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Dear Sam and Richard:

Having now had an opportunity to review Council Draft No. 2 of the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (dated Nov. 18, 2008), I wanted to express appreciation to you and our other Reporters for producing a new draft of Chapter 2 so promptly after the recent meetings of the Advisers and the Members Consultative Group.

Let me take this opportunity to offer several additional comments/reactions on sections of Chapter 2, as set forth below:

Section 2.03 – While Section 2.03 does an admirable job of attempting to illuminate and preserve the venerable concept of "carving at the joint" in framing issues classes, I fear that perhaps because of its sheer volume, the section ultimately paints an overly optimistic view of the viability and usefulness of the issues class device in aggregate proceedings.

I dare say that in most of the MDL proceedings and other aggregate litigation cases initiated since Federal Rule of Civil Procedure 23(c)(4) was promulgated in 1966, the presiding judge has contemplated trying to streamline the litigation through one or more issues class trials. I'm quite certain that in some instances, the judge's rumination was nothing more than a brief flirtation. In other proceedings, there was ample informal analysis with counsel. And in yet other cases, the discourse went the distance, producing formal motions and spirited debate. But

almost invariably, the discussion ultimately failed to produce an issues class because the court came to the realization that: (1) potential issues classes are rarely as neatly packaged as hypotheticals may suggest; (2) issues classes are rarely efficient; and/or (3) issues classes are, as a general rule, inherently unfair because they present the first jury with no real facts and the second jury with a preconceived finding of liability. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741, 746 (5th Cir. 1996) (rejecting proposed class issues trial on "core liability issues"); *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 495 F. Supp. 1321, 1334 (E.D. La. 1980) (rejecting separate issue trial because "plaintiffs will have to present a substantial amount of evidence relevant to their substantive claims" in the issue phase and therefore, "a separate trial, rather than saving time and effort, will probably require duplication of both"), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir. 1983); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 352 (S.D.N.Y. 2002) (noting that allegedly "common" question of "general causation" proposed for an issues trial is necessarily tied to the individual circumstances of each plaintiff's exposure and injury and therefore can be fabricated "only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury"). Thus, I fear this section will leave readers with the inaccurate impression that for the past forty years, the Rule 23(c)(4) issues trial authorization has been ignored, when in reality, courts have carefully examined the option in a wide array of contexts and found it only very rarely to be the complex litigation panacea that it is advertised to be.

In theory, issues classes sound attractive – a way to simplify complex cases. But that attractiveness normally wanes when one tries to assess employing the device in the context of a specific case. Such an exercise usually reveals that an issues class would serve primarily to tilt the playing field to one side or the other – not to create the kinds of efficiencies that supposedly recommend the device.

In assessing the propriety of a potential issues class, one must start with the proposition that our jury system works best when a jury is allowed to hear the whole story, not just pieces. For example, in a mass tort case, plaintiffs frequently propose an issues trial on a general causation question: could the product at issue cause the alleged adverse health effect? Typically, the burden of proof on that question (versus the specific causation question) is much lighter for plaintiffs. After all, the jury is, for all practical purposes, presented with a series of abstract questions about whether the defendants are bad actors. Since no tangible consequences would follow from a verdict against the defendants, a jury may be more inclined to find there is sufficient evidence to warrant subsequent individual trials. In that sense, the first jury acts as a de facto grand jury rather than a true factfinder.

Obtaining a favorable issues class verdict also creates a substantial litigation advantage for the prevailing party – an edge that is not always legitimate. For example, if an issues trial jury makes a general causation finding regarding a product (that is, the jury finds that the product could cause a particularly adverse health effect), that development will create an enormous advantage for plaintiffs in subsequent individual claims trials. When the jury in the latter trial is told of the general causation verdict, it is likely to be interpreted as a binding finding that the

product is dangerous, likely creating among jurors a greater receptivity to arguments that the drug had an adverse effect in the individual plaintiff's case and that a specific causation finding is therefore warranted. The bottom line is that when you put matters before a jury on a "bite-sized" basis (instead of entrusting to them the entirety of the story regarding a particular claim), it is bound to substantially favor one side or the other.

Given the substantial risks of unfairness created by issues trials, I would urge that Section 2.03 be modified in three respects (in addition to adding the historical point about Rule 23(c)(4) noted above):

First, the Section should note that because of the unfairness risks, the issues class device should be used only where there is a very compelling showing that the device will serve to create real efficiencies in resolving the proceeding. In particular, the section should be revised to endorse (and not reject, as it presently does) the widely held judicial view that issues trials are appropriate ***only*** where a class action as a whole satisfies the predominance requirement. As the *Castano* court held:

> Reading Rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of Rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

84 F.3d at 745 n.21. *See also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421 (5th Cir. 1998) (rejecting bifurcated class certification in racial discrimination suit because "when considered as a whole," the plaintiffs' claim "implicates predominantly individual-specific issues"); *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003) (purportedly common "sub-issues cannot be separated out from those that require individualized treatment unless the common issues in the action as a whole predominate"; Rule 23(b)(3) "cannot be satisfied by seeking to repeatedly split the claims pursuant to Rule 23(c)(4)," when "liability as to Plaintiffs is, overall, a highly individuated issue") (internal quotation omitted); *Robertson v. Sikorsky Aircraft Corp.*, No. 397CV1216(GLG), 2000 WL 33381019, at *19 (D. Conn. July 5, 2001) ("[a]n action must be considered as a whole in order to determine whether or not the predominance requirement has been satisfied"); *Neely v. Ethicon Inc.*, No. 1:00-CV-00569, 1:01-CV-37, 1:01-CV-38, 2001 WL 1090204, at *5 (E.D. Tex. Aug. 15, 2001) (holding that "Rule 23(c)(4)(A) does not operate independently from the rule of predominance found in 23(b)(3)" and refusing to limit its predominance inquiry to "common issues" alone); *Small v. Lorillard Tobacco Co., Inc.*, 679 N.Y.S.2d 593, 601 (App. Div. 1998) (rejecting certification of general liability issues; "[s]uch a relaxation of the predominance requirement would effectively nullify it: if *any* element of fraud were common to all the individual trials, [the rule] would be deemed satisfied no matter how much individualized proof was needed for the other elements").

Second, Section 2.03 would be greatly improved by stressing that the alternative to issues classes now used in many aggregate proceedings – bellwether trials – is in most contexts a far more appropriate means of understanding the scope and risk of a large controversy. If properly

selected, such trials tell a court and the parties about the strengths and weaknesses of the various categories of cases in an aggregate litigation claims pool – and the strengths and weaknesses of various elements of the claims within those cases. Although the results of such trials are not binding on other cases, they tend to have a strong precedential effect and loom large as the parties seek to resolve those proceedings through settlement or through further litigation. Such bellwether trials have the virtue of achieving this useful instructive effect through trials that are not artificially confined to only certain facts. They are trials in which juries consider a whole story – they consider and resolve the entirety of a specific claim. But while performing that task, the juries are often asked to answer interrogatories that may provide insight into the value of other cases in the aggregate litigation pool. Bellwether trials also have the added benefit of discouraging the filing of meritless claims because every case in an aggregate proceeding is at risk of being tried; by contrast, issues trials encourage parties with weak or frivolous claims to file them in the hopes of riding the coattails of a pro-plaintiff issues verdict.

These and other advantages of bellwether trials have become apparent in some of the MDL proceedings in which I have participated. For example, in one such mass tort proceeding involving claimant exposure to allegedly hazardous substances, some parties urged that the presiding court set a class issues trial on the question whether the manufacturers' warnings were adequate. The court instead set a series of bellwether trials in which one of the interrogatories the juries were asked to answer involved the adequacy of the manufacturers' warnings. Interestingly, the juries reached different conclusions on the question – in some cases, the jury found the warnings adequate, but in other cases, the jury found them lacking. Presumably, the juries reached different conclusions based on their evaluations of the totality of the facts surrounding the claimants' use of the products at issue. Those conflicting results confirmed the fallacy of trying to use a class issues trial in that context. At the end of the day, it was clear that juries reach different views about whether a warning is adequate depending on a plaintiff's specific experiences with the product and the warning.

Finally, Section 2.03 should stress that even if certain "common" questions could be answered in a vacuum in a particular case, an issues trial addressing those questions would be inappropriate if subsequent juries would be required to reconsider these "common" liability issues. (In this regard, please see my comments below regarding the reexamination issues raised by Section 2.06.) In its present form, Section 2.03 does not adequately warn courts that certification of issues classes should not be allowed where there is a risk of impermissible reexamination of the allegedly "common" issues at subsequent individual trials.

Section 2.04 – In my view, Section 2.04 of the draft suffers from a similar flaw insofar as it seems to promote the certification of medical monitoring classes, even though the numerous courts that have wrestled with trying to make medical monitoring classes work have concluded almost unanimously that they are ill-suited for class treatment.

As you know, court after court has rejected medical monitoring classes because, in reality, there are no situations in which hundreds or thousands of people with the same medical histories and predispositions are exposed to an allegedly toxic substance in the same amount,

putting them at the same risk of the same condition. The draft fails to convey sufficiently – as court after court has found – that medical monitoring cases are inherently individualized because assessing someone's risk of personal injury is usually no different from the specific causation analysis that makes personal injury cases so individualized. *See, e.g.*, *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 311 (N.D. Ohio 2007) (denying certification because "[i]n light of the different welding products, warnings, employers, work environments, and so on," "there is ultimately no single course of conduct by all of the defendants"); *Ball v. Union Carbide Inc.*, 385 F.3d 713, 726-28 (6th Cir. 2004) (upholding denial of certification; claims were too individualized given differences in plaintiffs' "total exposure time, exposure period, medical history, diet, sex, age, and a myriad of other factors"); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005) (reversing class certification because deciding whether an individual requires medical monitoring is necessarily an "individualized inquiry depending on that patient's medical history, the condition of the patient's heart valves at the time of implantation, the patient's risk factors for heart valve complications, the patient's general health, the patient's personal choice, and other factors"); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 146 (3d Cir. 1998) (denial of certification affirmed; "[i]n order to prove the program he requires, a plaintiff must present evidence about his individual smoking history and subject himself to cross-examination by the defendant about that history. This element of the medical monitoring claim therefore raises many individual issues"); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 612-13 (W.D. Wash. 2001) (certification denied because the "proposed class includes flight attendants who worked on the aircraft for different time periods, who may have smoked, who may have immediate family members who smoke, and who have different medical backgrounds"); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 659, 662 (M.D. Fla. 2001) (certification denied because "so varied are the facts surrounding each individual's exposure, so varied are the individual reactions of persons exposed to [the insecticide] in this fashion, and so uncertain are the long term health consequences of this type [of] exposure, only something in the nature of a general clinic . . . would suffice to meet all the individualized assessment needs of the putative class members"); *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 239-41 (S.D. Ind. 1995) (certification denied because "no single happening or accident occurred at [the plant] causing identical harms to each putative class member. Rather, each plaintiff was exposed to different levels of [the toxic substance] for different amounts of time in different areas of the plant. Each putative class member's susceptibility to injury from [the toxic substance] will vary. Thus, no single proximate cause inquiry applies equally to each putative class member; no one set of operative facts establishes liability."); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 570-73 (E.D. Ark. 2005) (certification denied because "[n]o matter how you cut it, cube it, or slice it, Plaintiffs cannot overcome the problems with individual issues of law and fact, which eclipse any possible common questions or cohesion among their claims"); *Perez*, 218 F.R.D. at 270-73 (certification denied because "individualized inquiries would still be required to assure that the medical monitoring elements were met with respect to each class member"); *Blaz v. Galen Hosp. Ill., Inc.*, 168 F.R.D. 621, 625 (N.D. Ill. 1996) (certification denied because "variations among individuals with respect to exposure and effects can vitiate a finding of typicality"); *Zehel-Miller v. AstraZenaca Pharms., LP*, 223 F.R.D. 659, 664 (M.D. Fla. 2004) (certification denied because "all of the individual issues identified in [the 23(b)(3) analysis] destroy any semblance of cohesion"); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 147 (E.D. La. 2002)

(certification denied because "variations involving proof of causation, the effect of warnings, the significance of the defendants' direct marketing to consumers, and other similar issues may swamp any common issues and defeat cohesiveness"); *Lewallen v. Medtronic USA*, No. C01-20395RMW, 2002 WL 31300899, at *2 (N.D. Cal. Aug. 28, 2002) (similar). Indeed, given that the current draft clearly recognizes that personal injury actions are normally not suitable for aggregate resolution (*see, e.g.,* Section 2.03, Illustration No. 1), it is somewhat surprising that the same approach has not been taken with respect to medical monitoring. After all, the characteristics that make personal injury cases unattractive candidates for class treatment are normally present in medical monitoring cases as well. Those two types of cases therefore should be treated similarly.

I am also concerned that the draft downplays the growing chorus of state courts that have rejected medical monitoring claims absent present injury as a threshold matter, making the class certification discussion irrelevant. As these courts have recognized, allowing claims for medical monitoring absent present injury would be "an unprecedented and unfounded departure from the long-standing traditional elements of a tort claim." *Paz v. Brush Engineered Materials*, 949 So. 2d 1, 6 (Miss. 2007). *See also Sinclair v. Merck & Co., Inc.*, 948 A.2d 587, 595 (N.J. 2008); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 855 (Ky. 2002) ("With no injury . . . there can be no recovery."); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 686 (Mich. 2005) (similar); *Houston County Health Care Auth. v. Williams*, 961 So.2d 795, 811 (Ala. 2007) (similar); *Hinton v. Monsanto Co.*, 813 So. 2d 827, 830-32 (Ala. 2001) (similar); *Lowe v. Philip Morris USA, Inc.*, 142 P.3d 1079, 1092-93 (Ore. Ct. App. 2006) (similar), *aff'd*, 183 P.3d 181 (Ore. 2008); *Goodall v. United Illuminating*, No. XO4CV 9501154375, 1998 WL 914274, at *10 (Conn. Super. Ct. Dec. 15, 1998) (similar); *Witherspoon v. Philip Morris*, 964 F. Supp. 455, 467 (D.D.C. 1997) (similar). By giving so much attention to medical monitoring class actions, the draft seems to be implicitly endorsing the availability of the medical monitoring remedy, a point not appropriate for an ALI principles document addressing procedural matters.

Section 2.05 – I am also concerned about the language in Comment C of Section 2.05 suggesting that there are situations in which a defendant's principal place of business should control the choice-of-law determination. While the current language indicates that such an approach is "rare" and may be subject to constitutional constraints, this discussion should more clearly indicate that federal and state courts across the country have flatly rejected the use of defendant's principal place of business to steer choice-of-law determinations in class actions. Otherwise, the comment, as currently drafted, could be read to legitimize an approach – the application of ***one*** state's laws to a class containing plaintiffs from multiple states – that has been soundly rejected by court after court. *See, e.g., Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 855 (Ill. 2005); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002); *Goshen v. Mut. Life Ins. Co.*, 774 N.E.2d 1190, 1196 (N.Y. 2002; *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996); *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 307 (N.D. Ohio 2001); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 369 (N.D. Ill. 1998); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532-34 (N.D. Ill. 1998); *Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 338-39 (N.D. Miss. 1998); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 177 F.R.D. 360, 369-71 (E.D.

La. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 214, 215-217 (E.D.N.C. 1997); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 629-30, 631-32 (D. Kan. 1996); *Walsh v. Ford Motor Co.,* 130 F.R.D. 260, 271-75 (D.D.C. 1990); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 607-608 (S.D.N.Y. 1982); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 681 (Tex. 2004); *Lewis v. Bayer AG*, No. 002353, 2004 WL 1146692, at *13 (Pa. Ct. Com. Pl. Nov. 18, 2004); *Stetser v. TAP Pharm. Prods. Inc.*, 598 S.E.2d 570, 586 (N.C. Ct. App. 2004); *Philip Morris, Inc. v. Angeletti,* 752 A.2d 200, 232 (Md. 2000). As the New Jersey Supreme Court recently put it, "certification of a nationwide class is rare," and "application of the law of a single state to all members of such a class is ***even more rare***." *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1086 n.3 (N.J. 2007) (emphasis added, quotation omitted).

On a related point, while the current draft language acknowledges that the application of the law of a defendant's principal place of business to all plaintiffs is "subject to constitutional constraints of due process," that statement, in my view, fails to capture the current state of the law. In reality, the constitutional constraints of due process will almost ***always*** render the application of one state's laws – including those of the defendant's principal place of business – inappropriate.

As the U.S. Supreme Court has stated, it is a "basic principle of federalism" that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Indeed, the Court applied that principle in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), to explicitly reject the application of Kansas law to class members' claims against a defendant with significant Kansas property and business interests, where the conduct at issue occurred primarily outside the state. *Id.* at 819, 821-22. The fact that the defendant "own[ed] property and conduct[ed] substantial business in the State" meant that "Kansas certainly ha[d] an interest in regulating [the defendant's] conduct *in Kansas*," the Court acknowledged, *id.* at 819 (emphasis added), but it did ***not*** suffice to give the Kansas court authority to apply Kansas law to the defendant's out-of-state conduct, as least insofar as Kansas law reflected different policy choices from the state laws that would otherwise govern the conduct, *id.* at 821-22. *See also In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 562 (E.D. Ark. 2005) ("in nationwide class actions, choice-of-law constraints are constitutionally mandated because a party has a right to have her claims governed by the state law applicable to her particular case"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (concluding that "constitutional restraints" precluded application of law of the state of defendant's principal place of business to claims of nationwide class); *Sanders v. Robinson Humphrey/Am. Express, Inc.*, No. C85-172A, 1986 U.S. Dist. LEXIS 23066, at *23 (N.D. Ga. July 8, 1986) (affirming denial of class certification where "based on the differences in the laws of the various states, it would be unconstitutional for the court to apply Georgia law to transactions in which investors had no contact with Georgia, nor any reasonable expectation that Georgia law would apply to their purchases").

Instead of presenting the defendant's principal place of business as a "rare" ***but potentially viable*** option to solve the choice-of-law problem presented by nationwide class actions, Comment C should reflect the fact that courts nationwide – including the U.S. Supreme Court – have almost unanimously rejected such an approach based on settled choice-of-law principles and constitutional analysis.

Section 2.06 – In my view, Comment a to Section 2.06 unduly downplays the significant practical and constitutional problems posed by reconsideration of evidence insofar as it ignores the fact that parties often attempt to use bifurcation to secure a lopsided trial of an abstraction – for example, of a company's allegedly bad acts. It also seems to overreach in essentially declaring the Reexamination Clause rulings in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) and *Castano v. Am. Tobacco*, 84 F.3d 734, 751 (5th Cir. 1996), to be wrongly decided.

The Comment declares that Section 2.06 "approaches the question of reexamination of evidence from a functional perspective based on the aims of aggregation." But it omits an important "functional" consideration – whether bifurcation prejudicially distorts the jury's fact-finding function. As discussed above, there is a significant risk that bifurcation could be used in such a way that, upon reexamination of first-phase issues in their greater context, a jury would be inclined to reach a different result regarding the same issues in later phases. Moreover, the same concerns that animate the federal rule against advisory opinions counsel further skepticism about the accuracy of a judgment based on abstract facts. *Cf. Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (observing that "the rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests'") (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) (rejecting "common" phase that would be merely a "trial of an abstraction"); *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323, 352 (S.D.N.Y. 2002) (noting impropriety of a common phase that can be fabricated "only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury").

I also am concerned about the Comment's seeming hostility toward widely recognized constitutional restraints on reexamination of facts by a second jury. As the Comment and Reporters' Notes recognize, bifurcation of trials into "common" and "individual" phases has been held unconstitutional in cases in which any facts decided by the first jury in the first phase of the trial could possibly be reconsidered by the second jury in the later phase of the trial. *See, e.g.*, *Rhone-Poulenc*, 51 F.3d at 1303 (reversing bifurcation order because the first jury would have merely determined "whether one or more of the defendants was negligent," leaving for a second phase "such issues as comparative negligence . . . and proximate causation," which would have inevitably required the second jury to revisit the findings of the first jury). The Comment simply sweeps these rulings aside, contending without substantial elaboration that the cases have

it wrong because the Reexamination Clause of the Seventh Amendment applies only to "retrial of facts by a second jury impaneled on appeal."

I believe that this is a cramped reading of an amendment that the Supreme Court has repeatedly explained is not frozen in time. *See, e.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436 n.20 (1996) (noting that the "meaning of the Seventh Amendment" was not "fixed at 1791"). But even if it were tenable to argue that the Reexamination Clause was intended to erect an extremely narrow protection that was not meant to adapt to the evolving practices of federal courts, the Comment as written is contrary to unanimous Supreme Court and federal appellate precedent on this issue. At a minimum, the Comment should be more forthcoming in acknowledging that, at least since 1931, the U.S. Supreme Court has taken a view of the Reexamination Clause that does not accord with the historical view expressed by the Comment on this issue. *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931) (noting that partial retrials were not used at common law but holding the Seventh Amendment nonetheless applied to the procedure and that where "the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice"). It should also acknowledge that the federal courts of appeals that have addressed the issue have all expressed agreement that bifurcation implicates constitutional reexamination concerns. *See, e.g.*, *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 169 n.13 (2d Cir. 2001); *Brown v. SEPTA* (*In re Paoli R.R. Yard PCB Litig.*), 113 F.3d 444, 452 n.5 (3d Cir. 1997); *Castano*, 84 F.3d at 751; *Olden v. Lafarge Corp.*, 383 F.3d 495, 509 n.6 (6th Cir. 2004) (citing *Rhone-Poulenc* with approval); *Rhone-Poulenc*, 51 F.3d at 1303; *Butler v. Dowd*, 979 F.2d 661, 678 (8th Cir. 1992); *United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 306 (9th Cir. 1961). Finally, it should note prominently that, in order for its "functional" approach to reexamination to carry the day, all of this precedent, dating back nearly a century, would have to be reversed. In my view, it would be preferable (and more realistic) to revise this section to accept the constitutional limitations on bifurcation as they are presently applied and to provide guidance on litigating bifurcated cases within those limitations.

Section 2.10 – In reviewing Section 2.10, I continue to struggle to understand why changing current law to create the option of certifying "opt-in" classes (as urged by the current draft) is either necessary or desirable. Although the Reporters' Notes say that "opt-in" classes should be permitted "in exceptional circumstances," neither the Notes nor Comment (a) identify what those "exceptional circumstances" might be other than to imply (perhaps unintentionally) that such circumstances might arise in connection with class actions primarily involving putative class members located in foreign countries. And the current text does not explain why it would be desirable for U.S. courts generally to expend resources adjudicating class actions comprised of foreign claimants alleging claims based on conduct that occurred in foreign countries or, assuming there is good reason to adjudicate such foreign class actions in U.S. courts, why such class actions cannot be adjudicated using the standard Rule 23 "opt-out" procedure.

The thrust of this Section appears to be aimed at reversing the decision of the Second Circuit in *Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004), in which the Court held that Rule

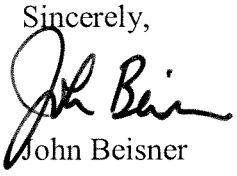
23 precluded the certification of an "opt-in" class as the liability stage. But the normative justifications offered by plaintiffs' counsel in *Kern* for why "opt-in" class actions should be permitted – that they will reduce future challenges to the adequacy of class notice and the adequacy of class counsel's representation in international class actions – are a relatively weak basis for adding a new procedure to the current class action regime. As Judge Cabranes observed in *Kern*, "adequate notice and satisfactory class representation are salient issues in most class actions." 393 F.3d at 128. It is simply not clear why *Kern* could not have proceeded as an "opt-out" class action. Accordingly, in the absence of a strong rationale for why the current "opt-out" procedure should be supplemented with an "opt-in" procedure, there does not seem to be a reason to change the present rule. For these reasons, I would recommend striking this Section.

If this Section is preserved, I would recommend including a statement in Comment (a) to the effect that nothing in this Section is intended to alter traditional *forum non conveniens* principles. Because the proposed "opt-in" class in the *Kern* case was comprised predominantly of foreign plaintiffs, the Section's current focus on *Kern* – and the implication that it was wrongly decided – could create the false impression that the real purpose of the commentary in this Section is to lower hurdles for bringing foreign class actions in U.S. courts. A sentence clarifying that such a purpose is not intended here, and that traditional *forum non conveniens* principles should apply in the context of "opt-in" class actions, should be sufficient to prevent confusion.

* * *

Thank you for taking time to consider the foregoing comments. Again, I believe the Reporters are to be applauded vigorously for the thoughtfulness and creativity reflected in the Principles draft. I look forward to further discussion of this document in the months ahead.

Sincerely,



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