Proposal to amend Rule 23 regarding proof of "common impact" as a criterion of class certification

In certain circuits a requirement that plaintiffs adduce, as a prerequisite to class certification, sufficient evidence to establish that each and every class member is harmed in the same way is giving rise to burdensome mini-trials and is impeding the just determination of claims.

This "common impact" requirement, imposed by cases such as *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), and *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), has no grounding in substantive or procedural law and no justification in policy. *See Kohen v. Pac. Inv. Mgmt. Co., L.L.C.*, 571 F.3d 672, 677 (7th Cir. 2009), *cert. denied, Pac. Inv. Mgmt. Co. L.L.C. v. Hershey*, 2010 U.S. LEXIS 1072 (U.S. Feb. 22, 2010), (Posner, J.) (That "a class will often include persons who have not been injured" is "almost inevitable" and "does not preclude class certification"). A single-minded focus on a preliminary showing of uniform "common impact" is inconsistent with the language of Rule 23, which requires only that common issues "predominate." Rule 23 does not require a complete absence of individual issues.

The common impact requirement unwarrantedly impedes use of a procedure vital to the public interests of assuring fair competition and providing redress for harms. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Keating v. Superior Court*, 31 Cal.3d 584, 609 (1982) ("Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to 'retain[ ] the benefits of its wrongful conduct.'"). We propose to amend Rule 23 to restore its original purpose and effect.

Conventional pattern jury instructions and special verdict forms applicable to class action trials do not address "common impact" at all. Generally, no effort is made at trial to allocate that aggregate recovery among individual class members, or to determine whether the class includes some subset of members who lack the requisite form of injury. The primary concern of the parties and attorneys in a class action, after liability has been found, typically is and should be the accuracy of the aggregate damages awarded.

Division of that award among class members nearly always is handled through post-trial administrative procedures in which the defendants have little, if any, genuine economic interest. As Judge Hornby recognized in one of his decisions in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 235 F.R.D. 127, 143 n. 55 (D. Me. 2006), *reversed in part, vacated in part and remanded*, 522 F.3d 6 (1st Cir. 2008), "[i]f the plaintiffs have an adequate model to award aggregate damages, the defendants' concern that some class members may be overcompensated at the expense of other class members seems a little suspect. Under the guise of fairness, the defendants' real objective is to avoid recovery by anyone." Defendants are not prejudiced if potentially unharmed class members are included in the class.

Because common impact generally is not even addressed at trial, it makes no logical sense to make it the lynchpin of whether a class should be certified. Doing so has burdened district courts with lengthy evidentiary hearings and resolution of complex disputes between expert economists on an issue which should make no difference in a case at all. It has little, if any, genuine relevance to fair resolution on the merits.

Nonetheless, some courts have found that Rule 23 requires rigorous proof of "common impact" before a class can be certified. Perversely, this creates higher evidentiary burdens for class certification than for the class to prevail at trial. The "common impact" requirement is inconsistent with the mandate of Rule 1 that the rules be construed "to secure the just, speedy, and inexpensive determination of every action or proceeding."

In re New Motor Vehicles Canadian Export Antitrust Litigation illustrates the problem. There, a class of new car purchasers alleged a horizontal conspiracy among major automakers to choke off the flow of cheaper Canadian exports to the U.S. market. A district court judge with prior MDL class action experience controlled the litigation with the stated goal of moving as quickly as possible toward trial. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 229 F.R.D. 35, 38 (D. Me. 2005). But the litigation bogged down in class certification. Six years after filing, with four years devoted to the question of "common impact," the district court assayed the conspiracy evidence, concluded that it was worthy of going to a jury, but granted summary judgment to defendants because plaintiffs could not meet the preliminary burden, under Rule 23, "to prove impact by common proof that applies to every member of the putative class." *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 632 F. Supp. 2d 42, 47-51 (D. Me. 2009). At trial, it is never the requirement in a class action that plaintiffs prove injury-in-fact as to "every member" of the class.

To a limited extent, the non-utility of "common impact" proof has been recognized in 15 U.S.C. §15(d), which makes proof of "common impact" unnecessary in *parens patriae* cases brought for price-fixing by state Attorneys General. That statute provides that in *parens partriae* cases in which price-fixing is found:

> damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

We propose adding to Rule 23 a similar provision that would apply in all civil class actions. Such a step would greatly alleviate heavy and unwarranted burdens on the trial courts, would contribute to fair and sensible treatment of litigants, and would be entirely consistent with the primary purpose of Rule 23, which is to make certain, both substantively and procedurally, that results reached through representative litigation under Rule 23 are "fair, reasonable and adequate."

This amendment would address only the need for such proof as a matter of class certification, and would not affect any individualized right to jury trial on a particular issue, in light of the right of all class members to receive notice of any class action settlement or judgment and to "opt out" under Rule 23 to pursue their individual rights.

John Vail
Vice President and Senior Litigation Counsel
Center for Constitutional Litigation, PC
777 6th Street, NW, Suite 520
Washington, DC 20001
direct 202 944 2887
fax 202 965 0920
john.vail@cclfirm.com