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March 19, 2015

Via Email and U.S. Mail
Committee on Rules of Practice and Procedure
Thurgood Marshall Building
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 20544
rules_support@ao.uscourts.gov

Dear Distinguished Members of the Committee on Rules of Practice and Procedure:

We understand that the Rule 23 Subcommittee will soon be considering possible revisions to Rule 23 of the Federal Rules of Civil Procedure. For the reasons set forth in the accompanying memorandum, we urge the Subcommittee to reject any changes to Rule 23 that would preclude class certification where a class may include some members who have arguably suffered no injury. In this vein, we also support the recommendations submitted by Jennie Lee Anderson on March 18, 2015.

Thank you for your consideration. Please do not hesitate to contact us if you have any questions or concerns.

Sincerely,

/s/ *Stephen J. Herman*

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Enclosure

Much Ado About Nothing:
The So-Called "No-Injury Class"

Stephen J. Herman and James Bilsborrow *

For the last several years, the class action defense bar has made much fuss over the so-called "no-injury class".[1] Conflating several different notions into one amorphous nametag, class action opponents contend that such "no-injury classes" result when courts ignore Article III standing requirements or the predominance requirements of Rule 23(b)(3). In fact, these critics themselves ignore the way in which a class action is litigated, conflate a judicial award of damages with a defendant's voluntary decision to settle, and disregard the desire for a class definition whose members are objectively ascertainable for notice, due process, and *res judicata* purposes, independently of the merits of any class-wide or individual class member's claim.

For a long time, courts have had to wrestle with cases in which the defendant claims the plaintiff suffered no injury or harm. While these cases may sometime be filed as putative class actions, the questions of injury-in-fact and redress are generally resolved at the Rule 12 pleading stage, whether on Article III grounds or as a matter of substantive law, before the case ever reaches the class certification stage.[2] When a case survives dismissal, and is certified, the defendant may disagree or otherwise feel aggrieved, but to call such an action a "no-injury class" is certainly a misnomer, as the court has already recognized the existence of a cognizable injury.[3]

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[1] The label itself—"no-injury class"—is applied pejoratively. *See* Edward Sherman, *"No Injury" Plaintiffs and Standing*, 82 GEO. WASH. L. REV. 834, 836 (2014).

[2] *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 305 (3d Cir. 2011) (en banc) ("An analysis into the legal viability of asserted claims is properly considered through a motion to dismiss under Rule 12(b) or summary judgment pursuant to Rule 56, not as part of a Rule 23 certification process.").

[3] In this fashion, defendants "put the cart before the horse," conflating merits and certification inquiries. *See Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, --- U.S. ---, 133 S. Ct. 1184, 1191 (2013). Indeed, many of these cases are pregnant with significant policy issues, for which Congress or other legislative bodies have established statutory damages or penalties to deter wrongful conduct and/or to provide damages for injuries that might be inefficient to prove or difficult to quantify. *See, e.g., Crabill v. Trans Union, LLC*, 259 F.3d 662, 665 (7th Cir. 2001) ("Many statutes, notably consumer-protection statutes, authorize the award of damages … for violations that cause so little measurable injury that the cost of proving up damages would exceed the damages themselves, making the right to sue nugatory"); *see also* Sherman, *supra* note 1 at 847-50. In many cases, defendants' complaints are not directed against the requirements of Rule 23 per se, but are aimed instead at statutory damages actions through which Congress has provided a specific remedy. *See, e.g.*, LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES AND ITS RULE 23 SUBCOMMITTEE, REPAIRING THE DISCONNECT BETWEEN CLASS ACTIONS AND CLASS MEMBERS: WHY RULES GOVERNING "NO INJURY" CASES, CERTIFICATION STANDARDS FOR ISSUE CLASSES AND NOTICE NEED REFORM 3 n.9 (2013), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_23_reform_8.13.14.pdf. In such instances, defendants' complaints are more appropriately directed at amendment of the statute at issue rather than Rule 23.

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What the class action opponents really seem to be complaining about are class actions that involve clear, legitimate and often serious injuries, but whose class definitions also encompass some persons or entities who were not injured by the defendant's conduct. Again, the term "no-injury class" is a misnomer when applied in this context; an allegedly "overbroad" class is what they really mean.

Contrary to the defense arguments regarding the parade of horribles that will arise from the certification of an allegedly "overbroad" class, however: **(i)** an over-inclusive class definition is the natural result of defining the potentially affected persons and entities by objectively ascertainable criteria for notice, due process and *res judicata* purposes; **(ii)** in a certified class action, the court almost never tries the class representative's claim, and then extrapolates the result to each and every other defined class member, but, rather, tries only the common and class-wide issues in a common and class-wide trial, with individual causation, damages and other conditions precedent to recovery left to be individually established by participating class members in subsequent proceedings; and **(iii)** knowing this, there is no reason for a defendant desiring to settle a certified class action to voluntarily compensate class members whom the defendant knows will not be able to obtain an individual recovery at the end of the day.

What the class action opponents really want is a Catch-22 under which no class can ever be certified: If the class proponents define the class in terms of injury, the defendant will argue that the class cannot be certified, because the class definition is not objectively ascertainable, but is, rather, intertwined with the merits.[4] If, on the other hand, the class proponents properly define the class in terms of objectively ascertainable criteria, untethered to the merits, the defendant will argue that the class cannot be certified because the class definition is "overbroad" and the class is therefore a "no-injury class." Hence, class actions involving clear, legitimate and often serious injuries will infrequently, if ever, be certified, and the baby will be thrown out with the bathwater.

<u>Complaints About the So-Called "No-Injury" Class Ignore the Purpose of the Class Definition, and the Distinction Between Class Membership and Actual Recovery</u>

It is well-settled that a class should be defined by objectively ascertainable criteria, so that the class members, for notice, opt out and due process purposes, and the courts, for *res judicata* purposes, can determine who will be or has been bound by any class-wide judgment at the end of the day.[5] The class should be fixed before the merits are considered, and its membership should not change based on the outcome of any class-wide or individual merits

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Honorable Christopher C. Conner in the Middle District of Pennsylvania and Hon. D. Brooks Smith of the U.S. Third Circuit Court of Appeals.

[4] *See infra* note 8 and accompanying text.

[5] 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS, § 3:1 (5th ed. 2013) ("A definable class protects absent plaintiffs in two ways—by enabling notice to be provided where necessary and by defining who is entitled to relief; and a definable class protects defendants by enabling a final judgment that clearly identifies who is bound by it."); *see also Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) ("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. If the definition is not clear in its applicability, then satellite litigation will be invited over who was in the class in the first place.").

determination.

The fact that a person or entity falls within a class definition simply means that he, she or it will be bound by any class-wide judgment, as a matter of *res judicata*; it does not mean that, assuming the class is successful on common or class-wide issues, he, she or it will automatically be entitled to relief.[6] Rather, the class should be defined separately and distinctly from the subgroup of people or entities expected to actually recover (assuming that the plaintiffs prevail on the common issues) at the end of the day.

Therefore, if done correctly, the class definition will almost always be "over-inclusive" in the sense that the class will be larger than the group of individual persons or entities who are ultimately entitled to recover, based on various legal and/or factual parameters, proofs and/or determinations.[7]

As noted, the class opponents' arguments regarding allegedly "overbroad" classes are attempts to place the class proponents in an unwinnable situation: By forcing them to define the contours of the class to be coterminous with the exact group of people or entities who will ultimately recover (assuming that the class prevails), the class proponents will frequently be required to inject merits elements into the class definition, and thereby compromise the objective ascertainability of the class.[8]

Concerns About "Overbroad" Classes Largely Ignore the Way in Which Certified Class Actions Are Actually Litigated

The concern that a defendant will be unfairly required to compensate persons or entities that fall within the class definition but suffered no injury seem to stem from the premise that, once a class is certified, the class representative's action or claim will be litigated to conclusion,

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[6] *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009). Indeed, class members are often required to submit individual proof of damages prior to recovery. *See, e.g.*, *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 245 (7th Cir. 2014); *In re Deepwater Horizon*, 739 F.3d 790, 796-98 (5th Cir. 2014); *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1326 (11th Cir. 2002). In recent product liability litigation concerning allegedly defective front-loading Whirlpool washing machines, the court of appeals certified a consumer class and left the district court to determine individual damages at trial. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013). The jury later returned a damages verdict in favor of the defendant. Paul M. Barrett, *Whirlpool Wins 'Smelly Washer' Test Case, With More Trials to Come*, BLOOMBERG, Nov. 5, 2014, http://www.bloomberg.com/bw/articles/2014-11-05/whirlpool-wins-smelly-washer-test-case-with-more-trials-to-come.

[7] *See Kohen*, 571 F.3d at 677 ("What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown.")

[8] *In re Nexium Antitrust Litig.*, 777 F.3d 9, slip op. at *22 (1st Cir. 2015) ("[E]xcluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a 'fail-safe class'—a class defined in terms of the legal injury."). It is improper to define a class by reference to those who are injured by the defendant's conduct "because it would allow putative class members to seek a remedy but not be bound by an adverse judgment—either those class members win or, by virtue of losing, they are not in the class and are not bound." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012). By demanding that plaintiffs define a class up front as only those who were injured by defendant's conduct, however, this is exactly what the defense bar is demanding.

with that result then applied to the actions or claims of all of the other absent class members whom he or she represented at trial.

However, virtually no class action is tried in this way.

A class action trial will almost always be structured to resolve only the common class-wide issues, claims and/or defenses, on a class-wide basis.[9] In some cases, the class representative will not even present evidence that is uniquely relevant to his or her own particular claim. Yet even where the class representative's action or claim is tried, (perhaps for standing, or efficiency, or "bellwether" purposes), the findings that are unique to the class representative – such as specific causation, *quantum* of damages, or an individualized defense – are almost never imputed, extrapolated or applied to the class as a whole.[10]

There are, of course, various securities, antitrust, ERISA, discrimination, and other cases where a formulaic damage model can be established and applied across the class from a database or other common sources of proof.[11] In some cases, the class will be entitled to a class-wide remedy, such as disgorgement, in which the relief turns not on any injury to any individual class member, but upon the defendant's ill-gotten gains. But even in the context of a compensatory damages remedy, the damages for which the defendant is ultimately liable is a function of the common and class-wide determinations, as applied to the individual facts and circumstances of the class members, as reflected in the data.

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[9] *See* MANUAL FOR COMPLEX LITIGATION, FOURTH, § 11.631 ("[T]he judge may consider severing for a joint trial those issues on which common evidence predominates, reserving noncommon issues for subsequent individual trials."); *see also Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012) (explaining that a trial may resolve liability questions common to the class, while subsequent individual hearings could determine claimant-specific damages), *vacated on other grounds*, *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 606 (E.D. La. 2006) (approving bifurcation of common liability issues and individual damages in oil spill litigation); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 658 (C.D. Cal. 2000) (bifurcating trial into liability and damages phases, and maintaining class status solely for determination of liability).

[10] The ongoing *Engle* tobacco litigation in Florida is but one example of this process. There, a class of smokers and their survivors filed claims against several tobacco companies seeking compensatory and punitive damages for smoking-related injuries. *See Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1256 (Fla. 2006). The trial court certified the class and issued a three-phase trial plan. *Id.* The first phase centered on defendants' common liability and the general health effects related to smoking. Subsequent phases centered on individual issues. The Florida Supreme Court upheld the application of phase one to the claims the class shared in common: general causation, addictive qualities of cigarettes generally, strict liability, fraud by concealment, negligence, and breach of warranties. *Id.* at 1245, 1269-70. The court then decertified the class because only individualized issues remained. *See id.* at 1269-70. The class consisted of thousands of members. Those members were then permitted to try their individual cases on the remaining issues. Some of those trials have resulted in verdicts for the plaintiff; some have resulted in verdicts for the defense. The pertinent point is that the class device permitted efficient resolution of common issues, but only common issues. *See, e.g.*, Nathan Koppel, *A Streak is Broken: Plaintiff Wins $80 Million Tobacco Verdict in Florida*, WALL STREET JOURNAL LAW BLOG, http://blogs.wsj.com/law/2010/11/16/a-streak-is-broken-plaintiff-wins-80-million-tobacco-verdict-in-florida/.

[11] *See, e.g.*, *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815-16 (7th Cir. 2012) (crediting expert testimony who used damage model to calculate antitrust impact). Courts are increasingly skeptical of cases that rely on damage formulas, however, and may be shifting to a preference to more often certify such cases for liability purposes only. *See, e.g., Fort Worth Employees' Retirement Fund v. JP Morgan Chase & Co.*, 301 F.R.D. 116, 141-43 (S.D.N.Y. 2014) (finding that a class could proceed for liability determinations but not for damages calculation).

Even in less formulaic class action cases, the triable common class-wide issues are, by their nature, common and class-wide. They are based on common and class-wide bodies of evidence, and not the vagaries of the individual class members' facts and circumstances. If the class loses on the necessary common elements, the individual facts become irrelevant. If the class wins on some or all of the common elements, many of the class members may still not be entitled to recover unless they come forward with evidence of causation or injury. In some cases, the individual class representatives themselves might not ultimately recover, even though they have prevailed on common issues for the rest of the class. Yet, whether or what, if anything, the class representative is found entitled to receive, it is not that recovery (or lack thereof), but subsequent claim form submissions, or mini-trials, or other proceedings, that will dictate whether and the extent to which absent class members will prevail.[12]

Or, stated another way: The defendant is not cast in judgment to provide compensation to an individual class member who has suffered no injury, even when the court has certified an allegedly "overbroad" class.

A Settling Defendant's Complaints About "Overbroad" Classes Makes Little Sense in the Settlement Context

When a settlement establishes a capped or limited fund, (and particularly where the settlement class is defined after the size of the fund has already been agreed upon), a potentially "overbroad" class presents a risk to the settling class members who have suffered the clearest or most serious injuries, that must be protected with structural safeguards under Rule 23(a)(4) and by a determination that the relief is fair, reasonable and adequate to those class members under Rule 23(e).[13]

It is curious, at the same time, that a settling defendant would be complaining about an "overbroad" class in this context – as the defendant is getting the benefit of a broader class-wide release.[14]

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[12] *See supra* note 6.

[13] The concern that the "valid" claims of "deserving" class members might be "watered down" by relief paid to "undeserving" class members who have more marginal (and perhaps even no cognizable) claims can be mitigated or alleviated entirely by the eligibility and/or proof requirements and standards that are built into the distribution model. While some courts appear to be bothered by the release of claims by potentially large numbers of class members who are not receiving any consideration if these individuals or entities do not have a claim that could have been realistically prosecuted in the first place, it would seem that the collective benefits of the settlement overall, (as well as the notice and due process benefits of having a clear and objectively ascertainable class definition), would tend to outweigh the downside (if any) to those absent class members who did not have much of a case in the first place.

[14] In the litigation surrounding the 2010 BP oil spill in the Gulf of Mexico, the parties reached a class settlement resolving economic and property damage claims. Defendant BP insisted on an expansive geographic boundary for the settlement class, covering all of Louisiana, Mississippi, Alabama, and significant portions of coastal Texas and Florida. *See In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 903 (E.D. La. 2012) (describing geographic boundaries of the class settlement). Soon after the settlement was approved, BP began complaining that the settlement class contained class members located far from the Gulf (in northern Mississippi, for example) who allegedly did not suffer economic damages as a result of the spill. *See In re Deepwater Horizon*, 739 F.3d at 798-99. BP never offered to renegotiate the opt-out provision so that the allegedly unharmed class members could escape the class-wide release; rather, BP argued for an

Class opponents seem to suggest that a class defendant is somehow "forced" to settle with absent class members who could not prevail if his or her claim were individually litigated. They speak of the supposed leverage that accompanies these "no-injury" claims through class certification. But it is the class defendant who has leverage in being able to force class counsel to waste time, money and effort litigating the claims of individual class members who cannot recover at the end of the day. Nevertheless, and in any event, there can be no class settlement unless the defendant has agreed to the class definition, (and other terms), and voluntarily decided whom to pay or not pay.

Defendants settle disputed, and even arguably "implausible" claims all of the time. Even an arguably implausible claim, however, may result in a litigated victory or the revelation of damaging discovery. The parties should be permitted to weigh costs and benefits, just as they do in every variety of litigation. There is no Article III requirement or limitation on a defendant's ability to settle a claim.[15]

Indeed, public policy strongly favors settlements, both in the class and non-class context.[16] As long as the settling class members are protected under Rule 23, why would we want to prevent a defendant from attempting to voluntarily resolve purported "no-injury" claims?

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additional undefined and subjective "standing" inquiry only after the opt-out period had elapsed and the district court approved the settlement. *Id.* at 799.

[15] *See In re Deepwater Horizon*, 732 F.3d 326, 359-60 (5th Cir. 2013) (Dennis, J., concurring in part and dissenting in part) (arguing that a defendant can choose to buy peace from an allegedly uninjured plaintiff if it chooses).

[16] *See, e.g., Ehrheart v. Verizon Wireless,* 609 F.3d 590, 593-595 (3d Cir. 2010); *Seals v. Herzing Inc.,* 482 Fed.Appx. 893, 896 (5th Cir. 2012); *In re Vioxx Prods. Liab. Lit.,* 412 Fed.Appx. 653, 654 (5th Cir. 2010).