A Comparison of the Proposed "Class Action Lawsuit Fairness Act" and Federal Class Action Rule 23

By Brad Seligman, Executive Director of The Impact Fund

As argued in other materials, the proposed initiative would drastically limit class actions under California law. While California class action law is arguably broader than federal class action law as embodied in Federal Rule of Civil Procedure 23, the proposed initiative, while borrowing some language from the federal rule, is also far more restrictive than federal law. If adopted, then, it would make class litigation more difficult and more expensive than either current California or federal rules. This memorandum will highlight the differences between the proposal and Rule 23.

1. Section 5(b)(2) of the proposal is partially modeled on Federal Rule of Civil Procedure 23(b)(2). Rule 23(b)(2) was adopted to facilitate civil rights class actions; cases charging "unlawful, class-based discrimination are prime examples" of 23(b)(2) classes. *Anchem Products v. Windsor*, 521 U.S. 591, 614 (1997). It does this by providing a stream-lined process with no opt out rights and allowing certification where common issues are present, even if they do not predominate. Under Rule 23(b)(2) certification is applicable so long as injunctive relief is sought and claims for monetary damages do not predominate. While there is some debate in federal courts as to when damages claims predominate, it is clear that injunctive and back pay claims are routinely certified under this provision, and in a number of circuits, additional damages claims may be certified as well. *Compare Dukes v. Wal-Mart, Inc*., 474 F.3d 1214, 1233-34, 1235-56 (9th Cir. 2007) (back pay and punitive damages) *and Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001) (back pay and compensatory damages), *with Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 415 (5th Cir. 1997) (back pay). The proposal, however, includes language far more restrictive than Rule 23, limiting this provision to *exclude* "actions that seek remedies beyond making a declaration about or enjoining defendants' actions affecting the class as a whole." Thus under this proposal, a Wal-Mart case, which sought injunctive relief, back-pay and

punitive damages, would not qualify. Nor would cases seeking only injunctive relief and back pay, or statutory minimum damages, such as in the disability rights case of *Arnold v. United Artists Theatre*, 158 F.R.D. 439, 444-45 (N.D. Cal. 1994), qualify. In short, this provision alone would undermine the goal of Rule 23(b)(2) which was to facilitate civil rights and similar cases.

2. Section 5(b)(3) partly tracks Rule 23(b)(3), which applies to actions where damages are the primary relief sought. Unlike Rule 23(b)(2) actions, 23(b)(3) requires a number of higher requirements for class certification, such as a requirement that common issues predominate, and also requires pre-trial class notice and a right to opt out of the case for class members. Under Federal Rule 23(b)(3), then, class certification is more difficult, and because of notice requires, more expensive than 23(b)(2). As noted above, section 5(b)(2) would force into this more demanding section many cases where injunctive relief was a primary goal of the case, although ancillary monetary claims are also made.

In addition, this proposed section raises the bar above Federal Rule 23(b)(3) in at least 3 ways. First, it requires a showing, at class certification stage, of "the evidence likely to be admitted at trial." Since class certification is supposed to be sought "at an early practicable time" (§ 5(c)(1)(A)) and since under the proposal discovery may on the merits be stayed prior to the class certification hearing (§§ 5(d)(5)-(6)), this provision will be very difficult to comply with in many cases. Second, this provision requires this evidentiary showing to establish that *both* the claims and the defenses for all class members are "substantially the same." This goes far beyond the federal rule, which only requires that common issues predominate—if, for example, liability issues predominate, some differences in defenses and damages may not be fatal to certification. Indeed, federal cases do not require that issues as to all class members be "substantially the same"—an extremely demanding requirement which would be hard to meet in most cases. Instead, Rule 23(b)(3) only requires that common issues "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication . . . ." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)

(quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1778 (2d ed. 1986)).

Finally, unlike Rule 23(b)(3), the proposal adds a requirement that courts consider "the extent to which the allegations at issue are subject to the jurisdiction of federal or state regulatory agencies." Many class cases involve allegations subject to agency jurisdiction—indeed, employment discrimination class actions, one of the most common type of class action, are all arguably "subject to the jurisdiction" of the Equal Employment Opportunity Commission (or California's Department of Fair Employment & Housing), which has a regulatory and enforcement function. Likewise wage and hour cases raise claims are within the jurisdiction of the federal Department of Labor, and the state Labor Commissioner. No court has heretofore suggested this should limit certification, which the proposal's language invites.

3. Section 5(c) tracks in part Rule 23(c), but adds several draconian provisions not present in the federal rule. First, section 5(c)(2) includes language that allows a court to consider the merits of the plaintiff's case and any defenses. While stated permissively at one point ("a court may consider") the section also refers to the court's "obligation to make such determinations." The language as a whole is not clear—to the extent it requires a court to consider the merits of a case in making a class certification ruling, it goes far beyond federal law, where it is long been established that a court may not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). This provision is particularly unfair, given the authority given a court under the proposal to deny discovery on the merits prior to class certification. *See infra* § 4.

Federal Rules allow a court to certify only part of a case, or a particular issue. FED. R. CIV. P. 23(c)(4). Section 5(c)(5) only allows such partial certification if "the case as a whole" merits certification, thus defeating the very purpose of issue specific certification. Under federal law, it is well established that "[e]ven if the common questions do not predominate over the individual questions so that class certification of

the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). For example, certification of class-wide liability, and not damages, which may be very individualized, is authorized by the federal rule "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *accord Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 439 (4th Cir. 2003).

4. Section 5(d) purports to track Rule 23(d), but once again adds provisions not present in the federal rule to the detriment of plaintiffs. Most problematic is section 5(d)(5), which would allow a court to stay all discovery on the merits until the class certification motion is resolved, a particularly unfair requirement given the courts "obligation" to consider the merits. *See* § 5(c)(2). Because the merits and class issues often overlap, and the plaintiff has to show that there are common questions of law or fact in all cases, and that such common issues predominate in damages cases, a limitation of discovery could prejudice a plaintiff in presenting the class certification motion, as the drafters of Rule 23 recognized. "It is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis." FED. R. CIV. P. 23(c)(1) advisory committee's notes (2003). Section (c)(6) also allows a court to limit discovery wherever a claim is made of lack of standing, a provision not present in the federal rule.

5. Under Federal Rule 23, there is no automatic right to appeal a certification ruling; rather, there is a discretionary right to seek leave to appeal, leave which should rarely be granted. FED. R. CIV. P. 23(f). Under section 5(f) of the proposal, however, there is an automatic right to appeal, no matter how weak the basis for appeal, which will have the effect of delaying virtually every case for a year or more. Delay, of course, is never to the benefit of the plaintiffs.

6. Under federal law, it is well settled that a party entitled to attorneys' fees is also entitled to fees for the expense of seeking such fees, so-called "fees on fees." *Kinney v. Int'l Bhd. of Elec. Workers*, 939 F.2d 690, 694-95 (9th Cir. 1991); *Johnson v. Mississippi*, 606 F.2d 635, 638 (5th Cir. 1979). Unlike this controlling federal law, the proposal denies fees incurred in litigating entitlement to fees and costs. § 5(h)(6). The federal rule is not a product of class action law, but of attorneys' fee law generally—so the proposal would essentially create a double standard-- class cases, the most expensive and potentially effective form of litigation (and thus where larger fee litigations most likely will occur) would be denied fees on fees, while smaller, individual cases could continue to recover such fees. Because fees in class cases usually are substantial, defendants often put up an extensive opposition to such motions. To deny fees on fees in such cases dilutes the plaintiffs' fees, since the work to obtain such fees would be uncompensated, and thus would exert undue pressure on a plaintiff to settle fees below their value to avoid protracted, unpaid litigation.