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Via E-Mail to: rules_support@ao.uscourts.gov

Committee on Rules of Practice and Procedure
Thurgood Marshall Building
Administrative Office of the United States Courts
One Columbus Circle NE
Washington DC 20544

Re: Potential Amendment to Federal Rule of Civil Procedure 23

To the Members of the Advisory Committee on Civil Rules and the Rule 23 Subcommittee:

Based on my 25 years of experience practicing law exclusively in the area of class actions, and as a past Co-Chair of the American Association for Justice's Class Action Litigation Group, I have extensively discussed and analyzed a variety of issues of concern to class action practitioners. I believe that Rule 23 could benefit from amendments that, among other things: 1) establish guidelines for cy pres settlements, 2) make clear that classes may be certified even though they include members who may not ultimately prevail on the merits of their claims, 3) clarify "ascertainability," and 4) confirm that courts can certify issues classes so long as the proposed issue class meets the standards generally applicable to class certification. Other attorneys have addressed some of these issues in suggestions to the Rule 23 Subcommittee. This letter focuses on the fourth issue – issue class certification.

By enabling courts to certify classes with respect to a particular issue, Rule 23(c)(4) is an especially useful tool to effectively manage class actions. Common issues, by their nature, are ones "with the capacity to generate common answers apt to drive the resolution of the

litigation,"[1] and common issues can resolve the entirety of the litigation "in one fell swoop."[2] It is precisely issues of this nature that lend themselves to certification and, when so certified, can significantly advance the resolution of complex litigation.

For example, in *McReynolds v. Merrill Lynch,* 672 F.3d 482 (7th Cir. 2012) (Posner, J.), the Seventh Circuit reversed the district court's order denying class certification and held that that the issues could be certified under Rules 23(b)(2) and (c)(4) because the practices challenged in this employment discrimination class action "present a pair of issues that can most efficiently be determined on a class-wide bases." 627 F.3d at 491*; see also Saltzman v Pella Corp.,* 606 F.3d 391, 396 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 998 (2011) (class action certified for certain consumer liability issues under Rule 23(b)(3), but left the issues of causation, damages, and statute of limitations for individual proceedings." ); *Piazza v. EBSCO Indus., Inc.*, 273 F.3d 1341, 1349, 1351-53 (11th Cir. 2001) (finding no basis for concluding that the district court abused its discretion by certifying a class against some defendants on claim for breach of fiduciary duty for lost profits); *Helmer v. Goodyear Tire & Rubber Co.*, 214 U.S. Dist. LEXIS 37501 (Mar. 21, 2014) (certification of liability only class in product defect class action; "Certifying a class based on this claim and asking a fact-finder to decide whether the product is indeed defective in the way that the plaintiffs allege would 'generate common answers apt to drive the resolution of the litigation.'").

As presently drafted, Rule 23(c)(4) leaves open whether a district court can certify an issue when only the identified issue meets the criteria for class certification or, instead, if the district court can certify the issue only upon finding that the class action, as a whole, satisfies class certification requirements. *Compare Castano v. Am Tobacco Co.*, 84 F3d 734, 745-46 n. 21 (5th Cir. 1996) (Rule 23(c) is a mere "housekeeping measure" that district courts may consider only after finding that the cause of action as a whole has met the requirements of rules 23(a) and (b)) *with In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (district courts may employ Rule 23(c)(4)(A) to certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test). Nineteen years after the Fifth Circuit suggested, in a footnote, that Rule 23(c)(4) can be applied only after the entirety of a case is certified, its interpretation has been soundly discredited. *See generally* P. Bronte, G. Robot & D.M. Williams, *"Carving at the Joint": The Precise Function of Rule 23(c)(4)*, 62 DePaul Law Review 745 ("All circuits unanimously hold that Rule 23(c)(4) authorizes certification of an issues class or subclass when the common, certified issues are pivotal to the entire claim and 'carved at the joint.'").

Nonetheless, district courts continue to cite *Castano* as a reason to consider issue certification separate and apart from certification of the entire action. *See, e.g., Snow v. Atofina Chems., Inc.*, 2003 U.S. Dist. LEXIS 27295, 26-27 ( E.D. Mich. Mar. 31, 2003) ("Before Rule 23(c)(4) can be implemented to bifurcate this class as Plaintiffs propose, Plaintiffs must satisfy the predominance requirement of Rule 23(b)(3)."). Consequently, Rule 23(c)(4) should be

[1] 11 S. Ct. 2541, 2544 (2011) ("That common contention, moreover, must be of such a nature that it is capable of class-wide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").
[2] *Mejdrech v. Met-Coil Systems Corp*., 319 F.3d 910, 911 (7th Cir. 2003).

amended to make clear that an issue can *first* be identified and *then* evaluated pursuant to Rules 23(a), (b) and (c), as follows:

> **Amended Rule 23(c)(4):**
>
> When appropriate, an action may be bought or maintained as a class action with respect to particular issues, and the provisions of this rule should then be construed and applied accordingly.

I propose that the current version of Rule 23(c)(4) be amended as set forth above to make clear that the provisions of Rule 23(a)-(c) are to be "construed and applied" *after* the issue to be certified is identified. I selected the proposed language because it is the precise language that was deleted for the sake of clarity and simplification as part of the 2007 Style Project. While the committee notes to the 2007 amendment explain that this deletion was stylistic, the deletion of this phrase has rendered Rule 23(c)(4) more ambiguous. I believe that the reinsertion of this language, together with a committee note explaining its purpose, will make clear that issues may be certified as a class even if the class, as a whole, could not be certified.

Thank you for your attention to this matter. I am more than willing to discuss this and other class certification issues with the Committee.

Sincerely,

Gary E. Mason