A Rule Change Is, After All, a Rule Change: Rule 23 Settlement Approval and the Problems of Consensus Rulemaking

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Reforming Federal Rule of Civil Procedure 23, the rule that covers class action lawsuits, is a fraught enterprise. So much so that past efforts by the Advisory Committee on Civil Rules to substantially reform Rule 23 have been met with such controversy that more recently, the Advisory Committee has elected to pursue more modest reforms. The Committee's most recent Rule 23 rulemaking efforts, which went into effect in 2018, have maintained this modest focus by focusing on procedural aspects of class actions like notice requirements and the criteria judges use to approve of proposed settlements. In addressing settlement approval in its rulemaking, the Advisory Committee hoped to unify the practice of different circuits, which had all developed their own sets of factors for judges to use in evaluating whether a proposed class settlement was fair, reasonable, and adequate. The new criteria, now codified in Rule 23(e)(2), have been widely understood as introducing modest changes and have even been argued by some to have done nothing more than codify existing circuit practice. And yet, in the few years since the amendment's adoption, two circuits—the Ninth and the Fourth—have sharply diverged in their interpretation of what the new Rule 23(e)(2) requires, calling into question whether the changes are so self-evidently modest and dashing the goal of unifying circuit practice.

DOI: https://doi.org/10.15779/Z38Q814T3N

* J.D. 2024, University of California, Berkeley, School of Law. Thank you to the many editors of the *California Law Review* who provided thoughtful feedback and encouragement through the publishing process. Thanks also to my civil procedure professor, Professor Dave Marcus, who taught me how much procedure matters.

This Note provides an account of the rulemaking process that attempts to explain this reemerging circuit divergence by situating the amended Rule 23(e)(2) settlement criteria within broader historical debates about the proper goals of class actions. Two competing visions of class actions—one a regulatory conception of class actions as a powerful corporate deterrence mechanism, the other a compensatory conception of class actions as merely a joinder rule—have divided thinking on the modern Rule 23 nearly from its inception and have affected every attempt at its reform. I argue that the approach to rulemaking taken by the Advisory Committee, which prioritized process values like consensus-building over other goals, was unlikely to lead to effective rulemaking given the contentious history of class actions. Indeed, the final amendment text and accompanying Committee Note substantially incorporate the ambiguities, subtleties, and conflicting values that reflect the work of consensus and compromise between very different visions of the role of class actions, making the interpretive split between the Fourth and Ninth Circuit understandable and even foreseeable. Finally, I conclude by arguing that the Ninth Circuit has taken the better approach to Rule 23(e)(2). Despite the modest ambitions of the amendment, the amended criteria do more than merely codify existing practice. Instead, they quietly embrace the compensatory view in the class action debates, with potentially far-reaching consequences for the regulatory power of small-value consumer class actions.

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INTRODUCTION

Imagine it is 2017, and you have filed a class action lawsuit for damages against a corporate defendant. You litigate aggressively, receive useful discovery from the defendant, and begin to think about how the case might be resolved. If your case is like almost all class actions in this country (and indeed almost all civil litigation generally), it will end in a settlement.[1] After much negotiation, you and the defendant agree in principle to a settlement, which you then present to the district court, hoping to get the court's approval.[2] Under this familiar path, your judge will then evaluate the procedural and substantive merits of your proposed settlement and decide whether to approve it as "fair, reasonable, and adequate," the broadly articulated standard of approval.[3]

If you had filed this lawsuit in the Second Circuit, your judge would have looked to the *Grinnell* factors to help assess the fairness, reasonableness, and adequacy of the settlement.[4] If you had filed in the Fifth Circuit, your judge would have considered your proposal using the *Reed* factors;[5] if in the Ninth Circuit, the *Hanlon* factors;[6] and so on. While many of the circuits' lists

1. *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 4, 28 (2017). ("Today, approximately 1 percent of all civil cases filed in federal court are resolved by trial . . . .").

2. Unlike the rules for non-class civil litigation, Rule 23, which governs class action procedure, requires that the district court make factual findings about the adequacy of the settlement before giving it final approval. The court must find that the settlement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e).

3. *Id.*

4. The *Grinnell* factors include "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." Charron v. Wiener, 731 F.3d 241, 247 (2d Cir. 2013).

5. The *Reed* factors are "(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members." Reed v. Gen. Motors Corp., 703 F. 2d 170, 172 (5th Cir. 1983).

6. The *Hanlon* factors are "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings;

ultimately share similar concerns, each circuit by 2017 had come up with its own criteria for evaluating whether a settlement was "fair, reasonable, and adequate." This led to concern from some about the "diversity and divergence" among the many settlement approval checklists circuits were using.[7] The American Law Institute had expressed its concern that "existing precedent produced an unduly diffuse and unfocused settlement review process, frustrating both judges and lawyers."[8] Some even feared that the differences between circuits could lead to forum shopping among plaintiffs' lawyers.[9]

These settlement criteria had been developing in the circuits for over thirty years since the Second Circuit's nine-factor checklist in *Grinnell*,[10] and by 2012 or so, the Advisory Committee on Civil Rules decided that enough was enough. It wanted to pare down all of the different checklists that courts applied in different circuits, not to mention reduce the sheer number of factors that courts were meant to consider under some circuits' lists.[11] The Advisory Committee was also concerned that some of these factors, such as support for the settlement by those who negotiated it, had little value in evaluating the merits of a settlement.[12] The Committee proposed to amend Rule 23(e) to provide explicit criteria to guide judges in approving settlements, criteria that would harmonize the circuit lists with the goal of "focus[ing] the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."[13]

After much deliberation and input from class action stakeholders, the eventual product of the Committee's work was a set of pared-down settlement criteria that instructed courts to consider four factors when evaluating the

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the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998).

7. Rule 23 Subcommittee, *Subcommittee Report*, *in* AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 87, 106 (2015) [hereinafter AGENDA BOOK], https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf [https://perma.cc/PPH9-YYG2].

8. *Id.*

9. *See* Rule 23 Subcommittee, *Notes of September 11, 2015 Subcommittee Meeting*, *in* AGENDA BOOK, *supra* note 7, at 151, 157.

10. Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

11. For example, in the Third Circuit, judges must consider the nine *Girsh* factors, but they may also consider the six non-mandatory *Prudential* factors. *See In re* Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions, 148 F.3d 283, 323 (3d Cir. 1998) ("[I]t may be useful to expand the traditional *Girsh* factors to include, when appropriate, these factors among others . . . .").

12. *See* CIV. RULES ADVISORY COMM., MINUTES 33 (Apr. 9, 2015), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2015 [https://perma.cc/QTU3-JQGT] (explaining that some factors articulated by circuits were discussed negatively in the draft Committee Note to the amendment).

13. COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 224 (2016), https://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_final_0.pdf [https://perma.cc/AV8E-9UZB].

fairness, reasonableness, and adequacy of class settlements, with the third factor being further broken down into four subfactors.[14] These new settlement approval criteria became part of Rule 23 with the 2018 amendments to the Federal Rules of Civil Procedure.

The goals of this Note are fairly straightforward: to tell the story of how these new settlement criteria came to be and to assess how some courts have reacted to and interpreted the new rule. Once one digs into that story, however, the narrative becomes inevitably complicated by its historical context—the context of earlier Advisory Committee efforts at rulemaking in this area, as well as of the long-running debates about the proper role of class actions in our legal system. In the end, what results is something of a parable of the hazards of wading into the thicket of class action reform and the difficulty of effective rulemaking in this area.

Parts I–III aim to be mostly descriptive so that a fairly balanced picture of the amendment process, from inception through implementation, can be understood. Part I is historical. It gives a brief background on the history of class action reform efforts and explains the ongoing debates between the regulatory and the compensatory conceptions of class actions that provide necessary background for understanding any changes to class action law. It also sets the table for discussion of the 2018 amendments by examining some prior reforms to class action settlement practice, including particularly the 2003 amendments. Part II digs into the 2018 amendment process, examining the proposal and drafting process of the amendment and how the settlement approval rule took shape as that process went on. In doing so, it considers a number of materials that help illuminate that process: the American Law Institute's 2010 *Principles of the Law of Aggregate Litigation*, which heavily influenced the rule, as well as the "legislative history" of the adoption, including documents from the Advisory Committee, statements of those involved in the rulemaking, and feedback received from stakeholders through public comment. Part III looks at how courts in two circuits have implemented the new criteria to evaluate class settlements since the 2018 amendments went into effect. It shows how these circuits could diverge in their interpretation of the new rule, with one circuit treating it as a meaningful rule change and another holding that it merely codifies existing settlement criteria.

The Note saves most of its argument for Parts IV–V, where, tying the threads of Parts I–III together, it makes claims about the consequences of the amendment process and how it might affect the future of class action practice. Part IV argues that the diverging interpretations of the rule's meaning were all but inevitable consequences of the rule itself. This is because the rule was a product of consensus-building around a topic as unlikely to produce consensus as the purposes and goals of class actions. Drawing on relevant scholarship on

14. *See* FED. R. CIV. P. 23(e)(2).

procedure theory, the Note uses the divergent interpretations to illustrate some of the consequences of what has become the dominant consensus-based approach to rulemaking. Finally, in Part V the Note concludes by arguing that despite the ambiguity provided by its subtle changes and the resulting differences in interpretation, the amendment is best understood as a shift in the focus of settlement review that, consistent with the 2003 reforms to settlement, signals a quiet shift toward the more limited compensatory conception of class actions.

I. THE REGULATORY-COMPENSATORY DIVIDE AND PAST EFFORTS TO REFORM RULE 23

A. The Dawn of the Modern Era: The 1966 Amendments

Fuller accounts of both the history of class actions in America and the development of Rule 23 have been made by others.[15] My purpose here is to offer a brief overview of the modern class action as it began with the 1966 amendments and to introduce the competing conceptions of the purpose of class actions. These competing conceptions have divided lawyers since shortly after the 1966 amendments went into effect and have affected all later attempts at reforms. Then I turn attention to more recent reforms and to the increasing focus on class settlements evident in these later reform efforts.

The modern era of class actions in the United States began in 1966 following significant amendments to Rule 23.[16] While Rule 23 goes back to the original 1938 Federal Rules of Civil Procedure, rulemakers almost immediately set about calling for revision of that version of the rule.[17] The rule categorized class actions into formalistic, cumbersome categories that judges sometimes worked around to solve practical problems that the categories created.[18] And so in 1960, the Advisory Committee on Federal Rules of Civil Procedure started the process of reform.[19] As the committee members who worked on the revisions saw it, the job was "to craft a cleaner, more flexible rule that better reflected how some courts had begun to use the class action device."[20] Though today it is "widely agreed that the federal-court class action became a somewhat revolutionary device after Rule 23 was amended in 1966,"[21] few in 1966 saw its

15. *See generally* David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang*, 1953-1980*, 90 WASH. U. L. REV. 587 (2013) [hereinafter Marcus, *History Part I*]; David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. 1785 (2018) [hereinafter Marcus, *History Part II*]; STEPHEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

16. Marcus, *History Part I*, *supra* note 15, at 588.

17. *See id.* at 600–02.

18. *See id.* at 600–01.

19. *Id.* at 603–04.

20. *Id.* at 604.

21. Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903, 903 (2018) [hereinafter Marcus, *Revolution v. Evolution*].

revolutionary potential, and it elicited little protest from the profession despite prolonged debate from within the Committee itself.[22]

Though its initial reception was perhaps unsuspecting of its power, within a few short years, many began to grasp the amendment's import.[23] A "dizzying array of substantive, political, and cultural changes" in the 1960s began almost immediately after the amendment was finalized, transforming Rule 23 "from a mere joinder rule into a regulatory icon."[24] As people began to appreciate the class action's power, the "now-hardened battle lines in the war over Rule 23 formed" as lawyers on opposing sides clashed "over the same alleged legal and economic pathologies that fuel debates today."[25] The fight over the purpose of class actions was on.

On one side, groups including plaintiffs lawyers and consumer and civil rights advocates argued for a "regulatory conception" of class actions, where private class actions are justified by serving a supplemental function to government regulation.[26] In this view, unleashing the powerful forces of private incentives to deter unlawful business conduct can be as effective as or more effective than government regulation, which may suffer from underfunding or even regulatory capture.[27] The idea that class actions deter bad conduct and thus serve a regulatory function beyond just compensating class members remains a central justification for this expansive view of their role in litigation.[28]

On the other side, the defense bar argued for a much more limited view of the purpose of Rule 23. They argued that the rule's purpose is merely to group together otherwise valid individual claims and to provide an efficient procedure for resolving similar disputes and, if needed, compensating class members for their harms suffered. In this compensatory conception, Rule 23 is distinctly

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22. Marcus, *History Part I*, *supra* note 15, at 605–06. "In 1966, Charles Alan Wright predicted that Rule 23(b)(3), by far the most consequential part of the rule, would have little impact." *Id.* at 609. In a revealing example of how much things have changed with more recent amendment proposals, Marcus notes that the 1966 proposal "provoked little public comment, and the reactions that trickled in showed almost no appreciation for the new rule's redistributive or regulatory potential." *Id.* at 606. As Marcus puts it: "Things changed fast in the 1960s." *Id.* at 609.

23. *See id.* at 606–07 (explaining that the proposal received little public comment or reaction, but that subsequent developments in the 1960s made the power of the class action apparent).

24. *Id.* at 606. Title VII, which provides a cause of action for employment discrimination class actions, went into effect in 1964. The Supreme Court created an implied right of action to sue for securities fraud in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). The public interest movement began to accelerate and law schools began producing more public-minded lawyers, and meanwhile public opinion began to turn against businesses. *Id.* at 607.

25. *Id.* at 609.

26. *Id.* at 590. Many may also describe this conception as the "deterrence conception," since beyond compensating victims, its effect can be to deter bad conduct. I stick with "regulatory conception" throughout for clarity.

27. *See id.* at 592–93.

28. "To supporters of the regulatory conception, the good it accomplishes legitimates Rule 23's use. . . . Since the 1960s, the design of the federal regulatory apparatus has included a substantial role for private litigation, and a powerful, flexibly deployed class action device contributes importantly to this scheme's success." *Id.* at 594–95.

procedural, akin to a joinder rule, and any suggestion that it has a regulatory purpose goes beyond procedure into substantive law.[29] The efficiency of class actions in accomplishing the goals of regulation cannot justify altering substantive law—the Rule is about creating efficient procedures for resolving aggregated legal disputes, not for creating a new, efficient private mechanism for achieving substantive regulatory ends.[30]

It would hardly be an overstatement to say that lawyers, commentators, and academics have been fighting it out over these basic premises ever since.[31] Complaints from the defense bar that class actions are nothing more than "legalized blackmail" or "ransom" that leaves "no reasonable alternative other than settlement . . . regardless of the merits" are a standard rallying cry against class actions today, but, as the source of these particular remarks demonstrates, the defense bar of 1972 perfected these arguments long ago.[32] And on the regulatory conception side, commentators today have justified their view of Rule 23's purpose by grounding it in what they argue were the regulatory goals of the rulemakers and the context of the 1966 rulemaking, placing the amendment within a larger push for an expanded use of federal courts.[33]

The lawyers tasked with implementing the new Rule 23 in the 1960s and 1970s—the judges, legislators, and practicing lawyers—could have adopted the position of one of these two competing conceptions and resolved the fundamental dispute, but as history demonstrates, they did not. Professor Marcus contends that the decision-makers instead maintained "sufficient ambiguity in class action doctrine" that "enable[d] the conceptions to coexist, however awkwardly."[34] In general, the decision-makers chose to "muddle through without picking sides," managing the dispute between the more expansive and more limited conceptions in a way that "stabilized class action law and practice."[35]

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29. *See id.* at 590.

30. *See id.* at 594.

31. The conflict is so central and enduring that Professor Marcus calls it the basic problem that "any history of Rule 23 must address: is the class action a mere procedural device, or is it a regulatory instrument?" *Id.* at 592.

32. BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 11 (2019). These excerpts come from a report sent to the Advisory Committee by a corporate defense lobbying organization. "All the complaints we hear today about class actions can be found in the 1972 report." *Id.*

33. *See* Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1937–38 (2008). "Rule 23 raised the federal flag in favor of a robust role for adjudication in regulation." *Id.* at 1937. "The 1960s rulemaking was part of a larger story aimed at using the federal courts for regulatory enforcement of federal rights." *Id.* at 1938. "In sum, during the 1960s and into the 1970s, Congress, the courts, and the drafters of the Federal Rules of Civil Procedure shared a vision for the federal courts as instruments of policy." *Id.* at 1944.

34. Marcus, *History Part I*, *supra* note 15, at 597.

35. *Id.* at 597–98.

B. Reform Efforts in the 1990s and 2000s

Judge Marvin Frankel, writing when the 1966 amendment went into effect, predicted that "it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23."[36] And indeed, after some abandoned efforts to reform the rule in the 1970s, it was not until the 1990s that the Advisory Committee considered amending it again in earnest.[37] Prompted by the rapid growth of mass tort and asbestos litigation in the 1980s, the Advisory Committee was asked to consider changes to the rule.[38] The focus was largely on class certification standards for Rule 23(b)(3) damages class actions.

The debate between the regulatory and compensatory views of class actions quickly emerged. What started as a "fairly aggressive" proposal to retool how damages class actions would be litigated and certified was eventually toned down considerably through rounds of debate and drafts within the Committee.[39] But a proposal to add a new factor bearing on class certification remained, which allowed consideration of "whether the probable relief to individual class members justifies the costs and burdens of class litigation."[40] The provision "became a lightning rod" during the public comment period, leading to a letter opposing the amendment signed by 144 law professors.[41] The letter denounced the proposed factor for ignoring the significance of deterrence provided by class actions—by focusing heavily on the probable relief to each individual class member as a factor bearing on whether the class action should go forward, the professors argued, the proposal would hamper the regulatory purpose of Rule 23.[42]

Reflecting after the public comment period, the minutes to the Advisory Committee meeting noted that "[t]he reactions to this proposal demonstrated that it goes to the very heart of the purpose of Rule 23."[43] The Committee had a discussion over "philosophical questions as to the proper role of Rule 23" and

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36. Marcus, *Revolution v. Evolution*, *supra* note 21, at 906 (quoting Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52 (1967)).

37. *Id.* at 906–07. For a more detailed account of the (ultimately fruitless) efforts at reforming class actions in the interim from both within the Advisory Committee and through legislation, see Marcus, *History Part I*, *supra* note 15, at 614–22.

38. Marcus, *Revolution v. Evolution*, *supra* note 21, at 907.

39. *Id.* at 918.

40. Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, 167 F.R.D. 523, 559 (1996).

41. Marcus, *Revolution v. Evolution*, *supra* note 21, at 918–19.

42. *Id.* at 919–20. Grounding the regulatory conception in the original purpose of class actions, they wrote that Rule 23(b)(3) "was conceived originally as a procedural device to facilitate the enforcement of laws that prohibit socially costly behavior that involves small wrongs to large numbers of people." 2 RULES COMM. SUPPORT OFF., WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 6 (1997), https://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf [https://perma.cc/E8RW-9BY6].

43. CIV. RULES ADVISORY COMM., MINUTES 4 (May 1–2, 1997), https://www.uscourts.gov/sites/default/files/fr_import/cv5-97.pdf [https://perma.cc/37XX-X2EX].

"cosmic choices about public law regulation through Rule 23."[44] After discussion in a later meeting about a "philosophical chasm on small-claims classes," the Committee decided to abandon further consideration of this factor.[45] Faced with this controversy over a factor that would have diminished the regulatory power of class actions, the Committee stood down and avoided taking a side. Instead, reform moved outside the Advisory Committee and the rulemaking process as Congress and the Supreme Court, both of which were arguably less burdened than the Advisory Committee by the need to balance the competing conceptions, stepped more aggressively into the arena of reshaping class actions.[46]

When the Advisory Committee picked back up with possible rulemaking later in drafting the 2003 amendments, it reined in its ambitions considerably. Picking more modest territory, the Committee made a deliberate turn away from substantive matters and toward "matters of process and procedure."[47] Among those procedural issues eventually enacted included addressing class settlements and attorney's fees.

For much of the class action's history, until the 2003 amendments, Rule 23 itself did not provide guidance to judges as to how they should evaluate and approve settlements.[48] Instead, judges relied on common law standards fashioned by each circuit. In 2003, Rule 23(e) was amended to explicitly require that judges find a settlement "fair, reasonable, and adequate" before approving it.[49] Among the goals of the amendment was to "strengthen the process of reviewing proposed class-action settlements."[50] The Advisory Committee found that court scrutiny was "essential to assure adequate representation of class members who have not participated in shaping the settlement."[51] But neither the amended rule itself nor the Advisory Committee Notes provided criteria to help judges decide what a fair or reasonable or adequate settlement looked like. The most that the Advisory Committee did was point in the Committee Notes to a

44. *Id.* at 9, 14. Indeed, the Committee was frank about the possible effects of its rulemaking, stating that "[t]he Committee's focus has not been on ending the regulatory use of small-claims classes. Rather, it has been attempting to find a way to regulate abusive uses of small-claims classes." *Id.* at 14.

45. CIV. RULES ADVISORY COMM., MINUTES 21 (Oct. 6–7, 1997), https://www.uscourts.gov/sites/default/files/fr_import/cv10-97.pdf [https://perma.cc/BG8A-GKXH].

46. *See* Marcus, *History Part II*, *supra* note 15, at 1825–31 (for a discussion of the Supreme Court's role in mass tort class actions); *id.* at 1836–42 (for a discussion of Congress's role in passing the Private Securities Litigation Reform Act (PSLRA)).

47. Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and Rules of Evidence, 201 F.R.D. 560, 590 (2001).

48. *See* FED. R. CIV. P. 23 advisory committee's note to 2003 amendment ("Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate.").

49. FED. R. CIV. P. 23 (as amended 2003). As the notes to the 2003 amendments explain, the amendments also mandated holding fairness hearings, a practice that had become widespread but was now made mandatory.

50. FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

51. *Id.*

Third Circuit case that enumerated a list of "many factors that may deserve consideration."[52]

While these changes may have been modest, and partly adopted merely to approve of and codify widely existing settlement approval practice at the time, they reflected a growing interest in class action settlements. Further reflecting these concerns, a new subsection of Rule 23 was also adopted as part of the 2003 amendments: 23(h) would now govern awards of attorney's fees and costs. The comments make clear that the new subsection reflected serious concerns with the role of attorney's fees in settlements. Attorney's fees "are a powerful influence on the way attorneys initiate, develop, and conclude class actions."[53] Along with another new subsection on the appointment process for class counsel, the attorney's fees subsection was meant to provide ways of better "monitoring the work of class counsel" during the course of the class action.[54]

After the 2003 amendments, the Advisory Committee did not touch Rule 23 again until it took up amendment proposals for what became the 2018 amendments. In the intervening period, Congress again stepped in with the Class Action Fairness Act of 2005 (CAFA), which was significant for providing for federal diversity jurisdiction over multistate class actions that were previously litigated primarily in state courts.[55]

While the jurisdictional provisions were considered the most significant portions of the bill, CAFA was also significant for requiring judges to more heavily scrutinize so-called coupon settlements, where the class's lawyers settled the case for coupons or vouchers redeemable for the defendant's product rather than for cash payments to class members. Coupon settlements could be used to "shortchange class members" by creating incentives for "class attorneys to collude with defendants," exchanging overall cheaper coupon settlements for higher attorney's fees.[56] Indeed, in the law itself, Congress explicitly stated that "[c]lass members often receive little or no benefit from class actions." such as cases where the lawyers "are awarded large fees, while leaving class members with coupons or other awards of little or no value."[57] CAFA required that attorney's fees in coupon settlements "shall be based on the value to class members of the coupons that are redeemed."[58]

During this period from the 1990s through mid-2000s, the Advisory Committee, Congress, and the Supreme Court all "extensively reexamine[d] fundamental issues, with numerous and significant doctrinal consequences."[59]

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52. *Id.* It also pointed to the Manual for Complex Litigation for further guidance on the matter.
53. *Id.*
54. *Id.*
55. *See* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and The New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1824 (2008).
56. *Id.* at 1874.
57. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4, 4.
58. *Id.* § 3, 119 Stat. at 6.
59. Marcus, *History Part II*, *supra* note 15, at 1843.

And all in their own way displayed an increased interest in class action settlements and the ways that they influence attorney behavior.[60] These reforms tended to be more modest than full-on reevaluations of the fundamental debates of the role of class actions. Yet some commentators still believed that they had the potential to diminish the regulatory power of class actions by looking more skeptically at class settlements, especially those from low-value consumer class actions.[61] For the Advisory Committee, the 2018 amendments largely picked up this thread in their continued focus on "matters of process and procedure" like class settlement procedures instead of wading into rulemaking on more controversial issues that go to the heart of the fundamental regulatory-compensatory debates.[62]

II. THE PROCESS OF AMENDING RULE 23 SETTLEMENT APPROVAL CRITERIA

While my focus in this Note is on the amended standards for approval of proposed class settlements, the 2018 amendments also addressed six other issues in class action practice.[63] The proposed amendments were the result of more than five years of study by the Advisory Committee's Rule 23 Subcommittee.[64] The Advisory Committee felt prompted to take up the study and examination of Rule 23 for several practical reasons: many years had passed since Rule 23 was last amended in 2003, a body of case law had developed in the intervening years, and Congress had demonstrated interest in the subject, as evidenced by adopting CAFA in 2005.[65] And so, in 2011 the Advisory Committee formed the Rule 23

60. See, e.g., *id.* at 1823–31 for a discussion of the Supreme Court's decision in *Amchem Products v. Windsor* and the impact on mass tort class settlements.

61. For a critique of some of these reforms and the "compensationalist hegemony" that they reflect, see generally Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

62. Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and Rules of Evidence, 201 F.R.D. 560, 590 (2001).

63. The other issues were (1) requiring more information to be provided to the district court before sending notice of a proposed settlement (known as "frontloading"), (2) clarifying that a decision to send notice under Rule 23(e)(1) is not appealable under Rule 23(f), (3) clarifying in Rule 23(c)(2)(B) that Rule 23(e)(1) notice triggers the class opt-out period for Rule 23(b)(3) class actions, (4) updating notice rules in Rule 23(b)(3) class actions, (5) establishing new rules for dealing with class action objectors, and (6) including a forty-five-day period in which to seek interlocutory appeal when the United States is a party. Memorandum of the Committee on Rules of Practice and Procedure (Oct. 4, 2017), *in* U.S. SUPREME COURT RULES PACKAGE - OCTOBER 2017, at 2, 7 (2017) [hereinafter OCTOBER 2017 RULES PACKAGE], https://www.uscourts.gov/sites/default/files/2017-10-04-supreme_court_package_final_for_posting_on_website_0.pdf [https://perma.cc/YC4A-ZGS2].

64. Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States [hereinafter Committee on Rules Report], *in id.* at 330, 332. As Professor Marcus (associate reporter of the Rule 23 Subcommittee during the 2018 amendment proposal period) has written regarding this source material in his own analysis of Rule 23 reform efforts, the "compilation of the various drafts considered, minutes of the pertinent meetings, transcripts of the various hearings, and written comments submitted during the public comment period, is an invaluable source on the development" of the amendments. Marcus, *Revolution v. Evolution*, *supra* note 21, at 917.

65. Committee on Rules Report, *supra* note 64, at 332.

Subcommittee to begin studying and developing a list of topics that might warrant amendments to Rule 23.[66]

In developing the proposals, the Subcommittee also attended almost two dozen meetings and bar conferences, held its own mini-conference to gather input from stakeholders, and considered extensive public comments provided in writing and at three public hearings.[67] The proposed amendments sparked serious interest from the bar, as the majority of the comments received during the public comment period for all of the proposed Civil Rules amendments in the 2018 package were addressed to the Rule 23 proposals.[68] Many commenters also urged the Advisory Committee to take action on other Rule 23 topics, some of which the Committee had already studied and determined not to be ripe for rulemaking.[69] My focus is on the amendments to settlement criteria; the following Section tells the story of how those criteria came to be.

A. The Work of the Rule 23 Subcommittee

Despite the relatively higher interest from the bar in its proposed notice and objector changes, the Subcommittee focused first on amending the "fair, reasonable, and adequate" standard for settlement approval in light of the "diversity and divergence" of settlement approval checklists used by different circuits.[70] As it was expressed in a meeting of the Advisory Committee, "the goal is to focus attention on the matters that are useful. A related goal is to direct attention away from factors that have been articulated in some opinions but that do not seem useful."[71]

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66. Report from the Advisory Comm. on Civ. Rules to the Standing Comm. on Rules of Prac. and Proc. 2 (Dec. 11, 2015), https://www.uscourts.gov/sites/default/files/2015-12-11-cv_rules_committee_report_0.pdf [https://perma.cc/9TRE-2WBE]. By spring 2012, the Subcommittee had identified the issues it was most interested in pursuing amendment. After a hiatus due to the run-up to the 2015 amendments, the Subcommittee resumed its work on the possible amendments in 2014. Marcus, *Revolution v. Evolution*, *supra* note 21, at 922.

67. Committee on Rules Report, *supra* note 64, at 332.

68. *Id.* at 333. The other proposed amendments were to Rules 5, 62, and 65.1.

69. Report from the Advisory Comm. on Civ. Rules to the Comm. on Rules of Prac. and Proc. (May 18, 2017) [hereinafter Report of the Advisory Comm. on Civ. Rules], *in* OCTOBER 2017 RULES PACKAGE, *supra* note 63, at 336, 352. Two major class action topics that the Rule 23 Subcommittee decided were not ripe for rulemaking at that time were ascertainability and pick-off of named plaintiffs using Rule 68. The Subcommittee cited developments in the case law, including several circuits ruling on ascertainability requirements and a Supreme Court grant of certiorari, that appeared to raise issues of Rule 68 pick-off. Issues around cy pres awards were another area that the Subcommittee concluded would not benefit by rulemaking. *See* Rule 23 Subcommittee, *Rule 23 Subcommittee Report* [hereinafter *Rule 23 Subcommittee Report*], *in* AGENDA BOOK, *supra* note 7, at 87, 89–90.

70. *Rule 23 Subcommittee Report*, *supra* note 69, at 106. Interestingly, the initial idea for drafting a national set of settlement approval factors began as early as 2000, when drafts were created with "a very detailed list of factors." But, reflecting the difficulty of reaching consensus on a factor list like this, that list was "later demoted to Committee Note and then removed from the Note." Rule 23 Subcommittee, *Notes of June 26, 2015 Subcommittee Conference Call* [hereinafter Rule 23 Subcommittee, *June 2015 Notes*], *in* AGENDA BOOK, *supra* note 7, at 275, 284.

71. Advisory Committee on Civil Rules, *Draft Minutes of the April 2015 Meeting of the Advisory Committee on Civil Rules* [hereinafter Advisory Committee on Civil Rules, *April 2015*

The list of criteria that the Subcommittee began with was modeled on the criteria proposed in the American Law Institute's 2010 *Principles of the Law of Aggregate Litigation*, and indeed, the *Principles*' influence on the final enacted amendments is apparent, even after many rounds of changes.[72] The ALI had written the *Principles* with the goal of identifying "good procedures for handling aggregate lawsuits," and as part of that project suggested revisions to settlement approval under Rule 23(e).[73] Its proposed criteria focused on the same four broad concerns that the final Rule 23(e)(2) criteria did: adequate representation by class counsel, fair and adequate relief to the class, arm's length negotiations leading to the settlement, and equitable treatment of class members relative to each other.[74] The *Principles* authors did not mince words about the need for this reform, writing that the current case law was "in disarray."[75] Courts had articulated a "wide range of factors to consider, but rarely discuss[ed] the significance" of a factor or why it was probative of the fairness, reasonableness, or adequacy of the settlement, and many of the criteria used had "questionable probative value" on those criteria.[76] The proposed changes were meant to articulate "four simple but important factors that courts should consider in reviewing any settlement."[77]

The forcefulness of the ALI proposal's language is notable. The proposed rule imposed strong obligations on the approving judge, stating that the court "must address, in on-the-record findings and conclusions," whether each of the criteria was satisfied.[78] The proposal stated that a negative finding "on any of the criteria specified . . . renders the settlement unfair."[79] The settlement could also be found unfair (and therefore rejected) for "any other significant reason that may arise from the facts and circumstances of the particular case."[80] The proposal also made clear that, contrary to the presumption of fairness that some courts applied to settlement proposals, courts "should not apply any presumption

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Minutes], *in* AGENDA BOOK, *supra* note 7, at 23, 56. An example given of a factor articulated by courts that would not be useful was the opinion of the lawyers who negotiated the proposed settlement on the quality of the settlement.

72. *See* Rule 23 Subcommittee, *Notes of July 15, 2015 Conference Call* [hereinafter Rule 23 Subcommittee, *July 2015 Notes*], *in* AGENDA BOOK, *supra* note 7, at 241, 263.

73. Roger H. Trangsrud, *Aggregate Litigation Reconsidered*, 79 GEO. WASH. L. REV. 293, 293 (2011). Principal authors of the *Principles* were Professors Samuel Issacharoff, Richard Nagareda, Charles Silver, and Robert Klonoff. *Id.* at 293–94.

74. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05. (AM. LAW INST. 2010) [hereinafter PRINCIPLES]. The language of the criteria is also largely similar to the actual amended criteria.

75. *Id.* § 3.05 cmt. a.

76. *Id.*

77. *Id.* § 3.05 cmt. b.

78. *Id.* § 3.05(a).

79. *Id.* § 3.05(b).

80. *Id.*

that the settlement is fair and reasonable," and "the burden is on the proponents of a settlement to establish" that it is fair and reasonable.[81]

Contrary to the "fair, reasonable, and adequate" standard, which outlined only in broad strokes what a court should find upon examining a settlement proposal, and which resulted in a balancing test where a judge could weigh ten or more factors of varying importance, the ALI proposal imposed specific expectations on how judges should review proposed settlements. Any of the four criteria not being satisfied would be grounds to reject a settlement, making the criteria for approving settlements more like elements to be individually satisfied as opposed to factors to be weighed in an open-ended balancing test. In this way, the *Principles* proposal would have had the effect of cabining judges' discretion as to what factors were most relevant and circumscribing the settlement approval inquiry to making fact-specific findings in which a negative result required disapproval.

The proposal was clearly an attempt to move away from the open-ended standard of settlement approval toward a more focused and demanding inquiry—always requiring a judge to address these four concerns in order to warrant approval, but allowing the judge discretion to disapprove a settlement on any other grounds the judge saw fit. Rather than the presumption of fairness often applied to class settlements that met certain criteria, the ALI approach would have encouraged a much more skeptical approach toward proposed settlements and, given its shift from factors toward elements, would have had the likely consequence of causing more settlement proposals to be rejected than under the prior rule.

The Rule 23 Subcommittee certainly had the ALI assessment in mind in its early meetings, where it was noted that the ALI had expressed a concern in the *Principles* that the existing circuit checklists "produced an unduly diffused and unfocused settlement review process" that frustrated judges and lawyers.[82] The criteria articulated in the *Principles* also presented the starting point for the Subcommittee's own criteria, though quickly the draft rule toned down the *Principles*' language that most severely cabined how judges should apply them.[83] In what will become a theme of this Note, subtle but ultimately significant changes would continue to be made throughout the amendment process that would change the likely impact of the rule, stripping it of much of the constraining force that the original *Principles* proposal that was its genesis had.

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81. *Id.* § 3.05(c).

82. *Rule 23 Subcommittee Report*, *supra* note 69, at 106.

83. "The formulation in rule text was built on the foundation provided by the ALI." The ALI factors were included in a sketch (but only with the requirement that courts consider the factors rather than make affirmative findings on each), along with a catch-all provision allowing a court to both refuse approval based on any other factor (as in the *Principles*) but also to approve based on other pertinent factors (different from the *Principles*). Advisory Committee on Civil Rules, *April 2015 Minutes*, *supra* note 71, at 56–57.

In what would anticipate later debate and disagreement among those who publicly commented on the proposal, the early meetings of the Rule 23 Subcommittee reflect substantial disagreement about what form the revisions should take. The Subcommittee presented an early draft that emphasized the same four key approval principles from the *Principles* proposal while also containing a "catch all" provision allowing judges to consider whatever else the judge thought important.[84] Some on the Subcommittee suggested the catch-all provision should be omitted, arguing that it "robbed the rule provision of its force" by introducing an "anything goes" addition.[85] Others argued it was necessary given that the factors that matter the most in any given settlement proposal are highly dependent on the factual circumstances and thus best left to the discretion of the judge.[86] This basic disagreement over constraint versus discretion would surface again and again throughout the process.

Relatedly, debate also divided the Subcommittee on how constraining the basic instruction of the rule should be, such that two alternatives were proposed: one merely said that "the court should consider" the listed factors; another—just like the *Principles* proposal—said that the court "must find" that all factors are met.[87] The Subcommittee worried on the one hand that Alternative 1 would be so broad as to encompass any factor that a court saw fit, and on the other that Alternative 2 would be too constraining such that a settlement that would be found fair, reasonable, and adequate under the first alternative might fail the second alternative.[88]

Members of the Subcommittee also expressed concern that neither of the alternatives would meaningfully change judges' behavior given the inclusion of

84. *Rule 23 Subcommittee Report*, *supra* note 69, at 106.

85. Rule 23 Subcommittee, *September 11, 2015 Subcommittee Meeting*, *supra* note 9, at 156–57.

86. *Rule 23 Subcommittee Report*, *supra* note 69, at 106. A response was that the four factors were articulated broadly enough that anything that would be relevant for a court to consider should at least touch on one of the four factors.

87. *Id.*

88. *Id.* at 106–07. The Reporter's Comments to an early draft of the amended Rule and Advisory Committee Note circulated to the participants at the Dallas mini-conference put these dual concerns this way: "The question whether a rule revision along these lines would produce beneficial results can be debated. The more constrictive a rule becomes (as in Alternative 2), the more one could say it provides direction. But that direction may unduly circumscribe the flexibility of the court in making a realistic assessment of the entire range of issues presented by settlement approval. On the other hand, a more expansive rule, like Alternative 1, might not provide the degree of focus sought." To the extent that a rule amendment "is designed to narrow the focus of the settlement review, perhaps the breadth of [the fair, reasonable, and adequate phrasing] is also a drawback." The phrase fair, reasonable, and adequate reflects longstanding Rule 23(e) analysis, so will any new rule "meaningfully concentrate analysis" if the overall description of fair, reasonable, and adequate remains? The reporter expressed hope that a revised rule might at least eliminate what has been complained of as a "rote recitation" of the factors in a given circuit by the parties and the court in approving a settlement proposal. Rule 23 Subcommittee, *Memorandum Prepared for Mini-Conference* (Sept. 11, 2015) [hereinafter Rule 23 Subcommittee, *Mini-Conference Memorandum*], *in* AGENDA BOOK, *supra* note 7, at 187, 198–99.

a catch-all provision.[89] One concern expressed was that "judges could continue to do exactly what they did before the amendment."[90] But a contrary view was that the uniformity provided by the rule change would allow judges to look to courts in other circuits for guidance without worrying that the other court was employing a different list of circuit factors.[91] A view expressed by a judge at a meeting with members of the Subcommittee was that replacing the checklists would be beneficial to judges because at present the judge "really can't give full weight to decisions by district judges outside his circuit" since they are applying different standards. A single set of national standards could help national case law develop.[92]

The early drafting stages revealed much disagreement over the purpose of the amended criteria, their proper scope, and their intended force in overruling or otherwise changing the practices of individual circuits. Some thought it important to avoid stating that the amendment would overrule circuits' own standards, and it was even suggested that the Advisory Committee Note to the amendment should reassure the circuits that they can "keep their factors."[93] But a response to this, reminiscent of the comments of the *Principles* authors, was that the existing circuit lists posed real problems that could be solved by a more forceful amendment: the lists were created at different times, they may emphasize different concerns, and some of them even had duplicative factors that reflected essentially the same settlement concern.[94] It was even suggested that the large and sometimes duplicative criteria could harm the quality of parties' briefing when presenting their settlement proposal.[95] A strong statement from Rule 23 itself could promote national uniformity in settlement standards, providing useful focus that would "displace the 'squishy balancing process'" that the multi-factor lists could engender.[96] And so it was suggested that maybe the amendment *should* say that the new factors overrule the existing circuit factor lists.[97] This suggestion brought further disagreement, as members of the Subcommittee again could not agree on how constraining the new factors should be.[98] One member raised the following question to those who favored the broader, less forceful Alternative 1: "Why do this if there's really no change

89. *Rule 23 Subcommittee Report*, *supra* note 69, at 107.
90. *Id.*
91. *Id.*
92. Rule 23 Subcommittee, *June 2015 Notes*, *supra* note 70, at 284.
93. Rule 23 Subcommittee, *Notes of September 11, 2015 Subcommittee Meeting*, *supra* note 9, at 156.
94. *Id.* at 157.
95. *Id.* "At least a revised rule might obviate what reportedly happens on numerous occasions—the parties and the court adopt something of a rote recitation of many factors deemed pertinent under the case law of a given circuit." Rule 23 Subcommittee, *Mini-Conference Memorandum*, *supra* note 88, at 199.
96. Rule 23 Subcommittee, *Notes of September 11, 2015 Subcommittee Meeting*, *supra* note 9, at 157.
97. *Id.*
98. *Id.*

because the four factors are essentially shortened lists of the longer ones now in use?"[99]

Despite the concern raised by this question, the consensus on the Subcommittee began to tend toward "favoring the less directive approach embodied in Alternative 1."[100] It was argued that the more permissive Alternative 1 might achieve less uniformity but could still provide a meaningful amount of focus compared to the "present laundry lists of factors" sometimes employed by circuits.[101] On a conference call in June 2015, where the Subcommittee considered its progress and planned for the upcoming mini-conference with stakeholders, the Subcommittee reflected on whether developing more explicit criteria would be a good idea, or whether the criteria in the draft were good ones.[102] After considering variations on many of the same arguments, the Subcommittee concluded that even with the less constraining alternative, it was worth moving forward with the proposal.[103] One member summed it up: "We should try to push judges who are now speaking essentially eleven dialects into using a single language, even if that does not ensure absolute uniformity."[104] Momentum was therefore building toward choosing the less constraining alternative as the more achievable reform. When the same broad disagreements emerged among the mini-conference participants, it became clear that if consensus could be reached, it could likely only be achieved for the less constraining Alternative 1.

B. Building Toward Consensus: The Dallas Mini-Conference on Class Actions and Presenting to the Full Advisory Committee

As part of its efforts to create a transparent process that considered input from stakeholders, the Rule 23 Subcommittee held a "mini-conference" on class actions on September 11, 2015, in Dallas, Texas, in which it invited a variety of participants from across the class action space to discuss each of the topics of possible rule amendment.[105] Participants included several representatives from the Subcommittee, lawyers from both plaintiff and defense firms, as well as

99. *Id.* at 158. Rule 23 Subcommittee associate reporter Professor Richard Marcus expressed a related concern in a 2015 article in *Judicature*: "[The Advisory Committee] will also need to consider whether there is a genuine need for a rule that attempts to do these things, and whether adopting such a rule could produce negative consequences." Richard Marcus, *Once More unto the Breach? Further Reforms Considered for Rule 23*, 99 JUDICATURE 57, 61 (2015).

100. Rule 23 Subcommittee, *July 2015 Notes*, *supra* note 72, at 246.

101. *Id.* at 245.

102. Rule 23 Subcommittee, *June 2015 Notes*, *supra* note 70, at 284.

103. *Id.* at 285.

104. *Id.*

105. *See* Rule 23 Subcommittee, *Notes of September 11, 2015 Mini-Conference (Dallas, TX)*, *in* AGENDA BOOK, *supra* note 7, at 163, 163. One limitation of the report produced from the mini-conference is that participants' comments are relatively anonymized, with speakers often referred to as only "another participant," or sometimes "a judge" or "a professor."

several law professors, judges, and representatives from government and nonprofit stakeholders.[106]

The discussion of settlement review criteria was introduced as involving "11 dialects" of settlement review in federal courts at the time due to the variations in the circuit lists.[107] After many participants expressed their disapproval of "laundry list" rules in relation to an earlier topic, the reporter of the mini-conference thought that the plan to amend settlement approval criteria could be thought of similarly as tearing down reliance on laundry lists of factors. But this idea did not produce a similar consensus.[108]

Instead, the same disagreements that surfaced in the Subcommittee's own discussions came up in the conference. An initial view was that "[t]his is a solution in search of a problem . . . . The lists we have now do the job."[109] A later comment expressed similar skepticism: "I'm not sure these factors are better than the current lists."[110] The same participant questioned whether such a strong focus on collusion was appropriate, given that collusion "is not a frequent concern."[111]

Others generally liked the approach, believing it was a good idea to standardize the factors. But even among those who liked it, divergence prevailed. Some preferred a broader approach, including providing catch-all language. Still others expressed support for adopting the more constraining Alternative 2, since requiring judges to consider each factor in turn would be better than the generalized consideration offered by the less-restrictive Alternative 1.[112] In all, the mini-conference participants expressed many of the same divided viewpoints previously expressed within the Subcommittee.

After the mini-conference, the Subcommittee held a meeting to debrief, and the same familiar disagreements reemerged. Further reflection was encouraged on the basic questions of how constraining the amendment should be, as it seemed that the Subcommittee had not reached consensus on "which tack to take."[113] Undeterred by the continued disagreements over the scope of the rule exposed by the mini-conference and its aftermath, the Subcommittee pressed on with its work on the amendments. From there, the proposals went to the full Advisory Committee meeting in November 2015, with plans to present to the

106. *Id.* Government stakeholders included representatives from the Department of Justice and the Federal Judicial Center, and nonprofit stakeholders included representatives from several legal nonprofits interested in class actions, including Public Justice, Impact Fund, and the National Consumer Law Center.

107. *Id.* at 168.

108. *Id.*

109. *Id.*

110. *Id.* A related point was expressed in response to a later question—whether judges would really follow the rule if adopted. One participant argued that even if the rule were adopted, courts would continue to use their circuit factors lists in their approval orders.

111. *Id.*

112. *Id.* at 168–69.

113. Rule 23 Subcommittee, *Notes of September 11, 2015 Subcommittee Meeting*, *supra* note 9, at 157.

Standing Committee in early 2016 and formally recommend publishing the proposals for comment.[114]

By the November 2015 meeting, it seemed that any possibility of adopting the more assertive Alternative 2 was fading. The proposals faced some questioning from Advisory Committee members on whether the amended rule would displace the "fair, reasonable, and adequate" standard or otherwise overrule circuit law.[115] Here, Subcommittee members provided several different statements about possible purposes of the rule change.

A Subcommittee member first reiterated that the purpose "is not to overrule existing circuit factors."[116] Its purpose was instead to encourage a court to "look closely at the settlement rather than move unthinkingly down a check list of factors . . . many of them not relevant to the particular settlement."[117] But later, a slightly different perspective was offered. A member noted that the Subcommittee had been receiving input from good lawyers who knew how to present a settlement to a court, but that not all lawyers did. Instead, this member suggested that "'[t]hese four factors are aimed at the lower common denominator' of lawyers who bring class actions without much experience or background learning."[118] From this perspective, the new criteria were not meant to impose new obligations so much as serve as pared-down guidelines for inexperienced lawyers.

Part of the purpose of the amendment, unarticulated up to this point, was also to "respond to increasing cynicism found in public views of class actions," since many people think that consumer class action settlements "provide no meaningful value to consumers and provide undeserved awards to class counsel."[119] Such a candid articulation of a substantive purpose behind the criteria—that they would help the public image of class actions by better ensuring that class counsel's interests are aligned with the interests of the class—had been mostly absent from discussions thus far. Participants had disagreed over how constraining the criteria should be and what the rule could accomplish, but there was little discussion over the substantive purpose of the amendment. The varied purposes of the amendment offered by the Subcommittee in the November 2015 meeting suggest that opinions still differed, making it likely that any compromise or consensus would ultimately tend toward the less constraining, and thus more achievable, Alternative 1.

By the end of that November 2015 meeting, the discussion pointed toward a possible synthesis of Alternative 1 and Alternative 2, whereby "fair,

114. CIV. RULES ADVISORY COMM., MINUTES 1, 6 (Nov. 5, 2015), https://www.uscourts.gov/sites/default/files/2015-11-05-minutes_civil_rules_meeting_final_0.pdf [https://perma.cc/N5KK-2EQ5].

115. *Id.* at 18.

116. *Id.*

117. *Id.*

118. *Id.* at 20.

119. *Id.* at 18–19.

reasonable, and adequate" would maintain its overarching place, but the court would only approve a settlement upon making positive findings on the four core concerns.[120] But such a synthesis would not come to pass. By the April 2016 meeting, the proposed criteria remained essentially the same as the draft presented in the November 2015 meeting, and, as there was agreement to recommend to the Standing Committee to publish the proposals in summer of 2016, the criteria were only briefly discussed as attention turned to other topics.[121] The final language presented in the May 2016 report to the Standing Committee, nearly identical to the language that would appear in the final Rule, read that if a settlement binds class members, "the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether" the four criteria are satisfied.[122] As can be seen, the less constraining version of the language ultimately won out, as the final rule did not require positive findings on each of the criteria but only instructed courts to consider whether they were satisfied as part of the fair, reasonable, and adequate inquiry.

C. Reception from Stakeholders During the Public Comment Period

Once the Subcommittee was satisfied with the draft and had presented its proposal to the Advisory and Standing Committees, the package of proposals to amend Rules 5, 23, 62, and 65.1 were published for public comment in August 2016.[123] Comments were received in written format and in oral testimony in three public hearings: the first on November 3, 2016, the second on January 4, 2017, and the final on February 16, 2017.[124] Consistent with the vigorous debate on the Rule 23 amendments thus far and the divided reception from stakeholders at the mini-conference, it should come as little surprise that the proposals to amend Rule 23 received the majority of both written and oral public comment.[125]

First, if there was a point of broader agreement among those who made public comments, it was in their shared appreciation for the outreach efforts made by the Advisory Committee throughout the amendment process itself. Many commenters expressed specifically that the Advisory Committee provided meaningful opportunities to be heard, to be involved in the process, and to help build an appreciation among the bar for the issues reflected in the

120. *Id.* at 20.

121. CIV. RULES ADVISORY COMM., MINUTES 1, 12 (Apr. 14, 2016) https://www.uscourts.gov/sites/default/files/2016-04-14-civil_rules_minutes_final_0.pdf [https://perma.cc/HYK3-ABTM].

122. Report from the Advisory Comm. on Civ. Rules to the Comm. on Rules of Prac. and Proc. 1, 3 (May 12, 2016), https://www.uscourts.gov/sites/default/files/2016-05-12-civil_rules_report_to_the_standing_committee_0.pdf [https://perma.cc/D4FX-QCBW].

123. Report of the Advisory Comm. on Civ. Rules, *supra* note 69, at 336.

124. *Id.*

125. *Id.*

amendments.[126] Others commented that the process and the outreach created consensus in favor of most of the provisions proposed.[127] In this regard, the Committee's efforts at creating a participatory process with stakeholder input paid off.

However, regarding the proposed changes to settlement criteria, there were some commenters who raised the same concerns earlier identified by the Subcommittee. For some, at least, the tensions in those debates had not been satisfactorily resolved. Lawyers for Civil Justice,[128] while approving of the "laudable intent" of the Committee of promoting uniformity and predictability while still providing flexibility for courts to consider other relevant factors, wrote that it was "doubtful that the proposal is likely to change judicial behavior" and was concerned that it could instead lead to increased confusion and litigation.[129] Its two-part critique was familiar: on the one hand, by telling courts "to consider" the factors, the rule change did not provide strong enough encouragement to actually lead to uniformity; on the other hand, without a "catch-all" provision, the factors did not leave courts enough discretion to consider what may be the most relevant factors in a given factual context.[130] And, even with a catch-all provision, courts would likely revert to their existing circuit lists to fill out that provision, reaffirming why the amendment was both unnecessary and unlikely to create uniformity.[131]

The Pennsylvania Bar Association wrote that some of the factors felt redundant (because they were addressed elsewhere in Rule 23) or were already in use by many courts, and thus the attempt to codify these core concerns without making clear that they were non-exclusive factors could cause confusion.[132] The New York Bar Association was generally in favor of the proposed criteria because it could see the value in promoting uniformity among the circuits, but it noted that some of the instructions in the Committee Note could cause confusion

126. *See* Transcript of Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure in Phoenix, Arizona, at 28, 45 (Jan. 4, 2017) [hereinafter Arizona Public Hearing Transcript], https://www.regulations.gov/comment/USC-RULES-CV-2016-0004-0059 [https://perma.cc/FB4P-LZYU] (expressing appreciation for the outreach efforts made by the Committee).

127. *See id.* at 45 (recording commenter Annika Martin thanking the Committee for embarking on a "listening tour" and reaching out to "stakeholders and various groups in the bar" and stating that as a result the proposal "really has a lot of consensus"); *id.* at 76 (recording commenter Paul Bland as saying "I think that the fact the proposals are ones for which there is by and large a consensus on both sides of the V . . . reflects [the Committee's inclusive process] to some extent").

128. Lawyers for Civil Justice is a "national coalition of corporations, law firms and defense trial lawyer organizations." Laws. for Civ. Just., Public Comment to the Advisory Committee on Civil Rules 1 (Oct. 3, 2016), https://www.regulations.gov/comment/USC-RULES-CV-2016-0004-0039 [https://perma.cc/S5NH-2N2N].

129. *Id.* at 9.

130. *Id.*

131. *Id.*

132. Penn. Bar Ass'n, Public Comment of the Pennsylvania Bar Association on Proposed Amendments to the Federal Rules of Civil Procedure 9 (Feb. 10, 2017), https://www.regulations.gov/comment/USC-RULES-CV-2016-0004-0064 [https://perma.cc/36YZ-CT64].

on this point.[133] In particular, the Note says that the amendment "directs the parties to present the settlement to the court in terms of a shorter list of core concerns," yet later in the Note, it says that the goal is "not to displace any of [the circuits'] factors."[134] The New York Bar Association suggested that the amendment make clear that courts and parties should principally address the Rule 23(e)(2) factors because the "same central concerns [embodied in the circuit factors] are embodied in the factors listed in Rule 23(e)(2)."[135] Like Lawyers for Civil Justice, then, this commenter felt that that Rule did not make clear enough the relation between the new Rule 23(e)(2) criteria and circuits' existing factor lists, which could cause confusion.

Other comments received tended to fall into two categories: those that saw the rule change as requiring more probing scrutiny by judges and were potentially worried by the (possibly unintended) consequences, and those that saw the increased scrutiny as praiseworthy but wanted to see the Committee go further. Those in the first group were mainly plaintiffs' lawyers or attorneys for consumer nonprofit groups—quintessential representatives of the expansive regulatory conception of class actions—worried about the effects on consumer class actions. Their concerns tended to reflect that regulatory viewpoint. Though they did not always frame them in exactly these terms, their comments demonstrated a concern that by focusing too much on the monetary relief to class members, the rule would signal a shift in the balance of class action law away from the regulatory conception and toward the compensatory conception of class actions.

For example, on the topic of Rule 23(e)(2)(C)(ii),[136] one commenter from this group expressed that it was a very good thing for the rules to, for the first time in the rule itself, "expressly address[]" the effectiveness of getting relief to the class.[137] But, his concern (also shared by others) was about how the language could be interpreted to suggest that the Rule imposes an absolute standard for effectively distributing relief to the class rather than a flexible standard that would compare the effectiveness against "reasonably diligent alternative

133. N.Y.C. Bar, Public Comment of the New York City Bar Association on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure 2–3 (Feb. 15, 2017), https://www.regulations.gov/comment/USC-RULES-CV-2016-0004-0070 [https://perma.cc/9KPP-AUUT].

134. *Id.* at 3. On this point, the New York Bar Association proved prescient, since after the amendments went into effect, courts began to cite this latter quote from the Committee Notes to explain why they were going to analyze the proposed settlement under their circuit factors rather than the Rule 23(c)(2) factors. For further discussion of how courts have applied the criteria, see Part III, *infra*.

135. *Id.*

136. The provision requires courts to take into account "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." FED. R. CIV. P. 23(e)(2)(C)(ii).

137. Arizona Public Hearing Transcript, *supra* note 126, at 12–13 (statement of Thomas Sobol).

methods of distributing relief."[138] The idea is that different class actions involve entirely different prospects for effectively getting relief to class members, and so the benchmark for effectiveness should be explicitly tied to reasonably alternative methods given the circumstances so as not to create a structural barrier to low-claims-rate consumer class actions.[139]

Relatedly, the American Association for Justice (AAJ)[140] submitted a comment that overall applauded the Committee's efforts at streamlining the factors courts consider to properly focus on the identified core concerns about settlements but that also expressed concern about the impact of some specific statements.[141] The Committee Notes to Rule 23(e)(2) state on the point of attorney-fee provisions that "the relief actually delivered to the class can be an important factor in determining the appropriate fee award" and that "reporting back to the court about actual claims experience" can bear on the fairness of the settlement.[142] The AAJ was concerned that these sentences could be interpreted as placing great focus on the claims experience when in its view the claims experience is of most concern for determining a fair attorney fee in so-called claims-made settlements as opposed to common fund settlements.[143] In so doing, the Committee could be encouraging an interpretation of the Rule of "making claims rate experience both a general and exclusive concern" for all class action settlements when its relevance is strongest in cases with claims-made settlements and low claims rates.[144]

Those in the second group, who praised the increased scrutiny encouraged by the rule but wanted the Committee to go further, included Judith Resnik, a Yale Law professor, and Ted Frank, a representative of the Competitive Enterprise Institute's Center for Class Action Fairness. Professor Resnik's

138. *Id.* at 15. Sobol's concern was shared by others, including the Public Citizen Litigation Group and the Committee to Support Antitrust Laws. *See* Report of the Advisory Comm. on Civ. Rules, *supra* note 69, at 409 (describing how Public Citizen shared the concerns raised by Sobol).

139. Two contrasting examples that illustrate the relative ease or challenge of locating and compensating class members are (1) a class action against a bank for fees improperly charged to customer accounts, where class members are easily identifiable through bank records and relief automatically distributed to the class through those same bank accounts, without requiring class members to submit a claim form, and (2) a class action for a falsely advertised grocery store product, where class members may be difficult to identify because they did not retain grocery receipts or don't remember whether they purchased the exact product in question, or getting relief to them may be difficult because many class members don't bother to come forward to make a claim, making the claims and distribution process look comparatively ineffective.

140. The AAJ, formerly known as the Association of Trial Lawyers of America, "advocates to ensure that all plaintiffs, including members of a class or proposed class under Rule 23, receive proper access to the courts under fair and reasonable rules of procedure." Am. Ass'n for Just., Public Comment of the American Association for Justice on Proposed Amendments to Rule 23 at 1 (Feb. 14, 2017) [hereinafter AAJ Comment], https://www.regulations.gov/comment/USC-RULES-CV-2016-0004-0066 [https://perma.cc/T7EQ-C8N2].

141. *Id.* at 3.

142. FED. R. CIV. P. 23(e)(2) advisory committee notes to 2018 amendments.

143. AAJ Comment, *supra* note 140, at 6.

144. *Id.*

comments praised the proposal's efforts to more directly recognize the court's responsibility for ensuring that class members receive actual relief.[145] But she insisted that the rule should go further in the area of post-settlement supervision by the approving judge.[146] As written, it only required judges to inquire into how relief is distributed to class members rather than "tasking them expressly with requiring" parties to provide information on how the settlement is implemented.[147] She argued that the "participatory and distributional interests of litigants and of the public" demanded more transparency here and that resolving class members' claims should "not be left to the private decision-makers" without any subsequent oversight by courts.[148] Emphasizing the public role of class actions in civil litigation and the secrecy that nonetheless often shrouds them, Professor Resnik invoked First Amendment and due process concerns in calling for courts to require more transparency from the parties after the fact as to how the settlement was implemented.[149]

Ted Frank, a frequent settlement objector as director of the Center for Class Action Fairness, wrote that the amendment proposals "correctly identify the adequacy of class counsel and the award of attorneys' fees as a core concern" in determining a settlement's fairness.[150] But he insisted that the Committee go further, since as drafted the proposed amendments were "not explicit enough" in tying attorneys' fee requests to the actual relief to the class.[151] Pointing to many examples of cases where class counsel appeared to look out more for themselves than for class members and where courts approved such settlements, Frank argued that the only way to meaningfully solve the problem would be to explicitly tie attorneys' fees to the relief delivered to the class.[152] Frank insisted that such an explicit provision would get at the "most fundamental problem of

145. Transcript of Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure in Dallas, Texas (Telephonic) 66–72 (Feb. 16, 2017), https://www.uscourts.gov/sites/default/files/transcript_of_2-16-17_hearing_0.pdf [https://perma.cc/L8YD-KPBQ] (comment of Judith Resnik).

146. It is important to note that while Professor Resnik's comments called for increased scrutinizing and publicizing information about class settlements, which could be seen as consistent with advocating for the narrow, adjectival conception of class action, Professor Resnik has elsewhere expressed resounding support for the regulatory conception of class actions. *See, e.g.*, Resnik, *supra* note 33.

147. Judith Resnik, Comments for the Telephonic Hearing on Proposed Amendments to the Federal Rules of Civil Procedure 1, 15 (Feb. 16, 2017), https://www.regulations.gov/comment/USC-RULES-CV-2016-0004-0092 [https://perma.cc/N8E9-9CX2].

148. *Id.* at 2, 15.

149. *Id.* at 15–16. Professor Resnik suggests that the Rule "should mandate periodic reports . . . about the remedies, from structural relief to dollars and how parties receive distributions and the sums paid." *Id.* at 16.

150. Theodore H. Frank, Competitive Enter. Inst., Comments to Proposed Amendments to Federal Rule Civil Procedure 23 at 1, 3 (Feb. 15, 2017), https://www.regulations.gov/comment/USC-RULES-CV-2016-0004-0085 [https://perma.cc/KNM3-82TH].

151. *Id.*

152. *Id.* at 3–11. Frank's proposal would require courts to consider the ratio of attorneys' fees to relief actually delivered to the class.

fairness in class actions," which he believed was class counsel structuring settlements to favor their own interests over the class's.[153] He also recommended prohibiting clear-sailing provisions and reversion clauses.[154]

As these examples show, the amendment proposal received varied reactions from across the class action bar. Foreshadowing later differences in how some courts would interpret the enacted rule, some commenters felt that the rule change would not cause a change in circuit practice because it did not speak strongly or clearly enough to displace circuit factors. Others believed that certain language could have serious consequences for how courts evaluated consumer class action settlements. These varied reactions may have reflected the rulemakers' own apparent uncertainty about whether and how the criteria would change existing practice. In any case, armed with this public input, the rulemakers then moved to the final stage of the amendment process.

D. From Public Comment to Enactment by Congress: The Final Version of the Rule

By the Advisory Committee's telling, "very few changes" were made to the language of the Rule after the public comment period, and the Committee Note language was "clarified and shortened" in some places.[155] The Subcommittee met shortly after the final public comment hearing and did consider many of the proposals made in the comments, including the concerns raised by some plaintiffs' lawyers about creating an absolute standard for claims rates as opposed to a relative one.[156] While the Subcommittee was unpersuaded to change the text of the Rule (since it thought it was fairly clear that an absolute standard was not intended), it did consider several revisions to the Committee Note, a few of which were adopted while others were rejected.[157]

The final version of the rule as enacted largely mirrored the version published for public comment, with minor stylistic changes. It required that a judge only approve a proposed settlement after a hearing and after finding that it

153. *Id.* at 11.

154. *Id.* at 11–12. Interestingly, the Subcommittee discussed these subjects at various times and mostly agreed as to their undesirability, but found that district courts had largely come to look skeptically on them over time without explicit instruction from Rule 23.

155. Report of the Advisory Comm. on Civ. Rules, *supra* note 69, at 352 .

156. *Id.* at 439.

157. *Id.* at 439–42. In particular, the attention drawn to the issue of claims rates did seem to push the Subcommittee to reconsider its discussion of claims rates in the Note to Rule 23(e)(1), since it seemed premature and not how things are usually done to consider predicting eventual claims rates at the stage of giving Rule 23(e)(1) notice to the class. The Subcommittee decided to delete these mentions of claims rates. As for the mention of claims rates in the Note to Rule 23(e)(2), the Subcommittee did consider a proposal to add language that would address the concerns raised in the public comments so that the Note would make clear that the claims rate should be considered "in light of other reasonably available methods" as opposed to as an absolute standard. Ultimately, the Subcommittee concluded that such an admonition that "100% success in distribution can very rarely be achieved" was not really helpful or necessary and so declined to add the language.

is fair, reasonable, and adequate, considering whether (1) the class has been adequately represented; (2) the proposal was negotiated at arm's length; (3) the relief for the class is adequate, taking into account the costs, risks, and delay of trial and appeal, the effectiveness of methods for distributing relief to the class (including claims methods), the terms of the attorney's fees award, and the existence of any side agreement made in connection with the proposed settlement; and (4) the proposal treats class members equitably.[158]

As has been noted many times now, the amendment process revealed widespread disagreement as to the proper scope of the amended rule and whether the new settlement approval rule was a necessary or desirable change at all. This disagreement was not solely a product of disagreement between plaintiffs' and defense counsel from the class action bar, as might have been expected, but rather was present from the very start of the process within the Rule 23 Subcommittee itself. As Professor Richard Marcus has put it, the debates during the amendment process "significantly reflect competing conceptions" of the regulatory-compensatory divide, and once again with this round of rulemaking, there was "a studied effort by the rule makers to avoid embracing the strongest position on either side."[159]

That studied effort was apparent in the rulemakers' work. The Subcommittee pressed on with the amendment process despite having equivocal feelings about the fruits of the process and ultimately produced an end result similar to where it started from, with small but meaningful differences. The four core concerns remained the same throughout, though the language introducing the criteria, especially with respect to how much the criteria would constrain judicial discretion, changed several times. It ended with language that could be interpreted as leaving judicial discretion intact rather than constraining it.

Along the way, thanks to its "road tour," the Subcommittee received input from stakeholders across the class action landscape, making the rulemaking a participatory process that was widely praised by those stakeholders.[160] Participants expressed appreciation at having their voices heard and feeling that the Committee sought to build consensus around the proposed changes. From this perspective of the process itself, the amendment rulemaking was certainly a success—the end product was one of consensus and compromise. In Part III, I examine how the amended criteria have been received and interpreted by some district and circuit courts to begin to measure how successful the amendment has been in one of its primary stated goals: achieving the hoped-for uniformity and consolidation of circuit factors.

158. FED. R. CIV. P. 23(e)(2).

159. *See* Marcus, *Revolution v. Evolution*, *supra* note 21, at 915–16.

160. *See* Laws. for Civ. Just., *supra* notes 128–131 (describing the positive response to the Committee's outreach efforts).

III. DIVERGING INTERPRETATIONS OF THE NEW RULE 23(E)(2)

It is still early—many circuit courts have not yet had the opportunity to address the question—so the law of course will continue to develop. But so far, the reception among the courts that have interpreted the new factors tends to show that the Advisory Committee's goal of harmonizing and simplifying the varied circuit settlement criteria has not been realized in the few years since the amendments were adopted. Instead, courts have gone on divergent paths in responding to the amended rule. While courts in some circuits have held that they wholly adopt the new criteria, and so courts should focus on the new "core concerns" that the Advisory Committee Notes identify, others have used them not to replace but to supplement their existing circuit factors, folding them into the settlement inquiry. And still others have declined to transition to the new factors at all, interpreting the new factors to overlap with the circuit's old factor list to such an extent that courts can just continue using the circuit's old factors to evaluate class settlements. In short, this proliferation of different methods appears to have foiled the Advisory Committee's hope of paring down circuits' factors and unifying settlement analysis.

The extent to which this presents a serious problem is debatable, and the longer-term consequences for class action settlements remain to be seen. But already in these developments we can see some of the specific pitfalls predicted during the amendment process being manifested: one public commenter suggested that courts may take the language in the Committee Note that the factors are not meant to displace any circuit factors as license to keep using their old factors, and that is exactly what some courts have done.[161] This is not to suggest that the Advisory Committee was somehow naive to these risks, as many of these possibilities were among the very concerns identified from the earliest discussions by members of the Rule 23 Subcommittee.[162] Clearly the consensus within the Advisory Committee was that the changes were worth pursuing despite these risks. While these early developments do not necessarily suggest permanent divergence, they do suggest that any uniformity must come either from further clarifying rulemaking or from an authoritative Supreme Court interpretation of the rule's meaning, both of which are likely to take many more years to come to pass.[163]

In this Part, I demonstrate how the fears that many expressed about how courts would receive the new rule came to fruition. Courts must decide as a matter of first impression how to interpret the new rule, and, because of

161. *See id.*

162. Recall the Subcommittee member who expressed that under either alternative then proposed, "judges could continue to do exactly what they did before the amendment." *Rule 23 Subcommittee Report*, *supra* note 69, at 107.

163. Convergence by the circuits themselves is not impossible. But given past experience with circuits' development of their circuit factors, convergence seems unlikely, and in any case would likely take even longer to come to pass.

ambiguity and conflicting language in the text and the Committee Note, they have plausibly arrived at quite different interpretations of the rule. Using the Fourth Circuit and Ninth Circuit as case studies, I show how one court can plausibly claim that the rule does nothing more than "codif[y] existing practice"[164] while another can just as plausibly argue that a rule change means a rule change and that by creating a set of "core concerns," the rulemakers intended Rule 23 to now require a deeper level of scrutiny of class action settlements.

Furthermore, instead of uniformity, a new circuit split could be emerging. At least one court of appeals has held that the amended criteria raise the scrutiny required of judges before approving a class action settlement, while another has found that the criteria impose no new obligations on district court judges and that a presumption of validity can still apply to class action settlement agreements. If this divergence among circuit approval practices proves durable, the amendment could have the effect of actually increasing the incentives of plaintiffs' lawyers to forum shop given the real divergence in scrutiny they could expect on a class settlement proposal.

A. The Differing Reception Among the Circuits

1. The Fourth Circuit Approach

On one end, there is the Fourth Circuit, which so far has held that the 2018 amendments impose no new obligations on settlement approval practice. Before the 2018 amendments, the Fourth Circuit had applied two sets of factors to the settlement approval inquiry: one to analyze a settlement's fairness, the other focusing on the settlement's adequacy.[165] The four factors for determining fairness are (1) the posture of the case, (2) the extent of discovery conducted, (3) the circumstances of settlement negotiations, and (4) the experience of class counsel in the area of litigation.[166] The five factors for assessing adequacy are (1) the strength of the plaintiffs' case, (2) the difficulties of proof or defenses the plaintiffs could face if the case goes to trial, (3) the expense of continuing to litigate, (4) the solvency of the defendant and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.[167]

The Fourth Circuit position post-2018 amendments has developed over several cases. First, in *In re Lumber Liquidators Chinese-Manufactured Flooring Products*, decided in 2020, the Fourth Circuit acknowledged that Rule 23(e)(2) was amended in 2018 to specify factors for courts to focus on in evaluating the fairness, reasonableness, and adequacy of a class action

164. NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13:48 (6th ed.).

165. This approach differs from that of many other circuits, where one set of factors was used to assess fairness, reasonableness, and adequacy together rather than treating them as discrete inquiries. See, e.g., the factor lists used by the Second and Fifth Circuits discussed *supra*, notes 4–5.

166. *See In re* Jiffy Lube Sec. Litig., 927 F.2d 155, 159 (4th Cir. 1991).

167. *See id.*

settlement. It then noted that the new factors "almost completely overlap" with the existing Fourth Circuit factors, and so the outcome would be the same under either set of factors.[168] Ultimately, the *Lumber Liquidators* court applied the Fourth Circuit factors to the case to maintain consistency with the approach that the district court had taken because the district court gave final approval prior to the adoption of the 2018 amendments and so evaluated the case under the circuit's factors. Arguably, then, the court's statements about the outcome being the same under either set of factors were dicta, but, as we will see, over subsequent cases it has developed into Fourth Circuit law.

In *Herrera v. Charlotte School of Law, LLC*, decided the same year, the court made a similar statement to that of *Lumber Liquidators*, albeit in an unpublished, nonbinding opinion. The *Herrera* court recognized that the Federal Rules of Civil Procedure had been amended and that Rule 23(e)(2) now "sets forth factors for the district court to assess in evaluating fairness, reasonableness, and adequacy."[169] It wrote that "[r]ecognizing that, this Court continues to apply its own standards" because the analysis is the same under either approach. Here the court quoted the *Lumber Liquidators* language about the standards almost completely overlapping with the Fourth Circuit factors.[170]

In a later case, *1988 Trust for Allen Children Dated 8/8/88 v. Banner Life Insurance Company*, decided in 2022, the Fourth Circuit described the "fairness analysis" required "[u]nder Rule 23(e)(2)" but did not make reference to the 2018 amendments or the factors now identified in Rule 23(e)(2).[171] Instead, the court pointed to the Fourth Circuit factors for determining fairness and adequacy identified by *Jiffy Lube* and *Lumber Liquidators* as the required guidance for the settlement inquiry.[172] The court in *Banner Life Insurance* did not make the same explicit statement as did *Lumber Liquidators* and *Herrera* about the Fourth Circuit continuing to apply its own standards due to the overlap between those standards and the Rule 23(e)(2) factors, but regardless, it proceeded to review the settlement under the Fourth Circuit factors.[173]

While the cases described so far have either largely ignored the new Rule 23(e)(2) factors or have acknowledged them but continued to apply the prior circuit factors, the Fourth Circuit took a third approach in another case. In *McAdams v. Robinson*, the lower court had approved a class action settlement using the *Jiffy Lube* factor tests.[174] When reviewing that approval, the Fourth

168. *In re* Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Pracs. and Prods. Liab. Litig., 952 F.3d 471, 484 n.8 (4th Cir. 2020).

169. Herrera v. Charlotte Sch. of Law, 818 F. App'x 165, 176 n.4 (4th Cir. 2020).

170. *Id.*

171. 1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co., 28 F.4th 513, 525 (4th Cir. 2022).

172. *Id.*

173. *Id.* at 525–27.

174. *See* Robinson v. Nationstar Mortg. LLC, No. 8:14-CV-03667-TJS, 2020 WL 8256177, at *2–3 (D. Md. Dec. 11, 2020).

Circuit articulated the requirements for settlement approval in terms of the 23(e)(2) factors while also identifying the five-factor *Jiffy Lube* adequacy test as relevant to the settlement's adequacy.[175] Though the lower court couched its analysis exclusively in terms of the *Jiffy Lube* factors, the appeals court nevertheless found that the judge had "considered the three relevant Rule 23(e)(2) criteria."[176] This appellate panel did not appear to exhibit a preference for how the district court articulated the required settlement approval inquiry, content that the district court's findings under the *Jiffy Lube* factors could be slotted to fit the Rule 23(e)(2) factors.[177]

Several district courts in the Fourth Circuit have taken the "complete[] overlap" identified by the *Lumber Liquidators* court as an invitation (if not instruction) to continue framing their settlement approval analysis around the *Jiffy Lube* factors instead of the new Rule 23(e)(2) factors.[178] One district court judge, citing *Lumber Liquidators*, concluded that "[t]herefore, I shall consider the factors as outlined in pre-2018 class action cases."[179] And so despite acknowledging the 2018 amendments and enumerating the Rule 23(e)(2) factors in its opinion, the district court framed its analysis in terms of the *Jiffy Lube* factors.[180]

Most recently, in *Feinberg v. T. Rowe Price Group, Inc.*, the district court drew on *Lumber Liquidators* and *Herrera* to articulate the standard for settlement approval.[181] In doing so, it recognized that applying the *Jiffy Lube* factors rather than the Rule 23(e)(2) factors is the Fourth Circuit approach to class action settlement analysis. And so, despite acknowledging that Rule 23(e)(2) "was amended in 2018 to specify factors" for evaluating a settlement, the court proceeded to evaluate the settlement using the *Jiffy Lube* factors.[182]

On one level, there is some variation in the approaches of these circuit panels and district courts in the Fourth Circuit. This could indicate that what I am describing is nothing more than some necessary messiness in the early days of interpreting and implementing a change to a familiar legal standard before courts coalesce around a unified interpretation. On another level, though, it seems clear that despite whatever minor differences in application they involve, these cases share a sense that the amended Rule 23(e)(2) factors do not change

175. McAdams v. Robinson, 26 F.4th 149, 159 (4th Cir. 2022).

176. *Id.* The panel noted that there was no "agreement required to be identified" in the case, negating the need to analyze the fourth 23(e)(2) factor. The panel also cited as relevant that the magistrate judge had weighted the five *Jiffy Lube* adequacy factors. *Id.*

177. This suggests that the *Lumber Liquidators* court may have been onto something when it suggested that the Rule 23(e)(2) factors had significant overlap with existing circuit law.

178. *In re* Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Pracs. & Prods. Liab. Litig., 952 F.3d 471, 484 n.8 (4th Cir. 2020).

179. Donaldson v. Primary Residential Mortg., Inc., No. ELH-9-1175, 2021 WL 2187013, at *4 (D. Md. May 28, 2021).

180. *See id.*

181. 610 F. Supp. 3d 758, 767 n.6 (D. Md. 2022).

182. *Id.* at 767–68.

anything of substance in terms of the inquiry district courts should be conducting. Whether the courts analyzed a settlement only under the *Jiffy Lube* factors, slotted the district court's analysis in to fit the 23(e)(2) factors, or combined the old and new factor lists in some way, there is a shared sense among the courts that the difference is not particularly important because nothing much has changed with the amended settlement criteria.

2. The Ninth Circuit Approach

While courts in the Fourth Circuit have stated that they will continue to use the Fourth Circuit's own factors to evaluate class settlements,[183] the Ninth Circuit has taken a markedly different approach. Like the Fourth Circuit, the Ninth Circuit had developed its own list of factors to consider when assessing whether a settlement was fair, reasonable, and adequate, known as the *Hanlon* or *Staton* factors:

> [T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.[184]

But unlike the Fourth Circuit, it has found enough daylight between the old factors and the new ones to hold that there are meaningful differences and that courts must apply the new factors. And in fact, in *Briseño v. Henderson*, it reversed a district court's decision to take the Fourth Circuit approach of favoring the old factors. The Ninth Circuit held that it was reversible error for the district court to evaluate a class action using the *Staton* factors instead of applying the Rule 23(e)(2) factors, despite the district court holding that "[t]here is substantial overlap" between the two.[185] Although "many of the *Staton* factors fall within the ambit of the revised Rule 23(e)," the Ninth Circuit found that the two factor lists were not entirely coextensive.[186]

Specifically, under Rule 23(e)(2), district courts "*must* now consider 'the terms of any proposed award of attorney's fees' when determining whether 'the relief provided for the class is adequate.'"[187] The court held that the plain language of the rule states that "a court must examine whether the attorneys' fees arrangement shortchanges the class."[188] "In other words, the new Rule 23(e) makes clear that courts must balance" the proposed attorneys' fees with the relief

183. *See In re Lumber Liquidators*, 952 F.3d at 484 n.8.

184. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998); Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

185. Briseño v. Henderson, 998 F.3d 1014, 1021 (9th Cir. 2021).

186. *Id.* at 1026.

187. *Id.* at 1024 (emphasis added) (quoting FED. R. CIV. P. 23(e)(2)(C)(iii)).

188. *Id.*

provided for the class in determining whether the settlement is adequate.[189] Without deciding that it would always be an abuse of discretion for a district court to apply the *Staton* factors in approving a settlement, the court concluded that courts must "follow the law that Congress enacted," which means "scrutinizing the fee arrangement for potential collusion or unfairness to the class."[190]

Furthermore, the court in *Briseño* held that the amended Rule 23(e)(2) requires "heightened scrutiny" of class action settlements to assess whether the settlement has fairly and adequately divided funds between the plaintiffs' attorneys and the class members.[191] Prior to the amendment, the Ninth Circuit had followed developments in other circuits in only requiring that district courts conduct a "more probing inquiry than may normally be required" of settlements reached before class certification.[192] Settlements reached pre-class certification are thought to be more susceptible to collusion between plaintiffs' counsel and the defendant at the expense of the class and thus require a watchful judge to look out for the class.[193]

Given this concern, the Ninth Circuit, like other circuits, developed law that required district courts to apply heightened scrutiny for pre-class certification settlements, when the potential for collusion was at its highest.[194] The Ninth Circuit explained what signs of possible collusion district courts should be looking out for when scrutinizing pre-class certification settlements in *In re Bluetooth Headset Products Liability Litigation*.[195] Unsurprisingly, the warning signs all have to do with attorneys' fees and the incentives created by them:

> (1) when counsel receive[s] a disproportionate distribution of the settlement; (2) when the parties negotiate a "clear sailing arrangement" under which the defendant agrees not to challenge a request for an agreed-upon attorney's fee; and (3) when the agreement contains a "kicker" or "reverter" clause that returns unawarded fees to the

189. *Id.*

190. *Id.* at 1026.

191. *Id.* at 1025.

192. *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998).

193. At the pre-class certification stage, "the court has not approved class counsel, who would owe fiduciary duties to the class," and the attorneys have "not yet devoted substantial amounts of time and money to the case." *Briseño*, 998 F.3d at 1024. For these reasons, there's a fear that plaintiffs' counsel will be tempted to "cut a quick deal" with the defendants, selling out the class's claims by settling cheaply in exchange for higher attorneys' fees, and that the defendants will be happy to go along with plaintiffs' counsel to quickly and cheaply resolve the case. *Id.* In theory, these worries about collusion at the expense of class members fade as the case progresses past class certification, since then plaintiffs' counsel owe fiduciary duties to the absent class members and have devoted more resources to the case, incentivizing them to push for the maximum feasible recovery. *See id.* at 1024–25.

194. "Several circuits have held that settlement approval that takes place prior to formal class certification requires a higher standard of fairness. . . . Because settlement class actions present unique due process concerns for absent class members, we agree with our sister circuits and adopt this standard as our own." *Hanlon*, 150 F.3d at 1026.

195. *See* 654 F.3d 935, 947 (9th Cir. 2011).

defendant, rather than the class.[196]

Bluetooth's prescription to look for signs in negotiated fee provisions that class members were being sold out unequivocally applied to pre-class certification settlements, but it was an open question whether the same scrutiny should ever be applied to post-class certification settlements.[197]

Briseño answered that question affirmatively. The answer, the court said, flows from the amended Rule 23(e)(2)(C): the text of the rule now requires district courts to scrutinize the terms of attorney's fees awards, and "[n]othing in the Rule's text suggests that this requirement applies only to pre-certification settlements."[198] While the threat of collusion may be highest before class certification, the potential for plaintiffs' counsel to elevate their interest over that of the class remains throughout class litigation.[199] Scrutinizing the terms of attorney's fees provisions may be the best that can be done in uncovering subtle signs of collusion between plaintiffs and defense counsel, and the *Briseño* court found that by including this new factor in the text of the rule, Congress had collusion in mind: "Congress sought to end this practice by changing the text of Rule 23(e)(2)(C)."[200]

a. Presumptions of Validity of Class Action Settlements

As the Ninth Circuit understands it, the heightened scrutiny required by Rule 23(e)(2) has a further implication—rather than the presumption of validity or fairness of class action settlements applied by judges in many circuits, in the Ninth Circuit, class settlements must now be presumed *invalid*. "Rule 23(e)(2) assumes that a class action settlement is invalid."[201] Again, the answer flows from the amended Rule 23(e)(2): whether the settlement proposal was negotiated at arm's length is only one of four factors a district court must consider, and satisfying one factor does not justify an overall presumption of validity.[202]

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196. *See Briseño*, 998 F.3d at 1023 (internal punctuation omitted) (quoting *Bluetooth*, 654 F.3d at 947).

197. "*Bluetooth* therefore left open a question no subsequent case has answered: whether district courts are required to look for these subtle warning signs in cases, like this one, that are settled *after* formal class certification." Campbell v. Facebook, Inc., 951 F.3d 1106, 1125–26 (9th Cir. 2020) (emphasis in original).

198. *Briseño*, 998 F.3d at 1024.

199. *Id.* at 1024–25.

200. *See id.* at 1025.

201. *Id.* at 1030.

202. *See* Roes, 1-2 v. SFBSC Mgmt., LLC, 944 F.3d 1035, 1049 n.12 (9th Cir. 2019) ("A presumption of fairness was commonly applied by district courts in our circuit prior to Congress' 2018 codification of standards for evaluating whether a proposed class settlement is 'fair, reasonable, and adequate.' . . . [This presumption] is very likely inappropriate under the standards now codified in Rule 23(e)(2). Rule 23(e)(2) now identifies 'whether . . . the proposal was negotiated at arm's length' as one of four factors that courts must consider and does not suggest that an affirmative answer to that one question creates a favorable presumption on review of the other three."). Some courts, by comparison, have articulated a presumption of validity to arm's-length-negotiated settlements. *See, e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) ("A 'presumption of fairness, adequacy,

The court in *Roes, 1-2* was careful to qualify that the assumption of invalidity is not a radical departure for the Ninth Circuit, pointing out that the Ninth Circuit has "never endorsed applying a broad presumption of fairness."[203] And the court in *Briseño* made clear that the presumption of invalidity "does not demand disfavoring settlement" or displacing the "strong judicial policy that favors settlements" in class actions.[204] The presumption of invalidity, then, seems primarily aimed at encouraging a thorough inquiry by district courts that satisfies Rule 23(e)(2) rather than at imposing a separate requirement. It does not demand that district courts disfavor class settlements, but it does call for them to conduct the "searching inquiry" required by Rule 23(e)(2) and requires them to make separate factual findings on each factor rather than allowing an affirmative finding on one factor to create presumptions on others.[205] Therefore, "a conclusory statement, without any further analysis, that 'the settlement is the product of serious, non-collusive, arm's length negotiations and was reached after mediation with an experienced mediator at the Ninth Circuit' is insufficient."[206]

3. Parsing the Differences Between the Fourth and Ninth Circuits

As should be plain at this point, the Ninth Circuit's approach appears to be quite different from that of the Fourth Circuit. The Fourth Circuit has adopted a reading of Rule 23(e)(2) by which the amendment does not change the existing law of settlement approval but merely rearticulates it. This reading has also found support from other sources, including influential class action treatises and in places in the Advisory Committee Note to the 2018 amendments.[207] Conversely,

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and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995))).

203. *See Roes, 1-2*, 944 F.3d at 1049.

204. *Briseño*, 998 F.3d at 1031.

205. *See Roes, 1-2*, 944 F.3d at 1049.

206. *Id.* at 1050 n.13. One interesting wrinkle about the reception of the new rule in the Ninth Circuit is that, despite the holdings of *Briseño* and *Roes, 1-2*, some district courts since *Briseño* continue to apply the *Hanlon* factors rather than the Rule 23(e)(2) factors to frame their settlement approval analysis, while noting separately that they will also scrutinize the fee arrangement for potential collusion under *Briseño*. *See, e.g.* Hashemi v. Bosley, Inc., No. CV 21-946 PSG (RAOx), 2022 WL 18278431, at *2–3 (C.D. Cal. Nov. 21, 2022) (describing the legal standard using the *Hanlon* factors while also conducting a separate inquiry for collusion under what the court called the *Briseño* factors); Smith v. Kaiser Found. Hosps., No. 18-cv-00870-KSC, 2021 WL 2433955, at *5–6 (S.D. Cal. June 15, 2021) (same). *But see* Peterson v. Alaska Commc'ns Sys. Grp., Inc., No. 3:12-cv-00090-TMB-MMS, 2022 WL 788399, at *3, *5–8 (D. Alaska Mar. 15, 2022) (describing the legal standard under both Rule 23(e)(2) and the *Hanlon* factors and evaluating settlement proposal under both sets of factors). Thus, despite the *Briseño* court's best efforts, courts in the Ninth Circuit sometimes still exhibit a preference for their own circuit's prior articulation of the law over the articulation made by Congress in the Federal Rules. And, even where the courts are reckoning with the amended rule, they are often doing so by reference to their own circuit court's gloss on the rule rather than the rule itself.

207. *See* NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 164, § 13:48 ("Because the 2018 amendments codified existing practice, they are unlikely to generate a significant change in the

the Ninth Circuit has adopted an interpretation of the rule that imposes new scrutiny requirements on district courts when considering whether to approve a proposed class action settlement.

The magnitude of the difference can be debated, since possible collusion in class settlements has long been on the radar of federal courts before the 2018 amendments, including in cases like the Fourth Circuit's *Jiffy Lube*.[208] What sets the Ninth Circuit approach apart, though, is that possible collusion is not just on the radar, but is a core component of the settlement approval inquiry that must be independently addressed by the district court. Rather than wait for an objector to object to the settlement and raise the collusion argument on appeal, district courts in the Ninth Circuit must make their own specific findings that assess the attorney's fees against the relief for the class and identify signs of collusion. Failing to "'investigate or adequately address' the economic reality of the settlement relief" and address the *Bluetooth* factors is an abuse of discretion in the Ninth Circuit.[209] And the Ninth Circuit is serious about courts making specific factual findings rather than conclusory statements: "the district court must do more than acknowledge that warning-sign provisions exist and then conclude that they are not dispositive without further apparent scrutiny."[210]

All of this is not to say that a Fourth Circuit district judge couldn't reject a proposed settlement as collusive by means other than an interpretation of Rule 23(e)(2). But framing matters. In the Fourth Circuit, district courts have been encouraged to consider possible collusion, but they do not have the same independent obligation to rigorously scrutinize specific elements of a settlement proposal that courts in the Ninth Circuit do. In one circuit, there remains a presumption of fairness in favor of class settlements and an open-ended factor balancing test to approve a class settlement. In the other, proposed settlements begin from a place of invalidity, and courts must make specific, non-conclusory findings to satisfy the Rule 23(e)(2) criteria. And specifically, courts must "balance the 'proposed award of attorney's fees' vis-a-vis the 'relief provided for the class'" in determining the adequacy of the settlement.[211] The difference is meaningful enough that, all else equal, a class settlement proposal faces more of an uphill battle in the Ninth Circuit. If a class action attorney has the choice between filing in the Ninth Circuit or elsewhere, they might look ahead toward

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settlement process or outcome."); FED. R. CIV. P. 23(e)(2) advisory committee note to 2018 amendments ("Overall, these factors focus on comparable considerations . . . . The goal of this amendment is not to displace any factor . . . .").

208. "The court determined that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion . . . ." *In re* Jiffy Lube Sec. Litig., 927 F.2d 155, 158–59 (4th Cir. 1991). "The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations." *Id.* at 158.

209. McKinney-Drobnis v. Oreshack, 16 F.4th 594, 610 (9th Cir. 2021).

210. *Id.* at 611.

211. Briseño v. Henderson, 998 F.3d 1014, 1024 (9th Cir. 2021). As the *Briseño* court noted, "we never explicitly mandated consideration of the terms of attorneys' fees in the *Hanlon/Staton* factors." *Id.* at 1023.

settlement approval and take that uphill battle into account—especially for small value consumer class actions where relief is notoriously difficult to get to class members.

IV. THE PROBLEMS OF CONSENSUS RULEMAKING IN CLASS ACTION REFORM

So, how did the Fourth and Ninth Circuits arrive at such different conclusions about the meaning of the amendment? The changes to the rule were undoubtedly subtle. Subtle enough, in fact, that it has been declared that they do nothing more than "codif[y] existing practice" among federal courts.[212] In this Part, I argue that this subtlety was neither by intention nor by accident, but because of two related pressures bearing on the Advisory Committee's work.

The first is the history of debate and reform in the class action arena—the deep, durable divisions between those supporting the regulatory and the compensatory conceptions of class actions leave little room for agreement on what proposed reforms should actually accomplish. The second is the lack of a substantive theory behind the rulemaking that could have provided guidance for what goals should be prioritized in drafting a new rule. Instead, the working model of procedural rulemaking employed by the Committee is an ad hoc model that prioritizes consensus-building over other considerations.

When these two pressures—deep disagreement over the goals of class actions combined with an approach that prioritizes consensus-building over everything else—come together, the rulemaking that results can only create subtle and open-ended rule changes that avoid controversy and leave most of the discretion in the hands of the judge.

That's a problem because an amendment to a rule still suggests a change of some kind, leading to a post-amendment arena in which courts can plausibly interpret the ambiguity created by the rule in very different ways—as either a meaningful change or really not a change at all—as in fact the Ninth Circuit and Fourth Circuit have done. That result can create interpretive ambiguity ripe for divergent interpretations, as the subsequent cases from the Fourth and Ninth Circuit have shown. Thus, rather than clarifying and unifying the law, the ambiguity created by the subtle rule change has perhaps created more circuit divergence in settlement scrutiny than before, when circuits had converged around largely similar sets of factors.

The Advisory Committee has acknowledged the pressure of the regulatory-compensatory debates on its rulemaking efforts. As discussed in Part I, the Advisory Committee abandoned efforts in the 1990s to pursue substantive reforms to the class certification process that were opposed by many for taking insufficient consideration of the regulatory role of class actions.[213] When the Committee took up reforms again in what ultimately became the 2003

212. NEWBERG AND RUBENSTEIN ON CLASS ACTIONS, *supra* note 164, § 13:48.
213. *See supra* Part I.B.

amendments, its sails had been trimmed significantly, as it by its own admission narrowed its focus to more procedural concerns of class actions rather than take a side on the big cosmic public law questions of class actions.[214]

The Committee's focus on smaller, more procedural concerns continued in the latest round of rulemaking, where it considered but ultimately punted on more controversial issues like ascertainability in favor of focusing on procedural concerns like class notice and minor settlement practice reforms.[215] As Professor Richard Marcus noted, the debates during the 2018 amendment process were highly cognizant of how the regulatory-compensatory balance might be affected by the Committee's rulemaking, and there was "a studied effort by the rule makers to avoid embracing the strongest position on either side."[216]

The Committee's studied effort at avoiding controversy is not surprising given its experience with controversy in prior rulemaking efforts. And there may be good reasons to favor such a cautious approach to rulemaking. Infrequent changes to rules help parties have settled expectations about the law. Minor rather than major changes can help continue something like the stalemate achieved between the competing conceptions of class actions described in Part I.[217] Commentators have expressed fears about the decline of class actions due to a comparatively incautious Supreme Court, which has shifted the balance and limited the regulatory potential of class actions.[218] By refusing to favor one side over the other, the Advisory Committee's work can be a force of relative stability in class action law.[219]

But rulemaking in a way that avoids controversy in such a delicate arena is no easy task. With two sides in diametric opposition, there is little room for a productive agreement about the goals of a Rule 23 amendment or how those goals might best be achieved. And without clear, agreed-upon goals, it is no wonder that even broad goals (like consolidating varied sets of factors to move toward uniformity) could be frustrated and diminished by the drafting process, with each side advocating to have their favored considerations reflected in the rule.

The frustrated goal of uniformity leads to my second, and larger, point: the consensus model of rulemaking employed by the Committee, especially in the

214. *See supra* Part I.B.

215. After some consideration of cy pres, ascertainability, pick-off offers, and settlement and issue classes, the Advisory Committee ultimately shelved them. "Although some of these issues are remote from the central tension between compensation and deterrence, in general they have overtones of that conundrum and illustrate the ongoing challenge of emphatic embrace of either the pure compensation or the pure deterrence rationale." Marcus, *Revolution v. Evolution*, *supra* note 21, at 923.

216. *See id.* at 916.

217. *See* Marcus, *History Part I*, *supra* note 15, at 597–98.

218. *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013). Klonoff concludes his review of major changes to class action practice implemented by federal appellate courts and the Supreme Court by "urging courts, rule makers, and Congress to return to a more balanced approach to classwide adjudication." *Id.* at 730.

219. *See* Marcus, *History Part I*, *supra* note 15, at 597–98.

arena of class actions, necessarily leads to rules that are open-ended, are ambiguous, and leave most of the hard decisions to the judge, as has been the case with the Rule 23(e)(2) settlement criteria. For this critique, I draw on Professor Robert Bone's critiques of consensus rulemaking and the lack of a strong procedural theory of rulemaking. The process of drafting and implementing Rule 23(e)(2) provides a recent real example illustrating some of the consequences of consensus rulemaking.

First, some background on consensus rulemaking. Consensus rulemaking has become a popular strategy among commentators and among the Advisory Committee itself because it "relies on consensus to resolve normative conflict."[220] Since choosing between competing normative values is impossible to do in an objective manner, using consensus to drive rulemaking is thought to be better because it considers as many interests as possible to produce rules, which at least avoids controversial rules, and can claim the legitimacy of a participatory process.[221] Consensus rulemaking is not new. The Judicial Conference of the United States has identified it as one of the central guiding norms of procedural rulemaking since at least the 1990s.[222]

And consensus rulemaking has much going for it, as exemplified by the enthusiastic response to the Advisory Committee's attempts to build consensus by many who submitted public comments.[223] As a rulemaking style, consensus rulemaking ensures a process that is sufficiently open to public input; that is "representative of, or at least sensitive to, the interests of those who will be most affected by the rules"; and that creates a healthy constraint on rulemaking because "lack of consensus about the wisdom of problematic proposed rules" is normally enough to sink such rules.[224] In sum, it imbues the rulemaking process with a public participation and democratic legitimacy that make it an appealing choice.

And again, there may be reasons to prefer a consensus rulemaking approach in the class action sphere in particular, with its deep-rooted divide between regulatory and compensatory conceptions of the class action's purpose. Rather than pushing through a rule favorable to one conception over the other, requiring consensus all but ensures that no great change will be made to class action practice. That relative stalemate may be worthwhile for those advocating on both

220. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and the Procedural Efficacy*, 87 GEO. L. J. 887, 916 (1999).

221. *See id.* at 916.

222. *See* A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 693 (1995) [hereinafter SELF-STUDY] (identifying consensus as a core norm of rulemaking, along with efficiency, fairness, simplicity, and uniformity).

223. *See* Arizona Public Hearing Transcript, *supra* note 126, at 45, 76.

224. SELF-STUDY, *supra* note 222, at 694.

sides of the divide, since forgoing outright victory will also foreclose outright defeat.

But, as should be apparent from the Rule 23(e)(2) amendments, there is a flip side to that coin. At a basic level, what good is a rule if its process all but ensures that it will have a difficult time achieving much of value? Or, as it was expressed in a comment made by a Subcommittee member discussed in Part II: "Why do this if there's really no change because the four factors are essentially shortened lists of the longer ones now in use?"[225]

Consensus tends to be most achievable, unsurprisingly, in the areas of least controversy. In civil procedure, these are most likely to be areas that deal with only technical or procedural rules with little substantive impact, making consensus difficult to achieve in areas with high substantive stakes like class action law.[226] This tendency is reflected in the Advisory Committee's move away from substantive issues of class action law that generated controversy toward tweaking with minor procedural issues.

Achieving consensus around rulemaking in areas of sharp disagreement is comparatively difficult. When there is any amount of contentiousness over a topic, forcing consensus can "paralyze the rulemaking process" as there is little likelihood of reaching consensus on contentious issues.[227] And when consensus or compromise among contentious groups is possible, resolutions tend to come together around "highly general rules" that leave "the difficult normative issues unresolved."[228] Highly general rules can be attractive to interested groups on opposing sides because, by leaving difficult issues unresolved, it "give[s] everyone a chance to wage the battles later in the context of individual suits."[229]

This is more or less exactly how the Rule 23(e) amendment rulemaking process played out. The Committee was most able to build consensus when it maintained discretion with trial judges, what Bone calls the "case management model." Case management is often justified on the grounds that trial judges are "on the ground" and best able to handle decision-making in complex factual circumstances. But it is also appealing because it doesn't require resolution of difficult issues at the rulemaking stage.

Favor for the case management model deeply affected the path of the draft criteria. Time and again during the rulemaking process, it was urged that the Committee should be clear that it was not trying to overrule circuits' factors. People also argued that the less constraining Alternative 1 was preferable because it maintained discretion with the trial judge. Some even argued that the entire amendment project was too narrowly conceived, since situations could

225. Rule 23 Subcommittee, *Notes of September 11, 2015 Subcommittee Meeting*, *supra* note 9, at 158.

226. Bone, *supra* note 220, at 916.

227. *Id.* at 916–17.

228. *Id.* at 917.

229. *Id.* As Bone notes, rulemaking in this way "strips rulemaking of any real purpose."

arise where criteria not on the Committee's list were relevant to the fairness, reasonableness, or adequacy of the settlement.[230] As the development from the highly specific ALI proposal to the broadly articulated final draft demonstrates, "[t]he need to reach consensus tends to push rulemakers toward highly general rules that leave most of the difficult normative questions to the discretion of trial judges in individual cases."[231]

Despite the virtues of the case management model, there are problems with leaving procedure entirely in the discretion of trial court judges. Unlike the original drafters of the Federal Rules, proceduralists today no longer believe that procedure is "largely devoid of substantive value" and, as a technical exercise, best performed by trial judges.[232] That view has been discredited as it has come to be recognized that the normative values of procedural rules are not "purely technical" but rather directly implicate substantive values.[233] In few areas of civil procedure should this point be as clearly grasped as in class actions, which are nearly always under attack for going "beyond procedure" into modifying substantive law.[234] And so, once it is acknowledged that procedural decisions carry substantive weight to them, it is not at all clear that trial judges resolving these questions on a pragmatic, ad hoc basis is the best way to approach these substantive value judgements.

If all this is a bit academic, it is worth considering the more direct consequences of the consensus rulemaking approach. Creating general rules that leave discretion in the hands of trial judges can create interpretive ambiguities ripe for diverging interpretations—exactly what happened in the Fourth and Ninth Circuits. While the specific requirements of a more constraining rule would be harder to interpret in different ways, the more open-ended a standard, the easier it is for judges to make different plausible interpretations. And a rule *amendment* (as opposed to a brand-new rule) poses its own challenges, as courts must interpret how much of a change is evident in the text of the rule as well as how much was intended by the drafters of the amendment, all against the backdrop of an existing rule. Courts must grapple with the fact that "[a] rule change is, after [all], a rule change. It says something should be done differently . . . ."[235]

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230. *See, e.g.*, Rule 23 Subcommittee, *Subcommittee Report*, *supra* note 7, at 87 (describing the desirability of maintaining judicial discretion in the new rule); Rule 23 Subcommittee, *Notes of September 11, 2015 Subcommittee Meeting*, *supra* note 9, at 156 (describing the desirability of allowing circuits to "keep their factors").

231. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 327 (2008).

232. *Id.*

233. *Id.*

234. *See, e.g.*, Law. for Civ. Just., *supra* note 128, at 4 ("No-injury class actions alter parties' substantive rights, thereby violating the Rules Enabling Act.").

235. Rule 23 Subcommittee, *June 2015 Notes*, *supra* note 70, at 285.

This, when combined with the subtlety of the rule as it was shaped by consensus, creates a post-amendment arena in which courts can plausibly interpret the ambiguity created by the rule in very different ways—as either a meaningful change or really not a change at all. Without clearer guidance from the rule or the Committee Note, the Ninth Circuit can conclude that the rule change is meaningful, and thus it should do things "differently."[236] And the Fourth Circuit can look to the broadly articulated instruction of the rule and the Committee Note that says the amendment was not meant to displace any factor, and conclude that it can continue with its prior ways. Rather than clarifying and unifying the law, the demands of consensus rulemaking have created a slight rule change whose intent was ambiguous, causing perhaps more circuit divergence in settlement scrutiny than existed before.

This consequence points to another problem that can come from prioritizing consensus: sacrificing other procedural rulemaking values. In its 1995 Self-Study of Federal Judicial Rulemaking, a subcommittee to the Committee on Rules of Practice, Procedure and Evidence identified that rules of procedure should be adopted to promote "five related norms: efficiency, fairness, simplicity, consensus, and uniformity."[237] But, while the Self-Study identifies these as *related* norms, the 2018 rulemaking process illustrates that they can as often be in tension with each other as in concert. In this instance, the Committee's oft-stated goal of uniformity in settlement approval was ultimately thwarted by its pursuit of consensus, as the consensus pushed away from a more forceful rule that could have encouraged uniformity by narrowing the range of possible interpretations taken by circuits. The Committee knew that it would sacrifice some uniformity by choosing the more discretionary version of the rule and was willing to accept that bargain.[238] In an environment where the dominant mode is consensus rulemaking (and favor for maintaining discretion with trial judges), the norm of consensus can take a default precedence over other potential values like uniformity, simplicity, or the efficiency of the rule produced by the rulemaking process.

Finally, on the note of efficiency, regardless of whether this is eventually sorted out by the Supreme Court or by the circuits themselves, there will be costs in the meantime from this divergence and from sorting out the differences. These costs could have been avoided or ameliorated by articulating a stronger purpose behind the rule and staying true to that purpose. As the Self-Study notes, the efficiency of a rulemaking process is tied up in the "efficiency of the actual rules the rulemaking process produces."[239] Rulemakers ought to consider "how costly

236. *See id.*

237. *See* SELF-STUDY, *supra* note 222, at 693.

238. *See* Rule 23 Subcommittee, *July 2015 Notes*, *supra* note 72, at 245 (acknowledging that the less constraining approach would dilute the objective of uniformity but arguing it could still provide "significant focus"); *id.* at 246 (reporting that "the consensus is tending toward favoring the less directive approach embodied in Alternative 1")

239. SELF-STUDY, *supra* note 222, at 693.

it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the federal courts," including considering the costs of "a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules."[240] These potential costs seem to have been undervalued by the process that prized consensus over other procedural rulemaking values.

V. THE CASE FOR THE NINTH CIRCUIT APPROACH: A BETTER INTERPRETATION OF RULE 23(E)(2)

Finally, in Part V, the Note concludes by arguing that the Ninth Circuit approach to the amendments is the more correct approach for several reasons. Despite the ambiguity brought about by the consensus rulemaking style, the amendment is best understood as a subtle shift in the focus of settlement review that, consistent with other recent reforms to class action settlement law, signals a quiet shift toward the compensatory conception of class actions. The Ninth Circuit interpretation is more faithful to the plain text of Rule 23(e)(2), and it is more consistent with the legislative history of the rule, despite some evidence to the contrary. Finally, by interpreting the rule change as a rule *change*, the Ninth Circuit properly respects the legitimacy of Advisory Committee rulemaking, as ratified by the Supreme Court and Congress. Circuits that have not yet interpreted the requirements of settlement approval under Rule 23(e)(2) should look to the text of the amended rule and the Ninth Circuit's example for guidance.

As we saw in investigating the rulemaking process, the final product that ended up in Rule 23 was considerably less direct and less constraining than it could have been. This caused confusion and different plausible interpretations as to what the new rule was meant to require. The original ALI proposal used language that imposed strong, clear obligations on courts. Courts would have had to "address, in on-the-record findings and conclusions" whether each criterion was satisfied, and a negative finding on a single one would bar settlement approval.[241] When the Rule 23 Subcommittee adapted the ALI rule into its own proposal, it considered creating a more constraining version of the rule. But by the time the language made it through the rulemaking process, it was much less direct. The final rule allowed a court to approve a settlement "only on finding that it is fair, reasonable, and adequate after *considering*" whether the criteria are met, with no requirement that a negative finding on any criterion bar settlement approval.[242]

Courts could thus be forgiven for seeing the new rule as less of a mandate, since the basic "fair, reasonable, and adequate" standard remained unchanged and many of the new factors overlapped with existing circuit considerations.

240. *See id.*
241. *See* PRINCIPLES, *supra* note 74, § 3.05.
242. *See* FED. R. CIV. P. 23(e)(2) (emphasis added).

They could plausibly see it as more of a codification of existing practice because the Committee Note that explains subdivision (e)(2) discusses the existing circuit factors and states that "[t]he goal of this amendment is not to displace any factor."[243] Given the Committee Note and the overlap between the new factors and many existing circuit factors, it is not unreasonable to conclude that the new rule merely codifies the approach already taken by circuits.[244]

While that all seems plausible, I argue still that the Ninth Circuit has taken the more correct approach. Courts should look beyond the Committee Note's reassurance about not displacing any factor to consider the amendment as a whole. First, there's the text itself. The revised rule tells courts to consider criteria like "the costs, risks, and delay of trial and appeal" when evaluating the proposed settlement.[245] This prong is expressed nearly verbatim in many of the circuit factor lists already in use.[246] Another criterion, judging whether class counsel have "adequately represented the class," can also be analogized to one or more factors in the existing circuit lists.

But other criteria may be addressed more or less directly by different circuits.[247] And still others have no clear analogues in existing circuit factors or are not addressed with the level of specificity that they are in the revised Rule 23(e)(2). Instead, these criteria reflect a new focus in the revised rule on attorney's fees and claims methods. Criteria like evaluating "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," and "the terms of any proposed award of attorney's fees, including timing of payment," do not have clear analogues in existing circuit lists.[248]

The attorney fee award, while addressed in Rule 23 since the 2003 amendments, was previously only considered for its own substantive fairness under 23(h). Now, courts are meant to consider the attorney fee award in relation to the substantive fairness of the overall settlement, and not just the fairness of the fee award standing alone. The *Briseño* court recognized this.[249] While courts can reduce and have reduced excessive fee awards, under the revised rule they

243. *See* FED. R. CIV. P. 23(e)(2) advisory committee notes to 2018 amendments.

244. This interpretation may be further explained by analogizing to the last amendment work on settlement approval from 2003, which created the "fair, reasonable, and adequate" standard, since that amendment was also widely seen as merely codifying existing federal courts practice. *See, e.g.*, Marcus, *supra* note 99, at 60 (describing how the "fair, reasonable, and adequate" criteria in the 2003 amendment were "largely based on existing case law").

245. FED. R. CIV. P. 23(e)(2)(C)(1).

246. See, e.g., the Second Circuit's *Grinnell* factors, discussed *supra* note 4, which consider "the complexity, expense and likely duration of the litigation," as well as several factors bearing on the risks of continued litigation through trial.

247. For example, on the existence of arm's-length negotiations, the Fifth Circuit's *Reed* factors have courts consider "the existence of fraud or collusion behind the settlement," while the Second Circuit's *Grinnell* factors are silent as to collusion. *See supra* notes 4–5.

248. See, e.g., *supra* notes 4–5, for circuit lists lacking these or similar criteria.

249. *See* Briseño v. Henderson, 998 F.3d 1014, 1024 (9th Cir. 2021).

can, and should, be rejecting entire settlement proposals if the relief to the class is inadequate in relation to the fee award.

Beyond the text, the amendment history and the intent of the rule expressed in the Committee Note guide the interpretation of the rule. Those who insist that the rule change intended to change little have latched onto the language in the Note that states that the "goal of this amendment is not to displace any factor" as permission to maintain the status quo.[250] But merely stating in a Committee Note that the goal is not to displace any specific factor should not be construed as permission to ignore the text of the rule entirely. Those who do so also tend to ignore other pertinent instructions of the Note. The Note repeats several times that the factors articulated by Rule 23(e)(2) are the "core concerns" of procedure and substance that should guide both how the parties present the settlement to the court and how the court decides whether to approve the proposal.[251] Lengthy lists of factors can "distract[] attention from the central concerns." The amendment "*directs the parties* to present the settlement to the court in terms of a shorter list of core concerns . . . that should always matter to the decision whether to approve the proposal."[252]

The intent of increasing attention toward attorney's fees is evident in the Note. The Note to paragraphs (A) and (B) of Rule 23(e)(2) states that "[p]articular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms."[253] The Note later counsels that "the relief actually delivered to the class can be a significant factor in determining the appropriate fee award."[254] The text of the rule and Note both reflect a newfound focus on the effect of the attorney's fee award on the fairness of the overall settlement.[255]

Finally, as the comments made by some plaintiffs' attorneys during the public comment period demonstrate, the focus on the proposed claims process and methods is another new feature of the rule. Evaluating the relief to the class "may require evaluation of any proposed claims process," including "directing that the parties report back to the court about actual claims experience."[256] Courts should "scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims."[257] The focus on the claims process is a new consideration that is not directly addressed in circuit factors. Those who argue that the amendment did nothing but codify existing practice ignore the significant evidence to the contrary in both the text and the Note.

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250. *See* FED. R. CIV. P. 23 advisory committee notes to 2018 amendments.
251. *Id.*
252. *Id.* (emphasis added)
253. *Id.*
254. *Id.*
255. See *id.* ("Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement.").
256. *Id.*
257. *Id.*

Looking beyond the text of the rule and the Note, the rulemaking process also provides evidence that the rule was intended to do something beyond codifying existing circuit practice, although admittedly (as discussed in detail in Part II) the evidence here is more equivocal. Many during that process expressed the view that the Advisory Committee should be clear that it would not be overruling circuit law so that the circuits could "keep their factors."[258] And the Committee Note ultimately included language that the rule was not meant to displace any specific circuit factor. However, there was also ample evidence from the rulemaking process that the Advisory Committee saw problems with current practice—not just that circuits applied slightly different factors, but that the factors themselves were often not the most relevant to the settlement and that courts and parties substituted rote recitation for real analysis. A goal was to have courts "look closely at the settlement rather than move unthinkingly down a check list of factors . . . many of them not relevant to the particular settlement."[259] The Advisory Committee hoped to both achieve uniformity and focus on the factors that, in its opinion, really mattered.

The Committee was also aware of the criticisms of the proposals—that they were too vague, that the amendment was not worth doing if it merely resulted in a shortened version of the existing factors—and yet it pressed on. The Committee must have believed that these changes were worthwhile beyond just codifying existing practice. One Subcommittee member, perhaps giving away too much, even admitted that a goal in amending the settlement criteria was to "respond to increasing cynicism found in public views of class actions. Many people view settlements in consumer class actions as devices that provide no meaningful value to consumers and provide undeserved awards to class counsel."[260] This statement is much more consistent with the conclusion that the Advisory Committee intended to change settlement review at least somewhat than that it intended to change nothing. The statement suggests that one unstated goal was to address principal-agent problems with class counsel—as could be achieved by focusing increasingly on attorney's fees and on claims methods.

A final reason why the Ninth Circuit approach is the correct one is that "[a] rule change is, after [all], a rule change. It says something should be done differently . . . ."[261] Absent a clear indication otherwise, the rule change should be interpreted to do something rather than nothing. The Ninth Circuit's interpretation respects the rulemaking legitimacy of the Advisory Committee (not to mention that of the Supreme Court and Congress, which ratified the rule) and the rulemaking force of the Federal Rules of Civil Procedure in creating uniform rules of procedure that apply across the federal courts.

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258. *See* Rule 23 Subcommittee, *Notes of September 11, 2015 Subcommittee Meeting*, *supra* note 9, at 156.

259. CIV. RULES ADVISORY COMM., *supra* note 114, at 18.

260. *Id.*

261. *See* Rule 23 Subcommittee, *June 2015 Notes*, *supra* note 70, at 285.

To treat the rule change as doing nothing because some of its enumerated factors overlap with existing circuit factors is to diminish the idea that the Advisory Committee and the Federal Rules have binding authority on federal judges. That approach embraces wholeheartedly the contested idea that the pragmatic, ad hoc decision-making achieved by investing broad case management authority in trial judge creates the right kind of procedure.[262] Many predicted during the amendment process that some judges would ignore the new rule. The fact that it was a predictable reaction, however, doesn't bear on the validity of the reaction.

So, what was the Advisory Committee intending with the amendment if it was not merely codifying a version of existing factor lists? While this part of my argument is necessarily more speculative, I argue that the new settlement approval criteria were meant to subtly shift the focus of settlement approval to the lawyers and, specifically, the class's lawyers. The Advisory Committee did not so state directly, but the specificity of the new criteria, the directives in the Committee Note, and the thrust of the amendment's ALI source material all point toward a greater focus on class counsel and its relation to the class. Instructing courts to specifically consider criteria like the attorney's fee award in the overall fairness of the settlement, the timing of the fee award, and the notice process and claims rate are all specific and direct instructions. And they are different from the often open-ended inquiry conducted by courts into things like the amount of discovery taken, the expertise of counsel, or the risks of trial and appeal.

This focus on the lawyers is undoubtedly rooted in concern over the principal-agent problems of class action lawyers and their absent clients. By encouraging class counsel to ensure a robust notice and claims process, the new rule helps ensure that the lawyers have the best interests of the class in mind when negotiating the settlement. And by encouraging courts to compare the attorney's fee and the timing of its payment with the relief provided to class members, the rule aims to align the interests of class counsel with the class.[263] This, of course, is a classic way to try to minimize principal-agent problems—by creating the right incentives for agents to pursue the best interests of the principal.[264] Nothing I am saying here is new—issues around harnessing the

262. *See* Bone, *supra* note 220, at 918 ("[V]esting broad (and essentially unreviewable) discretion in the trial judge undermines predictability and consistency and raises its own legitimacy concerns.").

263. To maximize the attorney's fee that a court will approve, as the lawyers will want to do, attorneys should maximize the relief provided to the class and avoid any suggestion that they are looking out more for themselves than class members by focusing on getting class members paid over themselves.

264. *See* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION 120 (2015) (noting that in class action litigation, the "percentage-of-the-recovery formula largely aligns [lawyers'] interests with those of the class"). Another possible solution, closer monitoring of the agent's work, is not feasible in class actions with large absent classes. Coffee writes that because individual class members typically have a tiny economic stake compared with the plaintiff's attorney, the attorney's decisions are "seldom closely monitored by the class members." *Id.* at 5. In this way, the attorney is "more like a principal than an agent," with the class members "serving as largely passive partners." *Id.*

profit motive of "entrepreneurial lawyers" to best serve an absent class have been long recognized in law and economics scholarship.[265]

It is likely that the Advisory Committee did not explicitly discuss the principal-agent issue because it could be interpreted as the Committee taking a side in the regulatory-compensatory class action debate that it might be thought the Advisory Committee should abstain from.[266] That's because the same principal-agent arguments that can be used to encourage class lawyers to get more money into class members' hands can also be deployed more cynically. Critics who would like to see the power of class actions broadly reduced commonly use examples of low claims rates and high fee awards to attack class actions and the lawyers who bring them.[267]

Indeed, many believers in the regulatory conception of class actions expressed fears in their public comments that the settlement criteria would, perhaps inadvertently, push toward the compensatory conception.[268] In response, Subcommittee reporter Professor Richard Marcus has written that these comments provide examples of "people reading positions on these issues into the package."[269] But the amendment's concerns around class counsel compensation and measures of class relief undeniably reflect a subtle embrace of this idea—whether one sees it as aimed at the agency problems of class actions or at embracing the compensatory model of class actions—advertently or inadvertently. The fact that these provisions were not more strongly opposed and the concerns expressed in those public comments were left mostly unaddressed is perhaps a sign of how ascendant the compensatory conception has become.[270]

To conclude, the story of the 2018 amendment process was in many ways but one more chapter in the long story of lawyers fighting over the proper role of class actions in our civil legal system, albeit fighting over smaller territory. After placing the amendment process in historical context and describing that process in detail in Parts I–III, in Parts IV–V I have tried to assess the reaction to the rule and to ring a note of caution for rulemakers by illustrating some of the possible consequences of reform efforts in this area under the current rulemaking

265. *See generally id. See also* Gilles & Friedman, *supra* note 61, at 113 ("Beginning with John Coffee's pioneering work in the mid-1980s, law and economics scholars began to critically examine the power financial incentives of entrepreneurial class action lawyers.").

266. *See* Gilles & Friedman, *supra* note 61, at 162–63 (connecting a focus on agency problems among scholars and policy-makers to the "primacy of compensation concerns" in class actions over concerns for regulation or deterrence).

267. *See* Resnik, *supra* note 145, at 14 (arguing that critics of class actions often "use the challenges of implementation" like the potential for low claims rates as "arguments to prevent [class] certification" in the first place).

268. *See supra* notes 140–141, 143–144 (expressing concern that specific statements in the proposal would impose burdensome standards for claims rates and for compensating class members).

269. *See* Marcus, *Revolution v. Evolution*, *supra* note 21, at 933.

270. *See, e.g.*, Gilles & Friedman, *supra* note 61, at 107–31 (explaining the "compensationalist hegemony" in class actions that has taken hold among academics, courts, Congress, and government agencies).

framework. This rulemaking outcome suggests that deeper reflection may be warranted on the aims of a proposed rulemaking and the possible unintended consequences. Finally, I have attempted to understand the intent of the rulemakers, to reconcile the ambiguity presented by the rule, and to argue for an interpretation of the rule based on the text, Committee Note, and history that seems most consistent with the evidence. From this view, the amended criteria do more than merely codify existing practice. Instead, they quietly embrace the compensatory conception of class actions.