 693, 707-09 (Spring 2013).

In other words, Justice Scalia's interpretation of Rule 23's mandatory application hinges on the language in Rule 23(b) that vests discretion with the plaintiff rather than the Court. If the language is revised to vest discretion with the Court, then Rule 23 no longer acts as "categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action,"[23] and there is no direct conflict between the federal rule and state statutes that limit a plaintiff's ability to "maintain" a class action.

Moreover, a further change to Rule 23 that would prohibit the certification of class actions where the underlying state statute on which the plaintiff bases its claims specifically disallows aggregate relief would alleviate forum shopping and related concerns that flow from the disparate treatment of such cases that are removed to federal court. Such an amendment would follow Justice Stevens's opinion that state laws that limit a plaintiff's ability to bring a class action are not preempted by Rule 23 if 1) the limiting provision is found within the text of a state statute that confers a substantive right and 2) applies only to cases brought under the statute.

PROPOSED CHANGES TO RULE 23 TO ADDRESS *SHADY GROVE*

Thus, to address the problems posed by the Court's decision in *Shady Grove*, the following changes are suggested to Federal Rule of Civil Procedure 23:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
  (1) the class is so numerous that joinder of all members is impracticable;
  (2) there are questions of law or fact common to the class;
  (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; ~~and~~
  (4) the representative parties will fairly and adequately protect the interests of the class; and
  (5) the action is not brought under a state statute that (i) confers a substantive right; and (ii) prohibits recovery of class actions under the statute.

(b) TYPES OF CLASS ACTIONS. A class action may be ~~maintained~~ permitted if Rule 23(a) is satisfied and if: . . . .

V. DRI Comment on Subcommittee's Conceptual Sketch of RULE 23(B)(4) – Settlement Class Certification Without Predominance

The DRI opposes the proposed addition of the new category of certifiable class actions reflected in the proposed Rule 23(b)(4). While it might make cases easier to settle on a class action basis, that is not a valid goal of the rules of procedure where the case is not otherwise deserving of class treatment. There is no good policy reason for a rule providing that claims which are too individualized to be certified as a class for litigation purposes is nevertheless certifiable as a class for settlement purposes. Moreover, the risks and unintended consequences of such a change would be significant and highly undesirable.

[23] *Shady Grove*, 559 U.S. at 398.

By definition, what this proposal seeks to do is to enable the classwide settlement of cases in which individualized issues predominate, and foreclose consideration of those overriding individual differences in the settlement certification process. Such a rule, however, would present serious Constitutional concerns given the United States Supreme Court's past indications that ignoring individual differences has Constitutional implications. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)); *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541, 2561 (2011); *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423 (1915); *see also Philip Morris USA, Inc. v. Scott*, — U.S. —, 131 S. Ct. 1, 3-4 (2010) (Scalia, J., in chambers) (granting a stay of the judgment and noting that fraud claims required proof of individual reliance, which defendants were unable to contest because the trial court relied on representative proof). Due process must always underlie the procedures a court applies, even when a case travels under the "class action" banner. *See* Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) & the Impact of General Telephone v. Falcon*, 54 Ohio St. L.J. 607, 609 (1993). In due process terms, the class action device is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979)). Even as it already stands, Rule 23(b)(3) had been called the "most adventurous" departure from the normal due process rule of individual adjudication. *Amchem Prods., Inc. v. Windsor*, 521 U.S 591, 614-15 (1997). Ignoring the potential conflict between further expansion of Rule 23(b)(3) and the Due Process limits on class treatment will also encourage similar adventurous experiments in state court, where the Due Process limits upon state class action procedures are already being litigated but are not yet fully developed. *See*, *e.g.*, *Petition for Certiorari* in *Wal-Mart Stores v. Braun,* No. 14- 1124 in the Supreme Court of the United States.

As the Supreme Court recently made clear in *Dukes,* the commonality requirement of Rule 23(a) requires proof that at least one key issue which drives the adjudication of the case is susceptible of a common answer. 131 S. Ct. at 2556. But the predominance requirement takes that a step further, requiring courts to assess whether individual or common issues would predominate in assessing and adjudicating the claims of every class member and the defenses asserted to those claims. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW & PRACTICE § 5:23 at 1263 (10th ed. 2013). In so doing, predominance tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623.

Therefore, the aim of the predominance requirement cannot be fulfilled by reliance on the commonality inquiry alone. They two are distinct inquires, with predominance being a critical test to determine whether the class is "sufficiently cohesive" to warrant class treatment at all. A class that is not "sufficiently cohesive" to warrant representative adjudication in the first place cannot logically be transformed by the handshake of the lawyers into one that is sufficiently cohesive to warrant representative adjudication for purposes of settlement. As the Supreme Court has observed, "it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623; *accord Ortiz*, 527 U.S. at 858 ("A fairness hearing under subdivision (e) can no more swallow the preceding protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3).").

If one assumes that the proposed change achieved its stated goal, and that the predominance of individual issues would then no longer be a concern in certifying settlement classes, then the logical result would be that virtually any claim could be pursued on a class basis. While the proposal

purports to maintain the "superiority" requirement for settlement classes, the proposed rule fails to articulate what "superiority" would mean once completely divorced from the traditional predominance inquiry. After all, from the narrow perspective of the convenience of the court and abstract efficiency, any class settlement is superior to the prospect of individual litigation by each member of the class. But if that alone is the effective meaning of superiority under this proposal—and it seems it would have to be if the predominance of individual issues is expressly removed from the equation for purposes of settlement—then superiority effectively becomes a rubber stamp for settlement classes. It is indeed difficult to imagine any putative class action that could not be certified for settlement purposes if the predominance of individual issues is truly no longer a concern. Would common law fraud class actions now be certifiable for settlement purposes despite the necessity of proving individual reliance in litigated individual cases? What about nationwide personal injury class actions? Mental anguish claims? How does the proposal guarantee otherwise?

Similarly, substantial uncertainty would attend interpretation of Rule 23(a)'s adequacy and typicality requirements if an inquiry into the predominance of common issues is removed from the settlement certification analysis. The "safeguards provided by the Rule 23(a) and (b) class qualifying criteria … are not impractical impediments—checks shorn of utility—in the settlement-class context," rather these "standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem Prods.*, 521 U.S. at 621. In what sense is a proposed representative adequate and his or her claims typical if each individual's claim admittedly turns on predominantly individual and not common facts? In what sense is representation for purposes of settlement "adequate" if the representative would not have the power to assert the claims of absent class members in litigation, and the bargaining leverage that comes with the willingness and ability to use that power? Class judgments can be collaterally attacked for lack of adequate representation. *See Hansberry*, 311 U.S. at 45 ("a selection of representatives . . . whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."). The elimination of the predominance tests for certification of settlement classes risks the unintended effect of fostering more collateral attacks on class settlements because it would effectively and inevitably foster representation of absent class members by persons whose claims are predominately the same as theirs

The 23(b)(4) proposal would in fact create unavoidable perverse incentives on the part of counsel for both sides. Plaintiffs' counsel would now have undeniable incentives, and indeed implicit permission in Rule 23 itself, to file otherwise uncertifiable class action complaints with the intent and purpose of using the cost and risks of defending them to force a class settlement. This problem already exists to a significant extent under the current version of Rule 23, and has been called the "blackmail effect" of class litigation. *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S. Ct. 1740, 1752 (2011) (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677-78 (7th Cir. 2009)); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1299-1300 (5th Cir. 1995). The 23(b)(4) proposal would make that problem much worse. The federal courts would surely see substantial increases in class action filings, since by definition it would then be entirely permissible to file suit with the aim and purpose of achieving settlement certification even for an otherwise uncertifiable class. These otherwise admittedly illegitimate class actions would then very frequently result in class settlements simply because it would very often be cheaper for defendants to settle these cases than litigate them. Indeed, once these cases are filed, both plaintiff's counsel and defense counsel would have clear incentives to disregard individualized variations and differences in favor of a deal that, in the

absence of Rule 23(b)(4), would surely have been deemed a collusive settlement. After all, Plaintiffs' counsel in these cases would have little to bargain with in negotiating settlement of these cases, since the defendant would face no real threat of classwide liability in litigation. *See, e.g. Amchem Prods.,* 521 U.S. at621 ("if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation [for settlement purposes] despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer…").

Indeed, if 23(b)(4) became law, it is not hard to imagine that the very fact that the class is *not* certifiable for litigation would become a popular reason for the plaintiffs' counsel to propose, and for the court to approve, a classwide settlement for mere pennies on the dollar. *Cf. City of Detroit v. Grinell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (risk that class certification could not be maintained through trial endorsed as a factor favoring approval of class settlement), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000). In these and other ways, the adequate representation of absent class members that is critical to due process is inevitably undermined by creating an easy path to settlement certification even where individual issues admittedly predominate and claims are therefore predominately dissimilar. This approach stands the concept of due process on its head.

Placing the burden entirely on the court to ensure the protection of absent class members merely by reviewing the fairness of the settlement's terms is hardly an answer to these problems. The certification of the class and the fairness of a settlement are separate inquiries. In the absence of properly incentivized adversarial advocacy, courts cannot be expected to be fully informed of the important variations in individual claims that may affect both inquiries. The Rule 23(b)(4) proposal largely serves as a disincentive to such advocacy.

There is another problem with the proposal. If the rule were adopted as proposed, it is unclear whether a class certified on this basis would automatically be vacated if the settlement which generated it were disapproved or failed to become effective, or whether a court could deem the parties estopped to challenge certification once they have supported it under the proposed new rule 23(b)(4). *Cf. Carnegie v. Household, Inc.,* 376 F.3d 656, 660 (7th Cir. 2004) (Posner, J.) (holding that parties who had stipulated that Rule 23(a) factors were met for purposes of settlement were judicially estopped to deny that the class met those same Rule 23(a) requirements for purposes of litigation after the settlement fell through). This problem would need to be explicitly addressed if any form of the 23(b)(4) proposal were adopted.

If the new settlement certification provision were applied to (b)(1) and (b)(2) as well as (b)(3), a possibility alluded to but not fully developed in the draft comments to the proposed rule, then all of the foregoing problems are only compounded, and still other new problems and uncertainties would be created.

The abstract efficiency of settling numerous claims at once is simply not a reason in and of itself to certify a class where the underlying issues, claims and damages are predominantly individualized and varying rather than common. In terms of ensuring that the rights of absent class members are fairly represented in proceedings brought by a self-selected class representative, the fees and classwide release that would make such settlement certifications financially attractive to both would-be class counsel and the defendant are hardly a substitute for the identity of interests that the predominance requirement assures. The 23(b)(4) proposal would inevitably be perceived as placing the interests of

class action lawyers ahead of the true interests of individual class members, exacerbating the already widespread perception that class settlements primarily benefit lawyers at the expense of clients. *See, e.g.*, *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (expressing "fear that class actions will prove less beneficial to class members than to their attorneys, [which] has been often voiced by concerned courts and periodically bolstered by empirical studies"). The DRI's national poll data confirms the breadth and persistence of the public's narrow view of class actions. *The DRI National Poll on the Civil Justice System*. It undermines the credibility of the class action device and the class action bar to have a rule that effectively says on its face that classes which are not cohesive, not susceptible of common proof on the predominating issues, and therefore admittedly uncertifiable for purposes of litigation, can nevertheless be a candidate for certification as a settlement class so long as the opposing lawyers agree to settle it on a class basis.

Nor is this the right cure for the problem that some courts see judicial estoppel consequences to the defendant from proposing a class settlement if the class settlement fails. *See, e.g., Carnegie v Household International, Inc.*, 376 F. 3d 656 (7th Cir. 2004). Incentivizing the filing of class actions in which individual issues predominate risks causes more harm than good, and would not prevent a risk of judicial estoppel as to the elements of Rule 23(a) – a problem which *Carnegie* itself demonstrates. In any event, judicial estoppel from a failed class settlement does not seem to be a concept many courts have embraced. Traditionally, judicial estoppel applies only when the party asserting the position has in fact prevailed in arguing the prior position and would gain unfair advantage by contradicting it. *See, e.g.*, *Zedner v. U.S.*, 547 U.S. 489, 503-06 (2006); *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). The notion of "temporary advantage" from a failed settlement, the concept embraced by the *Carnegie* court as sufficient to trigger the doctrine, seems a distinct stretch of the concept, and one not widely followed. Moreover, the concept typically applies to inconsistent positions of fact, not inconsistent positions involving propositions of law. *Lowery v. Stovall,* 92. F. 3d 219, 224 (4th Cir. 1996) (citing *Tenneco Chemicals, Inc. v. William T. Burnett & Co., Inc.,* 691 F.2d 658 (4th Cir. 1982). "Predominance" is largely a conclusion of law, deriving from legal analysis of the elements of the claims and defenses at issue.

A better cure for this problem would be language in the Rule simply saying that in the event a proposed class settlement is not approved, filings in support of or against a class settlement shall not be considered by the Court in determining a subsequent contested motion for class certification in that or any other case. That would resonate with the prohibitions on the use of settlement-related offers and settlement-related statements found Federal Rule of Civil Procedure 68(b) and Federal Rule of Evidence 408(a) and the policies supporting those Rules. *See* FED. R. CIV. P. 68(b) & advisory committee notes to 1946 amendment; FED. R. EVID. 408 & advisory committee notes. Alternatively, defendants can avoid the judicial estoppel risk by simply not taking a position on the Rule 23(a) and (b) factors at all for purposes of settlement, and allowing plaintiffs' counsel to argue those issues, and Rule 23 could easily be modified to expressly authorize this approach.

VI. DRI Comment on the Subcommittee's Conceptual Sketch Relating to *Cy Pres*

The Subcommittee has proposed adopting § 3.07 the ALI Principles regarding *cy pres* as an amendment to Rule 23(e). In particular, this proposal would permit a court to approve a proposal that includes a *cy pres* remedy, even if such a remedy could not be ordered in a contested case. The proposal also provides the criteria a court should consider in determining whether a *cy pres* award is appropriate. The Subcommittee stated at a recent conference that its reasoning, at least in part, for proposing such changes is to maximize compensation to class members rather than third parties.

DRI agrees with the principle that settlement funds should be directed to class members and third parties, but submits that the proposed change is unnecessary and may actually do more harm to the stated goal than good. The change is unnecessary because courts already do consider the criteria listed in the proposed amendment to Rule 23(e), *see e.g.*, *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063-64 (8th Cir. 2015) (discussing application of the American Law Institute's standards for cy pres awards); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (similar), and there is an entire industry of objectors ready and willing to ensure that courts consider such factors.

If a court finds that a settlement's notice plan and claims process are appropriate, and the amount of the settlement fund is "fair, adequate, and reasonable," then there should be no residue in a settlement fund, or no problem with it reverting to the defendant. DRI appreciates that the Subcommittee's September 2015 comments recognize this. The Subcommittee has proposed bracketed text that would suggest that reversion is an alternative to cy pres.

The Subcommittee appears concerned in connection with that sketch that defendants would press for unduly exacting claims processing procedures. But there are at least three mechanisms in place to deter such conduct. First, plaintiffs' counsel have not only an interest but a duty to ensure that the claims processing procedures are fair. Second, the judge has a duty and obligation to look at the same. Third, objectors often focus on the claims processing procedures. And finally, defendants who have decided to settle want the settlement to be approved, so they are likely to want the claims procedures to be fair so that the settlement is approved.

While the Subcommittee focuses on concerns about what defendants do, little attention is paid to plaintiffs' conduct. As the Subcommittee's conceptual sketch regarding notice recognized, notice methods have changed. Dutiful plaintiffs' counsel nowadays are often monitoring notice and claims returns to maximize claims. The good counsel are looking, in real time, at which electronic notice methods are maximizing claims returns and directing notice administrators to spend more of the funds on those sources rather than on ones not delivering results. Incentivizing plaintiffs to actually get the notice plan right and be vigilant about trying to achieve a healthy claims rate is a better method to maximize payments to class members than codifying a procedure for giving the money to a third party. The Subcommittee could augment the committee notes to the notice provisions to suggest that courts look at plaintiffs' counsel's diligence in conducting the notice program in analyzing fees to be awarded.

Similarly, if courts assessed plaintiffs' counsel's fees in terms of how much of the funds were distributed to class members – rather than how much was diverted to *cy pres* – this too may provide better incentives for plaintiffs' counsel to direct funds to class members. Such incentives could be reinforced by including language in Rule 23 that would exclude *cy pres* payments from attorneys' fee calculations. Judges are increasingly finding that attorneys' fees should be awarded based on the amount of benefit to the class members, *see Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *Pearson v. NBTY, Inc.*, 722 F.3d 778 (7th Cir. 2015), and because *cy pres* awards do not benefit the class members, plaintiffs' attorneys should not

be compensated for directing fees to *cy pres* recipients. Such a change would be consistent with where the case law is trending.[24]

Amending Rule 23 to codify the propriety of *cy pres* also may be counterproductive because the reality is that with these changes, plaintiffs' counsel will say that *cy pres* is now blessed by the Federal Rules, so it should be a component of every settlement. This could provide plaintiffs more leverage in settlement than they would have in litigation, which does not appear to be (nor should it be) the Subcommittee's goal. Parties need the flexibility to determine if *cy pres* is appropriate for each particular case. If plaintiffs' case is weak and few claims are expected because, for example, people did not feel harmed by the defendant's conduct, there is no reason the settlement should not reflect that reality and plaintiffs compensated accordingly.

Moreover, in DRI's experience, there is no reason to presume that "individual distributions are not viable for sums of less than $100," as the conceptual sketch originally stated. Many cases involve less than $100 where individual distributions are viable, as the Subcommittee recognized with its example of bank fees that are less than $100 and the bank could easily identify those account holders. But even if distributions are difficult, that reflects a problem with the named plaintiff's ability to prove ascertainability, which suggests that the case is worth less than it would be if class members were ascertainable, and justifies a lower recovery, lower payment by defendants, less or no *cy pres*, and a lower attorneys' fee award – none of which the proposed sketch addresses. Moreover, if it is impractical to distribute a settlement of a few dollars each to lots of class members, does that suggest that class treatment is really not superior to individual litigation after all? Those situations may be better left to regulatory enforcement actions. Class actions are not regulatory enforcement actions, and self-appointed, financially interested, roving private class counsel should not be able to extract the equivalent of a regulatory fine simply by leveraging the defense costs of class litigation into a *cy pres* settlement.

We also are concerned with the Subcommittee's suggestion that distributions to class members who submitted improper claims should be topped up before *cy pres* distributions are made. This is problematic for several reasons, but primarily because of the lack of specificity. The only type of claims that the Subcommittee suggests should be topped up are untimely claims. The reality is that the parties often decide to pay untimely or otherwise improper claims to avoid having to disturb the court or risk objections on such issues. Without more specificity, the Subcommittee's change suggests that the parties may be required to pay claims where the claims administrator has determined that the claimant is not entitled to relief. Parties often build fraud-prevention into their claims process, and they need the flexibility to determine whether a claim is fraudulent and should

[24] Congress did the same thing in CAFA when it required that attorneys' fee awards be calculated based on the amount of coupons redeemed, *i.e.*, the actual benefit to the class, not the face value of the coupons issued. The same should be true with respect to non-coupon class action settlements. We assume the amount of money that is "fair, adequate, and reasonable" is the amount that plaintiffs' counsel and the defendant agree upon, but it is entirely possible in this day and age when everyone is inundated with class action settlement notices that people are simply choosing not to make claims because they do not believe they were injured, they like the product about which the lawsuit was brought, or simply do not want to bother making a claim even if the process is very easy. Again, if we assume that notice and the claims process are adequate, as we must if a settlement is to be approved, there is no reason to think any remainder is excessive and should be redistributed (which may result in a windfall to class members). It may be that the plaintiff simply did not have a strong case, in which case it is fair and reasonable to revert the remainder back to the defendant. A reverter, which then would not be counted in plaintiffs' counsel's fees, provides incentives to plaintiffs to only bring claims where class members have actually been harmed and will take advantage of opportunity for compensation.

not be paid. Is the Subcommittee suggesting such claims should still be paid? In addition, the Subcommittee does not address how much topping up is necessary, and in fact suggests that claimants should be paid more even if they already have been paid "in full." DRI does not understand why the federal rules would support giving class members more than was bargained for. Many settlement agreements already include provisions for additional *pro rata* distributions if the fund is under claimed, so is the Subcommittee blessing those provisions or requiring more than that to which the parties agreed?[25]

The Subcommittee has reported that "[m]uch concern has been expressed in several quarters about questionable use of *cy pres* provisions, and the courts' role in approving those arrangements under Rule 23." But the Subcommittee's proposals do not address the questionable role of judges and objectors in influencing the recipient or amount of the *cy pres* award. For example, the Subcommittee may be interested in a website located at www.ohiolawyersgiveback.org, which appears to be run by a law firm that promotes the use of *cy pres* in class action settlements and actually encourages charities to apply to be *cy pres* recipients. In DRI's experience, the law firm then goes out and objects to settlements in order to get that charity a piece of the settlement funds.

Although the conceptual sketch would restrict *cy pres* recipients to those whose interests "reasonably approximate" those being pursued by the class, that does nothing to prevent judges or objectors from directing the residue to their pet charities. For their part, judges have been known to "suggest" that *cy pres* funds be donated to local bar foundations or other charitable organizations to which the judge belongs or presides over, and often this is not done on the record. Given that the judge is approving or rejecting the settlement, the parties often feel coerced into making the donation the judge "suggests."

DRI is not opposed to *cy pres*; its members routinely use it and like having the option of using it to settle cases. Our members need the flexibility to determine when it is appropriate, however, and we are concerned that having the concept engrafted into the Federal Rules as proposed would put defendants in a weaker bargaining position that they would be without it.

VII. DRI Comment on Subcommittee's Conceptual Sketch on Objectors

The Subcommittee has sketched out two possible amendments to Rule 23 related to class action settlement objectors. First, the Subcommittee has raised for discussion changes to Rule 23(e)(5) that would require an objector seeking to withdraw an objection to not only obtain court approval to withdraw (which is already required by the current rule), but also file a statement identifying any "agreement made in connection with the withdrawal." Second, the Subcommittee has proposed language regarding sanctions of objectors if objections are made for improper purposes. In doing so, it has proffered two possible options: (a) language added to 23(e)(5) to make objections subject to Rule 11; or (b) language added to the effect that a court *may* impose sanctions "if the court finds that an objector has made objections that are insubstantial [and/or] not reasonably advanced for the purpose of rejecting or improving the settlement."

[25] What does the Subcommittee mean in the bracketed text of page 16 of the September comments when it says "As an alternative, or additionally, a court may designate residual funds to pay class members who submitted claims late or otherwise out of compliance with the claim processing requirements established under the settlement." Is this suggesting that courts rewrite settlement agreements? They have no authority to do so.

As an initial note, we completely agree with the Subcommittee's expressed concern that, while some settlement objectors serve a useful purpose (the Subcommittee calls them "good" objectors), others hold up the settlement in the hopes of extracting money from the settling parties, and serve no purpose in improving the settlement (the Subcommittee calls these objectors "bad" objectors). The expressed intention of proposed Rule 23 changes related to objectors is to create a disincentive for the "bad" objectors. While it is definitely true that many objectors are often motivated more by money than by any improvement in recovery for the class, and that "professional objectors" are using Rule 23 as a source of income rather than a method of good legal reform, it does not appear that the changes proposed would necessarily serve the purpose of diminishing or eradicating their practices.

First, in our experience, it appears that Courts are already well-equipped to know who is a "good" objector and who is a "bad" objector. The Parties often spend significant time educating the judge on the history of the objectors, and can tell from briefing and oral argument what purpose they are serving, if any. Moreover, no objector is completely "good" or completely "bad." Most will be mixed – *i.e.*, they are bringing legitimate objections and seeking improvements to a settlement, but their motivation at the end of the day is monetary only. It seems overly simplistic to put objectors into "good" and "bad" categories, without also leaving room for the nuanced considerations (already in use by Courts) to determine how much weight to give objections.

Second, it does not necessarily follow that requiring notification of side agreements before an objector can withdraw will actually lead to less objectors. Rule 23(e)(5) already requires court approval to *withdraw* objections made at the district court level. This seems too late. Why not require court approval to *make* an objection? If we believe that most objections are worthless, why would we make it more difficult to withdraw, rather than more difficult to object in the first place? Moreover, it is questionable whether Rule 23(e)(5) (adopted in 2003), requiring court approval for withdrawal of an objection, actually decreased the number of "hold up" objectors (*e.g.*, professional objectors) simply seeking money, which was its intended purpose? It would seem that adding barriers to withdrawal of an objection may not serve the purpose of reducing objections in the first place – it may just lead to less withdrawals, which is not the desired benefit.

Third, the idea of sanctions, while seemingly helpful for dissuading objectors with less than pure motives, seems rife with difficulty. Sometimes an objector does not have a full record (*e.g.*, if parts of the record are under seal) and may not have a full record unless and until he files an objection. An objector may not be able to say he is complying with Rule 11 when he does not have a full record of the facts. Moreover, a court already has authority to impose sanctions under 28 USC §1927; extra authority is not needed to impose sanctions against objectors.

Finally, every settlement can always be "better" or more beneficial to class members – it is a product of compromise. An objector will typically be able to put forth some argument that appears to have a purpose of improving the settlement (*i.e.*, publication notice that reaches 85 instead of 75 percent; longer claims period; simpler claim form). It may very well be that any changes making life more difficult for objectors are a good thing, as viewed from the defense side of the bar, but we would ask that the Committee first consider whether previous amendments restricting withdrawal of objections have actually led to less objectors. Also, the Committee should consider whether there are other methods that could be used to separate out the "good" objectors from the "bad" objectors, perhaps by expressly allowing for discovery into the objectors' litigation history.

VIII. DRI Comment on Subcommittee's Conceptual Sketch on Issue Certification

Even in the usual course, "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-1291 (2002) ("[E]mpirical studies…confirm what most class action lawyers know to be true[.]"); see also *Nagareda*, *supra*, at 99 ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Indeed, a 2005 study conducted by the Federal Judicial Center found that roughly 90% of the suits under review that were fi led as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). This is because class actions place defendants in the untenable position of betting the company on the outcome of a trial. Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). Fear of negative publicity is also a motivating factor to settle even weak class claims. L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 La. L. Rev. 157, 222 (Fall 2004).

The elimination of predominance to pave an easier path to issue certification would lead to even more "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). There is no compelling policy for a change that would allow abusive class actions to progress more easily to certification – and legally unwarranted settlement. The enhanced leverage of an easier path to certification of some sort would inevitably trigger the filing of many more "strike suits" brought by opportunistic plaintiffs' attorneys to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996). The strain this places on the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated. Even without this easier path to certification, class actions can sound the death knell for new companies and those suffering under today's current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010). But the removal of the predominance requirement from the issue class certification equation gives even more power in upfront settlement discussions to plaintiffs whose claims might require individualized causation and remedy determinations. "Such leverage can essentially force corporate defendants to pay ransom…" S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010). And the ripple effects of these exorbitant settlements will be felt throughout the economy. The costs of settlements are, at least partially, inevitably passed on to consumers in some form or another. Removal of superiority and manageability issues from the issue certification equation in addition to eliminating the predominance requirement would only exacerbate these problems.

But there will be additional victims, too, if issue classes may be certified under Rule 23(c)(4) regardless of Rule 23(b). This approach will place a robust strain on the courts and judges called on

to adjudicate these "issue" class claims. It is well-understood that class action litigation consumes more judicial resources than individual litigation. In fact, one study found that class actions consume almost five times more judicial time and resources than non-class civil actions. Thomas E. Willging, *et. al.*, *Empirical Study of Class Actions in Four* 13 *Federal District Courts*, 7, 11, 23 (1996). It becomes even more problematic for the bench to carry out proceedings when adjudication of a class suit involves both class *and* individual trials. The class action mechanism should not be used in situations where proper adjudication of the claim will require individualized proofs and trial; these claims are better brought as individual suits.

DRI submits that the concept of issue classes should be eliminated from Rule 23 altogether. Alternatively, the rule should be amended to at least make it explicit that all of rule 23(b)'s existing requirements apply with full force to issue classes. Reaffirming the notion that class actions are limited to situations where common classwide claims can be resolved through a single trial will go a long way in preserving the district and appellate courts' limited judicial resources. Rule 23(b) provides the key component of the balance of when class treatment is preferable over individual actions. The issue certification concept, especially if predominance and/or superiority and manageability concepts are removed from the equation, disrupts this careful balance by allowing a class unable to fit within one of the types set forth in Rule 23(b) to proceed as an "issue" class even though final resolution of the claims will require individualized proofs and trials.

The need for issue class certification is hardly apparent. Where claims are predominantly individual but involve common issues, the doctrine of non-mutual offensive collateral estoppel already provides an avenue whereby resourceful litigants and judges can, where it is fair to the defendant to do so, avoid the need for that issue to be determined over and over as to the same defendant. *See, e.g., Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

In the final analysis, courts are in the business of resolving claims, not issues. Adjudicating issues but not claims on a classwide basis also presents serious Seventh Amendment concerns *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995). It may also present due process concerns. The United States Supreme Court has repeatedly observed that Rule 23(b)(3) is the "most adventuresome" of Rule 23's experiments with the due process norm of an individual's right to his own day in court. *See, e.g., Amchem Prods. Inc. v Windsor,* 521 U.S. 591, 614 (1997). Removing its predominance, superiority and manageability components for an issue class certification is more adventuresome by far. The due process risk is even greater under the Subcommittee's sketch proposals to the extent a right of opt out is not explicitly mandated for issue classes. Having class members bound by *res judicata* to an adverse determination of an issue critical to their individual claims without a right of opt out would almost certainly offend due process when the claims at stake do not turn on predominantly common issues to begin with.

If the concept of issue certification remains in any form, then an appeal as of right should lie from any order granting such certification for the reasons outlined in Section III above. Indeed, given the increased settlement leverage and reduced overall efficiency inherent in an easier path to issue class certification, the need for an appeal of right would be even more acute if any version of the Subcommittee's issue certification proposals were adopted.

CONCLUSION

DRI is grateful for the opportunity to submit these comments to the Subcommittee, and wishes to express its sincere appreciation for the active participation of several members of the Subcommittee in the recent "town hall meeting" at the 2015 DRI Class Actions Seminar in Washington D.C. We stand ready to respond to any follow-up questions the Subcommittee may have.

John Parker Sweeney, President of DRI – Voice of the Defense Bar

Testimony Before

Subcommittee on the Constitution and Civil Justice
The U.S. House of Representatives

February 27, 2015

"The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act"

John Parker Sweeney, President of DRI – Voice of the Defense Bar
Testimony Before The
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"The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act"

Good morning, Mr. Chairman, Mr. Cohen, and members of the subcommittee. I am John Parker Sweeney, president of DRI – The Voice of the Defense Bar. I will summarize my statement and ask that my full statement be included in the record.

I want to first thank the subcommittee for allowing us to appear here today. With 22,000 members, DRI is the largest association of lawyers defending American businesses – large and small – in court. Over the past four years, we have submitted 23 amicus briefs to the Supreme Court in cases involving class actions. We also conduct the nation's only annual national opinion poll devoted exclusively to the civil justice system.

I would also like to express our appreciation for the time and skill that went into the enactment of the Class Action Fairness Act of 2005. This legislation brought increased fairness and efficiency to the civil justice system. The importance of CAFA is highlighted by the Supreme Court's significant decisions over the past ten years in the areas of class and collective actions.

Representative actions such as class actions and collective actions are exceptions "to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682, 700-701 (1979). Exceptional litigation can create exceptional problems and calls for exceptional treatment and the enactment of CAFA helped address some of the exceptional problems inherent in aggregate litigation. As with most important legislation, the passage of time and the accrual of practical experience reveal

opportunities that would make the law more effective, as well as address the vulnerabilities that threaten its purposes.

Although there are a number of areas of concern to DRI's members, we would like to highlight today three areas we believe merit further study and reform:

1) No-injury class actions;

2) The use of the *cy pres* doctrine to increase the cost of class action settlements; and

3) Continued issues with removal of class actions to federal court.

Each of these areas presents unique challenges and each impacts the very concerns that led to the enactment of CAFA in the first place. We believe CAFA's reforms have worked and our discussion here is intended to highlight issues that warrant further review.

I. NO-INJURY CLASS ACTIONS

Article III standing is an "irreducible constitutional minimum," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and an individual lacks standing unless he has been affected "in a personal and individual way." *Id*. at 560 n.1. A plaintiff cannot rely on any injury others may have suffered to satisfy this requirement. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[T]he plaintiff . . . must allege a distinct and palpable injury to himself . . . ."). In other words, the plaintiff must have suffered an "injury in fact."

Yet defendants today face abstract claims that threaten to undermine the civil justice system: suits brought by plaintiffs who admittedly have not been harmed on behalf of a proposed class of similarly unharmed individuals. In these no-injury class actions, plaintiffs ask the courts to ignore the requirement of harm, often by seeking to recover some fixed amount or range of statutory damages without any showing of an injury.

Much of our concern over "no-injury" classes involve suits brought under state law, such as deceptive trade practices or consumer protection statutes that provide for a measure of damages untethered to any actual harm sustained by a person. With respect to such "statutory damages," one commentator has explained:

> Several states provide that private litigants may recover statutory damages, which are the greater of actual damages or an amount ranging from $25 in Massachusetts to $2,000 in Utah. State laws allow plaintiffs to receive the statutory minimum without proving actual damages. Nebraska law allows the court, in its discretion, to increase the award 'to an amount which bears a reasonable relation to the actual damages' up to $1,000 when 'damages are not susceptible of measurement by ordinary pecuniary standards.'

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 22-23 (October, 2005).

Federal statutes also contain statutory damages provisions. For example, the Fair and Accurate Transaction Act of 2003 ("FACTA") requires retailers to truncate credit card information on electronically printed receipts given to customers. 15 U.S.C. § 1681c(g). A part of the Fair Credit Reporting Act, ("FCRA"), 15 U.S.C. §§ 1681 et seq., FACTA incorporates the statutory damages provision of the FCRA, which can range from $100 to $1,000 per violation. 15 U.S.C. § 1681n. Copyright law also contains statutory damages provisions. 17 U.S.C. § 504(c), as does the Fair Debt Collections Practices Act. 15 U.S.C. § 1692k(a)(2) (providing for statutory damages but limiting amount recoverable in class actions to $500,000 or 1% of the violator's net worth). The Telephone Consumer Protection Act also provides for statutory damages in lieu of actual damages for violations of its provisions. 47 U.S.C. §§ 227(b)(3) and 277(c)(5).

Our experience with statutory damages class actions under both state and federal law is that while few if any of the putative class members have suffered any actual harm, the sheer

number of potential class members creates significant exposure to the defendant. Two justifications typically advanced for statutory damage awards are: (1) the actual damages sustained for a particular violation are difficult to measure or prove and statutory damages provide some measure of compensation to the plaintiff; and (2) to punish a defendant and to deter others from committing similar acts in the future. See, Ben Sheffner, *Due Process Limits on Statutory Civil Damages*, Washington Legal Foundation Legal Backgrounder, Vol. 25, No. 27 at 1 - 2 (August 6, 2010) (discussing proffered justifications for statutory damages in copyright cases). As noted below, when the plaintiff and the putative class have admittedly suffered no harm, there is nothing compensatory about such awards.

When these statutory damage provisions are combined with the aggregate power of the class action device, however, defendants can face significant and potentially ruinous exposure for conduct that admittedly harmed no one. *See e.g.*, *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350 (N.D. Ill. 2002) (denying certification of a nationwide statutory damages class because while "certification should not be denied solely because of the possible financial impact it would have on a defendant, consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended upon such an impact"). In fact, a recent certiorari petition identified 19 lawsuits (14 of them putative class actions) involving alleged technical violations of ten different federal statutes where the plaintiff suffered no economic or other harm. Petition For A Writ of Certiorari, at 9 – 12, *First National Bank of Wahoo v. Charvat*, (No. 13-679). The Court denied that petition and while it had previously granted certiorari in a case raising a similar issue, it ultimately dismissed that writ as improvidently granted. *First American Financial Corp. v. Edwards*, 132 S.Ct. 2536, 2537 (2012).

In a typical case, the plaintiff contends the defendant committed wide-spread technical violations of some statute. She admits that she and the class she seeks to represent sustained no economic or other actual harm as a result of the violation. She then seeks to have the court award aggregate damages based on some formulaic calculation drawn from a range of penalties recoverable under the statute allegedly violated. In other cases, the claims are brought by state attorneys general under a *parens patrie* theory. The relief sought in many class actions or in *parens patrie* actions brought by state attorneys general is based not on the actual harm suffered by any individual person, but rather on some legislatively-defined statutory damage amount set for each violation. Under this scenario, even an unwitting defendant can face catastrophic liability for inadvertent and technical violations when sued in a class action or state AG action. Although some statutes, such as the Truth in Lending Act – recognize the gross unfairness of imposing a statutory damages penalty where aggregate treatment is sought – most statutes do not contain such language and a number of courts have refused to consider the unfairness of the relief sought in making their certification decision.

These cases implicate Article III standing requirements – both for the putative class representatives and for the absent class members. They also implicate broad policy concerns over the appropriateness of using the civil justice system to punish defendants for what are at most technical violations. And punishment it is. Because the class members are by definition unharmed, there is nothing compensatory about the process. Permitting aggregated actions by unharmed individuals places enormous pressure on defendants to settle claims that would valueless if tried on an individual basis. With little or no interest on the part of absent class members in participating in these settlements, they implicate the same concerns the 109th

Congress had with coupon settlements that it attempted to address with CAFA. We believe this is an area in need of further study and reform.

Congress passed the Rules Enabling Act, 28 U.S.C. § 2072, to prevent the use of procedural rules to abridge or enlarge substantive rights. Permitting suits on behalf of unharmed absent class members who lack Article III standing (as several courts have held) contravenes this important Congressional mandate. Likewise, because some courts permit aggregation while others do not – despite the fact that the same statutory provisions and same procedural rules are at issue – the current environment is utterly and unnecessarily unpredictable for our members and our clients. In addition, permitting litigation by and on behalf of unharmed parties impairs the ability of the civil justice system to efficiently adjudicate the claims more properly before it. As an organization devoted to improving the civil justice system, we believe a hard look at addressing the problem of no injury class actions is warranted.

And we are not alone in this belief.

For the past three years, we have conducted the DRI National Opinion Poll on the Civil Justice System. We've asked class action questions on each of our polls. On the question of "harm" in our 2013 poll, 68% said they would require plaintiffs to show actual harm, rather than potential harm, to join a class action.

This year, we took it a step further. We asked if the respondent would support a law requiring a person to show that they were actually harmed by a company's products, services, or policies rather than just showing the potential for harm. Seventy-eight percent would support such a law; just 19% would oppose it. Large majorities supporting this reform occur across 11 demographic categories. Men, women, Republicans (86%), Democrats (71%), Liberals (73%),

Conservatives (85%). We believe these results further support a probing examination of the question of permitting no-injury class actions to proceed.

II. THE INCREASING USE OF *CY PRES* PAYMENTS IN CLASS ACTIONS

As Judge Posner recently noted, "*Cy pres* (properly *cy près comme possible*, an Anglo-French term meaning "as near as possible") is the name of the doctrine that permits a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent. A familiar example is that when polio was cured, the March of Dimes, a foundation that had been established in the 1930s at the behest of President Roosevelt to fight polio, was permitted to redirect its resources to improving the health of mothers and babies." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). Over the last decade, courts have increasingly used the *cy pres* doctrine to disperse settlement or judgment funds that remain unclaimed after attempted distribution to class members. That practice is coming under growing criticism. See, e.g., Jennifer Johnston, Comment, *Cy Pres Comme Possible to Anything is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. Econ. & Pol'y 277 (2013); Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014. We believe that criticism is worth considering.

In some instances, settlements made for the ostensible benefit of class members go entirely to *cy pres* recipients because it is infeasible or otherwise difficult to provide benefits directly to class members. Attorneys' fees are often calculated on the gross amount of class settlement. The availability of *cy pres* awards skews the entire process by increasing the size of settlement (and potentially class counsel's fees) while providing no direct benefit to the class members on whose behalf the suit was purportedly brought and whose rights are impacted by the

action. This ad hoc and unlegislated expansion of the class action device calls for specific reform to prohibit or strictly limit its use. Reforms here could be addressed through more rigorous application of the existing civil procedure rules, by the adoption of more explicit rules, and by the enactment of statute specifically addressing it.

III. CONTINUED ISSUES WITH REMOVAL OF CLASS ACTIONS

As the Supreme Court recently noted, "Congress enacted CAFA in order to "amend the procedures that apply to consideration of interstate class actions" in part because "certain requirements of federal diversity jurisdiction had functioned to keep cases of national importance in state courts rather than federal courts." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S., 134 S.Ct. 736, 739 (2014) (internal citations and quotations omitted). Even with CAFA, we have seen continued concerns with issues related to the amount in controversy requirements and inconsistent treatment of them by districts and appellate courts both with respect to class actions and to traditional diversity claims. Congress attempted to address this issue somewhat with the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Public Law 112-63, which added 28 U.S.C. § 1446(c)(2)(B), which provides that removal is proper if the district court finds, "by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a) [$5,000,000]." But what evidence is required to allow the district court to make that finding, and when that evidence must be submitted, is the subject of on-going dispute.

The Supreme Court recently addressed a portion of these concerns in its recent decision in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (Dec. 15, 2014). There, it rejected a presumption against removal in CAFA cases and held that a defendant is not required to provide evidence as to the amount in controversy at the time of removal. In that case, the

evidence was essentially undisputed that the amount in controversy exceeded $5,000,000. Although the defendant asserted such in its notice of removal, the district court held it could not consider post-removal evidentiary submissions supporting that assertion and remanded the case. A divided Tenth Circuit refused to consider the defendant's appeal. The Court granted the defendant's certiorari petition to consider a split between the Tenth Circuit and between five and seven other courts of appeal on the question and the majority agreed the defendant was not required to attach evidence at the time of removal.

Nonetheless, we still comprehend two concerns about the current treatment of the amount in controversy requirement in class action cases. First, we question whether imposing a $5,000,000 amount in controversy requirement over class actions makes sense when, to use the language of the Senate Judiciary Committee's report on CAFA, "a citizen can bring a 'federal case' by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state." Senate Report No. 14, 109 Cong., 1st Sess., at 11 (2005). We believe that the Committee should consider whether putative interstate class actions involving minimally diverse parties should be subject to the same jurisdictional minimum as traditional diversity claims. This threshold would eliminate a considerable amount of procedural wrangling at the removal stage and place class action defendants on equal footing with other out-of-state defendants sued in state court.

The second issue we believe warrants study goes directly to the courts' treatment of the amount in controversy requirement and the inappropriate burdens some have placed on class action defendants seeking to remove cases to federal court. In particular, we believe a hard look at what "evidence" is required in order for a removing defendant to establish the requisite amount in controversy under 28 U.S.C. § 1446(c)(2)(B). We believe the approach taken by the

United States Court of Appeals for the Seventh Circuit in *Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Company*, 637 F.3d 827 (7th Cir. 2011) properly balances the amount in controversy issues and invite the Committee to consider whether the essence of its holding should be incorporated into unambiguous statutory language applicable to all diversity removals.

In *Back Doctors, Ltd.*, the court attempted to lay down a fairly simple test for determining whether a class action defendant had met the amount in controversy requirement. It began by noting that the Supreme Court had long-ago held that when a plaintiff initiates an action in federal court (and thus is the proponent of federal jurisdiction), its allegations regarding the amount in controversy must be accepted unless it is impossible for it to recover the jurisdictional minimum. 637 F.3d at 829 (*citing St. Paul Mercury Indemnity Company v. Red Cab Co.*, 303 U.S. 283 (1938)). The Seventh Circuit held, consistent with 28 U.S.C. § 1446(c)(2)(B), that the same rule applied where a removing defendant (as the proponent of federal jurisdiction), made allegations regarding the amount in controversy in the notice of removal. 637 F.3d at 830. The defendant alleged that the compensatory damages exceeded $2,900,000 and that a potential punitive award in light of nature of the claims was sufficient to push the amount in controversy above $5,000,000. The plaintiff countered by pointing out that it had not sought punitive damages on behalf of itself or the putative class and without the possibility of a "speculative" punitive award, the amount in controversy could not be met.

The court recognized that while jurisdictional *facts* must be alleged and, if challenged, proven by a preponderance of the evidence, that does not require the defendant to show it was more likely than not the plaintiff class would recover in excess of the jurisdictional amount. *Id.* at 829. It then identified what it considered to be jurisdictional *facts*:

> The legal standard was established by the Supreme Court in *St. Paul Mercury*: unless recovery of an amount exceeding the jurisdictional minimum is legally impossible, the case belongs in federal court. Only jurisdictional facts, such as which state issued a party's certificate of incorporation, or where a corporation's headquarters are located, need be established by a preponderance of the evidence.

Back Doctors Ltd., 637 F.3d at 830. Because the defendant in that case could show that the compensatory damages sought exceeded $2,900,000 and because the plaintiff could not show that punitive damages were legally impossible to recover under state law, the court reversed the district court's remand order and directed it to consider the case on the merits. *Id*. at 831. We believe this approach would best balance the federalism concerns inherent in diversity removals while allowing the courts to devote their resources to issues other than fights over jurisdiction.

Now, if I may, Mr. Chairman, let me spend a few minutes on the DRI National Public Opinion Poll on the Civil Justice System. Often time in discussing these issues we forget about the American people, to whom the civil justice system really belongs. And that's why we created the DRI Poll.

As an advocacy group, we know that the integrity of our data has to be impeccable. That's why we selected Gary Langer of Langer Research Associates (NY) as our pollster. Langer is the former head of polling for ABC News and a former board member of the American Association of Public Opinion Researchers which sets the standards for the industry. All of our polls have been accepted by the Roper Center at the University of Connecticut, a premier repository that makes methodologically sound polls available to researchers. Summary results of all of our polls are available on our web site at www.dri.org.

We've asked class action questions on each of our polls. Let me highlight some of the data that we've obtained. We found that 38 percent of all adult Americans say they've been invited to join a class action suit. Six in 10 of them declined. That means a total of 15 percent of

all adults report having participated in a class action suit, the equivalent of nearly 37 million adults. And while 68 percent feel their participation was worthwhile, nearly three-quarters of those who won an award say it was "insignificant."

Basic attitudes on class actions are mixed. Fifty percent of Americans think most of these lawsuits as justified; 38 percent see them as unjustified, with the rest unsure. Ideology is a key factor: Liberals are 27 percentage points more apt than strong conservatives to see class-action suits as justified, 61 vs. 34 percent, as are Democrats over Republicans, 57 vs. 44 percent.

Yet there's substantial bipartisan and cross-ideological consensus on two questions – the preference that a class-action plaintiff should show actual harm and opposition to opt-out enrollment. Regardless of partisan and ideological preferences, two-thirds or more agree on these.

I mentioned earlier that 78% of Americans would support a law requiring a showing of actual harm in order for an individual to participate in a class action law suit. On another class action issue, 85% of Americans say class action lawyers should be required to obtain permission from individuals before enrolling them as plaintiffs.

Mr. Chairman, large majorities of the American public find it makes no sense to pay damages to people who have suffered no harm. They find it makes no sense to represent people in a lawsuit without asking their permission.

The public supports reform. It's just common sense to them…and should be to us.

LANGER RESEARCH ASSOCIATES

SURVEY RESEARCH DESIGN • MANAGEMENT • ANALYSIS

Feb. 27, 2015

Briefing Paper: Public Attitudes on Class-Action Litigation

Prepared for testimony of DRI-The Voice of the Defense Bar before the U.S. House Subcommittee on the Constitution and Civil Justice

Independent public opinion polling sponsored by DRI-The Voice of the Defense Bar since 2012 has found broad public support for significant reforms in the handling of class-action lawsuits, including opposition to opt-out enrollment and support for changes in who can join such suits.

These surveys also have demonstrated the vast reach of this type of litigation – 38 percent of all adult Americans say they've been invited to join a class action suit – as well as mixed feelings about their utility. While 54 percent think class actions often enable people to hold companies responsible, 62 percent say they often force companies that have done no wrong to pay damages.

Further, just half think most class action lawsuits that are filed are justified.

The random-sample telephone surveys have been conducted for DRI by the nonpartisan survey research firm Langer Research Associates, with rigorous methodology; neutral, balanced questions; and independent data analysis. The company, which polls for ABC News, Bloomberg and others, is a charter member of the Transparency Initiative of the American Association for Public Opinion Research and subscribes to its Code of Professional Ethics and Practices.

This memo summarizes some key findings from the research to date. Full results are available at DRI's website, http://www.dri.org, including analyses, full questionnaires, topline results and methodological details. Raw datasets from these surveys have been deposited with the nonprofit Roper Center for Public Opinion Research at the University of Connecticut for unfettered secondary analysis.

Among the findings:

- Just 26 percent of Americans say that showing the potential for harm should be adequate to join a class-action lawsuit. Sixty-eight percent instead say plaintiffs should be permitted to join a class only if they can show they've actually been harmed.

  The question: Do you think people should be allowed to join class-action lawsuits as plaintiffs only if they can show that they've been harmed by a company's products or actions, or is it enough for them to show the potential for harm, regardless of whether they've actually been harmed?

- A vast 85 percent say class-action lawyers should be required to obtain permission from individuals before enrolling them as plaintiffs. Just 10 percent support the current practice allowing lawyers to include individuals whom they believe are eligible without getting their permission first, then providing them the opportunity to opt-out later.

  The question: Lawyers who file class-action suits often include people who they think are eligible to be plaintiffs without first getting their permission. People who don't want to participate can drop out later. Do you think lawyers should or should not be required to get permission from people before including them as plaintiffs in class-action lawsuits?

It's probable that few Americans are closely following these issues; as such their expressed attitudes most likely reflect underlying world views, for example favoring personal precepts of fairness, individualism and self-determination. While additional information and argumentation could influence public views, the DRI survey's baseline measurements provide valuable insight into public preferences on these relatively little-studied issues.

Most broadly, basic attitudes on class actions are mixed. Fifty percent of Americans see most of these lawsuits as justified; 38 percent see them as unjustified, with the rest unsure. Ideology is a key factor: Liberals are 27 percentage points more apt than strong conservatives to see class-action suits as justified, 61 vs. 34 percent, as are Democrats over Republicans, 57 vs. 44 percent.

Yet there's substantial bipartisan and cross-ideological consensus on the preference that a class-action plaintiff should show actual harm and on opposition to opt-out enrollment. Across partisan and ideological groups, two-thirds or more agree on the former, eight in 10 or more on the latter.

As noted, 38 percent say they've been invited to join a class action; six in 10 of them declined. That leaves a total of 15 percent of all adults who report having participated in a class action suit, the equivalent of nearly 37 million adults. As many say they joined "to send a message" as to win an award. And indeed while 68 percent feel their participation was worthwhile, nearly three-quarters of those who won an award say it was "insignificant."

Selected results follow. Full results are available at http://www.dri.org.

Respectfully submitted,

Gary Langer, president
Langer Research Associates
New York, N.Y.

2012:

12. Have you yourself ever been invited to participate in a class action lawsuit, or not?

	Yes	No	No opinion
8/19/12	38	62	*

13. (IF INVITED TO PARTICIPATE) Have your ever participated in a class action lawsuit, or not?

	Yes	No	No opinion
8/19/12	39	61	1

12/13 NET:

		Invited		Never been invited	No opinion
	NET	Participated	Never participated		
8/19/12	38	15	23	62	*

15. (IF EVER PARTICIPATED) Did you participate mainly to (win damages), to (send a message to the company involved) or some other reason?

	Win damages	Send a message	Other reason	No opinion
8/19/12	43	45	10	1

16. (IF EVER PARTICIPATED) Did you receive an award, or not?

	Yes	No	No opinion
8/19/12	70	28	2

17. (IF EVER PARTICIPATED AND RECEIVED AN AWARD) Would you describe that award as substantial, modest or insignificant?

	Substantial	Modest	Insignificant	No opinion
8/19/12	8	19	73	*

18. (IF EVER PARTICIPATED) Do you think your participating in this suit was worthwhile, or not worth the trouble?

	Worthwhile	Not worth trouble	No opinion
8/19/12	68	27	5

2013:

8. In class-action lawsuits, a group of people known as plaintiffs sue a company for what they see as a faulty product, bad service or an unfair policy. Do you think most class-action lawsuits filed in this country are justified or unjustified?

	Justified	Unjustified	No opinion
10/6/13	50	38	13

9. Do you think people should be allowed to join class-action lawsuits as plaintiffs only if they can show that they've been harmed by a company's products or actions, or is it enough for them to show the potential for harm, regardless of whether they've actually been harmed?

	Show harm	Show potential for harm	No opinion
10/6/13	68	26	6

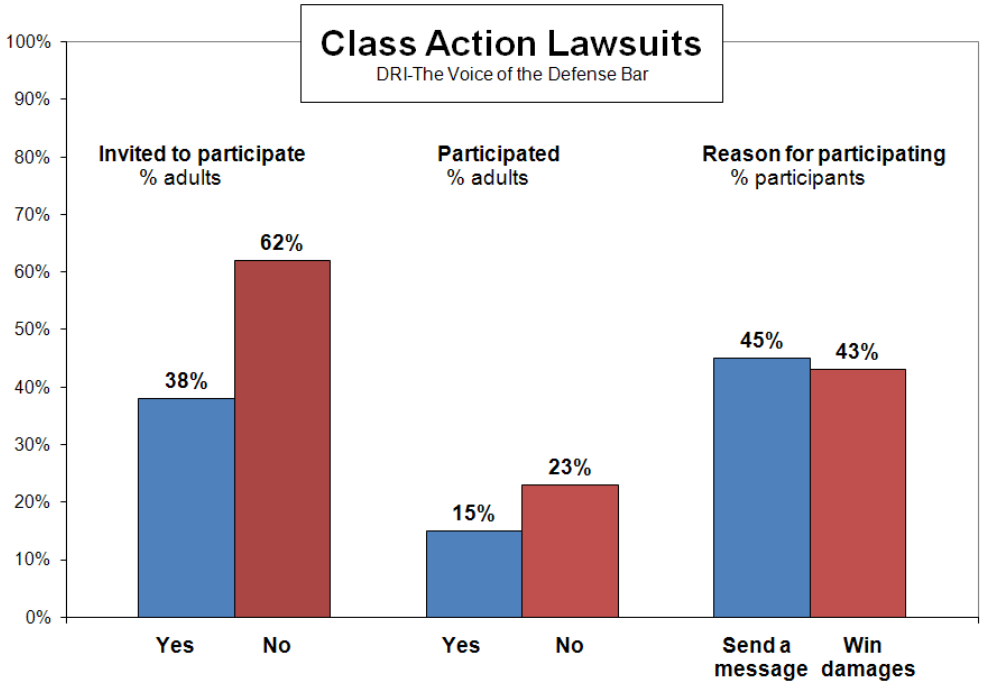
Compare to (2014): 4. Would you support or oppose a law saying that in order to join a class action lawsuit a person has to show that he or she has been actually harmed by a company's products, services or policies, rather than just showing the potential for harm?

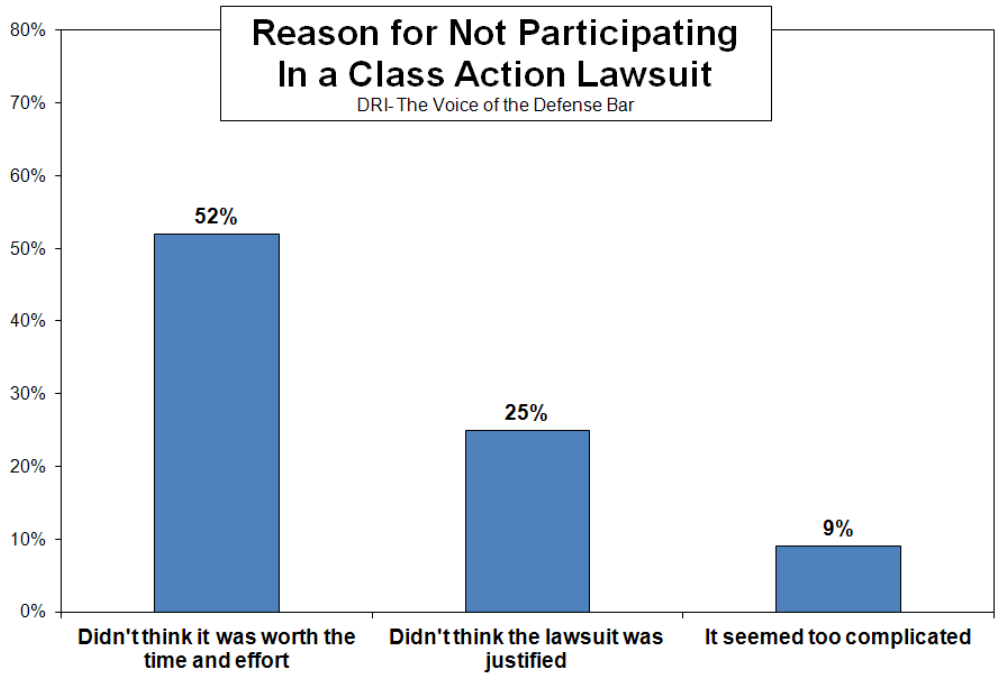
	Support	Oppose	No opinion
9/21/14	78	19	4

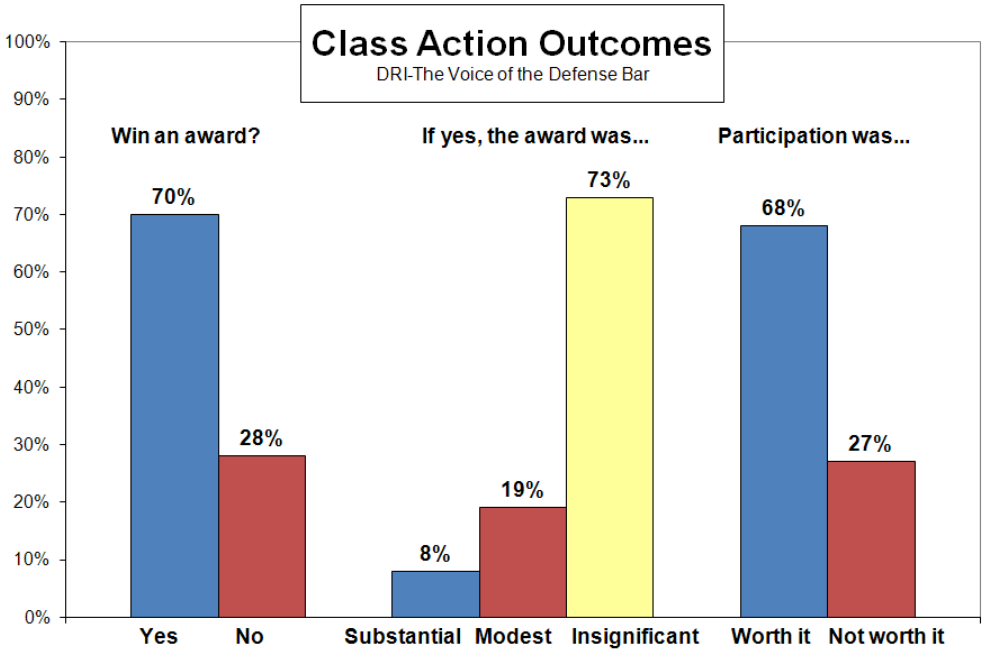
10. Lawyers who file class-action suits often include people who they think are eligible to be plaintiffs without first getting their permission. People who don't want to participate can drop out later. Do you think lawyers should or should not be required to get permission from people before including them as plaintiffs in class-action lawsuits?

	Should be required	Should not be required	No opinion
10/6/13	85	10	5

Selected Charts




Reason for Not Participating In a Class Action Lawsuit
DRI- The Voice of the Defense Bar
80%
70%
60%
50%
40%
30%
20%
10%
0%
52%
25%
9%
Didn't think it was worth the time and effort
Didn't think the lawsuit was justified
It seemed too complicated


Class Action Outcomes
DRI-The Voice of the Defense Bar
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Win an award?
If yes, the award was...
Participation was...
70%
28%
8%
19%
73%
68%
27%
Yes
No
Substantial
Modest
Insignificant
Worth it
Not worth it

Filing Date	Case Name	Court	Cert/Merit (SCOTUS)
12-Mar-12	*Ticketmaster v. Stearns*	U.S. Supreme Court	C
21-Mar-12	*Genesis Healthcare v. Symczyk*	U.S. Supreme Court	C
18-May-12	*Kia Motors v. Samuel-Basset*	U.S. Supreme Court	C
18-May-12	*Glazer v. Whirlpool Corporation*	Sixth Circuit	
22-Aug-12	*Willis of Colorado v. Troice*	U.S. Supreme Court	C
24-Aug-12	*Comcast Corporation v. Behrend*	U.S. Supreme Court	M
27-Aug-12	*Merrill Lynch v. McReynolds*	U.S. Supreme Court	C
6-Sep-12	*Genesis Healthcare v. Symczyk*	U.S. Supreme Court	M
29-Oct-12	*Standard Fire Insurance Co. v. Knowles*	U.S. Supreme Court	M
3-Dec-12	*IBEW Health & Welfare Fund*	U.S. Supreme Court	C
29-Mar-13	*Sears v. Butler*	U.S. Supreme Court	C
10-May-13	*Willis of Colorado v. Troice*	U.S. Supreme Court	M
9-Sep-13	*Mississippi ex rel Hood v. AU Optronics Corp*	U.S. Supreme Court	M
11-Oct-13	*Halliburton v. Erica P. John Fund*	U.S. Supreme Court	C
6-Nov-13	*Sears v. Butler; Whirlpool v. Glazer*	U.S. Supreme Court	C
6-Jan-14	*Halliburton v. Erica P. John Fund*	U.S. Supreme Court	M

24-Feb-14	*US Foods v. Catholic Healthcare West*	U.S. Supreme Court	C
3-Mar-14	*Allstate Insurance Co. v. Jacobsen*	U.S. Supreme Court	C
16-Jan-15	*Tibble v. Edision International*	U.S. Supreme Court	M
26-Feb-15	*Jimenez v. Allstate Insurance Co.*	U.S. Supreme Court	C
2-Apr-15	*Sandquist v. Lebo Automotive, Inc.*	California Supreme Court	
15-Apr-15	*Braun v. Wal-Mart Stores, Inc.*	U.S. Supreme Court	C
18-Jun-15	*Spokeo, Inc. v. Robins, Thomas*	U.S. Supreme Court	M
9-Jul-15	*Campbell-Ewald Co. v. Gomez*	U.S. Supreme Court	M
Jul-15	*Tyson Foods, Inc. v. Peg Bouaphakeo, et al.*	U.S. Supreme Court	M

Issue	Author	Committee Member
Class Actions - Articles Standing	Mary Massaron, Hilary Ballentine, Josephine DeLorenzo	Y
Collective Actions - Standing FLSA	Jeffrey A. Lamken, Martin V. Totaro, Lucas M. Walker	N
Class Actions (State) - Constitutional Due Process	John P. Elwood, Eric A. White	N
Class Actions - Certification	Mary Massaron, Hilary Ballentine	Y
Class Actions - Securities - State law	Linda Coberly, Gene Schaerr	Y
Class Actions - Certification - Expert Testimony	Carter G. Phillips, Jonathan F. Cohn, Matthew D. Krueger, Eric G. Osborne	N
Class Actions - "Issue" certification	Mary Massaron, Hilary Ballentine	Y
Collective Actions - Standing FLSA	Jeffrey A. Lamken, Martin V. Totaro, Lucas M. Walker	N
Class Actions - CAFA Removal	Paul D. Clement, Erin Morrow Hawley	N
Class Actions - Standing	Timothy S. Bishop, Emily C. Rossi	N
Class Actions - certification - Consumer products	Mary Massaron, Hilary Ballentine	Y
State law securities class actions	Linda Coberly, Gene Schaerr, Marissa Ronk, Steffen Johnson	Y
Class Actions - State AG mass actions - CAFA removal	Mary Massaron, Hilary Ballentine	Y
Class Actions - Securities Fraud	Timothy R. McCormick, Richard B. Phillips, Jr., Michael W. Stockham	N
Class Actions - certification - Consumer products	Mary Massaron, Hilary Ballentine	Y
Class Actions - Securities Fraud	Timothy R. McCormick, Richard B. Phillips, Jr., Michael W. Stockham	N

RICO and breach of contract class actions	John Cohn, David Carpenter, Wen Shen, Kate Comeford Todd, Sheldon Gilbert	N
Class Actions - punitive damages	David Axelrad, Curt Cutting, Felix Shafir	Y
Class action; ERISA; statue of limitations	Scott Smith	Y
Class actions; overtime; commonality	Willy Jay	Y
Class actions; arbitration	Jerry Ganzfried	Y
Wage & Hour Class Actions	Scott Smith	Y
standing; statutory violations	Mary Massaron	Y
Class action mootness	(Linda Coberly)	Y
Class action certification - FLSA - wage and hour	Willy Jay	Y