



March 13, 2015

Via Electronic Mail Only

Committee on Rules of Practice and Procedure
Thurgood Marshall Building
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 20544

Re: Comments by COSAL on Potential Amendments to Federal Rule of Procedure 23

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

The Committee to Support the Antitrust Laws (COSAL) was established in 1986 to promote and support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. COSAL members are law firms based throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. Prof. Joshua P. Davis of the University of San Francisco School of Law prepared these comments on behalf of COSAL, based on our members' extensive experience bringing antitrust class action lawsuits under Rule 23 of the Federal Rules of Civil Procedure. We respectfully request that you consider these views as you consider making revisions to Rule 23.

INTRODUCTION

We set forth below various proposals to amend Federal Rule of Civil Procedure 23. Before doing so, the following are some brief preliminary points.

First, private class actions play a crucial role in enforcing the antitrust laws. Studies of sixty recent successful private actions demonstrate that they have recovered at least \$34 to \$36 billion for victims of anticompetitive conduct. Joshua P. Davis & Robert L. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 17 (2013). Focusing on a subset of those cases, a similar study showed private recoveries had a greater deterrent effect in cartel cases than the much (and justly) praised criminal enforcement efforts of the Department of Justice. *Id.* at 26-27 (discussing Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315 (2011)). The role of private enforcement is particularly important when foreign actors prey on U.S. victims. In the sixty recent successful cases noted above, private litigation was able to recover \$6 to \$8 billion that otherwise would have remained the ill-gotten gains of foreign wrongdoers. Class actions played a central role in these efforts.

Second, there is no evidence that defendants settle antitrust class actions even when they lack merit and therefore overpay to settle. To the contrary, given the defendants' market power in antitrust cases and the incentives before the attorneys, the opposite is much more likely true: that defendants settle for too little. *Id.* at 66-70. Indeed, the only effort to date at a systematic study concluded that all penalties imposed on illegal antitrust cartels—by government and private actions—create insufficient, not excessive, deterrence. *See id.* at 33 (discussing John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427 (2012)).

For these reasons, preserving private antitrust enforcement through class actions is essential. With that goal in mind, the following are proposals to amend Rule 23.

1. Predominance for Litigation as a Whole, Not for Each Element of a Claim.

Description of Proposal. Rule 23(b)(3) should make explicit that common issues must predominate in the litigation as a whole, not as to each individual claim or element of a claim.

Proposed Edits. Modify the text of Rule 23(b)(3) to read as follows:

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

...

(3) the court finds that the 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 issue is whether questions of law or fact common to class members predominate in the action as a

whole, not in regard to each element or claim at issue in the action. The matters pertinent to these findings 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.

Rationale. The Supreme Court has held that, under Rule 23(b)(3), plaintiffs need not establish predominance for each element separately for common questions to predominate in an action. *Amgen Inc. v. Connecticut* 133 S. Ct. 1184, 1196 (2013) (“Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each ‘elemen[t] of [her] claim [is] susceptible to classwide proof.’ What the rule does require is that common questions ‘predominate over any questions affecting only individual [class] members.’ Fed. Rule Civ. Proc. 23(b)(3) (emphasis added).”) (internal citation omitted) (emphasis in original). However, some lower courts have required plaintiffs to show that common issues predominate for *each* element of plaintiffs’ claims, not just that common issues will predominate *on the whole* in litigation and trial. Antitrust provides an example. Some courts have held that plaintiffs must prove common impact—meaning they must use evidence common to the class to prove the fact of damage (or injury) to most or even all members of a proposed class. Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 988 & n. 104 (2010); *but see In re Nexium Antitrust Litig.*, Nos. 14-1521, 14-1522 (1st Cir. Jan. 21, 2015) (holding a class may be certified even if it includes uninjured members). In reality, in antitrust cases litigation and trial often focus overwhelmingly on whether defendants engaged in the alleged conduct and whether the conduct was illegal. Davis & Cramer, 17 GEO. MASON L. REV. at 989-91. Often, little time is spent at trial on whether the conduct caused harm and generally speaking no time is spent on determining the proportion of the class that suffered injury. *Id.* In antitrust actions, class certification can thus involve an inquiry divorced from litigation and trial. The proposed amendment would help to rectify that situation.

2. Not All Class Members Need to Have Suffered the Relevant Form of Harm.

Description of Proposal. Rule 23(b)(3) should make explicit that not all class members must suffer the relevant form of harm for common issues to predominate. The Rule should state that common issues may predominate if harm is widespread among members of a class.

Proposed Edits. Modify the text of Rule 23(b)(3) to read as follows:

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

...

(3) the court finds that the 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. Common issues can predominate even if not all class members suffered the relevant form of injury, as long as the injury is widespread among class members. The matters pertinent to these findings 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.

Rationale: Some courts have implied that plaintiffs must show harm to all or virtually all class members to support class certification under Rule 23(b)(3). Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890, 893, n. 3 (2014) (citing authorities). That could mean a small percentage of unharmed class members or perhaps even a single unharmed class member—who may not be identifiable and therefore cannot be feasibly excluded from the class—could defeat class certification. That would be bad as a matter of policy. *See generally* Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890 (2014). It also is not consistent with a proper interpretation of class certification doctrine. *See, e.g., id.* at 893, n. 2 (citing authorities). Nor is it required by standing doctrine, due process, or the Rules Enabling Act. *See generally* Joshua P. Davis, Eric L. Cramer, and Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858 (2014).

3. Opportunity for Additional Discovery; Not Necessarily at an “Early Practicable Time.”

Description of Proposal. In recent years, the courts have made clear that that they may address issues pertaining to the merits in determining class certification to the extent those merits issues are relevant to the criteria set forth in Rule 23. As a result, discovery regarding the merits—perhaps even extensive discovery—may be necessary for plaintiffs to establish that class certification is appropriate. Three suggested revisions to Rule 23 follow from this state of affairs. First, Rule 23 should be amended to include the equivalent of Rule 56(d). Plaintiffs should be permitted to seek additional discovery before moving for class certification (likely in the alternative to moving for certification). Second, Rule 23 should specify that courts should grant additional discovery where it could be reasonably expected to enable plaintiffs to meet their burden. Third, Rule 23 should make clear that courts have greater flexibility about the timing of class certification motion practice than in the past.

Proposed Edits. Amend Rule 23(c) to read as follows:

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, and after sufficient opportunity for relevant discovery, the court must determine by order whether to certify the action as a class action. If a movant shows by affidavit or declaration (in its moving papers or in reply) that, for specified reasons, it cannot present evidence sufficient to justify its motion, the court should:

(i) defer considering the motion; and

(ii) allow time to obtain affidavits or declarations or to take additional discovery; and

(iii) issue any other appropriate order.

Rationale. Plaintiffs seeking to certify a class can find themselves in a difficult situation. They bear the burden of proof. And courts often want to address class certification relatively early in the proceedings. But defendants often possess information and evidence essential to certify a class, especially when defendants have concealed their conduct, *e.g.*, as can happen in a price-fixing conspiracy or an employment discrimination case. Plaintiffs may not be able to obtain the discovery they need by the time a class certification motion is due. That may cause plaintiffs' motion to fail and, as a practical matter, end the litigation. The likelihood of this situation arising has increased as courts in recent years have delved further into the merits at class certification and found facts. Indeed, now plaintiffs' burden at class certification—where they must satisfy the requirements of Rule 23 by a preponderance of the evidence—can be heavier than their burden in opposing summary judgment—where plaintiffs need merely to raise a genuine issue of material fact. Historically, the inquiry at class certification was much lighter. Given the change in the law, plaintiffs should not be forced to move for class certification earlier than is practicable and should be permitted to show that they have made reasonable efforts at discovery but that they nonetheless may need additional discovery to make a showing on class certification.

4. *Daubert* Arguments as Part of Rule 23 Briefing.

Description of Proposal. Many trial courts are entertaining *Daubert* motions at class certification. (Whether they should do so has not been resolved authoritatively.) This significantly increases the cost and burden of the class certification proceedings, doubling the written materials. It also enables defendants to circumvent ordinary briefing practice, allowing them to file two additional briefs pertaining to class certification in the form of moving papers and a reply regarding *Daubert*. Except in extraordinary circumstances, defendants should be required to raise any concerns they have under *Daubert* in their brief opposing class certification.

Proposed Edits. Insert a new Rule 23(c)(1) that reads as follows:

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) Certification Briefing.

(A) The class certification briefing will ordinarily entail a motion and supporting papers filed by the movant or movants, responsive papers filed by the opposing party or parties, and a reply filed by the movant or movants. Except in extraordinary circumstances, the party or parties opposing class certification must raise in their responsive papers any issues related to the admissibility of expert testimony submitted in support of the motion for class certification and the movant or movants must respond in their reply. Except in extraordinary circumstances, the movant for class certification must raise in their reply papers any issues related to the admissibility of expert testimony submitted in opposition to the motion for class certification and the opposing party should have an opportunity to respond only to that issue.(42) Certification Order.

Rationale. Defendants' arguments regarding *Daubert* generally in effect address the merits of class certification. After all, now that courts at class certification may assess the substance of expert opinions—at least to the extent doing so is relevant to resolving whether Rule 23 is satisfied—any arguments attacking the testimony of an expert are likely to be relevant to whether the expert's testimony is persuasive in regard to the requirements of Rule 23. Indeed, it is not clear how much a *Daubert* challenge adds to the issue.

Daubert sets a minimum threshold expert testimony must cross to be admissible. To assist plaintiffs in carrying their burden at class certification, the expert testimony must not only cross the *Daubert* threshold but must be persuasive. That is a consequence of recent court opinions suggesting courts at class certification must delve into the substance of expert reports to the extent doing so is relevant to addressing the requirement of Rule 23. It is hard to imagine an expert report can be persuasive without at least satisfying *Daubert*. So the class certification standard leaves defendants ample room to make the kinds of arguments they would make regarding *Daubert*.

The reality is defendants' *Daubert* arguments rarely warrant independent briefing. Their opposition to class certification already challenges the expert testimony on which plaintiffs rely. Any arguments pertaining to *Daubert* can be framed as a criticism of that expert testimony, which courts address anyway in deciding class certification. As a result, the most salient practical effects of allowing *Daubert* challenges at class certification are twofold: (1) increasing the burden and expense by adding to the paperwork judges must review and lawyers must prepare and (2) creating an opportunity for strategic behavior by allowing defendants to invert the ordinary briefing process at class certification, generally giving them two additional briefs (compared to one extra brief for plaintiffs) and allowing the defendants to have the final word in a reply brief. The proposed guidance regarding the briefing schedule is designed to address this unintended effect.

Plaintiffs too should be limited in the briefing they may submit in support of a *Daubert* motion. The proposal would be to require them to make their *Daubert* arguments in a reply brief and to provide defendants an opportunity to respond.

5. Ban on Retaliation.

Description of Proposal. In some areas of the law, plaintiffs have no clear right to be free from retaliation for pursuing class litigation. The threat of retaliation can chill private enforcement of the law. Rule 23 should deter that threat.

Proposed Edits. Add a new provision as Rule 23(i) that reads as follows:

(i) PROHIBITION ON RETALIATION. It shall be sanctionable as interfering with orderly procedure for a defendant to retaliate against a named party or potential absent class member in an action brought as a proposed class action because he, she or it has filed a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing in the proposed class action pursuant to Rule 23. If any such retaliation interferes with or in any way impedes prosecution of the litigation, the court shall impose sanctions as set forth in Rule 11(c)(4). Any further retaliation by the defendant shall result in sanctions as set forth in Rule 37(b)(2)(A).

Rationale. Parties should not be subject to retaliation for asserting legal rights. Yet in some areas of the law they have no clear protection. Antitrust is an example. In federal antitrust cases this is particularly troubling. Only direct purchasers can sue for overcharge damages under federal antitrust law. That means the ideal plaintiffs have a direct relationship with potential defendants and are likely to be susceptible to retaliation. That danger—and the resulting deterrent effect on bringing private claims—subvert the reasoning of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The proposed language borrows from the ban on retaliation under Title VII of the Civil Rights Act of 1964.

6. Adapting Analysis for Settlement and Trial/Litigation.

Description of Proposal. Rule 23 should specify that the standard for class certification can vary depending on whether a class is being certified for purposes of settlement or trial. The requirements of Rule 23(a) and (b) remain the same. But how they apply depends on whether a court will be overseeing the settlement process or litigation and trial.

Proposed Edits. Insert a new Rule 23(e)(6) that reads as follows:

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

...

(6) A court in determining whether to certify a class for purposes of settlement only should apply the requirements in Rules 23(a) and (b) in light of that context, and should not, for example, take into account trial manageability.

Rationale. Courts have had a difficult time distinguishing the class certification standard for litigation and trial from the standard for settlement. Yet the two procedures are quite different. Common issues may predominate, for example, in assessing the adequacy of a settlement and in allocating funds to class members while they would not predominate in litigation or at trial (and, in theory, perhaps *vice versa*). The most obvious distinction is that in certifying a class for purposes of settlement it makes little sense to worry about trial management. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 2248 (1997).

7. Requiring Vexatious Objectors to Furnish Security.

Description of Proposal. Rule 23 should be modified to include a provision that requires vexatious objectors—often called “professional objectors”—to furnish security when making objections that have no reasonable probability of succeeding.

Proposed Edits. Insert a new Rule 23(i) that reads as follows:

Rule 23(i). Vexatious Objectors.

(1) “Objector” means a person—or the attorney, law firm or other entity providing legal representation to such a person—who is a member of a certified class or a proposed class and who objects to an aspect of the settlement proceedings, including objecting to the proposed settlement, to certification of a proposed class for settlement purposes, or to the notice provided as part of a proposed settlement.

(2) “Security” means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable costs, including attorney’s fees (and not limited to taxable costs) and any loss from a delayed recovery (including the loss of a reasonable return on investment), resulting from an objection, including any appeal.

(3) In any proposed or certified class action, at any time until final judgment is entered, any party may move the court, upon notice and hearing, for an order requiring any objector to furnish security. The party shall be entitled to appropriate discovery to determine the merits of the motion. The motion for an order requiring the objector to furnish security shall be based upon the ground that the objection violates Rule 11(b).

(4) At the hearing upon the motion the court shall consider any evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof.

(5) If, after hearing the evidence upon the motion, the court determines that the objection violates Rule 11(b), the court shall order the objector to furnish, for the benefit of the moving party, security in such amount and within such time as the court shall fix. In making this determination, a court may consider that an objector has previously been required to furnish security under this provision or has made multiple unsuccessful objections to proposed settlements in other proposed or certified class actions.

(6) When security that has been ordered furnished is not furnished as ordered, the objection shall be dismissed with no right to appeal except as to the issue of whether the trial court erred in requiring the objector to furnish security.

Rationale. So-called professional objectors file meritless objections to class action settlements, certification of settlement classes, and class action notices, and then appeal as a way to coerce payments from plaintiffs or their counsel. These objections can significantly delay the benefit to the class and discourage the filing of class actions (as they are an anticipated cost that makes filing a class action less attractive, all else equal). The proposed provision requires “vexatious objectors” to furnish security to compensate for the costs imposed by the objection, including for attorney’s fees and on appeal. A court can impose this requirement only if the objector meets the definition of a “vexatious objector.” Often the real culprit is the attorney, law firm or other entity representing an objector, and so the attorney, law firm, or other entity—and not just the party—is subject to the proposal. The proposal builds on Federal Rule of Civil Procedure 11.

Thank you for considering our views.

Respectfully submitted,

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