SEYFARTH SHAW

Seyfarth Shaw LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

Writer's direct phone
(312) 460-5965

Writer's e-mail
gmaatman@seyfarth.com

February 15, 2017

Committee on Rules of Practice and Procedure
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington, DC 20544

Re: Seyfarth Shaw LLP's Public Comment To The Advisory Committee On Civil Rules On Needed Reform To Rule 23

Seyfarth Shaw LLP[1] ("Seyfarth Shaw") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") regarding the Committee's proposed amendments to Rule 23 ("Proposed Amendments").

I. Introduction

Seyfarth Shaw is a law firm with more than 850 attorneys and 14 full-service offices in the United States and internationally. We recognize firsthand the serious problems that have developed as a result of inconsistent application of Rule 23 in federal courts. Indeed, courts have fashioned a body of law that simultaneously creates inconsistencies and gaps in the scope and interpretation of Rule 23, leaving practitioners on both sides of the bar struggling to discern the proper application of the Rule. While we support the current proposed amendments to Rule 23, we believe that they do not go far enough in addressing a number of the practical difficulties regularly encountered in class action litigation.

Accordingly, this Comment proposes four areas in need of reform and guidance from the Committee, which are not addressed by the pending proposed rule amendments. First, Rule 23 should be amended to require the presentation of viable trial plans in conjunction with motions for class certification. Second, Rule 23 should be amended to provide a right to interlocutory appeal of decisions to certify, modify, or de-certify a class. Third, Rule 23 should provide guidance regarding

[1] This submission – from members of Seyfarth's class action defense group – is a joint effort of practitioners in our group, including Thomas Ahlering, Kate Birenbaum, Matthew Gagnon, Hilary Massey, Jennifer Riley, Tiffany Tran, Julie Yap, and Kevin Young.

the predominance analysis as applied to certification of a settlement class, as opposed to class action litigation. Fourth, Rule 23 should provide guidance regarding the application of Rule 26's proportionality requirement to the scope of pre-certification discovery.

II. Rule 23 Should Be Amended To Add An Express Requirement That A Party Seeking Class Certification Must Submit A Viable Trial Plan

The 2003 amendments to Rule 23(c)(1)(A) changed the requirement that class certification must be determined "at an early practicable time" rather than "as soon as practicable."[2] This change reflected the acknowledgment that "[t]ime may be needed to gather information necessary to make the certification decision" which "often includes information required to identify the nature of the issues that actually will be presented at trial."[3] The Advisory Committee also noted:

> Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." *A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.*[4]

It is generally undisputed that trial plans help facilitate a court's determination of whether a case is capable of class-wide adjudication. Specifically, a trial plan is essential to determining whether the case is "manageable" and can be tried on a class-wide basis, or whether individualized issues (such as choice of law or individualized proof or damages inquiries) are insurmountable and render the class action unmanageable.

Accordingly, as acknowledged by the Advisory Committee, "an increasing number of courts *require* a party requesting class certification to present a trial plan"—and for good reason.[5] If a

---

[2] Fed. R. Civ. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

[3] Fed. R. Civ. P. 23 Advisory Committee Note (2003).

[4] *Id.* (emphasis added) (citing Manual for Complex Litigation, Fourth, § 21.213 at 44; § 30.11, 214; § 30.12, 215 (3d ed. 1990)).

[5] *See, e.g., Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (district court's request for a trial plan from the plaintiffs' attorney as "a reasonable request given the difficulty of trying a class action" (citations omitted)); *Haley v. Kolbe & Kolbe Millwork Co., Inc.*, 2015 WL 9255571, *16 (W.D. Wis. 2015) (requiring plaintiffs "to submit a plan for trial, in which they describe in detail the issues likely to be presented at trial, discuss whether and how those issues are susceptible to class-wide proof and explain how individual inquiries could be handled" noting that plaintiffs "will not be successful if they rely on the same vague and conclusory statements that they made in support of [their class certification] motion."); *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001), opinion amended on denial of reh'g, 273 F.3d 1266 (9th Cir. 2001) ("Because Zinser seeks certification of a nationwide class for which the law of

party seeking class certification is unable to present a trial plan demonstrating that the case can be manageably tried on a class-wide basis, this alone demonstrates that the requirements of Rule 23 cannot be met. On the other hand, other courts have recognized that the Advisory Committee Notes indicating the usefulness of trial plans in determining whether a class action meets the requirements of Rule 23, do not mean that a party seeking class certification is *required* to submit a trial plan.[6]

A simple change to Rule 23 requiring the presentation of viable trial plans in conjunction with a motion for class certification makes sense from both a legal and practical perspective and would almost certainly prevent unwieldy and unmanageable class actions from proceeding past the class certification stage to trial.

Specifically, Rule 23 should be amended to embrace the approach adopted by the California Supreme Court in *Duran v. U.S. Bank Nat. Assn.*, which explicitly held that "[c]lass certification is appropriate only if [] individual questions can be managed with an appropriate trial plan."[7] In *Duran*, the California Supreme Court vacated a $15 million judgment in a wage-hour class action on the ground that it was based on a flawed statistical sampling methodology. While the California Supreme Court did not foreclose the possibility of using statistical sampling to establish class-wide liability, it made clear that: (1) a trial plan that includes the proposed sampling should be presented to the trial court before class certification, (2) the proposed sampling should be statistically reliable, and (3) the trial plan should not deprive defendants of their due process right to present affirmative defenses. Significantly, the California Supreme Court noted that the court must consider at the certification stage whether a trial plan has been adequately developed:

> A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. *Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.*[8]

The California Supreme Court's rationale in *Duran* should be applied to *all* class actions including those brought pursuant to Rule 23—and regardless of whether a party is seeking class certification based on statistical sampling—because it requires that a trial court certify a class action *only after* sufficiently analyzing whether the case can be tried on a class-wide basis at the class certification stage. Absent such an analysis, class action defendants remain susceptible to expensive

---

forty-eight states potentially applies, she bears the burden of demonstrating 'a suitable and realistic plan for trial of the class claims.'") (quoting *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 454 (D.N.J. 1998)).

[6] *See, e.g.*, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 n.4 (9th Cir. 2005) ("[N]othing in the Advisory Committee Notes suggests grafting a requirement for a trial plan onto the rule"); *Olson v. Tesoro Refining and Marketing Co.*, 2007 WL 2703053, *7 (W.D. Wash. 2007) ("[T]he Court rejects defendant's contention here that a trial plan is required for class certification.")

[7] 59 Cal. 4th 1, 27 (2014).

[8] *Id.* at 32 (emphasis added.)

and unwieldy class action litigation and also run the risk of forfeiting their right to litigate affirmative defenses.

Perhaps most importantly, such a modest amendment makes sense as a practical matter. The submission and evaluation of a trial plan at the class certification stage, rather than on the eve of trial, will prevent the significant waste of resources of all parties involved in the litigation (including the courts) in the event that the trial court finds that the class action is unmanageable for trial.[9] This is especially true in light of the Advisory Committee Notes acknowledging that the parties have often engaged in significant discovery at the class certification stage, including "information required to identify the nature of the issues that actually will be presented at trial."[10] In other words, there is no reason that a court should wait until the eve of trial to evaluate a trial plan because a party seeking class certification should have the information they need to present a viable trial plan at the class certification stage.

III. Rule 23(f) Should Be Amended to Provide a Right to Interlocutory Appeal of Decisions to Certify, Modify, or Decertify a Class

A district court's decision on a motion for class certification can determine the outcome of the litigation. For defendants, class certification can create a "hydraulic pressure…to settle, avoiding the risk, however small, of potentially ruinous liability." *In re Visa Check/Mastercard Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2011); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (noting that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"). Plaintiffs are not immune from a similarly enormous impact, as a class certification denial can leave them with "an individual claim that, standing alone, is far smaller than the costs of litigation." Fed R. Civ. P. 23(f) Adv. Comm. Note to 1998 Amdt.

With its adoption in 1998, Rule 23(f) was an attempt to blunt the razor-sharp edge of class action certification decisions by providing a new avenue for appellate review and promoting more uniform class certification standards.[11][12] The rule states that "[a] court of appeals *may permit* an

---

[9] *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, No. 09-CV-625-BBC, 2011 WL 2009967, at *4 (W.D. Wis. May 23, 2011), *amended*, No. 09-CV-625-BBC, 2011 WL 2132975 (W.D. Wis. May 27, 2011), and aff'd, 705 F.3d 770 (7th Cir. 2013) (decertifying a collective and class action on the eve of trial and noting "[i]t is unfortunate that this case must be decertified at this stage, on the eve of trial and after the large investment of resources by the parties…However, I cannot allow this case to proceed to a jury trial under plaintiffs' proposed [trial] plan.").

[10] Fed. R. Civ. P. 23 Advisory Committee Note (2003).

[11] Before Rule 23(f), there were only two such avenues, each widely viewed as inadequate: (i) ask a district court to certify its own order for immediate review under 28 U.S.C. § 1292(b) and hope the appeals court would take the appeal, or (ii) petition the appeals court for a writ of mandamus. *See* Brian Anderson, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, 11 No. 3 Andrews Class Action Litig. Rep. 21 (2004). These avenues rarely succeeded: from 1987 through 1996, there were only 18 published decisions by appeals courts reviewing class certification decisions on an interlocutory basis. *See id.* (internal citations omitted).

appeal from an order granting or denying class-action certification...."[13] Such appeal is not mandatory, however, but is instead left to the "unfettered" discretion of the appeals court.[14]

Unfortunately, Rule 23(f) has not effectively served its purpose. The path to appellate review that the rule aims to provide is incredibly narrow. Though the available data is imperfect, a widely-cited study found that just 558 Rule 23(f) petitions were filed from December 1998 through October 2006, which amounts to just 6.4 per appellate court, per year.[15] Of those 558 petitions, the appellate courts ruled on whether to permit appeal in 476 cases (with the remainder dismissed or withdrawn) and agreed to hear only 168 petitions—less than two per court per year.[16]

Not only is the path to a Rule 23(f) appeal narrow, but it is much rockier in some parts of the appellate landscape than others. In the overwhelming majority of petitions actually decided (which, as noted above, is not many to begin with), appellate courts summarily rule on the petition without issuing a published decision. *Id.* With the resulting dearth of authority to anchor or steer future decisions, along with the "unfettered" discretion afforded by the rule, some circuits have effectively shut off the Rule 23(f) safety valve. The study noted above, for example, found that one circuit failed to grant a single Rule 23(f) petition at any point over the course of the nearly eight-year study, and another granted only five. *Id.*

Rule 23(f) should be amended to provide an appeal from a class certification order as a matter of right. In today's litigation arena, these orders—be it one granting certification, denying certification, or ruling on decertification—often leave one party or the other with no practical alternative to settlement. As such, a class certification order can have the same effect as an order granting summary judgment, given that both spell the end of a case. Rule 23(f)'s current approach of allowing interlocutory appeal only on a discretionary basis has failed to open a meaningful avenue for reviewing these decisions.

IV. Further Consideration Should Be Given To Amendments That Consider The Practical Application of Class Certification For Settlement Classes

Another issue of concern for practitioners on both sides of the bar is the standard for class certification in the context of settlement. The proposed amendments and commentary do not address this concern directly or otherwise provide guidance, except to note that "the standards for certification differ for settlement and litigation purposes." The Rule 23 Subcommittee initially considered addressing these different standards, but has since tabled the issue.[17] The Supreme

---

[12] See Brian Anderson, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, 11 No. 3 Andrews Class Action Litig. Rep. 21 (2004).
[13] Fed. R. Civ. P. 23(f) (emphasis added).
[14] *See* Fed. R. Civ. P. 23(f) Adv. Comm. Note.
[15] *See* Barry Sullivan and Amy K. Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 283-85 (Jan. 1, 2008).
[16] *Id.*
[17] *See* Introductory Materials, Rule 23 Subcommittee, Advisory On Civil Rules, Mini-Conference On Rule 23 Issues, 9/11/15, at 34-38 (noting at 35 that "[c]oncerns have emerged about whether it might sometimes

Court, however, has squarely held that "[s]ettlement is relevant to a class certification" and that a district court "[c]onfronted with a request for settlement-only class certification ... need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial."[18] This reasoning potentially differentiates application of the predominance requirement for class certification at the settlement stage as opposed to certification for litigation. At the same time, however, the Court stressed that in the settlement context "other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention."[19]

Manageability is a critical factor that is related to a court's predominance analysis.[20] For example, in a class action governed by the laws of multiple states, variations in state law may well swamp any common issues and defeat predominance in a Rule 23 analysis.[21] For purposes of certifying a settlement class, however, the issues that arise in managing the trial of such a class disappear, rendering the settlement class more-easily certified.[22] It is clear, then, that the presence or absence of manageability issues in a class action vary significantly between a court's analysis of predominance with regard to class action settlement versus litigation.[23] To the extent that a finding of predominance is primarily driven by the ability of a court to effectively manage the litigation through a trial, Rule 23 should provide guidance with respect to predominance about differences in the certification of a settlement class as opposed to a litigation class.

---

be difficult to obtain certification solely for purposes of settlement" and that "the (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes").

[18] *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997) (citing Fed.R.Civ.P. 23(b)(3)(D) (one of the "matters pertinent" to a finding of predominance is "the likely difficulties in managing a class action.")).

[19] *Id.*

[20] *Id.*at 615 (noting that manageability is one of the four considerations in the "nonexhaustive list of factors pertinent to a court's close look at the predominance and superiority criteria" (internal quotation marks omitted)).

[21] *See, e.g., Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007).

[22] *See, e.g., Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 302-03 (3rd Cir. 2011) (en banc) (while differences in varying state regulatory schemes would relate to the predominance analysis with regard to certification of a litigation class, for purposes of inquiring into the predominance of questions of law and fact relevant to a settlement class, manageability issues that are of obvious concern for anticipated litigation consideration are not similarly relevant); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3rd Cir. 2004) (the difference between litigation classes and settlement classes is key because "when dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class."); *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 746-47 (7th Cir. 2001) ("Given the settlement, no one need draw fine lines among state-law theories of relief.").

[23] *See, e.g. Sullivan*, 667 F.3d at 304 n. 29 (noting that, with the elimination of the manageability factor, the court is "more inclined to find the predominance test met in the settlement context."); *cf. In re IPO*, 226 F.R.D. 186, 195 n. 51 (S.D.N.Y. 2005) ("[A]lthough litigants frequently conceive of 'predominance' and 'manageability' as separate requirements of Rule 23(b)(3), they are not;" noting that for purposes of certifying a settlement class,"[i]n this case, the removal of [the manageability] factor from consideration alleviates the predominance defect").

V. Rule 23 Should Provide Guidance To Courts Regarding How "Proportionality" Applies To Precertification Class Discovery

Disputes about precertification discovery often involve requests for a wide variety of information based on conclusory allegations that have little to no factual support. In employment class action cases, for instance, plaintiffs regularly request class lists, contact information, and other information about potential class members, *prior to* any showing regarding the merits of plaintiff's individual claim or that the case is appropriate for class treatment. Courts, in turn, have taken varying approaches to resolving these precertification discovery disputes. In some courts, plaintiffs bear the burden at the precertification stage of either making a *prima facie* showing that Rule 23 class action requirements are satisfied or that discovery is likely to produce substantiation of the class allegations.[24] In other courts, even those within the same circuit, the law remains unsettled, with some courts taking a sweeping approach to precertification discovery and granting plaintiff class contact information outright.[25]

Effective December 1, 2015, Rule 26(b)(1) was amended to require that discovery be "proportional to the needs of the case."[26] The proportional standard directly affects Rule 23 and class action procedures since courts must apply the standard when resolving disputes about the scope of permissible discovery.[27] Class action plaintiffs are not exempt from this requirement to tailor their discovery requests to account for the significance of the information requested, and the cost and burden imposed for gathering responsive information. This relatively new standard has precipitated the need for additional guidance regarding the scope of precertification discovery under Rule 23.[28]

While the types of precertification discovery at issue will vary by type of case, further guidance regarding the interplay between the proportionality standard and the scope of

---

[24] *See, e.g., Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

[25] *See, e.g., Acevedo v. Ace Coffee Bar, Inc*, 248 F.R.D. 550, 554 (N.D. Ill. 2008) (district court in Seventh Circuit finding the plaintiff's need and due process right to discover class contact information outweighs any privacy concerns of the putative plaintiffs); *Boice v. M+W U.S., Inc.*, 130 F. Supp. 3d 677, 698 (N.D.N.Y. 2015) (noting that courts in the Second Circuit disagree about proper scope of precertification discovery).

[26] Fed. R. Civ. P. 26(b)(1).

[27] *See, e.g., Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-CV-05061-JMC, 2 017 WL 279768, at *3 (D.S.C. Jan. 23, 2017) (denying plaintiff's motion to compel documents that would identify members of Rule 23 class because the discovery was not proportional to the needs of the case); *Tillman v. Ally Fin. Inc.*, No. 2:16-CV-313-FTM-99CM, 2017 WL 73382, at *6 (M.D. Fla. Jan. 6, 2017) (denying in part plaintiff's motion to compel list of putative class members and requiring plaintiff to serve amended discovery requests focused instead on Rule 23 burden: "In comparison to Plaintiff's need, the alleged burden that Plaintiff's [requests] impose on Defendant is heavy, because they seek . . . the identities and phone numbers of possibly all putative class members.").

[28] Rule 23 precertification discovery issues are further complicated in employment cases filed pursuant to both Rule 23 and the Fair Labor Standards Act, which has its own well-developed case law concerning the appropriate scope of discovery at various stages of the proceedings. *Boice v. M+W U.S., Inc.*, 130 F. Supp. 3d 677, 698 (N.D.N.Y. 2015) (noting differences between standards for Rule 23 and FLSA discovery).

precertification discovery will help alleviate uncertainty associated with the varying standards that currently plague the federal circuits, and act to prevent costly disputes at the outset of litigation.

VI. Conclusion

Seyfarth Shaw appreciates the Committee's recognition that amendments to Rule 23 are necessary to address the serious problems that have evolved with the inconsistent application of Rule 23 in recent years. Indeed, this Comment reflects a collective concern from our legal practitioners who regularly face uncertainty and inconsistencies regarding federal courts' interpretation of Rule 23. We urge the Committee to enact substantive amendments that are not currently addressed by the proposed amendments. These amendments include requiring viable trial plans in conjunction with a motion for class certification, providing a right to interlocutory appeal of decisions to certify, modify, or decertify a class, providing guidance on predominance with respect to class action settlements as opposed to class action litigation, and providing guidance regarding how proportionality applies to the scope of precertification discovery.

Very truly yours,

SEYFARTH SHAW LLP

Gerald L. Maatman, Jr.

GLM/JGY:ljm