LETTERS

Cy pres awards need attention

I am writing with respect to the article, **"Once More unto the Breach? Further Reforms Considered for Rule 23" [May 2015]**, by Richard Marcus, which briefly discusses various topics currently being explored by the Advisory Committee on Civil Rules, including the issue of cy pres – the practice of distributing leftover settlement money to third-party charities. As the article recognizes, the current version of Federal Rule of Civil Procedure 23 "says nothing about cy pres arrangements."

Should the Advisory Committee go forward with a proposal authorizing cy pres settlements, it should address the role of cy pres distributions in determining attorney's fee awards. After all, one of the main problems with cy pres awards is that they are sometimes used to justify fee awards in settlements from which class members receive little or no direct benefit. In order to address this growing problem, any cy pres-related amendment to Rule 23 should make clear that fee awards should be based primarily on the benefits that actually reach class members rather than cy pres payments. As explained in the ALI Principles of Aggregate Litigation, "because cy pres payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorney's fees as would be given to direct recoveries by the class." The Third Circuit recently reiterated this principle, declaring that "[w]here a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, . . . it [is] appropriate for the court to decrease the fee award." A rule that embodies this principle would help rein in fee requests that bear little relation to the direct benefits actually realized by class members.

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"Authentication" a help to judges and lawyers

As a trial judge with many years on the bench, in the trenches, and in front of classrooms, I can still experience moments of near panic when I am suddenly faced with ruling on the admissibility of a piece of electronic evidence. Gregory Joseph's article **["Authentication: What Every Judge and Lawyer Needs to Know about Electronic Evidence," August 2015]** is a welcome reminder that electronic evidence is simply evidence, and the fundamental rules still apply. As the article emphasizes, the proponent's Rule 901 burden is not heavy, and there is plenty of room for common sense ("Sometimes, common sense must intrude"). The Judicial Conference of the United States has published for comment proposed changes to a couple rules that pertain to electronic material. The proposed amendments and accompanying memorandum from the Advisory Committee on the Federal Rules of Evidence make a nice supplement to Mr. Joseph's article. They can be found online at *www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment*.

One Committee proposal is to eliminate Federal Rule of Evidence 803(16), on the ground that older doesn't necessarily mean wiser when it comes to documents. Common sense tells us that might be especially true with electronic material because it is so easily created, changed, and disseminated. An online ruckus that doesn't deserve to be admitted in a court of law does not become more deserving by sitting on a server for 20 years.

Rule 803(16) refers to authentication pursuant to Rule 901(8)(C), to which no change is currently proposed. Two additions to Rule 902 are, however, included in the proposed changes. Possible new Rules 902(13) and (14) would let a qualified person certify that certain electronic evidence is authentic.

Judges and lawyers in state and federal court will benefit from Mr. Joseph's article. With the article as background the reports available on the Judicial Conference website should prove doubly enlightening. Improved understanding of this relatively new sort of evidence should help lawyers lay the necessary foundation efficiently and confidently – and in a way that keeps judge and jury awake. Improved understanding on the other side of the bench should prove helpful in maintaining a calm judicial demeanor!

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Musings on New Pleading

Prof. [Scott] Dodson's **"A Closer Look at New Pleading in the Litigation Marketplace" [August 2015]** offers many invaluable insights on the "new pleading," whatever it may turn out to be. Without conveying any sense that the continuing evolution has reached full maturity, he provides a reassuring sense that the sky has not fallen. And his emphasis on the need for diligent empirical work is right on target. There is no reason to attempt to elaborate on this fine work. But it may be useful to sketch some of the musings prompted by reading his concise but far-ranging thoughts.

> ***". . . I can still experience moments of near panic when I am suddenly faced with ruling on the admissibility of a piece of electronic evidence.***

One way to understand *Twombly* is as an invitation to the lower federal courts to experiment with pleading in a common-law attempt to improve on the balance among pleading, at times voluminous discovery, and summary judgment that changed progressively from 1938. The Court gave the lower courts license to do openly what many had been doing in more or less clandestine fashion – to apply more demanding standards of pleading in some cases. After an uneven start, we may be entering a more measured period that will generate identifiable consensus on some matters, with more divergence on others. It seems likely that some substantial stability will be reached. "[T]he defendant negligently drove a motor vehicle against the plaintiff" should survive as a sufficient pleading, no matter that it mingles legal conclusion with implicit fact and might be characterized as "threadbare."

Stability is not always a good thing. Although clarity in the rules can reduce the costs of uncertainty, clear bad rules may impose costs

out of all proportion to any gain. So how does "fact" pleading fare?

One clue may be provided by Prof. Dodson's reminder that "only eight states . . . have maintained their liberal pleading standard in the wake of *Twombly*." Given that many states had fact pleading all along, is the acceptance of *Twombly* in states that had earlier followed relaxed notice pleading in the former federal manner the result of bullying by the Supreme Court? A mere wish to keep life simple for lawyers by adhering to a common pleading standard that can be followed in both state and federal courts? Or a sense of relief that it is now more acceptable to do something they prefer to do?

Another clue may be provided by the observation that "[p]laintiffs always have generally tended to put more information in their complaints than necessary, even before *Twombly* . . . ." Why would they do that? One reason is to assert control over the structure and focus of the action. The defendant must respond by pleading to everything in the complaint, as Prof. Dodson so clearly shows. This may increase the defendant's costs at the first stage. But it also may improve the steps that follow. The parties can assist the court in framing a more effective scheduling order. Disclosures and discovery can be better focused, with or perhaps without guidance in the scheduling order. The last consideration of pleading standards by the Civil Rules Advisory Committee before *Twombly* was decided, indeed, was prompted by alternative drafts of a revised Rule 12(e), the most ambitious of which provided a motion for a more definite statement that would enable the court to manage the litigation. Something like that might emerge through further development of case-derived pleading standards.

Yet another clue may emerge as courts confront the challenges that Prof. Dodson identifies in integrating pleading standards with discovery. Encouraging active judicial management has been one central purpose of repeated rounds of discovery amendments beginning in 1983, and the closely related revisions of the Rule 16 pretrial procedures. That purpose carries forward in the package of amendments that were transmitted by the Supreme Court to Congress last April, to take effect, Congress willing, on Dec. 1. Even under the present rules, there is room to permit discovery in aid of pleading once an action is filed and the complaint is challenged by a motion to dismiss. At a minimum, the plaintiff can be allowed to identify the facts it hopes to support by discovery so that they can be pleaded. A more ambitious approach might ask the defendant what facts would make for a sufficient complaint, and ask whether the defendant has access to information about those facts. No doubt other approaches will be devised, in part to avoid the mild embarrassment for federal procedure that would result if plaintiffs take up Prof. Dodson's suggestion that, when state practice permits, discovery to aid in framing a (federal) complaint might be sought in a state court.

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